FEDERAL MARITIME COMMISSION

DOCKET NO. 70-30

AGREEMENT NOS. 9847 AND 9848—REVENUE POOLS, U.S./BRAZIL TRADE

Decided November 17, 1970

Agreement 9847 between Moore-McCormack, Lloyd Brasileiro and Netumar, calling for the apportioning of freight revenue on certain cargo shipped by those lines from Atlantic ports of the United States and destined to ports on the coast of Brazil, and agreement 9848 between Delta Steamship Lines, Lloyd Brasileiro and Navegacao Mercantil S/A.—Navem, calling for the apportioning of freight revenue on certain cargo shipped by those lines from Gulf ports of the United States and destined to ports on the Brazilian Coast between Recife and Paranagua, not found to be unjustly discriminatory or unfair as between carriers; detrimental to the commerce of the United States; or contrary to the public interest or otherwise in violation of the Shipping Act, 1916.

Thomas E. Stakem and *Donald MacLeay* on behalf of Delta Steamship Lines, Inc. and Moore-McCormack Lines, Inc.

Neal M. Mayer and *Marvin J. Coles* on behalf of Companhia de Navegacao Lloyd Brasileiro, S.A.

R. C. Giallorenzi for Companhia de Navegacion Maritima Netumar.

Frank J. McConnell for Navegacao Mercantil S/A.—Navem.

Thomas K. Roche and *Raymond de Member* for The Northern Pan-American Line.

Elmer C. Maddy and *Baldvin Einarson* for Norton Line and Ivaran Lines.

James L. Malone and *Donald J. Brunner* hearing counsel.

REPORT

BY THE COMMISSION: (Helen Delich Bentley, *Chairman;* James F. Fanseen, *Vice Chairman;* Ashton C. Barrett and James V. Day, *Commissioners*)

This proceeding was initiated by the Commission on August 7, 1970, to determine whether proposed pooling agreement Nos. 9847 and 9848 are unjustly discriminatory or unfair as between carriers, whether

they will operate to the detriment of the commerce of the United States or be contrary to the public interest or in violation of the Shipping Act, 1916, within the meaning of section 15 of that act, or whether they will subject particular traffic to undue and unreasonable prejudice and disadvantage in violation of section 16 of the act. In order to expedite procedure, the Commission sat, en banc, on September 9, 10, and 16, 1970, for the taking of evidence.[1] Briefs were subsequently filed, and oral argument held on October 6, 1970. This decision constitutes the Commission's final decision in this proceeding.

Agreement 9847, between Moore-McCormack Lines, Inc. (Mormac), a U.S.-flag carrier as one party, and Companhia de Navegacao Lloyd Brasileiro, S.A. (Lloyd) and companhia de Navegacion Maritima Netumar (Netumar), as the other parties, establishes a revenue pooling and sailing arrangement in the southbound trade between all ports on the Atlantic Coast of the United States to ports on the Coast of Brazil in the Fortaleza/Porto Alegre range, both inclusive.[2]

Agreement 9848 is between Delta Steamship Lines, Inc. (Delta), a U.S.-flag line, and the parties of Lloyd and Navegacao Merchantil S/A.—Navem (Navem), both Brazilian-flag lines. This agreement establishes a similar pooling and sailing arrangement concerning the southbound trade from U.S. Gulf ports to ports in Brazil in the Recife/Paranagua range, both inclusive.[3]

The agreements are substantially identical in their provisions. Both agreements covers the carriage of all cargo carried by the signatories, government and commercial, with the exception of dry and liquid bulk cargo, mail, cargo of non-U.S. origin transshipped at a U.S. Atlantic port, and cargo originating in the United States and transshipped via any Brazilian port to a destination which is not a pool port. Other relevant and essential provisions of the agreements provide for the following:

(*a*) Equal access to cargoes controlled by both the United States and Brazilian Governments. The parties commit themselves to act through appropriate governmental channels to assure that the legal and/or administrative regulations and practices in force regarding the reservation and protection of cargo are extended equally to both parties;

[1] Under the Commission's "Rules of Practice and Procedure," Moore-McCormack Lines, Inc., Delta Steamship Lines, Inc., Companhia de Navegacao Lloyd Brasileiro, S.A., Companhia de Navegacion Maritima Netumar and Navegacao Mercantil S/A.—Navem were designated respondents. Norton Line, Ivaran Lines and The Northern Pan-American Line were designated petitioners.

[2] A copy of agreement 9847 is available at the Federal Maritime Commission.

[3] A copy of agreement 9848 is available at the Federal Maritime Commission.

(*b*) Rationalization of sailings with an agreement that the parties will provide sufficient cargo capacity to satisfy the needs of the trade, each party having agreed to maintain a minimum number of sailings per calendar year. An increase in the number of minimum sailings may be agreed upon but is subject to prior approval of the appropriate governmental authorities of the United States and Brazil;

(*c*) No infringement on the right of third-flag ships to compete for cargoes available to them;

(*d*) The pooling of revenue between the parties with the following stipulations:

(1) Sixty percent of average revenue of both parties to be considered "handling charges";

(2) No pooling of the first $100,000 of overcarriage revenue after deducting the agreed "handling charge";

(3) Extra length, heavy lift, and ad valorem charges are included in the pool account; however, surcharges, taxes, and port differentials are to be excluded;

(*e*) A 3-year approval;

(*f*) Periodic meetings among the principals in order to adjust the agreements in line with the needs of the trades;

(*g*) An exchange of manifests and other shipping documents through a "pool accountant"; and

(*h*) The rates, rules, and regulations to be applied are those contained in the schedules issued by the parties which, at this time, are set forth in the tariff of the Inter-American Freight Conference (IAFC), of which all parties are members.

Petitioners Norton Line (Swedish-flag) and Ivaran Lines (Norwegian-flag), appeared in opposition to approval of agreement 9847. The Northern Pan-American Line (Nopal) (Norwegian-flag) appeared in opposition to approval of agreement 9848. The Department of Transportation intervened, but did not actively participate in the proceeding.

BACKGROUND

The U.S. Atlantic/Gulf/Brazil trade has been in a state of turmoil for many years while Brazil has endeavored to unilaterally protect and foster its Merchant Marine through the issuance of a large number of decrees, laws, resolutions, and bulletins. These governmental edicts, going back as far as 1959, may be summarized as follows:

(*a*) Establishment of a program to upgrade the foreign commerce fleet of Brazil with new ships constructed both in Brazil and in foreign shipbuilding centers;

(*b*) An effort to carry a substantial portion of the foreign commerce of Brazil in Brazilian ships;

(*c*) The stated position that the trade between two nations should be carried predominantly by the ships of those nations;

(*d*) The understanding that reciprocity in the carriage of government-controlled cargoes should be granted to ships of nations that guarantee like treatment to Brazilian-flag ships;

(*e*) The position that all cargoes favored with exchange or tax privileges and all cargoes generated by governmental entities are considered government-controlled cargoes (see Decree Law 666, issued in July 1969);

(*f*) Equal access to controlled cargoes will depend on the degree of reciprocity granted by other nations;

(*g*) Controlled cargoes may be waived to third-flag ships;

(*h*) No shipping lines may engage in Brazil's foreign commerce unless they belong to conferences participated in by Brazilian carriers; and,

(*i*) Brazilian lines are encouraged to negotiate agreements with other shipping lines in the same trade, bearing in mind the Brazilian Government objective to have Brazilian ships carry a substantial portion of Brazil's foreign commerce.

Since 1960, numerous efforts to stabilize conditions in the trade have met with failure. A primary issue in the negotiations in both agreements has been the question of "equal access" to Brazilian Government-controlled cargo moving southbound.

In October of 1960, Mormac and Lloyd reached agreement on equal participation by the parties in the transportation of cargo from the U.S. Atlantic Coast to Brazil. The Commission, on May 25, 1965 (dockets 921 and 928),[4] approved this southbound pool on two conditions: (*a*) deletion therefrom of all reference to commercial cargo, and (*b*) deletion therefrom of article 10 of the agreement which was concerned with the cooperative solicitation of cargo. These conditions were not acceptable to the Brazilians and the agreement consequently was not effectuated.

In June of 1967, at a principal's meeting of the then-existing seven conferences in the trade in Rio de Janeiro, efforts were made to reach agreements on northbound coffee pools. Since no agreement could be reached, the Brazilian lines withdrew from the conferences and formed, with the U.S. lines, a new conference covering both northbound and southbound movements of all cargo between the U.S. Atlantic and U.S. Gulf ports and the East Coast of South America.

[4] *Brazil Conference et al.* v. *Brasileiro & Moore-McCormack Lines*, 8 FMC 476 (1965).

This new conference, known as the Inter-American Freight Conference, now is operating under a Commission approved agreement (FMC No. 9648–A). European third-flag lines serving the trade eventually entered the IAFC, and the original seven conferences were disbanded.

Following the withdrawal of the U.S. and Brazilian lines from the seven original conferences, a new principals' meeting was held in Rio de Janeiro in October 1967, at which the Brazilians agreed in principle with the European lines on northbound coffee quotas, together with certain "southbound guarantees" for the European third-flag carriers (October 28, 1967). The Brazilians subsequently assigned coffee carriage percentages to the American lines without their concurrence or participation. These percentages were totally unacceptable to the U.S. carriers as being entirely too low and out of concert with their past carryings northbound in the trades.

The lines serving the North Atlantic/Brazil trade did execute coffee, cocoa and general cargo pooling agreements (FMC Nos. 9682, 9683 and 9684) following the formation of the IAFC. The general cargo pool expired under its own terms prior to approval and effectuation. The coffee and cocoa pools were effectively nullified by the Commission in its decision in docket 68–10 (served September 4, 1970), when that proceeding was discontinued for lack of jurisdiction.

In 1967, Netumar and Navem entered the Atlantic Coast to Brazil and Gulf to Brazil trades, respectively. This action was prompted by a Brazilian Government move to encourage the entrance of privately owned shipping companies flying the Brazilian flag into the Brazilian foreign commerce.

On June 11, 1967, a "Memorandum of Understanding," signed by Maitland Pennington of MARAD and Paulo Strauss of the Brazilian Merchant Marine Commission (the predecessor to SUNAMAN), gave "equal access" to Brazilian and U.S. Government-controlled cargoes to both American and Brazilian lines. The "Memorandum," however, provided only for waivers under P.R.–17 of Export-Import Bank cargoes, but no other U.S. Government-controlled cargoes. At the October 1967 IAFC principals' meeting, the Brazilians, feeling this arrangement too one-sided, repudiated it.

On August 7, 1968, Delta, Lloyd, and Navem reached agreement on (*a*) equal access to government-controlled cargo, (*b*) rationalization of sailings, and (*c*) an equal sharing of cargo to be carried by Delta and the Brazilian lines on a flexible payment ton formula. The agreement did not provide for the exchange of revenue but called for adjustments in cargo carrying to reach equality between the parties.

The agreement was approved by the FMC on December 3, 1968, on a 1-year trial basis. Although manifests and other shipping documents were exchanged by the lines for three-fourths of a year, the agreement was never implemented and was permitted to expire. No renewal of Commission approval was sought.

As a result of Brazilian Decree Law 666, on August 13, 1969, an interim Rationalization and Cargo Agreement was drawn up and signed by Mormac. The National Superintendency of the Merchant Marine (SUNAMAN) denied approval stating that any agreement of such nature can be approved only if it covers both government controlled and all other cargoes carried by the companies, signatories of the agreement, in the traffic between the two interested countries.

In March 1970, a "Memorandum of Consultation" was agreed to by United States and Brazilian Government representatives. The understanding covered the following guidelines:

(*a*) The Brazilian and United States Governments will enter an agreement providing for equal access to government-controlled cargoes except such government-controlled cargoes as the Brazilian Government may waive to third-flag lines;

(*b*) The agreement will provide for the equal division on a revenue basis between the national lines of the two countries of government-controlled cargoes;

(*c*) If the third-flag lines are willing to enter into revenue pools in the northbound trade on a basis which is acceptable to the United States and Brazilian lines, then the Brazilian Government will release by waiver sufficient freight for the third-flag carriers to come up to the southbound share agreed upon for them by the lines in the conference;

(*d*) The United States and the Brazilian lines will enter into a revenue pool in the southbound trade providing for an equal division of revenue arising from such trade as they may carry between them;

(*e*) Pools, based on revenue and specifying shares for all lines serving the U.S. North Atlantic and Gulf/Brazil trade in coffee and cocoa, will be negotiated by the conference members;

(*f*) The details of the pooling agreements, such as the number of sailings, over- and under-carriage provisions, and similar matters, will be determined by the lines which are parties to them;

(*g*) Agreements should not exceed 3 years initially, but may be renewable;

(*h*) Agreements should relate only to cargoes covered by the IAFC;

(*i*) The southbound equal access provisions will become effective upon agreement by all lines participating in the conference to negotiate the northbound and southbound agreements described herein. Equal access agreements shall not be terminated during the period of negotiations among the lines;

(*j*) The Governments of the United States and Brazil will take action to stop rebating activity in the northbound trade; and

(*k*) The Government of Brazil and the Government of the United States will consult with each other before either government terminates the equal access provisions which have been put into effect.

In April 1970, the IAFC principals reconvened and again failed to reach a pooling agreement on a multilateral basis because of continued inability to agree on apportionment of cargo. Subsequent to adjournment, Mormac, Lloyd, and Netumar initiated negotiations which resulted in the signing of agreement FMC No. 9847 (U.S. Atlantic Coast/Brazil trade, southbound only), which is before the FMC for approval in this docket. At the same time Delta, Lloyd, and Navem negotiated a similar agreement, FMC No. 9848, also before the Commission, covering southbound cargo between the U.S. Gulf Coast and Brazil.

Discussion and Conclusions

It is in the best interest of the commerce of the United States to achieve, insofar as posssible, stability in the southbound trade between the United States and Brazil. We conclude on the record herein, agreements 9847 and 9848 will contribute substantially to that stability, thereby benefiting the commerce of the United States without infringing upon the requirement under the Shipping Act, 1916, that all carriers, regardless of flag, be accorded equal treatment under the laws administered by the Commission.[5] No violation of sections 15 or 16 of the Shipping Act exists.

The agreements, although admittedly anticompetitive devices, have been shown by respondents to be necessary under present conditions existing in the trade areas served. In 1966, in the *Mediterranean Pools Investigation* case, we explicitly set forth a guide for approving pooling agreements, wherein we said that:

> * * *[T]he question of approval under section 15 requires (1) consideration of the public interest in the preservation of the competitive philosophy embodied in the antitrust laws insofar as consistent with the regulatory purpose of the Shipping Act and (2) a consideration of the circumstances and conditions existing in the particular trade involved which the anticompetitive agreement seeks to remedy or prevent. The weighing of these two factors determines whether the agreement is to be approved * * * For presumptively all anticompetitive combinations run counter to the public interest in free and open competition and it is incumbent upon those who seek exemption of anticompetitive combinations under section 15 to demonstrate that the combination seeks to eliminate or remedy conditions which preclude or hinder the achievement of the regulatory purposes of the Shipping Act.[6]

Again, in 1968, in *FMC* v. *Svenska Amerika Linien*, 390 U.S. 238 (1968), we required that those proponents seeking to impose restraints

[5] *Nopal* v. *Moore-McCormack*, 8 FMC 213 (1964) ; *Alleged Rebates of Mitsui S.S. Co. Ltd.*, 7 FMC 248 (1962).

[6] *Mediterranean Pools Investigation*, 9 FMC 264, 290 (1966). For an earlier statement of the same standards, see *California Stevedore and Ballast Co.* v. *Stockton Port District*, 7 FMC 75 (1962).

which interfere with the policies of the antitrust laws must demonstrate that the restraints are required by a serious transportation need, necessary to secure important public benefits or to be in furtherance of some valid regulatory purposes.[7] We now affirm those standards and base our approval herein on findings consonant with those prior decisions.

Agreements 9847 and 9848 are concerned with an estimated 80 to 85 percent (that being the best estimate available on the record)[8] of the cargo moving southbound in the trade from the Atlantic Coast and Gulf to ports of the East Coast of Brazil, together with such uncontrolled commercial cargo that the signatory lines carry.

Respondents and hearing counsel have taken the position, with which we concur, that no evidence was presented which indicates with any degree of certainty that the competitive situation will be changed to any significant degree by approval. At the present time, third-flag lines carry approximately 15 percent of the cargo in this trade. They participate to a limited extent in the carriage of cargo controlled by the Brazilian Government, not by any existing right, but by virtue of waivers issued by Brazilian authorities. These waivers are granted when it appears the Brazilian-flag vessels first, and the U.S. vessels second, cannot handle the cargo offered. Therefore, the effect of these agreements will be to grant the U.S. lines and Brazilian lines equal access to the 80 to 85 percent United States and Brazilian Government-controlled cargo moving in the trade. It is this "equal-access provision" which is the heart of the agreements and the primary reason they were negotiated. Simply, the provision calls for reciprocal rights to carry the controlled cargoes of the United States and Brazil by national-flag carriers of each country without the necessity of obtaining waivers. As was repeatedly brought out in the arguments of hearing counsel and the respondents, the mutual benefit accruing to the signatory lines from such an arrangement is fully apparent. The agreements make participation in the carriage of cargoes otherwise largely inaccessible to non-Brazilian lines available to the signatory lines. Non-government-controlled cargo carried by the signatories is subject to the agreements; however, third-flag lines will remain free to compete on equal terms for the carriage of that cargo.

Therefore, the realities of the trades necessitate these agreements. In order to preserve their own participation in the South American

[7] *FMC* v. *Svenska Amerika Linien,* 390 U.S. 238, 243 (1968).

[8] Whether a certain commodity is or is not government-controlled is not capable of a precise definition as the same commodity may, at one time, be government-controlled, but not at other times. The consensus seems to be that the best estimate of government-controlled cargo moving in the southbound trade is between 80 and 85 percent.

trades, certain Scandinavian lines have likewise entered into agreements with Brazilian lines which apportion the cargo carried in the trades between South America and their own countries.[9] Those agreements show not only the implementation of the policies of Brazil, but they show the willingness of the national-flag lines of those Scandinavian countries to participate in such agreements. In addition, as we stated in docket No. 67–48, *Inter-American Freight Conference Agreements Nos. 9648 and 9649 and other Related Agreements*, 11 FMC 332 (1968), approving the IAFC discussed above:

> We are not cited to nor can we find anything in section 15 or any other provision of the Shipping Act which would render unlawful an agreement between carriers operating between two countries to "recognize" the publicly announced policies of those countries.[10]

It is apparent from the petitioners' case opposing approval of the agreements that central to their concern is the fear that operation of the agreements will in effect eliminate them from the trades or, at the least, cause them sufficient serious injury so that the quality of their service would decline appreciably; and that this would be unjustly discriminatory and unfair as between carriers, in violation of the 1916 act, detrimental to the commerce of the United States, and contrary to the public interest. We find ourselves unable to conclude that this will or is likely to happen. As aptly stated by hearing counsel, the evidence on balance simply does not show that the proposed agreements will eliminate or seriously restrict them. The evidence adduced at the hearing, while indicating that there may be some limited disadvantage to the third-flag carriers flowing from these agreements, does not support their contention that they will be driven from the trade by virtue of these agreements or indeed even irreparably damaged. Speculation is the principal basis for petitioners' contention, and the evidence presented by them was of a basically conjectural nature concerning what they thought might happen. There is no substantial evidence to support either the conclusion that third-flag lines will be deprived of the opportunity to equally compete for nongovernment-controlled cargo or that cargo designated as government-controlled cargo will be substantially increased resulting in the elimination of or substantial decrease in free noncontrolled cargo available for third-flag competition.

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[9] An example of pooling agreements executed by Brazilian lines under government sanction with carriers of other nations can be found in the "Memorandum of Agreement" signed on Oct. 9, 1969, with the shipping lines of Finland, Norway, Sweden, and Denmark dealing with the trade of each of these countries with Brazil. A copy of this agreement is available at the FMC and MARAD (see exhibits 8 and 9). Agreements of similar nature have also been executed with other European countries.

[10] Docket No. 67–48, *Inter-American Freight Conference Agreements*, 11 FMC 332, 337 (1968).

To attribute the conjectured disadvantage to third-flag lines to the agreements before us is unrealistic. It is not the agreements which basically cause limitations on third-flag lines. Rather, it is the Brazilian laws and decrees and the U.S. cargo preference laws which limit the operations of the third-flag lines. Historically, the U.S.-flag lines have carried the major portion of the cargo moving between the United States and Brazil. The Brazilian Government, determined to insure the participation of its flag vessels in all trades, has issued decrees to effectuate that purpose. Likewise, the impact of these decrees, especially Decree Law 666 issued in July 1969, has resulted in a loss of cargo by U.S. lines. Since Decree Law 666, Mormac and Delta's southbound carryings and their success in obtaining waivers to carry Brazilian Government-controlled cargoes have been materially impaired.

Cognizant of these facts, we are unable to deduce more from the petitioners' case than a suspicion of possible increasingly adverse consequences of an indirect nature. There is no solid evidence that the presently available commercial cargo, whatever its extent, will not continue to be open to petitioners nor that they will not be able to continue to receive waivers of Government-controlled cargo if the agreements are approved. Therefore, we conclude that at this time it does not appear that the status quo will be appreciably altered with reference to third-flag participation in the trade.

There is considerable similarity between the problem before us and the problem presented to the Commission in *Alcoa* v. *Compania Anonima Venezolana Navegacion*, 7 FMC 345 (1962), aff'd sub nom. *Alcoa Steamship Co.* v. *FMC*, 321 F. 2d 756 (D.C. Cir. 1963), where the Commission approved an agreement between a Venezuelan Government-owned line ("CAVN") and Grace Line, Inc. ("Grace"). In that case, the Venezuelan Government similarly had emphasized a nationalistic shipping policy with the issuance of numerous decrees, the effect of which was to reduce significantly Grace's participation in the trade. The Commission found that, on balance, the evidence did not show that the agreements would eliminate or seriously restrict the third-flag lines in the trade.[11] It took the view which we now affirm that "something more than a fear of increased competition is necessary to justify a finding that an agreement is unjustly discriminatory or unfair as between carriers, contrary to the public interest, or otherwise merits disapproval under section 15 of the act." [12]

In the *Alcoa-CAVN* case, the Commission cited *West Coast Line, Inc.* v. *Grace Line, Inc.*, 3 FMB 586 (1951), wherein the Federal Mari-

[11] *Alcoa S.S. Co., Inc.* v. *Cia Anonima Venezolana,* 7 FMC 345, 359 (1962).
[12] *Id.* at 361.

time Board, in upholding the pooling agreements in question, dismissed the issue of unjust discrimination under section 15 with the following language particularly relevant to the present agreements:

One thing seems reasonably clear and that is that the pooling agreements between respondents were not entered into for the purpose of eliminating complainants as a factor in the trade. It was readily testified to by a witness of Grace that the Chilean regulations were a very important motivating circumstance that led to the execution of the pooling agreements. The pooling agreements developed as the result of a number of other factors also, but the Chilean regulations were clearly dominant.

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This Board is only able to decide cases on the evidence of existing facts and the reasonable deductions to be drawn therefrom. It is not authorized to base decisions on speculative possibilities. However, the Board points out that a finding at this time that the operations of the pooling agreements in question do not today result in unfair discrimination does not close the door to a reexamination of the same pooling agreements at a future date if changed conditions bring about changed results. Section 15 of the Shipping Act, 1916, expressly provides that the Board may "disapprove, cancel, or modify any agreement * * * *whether or not previously approved by it,* that it finds to be unjustly discriminatory or unfair" etc. (Emphasis ours.) [13]

As our predecessors pointed out in that decision, our present approval of agreements 9847 and 9848 in no way limits our section 15 right of reexamination at any future date should changed conditions bring about changed results. We shall closely follow the progress of these agreements in alleviating the instability that plagues the trades in question. At this time, however, we find it unnecessary to impose additional reporting requirements on the parties as requested by hearing counsel because any requirements above those provided in the agreements would not yield benefits commensurate with the work involved in their preparation.

Our decision to approve agreements 9847 and 9848 is not in conflict with the guidelines established in our decision in docket 68–10, *Inter-American Freight Conference—Cargo Pooling Agreements Nos. 9682, 9683, and 9684, 14 FMC 58–62* September 4, 1970. Before setting forth those principles in docket 68–10 which we indicated would guide our deliberations in cases such as this one, we offered the following preliminary caveat:

Guidelines are nothing more than broad canals within which future action may be channeled with some reasonable assurance of its validity. As such, guidelines do not decide specific cases. Time, circumstance and the facts of the individual case can and probably will alter the "guidelines" to some greater or lesser extent. We offer this fact of administrative life only because our past experience has been that all too frequently broad and necessarily flexible policy

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[13] *West Coast Line, Inc.* v. *Grace Line, Inc.*, 3 FMB 583, 594, 595 (1951).

statements have been played back as narrow and ironclad precedents which are said to dictate a particular conclusion in a given case.[14]

Therefore, it was not our intent in docket 68–10 to render a blanket prohibition against approval on all pooling agreements. Rather, it was our intent to forewarn potential parties to such agreements that pools not grounded on economic or commercial reality and based instead solely on the grounds of national interest without deference to shipper desires, or the efficiency of the operator, or the worth of the service rendered, would not meet the critieria under section 15 for Commission approval.[15]

We affirm our statement in docket 68–10 that:

There is simply no room under section 15 for the approval of a pooling agreement which embodies discriminatory or unfair quotas dictated by governmental law, regulation, decree, ukase or fiat.[16]

However, as hearing counsel and respondents have demonstrated, no attempt to unlawfully favor any flag carriers is embodied in these agreements; rather, their purpose is remedial—to overcome present inequities prevailing against respondents in their southbound carriage. No treatment of petitioners with an "uneven hand" or attempt to favor national-flag carriers in violation of sections 15 and 16 first of the Shipping Act exists, as was the situation in *Nopal* v. *Moore-McCormack*, 8 FMC 213 (1964), or in FMC docket 68–10, supra.

ULTIMATE CONCLUSIONS

In summation, and upon the record before us, we have reached the following conclusions:

First, that the purpose of these agreements is to rationalize sailings and to provide U.S. lines with equal access to government-controlled cargo.

Second, that the participation of third-flag lines in carriage of cargo in this trade will not be affected to any significant degree in relation to the cargo they now carry.

Third, that approval of these agreements will contribute substantially to stability in the southbound trade between the United States and Brazil, thereby fulfilling a serious transportation need without constituting unjustly discriminatory or unfair treatment between carriers. The agreements will neither operate to the detriment of the commerce of the United States, or be contrary to the public interest

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[14] FMC docket 68–10, *Inter-American Freight Conference Cargo Pooling Agreements Nos. 9682, 9683, and 9684, 14 FMC 58, 62.*

[15] *Id.* 72.

[16] *Id.* 72.

or in violation of the act within the meaning of section 15, nor will they subject particular traffic to undue and unreasonable prejudice and disadvantage in violation of section 16 of the act.

Fourth, that should the competitive situation be so adversely affected as petitioners fear, this Commission retains jurisdiction over these agreements and upon proper showing, may require their modification or disapproval at any time.

Agreements 9847 and 9848 are approved for a 3-year period as requested.

Commissioner George H. Hearn, *concurring:*

I concur in the conclusions reached by the majority in this case, and I agree, generally, with the majority report. However, I wish to make a few observations on some aspects of this case.

There can be no doubt that the trades involved herein have been in a state of instability in recent years, and that such a situation is undesirable and detrimental to the foreign commerce of the United States. Furthermore, I find no factor inherent in the type of agreements before us to render them unapprovable, and I consider them well suited to overcome the difficulties in the trades to which the agreements apply.

However, I think we should realize that these agreements do more than correct instability. The instability involved is not the result, primarily, of commercial interaction, but of government action specifically designed to create conditions which would require agreements of the kind we are approving.

Thus, our approval is a recognition of prevailing political and commercial realities in international trade. And as I said in docket No. 68-10: [17] "Under appropriate circumstances and conditions, what may be unlawful conduct in one instance may be lawful in another * * * [and] activity which this Commission may be powerless to approve under section 15 may be permissible or noninterdictable when such approval is not sought." Furthermore, as to action colored by government measures and amenable to our approval: "If the commerce of the Unitied States is not adversely affected, such action may not be violative of our laws * * *" [18] and its approval may be both desirable and necessary. We "cannot forestall the changes in technology and politics which are radically altering traditional rights and prerogatives." [19]

[17] *Inter-American Freight Conference—Cargo Pooling Agreements Nos. 9682, 9683, and 9684, 14 FMC 58, 75.*

[18] *Id.* 76.

[19] *Id.* 77.

Nevertheless, it should be made clear that there must be a limit not only to the extent and purpose to which the "national interest factor" may be used. There is a limit also to the methods by which governments may seek to introduce even a permissible level of "national interest" into commercial activities. International shipping policies of governments and carriers, to obtain in the foreign waterborne commerce of the United States, must not transgress the bounds created by Congress in our antitrust laws. It is only within this framework and that of our shipping statutes, with the exceptions and exemptions created therein, that the Federal Maritime Commission may accept or approve conduct in the foreign waterborne commerce of the United States.

It cannot be said that utilization of a "national interest factor" is generally good or bad. Cargo control and preference laws, for example, can be ligitimate expressions of the needs of nations. When, however, national interest is advanced at the expense of all other considerations, it can hinder reliable ocean service. But properly utilized, national interest can produce trade stability, especially as here, where government activity on both sides is aimed at such goals as elimination of overtonnaging and maintenance of efficient service. That agreements implementing national interests benefit the carriers of the countries involved does not, per se, render them unapprovable.

Likewise, speculation that such agreements may prove at some future time to be detrimental to our commerce or otherwise in violation of our laws is not a ground for disapproval. Section 15 agreements are restrictive of competition; but Congress has determined that this departure from our antitrust principles is permissible when placed under appropriate regulation. Consequently, the Federal Maritime Commission has as one of its functions the surveillance over approved section 15 agreements to ward against their operation in violation of law.

For the reasons set forth in the majority report and in accordance with the foregoing comments, I concur in the conclusions of the majority in approving agreements Nos. 9847 and 9848.

FRANCIS C. HURNEY,
Secretary.

[SEAL]

FEDERAL MARITIME COMMISSION

DOCKET NO. 70-42

AGREEMENT NO. 9905

Decided November 23, 1970

Agreement No. 9905, providing for purchase of four vessels by American Export Isbrandtsen Lines, Inc. from Moore-McCormack Lines, Inc., approved.

Richard W. Kurrus for respondent American Export Isbrandtsen Lines, Inc.

John Mason, *Edward M. Shea* and *Paul J. McElligott* for respondent Sea-Land Service, Inc.

Marvin J. Coles and *Paul N. Tschirhart* for respondent Seatrain Lines, Inc.

Arthur M. Becker for intervener Moore-McCormack Lines, Inc.

REPORT

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

On August 14, 1970, Moore-McCormack Lines, Inc. (Mormac) and American Export Isbrandtsen Lines, Inc. (AEIL), entered into an agreement of purchase and sale whereby AEIL agreed to purchase from Mormac four so-called ro-ro vessels, the SS *Mormacsea*, SS *Mormacsky*, SS *Mormacstar*, and SS *Mormacsun.* Notice of this agreement was published in the FEDERAL REGISTER on October 17, 1970, and protests to the approval of the agreement, which we have designated as agreement No. 9905, were filed by Seatrain Lines, Inc. (Seatrain) and Sea-Land Service, Inc. (Sea-Land), both of which requested a hearing. Because both protestants indicated that their interests with respect to the sale of the ro-ro vessels centered upon the use to which AEIL intended to put such vessels, the Commission instituted this proceeding by an order to show cause served October 30, 1970, which provided that AEIL file an affidavit indicating its future operational

plans for the four Mormac vessels, together with other operational data demonstrating that agreement 9905 should be approved, and ordered Sea-Land and Seatrain to show cause why the agreement should not be approved. Mormac intervened on November 5, 1970, and it and AEIL have filed affidavits herein.

Neither Sea-Land nor Seatrain now opposes our approval of agreement 9905. Seatrain has, by statement filed November 13, 1970, withdrawn from the proceeding based upon the statement in AEIL's affidavit that the acquired vessels will not be used in competition with Seatrain in the North Atlantic/Northern European trade. Seatrain therefore declares that it has "no further objection to agreement No. 9905." Sea-Land, on the other hand, as was indicated in our order to show cause in this proceeding, is concerned not with the agreement of sale and purchase as such or even with the authority which must be obtained from this agency prior to effectuation of the agreement, but only with the use made of the vessels by the buyer pursuant to an operating differential subsidy contract. We have no jurisdiction over the payment of operating differential subsidies and the use made by carriers of vessels operating pursuant to such subsidies. Sea-Land has in fact recognized this by saying that it does not object to the Commission's passing on the approvability of agreement 9905 without hearing, if the Commission holds that the subsidy issue is "not reached in deference to the primary jurisdiction and expertise of the MA/ MSB."

We are thus presented with an agreement with respect to which no party desires a hearing and to which no party objects with respect to any matter which is within our jurisdiction. We believe that the uncontested affidavits in support of agreement 9905 submitted by Manuel Diaz, vice chairman and chief executive officer of AEIL, and William T. Moore, chairman of the board of directors and chief executive officer of Mormac, provide a substantial basis for approval of the proposed agreement. As indicated in these affidavits, agreement 9905 provides merely for the sale of the vessels and contains no other commitments, understandings or undertakings of any nature between Mormac and AEIL. AEIL is not purchasing the Mormac North Atlantic service; there is no merger or consolidation of assets between the companies; there will be no continuing arrangement between the parties as a result of the sale; there is no transfer of operating subsidy rights from Mormac to AEIL; and there is no understanding between the carriers in any way restricting or limiting future competition between them. The sale and purchase of the subject vessels was approved by the Maritime Administrator and the Maritime Subsidy Board on Oc-

tober 19, 1970. In fact, as the uncontested affidavits of the carrier parties indicate, the agreement not only has not been shown as likely to have detrimental effects, but appears to afford substantial benefits to the foreign commerce of the United States and to the public interest. The high speed of the Mormac vessels will allow the AEIL to increase its port coverage, thus allowing shippers a more comprehensive direct service and benefiting added ports as well. The public will be afforded the use of a new and modern high-speed roll-on roll-off service not presently available in the trade in which AEIL states the acquired vessels will be used. The operation of the vessels in this trade, furthermore, does not appear to result in an appreciable increase of capacity which could cause overtonnaging.

The Commission, of course, retains jurisdiction under section 15 over agreement 9905 and can at any time either upon complaint or of its own motion reexamine the agreement to see whether it should be cancelled, disapproved or modified. We make one final observation with respect to the course followed by the Commission in this proceeding, although perhaps such is not required because of Seatrain's withdrawal therefrom. Seatrain had maintained that the issuance of a show cause order in this case improperly shifted the burden of proof on to the carriers protesting approval of a section 15 agreement. The burden of proof has not been transferred to the protesting carriers by the issuance of a show cause order in this proceeding. The burden of proof with respect to approval of a section 15 agreement ultimately rests with the Commission. "The Commission must of course adduce substantial evidence to support a finding under one of the four standards of section 15 * * *." *FMC* v. *Svenska Amerika Linien*, 390 U.S. 238, 244 (1968). Similarly, the proponent of a proposed agreement may be required to come forward with information concerning such agreement, and it is for this reason that the show cause order issued herein provided that AEIL furnish information "which would tend to demonstrate that agreement 9905 should be approved under section 15." The requirement that protestants to this agreement show cause why it should not be approved merely placed them under the obligation to come forward with information in support of the allegations made in their protests.

Based upon the uncontested affidavits submitted in this proceeding, we conclude that agreement No. 9905 is approvable under section 15. Therefore, it is ordered that agreement 9905 is approved and that this proceeding is hereby discontinued.

[SEAL]

FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 70–43

ATLANTIC AND GULF/WEST COAST OF SOUTH AMERICA CONFERENCE IMPOSITION OF A BUNKER SURCHARGE ON LESS THAN 90-DAY TARIFF FILING NOTICE

Decided December 17, 1970

Imposition by the Atlantic and Gulf/West Coast of South America Conference of a bunker surcharge in response to rising fuel costs on less than 90-day notice found to be violative of section 14b(2) of the Shipping Act, 1916, and article 10(c) of the Conference's Merchants' Freighting Agreement.

Rising bunker costs, under the facts herein, do not constitute an "extraordinary condition" within the meaning of Article 10(c) of the Merchants' Freighting Agreement nor do such increased costs unduly impede, obstruct, or delay the carriers' service within the context of said clause.

David Orlin and *Jose A. Cabranes*, in behalf of Atlantic and Gulf/West Coast of South America Conference.

Joseph B. Slunt and *Donald J. Brunner*, hearing counsel.

REPORT

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

This proceeding was instituted to determine whether the bunker surcharge imposed on 30 days notice by the Atlantic and Gulf/West Coast of South America Conference violates section 14b(2) [1] of the Shipping Act, 1916, as amended (the act), and article 10(c) [2] of their Merchants'

[1] Section 14b(2) provides:

That whenever a tariff rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than 90 days.

[2] Article 10(c) provides:

In the event of any extraordinary conditions not enumerated in article 10(a), which conditions may unduly impede, obstruct, or delay the obligations of the carriers, the carriers may increase any rate or rates affected thereby, in order to meet such conditions; provided, however, that nothing in this article shall be construed to limit the provisions of section 18(b) of the Shipping Act, 1916, in regard to the notice provisions of rate changes.

Freighting Agreement and, accordingly, why the Commission should not order the respondents to defer the effective date of their bunker surcharge a sufficient period of time to satisfy the 90-day notice requirements. The proceeding was limited to the submission of affidavits and memoranda, and by agreement of the parties, oral argument was dispensed with. The Conference submitted an opening brief supported by affidavits of officials of the Conference's two American-flag member lines, John J. Haggerty of Prudential-Grace Lines, Inc. (Prudential) and Lloyd Strickland of Gulf and South American Steamship Co., Inc. (G & SA). Hearing counsel subsequently submitted a brief in reply to which Mr. Haggerty was given the right of response by supplemental affidavit. No petitions to intervene were filed with the Commission.

FACTS

The Conference operates in the U.S. Atlantic and gulf to west coast of South America trade, pursuant to Commissioin-approved Agreement No. 2744. It also maintains a dual rate contract system approved by the Commission.

On October 23, 1970, the Conference submitted to the Commission a telegraphic revision of its Southbound Tariff SA-12, FMC-1, instituting a "bunker surcharge" of five percent on all contract, noncontract, special, charitable, and industrial contract rates, effective November 23, 1970. On October 26, 1970, the staff of the Commission sent a telegram to the Conference stating its view that the surcharge required 90-day tariff notice and requested that the effective date be altered accordingly. On October 28, 1970, the Conference rejected the staff's view and requested a formal ruling by the Commission on the matter. To allow for such ruling, the Conference deferred the effective date of the surcharge to November 30, 1970.

The Conference instituted its bunker surcharge, relying upon the authority granted under section 10(c) [3] of the Merchants' Freighting Agreement, drafted and approved by the Commission, to increase, on 30 days' notice, any rate or rates affected by any (1) extraordinary conditions not enumerated in article 10(a),[4] which may (2) unduly

[3] Id.

[4] Article 10(a) provides:

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

impede, obstruct or delay the obligations of the carrier. Article 10(c) thus grants an exception, under the appropriate conditions, to the ordinary requirement of 90 days' notice for a rate increase as required by section 14b(2) of the act.

The Commission, in its order to show cause of November 4, 1970, expressed the opinion that "the cost of bunkers transpiring in the Conference trade since January 1, 1970, does not constitute an extraordinary condition within the meaning of article 10(c) of the Merchants' Freighting Agreement", and that such increased costs "will not unduly impede, obstruct, or delay the carriers' service within the context of said clause." The Conference, on the other hand, stated that it was the view of its members that the increase in bunker prices in recent months went far beyond any situation which could have been reasonably anticipated by a prudent operator and, therefore, constituted an extraordinary condition within the meaning of article 10(c) of the Merchants' Freighting Agreement, permitting the giving of 30 days' notice of the surcharge.

Therefore, the issue before us is whether the recent increases in bunker prices meet the criteria of article 10(c) so as to justify the imposition of a surcharge on 30 days' notice.

Discussion

After full consideration of the briefs and supporting affidavits, it is our decision that the increase in bunker prices occurring in recent months does not represent an "extraordinary condition" within the meaning of article 10(c) and, accordingly, the Conference must be held to the requirement of 90 days' notice as set forth in section 14b(2) of the Shipping Act, 1916.

Article 10(c), approved in *The Dual Rate Cases*, 8 F.M.C. 16 (1964), was intended to allow conferences and individual carriers maintaining a dual rate contract system to increase rates on the 30-day notice provided in section 18(b) of the act where extraordinary circumstances other than those set forth in article 10(a) unduly impeded or delayed the carriers' service. In approving clauses to justify rate increases on short notice, we were merely recognizing that there would almost certainly arise circumstances where carriers might be entitled to relief from the 90-day notice obligation as prescribed by section 14b(2), Shipping Act, 1916. However, we think it clear that the involved circumstance must be both "extraordinary" and at the same time it must unduly impede, obstruct or delay the obligations of the carriers. The current conditions caused by increased bunkering costs are neither "extraordinary" within the meaning of article 10(c), nor

do they represent an undue impediment or obstruction to the carriers' obligations.

Respondents contend that this construction of article 10(c) is "unduly narrow" and fails to take into account both "the severity of the emergency fuel shortage which they argue has led unexpectedly to a series of dramatic and unforeseeable price increases in one of the carriers' major cost factors" and the "substantial adverse effects of those increases upon the financial conditions and operations of the carriers."

To support their contentions, respondents submitted public statements and press releases referring to the national fuel shortage and specifically the shortage of residual fuel including Bunker C residual fuel upon which the shipping industry relies. Supplementing these statements, respondents have submitted statistics verifying the increase in costs for Bunker C fuel since January 1970.

We have noted the above data and the definite price trends in the cost of the Bunker C type of fuel. However, we are unable to agree with the conclusions drawn by respondents from that information. As pointed out by hearing counsel and confirmed by respondents' supporting statements, the shortage of residual fuel oil is not an entirely new fact of commercial operation. Rather, the shortage has been developing due to increased demand since 1960, with the current crisis in supply starting at least 2 years ago. Likewise, as also noted by hearing counsel, the price information furnished by the Conference itself, as well as that obtained by our own staff, clearly shows that the behavior of the prices was such that a vessel operator using a reasonable degree of care could foresee that the prices were climbing to the present levels. Prices have consistently risen over a period of 8 months. The greatest increase, a total of 100 percent, occurred at U.S. east coast ports. However, a close examination of that 100 percent increase shows that it consisted of: a 9 percent increase from January to March, an 8 percent increase from March to May, a 13 percent increase from May to June, a 16 percent increase from June to July, a 12 percent increase from July to August, and a 16 percent increase from August to October. Other ports showed similar increases for the same period. These increases are out of the ordinary but, in our opinion, they cannot be classified as drastic overnight increases amounting to a sudden emergency or an unforeseeable condition.

In docket No. 65-7, "Imposition of Surcharge at United States Atlantic and Gulf Ports on Cargo Moving Between Said Ports and Latin American Ports," 10 F.M.C. 13 (1966), we had cause to consider the language of article 10(c) as it applied to a longshoremen's strike which occurred in 1965. We said:

The criteria are apparent: the condition must be outside or beyond the carrier's control, the condition must impede or delay the carrier's service, and there must be an emergency, an abnormal condition, or an extraordinary circumstance.

* * * * * * *

The words—emergency, abnormal, extraordinary—are subjective; they presuppose some lack of foreseeability.

Thus, the carriers must provide 90 days' notice of rate increases to dual-rate shippers if the conditions that give rise to the need for the increase are "normal"; that is, foreseeable by the carriers. *For example, where such conditions as rising salaries, costs of vessels, fuel, or increased stevedoring expense require additional freight revenue, then 90 days' notice is required because the carrier is expected to anticipate these needs.* This is so because exporters, in conducting their business, need the stability afforded by a guarantee of 90 days' notice. Indeed, this is one of the most important inducements to shippers to commit themselves to an exclusive patronage contract with a conference. In this context, under the dual-rate contract, the notice requirement is highly important. Carriers have a strict duty to anticipate the need for rate increases and give timely notice thereof to dual-rate signatories. The factual question, therefore, is whether the carriers, in the exercise of a high degree of diligence should have foreseen or anticipated the conditions which unduly impeded, obstructed, or delayed the obligations of the carriers.[5] (Emphasis ours.)

The 90-day notice benefit is one of the most important inducements to shippers to commit themselves to an exclusive patronage contract. Shippers frequently make contracts and quote prices based on freight costs having at least a 90-day duration. If the freight costs are increased on only 30 days' notice, the shipper in many instances will either have to absorb the increases on prices already quoted or try to pass on the increase at the risk of losing the sale. These observations are relevant to the case in issue and further substantiate our inability herein to recognize or create an exception to the 90-day rule.

As we have stated, we do not find an existing extraordinary condition as required under article 10(c). However, should we have found such fuel costs to be extraordinary conditions within the meaning of article 10(c), it is our position that such increased costs still would not "unduly impede, obstruct, or delay" the carrier service as required by said article. Respondents have presented no substantial evidence that they would suffer the type of economic harm that would impede or obstruct their services. In Mr. Haggerty's supplemental affidavit, he

[5] "Imposition of Surcharge at United States Atlantic and Gulf Ports on Cargo Moving Between Said Ports and Latin American Ports," 10 F.M.C. 13, 22, 23 (1966).

speaks to the withdrawing of certain vessels by Prudential from all service by early 1971, as an impediment to their service. However, at the same time he indicates that the cost of Bunker C fuel was not the only factor contributing to the decision to withdraw these vessels from service. Without more facts than presented, we are unable to treat the suggested relationship between the cost of fuel and withdrawal of service as anything more than conclusory and self-serving.

Respondents also mention delays of "long awaited capital expenditures" and delays "in its service to this trade as a direct consequence of the rise in fuel price." However, at no point did they present the Commission with specific incidents of such delays and, therefore, the relationship was again only conclusory and self-serving.

Finally, the Conference urges that they certainly cannot be held responsible for the increase in fuel prices, and with this we agree. However, we do not agree that this places the circumstance "outside or beyond the control of the Carrier", thus allowing the Conference to escape responsibility for the manner in which it responds to the changed conditions. The carriers, of necessity, must be held to a high degree of diligence with regard to shippers and the implementation of rate increases after porper notice. The repeated increases as well as the general worldwide upward movement in bunker costs should have served as warnings to the carrier members of the Conference simply as prudent businessmen long experienced in dealing with fluctuating costs and prices.

CONCLUSION

Therefore, based on the record before us, we conclude that the imposition by respondents of the bunker surcharge under consideration herein, on less than 90 days' notice is violative of section 14b(2) of the Shipping Act, 1916, and article 10(c) of the respondents' Merchants' Freighting Agreement. Respondents are hereby ordered to defer the effective date of their bunker surcharge a sufficient period of time from October 23, 1970, to satisfv the 90 days' notice requirement.

[SEAL] FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 1092

AGREEMENT NO. 8660—LATIN AMERICA/PACIFIC COAST STEAMSHIP CONFERENCE AND PROPOSED CONTRACT RATE SYSTEM

Decision December 28, 1970

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, found contrary to the public interest and, accordingly, not permitted approval under section 14b of the Shipping Act, 1916.

The Conference is required to amend clause 2 of its dual rate contracts so that such contracts be offered separately in each trade area the Conference serves.

Robert L. Harmon, Esq. and *William J. Ziegler, Esq.*, for Latin America/Pacific Coast Steamship Conference and member lines.

Donald J. Brunner, Esq., *Robert H. Tell, Esq.*, *G. Edward Borst, Esq.*, and *James N. Albert, Esq.*, hearing counsel.

REPORT

BY THE COMMISSIONS (Helen Delich Bentley, *Chairman;* James F. Fanseen, *Vice Chairman;* George H. Hearn, *Commissioner*)*

This proceeding is before us on exceptions to the initial decision of examiner Edward C. Johnson in which he recommended the Latin America/Pacific Coast Steamship Conference be permitted the continued use of its currently employed exclusive patronage (dual rate) contract system.

BACKGROUND

On January 15, 1962, certain steamship lines filed with the Commission Agreement No. 8660 for approval under section 15 of the Shipping Act, 1916, as amended. The purpose of this agrement was to form

*Commissioner Ashton C. Barrett did not participate.

the Latin America/Pacific Coast Steamship Conference (Conference) which was to supersede 10 existing conferences serving the trade inbound and outbound between ports on the west coast of the United States and Canada and ports in Mexico, Central America, the Caribbean and the west coast of South America.[1] Under Agreement No. 8660, this trade was divided into five-so-called "trade areas" and it was provided that only carriers actively serving a particular trade could participate in matters affecting that area, e.g. ratemaking.

Subsequently, the signatories of No. 8660 filed a proposed "Shippers Rate Agreement" and a "Receivers Rate Agreement" with the Commission for approval under section 14b of the Shipping Act, 1916. It was proposed that the Shippers Rate Agreement, entitling shippers to lower rates for their exclusive patronage to conference lines, would be offered to all shippers in the three outbound trades, whereas the Receivers Rate Agreement would be offered to all receivers (or importers) in the two inbound trades.

On February 27, 1964, we instituted the original proceeding in this docket to determine:

> (1) Whether Agreement No. 8660, establishing the Latin America/Pacific Coast Steamship Conference, should be approved under section 15, Shipping Act, 1916, and (2) whether the "Shippers Rate Agreement" and the "Receivers Rate Agreement" filed for use in connection with Agreement No. 8660, if approved, should be approved under section 14(b), Shipping Act, 1916; * * *

After hearings, Examiner Edward C. Johnson issued an initial decision in which he approved both the conference agreement and the dual rate contracts, the latter with certain modifications not relevant here. Exceptions to the initial decision were taken by hearing counsel and certain interveners.

On March 30, 1964, we issued our Report in "The Dual Rate Cases," 8 F.M.C. 16 (1964), which included our decision on the issues raised in docket No. 1092, along with the decisions in approximately 60 other dockets then pending before us. We approved both agreement No. 8660 and the Conference's dual rate contract form, provided, however, that a merchant not be required to obligate himself to exclusive patron-

[1] The 10 predecessor conferences were:

No. 6670—Camexco Freight Conference.
No. 6070—Canal, Central America Northbound Freight Conference.
No. 6170—Capaca Freight Conference.
No. 8390—Caribbean/Pacific Northbound Freight Conference.
No. 7270—Colpac Freight Conference.
No. 4294—Pacific Coast/Caribbean Sea Ports Conference.
No. 7570—Pacific Coast/Mexico Freight Conference.
No. 7170—Pacific Coast/Panama Canal Freight Conference.
No. 4630—Pacific/West Coast South America Conference.
No. 6270—West Coast South America/North Pacific Coast Conference.

age in all the five trade areas. In requiring that the Conference offer its dual rate contract in each of the five trading areas which it served, we had the following to say:

> The use of a dual rate contract by the new conference presents a special problem, however * * * 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 obligated 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.* (Emphasis ours.)

The Conference appealed our decision in "The Dual Rate Cases," *supra*, as it related to docket No. 1092, to the U.S. Court of Appeals for the Ninth Circuit. The exact relief sought by the Latin America/Pacific Coast Steamship Conference in its appeal was set forth in its "petition for review of an order of the Federal Maritime Commission," dated April 10, 1964:

> Petitioners pray that this court declare invalid, permanently enjoin, set aside, and suspend the enforcement and carrying out of the said order of the Federal Maritime Commission insofar as the said order prescribes a form of "Shippers Rate Agreement" to be used by the Conference, and that the said Shippers Rate Agreement be offered to "merchants" in each of the five trade areas covered by the Conference, and such other and further relief as may be proper in the premises.

The Conference's appeal was consolidated for decision with appeals of the Pacific Coast European Conference and the Pacific Coast River Plate Brazil Conference from the Commission's orders issued in "The Dual Rate Cases" in docket No. 1007 and docket No. 1057, respectively.

On February 3, 1965, the court handed down its decision in *Pacific Coast European Conference* v. *United States*, 350 F. 2d 197 (C.A. 9, 1965), wherein it remanded the proceeding to allow us to cure certain procedural defects not relevant here. The court, however, was silent concerning the Commission's requirement imposed in docket No. 1092, that the Conference offer its dual rate contract in each of the five areas in which it operated.

Subsequently, after an evidentiary hearing, we reimposed the requirement that the Conference offer its dual rate contract in each of the five trade areas covered by the conference agreement. (See our earlier report in this proceeding, 12 F.M.C. 149.) In doing so we concluded that respondents had failed to meet the test first espoused in *Investigation of Passenger Travel Agents*, 10 F.M.C. 27 (1966), and affirmed by the Supreme Court in *FMC* v. *Svenska Amerika Linien*, 390 U.S. 238 (1968), that:

> * * * 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 benefis or in the furtherance of some valid regulatory purpose of the Shipping Act." [390 U.S. 243]

Respondents, on February 4, 1969, petitioned the Commission to reopen the proceeding to afford them an opportunity "to meet the new burden of proof" imposed by "the rule of *F.M.C.* v. *Svenska Amerika Linien*", *supra*. They took the position that the *Svenska* decision, which "was not handed down by the Supreme Court until March 6, 1968, some 6 months after the close of the evidentiary hearings in this docket", constituted a "changed condition of law" and due process required that they be given an opportunity to prepare the record necessary to satisfy this "changed condition of law".

We granted respondents' petition to reopen and remanded the proceeding to the examiner:

> * * * for taking further evidence on the question of whether Respondents' present dual rate 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.

In his Initial Decision, the examiner found:

> * * * that the Latin America Pacific Coast Steamship Conference's present dual rate contract system has been shown to be required by serious transportation needs, is necessary to secure important public benefits and is in furtherance of the valid regulatory purposes of the Shipping Act.

On the basis of this finding, the examiner concluded that respondents' present dual rate system should be permitted "continued use and approval":

> * * * the Commission's decision of January 7, 1969, should be modified * * *, and the order served therewith should be vacated and these proceedings should be terminated.

The examiner's findings and conclusions were based upon the testimony of "11 representative witnesses consisting of shippers, car-

riers, freight forwarders and conference officials.[2] The examiner quotes exhaustively from the testimony of these witnesses and reaches the following "general conclusions":

1. A representative cross-section of shippers and receivers and freight forwarders, who are intimately connected with the details of shipping arrangements, have experienced an improvement in the service offered by the conference members since the implementation of the present contract system;

2. The present contract system acts as an incentive to the conference member lines to increase their investments in vessels committed to the conference trade and that the present improved level of conference service is a primary result of the present contract system;

3. The rule proposed by the Federal Maritime Commission will result in a deterioration of service in the area served by Respondents and presents a threat to the transportation needs of the shipping public;

4. Rate stability, which is desired by and essential to shippers and receivers, is dependent to a very large degree upon the maintenance of the present contract system;

5. For sound business reasons, the testimony discloses that shippers and forwarders alike desire the type of flexibility provided by the present two-contract system and that the "flexibility" proposed by Hearing Counsel may well result in disorganization and trade disruption;

6. Shippers and receivers receive fair treatment under the present system and can see no advantage in tampering with, or changing their contract arrangements when they are assured that these ararngements work to their advantage, as at present. Actually the record discloses and I so find and conclude that the two-contract system now in use by the Conference is required by a serious transportation need in the area involved herein, is necessary to secure important public benefits, and is in the furtherance of a valid regulatory purpose of the Shipping Act.

Hearing counsel excepts, principle at least, to all of the examiner's general conclusions. Specificially, he objects to the examiner's basic conclusions that the present contract rate system has: (1) Resulted in improved service in the conference trade; (2) provided an incentive to member lines to increase their investments in vessels committed to the conference trade; and (3) resulted in rate stability in the various trade areas.

The Contract System and Improved Service

In concluding that the present improved level of service is a result of the present contract system, the examiner relied principally upon the testimony of four witnesses: Mr. John W. Flook, manager of the trading department of Macondray & Co.; Mr. Edward H. Shustack, president of R. H. Baker & Co., Inc.; Mr. Albert A. Wright, assistant

[2] The 11 witnesses who appeared at the hearing may be broken down by category as follows: five shipper witnesses, three carrier witnesses, two conference witnesses, and one freight forwarder association witness.

manager of traffic and distribution department, Standard Oil Co. of California; and Mr. James R. Scott, manager of transportation services of the U.S. Borax and Chemical Corp., of Los Angeles. In each instance the examiner has quoted, paraphrased or referred to only those portions of testimony which are most favorable to the conclusion he reached. The testimony of Mr. Flook offers an example. The examiner cited the following in support of his conclusion that the improved service level was due to the present contract rate system:

Q. Mr. Flook, you have been a party to, signatory to the dual rate contract since 1961?

A. Yes.

Q. And you indicate in your written testimony that it has been your experience that the rate agreement covering the three southbound and two northbound has resulted in improved service; is that correct?

A. Yes.

Q. On the part of the Conference?

A. Yes.

Q. What are you comparing that to?

A. Well, we are comparing that to the previous system where there were 10 individual rate agreements.

Q. So since the Federal Maritime Commission's approval of the super conferences, we might call it, you have gotten better service?

A. We have, yes.

Q. In your opinion, is this attributable to the amalgamation of separate conferences into one?

A. Yes, it is an ability by the Conference, I feel, to better structure rates.

Q. I don't understand that.

A. Well, with the Conference controlling the five different trade areas, three southbound and two northbound, we feel that it offers the lines a greater opportunity through the participation of the European lines that do service the area, to offer better service both north and southbound.

From the foregoing, it is just as easily concluded that the establishment and approval of the "super conference" was the cause of the increased service level such as it may be. The real difficulty lies in concluding that it was the present contract rate system that produced the alleged result. Indeed, it would seem that it was the conference agreement that enabled the European lines to participate more fully. The same is true of the other testimony relied upon by the examiner in concluding that improved service was the result of the contract rate system.

THE CONTRACT SYSTEM AND RATE STABILITY

In our earlier report in this case we had the following to say concerning the respondents' contract system:

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. [Emphasis ours.] 12 F.M.C. at page 157.

Again, the testimony relied upon by the examiner fails to demonstrate how the single contract system provides rate stability which would not otherwise prevail under the system which would offer a separate contract for each of the five trade areas. The following treatment of one witness' testimony is illustrative:

Witness John W. Flook testified that the present contract system "is important to maintain stability of rates" and that "the imposition of the Commission's proposed rule would probably result in instability of rates and service in the trade areas served by the Conference due to the possibility of disruptive non-Conference service * * *." Mr. Flook, upon cross-examination, said that as an exporter, his company often sold goods for delivery forward, for up to 60 days in advance. He further stated:

> We require, when making these contracts to be assured that at the time of shipment the rate on which we based our cost calculation would apply.
>
> If, on the other hand, there were non-Conference lines within the trade area and there was a freight war in existence where the Conference and the non-Conference lines were competing for the cargo, the natural instability would exist.

In response to an inquiry from the presiding examiner, Mr. Flook stated:

I think that as far as the imports are concerned, I think the general consumer will always benefit by the, again, stability of rates and not having to pay an increased rate on one occasion and a lower rate on another occasion.

* * * * * * *

I relate that to the item that we are importing in greatest volume, cocoa beans, that due to the fixed rate that we have had in effect, the buyers can anticipate their costs on a better basis.

As a matter of fact, in that way the consumer benefits by not having a fluctuating rate.

Or as another example the examiner offers:

Mr. M. J. McCarthy, of the Freight Forwarders Association, stated that he had been in the shipping business for 41 years, and that this present contract system "better affords stability of rates", and that without the present contract system there would be no rate stability. When hearing counsel asked whether the shipper should have the option of shipping conference or non-Conference, Mr. McCarthy stated:

> If you put it that way, Mr. Tell, forget about the Conference, just break them up and forget about it if you're going to give the latitude where he can ship conference or non-Conference. If he has that latitude, I seee no reason why he should have a Conference. Why don't you walk right into a rate war?

Here, as with almost the entire approach of the examiner and the respondents to the issue at hand, it was made to appear that the choice involved is between the present contract or no contract at all, which is, of course, not the case. We do not insist that a shipper be allowed the choice of conference or nonconference within a "trade area", we only insist that a shipper be allowed to choose whether or not to sign a contract for each of the five trade areas. Nothing in the record supports the conclusion that rate stability is dependent upon the present contract system.

THE CONTRACT RATE SYSTEM AND INVESTMENT INCENTIVE

According to the examiner:

Mr. Robert B. Swenson of Balfour Guthrie & Co., Ltd. stated that the present contract system acted as an inducement to Grancolombiana, for whom his company acts as agent, to increase their service and investment in the trade and to maintain their present investment. He stated:

Well, we only recently, I should say the last 3 months of 1968, completed a study; we as agents completed a study for Grancolombiana on the future of the particular trade route and based on this, they are presently studying this and have told us indirectly that they are planning to add to their fleet and improve their service to some extent.

Now, of course, this study and their planning is based upon the fact that there will be certain tonnages moving, and if you take away the larger parcels, of course, the service could not exist, and instead of having a ship every 2 weeks, there will be maybe a ship a month, or a ship every 6 weeks.

Thus, in Mr. Swenson's opinion, it would appear that the plans of Grancolombiana to extend their service are directly related to the maintenance of the present contract system, and specifically, the maintenance of the present level of service is dependent upon the conference lines carrying certain base parcels cargo which he felt would be taken away if the Commission's rule went into effect. In light of Mr. Swenson's additional statement that the Grancolombiana Line covers all three of the so-called southbound "trade areas" with the same ship the importance of one contract covering all three trade areas and of Grancolombiana's ability to depend upon patronage for the entire conference area becomes of considerable importance.

In light of such testimony it is apparent that the possibilities of the conference carriers for maintaining and extending service and for their adding to their fleets are directly related to the carrier's assurance that the cargo upon which they are dependent in the Latin American trade area will not be taken away.

I therefore find and conclude from the testimony that the present level of conference service is a result of the present contract system now in use.

The record shows that Mr. Swenson's complete testimony does not demonstrate that Grancolombiana's plans are dependent upon the continuation of the present contract system. Rather, they are tied to the continuing carriage of certain "base parcels cargo". Here, we would agree with hearing counsel that even without the single contract system

if a nonconference carrier wishes to carry base cargoes, he would; (1) have to offer a lower rate, and (2) convince the base cargo shipper that regular and dependable nonconference service will be provided. If the Conference service in the particular trade area is dependable and efficient and the rates are reasonable, it follows that the shippers of any size in that area will sign contracts and the Conference will be adequately protected in that trade area.

THE EFFECT OF THE PROPOSED CONTRACT SYSTEM

The examiner concluded that "the rule proposed by the Federal Maritime Commission, which would require the respondent conference to offer its contract separately in its five ratemaking areas, would prove detrimental to the commerce of the United States and would adversely affect the public interest."

Here, the examiner relies most heavily on the testimony of Mr. Henri P. Blok, now chairman of the respondent conference. Mr. Blok emphasized two factors which the examiner found to be unique to the respondent conference. First, this conference serves a trade area "situated in one of the most active cross-trade routes in the world." Second, "11 members of the Pacific Coast/European Conference and several transpacific carriers are members of this conference, but their membership in the respondent conference is somewhat incidental to the major trade routes they serve." The examiner then had the following to say concerning the Blok testimony:

> As a result of the first of these factors, he stated that his conference is peculiarly susceptible to "raiding" by nonconference members on an occasional basis in the cross trade areas; that if such raiding should occur, it would be an easy step for those carriers who are also members of other conferences to withdraw from their regularly scheduled sailings of the respondent conference because of the second factor; and that resulting chaos and loss of service throughout the conference would occur.

The testimony of Mr. Blok is to be contrasted with that of Mr. Raymond Burley, Mr. Blok's predecessor in the chairmanship of the respondent conference, and a man whom the examiner recognized as "a distinguished shipping authority" of more than 20 years experience. In responding to an inquiry regarding the effect of the super conference on nonconference competition, Mr. Burley testified in 1967, "The effect it had on nonconference competition has not been material because we did not have a great deal of nonconference competition at the beginning."

The testimony of Mr. Blok primarily relied upon by the examiner was:

It is not difficult to recognize * * * that [the] nonmember European carriers, whose vessels in the exercise of their primary trade route functions also regularly traverse various Latin American trade routes, remain an ever-present potential to lift an occasional parcel in the Latin American trade whenever they find cargo offerings on their major trade routes uncomfortably disappointing. In doing so, these carriers may be less concerned about any particular return they receive, as long as this return at least covers the out-of-pocket costs of handling and contributes something towards the cost of overhead, which could well be preferable to having to return their vessel partly unfilled.

* * * under the present conference contract system whereby shippers in general have more at stake than losing their privileges to individual, limited designations, the danger is small that regularly engaged Latin American Conference carriers will have to face non-Conference liftings at rates they, or any one who could try to make a living in that trade, could possibly afford. If the present contract system were broken down under the Commission's proposed rule, however, I fear that a good many shippers, who regularly ship to a given area, would easily be swayed to rely on the availability of dead space in nonmember European vessels. They would thus cancel their contract to that area, but retain their contracts to other areas in the expectation that the Conference service there would be maintained. This may appear attractive to the shipping public at first glance, but the almost inescapable consequence is that many of the Latin America Conference member lines will rapidly lose interest in this cross-trade which heretofore assured them of cargo offerings to all areas to remunerative rates. After all, it is assured, paying, rate level which induces the carriers to allocate a portion of their vessels' space to the Latin America trade, sometimes even at the expense of cargo-offerings in their primary (Europe) trade. Necessarily, the end result of the Commission's rule must be a spotty, cutrate, unrealiable service which is neither responsive or adequate to the demands to the shipping public.

The validity of this argument depends, of course, upon the real and effective presence of competition from nonconference carriers, the mere presence of such carriers in the trade is not enough. They must offer a service which is truly competitive with that offered by the respondents. To be truly competitive such a service must, in the view of the respondents' own shipper witnesses, be adequate and dependable and offer reasonable and stable rates. Moreover, in a statement not referred to by the examiner, Mr. Blok places the extent and severity of the nonconference competition in its proper perspective. Mr. Blok, after alluding to the 11 members of the Pacific Coast European Conference, who are members of the respondent conference, states:

At the present time, in the same Pacific Coast/European trade there are nine other carriers not members of this conference, which are exclusively engaged in that major trade route. If it ever appeared that the present members of the Latin American Conference were unable to cope with the tonnage moving in the Pacific Coast, Mexico, Central America, Canal, Caribbean trade, any of these non-member European carriers may be interested in joining the Latin American Conference which, after all, is open to all qualified carriers, As it presently stands, however, the present Latin American membership appears to fill the bill

and is encouraged to stand by its commitments primarily because of the stable conditions which prevail under the present contract system.

It is only after this statement that Mr. Blok points out that:

It is not difficult to recognize, however, that these nonmember European carriers * * * remain an ever-present potential to lift an occasional parcel of cargo * * * whenever they find the cargo offerings on their major trade route uncomfortably disappointing.

Thus, the nonconference competition which respondents cry would wreak havoc and chaos in the trade if we were to modify their present contract system as proposed reduces itself to some nine lines which might be "interested in joining" the respondent conference if it appeared that respondents were "unable to cope with the tonnage moving" but which also remain every ready to "lift an occasional parcel" when the offerings in their own trade become disappointing.

Finally, again unmentioned in the initial decision, the following colloquy between Mr. A. Wright, assistant manager of traffic and distribution department, Standard Oil of California and hearing counsel is illuminating:

Q. Mr. Wright, you indicated that you export to all three trade areas in question?

A. Yes, sir.

Q. Do you have any idea as far as the percentage breakdown goes where your exports go?

A. No, sir, Mr. Tell. We have 13 subsidiaries that are signatories to the involved contract here, and I simply have not had an opportunity to refine the figures to get a percentage breakdown from one area to another.

Q. Well, is there a particular area in your estimation which occupies a greater percentage of your exports than, say, another?

A. I would suspect that the areas in Central America and Venezuela, for example, loom large in the picture.

Q. What products do they export?

A. Petroleum products basically.

At the time, at the same time, we also have a fairly steady movement of inbound maintenance materials for our installations down there. It could be machinery, pipes, valves, things of that nature.

Q. So, in other words, you are party to both the shipper's agreement and receiver's agreement; is that correct?

A. No, sir. We do not appear as signatory to the northbound agreements.

Q. Why is that?

A. We have very little movement coming north.

Q. When you come north, do you ship Conference?

A. We ship on the Conference lines, yes.

Q. Why, in your estimation, is there no necessity to become part of the receiver's agreement if you utilize Conference service coming north?

A. The need is so minute that it simply is not worth the necessary policing activity of maintaining the Conference agreements and maintaining the records and so forth; it just isn't worth it to us.

Q. Do you utilize anything else but Conference service coming north?

A. No to my knowledge.

Q. In your estimation, would it not be advantageous to be a party of the receiver's agreement coming north even though your shipments are negligible just by the fact you get a 15 percent reduction?

A. It could be; and if the movement were ever to escalate, it would be; I suspect that we would.

Contrast this statement of Mr. Wright's with our own conclusion as to one of the primary difficulties we found with present contract rate system. In our earlier report we said:

Whereas before approval of agreement 8660 a shipper could have signed a dual rate contract with one, several, or all of ten conferences * * * now a shipper must 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 rare shipments in "B" to conference vessels in order to obtain the lower contract rate in "A".

Nothing in this record causes us to change our mind. We have been offered nothing in the way of transportation need, important public benefits to be secured or valid regulatory purpose to be achieved by the present system. Here, as in the earlier hearing, the vast bulk of the testimony is either speculative as to the consequences of modifying the present system or leads to the conclusion that factors other than the contract rate system—such as the approval of the so-called super conference itself—have been the causes of the rate stability, dependable service, etc., pointed to by respondents as supporting the contined use of the present system.

We have very carefully reviewed the record before us and we find nothing that would lead us to change the conclusions reached in our earlier report, which conclusions we set forth below omitting quotation marks for the sake of convenience.

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, he must institute a service in it. 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 the approval of Agreement No. 8660 a shipper could have signed a dual rate

contract with one, several, or all of 10 conferences (assuming they would all have obtained approval of contracts under 14b), now a shipper must 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.[3]

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 No. 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

[3] 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 at 12 F.M.C., 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 section 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.

interest unless necessary to pursue some legitimate commercial objective. In 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.

COMMISSIONER JAMES V. DAY, DISSENTING

This case concerns the validity of the dual rate system now used by the Latin America/Pacific Coast Conference.

The Conference covers five trade areas—three outbound from the United States and two inbound. The dual rate contract employed by the Conference binds a shipper in any one outbound trade area to the exclusive use of conference vessels in that area and the two other outbound trade areas if and when he ships in such other areas. Conversely, a shipper (receiver) in either one of the inbound trade areas must exclusively use conference vessels in both inbound trade areas.

The basic issue in this case is whether such a dual rate contract is against the public interest as this term is used in section 14b of the Shipping Act.

The majority has again found that the subject dual rate contract is against the public interest.[1]

[1] The majority likewise found in a prior opinion wherein it stated that the contract, restricting shipper choice of carriers, violated the antitrust laws and was hence against the public interest absent the Conference showing the necessity for such restriction. (Agreement 8660–12 FMC 149 (1969).)

The Conference then objected and petitioned as follows: "Come now respondents, the Latin America/Pacific Coast Steamship Conference and its member lines, and respectfully petition the Commission to reopen the subject docket for further evidentiary hearings in light of the Commission's report served on Jan. 7, 1969.

"The basis for this petition and motion is that the Commission has, in its report, unfairly and improperly applied the rule of *F.M.C.* v. *Svenska Amerika Linien*, 390 U.S. 238 (1968), to the respondents for the reason that respondents have not been afforded an opportunity to meet the new burden of proof imposed by that rule. The decision in *Svenska* was not handed down by the Supreme Court until Mar. 6, 1968, some 6 months after the close of the evidentiary hearings in this docket. Nonetheless, on the basis of the *Svenska* decision the Commission has held in its report that, 'It is up to respondents to

The majority in this instance has reached the opinion that the contract is invalid via the following legal rationale or route.[2]

The majority decision states: (1) That the subject dual rate contract violates the antitrust laws (in that it restricts shippers from going nonconference).[3]

The majority says: (2) That the subject contract restriction violating the antitrust laws is in itself (sufficient and) substantial evidence that the contract is against the public interest.[4]

The majority holds: (3) That without countervailing evidence showing the necessity for this dual rate contract, the contract being inherently against the public interest must be declared invalid.[5] In

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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.'

"Respondents propose to demonstrate through the introduction of competent testimony that the two-contract system presently being utilized by the Conference is required by a serious transportation need, is necessary to secure important public benefits and is therefore in furtherance of valid regulatory purposes of the Shipping Act. Such testimony was not proffered during the prior hearings because of respondents' belief (wholly reasonable, we submit, in the pre-*Svenska* context) that, before their present contract system could be disapproved the Commission had the burden of making affirmative findings, within the meaning of the Shipping Act, that the present system was detrimental to the commerce of the United States and contrary to the public interest."

Respondents were granted further hearing and the matter is now decided. (In this opinion, italics have been added for emphasis.)

[2] It has followed the test hereinafter spelled out at length which was affirmed by the Supreme Court, in *FMC* v. *Svenska Amerika Linien,* 390 U.S. 238, 244–6 (1968) for interpreting sec. 15 of the act. It has done this, as it has said, in agreement 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". (See "Majority Opinion" of January 1969; 12 FMC 149, 153.)

[3] The majority says (at p. 184) that "absent the protection of sec. 14b, the exclusive patronage tying arrangement embodied in a dual rate contract would clearly run counter to the anti-trust laws".

[4] In its prior opinion (12 FMC 155) the majority emphasized that an exclusive patronage tying arrangement violates the antitrust laws and "Therefore, unless there are to be diametrically opposed meanings attached to the public interest standards as they appear in secs. 14b and 15, there is without more, 'substantial (and sufficient) evidence' that respondent's contract is contrary to the public interest." (Footnote omitted.)

This position, of course, is consonant with the Court's in *Svenska* which held (as to sec. 15) that "once an antitrust violation is established, this alone will normally constitute *substantial evidence that the agreement is contrary to the public interest*".

However, compare some of the legislative history of sec. 14b. The Senate Committee said "We believe that any contract which contains the eight safeguards expressly required by the amended bill makes out a *prima facie case that the contract is not—contrary to our public interest—*." S. Rept. No. 860, 87th Cong., 1st Sess. 23 (1961).

The subject contract, of course, contains such special sec. 14b safeguard provisions and under the Senate rationale it could have been approved by the Commission without further evidence. The majority holds otherwise.

[5] This is the Court's position relative to sec. 15, namely that "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". *FMC* v. *Svenska Amerika Linien,* 390 U.S. 238, 244–6 (1968).

This is now the Commission's position relative to sec. 14b. One should compare, however, this present position to the Commission's statement in *The Dual Rate Cases,* 8 FMC 16, 50 (1964), where in discussing the subject dual rate contract it said: "One intervener in docket No. 1092 argues that there is no 'need' for the extension of the dual rate system

this regard the test employed by the majority for such supportive evidence is that it show that the contract is required by some *legitimate commercial objective*—i.e., required by a serious transportation need, necessary to secure important public benefits or (required) in furtherance of some valid regulatory purpose of the Shipping Act.[6]

The majority also imply that the subject contract must absolutely be required in order to achieve a valid commercial objective and any degree of restraint in the contract not necessary to achieve that legitimate objective will be struck down as not in the public interest.[7]

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to areas included in the new conference agreement which are not now covered by existing dual rate systems of the individual conferences. *Sec. 14b does not require that the conference demonstrate a positive need* for the system as a prerequisite for approval. Rather it authorizes the use of dual rate contracts if they meet certain safeguards." This statement confirms a prior opinion of the examiner ("Initial Decision," January 1964, at p. 31).

However, regardless of whether the contract initially be considered as either *prima facie in the public interest* (and hence not requiring a demonstration of its need) or *inherently against the public interest* (and thus requiring justification), supportive evidence has been introduced which insures the contract's validity.

[6] One ponders the completeness of the majority's general statement that "In the normal run of things, that legitimate commercial objective will be a conference's need to protect itself from the inroads of nonconference competition." (*supra*, p. 18).

The legislative history of our law reveals that sec. 14b was enacted "so as to expressly authorize the use of dual-rate systems by conferences, irrespective of the presence or absence of nonconference competition." H.R. Rept. No. 498, 87th Cong. 1st Sess. 7 (1961).

Further, the Senate Committee considering this legislation found: "1. *Conferences need the right to use dual-rate contracts*—In order for the ocean common carriers and conferences serving our foreign commerce to do so on a regular, dependable, and nondiscriminatory basis, they must be allowed, as they are throughout the rest of the maritime world, to enter into dual-rate contracts with shippers and consignees. Otherwise, the economics of ocean shipping will force the lines concerned into rate wars among themselves that might result in the destruction of ocean common carriage. If that happens, there can be no doubt that the high cost American lines will be the hardest hit." S. Rept. No. 860, 87th Cong., 1st Sess. 10 (1961).

Likewise, it has also been noted that sec. 14b springs from "an appreciation of the hard fact of international shipping life that—the only method that has proved practical to assure continuity of service on a particular route with a degree of stability of rates, in view of the very large investment required in the establishment of a regular service, is—[the] providing [of] specific inducements to shippers to utilize the services of the particular line or lines regularly serving that route." S. Rept. No. 860, 87th Cong., 1st Sess. 2 (1961).

Shippers are likewise concerned with obtaining sound service for their trade objectives. Further, they look to the dual-rate system to provide stability of rates and for assurances that their transportation costs are identical with those of their competitors shipping within the same conference. H.R. Rept. No. 498, 87th Cong., 1st Sess. 13 (1961) and S. Rept. No. 860, 87th Cong., 1st Sess. 5 (1961). In summary, the aim of the law is "the betterment of the American merchant marine and the stability of foreign commerce." H.R. Rept. No. 498, 87th Cong., 1st Sess. 2 (1961).

Thus, all the above considerations, I would say, should also be considered within the scope of "legitimate commercial objectives"—or pertinent to "serious transportation need, important public benefit, or in furtherance of valid regulatory purposes."

[7] Thus the majority's statement—"In 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." (p. 18).

Such is the majority rationale. But in applying all these principles I reach a different result than the majority. I weigh the evidence of record and I conclude as has the Examiner that the subject dual rate contract is in the public interest—required by legitimate commercial objective that is, required by a serious transportation need, necessary to secure important public benefits and is in furtherance of valid regulatory purpose.

In the aforesaid regard I more specifically conclude that the present contract rate system is necessary to maintain the same current level and degree of: (1) improved service in the conference trade; (2) real incentive to member lines to increase their investments in vessels committed to the conference trade; (3) sound assurance of rate stability; and (4) particular competitive benefits now enjoyed by shippers.

I further conclude that the majority alternative contract rate system will not be sufficient to accomplish the same results in support of the public interest.

These conclusions are derived from a review of all the accumulated evidence in this record now before us. The particular evidence which I find persuasive is as follows:

(1) Improved service:

The testimony of eight witnesses was cited by the examiner in support of his conclusion that the present level of improved service is attributable to the present contract system.[8]

For example, witness Warrick testified (I.D. p. 11) that the present system of one contract covering all southbound areas reduces "redtape and paperwork" and provides dependability:

> We know that we are covered in all of the areas; we don't have to worry about *arranging contracts* with each and every individual carrier or conference. There is a certain amount of *dependability* in that respect by having the one arrangement under which we are operating today.

Mr. Swenson testified (I.D. p. 13) that the present contract system has acted as an inducement to increase service:

> * * * we as agents completed a study for Grancolombiana [and] * * * they are planning to add to their fleet and improve their service to some extent.
>
> Now, of course, this study and their planning is based upon the fact that there will be certain tonnages moving, and if you take away the larger parcels, of course, the service could not exist * * *

As the examiner notes, it would appear from the above testimony that Grancolombiana's plans to improve service are related to main-

[8] Messrs. Flook (shipper), Shustack (shipper), Wright (shipper), Scott (shipper), Warrick (shipper), Rutherford (shipper), Walker (Grace Line), Swenson (Grancolombiana Line).

tenance of the present dual rate contract coverage—securing certain parcels of cargo.[9]

Witness Shustack stated (I.D. at p. 8) that the present system has encouraged a sufficiency of service, has ensured his ability to compete in South America, and is of benefit to U.S. commerce:

> The service as furnished by the Conference enables a sufficiency of vessels and availability of the sufficiency of vessels to make the required shipments over a period of time of these contracts.
>
> * * * with this system not adhered to wherein just chance carriers that come in and scoop up some of the business and run off with it and discourage the regular Conference vessels in making these odd ports, we might not then be able to compete in South America.
>
> * * * * * * *
>
> Q. "Would you say that the single Conference contract system serves a beneficial need and is of benefit to the commerce of the United States?"
>
> A. "From my own experience I have found it has met a need and is so."

Witness Scott testified (I.D. at p. 9) that "the single conference *contract covering all the trade areas serviced by the Conference* presents a potential for satisfying important transportation needs in the area * * * which could not be obtained under the Commission's proposed rule."[10]

One may also recall earlier testimony of record by witness Hansbrow (carrier agent) who said (I.D. 1968 at p. 23):

> 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.

Further, witness Gottschall of Sea-Land earlier stated (I.D. 1968 at p. 24):

> Q. Would 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.

In the light of such testimony it is clear that maintenance and extension of service is directly related to the present single contract system. One thus concludes that the present level of improved service is, indeed, a result of the present system.

[9] The importance of the single contract coverage to Grancolombiana is self-evident when it is noted that the line covers all three southbound areas with the same ship according to Mr. Swenson.

[10] The witness further stated (I.D. at p. 10) relative to "area" that "we feel that the Latin American area is generally one area" and that "we haven't had any problems on getting our shipments out on Conference vessels. We consider Conference vessels as a whole rather than [individual lines]."

(*2*) *Real investment incentive:*

Witness Swenson testified (I.D. at p. 13) that the present contract system has also acted as an inducement to Grancolombiana to increase its investment:

> * * * we as agents completed a study for Grancolombiana on the future of the particular trade route and based on this, they are presently studying this and have told us indirectly that they are planning to add to their fleet. * * * Now, of course, this study and their planning is based upon the fact that there will be certain tonnages moving, and if you take away the larger parcels, of course, the service could not exist * * *
>
> * * * * * * *
>
> I am afraid * * * if we broke up the present contract structure that we have and allowed a shipper to ship non-Conference to Central America and Conference to South America or the Caribbean area, this would take away a very substantial portion of their base cargo, and obviously it would mean that the service would be reduced. (Tr., p. 127)

In view of such testimony one concludes that the present real investment incentive is indeed based on having the certain assurance of shipper business through the present contract coverage.

(*3*) *Sound assurance of rate stability.*

The Examiner has cited the testimony of eight witnesses in support of his conclusion that the present sound assurance of rate stability is dependent on the present contract system.[11]

For example, Mr. Blok, the Conference Chairman, stated:

> These carriers provide this service at agreed, dependable and uniform rates, offering regular sailings in response to the need of the traffic. More importantly, these carriers are willing to commit themselves to this incidental trade precisely because they are assured of a remunerative rate level and of loyalty on the part of the shipping public.

I likewise conclude, therefore, that the particular incentive and assurance of rate stability now existent is due to the present wide coverage of the one contract system.

(*4*) *Particular competitive benefits now enjoyed by shippers:*

The examiner relied on the testimony of seven witnesses to reach his conclusion that the present contract operates to the particular benefit of shippers.[12]

For example, the examiner noted that witness *Shustack* stated he had found the present system gave his company an availability and a sufficiency of vessels which allowed his company to compete in areas where they would not otherwise be able to compete.

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[11] Witnesses Shustack, Warrick, Torres, Scott, MacInerney, Flook, McCarthy, and Blok.
[12] Witnesses Scott, Shustack, Rutherford, Flook, Warrick, McCarthy, and Walker.

Witness *McCarthy*, President of the Pacific Coast Customs and Freight Brokers Association, which handles between 50 and 60 percent of the total cargo moving in the Latin American trade, said:

The way it [the conference contract system] is working now, he [the shipper] has that flexibility to quote his export price under one contract in the three trade areas, which is flexible to the shipper and flexible to me as a forwarder.

Further, in late testimony, Mr. *McCarthy responded* (I.D. at p. 24):

* * * I thought I answered it sometime ago by stating that the flexibility as proposed by the Commission as against what the situation is today in my opinion the shipper has more flexibility today than he would have under, say, two, three, or four contract rate systems.

I am speaking from experience that I have found in the European Conference and the Westbound Conference trade that flexibility within those trades in my opinion is very, very good for the shipper, and I think the same condition should exist in the trades in the Latin American countries.

Now, as I told you before, that a shipper by having a contract in the whole area that we're talking about in South America is in a position to quote prices in any area and thereby no delay in that shipper getting a contract from the Conference.

Now, I know that has happened, and when you had the Conference before there was delays. I know that the Conference puts out a contract as quickly as possible but the shipper has to have that flexibility to say I can go here, there and there, and I have one contract.

As a further example of how the present contract system benefits shippers in getting business, and foster extensions of commerce, one notes the testimony of Mr. *Walker* (I.D. at p. 12):

* * * rates have been arranged by the conference to Peru and Chile because there is every evidence that this will expand, if successful, to every country in Latin America, and this particular shipper has contracts; he is particularly interested in our Conference setup because he has confidence in it that if he is treated properly and in a business-like way in one area that he can build into the other area and expect the same treatment.

I also refer to prior testimony of record by the respondent Conference chairman stating that under the present contract system:

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. Agreement No. 8660, 12 FMC 149, 162 (1969).

Hence, I conclude that such testimony as above noted supports the view that the present contract system provides particular benefits now enjoyed by shippers.

THE ADVERSE EFFECT OF THE MAJORITY'S SYSTEM

The examiner concluded that the majority's alternative would be detrimental to commerce. He reached this conclusion from the testi-

mony of five witnesses.[13] He noted that the lines stated they would lose their particular incentive to maintain their present level of service and investment and that shippers favoring the present system were fearful that the majority's system would result in a disruption of service for our commerce.

For example, the examiner noted (I.D. at pp. 14 and 15) the testimony of Conference Chairman Blok who referred to the particular vulnerability of the respondent conference and the impact which the Commission's proposed rule would have on the service which the other witnesses stated they enjoy and wished to maintain. Mr. Blok emphasized that eleven members of the Pacific Coast/European Conference and several transpacific carriers are members of this conference, but their membership in the respondent conference is somewhat incidental to the major trade routes they serve.

As a result of this factor, he stated that he believed it would be an easy step for those carriers who are also members of other conferences to withdraw from their regularly scheduled sailings of the respondent conference and that upon such occurring chaos and loss of service throughout the conference would occur. Mr. Blok described the situation as follows:

> If the present contract system were broken down under the Commission's proposed rule, * * * the almost inescapable consequence is that many of the Latin America Conference member lines will rapidly lose interest in this [trade] which heretofore assured them of cargo offerings to all areas at remunerative rates. After all, it is an assured, paying rate level which induces the carriers to allocate a portion of their vessels' space to the Latin America trade, sometimes even at the expense of cargo offerings in their primary (Europe) trade. Necessarily, the end result of the Commission's rule must be a spotty, cutrate, unreliable service which is neither responsive or adequate to the demands to the shipping public.

Prior testimony of record supports the above evidence.

Then Conference Chairman Burley said in 1967:

> I testified earlier that one of our real problems in the matter of administering a noncontract rate system and keeping rate stability in our trade was the fact that the Latin states are right in the middle of the cross trades.
>
> In other words, as this map displays, vessels traversing the area from the Orient to the Atlantic coast traverse part through Central America, South America, through the Caribbean.
>
> They are potential nonconference competition if they so wish.
>
> We have the Japanese lines that come from Japan via the Pacific coast to the west and east coasts of South America. If they weren't conference members they would be potential competition.
>
> * * * I think that we have kept it fairly well under control through our single-contract system. (1967 *Tr.*, pp. 26–28)

[13] Witnesses Blok, Walker, Swenson, Flook, and Shustack.

I would further note the testimony of shipper witness Flook who said (I.D. at p. 17) that if the present contract system were broken up into a number of separate contracts, there would be no incentive for the present carriers to remain in the trade and that this "would result for a time in a freight war and could possibly disrupt the service which we are presently enjoying on a really scheduled basis.[14]

Under all the circumstances above noted, I conclude that switching to the majority's alternative would prove detrimental to our commerce and not in the public interest.

CONCLUSION

To summarize, we here determine the issue of whether the Conference's dual rate contract is against the public interest as this term is used in section 14b of the Shipping Act.

The majority presumes it is useless the contract is shown to be required by some legitimate commercial objective—i.e., required either by a serious transportation need, or necessary to secure important public benefits or [required] in furtherance of some valid regulatory purpose of the Shipping Act.

I have found that the contract is required in order to maintain the existing: improved carrier service, carrier investment incentive, assurance of rate stability, and competitive benefits to shippers. Each one of these factors is certainly a legitimate commercial objective representing a serious transportation need, an important public benefit or furthering a valid regulatory purpose.[15]

I would emphasize that the contract is essential for not merely one but, indeed, for all four factors or objectives. If the contract related to just one, of course, this alone could be support for its continued use.

As a final word on geographic areas I would point out that 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 greater area (regardless of the routing

[14] Witness Edward Shustack summed up the attitude of the shipping public:

I would be loath to tamper with a system that is working and working real well especially when American manufacturers are at a disadvantage shipping to foreign ports versus their counterparts in other countries.

I would have to be shown a substantial advantage in such a change before I would want to tamper with what I feel to be an unknown situation.

[15] See the legislative history of section 14b noting these factors of service, investment, rate stability, and shipper benefit. Footnote 6 at p. 3, *supra*.

of their current business). Broadness of coverage cannot *per se* be equated with badness in viewing the history of respondent conference.[16]

Where, of course, the present shipper contract is here found on the evidence to be required, this is sufficient to justify its use regardless of whether the conference structure also contributes to the improved service, carrier investment incentive, assurance of rate stability, or the competitive benefits to shippers flowing from dual-rate contract coverage.

Indeed, the evidence is certainly "substantial" that this long-existing dual-rate contract is required. Testimony was taken from 11 representative witnesses consisting of carriers, conference officials, shippers, and freight forwarders. Essentially, all the testimony is in favor of the present dual-rate contract (that it is required) and against the majority substitute (not shown to be able to achieve as much for our commerce, our carriers and our shippers). It would seem far less certain in protection of the public interest to ignore sworn testimony of shippers and carrier management as to the benefits merely 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 hereby hold in the light of all the evidence that the existing dual-rate contract accomplishes legtitimate commercial objectives and is in the public interest. Hence, and subject always to appropriate Commission review, the conference is entitled to continue using its existing dual rate contract.

(SEAL)

FRANCIS C. HURNEY,
Secretary.

[16] This long-used system of one contract for shipments to Latin America (and another for shipments therefrom) is consonant with shipper testimony that "the Latin American area is generally one area" and "We consider Conference vessels as whole rather than [individual lines]." (Footnote 10, *supra.*) In this connection, a significant number, although not all, of the conference carriers operate in several of the five trade areas the conference has designated regarding carrier operations.

In the final analysis it is no more valid to try conforming apples to oranges than to say that the shipper contract coverage must be splintered in accord with the conference's internal organizational structure of five carrier areas. The conference structure merely insures that the particular carriers operating in an area have the say in such area—logically, they are best equipped through their current operations to vote therein on pertinent conference matters. This is hardly necessary or desirable to the shippers' business operations in this case. Certainly the evidence here shows that the present shipper contract coverage is considered to be at least one necessary support for present and potential business and benefit to all.

FEDERAL MARITIME COMMISSION

DOCKET NO. 1092

AGREEMENT NO. 8660—LATIN AMERICA/PACAFIC 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 agreement, 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 transportaton by water of goods from Pacific coast ports of the United States and Canada and the ports in Lation 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, Gautemala, 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 Columbia, 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.

FRANCIS C. HURNEY,
Secretary.

STAY OF ORDER

Granted March 12, 1971

The Commission's report and order in this proceeding, served December 31, 1970, would require the respondent conference to amend its dual rate contract to offer a separate contract rate system in each of five "trade areas" whereas the existing contract system binds signatories to all inbound or outbound trade areas. The date for compliance with this order is currently March 31, 1971.

Respondent has now petitioned for a stay of this order pending judicial review of the Commission's decision and order in this proceeding. Respondent sets forth various grounds to support its request. Essentially, respondent seeks to demonstrate that compliance with the order would be burdensome and costly and that a grant of a stay would result in no appreciable injury to the shipping public.

Good cause appearing, respondents request for a stay of the Commission's order in this proceeding pending judicial review is hereby granted.

By the Commission.

FRANCIS C. HURNEY,
Secretary.

(SEAL)

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NOS. 425 & 426 REVELL INCORPORATED

v.

PACIFIC WESTBOUND CONFERENCE

February 16, 1971

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER GRANTING REFUND

No exceptions having been taken to the initial decision of the examiner in these proceedings and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on Febuary 16, 1971.

It is ordered, That applicant is authorized to refund to Revell Inc., the amount of $3,199.27.

It is further ordered, That applicant publish promptly in its appropriate tariff the following notice.

Notice is hereby given that as required by the decision of the Federal Maritime Commission in Special Docket Nos. 425 and 426, that effective July 23, 1970 the contract rate on Item 1115, Kits, Hobby, Plastic Construction, for purposes of refunds or waiver of freight charges on any shipments which may have been shipped during the period July 23, 1970 to January 15, 1971 is $48.25 W/M, subject to all other applicable rules, regulations, terms, and conditions of said rate and this tariff.

It is further ordered, That refund shall be made within 30 days of this notice and applicant shall within 5 days thereafter notify the Commission of the date of the refund and of the manner in which payment has been made.

By the Commission.

[SEAL]

FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NOS. 425 & 426 REVELL INCORPORATED

v.

PACIFIC WESTBOUND CONFERENCE

Applications to refund a portion of freight charges granted.

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

No. 425

Pacific Westbound Conference (applicant) seeks permission to refund to Revell, Inc. (shipper), a portion of the freight charges collected on five shipments of Revell Educational Hobby Kits and Revell Plastic Model Kits carried on vessels of Kawasaki Kisen Kaisha, Ltd. (K Line), a member of respondent conference. The rate applicable at the time of shipment was $50.50 W/M (item 1115, PWC local tariff 3, FMC 8) and, in accordance with the conference tariff, K Line collected a total of $30,835.31 from the shipper. The shipments were delivered to the consignee at various times between August 18 and November 27, 1970.

At a meeting of the conference held on June 24, 1970, the member lines approved a reduction in the rates applicable to kits, hobby, plastic construction, contained in local tariff item 1115 of PWC tariff 3, FMC 8, from $50.50 W/M to $48.25 W/M, to become effective June 29, 1970. Revell was advised of this reduction. Through inadvertence, the reduction was made in the tariff on local item 1115–A of tariff No. 3, covering kits, plastic model industrial construction, but not accomplished for item 1115, which was specifically applicable to the shipment here involved. Prior to the submission of this application, applicant filed with the Commission a corrected tariff page setting forth a rate of $48.25 W/M for kits, hobby, plastic construction, the rate here sought to be applied.

[1] This decision became the decision of the Commission February 16, 1971.

Public Law 90–298, 75 Stat. 764, authorizes the Commission to permit a common carrier by water in foreign commerce to refund a portion of the freight charges collected from a shipper where there is shown to be an error in a tariff of a clerical or administrative nature. The evidence presented by applicant shows that the conference members, at a regular meeting, voted to reduce the rate on the commodities involved in these five shipments but inadvertently failed to file a tariff amendment reflecting the reduction.

The application involves a situation within the purview of Public Law 90–298 and the application was filed within 180 days of the shipments. No other shipments of the same or similar commodity moved on conference vessels during approximately the same time as these shipments, and no other proceedings involving the same rate not disposed of in this initial decision are pending. Applicant having complied with the legal requirements, and good cause appearing, applicant is permitted to refund to the shipper the sum of $3,014.84. The notice referred to in the statute shall be published in the conference tariff and the refund shall be effectuated within 30 days thereafter. Within 5 days of making the refund, applicant shall notify the Commission of the date of the refund and the manner in which payment was made.

No. 426

The facts and circumstances set forth in this application, which involves the same parties, are identical with those set forth in No. 425 except that the shipment was of a lesser amount of the commodity, was carried by Yamashita-Shinnihon Line, also a member of the conference, and the bill of lading was dated October 31, 1970. The findings as to error in a tariff of a clerical or administrative nature, as set forth in No. 425, are incorporated herein, and as it appears that the application conforms to the statutory requirements, applicant is permitted to refund to the shipper the sum of $184.43. Applicant shall advise the Commission of payment as required in No. 425.

HERBERT K. GREER,
Presiding Examiner.

WASHINGTON, D.C., *January 21, 1971.*

FEDERAL MARITIME COMMISSION

No. 70-46

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE
No. 1132—MARIO J. MACCHIONE

February 23, 1971

NOTICE OF ADOPTION OF INITIAL DECISION; ORDER OF SUSPENSION

Notice is hereby given that the Commission has determined to adopt the initial decision of the examiner in this proceeding served February 9, 1971, the effect of which is to suspend respondent's freight forwarder license for a period of 90 days.

Therefore, it is ordered, that independent ocean freight forwarder license No. 1132, issued in the name of Mario J. Macchione, is hereby suspended for a period of 90 days from the date of service of this order.

It is further ordered that license No. 1132 be returned to the Commission to be held during the period of suspension which will expire May 27, 1971.

It is further ordered that copy of this notice be published in the Federal Register.

By the Commission.

FRANCIS C. HURNEY,
Secretary.

[SEAL]

FEDERAL MARITIME COMMISSION

No. 70-46

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE
No. 1132—MARIO J. MACCHIONE

Freight Forwarder License No. 1132 suspended for 90 days.

Walter E. Doherty, Jr., for respondent.
Charles Haslup, III, and *Donald J. Brunner* as hearing counsel.

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

This investigation was instituted by the Commission to determine whether respondent Mario J. Macchione has engaged in activity in violation of sections 510.23(a) and 510.24(e) of Federal Maritime Commission General Order 4 by permitting his license or name to be used by another person and by receiving compensation (brokerage) for freight forwarder services through a separate establishment without written approval of the Commission, and to determine whether respondent's freight forwarder license should be revoked.

A stipulation of facts was submitted and no hearing was held. The facts which have been stipulated by and between the parties, insofar as necessary for resolution of the issues presented, are as follows:

1. In September 1969, one John F. Crowley, an employee of respondent, having obtained an agreement to handle the shipments of Nashua Corp., approached respondent regarding the use of Freight Forwarder license No. 1132. Respondent being unaware that the arrangement would be contrary to the Commission's rules and regulations, agreed.
2. Crowley organized Door to Door International, Inc., and began operating as a freight forwarder under respondent's license. Crowley was not conversant with Commission rules and regulations.
3. Between October of 1967 and February 16, 1970, Door to Door International handled approximately 198 shipments which were forwarded under respondent's license No. 1132.
4. As of February 16, 1970, Crowley, as Door to Door International, Inc., ceased operating as a freight forwarder and turned over all shipments he had contracted for to respondent for handling.

[1] This decision became the decision of the Commission February 23, 1971.

5. During this period, Crowley did not share in respondent's freight brokerage revenue, nor did respondent share in freight forwarder fees collected by Door to Door International, Inc.

It is found that respondent violated the Commission's rules and regulations governing freight forwarders by permitting his license No. 1132 to be used by Door to Door International, Inc.

It is concluded that, except for the activities above found, respondent is fit and able to operate as a freight forwarder and that, as hearing counsel recommends, a fair and reasonable penalty for violations found is suspension of respondent's license No. 1132 for a period of 90 days.

Respondent's Ocean Freight Forwarder license No. 1132 is suspended for a period of 90 days from such date as the Commission may order.

HERBERT K. GREER,
Presiding Examiner.

WASHINGTON, D.C., *February 9, 1971.*

FEDERAL MARITIME COMMISSION

DOCKET NO. 70-24

AGREEMENT NO. 9835—JAPANESE LINES' PACIFIC NORTHWEST CONTAINERSHIPS SERVICE AGREEMENT

Decided February 24, 1971

Pursuant to all of the standards of section 15 of the Shipping Act, 1916, and pertinent interpretations and adjudications thereof, agreement No. 9835 is approved.

This agreement, as filed with the Commission, represents the full and complete agreement of the parties.

There are no additional ancillary understandings or arrangements among the various carrier members to this agreement which have been entered into and carried out or which have not been filed with and approved by the Commission.

Charles F. Warren, *John H. Caldwell*, and *William Warfield Ross* for respondent Japanese Lines.

Edward Schmeltzer, *Edward Aptaker*, and *Edward J. Sheppard* for petitioner city of Portland, Oreg.

Norman E. Sutherland and *Thomas J. White* for the city of Portland, Oreg., and the Dock Commission of the city of Portland.

Gerald Grinstein and *Richard D. Ford* for intervenor port of Seattle.

James Albert and *Donald J. Brunner* as hearing counsel.

REPORT

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

Pursuant to section 15 of the Shipping Act, 1916, the Commission, on April 17, 1970, originally approved agreement No. 9835 over the protest and request for hearing of the city of Portland Commission of Public Docks (hereafter Portland). Portland then filed an application with the Commission seeking a stay of its order of approval. The application was denied on May 25, 1970, and Portland appealed to the U.S. Court of Appeals for the District of Columbia Circuit for a stay, alleging that an unfiled agreement not to serve Portland existed between the Japanese Lines party to agreement No. 9835.

On June 12, 1970, the court in *The city of Portland, Oregon* v. *Federal Maritime Commission and the United States of America*, No. 24182, granted a stay of the Commission's order delaying its effective date for 60 days and remanded the record to the Commission in order to expedite the holding of a hearing to determine, in light of the protest of Portland, whether the agreement and the alleged ancillary agreements, if any, should be approved. The Commission on June 25, 1970, ordered (pursuant to sections 15 and 22 of the Shipping Act, 1916 (46 U.S.C. 814 and 821)), an expedited investigation and hearing be held to determine (1) whether agreement No. 9835 should be approved, disapproved or modified pursuant to section 15 of the Shipping Act, 1916; (2) whether this agreement as filed with the Commission represents the full and complete agreement of the parties; and (3) whether there are any additional ancillary understandings or arrangements among the various carrier parties to agreement No. 9835 which have been entered into and carried out or which have not been filed with and approved by the Commission.

Hearings were duly held, and Examiner John Marshall's initial decision recommending approval of the agreement was served on October 5, 1970. Parties participating in the hearing were: Portland as protestant, six Japanese Lines as respondent,[1] the port of Seattle as intervenor and hearing counsel. Exceptions to the examiner's decision were filed by Portland and hearing counsel.

Subsequent to filing of the exceptions, the Japanese Lines agreed to institute service to Portland every 20 days, and Portland withdrew its exceptions. Hearing counsel excepted to the examiner's rejection of their proposed modification proscribing the practice of the member lines to agreement No. 9835 of absorbing inland freight on Portland cargo and moving that cargo via Seattle.

While the Commission concurs with the examiner's ultimate conclusion to approve the agreement without the modifications advocated by hearing counsel, the subsequent service to Portland and withdrawal by Portland of its exceptions, renders moot a number of issues discussed by the examiner. Therefore, in our opinion, we think it inappropriate to treat those issues, and accordingly we have restricted our decision here to conclusions which reflect the existing facts in determining compliance with the standards for approval set forth in section 15 of the Shipping Act, 1916. It is not, however, our intention to either reject or affirm the examiner's initial decision. Rather, our decision herein merely speaks to the change in circumstances since the issuance of the initial decision.

[1] Japan Line; Kawasaki Kisen Kaisha, Ltd.; Mitsui-O.S.K. Lines, Ltd.; Nippon Yujen Kaijha; Showa Shipping Co., Ltd.; Yamashita-Shinnihon Steamship Co., Ltd.

FACTS

1. The Japanese Ministry of Transport (MOT) is responsible for the formulation and effectuation of policy in connection with the construction and operation of Japanese-flag vessels. Any Japanese carrier wishing to build a vessel must first get the approval of MOT. Moreover, financing through the Development Bank of Japan is dependent upon such approval. MOT, with the advice of the Shipping and Shipbuilding Rationalization Advisory Council, an advisory body to the Minister of Shipping and Shipbuilding Policy, concluded that the most economically feasible and efficient service between Japan and the Pacific Coast ports of North America would consist of a three-vessel system providing, inter alia, weekly service where possible, interchange of containers, space charters, and centralization and joint operation of container terminal facilities.

2. On September 11, 1968, the managing directors of the respondent lines were orally directed to work out an arrangement to accomplish the above objectives and to submit the specific terms of such an arrangement to MOT and the FMC for approval. The opportunity was never available to any one of the six lines to build a containership for operation in the Pacific Northwest trade, or to operate a container venture on any basis other than under the arrangement directed by MOT.

3. In October 1969, the carriers agreed on the basic formula that the arrangement would be designed around. It closely followed agreement No. 9718, which pertains to Japan-U.S. Pacific Southwest full-containership service.[2]

Signed by the six lines in December 1969, agreement No. 9835 provides for joint containership service between Japan and ports in the States of Oregon and Washington. The service would be provided by three fully containerized vessels. The six participant lines would be divided into teams of two, with each team jointly owning and operating one vessel. Sailing schedules would be subject to the unanimous agreement of all six lines though solicitation and booking of cargo would be on an individual basis by each line for its own account. Individual bills of lading would be issued. There are no provisions for the pooling of revenues or the sharing of operational expenses among the parties to the agreement. The agreement does provide, however, for the sharing of administrative expenses as well as the

[2] Filed May 10, 1968, and approved by the Commission July 3, 1968. Four of the six Japanese lines are included; i.e., Japan Line, Kawasaki Kisen Kaisha, Ltd., Mitsui-O.S.K. Lines and Yamashita-Shinnihon Steamship Co. U.S. Pacific coast calls under the agreement are made at Los Angeles and Oakland only.

interchange of containers and related equipment. In addition, there is a provision providing for the transportation of each line's containers on any of the three ships by way of a space chartering arrangement. The agreement is to remain in effect for 2 years with the option to extend the agreement for another year by unanimous consent of the parties.

4. MOT does not control the selection of ports. This is left to the discretion of the lines. In October 1969, all six lines agreed that it would be best to review the results of the three vessel operations, at least through the main winter season of December, January, and February, before deciding whether to call at Portland. Portland was so advised in early February 1970.

5. There is no indication that the Lines at any time had decided to exclude Portland on a permanent basis, and as we have already noted, subsequent to the examiner's decision, the Lines agreed to serve Portland. Their interim decision not to serve Portland was based on the factors of cargo opportunities, competitive considerations, and the desire to maintain a 30-day turnaround or round-voyage schedule. The record indicated (1) that if Portland could produce enough traffic to justify the call and (2) that if the call could be made within the 30-day turnaround time limitation "throughout the seasons," Portland would be given direct full-containership service. Such considerations were responsive to the MOT directive for regular service.

6. As of this report, Portland has been served under the consortium arrangement on the following dates:

	Arrived
Golden Arrow	12–11–70
Hotaka Maru	12–30–70
Beishu Maru	1–23–71
Golden Arrow	2– 8–71

7. As early as February 1970, the Lines advised their agents that they had temporarily agreed on the calling ports and the schedule for the first vessel. The April 13, 1970, issue of the *Pacific Shipper* contained the outbound and inbound schedule of that vessel, the *Golden Arrow*. However, such preliminary actions are not subject to section 15 sanctions, and no operation was conducted under agreement No. 9835 prior to Commission approval on April 17, 1970. No cargo was booked and no joint advertisements were published.

Discussion and Conclusions

Section 15 of the Shipping Act, 1916, provides, in part:

> The Commission shall by order, after notice and hearing, disapprove, cancel, or modify any agreement * * * whether or not previously approved by it, that

it finds to be unjustly discriminatory or unfair as between * * * shippers, * * * 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 the Act, and shall approve all other agreements * * *.

Consequently, the Commission is charged with disapproving a section 15 agreement based on the following four standards: (1) unjust discriminations; (2) detriment to the commerce; (3) contrary to the public interest; and (4) violation of the Act (Shipping Act, 1916). As the court indicated in *FMC* v. *Svenska Amerika Linien*, 390 U.S. 238, 245 (1968), the Commission must be presented with substantial evidence to support a finding under one or more of the above standards. On the record before us, it is our opinion that such "substantial evidence" cannot be found to justify disapproval of Agreement No. 9835. As the examiner concluded in his decision, a proper judgment on balance must be that operations under the agreement, "will not be unjustly discriminatory in any true sense of the word, will be beneficial to the commerce, in keeping with the public interest, and not a violation of the Shipping Act, 1916."

International shipping is currently experiencing a phenomenal increase in the utilization of containerships for the transportation of cargo. It is absolutely essential to the success of this new shipping system that the high cost vessels, supporting equipment and facilities be utilized in the most economical and efficient manner. In the interest of fulfilling that objective as well as providing regular service, interchange of containers, space charters, etc., MOT directed that full-containership service to the Pacific Northwest be provided through utilization of the consortium arrangement.

Agreement No. 9835, under the now-existing circumstances, quite obviously affords transportation benefits, including, among others, the regularity of service and the efficient utilization of high cost equipment, which far outweigh any relevant antitrust considerations which could be marshaled against its approval under section 15. *Investigation of Passenger Travel Agents*, 10 FMC 27, 34 (1966), aff'd *FMC* v. *Svenska Amerika Linien*, 390 U.S. supra. We are presented with no question of merger or consolidation. The companies maintain their separate organizations and identities. There is no sharing of revenues or profits. As pointed out by the examiner, "the agreement merely provides for a cooperative working arrangement covering space chartering and interstitial agreements on future sailings and administrative details."

In addition, the question of whether agreement No. 9835 is unjustly discriminatory under section 15 has become essentially moot with the subsequent decision of the Lines to provide direct containership serv-

ice to Portland on a 20-day cycle. Portland had contended during the hearing that respondents had entered into a clandestine determination to restrict or exclude the containership service from calling at Portland. The alleged "permanent exclusion" of Portland from any direct service was the only ground upon which the charge of discrimination was based. The new arrangement for direct service is satisfactory to Portland and constituted the basis upon which they withdrew their exceptions to the examiner's decision. The record reveals no other facets of the agreement which are potentially unjustly discriminatory under section 15.

In our order of investigation, we also questioned the existence of ancillary understandings or arrangements among the parties which may have been effectuated without Commission approval. As we indicated in our original order of approval, and now affirm herein, "there is nothing in the agreement filed with the Commission which indicates that it does not embody the complete understanding of the parties." The subsequent service to Portland by the consortium has negated considerably the merit of the original objection. Even before the initiation of the Portland service, the record did not support a finding that the Lines had entered into any permanent form of ancillary understanding or arrangement not to serve Portland in the future.

Further, it is our conclusion that the agreement as filed represents the full and complete agreement of the parties. Portland had originally contended that the agreement is incomplete in that it contemplates future agreements between the Lines with regard to schedules and advertising, space charters, mutual accounting procedures, and container interchanges. However, those matters do not speak to the essence of the agreement. As the examiner indicated, the Commission, MOT and the Lines know what the arrangement is. Formalization of the remaining details will not constitute the creation of a new agreement or arrangement requiring separate section 15 approval. Rather, they refer to what the Commission and the courts have termed "interstitial sort of adjustments." [3]

Those adjustments in terms of hearing counsel's analysis, are merely "ordinary administrative matter among the operators which does not affect the quality, quantity or cost of service to the shipper." The Commission, of course, retains continuing jurisdiction over operation of these agreements, and should any matter other than administrative or operational adjustments be the subject of future agreement between the lines, then appropriate compliance with section 15 requirements will be required.

[3] *Isbrandtsen Co.* v. *U.S.*, 211 F. 2d 51, 56 (1954).

There remains before us the question of hearing counsel's proposed modifications which were rejected by the examiner. Specifically, they propose that first a proviso be added to clause 1, "Sailings" of the agreement to prohibit the issuance of bills of lading to ports other than "those ports specified in the bills of lading [which] are served directly by the vessel or vessels on the voyage on which the cargo is carried." The intent of the proviso is to insure that Portland's growth potential as a container port is not arrested by absorption practices which divert cargo. Without the proviso, they maintain that the agreement may be an instrument by which discrimination between ports is effectuated.

Second, hearing counsel proposes that the Commission, for the sake of clarity, should further modify clause 1. "Sailings" so that the agreement is defined to mean "by unanimous assent" as per the intent of the parties to the agreement. As authority for this modification, they cite the *Mediterranean Pools Investigation*, 9 FMC 264 (1966) case, wherein the Commission stated:

On several occasions our predecessors have pointed out that "all agreements should be complete and the language used should be so clear as to eliminate all necessity for the interpretation as to the 'intent' of the parties." *In the Matter of Agreement No. 6510*, 1 U.S.M.C. 775–778, 2 U.S.M.C. 22; see also *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, 3 F.M.B. 556, 581.

It is our opinion that these modifications suggested by hearing counsel should be rejected for the reasons set forth by the hearing examiner. The validity of inland port-to-port absorption practices was not an issue in this case. The Commission's order of investigation did not call for an investigation into absorption. Absorption between Seattle and Portland is the subject of FMC docket No. 70–19, *Intermodal Service to Portland, Oregon*, to which Seattle, Portland, and the Lines are parties. No direct evidence was received at the hearing on this issue, and it would be inappropriate to modify the agreement on that ground at this time. The public interest is adequately safeguarded because of the proceeding in FMC docket 70–19.

As to the proposed modification substituting the words "by unanimous assent" for "agreement" within clause 1, "Sailings," it is our opinion that it is unnecessary for approval. The terms of the agreement as it stands contemplate the unanimous action of the parties. Nothing of substance would be gained by the modification.

Hearing counsel, on December 30, 1970, filed a paper entitled, "Reply to Various Motions for Summary Disposition," in which they request oral argument unless the Commission approve the agreement with their suggested modifications, or approve the agreement without adopting the examiner's initial decision and with the explicit under-

standing that the Commission's rulings on the absorption of inland freight in docket No. 70–19 will be applied equally, both in time and force, to the parties and practices in the instant proceeding.

Having dispensed with hearing counsel's proposed modifications, we find no reason to grant their request for oral argument. Therefore, it is accordingly denied. By way of comment, however, it is clear to us that insofar as parties and practices in the instant proceeding are involved in docket No. 70–19, then any decision forthcoming therefrom would be wholly applicable to these similar parties or practices.

Finally, American Export Isbrandtsen Lines, Inc. (AEIL), on November 2, 1970, filed its third petition for leave to intervene. This petition, as in the case of their prior petitions, was filed for the purpose of being given an opportunity to argue to the Commission that AEIL has a right to be heard in the event the Commission should determine that the proceeding herein encompasses the absorption/substituted service issue. Having specifically ruled against consideration of the absorption issue, we therefore deny AEIL's petition to intervene.

We have considered all aspects of agreement No. 9835 with reference to the various papers submitted by the parties to the proceeding and the facts as they have developed. Any arguments or positions not specifically dealt with are rejected as immaterial to our decision based on the facts as they currently exist before us. Accordingly, for the reasons set forth, we hold that agreement No. 9835, providing for containership service to the Pacific Northwest, is approved without modification. An appropriate order will be issued.

[SEAL]

FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 70-24

AGREEMENT NO. 9835—JAPANESE LINES' PACIFIC NORTHWEST CONTAINERSHIP SERVICE AGREEMENT

ORDER

This proceeding having been instituted 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 agreement No. 9835, as filed with the Commission and executed by Japan Line, Kawasaki Kisen Kaisha, Ltd., Mitsui-O.SC.K. Lines, Ltd., Nippon Yusen Kaisha, Showa Shipping Co., Ltd., and Yamashita-Shinnihon Steamship Co., Ltd., on December 24, 1969, is approved and this proceeding is discontinued.

By the Commission.

[SEAL]

FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 69–13

GENERAL INCREASES IN RATES IN THE U.S. GULF/PUERTO RICO TRADE

No. 69–23

GENERAL INCREASES IN RATES IN THE U.S. GULF/PUERTO RICO TRADE

Decision adopted March 4, 1971

Increased rates and other rates under investigation between Gulf of Mexico ports of the United States and ports of Puerto Rico found just and reasonable and not shown to be unlawful.

Mark P. Schlefer and *John Cunningham* for respondent, Lykes Bros. Steamship Co., Inc.

Warren Price, Jr., *Donald G. Massingale*, and *Robert L. Dausend* for respondent, Gulf-Puerto Rico Lines, Inc.

Edward Schmeltzer, *Frederic Moring*, and *Mario F. Escudero* for intervener, the Commonwealth of Puerto Rico.

R. Stanley Harsh, *Norman Kline*, *Ronald D. Lee*, and *Donald J. Brunner* as hearing counsel.

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

The subject two proceedings were consolidated for hearing by the Commission in its order, served on August 7, 1969, and its order served November 6, 1969. By notice of reassignment and consolidation by the chief examiner, served October 6, 1969, these proceedings also were consolidated for the issuance of an initial decision. There are two respondent ocean common carriers. Lykes Bros. Steamship Co., Inc. (Lykes), is respondent in docket No. 69–13, and Gulf-Puerto Rico Lines, Inc. (Gulf-Puerto Rico), is respondent in docket No. 69–23.

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[1] The decision in Dkt. 69–13 became the decision of the Commission March 4, 1971. The decision in Dkt. 69–23 was remanded to the examiner by Commission Order dated May 13, 1971.

Hearings were held in New Orleans, La., and in Washington, D.C.

In No. 69–13, by order of investigation, and by supplemental orders, served April 11, 1969, May 7, 1969, and November 25, 1969, certain increased rates and all of the rates already in effect as well as all future changes in rates filed during the course of this investigation, of Lykes Bros., in this U.S. Gulf/Puerto Rico trade were placed in issue.

In No. 69–23, by order of investigation and by supplemental order, served May 9, 1969, and June 8, 1970, certain increased rates of Gulf-Puerto Rico Lines, Inc., in this U.S. Gulf/Puerto Rico trade were placed in issue.

In both subject proceedings the rates are under investigation to determine whether they are unjust, unreasonable or otherwise unlawful under section 18(a) of the Shipping Act, 1916, and sections 3 and 4 of the Intercoastal Shipping Act, 1933 (the acts). The rates in issue were not suspended and have gone into effect.

These are so-called general revenue cases. In such cases, two principal matters for determination are whether a respondent common carrier by water is operating at a profit in a trade, and if at a profit whether it is earning a reasonable rate of return on its investment.

Lykes' vessels in this trade make calls at Port Arthur, Lake Charles, Houston, and Galveston among other ports on the Gulf and at San Juan, Mayaguez and Ponce in Puerto Rico. Lykes' operations in this Puerto Rico trade are conducted at a loss.

Lykes' past losses continued in 1969 notwithstanding that most of the rates under investigation herein were in effect for most of 1969. It was stipulated that Lykes' loss in 1969 was "not less than it was in 1968." The 1968 loss was $1,246,192.

A question was raised as to whether Lykes' losses in the Puerto Rico trade were due to "the kind of ships that they are operating in the trade." Evidence introduced by Lykes comparing the results of operating C–2 vessels, as at present, with its newer vessels of the Gulf Pride class, at May 31, 1969, cost levels and at the increased rates under investigation, shows that Lykes would suffer a greater loss from the operation of Gulf Pride vessels than from use of the C–2's.

It is concluded and found that the increased rates and other rates of Lykes under investigation herein are just and reasonable and not shown to be unlawful under the acts.

Gulf-Puerto Rico's operation in this trade has been primarily of the break-bulk type. The same is true of its competitors, Lykes and more recently Delta Steamship Co. No shipper or receiver has indicated any dissatisfaction with the increased rates of Gulf-Puerto Rico so far as this record shows.

Even under the increased rates, the operation of Gulf-Puerto Rico in this trade has been unprofitable. This respondent hopes to replace its two break-bulk vessels with containerships, and is hopeful that this projected containership service will be profitable, but its effect on revenues and expenses will not be known until there has been sufficient experience with a full containership operation.

Gulf-Puerto Rico now offers service between Mobile and New Orleans, and San Juan, Ponce, and Mayaguez. This respondent lost $810,000 in 1969 in this trade, and it shows a projected loss for 1970 of $1,132,651. Certain evidence was adduced by the Commonwealth of Puerto Rico designed to show the future profitability of an all-containership operation by Gulf-Puerto Rico, but this evidence was not at all persuasive, and is irrelevant to the main controlling issue in this proceeding of the profitability of the existing service. A common carrier cannot be compelled to offer service in this trade, and it follows that its management cannot be told to provide a particular type of ship or other equipment to service the trade.

If the Commission were to withhold approval of this rate increase because the respondent, Gulf-Puerto Rico, has not placed full containerships into the service, the Commission in effect would be dictating the type of vessels to be used and usurping a management prerogative or function. Of course, on the other hand, the Commission may if it wishes as suggested by hearing counsel in No. 59–23, encourage Gulf-Puerto Rico to convert to containership service as soon as feasible.

It is concluded and found that the rates of Gulf-Puerto Rico under investigation herein are just and reasonable and not shown to be unlawful under the acts.

Orders should be entered in both subject proceedings (No. 69–13 and No. 69–23) discontinuing the proceedings.

CHARLES E. MORGAN,
Presiding Examiner.

Washington, D.C., December 7, 1970.

FEDERAL MARITIME COMMISSION

DOCKET NO. 68-48
INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 790
NORTH AMERICAN VAN LINES, FORT WAYNE, IND. 46801

Decided March 4, 1971

License revoked. Respondent, found to be owned and controlled by a shipper in the foreign commerce of the United States by oceangoing common carriers, no longer qualifies for a license as an independent ocean freight forwarder within the meaning of sections 1 and 44 of the Shipping Act, 1916.

Martin A. Weissert for respondent.
James L. Malone and *Donald J. Brunner* as hearing counsel.
Gerald H. Ullman for intervener, New York Foreign Freight Forwarders and Brokers Association, Inc.

REPORT

BY THE COMMISSION: (Helen Delich Bentley, *Chairman;* Ashton C. Barrett, *Vice Chairman;* James F. Fanseen and George H. Hearn, *Commissioners*)

We instituted this proceeding to determine whether we should revoke North American Van Lines' license as an independent ocean freight forwarder because it is owned and controlled by PepsiCo Inc., which through its controlling interest in the Pepsi-Cola Corp., and Frito-Lay Corp., is a shipper of goods in the foreign commerce of the United States.

Permission to intervene was granted to the New York Foreign Freight Forwarders and Brokers Association, Inc. Subsequently, on March 10, 1969, North American voluntarily suspended operations under its license pending the outcome of these proceedings.

Examiner Richard M. Hartsock, in his initial decision, concluded that, "North American Van Lines is controlled by a corporation exporting cargo in the foreign commerce of the United States by oceangoing common carriers and that continued operation by North American

Van Lines as an independent ocean freight forwarder is, because of such control, inconsistent with sections 1 and 44 of the Shipping Act, 1916."

Respondent has filed exceptions to which hearing counsel have replied. We heard oral argument.

Facts

North American Van Lines, respondent, has been an ocean freight forwarder since 1958. It operated pursuant to Grandfather Rights until it was issued license No. 790 by the Federal Maritime Commission on June 8, 1965. On June 14, 1968, PepsiCo, Inc. acquired 100 percent of the capital stock of North American. PepsiCo also owns all of the stock of Pepsi-Cola and Frito-Lay corporations. Both of these corporations export cargoes in the foreign commerce of the United States by oceangoing common carriers. On March 10, 1969, North American voluntarily submitted its license for suspension and ceased ocean freight forwarding operations pending the outcome of this investigation.

While in 1946 respondent was incorporated as an Indiana corporation, on June 14, 1968, it was reincorporated as a Delaware corporation pursuant to the plan of acquisition by PepsiCo.

Respondent has engaged in the business of transporting or arranging for the transportation of household goods and related commodities since 1933. Surface operations are conducted within the United States under motor carrier certificates issued by the Interstate Commerce Commission. The certificates authorize the transportation of "household goods," as defined by the Interstate Commerce Commission, between points in the United States. They also authorize the transportation of certain other commodities such as new furniture, store fixtures, and household appliances not contained within the household goods definition.

A total of 90 percent of North American domestic surface operations consists of the transportation of "household goods" as opposed to the other authorized commodities. During 1968, the company transported 122,823 shipments of household goods and 40,725 of other authorized commodities such as new furniture. The latter operations constitute only 10 percent of the company's volume in terms of gross revenues.

Respondent's domestic motor carrier fleet consists of 230 company-owned tractors and 1,201 company-owned semitrailers. It also leases an additional 2,581 tractors, 3,214 semitrailers and 864 straight trucks. The book value of company-owned equipment exceeds $5 million.

The company also provides for the transportation of household goods by air. It solicits shipments for direct air carriers under I.A.T.A. agency contracts. During 1968 it arranged for 292 international household goods shipments in that capacity. Respondent also provides a service to the Department of Defense for overseas household goods shipments in its capacity as an air freight forwarder approved by the Civil Aeronautics Board. Under this system North American performs the necessary surface movement and arranges for the intermediate air carriage. This "through-bill-of-lading" service in 1968 resulted in the movement of 479 household goods shipments.

Respondent also furnishes services from and to overseas points as an NVO and as an ocean freight forwarder. The latter operations were commenced some time in 1950. On June 13, 1958, it was issued FMB Freight Forwarder Registration No. 2329. Following the amendment to the Shipping Act in the early 1960's, the company filed an application for freight forwarder license in January 1962. The Commission assigned No. 790 to the application, authorizing continued operations pending disposition of the proceeding. A license was issued on June 8, 1965.

Respondent never completely exploited the potential of the freight forwarder license because during the pendency of the application it could not risk substantial capital for that operation because there was no assurance that a license would ultimately be granted, and on May 31, 1966, shortly after the license was issued, the company entered into the purchase agreement with PepsiCo. North American thereafter was reluctant to expand until the potential conflict posed by the PepsiCo affiliation was resolved. The company did conduct some activity under the license; for example, during 1966 through 1968 it handled some 395 shipments. Gross revenues from those shipments including advanced charges for land and ocean freight was $159,088; of this only approximately $1,000 constituted forwarding fees. Ocean freight commissions aggregated $195.

Of the commodities which respondent is certified to transport as an ICC surface carrier, only "used household goods" are moved onward as an NVO.[1] The company's ocean freight forwarder activities are therefore confined to authorized surface commodities which are not considered as "used household goods" such as computers, exhibits and displays and new furniture, fixtures, etc. In its freight forwarder operations its customers can really fall into two categories. First,

[1] Nonvessel operating common carrier.

colleges and universities which were in the process of establishing educational facilities in foreign countries. In this operation the university would assign instructors to foreign countries and call upon North American to move the person's "used household goods" to his new overseas residence. This movement was handled as a combined surface movement and as NVO. In addition to the used household goods the college would also desire to ship project or educational supplies to the same foreign facility and ask North American to provide a service for the transportation of those commodities as well. North American declined to assume full through-liability for those shipments as an NVO but would assist the shipper by making arrangements to move the shipments in its ocean freight forwarder capacity.

The second type of customer consisted of manufacturing firms which North American already served as a domestic carrier for the transportation of products other than "used household goods." These products consisted of electronic equipment, exhibits and displays, and new furniture and fixtures. Customers became aware of North American because of its surface motor carrier operations. Occasionally, these companies had a need to ship certain of their manufactured goods overseas and, since they were not skilled or experienced in the export business, they turned to North American to make the necessary arrangements. These needs were accommodated by providing services as an ocean freight forwarder.

PepsiCo, a Delaware corporation having its principal offices in New York City, owns 158 subsidiary corporations which in turn are organized into five operating groups or divisions: Pepsi-Cola Division, Frito-Lay Division, PepsiCo International, PepsiCo Leasing Division and PepsiCo Transporttaion Division. The Pepsi-Cola Division sells soft drink concentrates, advertising and marketing matter to 500 independent and 25 company-owned bottling plants within the United States. The Frito-Lay Division manufactures and distributes snack and convenience products in the United States. PepsiCo International performs for the parent corporation the same as is done by Pepsi-Cola Division and Frito-Lay in the domestic market. It sells concentrates to approximately 500 independent and 25 company-owned bottling plants located overseas. The PepsiCo Leasing Division leases items such as automobiles, trucks, aircraft, office equipment, plant equipment to lesses located principally in the United States. The PepsiCo Transportation Division engages in the carriage of household goods, mobile homes and certain other products. North American operates under the latter division in its transportation activities.

PepsiCo exports equipment and supplies for bottlers, finished snack foods and beverages and household goods. All such arrangements are provided by the Traffic Department of PepsiCo International. The principal products for export are equipment and supplies for bottlers such as plant equipment, vending machines, advertising materials, which products are actually purchased by overseas franchisers from third party sources in the United States as PepsiCo neither sells nor leases equipment to overseas bottlers. Overseas bottlers may request PepsiCo International to assist it in purchasing and making shipping arrangements, in which case such assistance is granted. All shipments of equipment, supplies and finished products exported in the name of PepsiCo International are tendered to ocean freight forwarders, in recent years utilizing services of Maron Shipping and Cobal International in New York City, International Expeditors in Los Angeles and San Francisco, Calif. Those from the New York area are tendered to Maron, from the Gulf area to Cobal and from the West Coast to International Expeditors. The North American freight forwarders service has never been used.

PepsiCo International also ships used household goods of its employees and in recent years has tendered most of this traffic to North American. In 1969, North American handled eight overseas shipments of household goods for PepsiCo.

No director of PepsiCo serves as director of North American, but one of North American's directors is a PepsiCo officer. Victor DeMaras is a vice president of PepsiCo in charge of all the activities of the transportation division and also serves as a North American director Harold E. Rome is assistant secretary for both North American and PepsiCo, and Edward V. Lahey, Jr., is assistant general counsel for PepsiCo and a vice president for North American. They have been so placed ostensibly for housekeeping purposes, that is, to have someone in New York as well as Fort Wayne to sign corporate documents. While PepsiCo may be termed a "holding company with respect to its subsidiaries," North American represents that it is to be run as a separate and autonomous company and it is a policy of PepsiCo to procure goods and services at the best price irrespective of subsidiary operations. Thus, it is stated further that it has a policy against "cross fertilization," "tie-in sales," and "reciprocity." Each division or subsidiary is operated as a profit center, and each is responsible for operating in an efficient and profitable manner. While subsidiaries may deal among themselves, were an affiliated company's product or services advantageous, all intercompany transactions must be approved

by PepsiCo and justified for some substantial reason. While the parent, of course, holds veto power, the subsidiary is left to its own resources to pursue its projected profit goal, the parent function being to provide management expertise to assist in reaching those goals, such as legal advice and counsel in systems analysis and computer application.

Discussion and Conclusions

North American has taken some eight numbered exceptions, the first five of which are directed to "the examiner's finding that the alleged prohibition against forwarder shipper relationships is absolute, his reasons therefor, and the conclusion that * * * license No. 790 must be revoked." We think the examiner's conclusion that the prohibition is absolute was correct.

Section 1 of the Shipping Act, 1916, states:

> An "independent ocean freight forwarder" is a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest.

This definition found in S. 1368 and H.R. 2488, 87th Congress, first session, became law in Public Law 87–254, 87th Congress, September 19, 1961, and is clear and unambiguous. Thus, it requires no statutory interpretation. *Caminetti* v. *United States*, 242 U.S. 470, 485 (1916). The legislative history, for the greater part, is silent as to the particular language employed although the vices sought to be corrected are clear and apparent. The language "directly or indirectly controlled or is controlled by such shipper or consignee or by any other person having such a beneficial interest" has its genesis in the statement:

> Forwarders occupy a dual status. They are independent contractors as to shippers, and brokers as to carriers. (H.R. Report No. 2939, 84th Cong., 2nd Sess., p. 38)

In H.R. Report No. 2333, 85th Congress second session, respecting H.R. 8382, the first like definition is found and reads:

> An independent foreign freight forwarder is a foreign freight forwarder who in connection with shipments dispatched by such forwarder is not a shipper or consignor or seller or purchaser or common carrier by water of such shipments nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by the shipper or consignor, common carrier by water or by any person having a beneficial interest in such shipments.

The report states:

Our interest here is to have every person, firm or corporation who holds itself out as a forwarder to be fully competent and qualified to act in the *fiduciary relationship* which such business necessitates. (Emphasis supplied)

The report continues—pages 8-9:

This would make it clear that *all* shippers, consignees, sellers, purchasers, and carriers of ocean export cargoes are to be prohibited from obtaining a license regardless of whether these groups forward only their own cargoes or the cargoes of others. (Emphasis supplied)

H.R. Report No. 5068, 86th Congress, first session, considering S. 2300, 86th Congress, first session, deletes from the above definition the terms "or common carrier by water of such shipments" and "common carrier by water," and adds after the words "beneficial interest" the words "other than a lien."

In Senate Report No. 1682, 86th Congress, second session, the language, page 4, reads:

The definition of the term "*independent* ocean freight forwarder" made it clear that only those persons who engage in ocean freight forwarding on behalf of others "will come within the licensing provisions" and only independent ocean freight forwarders may be compensated for services by water common carriers. (Emphasis supplied)

All of the legislative history points out clearly that exceptions to the the clear and unambiguous language of the statute were to be excluded and that the inherent prohibition vis-a-vis control is absolute and we have so held in numerous proceedings. (See: *Application for Freight Forwarding License—Louis Applebaum*, 8 FMC 306 (1964); *Application for Freight Forwarding License—Wm. V. Cady*, 8 FMC 352 (1964); *Application for Freight Forwarding License—Del Mar Shipping Corp.*, 8 FMC 493 (1965); *Application for Freight Forwarding License—York Shipping Corp.*, 9 FMC 72 (1965).

We further agree with the examiner's conclusion that there is no question that North American is or can be controlled by PepsiCo, a shipper in the foreign commerce of the United States by oceangoing common carriers. Thus, it cannot qualify as an independent ocean freight forwarder by definition, and therefore is not entitled to conduct the business of a freight forwarder.

Finally, respondent excepts to the examiner's failure to exercise the Commission's "discretionary power" and permit license No. 790 to continue in existence, subject to an appropriate restriction. Here respondent would distinguish between cases involving new or initial licenses and those involving licenses already issued. In the latter cases, says respondent, the Commission may by using its power to "amend or

modify in whole or in part any license previously issued," allow respondent to continue its forwarding business subject to the limitation that it would not serve its owners as a forwarder.

The Commission consistently has held that forwarders who control or are controlled by shippers in the oceangoing commerce of the United States are absolutely disqualified from licensing. It is immaterial that such control arises after a license is issued rather than prior to the application therefor. The Commission settled this issue in *Application for Freight Forwarding License—York Shipping Corporation*, supra, when it held that it lacked statutory authority to allow continuance of a license on condition that the licensee will not ship for the exporter controlling it, saying at page 76:

There is no proviso in Public Law 87–254 exempting from the ban on licensing shipper-controlled forwarders who do not forward shipments for their shipper-employees * * *.

The factual difference of an application for an initial license involved in York and an existing license in the instant proceeding, while significant in some respects, is not pertinent when, as here, the question is one of whether the statutory requirement of "independence" has been met. Shipper control negates the Commission's authority not only to issue a license in the first instance, but to allow it to continue, regardless of any condition that the licensee may propose. Indeed, section 510.9(d) of General Order 4 would appear not to import what respondent claims, but rather that not only to initially qualify for a license but also to prevent a discretionary revocation, a licensee must undergo no "* * * change of circumstances whereby * * * [it] no longer qualifies as an independent ocean freight forwarder."

We have considered all of respondent's arguments, and any which are not specifically dealt with are rejected as without merit or as immaterial to our decision. Accordingly, for the reasons set forth, we hold that the ultimate conclusions reached by the examiner are well-founded and proper. The adoption of restrictions to the license, as an alternative, to revocation should not be employed.

We hold that North American Van Lines is controlled by a shipper in the foreign commerce of the United States by oceangoing common carriers and that the continuance of its license is inconsistent with the provisions of sections 1 and 44 of the Shipping Act, 1916, and therefore it is hereby revoked.

An appropriate order will be entered.

Commissioner JAMES V. DAY *Dissenting:*

The facts here are simple and the applicable law easily determined. Further, while the case is one of first impression, the key issues are concise and clear.

Factually, North American Van Lines commenced operations as an ocean freight forwarder 20 years ago. Since that time it has operated pursuant to various authorities including the license granted it by this Commission in 1965. In 1968 its stock was acquired by PepsiCo, Inc., which (by virtue of holdings in other companies) is a "shipper."

In view of such acquisition North American consulted with this Commission and voluntarily surrendered its license pending determination of its qualifications to continue as a licensed forwarder. The respondent's action was specifically prompted by the statutory restriction against initially granting licenses to shipper-connected entities.

Section 17 of the Shipping Act of 1916 defines a forwarder as:

> * * * a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such a shipper or consignee or by any person having such a beneficial interest.

The statute states in section 44(b) that:

> A forwarder's license shall be issued to any qualified applicant therefor it is found by the Commission that the applicant is, or will be, an independent ocean freight forwarder * * * and that the proposed forwarding business is, or will be, consistent with the national maritime policies declared in the Merchant Marine Act, 1936 * * *.

The statute also declares in section 44(d) that:

> Any such license may * * * in the discretion of the Commission, be amended or revoked, in whole or in part * * *.

While we have denied licenses to shipper-controlled forwarder applicants in other cases we have not before determined a case like this one—where the respondent is already licensed and seeks appropriate remedy in order that it may conform to what the law intends.

There are only two key issues. First, where respondent, as holder of an existing license, is acquired by a shipper, can the Commission amend respondent's license to comport with the statute permitting operations by a forwarder who is independent of a shipper.

The second issue is, merely, if the Commission can amend such license, should it.

In my opinion the Commission can and should.

The power to amend an existing license is explicit in section 44(d):

any such license may * * * in the discretion of the Commission, be amended * * *[1]

The power to amend an existing license is also implicit under the Shipping Act. The act is to be interpreted and implemented in order to foster commercial services and commerce, not to stifle services and commerce. Cf. *Tariff Filing Practices, etc., of Containerships, Inc.*, 9 FMC 56, 69 (1965); and *Greater Baton Rouge Port Commission* v. *United States.*, 287 F. 2d 86, 89 at footnote 3 (1961).

The 1961 freight forwarder amendments to the Shipping Act are likewise to be interpreted and implemented for the same overall purposes. Their objectives more specifically stated are to preserve sound forwarder operations (by permitting brokerage) and to prevent a distortion of forwarder operations (by prohibiting shipper control of forwarder operations which could result in illegal rebates).

The particular means of implementing the forwarder amendments are spelled out in section 44. In the case of existing licenses, the Commission has been given the power to amend or revoke. The Commission has thus been provided with an option to achieve statutory goal and purpose. This has been granted because as the court said in *New York Foreign Freight F. & B. Association* v. *FMC*, 337 F. 2d 289, 295 (1964):

Congressional legislation does not undertake to deal with every specific evil for some are unforeseeable; instead Congress often creates an administrative agency to allow application of experts' familiarity with the problems involved.

Likewise, the court said in *State of California* v. *United States*, 320 United States 577, 584 (1944):

Finding a wrong which it is duty bound to remedy the Martime Commission * * * may, within the general framework of the Shiping Act, fashion the tools for so doing.

Thus, by virtue of the explicit language of section 44(d) and the power implicit in the general objectives of the Shipping Act and the subject amendments, the Commission can amend the existing license. The law is clear. Yet if anyone could doubt it let them seek clarifying legislation. This has been done before and could be done again.

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[1] This general amending authority is not restricted by such language as appears in sec. 44(b): "a license shall be issued [*only*] if * * * the applicant is * * * an independent freight forwarder as defined [under sec. 1] * * *." There is, furthermore, no basis for applying such language in sec. 44(b) to the wording in sec. 44(d). To do so would negate the very purpose of this latter section expressly giving the Commission clear *discretion* to revoke or amend existing licenses.

We hence come to the second issue—whether we should amend this license. Initially we note the statutory goal is certainly to preserve sound forwarder operations. North American has long been licensed and has been providing a flexible, multimodal shipping service to the public (including forwarding), and a service on which the public has come to rely. To preserve this operation would conform to statutory objective.

But now the subject operation has become shipper-controlled. Finding this wrong, the Commission is duty bound to fashion a remedy. To accomplish this we may, first, again recall just what Congress was seeking to accomplish in saying that new applicants for forwarder licenses could not be shipper-controlled.

> One of the principal purposes of Public Law 87–254 was to authorize payment of so-called brokerage by ocean carriers to freight forwarders, but only under such circumstances as not to result in any benefit to a shipper such as to constitute a rebate. To prevent the possibility of such indirect rebating the definition of an "independent ocean freight forwarder" was established and conformity therewith made a condition to the granting of a license; and carriers were permitting to compensate only licensed forwarders. The definition was intended to exclude indirect as well as direct interests, including so-called dummy forwarders—concerns organized for the sole purpose of collecting compensation from carriers which would find its way back in whole or in part to the shipper.[2]

Thus, as H.R. Report No. 2333, 85th Congress, second session, states the congressional intent was:

> * * * to have every person, firm or corporation who holds itself out as a forwarder to be fully competent and qualified to act in the fiduciary relationship which such business necessitates.

Hence, it would seem that what Congress wished to avoid was a situation where a shipper might exercise undue control over a forwarder, e.g., where the shipper had the power, and the situation was susceptible to the use of that power, to distort the operational functions of the forwarder. In sum, Congress wished to avoid a control which could be contrary to the public interest.

Such need not be the situation here.

We do not have here the situation where a company seeks coercive control over a forwarder to distort the captive operations to its own ends.

On the contrary we have here quite a different situation. The record indicates that the affiliation between PepsiCo and North American was not accomplished in order for North American to serve its parent or affiliated subsidiaries as an ocean freight forwarder. PepsiCo has never

[2] *Freight Forwarding License—Wm. V. Cady*, 8 FMC 352, 358 (1964).

utilized its subsidiary's freight forwarder service. Further, there is no suggestion that PepsiCo coerces North American to do business with it or to otherwise conduct forced intraorganization commerce. The record leads us to believe that North American is operated autonomously for its own profit purposes, and not as a captive customer or supplier for its affiliated companies. There appears no management incentive, therefore, for either organization to breach any restrictive condition we might impose in the license.

Further, both North American and PepsiCo have fairly demonstrated their ability to conform to regulatory prohibitions. When PepsiCo acquired North American, a condition was imposed by the Interstate Commerce Commission against either organization soliciting for the other.[3]

Of course, to avoid illegal rebates, a shipper cannot be allowed the power to order the forwarder to handle his cargo.

Further, still, a shipper should not have the power to control the forwarder's business with others—any of its day-to-day operations. Such a prohibition would bar the subject shipper from any real chance (inadvertently or by design) to weaken in any way a sound forwarder operation benefiting the shipping public.

Hence I would exercise the power present in section 44(d); preserving an existing public service and removing at the same time any potential for public harm.[4]

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[3] Since PepsiCo already controlled other surface carriers at the time of the acquisition, it was required by sec. 5(2)(a) of the Interstate Commerce Act [49 U.S.C. sec. 5(2)(a)] to seek approval from the Interstate Commerce Commission to control North American. That approval was issued and has not been revoked.

[4] Such action is not without precedent and analogous support. The Interstate Commerce Commission restricted a motor carrier's certificate against serving its affiliated shipper, as an alternative to revocation or denial, where such action was sufficient to guard against the possibility of "undue preference" which that act prohibits. See *K Lines, Inc.—Purchase—Shannon Transport, Inc.*, 1967 Fed. Car. Cases sec. 36, 091, at sec. 36, 091.02.

This Federal Maritime Commission has exercised similar discretion. Following the passage of the 1961 forwarder provisions in the Shipping Act a question was raised whether NVO's should be licensed as freight forwarders in view of the fact they would have the dual status of "shippers" as well as being carriers. That issue raised such questions as should NVO's be absolutely prohibited from acting as forwarders to avoid any possibility of rebating to themselves or affiliates as "shippers," or should some less drastic remedy be devised, such as a restriction in their forwarder licenses which would accomplish the desired legislative purpose short of an absolute prohibition against licensing under any circumstances. The Commission was faced with such indications of statutory intent as set forth in H.R. Report No. 2333, 85th Cong., 2d sess., at pp. 8–9: "* * * shippers * * * and carriers of ocean export cargoes are to be prohibited from obtaining a license regardless of whether these groups forward only their own cargoes or the cargoes of others."

The Commission chose the alternative course of conditional license rather than no license. It held that NVO's could be licensed, subject to the condition they could not act as a forwarder and collect brokerage in instances where they or "related persons" acted as the shipper. Thus did the Commission act to permit NVOs to provide the shipping public with flexible services which included both forwarder and NVOCC operations. See freight forwarder regulation 510.22(c).

I would amend the existing license to prohibit North American handling shipments for PepsiCo or its affiliates. Further, I would prohibit PepsiCo or its affiliates from having any managerial power over the forwarder operations of North American.[5] Furthermore, I would enforce the above prohibitions through audit and through sworn affidavit reports from key personnel of PepsiCo and North American.

FRANCIS C. HURNEY,
Secretary.

ORDER

This proceeding having been instituted 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 Independent Ocean Freight Forwarder License No. 790, issued to and now held by North American Van Lines, is hereby revoked pursuant to section 44(d), Shipping Act, 1916, and rule 510.9 of general order 4.

By the Commission.

[SEAL]

FRANCIS C. HURNEY,
Secretary.

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[5] Freedom to operate (as opposed to loss of license) would certainly appear worth prompt consideration by respondent, particularly since even now "North American operates as a separate and autonomous company, responsible only for maintaining its projected profit goals." See respondent's memorandum of exceptions at p. 5. Responsibility for profits to stockholder PepsiCo (after operating periods are concluded) is, of course, only appropriate.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET No. 76(I)

HETEROCHEMICAL CORP.

v.

PORT LINE, LTD.

Decided March 8, 1971

Reparation in the amount of $37.12 granted to claimant based upon a shipment on October 9, 1967, of 10 drums of a poultry feed additive called Hetrazeen.

REPORT

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

Pursuant to the Commission's informal procedure for adjudication of small claims (46 CFR 502, subpart s), Heterochemical Corp. (hereinafter designated as claimant), filed with the Commission on October 6, 1969, a claim for reparation in the amount of $45.22 based upon a shipment, October 9, 1967, of 10 drums of a poultry feed additive called Hetrazeen. The claim was based on an error in the bill of lading description wherein Hetrazeen should have been described as "feed, cattle, poultry or dairy, containing not more than 1-percent antibiotics."

On December 17, 1969, the examiner's initial decision was served. The examiner granted reparation in the amount of $45.22 based on the contract rate of the U.S. Atlantic and Gulf/Australia-New Zealand Conference for "feed, cattle, poultry or dairy, containing not more than 1-percent antibiotics."

Due to a question as to whether the claimant was in fact entitled to a contract rate, the original decision of the examiner was remanded to him on November 13, 1970, for reconsideration.

On January 20, 1971, the examiner, finding the claimant not to be a contract rate agreement signatory, reversed his earlier decision and dismissed the original complaint as being "fatally defective and, having arisen more than 2 years ago, now time barred."

We are unable to accept the examiner's ultimate decision on remand and, therefore, grant reparation to the claimant as set forth below.

Heterochemical Corp. duly presented the Commission a claim for reparation based on a misdescription of goods. The misdescription was certified by the claimant, recognized by the respondent in its letters to the Commission of October 17, 1969, and February 13, 1970, and subsequently upheld by the examiner. Therefore, the claimant was entitled to reparation based on a *noncontract rate* for "feed, cattle, poultry or dairy, containing not more than 1-percent antibiotics."

Under the facts as they developed herein, we are unable to accept the examiner's conclusion that the claimant, by requesting reparation under a nonexistent contract rate agreement, originally submitted a fatally defective claim which is now time barred by the Commission's period of limitations. The fact that the claimant asserted reparation based on a contract rate does not go, in this case, to the substance of the complaint which is a misdescription. The rate on which recovery should be awarded concerns only the selection of the appropriate remedy. Dismissal of the complaint as "time barred" assumes the continued running of the period of limitations during the pendency of the present proceeding, an assumption that we think is unwarranted where as here the gravamen of the complaint, a misdescription, has been established. Where a complaint is defective only as to a question of the appropriate remedy, or in any other manner not involving the substance or gravamen of the claim, the 2-year period of limitations is tolled once a claim is submitted to the Commission for adjudication.

The small claims procedure was established to facilitate the settlement of claims with a minimum amount of administrative or regulatory action. Therefore, it is incumbent upon claimants to be meticulous and precise in the submission of their claims as well as prompt in compliance with Commission inquiries or requests.

The claimant herein has been reticent in enabling the Commission to promptly dispose of this matter. However, in the interest of insuring just charges between shippers and carriers, and in the interest of terminating this proceeding in as equitable a manner as possible, the claimant is granted reparation in the amount of $37.12 from the respondent based on a noncontract rate for "feed, cattle, poultry or dairy, containing not more than 1-percent antibiotics."

It is so ordered.

By the Commission.

[SEAL]

FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 427

AMERICAN TRADE SALES A/C CONSULATE OF INDONESIA

v.

LYKES BROS. STEAMSHIP CO., INC.

April 19, 1971

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

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 April 19, 1971.

It is ordered, That applicant is authorized to waive $9,929.88 of the charge previously assessed American Trade Sales A/C Consulate of Indonesia.

It is further ordered, That applicant publish promptly in its appropriate tariff the following notice.

Notice is hereby given that as required by the decision of the Federal Maritime Commission in Special Docket 427, that effective March 8, 1971, the rate on Item No. 2270, cotton yarn, for purposes of refunds or waiver of freight charges on any shipments which may have been shipped during the period March 8, 1971, to March 9, 1971 is $172.00 WT (including $2.00 bunker surcharge), subject to all other applicable rules, regulations, terms, and conditions of said rate and this tariff.

It is further ordered, That waiver of the charges shall be effectuated within 30 days of this notice and applicant shall within 5 days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL]

FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 427

AMERICAN TRADE SALES A/C CONSULATE OF LOUISIANA

v.

LYKES BROS. STEAMSHIP CO., INC.

Application to waive a portion of freight charges granted.

INITIAL DECISION OF STANLEY M. LEVY, PRESIDING EXAMINER [1]

Lykes Bros. Steamship Co., Inc. (applicant/respondent) seeks permission to waive to American Trade Sales A/C Consulate of Indonesia (shipper) a portion of the freight charges on four shipments of cotton yarn from New Orleans to Djakarta, Indonesia, and Soerabaya, Indonesia.[2]

Because the conference permits shipments under an open rate, respondent prior to shipment quoted the shipper a tariff rate of $172 per ton including the $2 bunker surcharge, which rate was somewhat lower than the current tariff. Due to inadvertence Lykes failed to notify the conference of the rate change.

The rate on file at the time the shipments were delivered to the carrier was $73.50 W/M (per page 190A 13th revised, effective Nov. 30, 1970, Item No. 270, Atlantic and Gulf/Indonesia Conference No. 14, FMC–3) which includes a bunker surcharge of $2. The carrier assessed the shipper $35,981.94 based on 302,931 pounds/19,582 cu. ft. aggregate weight/measurement. Payment was to be against Bank Indonesia letter of credit, No. 0103/1101. Because of the error in charges and the pendency of this application Lykes has not exercised its claim for freight charges against the letter of credit.

The conference, because of lack of notice from Lykes, failed to file a tariff amendment reflecting the reduction. If the new tariff had been filed and had been in effect at the time of the shipment the aggregate

[1] This decision became the decision of the Commission Apr. 19, 1971.

[2] Bills of lading Nos. 25, 31, 32, and 33, dated Mar. 8, 1971.

freight charges would be $26,052.06, or $9,929.88 less than the tariff then actually on file. It is this amount of $9,929.88 that Lykes seeks to waive.

Prior to the submission of this application, the conference on March 9, 1971, filed with the Commission a corrected tariff page 190A setting forth a reduced rate of $172 WT, including a $2 bunker surcharge, which is in accordance with the rate quoted by Lykes.

Public Law 90–298, 75 Stat. 764 authorizes the Commission to permit a common carrier by water in foreign commerce to waive a portion of the freight charges billed a shipper where there is shown to be an error in a tariff of a clerical or administrative nature, or due to inadvertence in failing to file a new tariff.

The application involves a situation within the purview of Public Law 90–298 and the application was filed within 180 days of the shipments. No other shipments of the same or similar commodity moved on respondent's vessels during approximately the same period of time at the rate applicable at the time of the shipments involved in this application, and no other applications or proceedings involving the same rate situation are pending.

Applicant having complied with the legal requirements and good cause appearing, respondent is permitted to waive $9,929.88 of the charges previously assessed the shipper.

Notice of waiver shall be published in the conference tariff within 30 days of this decision. Within 5 days of effecting the waiver of charges applicant shall notify the Commission of the date and manner of effecting the waiver.

STANLEY M. LEVY,
Presiding Examiner.

WASHINGTON, D.C., *March 29, 1971.*

FEDERAL MARITIME COMMISSION

DOCKET NO. 69-5

IN THE MATTER OF AGREEMENT NO. T-2227 BETWEEN THE SAN FRANCISCO PORT AUTHORITY AND STATES STEAMSHIP CO.

(*Decided April 21, 1971**)

Minimum annual rentals provided for in a public terminal lease agreement, such as Agreement No. T-2227 between the Port of San Francisco and States Steamship Co., will be deemed to be compensatory if they recover fully distributed costs.

Interest expense attributable to revenue bonds issued to provide moneys for the construction or improvement of a terminal facility is an expense which must be considered, along with the other operating costs involved, in determining the compensatoriness of a minimum annual rental.

Examiner's determination that agreement No. T-2227 recovers costs and is therefore compensatory is not justified or supportable on the basis of the present record.

Respondents requested to furnish additional financial information relating to the bonded indebtedness incurred and to be incurred by the Port of San Francisco.

Miriam E. Wolff for respondent San Francisco Port Commission.

Robert Fremlin for respondent States Steamship Co.

John E. Nolan and *J. Kerwin Rooney* for petitioner Port of Oakland.

Robert H. Tell, *James N. Albert*, *Joseph L. Di Tomo, Jr.*, and *Donald J. Brunner* as hearing counsel.

REPORT

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

This proceeding was instituted to determine whether agreement No. T-2227, a marine terminal lease between the San Francisco Port Commission (San Francisco) and States Steamship Co. (States) should

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*Supplemental report July 28, 1971.

be approved under section 15 of the Shipping Act, 1916. The investigation was " * * * confined to whether the rentals contained in Agreement No. T-2227 are noncompensatory resulting in unlawful discrimination to other ports or terminals." San Francisco and States were made respondents in the proceeding, and the Port of Oakland, which protested the proposed agreement on the grounds that it was noncompensatory, was designated petitioner. Hearing counsel also participated.

Hearings have been held and an initial decision has been issued, to which exceptions and replies thereto have been filed.

Facts

Agreement No. T-2227, a nonexclusive preferential assignment or lease, encompasses an area which is approximately 26.7 percent of what is known as the Army Street Terminal, also called pier 80. The lease, which extends for a period of 10 years and is cancellable by either party after the end of the fifth year, will not commence until it is approved by the Commission and until certain improvements are placed on the premises.

Under the terms of the lease, States guarantees San Francisco [1] a minimum of $310,000 per year for the terminal area, charged against San Francisco's tariff charges for dockage, wharfage, wharf storage, and wharf demurrage. The minimum charge for the terminal area, based on the full tariff charges for the first 5-year period, is therefore $1,550,000. Above minimum, all tariff charges will be divided, 40 percent accruing to San Francisco and 60 percent to States. There is no maximum limit on the payment of compensation to San Francisco under the proposed agreement, and San Francisco also retains the right to secondary use of the premises. In the sixth year, and every year thereafter, the minimum guarantee may be changed upwards by San Francisco, taking into consideration percentage of change in the Bay area for wharfage, dockage, storage, and demurrage, and for changes in the cost of living indices. After the fifth year, the division of revenue over the minimum will be on a yearly basis.

In addition to the minimum guarantee of $310,000 and its share of the revenues above the minimum, San Francisco will also receive approximately $20,000 for the rental of some 8,000 square feet in the Administration Building. This is at the rate (20 cents per square foot per month) which has been charged all tenants of the building. All

[1] Until February 7, 1969, the port of San Francisco was an agency of the State of California. After that date, the port facilities and lands were transferred to the city of San Francisco on that date, and the port became a department of the city of San Francisco, city and county of San Francisco.

utility charges, janitor service and upkeep of the common areas, including gardening maintenance for the extension of the building, are the responsibility of the tenant.

For approximately 12 years, States has been located at piers 15–17 under a license or preferential assignment, which is the standard 30-day cancellable license arrangement set forth in the San Francisco tariff.[2] In the latter part of 1967, it advised San Francisco that these facilities had become inadequate for its container cargo. The volume of such cargo had increased beyond the capacity of the container yard which, being located on the other side of the Embarcadero, is inefficient at best. The 16-foot stringers are too narrow to accommodate the 20-foot containers used by States which must be placed lengthwise in a single row. Moreover, the containers are too large and too heavy for the wharf stringers. States further advised that it was obtaining five modified mariner-type vessels, at a cost of $15 million each, and that changes would have to be made to piers 15–17 to accommodate the vessels and new methods of cargo handling. The estimated cost to San Francisco of effecting the required changes was found to be on the order of $6 million (in October 1967) and it was anticipated that the piers would not be available for occupancy during the period of rebuilding, perhaps as long as 5 years.[3]

Army Street Terminal, on the other hand, is a nine-berth complex built on 63 acres of land containing four cargo sheds and totaling approximately 1 million square feet in clear and span-covered space and about 40 acres of more open area. It is a general purpose facility built for handling breakbulk and containerized cargo. The new Army Street facility has 50-foot stringers which will permit container and breakbulk operations to be carried on simultaneously, and will enable States to work from rail cars while performing its other terminal operations. The facility also includes an adequate marshaling and storage area for containers, and a larger container yard to permit both the storage and repair of containers.

There are also disadvantages in the new facility, however. States has three berths at piers 15 and 17 and will have only two at Army Street, and thus will lose one berth in the move. Furthermore, the inside covered area at piers 15 and 17 is 235,000 square feet, while States' covered area at Army Street will be less, approximately 220,000 square feet.

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[2] Under its present license arrangement States is not guaranteed the full use of the facility, and the port has the privilege of letting other vessels use the berths and of putting other cargo through the facility when space permits. The port has made such secondary use of piers 15 and 17 on several occasions during the past 10 years.

[3] As the tenants who will replace States at piers 15–17 will not require substantial modifications, this expense and displacement will be avoided.

In determining the minimum acceptable guarantee for the terminal area portion of the proposed Army Street lease, the San Francisco port director took into consideration the total revenue received from States' occupancy of piers 15–17 which, for the 5-year period through fiscal 1967, the latest year then available, was between $223,000 and $321,000 per year.[4] This revenue represents dockage, wharfage, wharf demurrage, wharf storage, and wharf rental. The value of the premises to the users was therefore figured to be in the neighborhood of $310,000. The $20,000 per year rent for space in the Administration Building brings the total to $330,000.

By the time of the hearing herein, figures for fiscal 1968 had become available. These showed a total revenue from States' occupancy of piers 15–17 of $412,143, which could be broken down as follows: dockage—$32,109; wharfage—$262,678; demurrage—$10,782; wharf rental—$106,574. The substantial increase over prior years is said to be due to an abnormal amount of cargo moving to Southeast Asia generated by the Vietnam war.

Army Street is not a specialized facility, and it was not built for any particular user. It is a general cargo facility and, as such, a part of the total San Francisco complex. Financing for all such developments, revenue and nonrevenue producing, is arranged through general obligation bonds. Pier 80 itself was financed by two bond issues, totaling $25 million, with a total annual bond interest of $819,500.[5]

In addition to the aforementioned $25 million indebtedness, San Francisco has outstanding other revenue bonds for the construction of other marine terminal facilities at the port. One of the exhibits submitted into evidence during the course of the hearings in this proceeding estimates that the port's bond servicing requirements will cost the port between $1 million and $1,770,000 per year in interest in the next 10 years.[6]

Agreement No. T–2227 is an integral part of a detailed and thoroughly considered redevelopment plan of the port of San Fran-

[4] The revenue derived from States' occupancy of piers 15-17 for each of the 5 years in question is set forth below:

Fiscal years	*Dockage*	*Wharfage*	*Demurrage*	*Wharf rental*	*Total*
1967	28,402	178,644	6,295	106,574	319,915
1966	25,119	154,857	6,862	106,574	293,412
1965	27,307	155,736	8,338	106,574	296,955
1964	31,089	173,444	10,709	106,574	321,816
1963	16,881	115,112	234	90,776	223,003
5-year average	25,760	155,559	6,488	103,414	291,020

[5] One bond for $15 million was issued in 1960 and carries an interest rate of 3.31 percent. Another for $10 million at 3.23 percent was issued in 1965.

[6] Exhibit No. 12 sets forth the "interest paid" on bonded indebtedness for the 10-year period between 1970 and 1979 as follows: 1970—$1,720,000; 1971—$1,700,000; 1972—$1,620,000; 1973—$1,540,000; 1974—$1,480,000; 1975—$1,321,000; 1976—$1,290,000; 1977—$1,210,000; 1978—$1,130,000; and 1979—$1,050,000.

cisco. At the request of San Francisco, Arthur D. Little, Inc., one of the largest research and consulting firms in the country, conducted two studies for the port, in 1966 and 1967, to examine San Francisco's future development of cargo and the redevelopment of the port for nonmaritime commercial activities. It was concluded that the port has a strong economic future provided it carries out a redevelopment program that will provide additional revenues as well as up-to-date cargo handling facilities—especially for container and LASH (lighter aboard ship) operations. This eventually involves phasing out about three-fourths of the old finger piers on the northern waterfront, that is, those lying between the Ferry Building and Fisherman's Wharf, and the use of the approximately 41 acres of land thus made available for nonmaritime commercial developments including hotels, apartments, office buildings, ships and parks. Phased out would be piers 1, 3, 5, 7, 37, 39, 41 and 45.[7] The release of this land will provide San Francisco with substantial revenues from ground rents, thereby contributing funds for the provision of more suitable marine terminal facilities.

Briefly, what the port director plans to do is:[8] move States from 15–17 to Army Street; move the present users of piers 7, 37, and 92 into 15–17; and construct an import automobile facility at pier 90 which will enable him to move the user at pier 45, the Fisherman's Wharf area, to pier 90. American President Lines will move from pier 50 and share Army Street with States. The present California Maritime Terminal tenants at Army Street will move into piers 50, 39, and 41, which will permit them to break up their unsatisfactory joint venture and go back into an autonomous business. These moves would not only permit the existing tonnage of San Francisco to continue to the port, but would allow automobile import tonnage now moving through Fort Mason to come through San Francisco port facilities. All potential users have been contacted by San Francisco and have agreed to the moves if States' move to Army Street is approved by the Commission.

The port director's future plans also include building a LASH facility for Pacific Far East Line, which would then vacate piers 27, 29, 31, and 33. He would then move the present tenants from piers 37 and 39 into the complex vacated by Pacific Far East Line and would

[7] At the present time, pier 1 is used as a parking area. In fact, piers 1, 3, and 5 are now available for commercial development. Pier 7, which is adjacent to pier 5, will be available as soon as the tenant can be moved.

[8] All the moves described herein which the port director proposes are in accordance with the Arthur D. Little report.

have the whole area from pier 35 to pier 45 available for commercial development.[9] Piers 35 and 33 would be used for passenger ships.

The lease was let by public advertisement in daily newspapers of general circulation and an "Information for Bidders," which clearly set forth the minimums San Francisco was willing to accept. There were no other bidders except States, nor has there been any complaint by any competitor of the tenant. The sole complaint has been filed by Oakland.

Discussion and Conclusions

Despite contentions to the contrary advanced by Oakland,[10] there is but one issue to be resolved in this proceeding and that is whether the rentals contained in agreement No. T-2227 are compensatory. Recognizing that agreement No. T-2227 is a long-term lease, we should also like to make it clear at the outset that, in the words of the hearing examiner in *agreements Nos. T-2108 and T-2108A*, 12 FMC 110, 120 (1968), a decision adopted by the Commission, the minimum established therein must be "sufficient to assure that the port will not furnish the facilities at less than cost *during any year of the pendency of the agreement.*" (emphasis added). Unlike the situation that existed in *agreement No. 2214*, 13 FMC 70, 74 (1969), where the Commission permitted a 10-year lease to be "less than fully compensatory" the first year because of the "substantial investment" in terminal equipment, no justification has been demonstrated here for waiving the requirement that the minimum guarantee must be compensatory for *each* year of the term of the lease.

The examiner, in his initial decision, found that the $330,000 minimum yearly rentals were in fact "compensatory of fully distributed costs," and accordingly approved agreement No. T-2227. He predicated this conclusion on the finding that the $330,000 minimum yearly revenue derived from the States' lease less the fully distributed operating expenses of $239,000 results in a net revenue of $91,000, which provides a return on investment of 1.31 percent. On the theory that

[9] For example, it is estimated that the release of piers 7, 37, and 45 will provide San Francisco with $330,000 a year in ground rents and the city a like amount in possessory interest taxes.

[10] While Oakland claims the examiner erred in refusing to consider the subject agreement's alleged unlawfulness under sections 16 and 17 of the act, we find that his summary dismissal of these issues was both proper and well founded. The Commission's order of investigation in this docket *specifically* directed that "* * * the issues in this proceeding be confined to whether the rentals contained in agreement No. T-2227 are noncompensatory resulting in unlawful discrimination to other ports or terminals." The implication is clear. If the agreement is compensatory, then there can be no "unlawful discrimination." If, on the other hand, the lease is found to be noncompensatory, it will be disapproved and thereby denied effectiveness. In either event, the question of the unlawfulness of the agreement under other sections of the act need never be reached.

"interest is considered return on investment and not expense," the examiner excluded all interest expense on bonded indebtedness in arriving at the "fully distributed operating expenses." Alternatively, he did find, however, that even if interest attributable to the bonds which provided construction moneys for the Army Street pier is taken into consideration, "* * * the $330,000 minimum guarantee under the agreement continues to exceed all fully allocated expenses." In so ruling, the examiner expressly found favor with San Francisco's method of allocating port-wide interest expense against all revenue producing facilities and rejected the "stand-on-its-own-feet" method of allocation advocated by Oakland and hearing counsel.

Oakland and hearing counsel challenge the examiner's approval of agreement No. T-2227. Their position essentially is that the lease as approved by the examiner has not been shown to be compensatory in that it allegedly fails to (1) take into consideration, in determining the minimum rentals, the total interest charges on the revenue bonds San Francisco was required to issue to construct pier 80; and (2) provide an "adequate" or "sufficient" return on investments.

Setting aside for the moment the question of what costs are to be included in computing a compensatory rental, we will first take up the only other major issue raised by the excepting parties. Both Oakland and hearing counsel are of the opinion that a terminal facility does not meet the standards established by the Commission when it limits its earning capacity to the recoupment of operating expenses as, they allege, San Francisco has attempted to do in the present case. In support of their argument that in order to be compensatory any terminal lease executed by San Francisco must return to the port not only all legitimate allocable costs of investment and operation but also a *reasonable return on investment*, hearing counsel cite a number of Commission decisions, relying principally on *Terminal Rate Structure—California Ports*, 3 U.S.M.C. 57 (1948). Hearing counsel interpret that decision of our predecessor as standing for the proposition that terminal operators of publicly owned facilities *must* realize a return on investment, and that the amount of this return *must* be sufficient to generate a surplus in excess of operating expense to carry out the port's responsibilities, including harbor promotion, construction of new facilities and the acquisition of land. Whatever may be the merits of hearing counsel's arguments as regards privately owned terminal leases, they clearly have no application to leases of public terminals.

The issue raised in that particular portion of the opinion in *Terminal Rate Structure—California Ports*, supra, to which hearing counsel allude, went to the "right" of publicly owned terminals to include a

reasonable allowance for return on investment in their charges. Addressing itself to this issue, the Commission merely acknowledged the fact that the California ports were "authorized" to collect revenues sufficient to perform their duties, "among which are promotion of the harbor, construction of new facilities, and purchase of additional land." Thus, while the Commission recognized that terminal operators of publicly owned facilities are "entitled to a fair return on investment" and accordingly can, if they so desire, allow for such a return in their leases, it imposed no requirement on them to actually do so. The decision in *Terminal Rate Structure—California Ports*, supra, does not support hearing counsel's argument that publicly owned terminals *must* provide in their leases for a reasonable rate of return on investment for the particular facilities in question.

Hearing counsel's reliance on *Terminal Lease Agreement at Long Beach, Calif.*, 11 FMC 12 (1967) and *Lease Agreements at Long Beach, Calif.*, 11 FMC 35 (1967), is equally misplaced since these decisions merely bear out the fact that a public terminal *may* provide for a reasonable return on investment in its terminal leases. In both these cases the Commission was concerned only with the lawfulness of the particular rate of return provided for in the leases. In neither decision is there even the slightest suggestion that the port of Long Beach was required to provide in its leases for any return on investment. Manifestly, the Commission has never made mandatory an allowance for return on investment in public terminal leases. On the contrary, the Commission has always proceeded on the theory that public terminals are in essence public utilities,[11] and that, as such, they are only required to set their rentals at a level which will provide revenues to cover the economic costs of doing business, which includes, but need not be limited to, operating expenses, maintenance, and depreciation. As a general principle, therefore, a public terminal lease, such as the one before us here, is compensatory if the annual minimum rentals provided for therein cover all fully distributed costs.[12]

[11] *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525, 547 (1966).

[12] In its exceptions Oakland reasserts that, although under the agreement States is required to pay charges accruing for dockage, wharfage, wharf storage, and wharf demurrage, it is not required to pay the wharf assignment rental presently being assessed by San Francisco at piers 15 and 17 at the rate of $0.02 per square foot per month for all areas including outside container storage areas. The result, according to Oakland, is that the minimum guarantee is not based upon tariff revenues at piers 15–17, but only part of such revenues, and that by not having to pay the wharf rental charge, States is given an unfair advantage. Clearly, it is wholly immaterial what tariff factors San Francisco based its minimum rental on so long as that minimum is compensatory in terms of recouping all applicable direct and prorated port costs for States' portion of pier 80. That the proposed agreement does not specifically include the wharf rental charge is not controlling if the lease is otherwise compensatory.

With this principle in mind, we can more clearly focus on the examiner's conclusion that agreement No. T-2227 was compensatory. All parties to this proceeding are essentially in accord as to the value of the pertinent assets and improvements involved in the present case and are also generally in agreement with the examiner that the fully distributed operating expenses, less interest charges, attributable to States' portion of pier 80 would be $239,000. At issue then is the question of whether interest expense attributable to construction bonds should be considered a cost in ariving at a compensatory rental.

Oakland and hearing counsel take the position that the cost of servicing construction bonds is a legitimate expense allocable to States' facility at pier 80, which must be accounted for and recouped through the minimum rental. Further, they submit that if the total interest expense on revenue bonds allocable to States' portion of pier 80 were included in the compensation base, the minimum rental would have to be increased. This argument raises two important issues. In addition to the obvious challenge to the examiner's ruling that "interest is considered return on investment and not expense" and need not be included in the base, the position taken by Oakland and hearing counsel also calls into question the propriety of San Francisco's system of accounting and expense allocation.

Clearly, the cost of the construction bonds cannot be ignored. Compensation must be related to the cost of the entire facility. *Agreements Nos. T-2108 and T-2108-A*, supra. Financing costs do indeed constitute a basic and undeniable element of total development costs which must be considered in ascertaining the compensatoriness of a terminal lease. It follows, therefore, that to properly establish whether the disputed minimum annual rental is compensatory, it is essential that the total bonded indebtedness, allocated to pier 80 and, more specifically, States' portion of pier 80, be taken into consideration, along with the other costs involved, in arriving at a minimum rental. As hearing counsel have so succinctly pointed out, it matters little whether interest is considered in this instance as an operating expense or a charge against the return, "for interest expense constitutes a very real charge, and the net return that the port realizes must be sufficient to meet this charge." The Commission iself has always considered the cost of servicing bonds which fund the construction or improvement of terminal facilities as being relevant to a determination of a minimum rental.[13]

Having determined that interest on bonded indebtedness is a very real expense which should be included in the actual costs of the facility

[13] See *Terminal Lease Agreement at Long Beach, Calif.*, supra; *Agreements Nos. T-2108 and T-2108-A*, supra; and *Lease Agreements at Long Beach, Calif.*, supra.

in arriving at a compensatory rental, we move now to the consideration of how this interest expense should be allocated. Hearing counsel and Oakland advocate the use of the so-called "stand-on-its-own-feet" method of allocation, whereby interest on a bond is chargeable to the particular facility in the port complex for the construction or improvement of which the particular bond was issued. San Francisco, on the other hand, following a uniform accounting system established by the State of California, Department of Finance, would allocate bond interest, as it does all other costs, among all the revenue producing facilities not of a specialized nature built for a special user. Since pier 80 is a general purpose, rather than a specialized facility, and was not built for States or any other specific user, they submit that it would be "grossly unfair" to require States to pay the entire bond interest costs on pier 80 when no other tenant of the port pays such costs. In any event, respondents see no reason why San Francisco must forsake a long-established, and State-authorized, accounting procedure to adopt here, for the first time, the "stand-on-its-own-feet" accounting method urged by Oakland and hearing counsel. We agree.

The accounting system adopted by the State of California is a valid and widely recognized and utilized system. It is the one that was imposed on the port when it was a State agency, and it has been carried over by the port under its city status. Accordingly, we have no objection to San Francisco's use of this system in allocating portwide interest expense against all revenue producing facilities. So long as a particular system of accounting is generally acceptable and all legitimate costs and expenses are considered and properly allocated thereunder, we shall not require its abandonment to adopt another "acceptable" accounting system.

This brings us to the question of the total amount of interest expense on bonded indebtedness that should be allocated to States' portion of pier 80 in arriving at a compensatory rental for that facility. Pier 80 itself was financed by two bond issues, totaling $25 million, with a total annual bond interest of $819,500. This much is clear on the record. Although San Francisco has taken the position in this proceeding, for much the same reason as the examiner, that revenue bond service costs are "irrelevant" to a determination of a minimum annual compensatory rental, they have nevertheless submitted into evidence an exhibit which purports to allocate $36,937 in bond interest costs to States' portion of pier 80. While exactly what the basis for this allocation is or how it was arrived at is not at all clear on the record, the implication is that the $36,937 interest allocation is attributable to the $25 million bond issues.

In addition to the existing $25 million indebtedness, however, San Francisco has also committed itself in its reconstruction program to incur an additional $100 million in debt. Since pier 80 is in fact a revenue producing facility, it would follow that in accordance with the system of accounting utilized by the State of California, it should be assigned its proportionate share of the portwide interest on this additional indebtedness when incurred. It may very well be, as hearing counsel have alleged, that the proponents of agreement No. T-2227 and the examiner have completely overlooked this fact in determining a compensatory minimum rental for States' portion of pier 80. Certainly, the record in this proceeding contains no indication whatever that the cost of repaying the additional $100 million indebtedness was among the expenses considered in establishing a compensatory rental. Thus, while San Francisco itself has admitted that it would incur other bonded indebtedness in developing other facilities at the port, we have no way of determining the fair share of the interest charges on this indebtedness which will be allocable to pier 80 under San Francisco's method of allocating portwide interest against all revenue producing piers.

Our inability to arrive at the amount of interest expense allocable to States' portion of pier 80 is further complicated by the fact that San Francisco intends to phase out a number of revenue producing marine piers. Since, as a result of this proposed deactivation, pier 80's interest allocation will be increased proportionately to defray the interest expense which presently should be allocated to those revenue producing piers which are scheduled to be phased out, it is essential that the Commission know the full extent of this reallocation of interest costs. This also cannot be determined either from the testimony or exhibits of record.

It is clear from the foregoing then that the total amount of interest costs that is allocable to States' portion of pier 80 and must be considered in arriving at a compensatory rental for that facility cannot be determined from the present record. As a result, we are unable to reach any conclusion regarding the compensatoriness of agreement No. T-2227. Accordingly, while we may not ultimately disagree with the examiner's determination that agreement No. T-2227 recovers costs and is therefore compensatory, we do not believe that his conclusion is justified or supportable on the basis of the present record.

Specifically, we believe the following financial information relating to the interest costs incurred and to be incurred by San Francisco is vital to a final resolution of the issues in this proceeding:

1. The full extent of the port of San Francisco's present and contemplated (within the next 5 years) bonded indebtedness;

2. The total interest expense which will be incurred to service the above indebtedness;

3. The portion of the total port-wide interest which must be allocated to the port's revenue producing marine piers and specifically to States' portion of pier 80; and

4. The basis upon which the interest allocations were made, taking into consideration the possible deactivation of any revenue producing marine piers.

If this information can be furnished directly to the Commission by the proponents of Agreement T–2227 and stipulated to by the other parties to this proceeding, then the Commission will, in order to expedite what has already been a long proceeding, review and consider this supplemental information and attempt to make a determination as to the compensatoriness of the disputed agreement on the basis thereof as well as on the basis of the existing record. Failure of the parties to so stipulate within the time provided for in the order attached to this report will in all probability result in the proceeding being remanded to the examiner for further hearings in accordance with the principles set forth in this decision.

An appropriate order will be entered.

[SEAL] S/ FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 69-5

IN THE MATTER OF AGREEMENT NO. T-2227 BETWEEN THE SAN FRANCISCO PORT AUTHORITY AND STATES STEAMSHIP CO.

ORDER

The Federal Maritime Commission instituted this proceeding to determine whether the rentals contained in agreement No. T-2227, a marine terminal lease between the San Francisco Port Commission and States Steamship Co., are compensatory and, accordingly, whether agreement No. T-2227 should be approved under section 15 of the Shipping Act, 1916. The Commission has this day entered its report in this proceeding, which is hereby made a part hereof by reference, and has found, *inter alia*, that, because of the paucity of financial information regarding the port of San Francisco's total bonded indebtedness, no conclusions can be reached regarding the compensatoriness of agreement No. T-2227. The Commission advised in its report, however, that if certain financial information could be furnished to it by the proponents of agreement No. T-2227, and stipulated to by the other parties to this proceeding, the Commission would attempt to make a determination as to the compensatoriness of the disputed agreement on the basis thereof, as well as on the basis of the existing record.

Therefore, it is ordered, That the port of San Francisco has 30 days from the date of service of this order within which to supply the Commission with the following information, which must be agreed to by the other parties to this proceeding:

1. The full extent of the port of San Francisco's present and contemplated (within the next 5 years) bonded indebtedness;

2. The total interest expense which will be incurred to service the above indebtedness;

3. The portion of the total port-wide interest which must be allocated to the port's revenue producing marine piers and specifically to States' portion of pier 80; and

4. The basis upon which the interest allocations were made, taking into consideration the possible deactivation of any revenue producing marine piers.

It is further ordered, That if the financial information specified in the preceding paragraph is not provided to the Commission, and stipulated to, within the time specified, a further order will be issued remanding this proceeding to the Chief, Office of Hearing Examiners, for further hearings in accordance with the principles set forth in the Commission's report.

By the Commission.

[SEAL] S/ FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET No. 69-5

IN THE MATTER OF AGREEMENT No. T-2227 BETWEEN THE SAN FRANCISCO PORT AUTHORITY AND STATES STEAMSHIP CO.

Decided July 28, 1971

Minimum rentals provided for in terminal lease agreement No. T-2227 between the San Francisco Port Authority and States Steamship Co. found to be compensatory. Agreement No. T-2227 accordingly approved.

Miriam E. Wolff for respondent San Francisco Port Commission.

Robert Fremlin and *Edward D. Ransom* for respondent States Steamship Co.

John E. Nolan and *J. Kerwin Rooney* for petitioner port of Oakland.

Robert H. Tell, *James N. Albert*, *Joseph L. D. Tomo, Jr.*, *Ronald D. Lee* and *Donald J. Brunner* as hearing counsel.

SUPPLEMENTAL REPORT

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

On April 23, 1971, the Commission entered a report and order in this proceeding [1] wherein it found that the rentals contained in agreement No. T-2227, a marine terminal lease between the San Francisco Port Authority (San Francisco) and States Steamship Co. (States), had not been shown to be compensatory.

In setting aside the examiner's approval of the proposed lease as being "neither justified nor supportable on the basis of the existing record," the Commission explained that while it "may not ultimately disagree with the examiner's determination that agreement No. T-2227 recovers costs and is therefore compensatory," its "inability to arrive at the amount of interest allocable to States' portion of pier 80" prevented it from reaching any conclusion regarding the compen-

[1] *In the Matter of Agreement No. T-2227 Between the San Francisco Port Authority and States Steamship Co.*, 14 F.M.C. 233 (1971).

satoriness of the proposed lease agreement. In so ruling, the Commission, in its report, made the following specific finding:

1. * * * As a general principle * * * a public terminal lease, such as * * * [agreement No. T-2227], is compensatory if the annual minimum rentals provided for therein cover all fully distributed costs.

2. * * * [T]he minimum established * * * [in the lease] must be "sufficient to assure that the port will not furnish the facilities at less than cost *during any year of the pendency of the agreement*" * * *.

3. * * * Financing costs do indeed constitute a basic and undeniable element of total development costs which must be considered in ascertaining the compensatoriness of a terminal lease. It follows, therefore, that to properly establish whether the disputed minimum annual rental is compensatory, it is essential that the total bonded indebtedness, allocated to pier 80 and, more specifically, States' portion of pier 80, be taken into consideration, along with the other costs involved, in arriving at a minimum rental * * * [I]t matters little whether interest is considered in this instance as an operating expense or a charge against the return, "for interest expense constitutes a very real charge, and the net return that the port realizes must be sufficient to meet this charge" * * *.

4. * * * [T]he total amount of interest costs that is allocable to States' portion of pier 80 and must be considered in arriving at a compensatory rental for that facility cannot be determined from the present record * * *.

In lieu of remanding the proceeding forthwith to the examiner for further hearings in accordance with the principles set forth in its report, however, the Commission requested that certain financial information relating to the interest costs incurred and to be incurred by San Francisco, which could not be determined either from the existing testimony or exhibits of record, be furnished directly to it by the proponents of agreement No. T-2227. Specifically, the Commission requested the following information which it considered "vital to a final resolution of the issues in this proceeding":

1. The full extent of the port of San Francisco's present and contemplated (within the next 5 years) bonded indebtedness;

2. The total interest expense which will be incurred to service the above indebtedness;

3. The portion of the total port-wide interest which must be allocated to the port's revenue producing marine piers and specifically to States' portion of pier 80; and

4. The basis upon which the interest allocations were made, taking into consideration the possible deactivation of any revenue producing marine piers.

The Commission explained that if such information could be supplied to it as requested "and stipulated to by the other parties to this proceeding," namely, the port of Oakland (Oakland) and hearing counsel, it would consider this supplemental information and attempt to make a determination as to the compensatoriness of the disputed agreement on the basis thereof as well as on the basis of the existing record.

In accordance with the Commission directives, San Francisco has now submitted detailed data schedules bearing on the port's bonded indebtedness. Covering the fiscal years 1971-72 through 1975-76, inclusively, these schedules relate to the following: (1) Interest Expense Exclusive of Revenue Bonds; (2) Explanation of Interest Income Computations; (3) Interest Expense Including Reveuue Bonds; (4) Modification of Bond Interest Expense When Allocated Only to Revenue Producing Marine Piers; (5) Revision of Expenses at Pier 80 if LASH Terminal Is Included.

In its supporting materials, San Francisco explains that the basis for the allocation of bond interest expense is the value of the facilities [2] and that while it has submitted the interest schedules in various combinations as requested by the Commission, it nevertheless remains of the opinion that bond interest should not be one of the costs to be considered in determining whether a minimum return is compensatory.

All other parties to the proceeding have now stipulaated to the accuracy of the data schedules entered by San Francisco.[3] The stipulations submitted by Oakland and hearing counsel evidence some disagreement between the parties, however, as to which portions of the information offered by San Francisco should be utilized in making a determination as to the compensatoriness of the proposed lease agreement. While Oakland "stipulate[s] to the accuracy of the figures contained in the various compilations submitted" and in so doing makes it clear that it "would agree" if the Commission deems the information submitted to be adequate to make a determination in this matter without further hearings, it nevertheless submits that only portions of the information are responsive to the Commission's order and that only those portions should be considered in determining whether the subject agreement is compensatory. Specifically, Oakland would utilize those schedules which (1) allocate a portion of the interest expense incurred by reason of the construction of the LASH facility to pier 80, and (2) limit the allocation of *net* bond interest expense *including revenue bonds* (LASH facility) to *only* the revenue producing marine piers at the port.

Hearing counsel in their response to the information supplied by San Francisco also "stipulate that it is sufficiently accurate and respon-

[2] We are advised that recent revenue bonds were not included (although relevant financial information relating to these bonds is supplied) in their computations of the interest expense allocable to the revenue producing marine piers, and more specifically pier 80, because such bonds "were sold to build a specialized facility for one tenant (the LASH facility for Pacific Far East Lines), which was covered by a lease with sufficient revenue to pay all expenses and approved by the * * * Commission."

[3] States has also submitted a letter stipulating as to the correctness of the figures supplied by San Francisco.

sible." But while hearing counsel also advocate the use of particular interest schedules, or portions thereof, in making a determination as to the compensatoriness of the subject lease, they do not agree with Oakland that bond interest expense should include interest on revenue bonds issued to construct the LASH facility, or that net bond interest expense should be allocated between *only* revenue producing marine piers.

Actually, if bonded interest is in fact taken into consideration, as it must be, hearing counsel are in agreement with San Francisco's suggested utilization of the information submitted in all but one respect. Hearing counsel would exclude from interest income, which is set-off against interest expense, that portion related to "other surplus funds." Essentially, their position appears to be that interest income from "other surplus funds" is not directly related to the bonds for which interest expense is incurred.[4]

Discussion and Conclusion

Before directing ourselves to the schedules submitted and in order to make clear the basis for our evaluation of the proposed lease in light of the data supplied, it is necessary at the outset to consider certain issues raised by San Francisco in its response to the Commission's inquiries, and by Oakland and hearing counsel in their "stipulations."

To begin with, San Francisco's contention that "bond interest should not be considered in fully distributed costs" is but a reiteration of an argument that has already been considered and rejected by this Commission in its earlier report in this proceeding. As we stated therein:

> Clearly, the cost of construction bonds cannot be ignored. Compensation must be related to the cost of the entire facility * * * Financing costs do indeed constitute a basic and undeniable element of total development costs which must be considered in ascertaining the compensatoriness of a terminal lease.

San Francisco has presented nothing which would persuade us to a different view. Its suggestion that we ignore interest expense must again be rejected.

Likewise, Oakland's argument that bond interest should include interest on revenue bonds issued to construct the LASH facility must also be dismissed. The LASH facility is a specialized facility built

[4] On the basis of the interest data submitted and the position they have taken relative to the use of such data, hearing counsel have arrived at a computation table bearing on the compensatoriness of the proposed lease. This table purports to indicate that while the lease will be compensatory during the last 3 years of its pendency, it will not be so compensatory during the first 2 years.

for a particular user (Pacific Far East Lines) and under San Francisco's accounting procedure, which we expressly endorsed in our report,[5] all items relating thereto, including the revenue bonds, should be maintained in an account separate from the general accounts and dealing solely with that facility. Thus, San Francisco's position that the interest paid by it on the LASH bonds should not be included in the net interest expense is entirely consistent with the Commission's earlier report and, accordingly, proper.

Despite contentions to the contrary advanced by hearing counsel, San Francisco's system of using interest income from "other surplus funds" in conformity with the long established bookkeeping practice at the port is also proper. We see absolutely no reason to exclude, as Hearing Counsel have done, interest income derived from "other surplus funds" in setting off interest income against interest expense. As San Francisco has pointed out, these funds, invested as are bond funds, are not ordinary income of the port, but reserves that are put with the bond funds to protect the bond funds in the event of delays of sale or other contingencies. Under the circumstances we are of the opinion that San Francisco's consideration of interest earned on "other surplus funds" is entirely justified.

Further, we find that San Francisco's method of allocation whereby the net interest expense is allocated 76.8 percent to revenue producing marine piers, 9.2 percent to other piers, and 14 percent to other facilities such as the World Trade Center, appears to be wholly valid and unobjectionable on the basis of the data furnished and stipulated to by the parties. To allocate all interest incurred on construction costs at all facilities at the port *only* to revenue producing marine piers, as Oakland would do, is totally unrealistic. As hearing counsel have so recently pointed out, "it is absurd to deny allocation of the net bond interest expense to nonrevenue producing facilities (such as the World Trade Center) when the bonds for which such interest expense is incurred were used, in part, to build such facilities."

[5] In affirming the examiner's finding and rejecting the "stand-on-its-own-feet" method of allocation (where every pier or facility must pay for itself), advocated by Oakland and hearing counsel, the Commission stated:

> * * * San Francisco * * * following a uniform accounting system established by * * * California. Department of Finance, would allocate bond interest, as it does all other costs, among all the revenue producing facilities not of a specialized nature built for a special user * * *.
>
> The accounting system adopted by the State of California is a valid and widely recognized and utilized system. It is the one that was imposed on the port when it was a State agency, and it has been carried over by the port under its city status. Accordingly, we have no objection to San Francisco's use of this system in allocating port-wide interest expense against all revenue producing facilities. So long as a particular system of accounting is generally acceptable and all legitimate costs and expenses are considered and properly allocable thereunder, we shall not require its abandonment to adopt another "acceptable" accounting system.

Evaluating the relevant information submitted by San Francisco in light of the foregoing, we find that the rentals contained in the proposed lease agreement are in fact compensatory in all years of its pendency. As a matter of fact, our computations indicate that the $310,000 minimum rentals provided for in the proposed lease not only recover operating plus interest expense but return earnings to the port of some $81,450 over 5 years. Agreement No. T-2227 is accordingly approved.

For the sake of clarity and to facilitate an understanding of the basis of our decision here, we have prepared and attached to this report (and made a part hereof) a table setting forth what we considered to be the data pertinent to the proposed lease in question and detailing our computations made on the basis thereof.[6] In arriving at this table, we have relied on that information supplied by San Francisco which we deemed to be responsive to the directives of our earlier report and order in this proceeding.

An appropriate order will be entered.

[SEAL] S/ FRANCIS C. HURNEY,
Secretary.

Item	Fiscal year				
	1971-72	1972-73	1973-74	1974-75	1975-76
1. Total bonded indebtedness at beginning of fiscal year.	$49,497,000	$47,103,000	$44,709,000	$42,025,000	$39,346,000
2. Total bond interest expense	1,755,549	1,671,317	1,579,110	1,483,741	1,389,499
3. Interest income	683,760	669,240	550,000	500,000	400,000
4. Net bond interest expense (item 2 less item 3)	1,071,789	1,002,077	1,029,110	983,741	989,499
5. Pier 80 interest expense (20.183% of item 4)	216,320	202,250	207,705	198,548	199,711
6. States portion of pier 80 interest expense (26.7% of item 5).	57,757	54,001	55,457	53,012	53,323
7. Operating expenses*	239,000	239,000	239,000	239,000	239,000
8. Total expenses (item 6 plus item 7)	296,757	293,001	294,457	292,012	292,323
9. Rental income from lease	310,000	310,000	310,000	310,000	310,000
10. Earnings (item 9 less item 8)	13,243	16,999	15,543	17,988	17,677

*Administration, operation, maintenance, depreciation.

[6] It will be noted that our computations are based on a minimum rental of $310,000 per year, as provided in article 3 of the proposed agreement, and not the $329,000 figure advocated by San Francisco. The latter figure includes an amount for the rental of space in the port's Administration Building which we do not consider germane to our consideration here.

FEDERAL MARITIME COMMISSION

DOCKET NO. 69-5

IN THE MATTER OF AGREEMENT NO. T-2227 BETWEEN THE SAN FRANCISCO PORT AUTHORITY AND STATES STEAMSHIP CO.

ORDER

This proceeding having been instituted 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;

Therefore, it is ordered, That terminal lease agreement No. T-2227, between the San Francisco Port Authority and States Steamship Co., be, and hereby is, approved.

It is further ordered, That the proceeding be, and hereby is, discontinued.

By the Commission.

[SEAL]

S/ FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 70–44

UNITED STATES OF AMERICA

v.

HELLENIC LINES LIMITED

May 14, 1971

NOTICE OF ADOPTION OF INITIAL DECISION

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 May 14, 1971.

It is ordered, That reparation in the amount of $6,034.15 is awarded claimant with interest at 6 percent per annum if not paid within 30 days from the date of this notice.

It is further ordered, That respondent, within 5 days from the date of payment of reparation, notify the Commission of the date and manner of payment.

By the Commission.

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

FEDERAL MARITIME COMMISSION

No. 70-44

UNITED STATES OF AMERICA

v.

HELLENIC LINES LIMITED

Reparation awarded.

Roderick H. Potter for complainant.
Stanley O. Sher and *Alan S. Davis* for respondent.

INITIAL DECISION OF STANLEY M. LEVY, PRESIDING EXAMINER [1]

The complainant United States seeks reparation in the amount of $6,034.15 for alleged overcharges by the Hellenic Lines Ltd. (respondent) for a shipment of goods from Bayonne, N.J., to Piraeus, Greece, aboard respondent's ship M/V *Hellos.*

On Agust 7, 8, 9, 12, and 13, 1968, the Military Ocean Terminal at Bayonne, N.J., tendered to respondent cargo consisting of 320 cases of new clothing weighing 233,305 pounds and with a cubic measurement of 15,572 cubic feet (cu. ft.). Respondent billed at the rate of $86.50 per 40 cu. ft. per item 0420 of the North Atlantic Mediterranean Freight Conference Freight Tariff 10 (FMC-3) for Clothing N.O.S. whereas the claimant asserts that it is entitled to a rate of $71 per 40 cu. ft. per item 0424 of the tariff for clothing in cases.

The description of the cargo in the shipping documents is clear. Whatever the characterization of the cargo might be for the purposes of the application of a tariff the parties do not dispute that the shipment was new clothing of an unspecified type and that it was packed in 320 "cases" as opposed to any other method of packaging.

The issue herein centers on whether "in cases" is a tariff subdivision of the old clothing category—as contended by respondent, or whether "in cases" is a separate tariff subdivision embracing both old and new clothing—as contended by claimant.

[1] This decision became the decision of the Commission May 14, 1971.

Under the general heading of "Clothing, viz.:"; original page 64 of the tariff, effective April 1, 1968, lists three items under three subheadings: N.O.S.—Item No. 0420; Old or Used (NOT Effects, Personal) in bags, bales, bundles:—Item No. 0422; in cases—Item No. 0424.

On August 19, 1968, a first revision of page 64 of the tariff became effective. This revision under the general heading of "Clothing, viz.:" again listed three items under three subheadings: N.O.S.—Item No. 0420; Old or Used (NOT Effects, Personal) in bags, bales, bundles:—Item No. 0422; (c) in cases/cartons (NOT Barrels, Drums, Suitcases, Trunks)—Item No. 0424.

Thus, both in the tariff in effect at the time of shipment, and the one put into effect a few days after the shipment, the classification of clothing "in cases" appears, although by August 19, 1968, item 0424 was clarified to include cartons, but not barrels, drums, suitcases, or trunks.

At page 8 of the Commodity Index of the tariff, fourth revision, effective July 15, 1968, and fifth revision, effective August 19, 1968, reference is made to Clothing, N.O.S.—Item No. 0420; Clothing Old or Used in Bags, Bales, Bundles—Item No. 0422; Clothing, in Cases/Cartons Only * * * (C)—Item No. 0424.

Hellenic, in support of its assessed charges, asserts that the construction of the tariff as claimed by the United States would lead to an absurd, unjust and improbable result which tariff construction should avoid. It points out that if the classification "in cases" is not restricted, and is applicable alike to old and new clothing, then the distinction and rationale in shipping costs relating to the value of the shipment disappear. Hence, old clothing having possibly little value would cost as much to ship in cartons as would new clothing shipped in cartons, though presumably a much higher value would attach to new clothing. Hellenic points out that the rationale of shipping costs relating to value is evidenced when clothing is shipped in bags, since new clothing in bags at $86.50 is rated nearly $40 higher than old clothing in bags shipped to certain base ports. This, it says, shows that the conference clearly intended to distinguish between old and new clothing.

It is undisputed that value of the goods shipped is an element in establishing rates. But it is not the only element. Among other considerations are method of packaging, volume, weight, perishability, hazardousness, and distance freighted. In any given circumstance one or more of these elements may be given more weight in establishing the tariff than they would under other circumstances. The weight to

be given any factor is to be determined by the drafter of the tariff. But whatever factor or factors are determinative, the tariff as published must make the end result clear.

There is no doubt that the conference intended to distinguish between old and new clothing. Item 0422 of the tariff clearly refers only to old clothing. But by distinguishing between old and new clothing insofar as item 0422 is concerned is not to say that the other clothing items in the tariff are necessarily restricted to either old or new clothing. For example, old clothing which might be personal effects or not in bags, bales, bundles would go in item 0420 if in cases or cartons but would go in N.O.S. item 0420 if in barrels, drums, suitcases or trunks. Similarly, new clothing would clearly go in N.O.S. item 0420 if in bags, bales, bundles, barrels, drums, suitcases, or trunks. And it remains to be determined whether new clothing in cases or cartons might go in item 0424, as might old clothing.

The tariff is clear as to what shipment is eligible under item 0422. It must be old or used clothing, excluding personal effects, and it must be packed in bags, bales, or bundles. The conference has no difficulty in clearly designating the conditions necessary to obtain the rates set forth in item 0422. It also has no difficulty in designating certain conditions necessary to obtain the rate set forth in item 0424. It must be shipped in cases or cartons. It cannot be shipped in barrels, drums, suitcases, or trunks. There are no other restrictions, prohibitions, or classifications set forth in the tariff for item 0424.

If the conference desired or intended to exclude new clothing or personal effects or to exclude any other type of clothing or method of packaging or to affirmatively limit the item to any particular type of clothing it could easily set forth such additional exclusions or limitations in item 0424. It failed to do so. Having the ability in the first instance to control and designate the coverage of particular items in its tariff, the fair and reasonable interpretation of the conference's failure to further limit or exclude is that except for the limitations or exclusions set forth there are no other limitations to that item of the tariff.

Respondent cites FMC–2, the predecessor tariff of FMC–3, in support of its contention that the conference carriers intended only the N.O.S. rate to apply to new clothing in cases. It says that on page 80 of FMC–2 "in cases" is indented to modify old or used clothing, and is restricted thereby. Since new clothing is not specifically rated, respondent says it would have been N.O.S. rated in FMC–2. Respondent claims that the failure to indent in FMC–3 was the result of an inadvertent or typographical error.

This is an ingenious argument but for a number of reasons is without substantial support. In the first place, an interpretation of FMC-2 is not in issue and, if it were, it cannot be said what classification would ultimately be determined for new clothing in cases. Further, whether the different indentation in FMC-3 was the result of an inadvertent clerical or typographical error is material only if it is first presumed that the answer to whether item 0424 is or is not separate and distinct from item 0422 depends on whether it is or is not indented. Tariff classification determination, however, should not be dependent on typesetting.

Hellenic also argues that inasmuch as "in cases" is not capitalized the item is within the scope of "Old or Used" category. This argument, however, is refuted on the very same page of the tariff by reference to "Coffee, viz." For this commodity there are 3 items—in bags; Instant; and N.O.S. The "in bags" item 0426 is not a category of either of the other two items although it is not capitalized and the others are.

Respondent's argument of typographic or inadvertent error is also weakened by reference to the numerous revisions of page 64. If original page 64 of FMC-3, dated April 1, 1968, is to be deemed the successor to FMC-2, the typographic or inadvertent error, if any, occurred at that time. Yet the conference failed to correct the alleged typographic error until the sixth revision, effective June 18, 1970, which indented and capitalized item 0424.

The record shows that the claimed overcharge was brought to the carrier's attention by the Government's notice of overcharge, dated January 5, 1970. By letter dated February 4, 1970, Hellenic rejected the Government's claim. Thereafter there ensued a series of letters between the parties culminating on June 9, 1970, with the carrier's continued rejection of the claim. In the interim, and after notice of the Government's claim of overcharge, the conference issued fifth revision, effective January 14, 1970, which continued the format of the original and four revisions of page 64. It took the conference, however, over 5 months after notice to one of its members to change the tariff format to correct what is alleged to be a typographical error.

That page 64 tariff revisions can be accomplished very quickly is evidenced by the time differential of sixth revision, effective June 18, 1970, and seventh revision, effective June 22, 1970; eighth revision, effective July 30, 1970, and ninth revision, effective August 17, 1970; fourth revision, effective December 19, 1969, and fifth revision, effective January 14, 1970.

The N.O.S. classification is a catchall which, by definition, is applicable if no other classification is or can be specified. While one should

not unduly strain to find a classification for goods, nevertheless, an N.O.S. classification is a classification which should not be resorted to if a reasonable classification can otherwise be found in the tariff. Whether a classification is reasonable and not inconsistent with another classification we look to the inclusionary or exclusionary language of the item in conjunction with the inclusionary or exclusionary language of other items in the tariff.

In this case, by utilizing the inclusionary and exclusionary language of both item 0422 and item 0424 it can readily be seen that a finding that new clothing in cases is within item 0424 is not violative of nor inconsistent with any of the language of that item or of item 0422. To recapitulate, new clothing in cases is within "clothing in cases or cartons (NOT Barrels, Drums, Suitcases, Trunks)" and nothing in the classification "Old or Used (NOT Effects, Personal) in bags, bales, bundles" is inconsistent with nor precludes such classification for new clothes in cases. Nor, in the language of the commodity index, is there anything which precludes or is inconsistent with a finding that new clothing in cases is within the scope and purview of item 0424.

Hellenic utilizes FMC–2 in support of its position herein by claiming that inasmuch as FMC–3 was published to effect a general increase in rates the Government's interpretation of FMC–3, insofar as new clothing in cases is concerned, would thwart that intent and would produce a rate decrease from $81.50 to $48.25. This presumes, necessarily, that under FMC–2 new clothing in cases could be rated only under the N.O.S. classification. No such ruling has been made. Further, since clothing in cases would under FMC–3 not be charged less than clothing in cases under FMC–2 there is no thwarting the intent of FMC–3 to effect a general increase in rates. *National Van Lines* v. *United States*, 355 F. 2d 326 (7th Cir., 1966).

Respondent contends that to find that the carriage of new clothing in cases should be rated under item 0424 of the tariff is to engage in an unnatural or strained construction. To the contrary, only by engaging in an unnatural or strained construction can one find that new clothing in cases/cartons is to be classified only under a catchall N.O.S. Such a classification on the theory that the tariff never intended under any circumstances to carry new clothing at other than an N.O.S. rate would indeed rquire an unnatural or strained construction of the tariff as published. *Buckley Dunton Overseas, S.A.* v. *Blue Star Shipping Corp.*, 8 F.M.C. 137 (1964).

Section 18(b)(3) of the Shipping Act of 1916 recognizes that error in a tariff may occur by reason of clerical or administrative error. But, in such case, the statute only provides retroactive relief for the ship-

per; none for the carrier. Recognizing the possibility of tariff error the intent of the statute appears to be that if the error causes a lesser tariff to be published than intended, no more than the published rate can be charged; whereas, if the error results in the publication of a higher tariff than intended, a refund or waiver of the excess may be permitted. Correction of error in a tariff of a clerical or administrative nature which will result in an increase in cost to a shipper can only be accomplished by publication of a new tariff. Section 18(b) (2).

It is not only incumbent upon the drafter of the tariff to be precise—it is vital to the interest both of the carrier and the shipper that the tariff be free from ambiguity or doubt. While conciseness is to be striven for it should not be achieved at the sacrifice of preciseness. Where a tariff is ambiguous or doubtful it should be construed against the carrier who prepared it. *Peter Bratti Associates, Inc.* v. *Prudential Lines, Ltd.*, 8 F.M.C. 375 (1964). See also *United States* v. *Strickland*, 200 F. 2d 234 (5th Cir., 1952).

Respondent also contends that the claim is barred by the statute of limitations. The clothing was shipped under Government Bill of Lading D–2721289, dated August 7–13, 1968. On October 17, 1968, Hellenic submitted a voucher, Carrier's Bill No. 68–465, for transportation charges (standard form 1113) certifying that the account stated thereon in the amount of $33,674.45 was correct and just. Freight charges of $32,895.88 were paid on November 12, 1968, by complainant's check No. 945463 as shown on the same voucher, schedule No. 1506. In making payment the carrier's bill was reduced by $778.60 which represented discharge costs for the account of the recipient Government. The complaint was filed herein on November 10, 1970. Whether the claim is barred by the statute of limitations is dependent on whether the cause of action accrued at the time the shipment was received or delivered by the carrier, August 1968; at the time of billing, October 17, 1968; or at the time when the freight charges were paid, November 12, 1968. If it accrued at the time the shipment was tendered or delivered, or at the time of billing, the claim is barred by the 2-year period within which the statute requires that claims be filed. If it occurred at the time when the freight charges were paid, then the claim is not barred until November 12, 1970. The rule of law is that "the cause of action of the shipper * * * shall be held not to have ocrued until payment has been made of the unreasonable charges. * * *" *U.S. ex rel Louisville Cement Company* v. *I.C.C.*, 246 U.S. 638, 644 (1917). See also *Aleutian Homes, Inc.* v. *Coastwise Line, et al.*, 5 F.M.B. 602, 611. The cause of action having accrued on November 12, 1968, when payment was made, the filing of the complaint on Novem-

ber 10, 1970, was within the 2-year period of time set by section 22 of the Shipping Act of 1916 and is not barred.

The evidence supports, and I find, that the proper freight rate to be applied to the shipment herein is set forth on original page 64 of the tariff item 0424, effective April 1, 1968. Reparation in the amount of $6,034.15 is awarded claimant with interest at 6 percent per annum if not paid within 30 days.

STANLEY M. LEVY,
Presiding Examiner.

WASHINGTON, D.C.
April 2, 1971.

FEDERAL MARITIME COMMISSION

No. 70-47

UNION CARBIDE INTER-AMERICA

v.

NORTON LINE

June 1, 1971

NOTICE OF ADOPTION OF INITIAL DECISION

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 1, 1971.

It is ordered, That reparation in the amount of $1,514.50 is awarded claimant with interest at 6 percent per annum if not paid within 30 days from the date of this notice.

It is further ordered, That respondent, within 5 days from the date of payment of reparation, notify the Commission of the date and manner of payment.

By the Commission.

[SEAL]

FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 70-47

UNION CARBIDE INTER-AMERICA

v.

NORTON LINE

Reparation awarded.

V. G. Wilson for complainant.

Daniel J. DeMarco for respondent.

INITIAL DECISION OF STANLEY M. LEVY, PRESIDING EXAMINER [1]

The complainant, Union Carbide Inter-America seeks reparation in the amount of $1,514.50 for alleged overcharges by the Norton Line (respondent) for a shipment [2] from Norfolk, Va., to Rio de Janeiro, Brazil, aboard respondent's vessel *Dorotea.*

The shipment of 174 metal drums, measuring 1,865′ 5″ cu. ft. and weighing 83,520 lbs. was assessed a total of $4,217.30 at the rate of $87.50 plus $3 surcharge W/M per 40 cu. ft., as per item 1, 4th revised page 92 of the Inter-American Freight Conference Tariff No. 1 (FMC No. 1) for Chemicals, N.O.S., Nonhazardous, value $1,500–$3,000 per 2,240 lbs.

Claimant contends that the shipment should have been assessed a total of only $2,702.80 at the rate of $55 plus $3 surcharge W/M per 40 cu. ft. as per rate item 9, 3d revised page 96 of the tariff for compounds, surface active (wetting agents or emulsifiers).

The bill of lading described the shipment as "Amine 220 F.P. 465° F, not inflammable." The export declaration listed the goods as "schedule B No. 512.0943.—amines n.e.c."

Claimant claims now that it misdescribed the goods on the bill of lading and export declaration. It contends that the bill of lading

[1] This decision became the decision of the Commission June 1, 1971.

[2] Bill of lading No. 3, dated June 17, 1969.

should properly have described the shipment as "Amine 220—wetting agent," and the proper schedule B number should have been 554.203—surface active wetting agents.

Amine 220 is Union Carbide's trade name for 1-hydroxyethyl 2-heptadecenyl Glyoxalidine. Amine as described in *The Condensed Chemical Dictionary*, 7th edition Reinbold, 1966, is a class of organic compounds of nitrogen. Amine 220 is further described as a cationic [3] wetting agent.

In defense of its assessed charges respondent asserts that there is no commodity listing in the tariff for "Amine 220" and thus in rating the shipment it merely followed complainant's own classification of its trade name product which it described as "chemical N.O.S." Also the charges are in accordance with the description in the export declaration. Respondent points out that a rating clerk is not a chemist and depends on the description of the commodity as submitted by the shipper. Hence, Norton argues that it should not be held accountable for an error made by the claimant.

This case presents the classic dilemma between the concept that what was actually shipped determines the applicable rate rather than what is declared on the bill of lading and the carrier's need to have the shipper accurately describe the shipment in order that the carrier may assess the lawful rate. Here the shipper admits it misdescribed the shipment yet complains that the carrier charged a rate in accordance with the misdescription. The resolution of the dilemma necessarily must redound to the detriment of an otherwise fault free carrier or ignore the concept that charges must be based on what was actually carried. Accordingly, the Commission has held that claims for reparation involving alleged errors of description can be allowed only if the claimant meets the "heavy burdens of proof" once the shipment has left the custody of the carrier.[4]

In this case the claimant's description on the bill of lading and invoices [5] relating to this shipment establish that the goods carried were in fact 1,864′ cu. ft. of Amines 220 packed in 174 metal drums. The record also establishes that Amine 220 is a trade name of an organic compound of nitrogen demulsifier and it is a surface active (cationic) wetting agent. At the time of the shipment 3d revised page 96 of the respondent's tariff provided a specific rate for compounds, surface

[3] Cationic: surface-active positively charged ion.

[4] *Colgate Palmolive Co.* v. *United Fruit Co.*, informal docket No. 115(I), Commission order served Sept. 30, 1970.

[5] Invoices order No. 51–3778–2, dated Apr. 28, 1969; and No. 51–3775–2, pt. 1, dated Feb. 28, 1969.

active (wetting agents or emulsifiers) at $55 plus $3 surcharge W/M. Accordingly, the evidence in this record supports, and it is so found, that the shipment should be rated at $55 plus $3 surcharge W/M.

Claimant is awarded reparation on the claim herein in the amount of $1,514.50 with interest at the rate of 6 percent per annum if not paid within 30 days.

STANLEY M. LEVY,
Presiding Examiner.

WASHINGTON, D.C., *May 4, 1971.*

FEDERAL MARITIME COMMISSION

DOCKET NO. 70–11

PACIFIC COAST EUROPEAN CONFERENCE—RULES 10 AND 12, TARIFF NO. FMC 14

Decided June 10, 1971

Tariff rule 10 and proposed amended rule 10 of the Pacific Coast European Conference, limiting the number of loading terminals in the San Francisco Bay area, are subject to section 15 of the Shipping Act, 1916, and not having been approved are unlawful.

Tariff rule 10 and proposed amended rule 10 are unapprovable under section 15 as contrary to the public interest since they prevent or attempt to prevent carriers from serving federally improved ports in contravention of section 205, Merchant Marine Act, 1936.

Tariff rule 12, providing for equalization of shippers' inland transportation costs from point of origin in California to loading terminal, is not required to be filed for approval under section 15 as it is authorized by the terms of the Conference's presently approved agreement.

Neither tariff rule 12 nor the deletion thereof is unlawful.

Leonard G. James and *F. Conger Fawcett* for respondents.

Thomas C. Lynch, *Walter S. Rountree*, and *Denis Smaage* for Governor of California.

J. Richard Townsend and *Albert E. Cronin, Jr.*, for Stockton Port District; *J. Kerwin Rooney* and *John E. Nolan* for Port of Oakland; and *Clarence Morse* and *John Hamlyn, Jr.*, for Sacramento-Yolo Port District, intervenors.

Margot Mazeau, *R. Stanley Harsch*, and *Donald J. Brunner*, hearing counsel.

REPORT

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

We instituted this proceeding to determine whether tariff rules 10 and 12 of the Pacific Coast European Conference (hereinafter "the Conference" or "respondents"), in their present form, or the proposed charges therein, are authorized by respondents' agreement No. 5200

and are otherwise lawful under sections 15, 16, and 17 of the Shipping Act, 1916 (the act). Rule 10 generally limits the number of terminals in the San Francisco Bay area at which conference members may call to pick up cargo to two, and the proposed change in rule 10 would limit such terminals to one. Rule 12 establishes a system of port equalization between San Francisco Bay area ports, which the Conference proposes to terminate. In addition, pursuant to a protest filed by the Governor of the State of California under section 16 of the act, respondents were directed to show cause why the proposed changes in rules 10 and 12 should not be set aside as unjustly discriminatory against the State of California and its products moving in foreign commerce to Europe within the meaning of sections 15 and 17 of the act and contrary to section 205, Merchant Marine Act, 1936 (section 205). Stockton Port District (Stockton), Port of Oakland (Oakland), and Sacramento-Yolo Port District (Sacramento) intervened. Hearings were held in San Francisco from April 7 through 17, 1970. Opening briefs were filed by all parties and reply briefs by Stockton, Sacramento, and respondents. Chief Examiner C. W. Robinson issued an initial decision, in which he found rule 10 in both its present and proposed forms unauthorized by the Conference's basie agreement, but approvable if filed in its present form as an agreement modification pursuant to section 15 of the act. He found the proposed one-terminal limitation unapprovable as violative of section 16 first and parts of section 15. Finally, he determined that rule 12 (port equalization system) is authorized by the conference agreement, that it is not otherwise unlawful, and that its termination likewise would not be unlawful. Exceptions to the initial decision have been filed by the Conference, Stockton, Oakland, Sacramento, and hearing counsel, and replies thereto were filed by all of the above except Oakland.[1] We have heard oral argument.

FACTS

Agreement No. 5200 covers the transportation of cargo from "Alaska, Washington, Oregon, and California to ports in the United Kingdom of Great Britain and Northern Ireland, Ireland, the Scandinavian Peninsula, continental Europe, including ports on and in the Baltic and Mediterranean Seas, as well as the seas bordering thereon, and Morocco and to the Atlantic Islands of the Azores, Madeira, Canary,

[1] The Governor of the State of California had maintained before the examiner that the single terminal limitation was unlawful and was especially injurious to the State when coupled with the elimination of the port equalization system. He also suggested that the Commission consider declaring the two-terminal limitation unlawful. However, he urged retention of the equalization system if the Commission held the two-terminal limitation to be lawful.

and Cape Verdes and by transshipment at the aforementioned ports to ports in Iceland and West, South and East Africa."

Amended rule 10 of the tariff, now scheduled to become effective June 30, 1971, provides as follows:

Shifting of vessels.—Shifting of vessels is permitted within loading ports but, except as otherwise provided, there shall be no absorptions for bringing cargo to, from or within such ports. Each member shall be limited to a single terminal in the San Francisco Bay area, designated semiannually, July through December and January through June, except that vessels may shift to additional terminals for military cargo and cargo loaded in bulk. A Member without a sailing from the San Francisco Bay area for a period of 60 days or more may redesignate its terminal. Calls at additional terminals may be made to load a minimum quantity of 750 short tons from one shipper. For the purposes of this rule, Members participating in a joint service shall be treated as a single Member.

The provisions of this rule do not preclude the loading of cargo at the vessel's discharging terminal on the inbound call, provided that the inbound call does not also constitute the occasion for vessel to additionally load at its designated terminal.

For the purpose of this rule, the San Francisco Bay area includes all terminals and/or ports inside the Golden Gate.

To coincide with the effectiveness of amended rule 10, respondents propose to delete rule 12, which provides in pertinent part as follows:

Port equalization.—For cargo destined to Groups 1, 2, 3 and 4, Carriers may absorb a shipper's extra delivering transportation cost (based on the lowest available published rate(s)) between point of origin in California to nearer declared San Francisco Bay Area loading berth and point of origin in California to other declared San Francisco Bay Area loading berth defined in Rule 10 as the limited two loading berths. For the purpose of this rule, San Francisco Bay Area loading berths are limited to berths at Alameda, Oakland, Redwood City, Richmond, Sacramento, San Francisco, or Stockton.

If the carrier unloads and loads at the same time in the Bay area and then proceeds to the Northwest for unloading and loading, it may return to the Bay area for loading at a terminal other than the one at which it previously unloaded and loaded. On the other hand, where the vessel completes its unloading in the Bay area and does not proceed to the Northwest, it cannot load at its discharging berth and must proceed to its designated loading berth.

Where one shipper at a second terminal offers 750 tons, cargo of other shippers can be loaded at that terminal, but if there are two or more shippers whose aggregate volume exceeds 750 tons but whose individual total is less than 750 tons, no call can be made at the second terminal. A vessel calling for bulk cargo may not pick up general cargo of other shippers; the same is true in the case of military cargo. There is no required minimum for bulk cargo, which generally is not

sought after by the lines unless the quantity justifies the carriage, a space needs to be filled, or a bottom cargo is needed for stability purposes. Bulk cargoes usually are open-rated and the lines feel that they do not need a protective rule for such cargo.

The provision that a "Member without a sailing from the San Francisco Bay area for a period of 60 days or more may redesignate its terminal" is designed to cover situations where a carrier serves the Bay area less frequently and usually goes where some cargo is offered; it is not likely to use more than one terminal.

In 1927, the conference tariff contained a general prohibition against the shifting of vessels within terminal loading ports. This proscription was removed in 1929, and thereafter some of the lines began to call at East Bay terminals (Oakland, Alameda, Richmond) in the San Francsico Bay area for minimum quantities of 100 short tons. The individual terminals competitively solicited shippers to use their respective facilities. This forced many vessels to call at terminals at all three East Bay ports in addition to their regular loading berths in San Francisco. Where the East Bay terminal failed to offer 100 short tons for a sailing, the terminal delivered the cargo to another East Bay terminal of the carrier's choice. Fresh fruit was loaded only at San Francisco berths.

The minimum volume to shift to an East Bay terminal was increased by the individual carriers comprising the Conference to 150 short tons during World War II, and the terminals transferred lesser quantities to the carrier's berth if the carrier failed to solicit and receive the minimum. At about this time the loading of European cargo at San Francisco had all but stopped. Unsuccessful attempts were made in the early 1950's to increase the minimum for which vessels would shift to East Bay terminals. The lines tried to adopt a rule for alternate loadings in the East Bay, or to require each member to nominate a single such terminal for loading. An agreement was reached in October 1957, and a rule was adopted limiting calls to two loading terminals in the Bay area, excluding San Francisco and Stockton. In August 1964, upon the emergence of Sacramento as a port, the rule was revised to permit calls at three loading terminals, excluding San Francisco.

The rule was altered, substantially to its present form, on January 1, 1965, to limit calls to two loading berths (or "terminals," as they are now called) in the Bay area; however, vessels could shift to additional berths for military and bulk cargoes as well as for a minimum of 750 short tons of general cargo from one shipper. In June 1969,

the Conference voted to adopt the one-terminal rule here under consideration and to cancel rule 12.

To help stem their increased costs of operation in the Bay area, the Conference has explored, in recent years, the possibility of a single loading terminal for use by all members. Equalization also has been tried in an effort to minimize the shifting of vessels, and this has resulted in a decrease in the number of additional calls.

A competitive factor as well as possible economies was involved in the amendment of rule 10. Some of the lines have weekly sailings, some every 2 weeks, and some only once a month. Those with monthly sailings would not agree to confine their loading to one terminal while others had the privilege of utilizing four different terminals during a month, hence the compromise on one terminal.

There is no single-terminal provision in the tariff applicable to ports other than those located in the Bay area because the traffic pattern at the latter has certain peculiarities. Furthermore, the Bay area does not have industrial activities which produce specialized cargo movements. In contrast, and as an example, the nature of the cargo in the Puget Sound and Columbia River areas is such that there is no pull-and-tug effort to compel calls at specific terminals; the carrier usually can either control where the cargo will be lifted or will call at the port or ports to which the cargo is naturally tributary. The number of regularly scheduled ports in the Northwest has been reduced, the main consideration being the type and volume of the offering. No pressure upon the lines comparable to that exerted in the Bay area is found in the southern California ports served by the lines.

Operations in this trade, like those in many other trades, are becoming more containerized. One respondent utilizes containerships entirely and switched its general operations from Alameda to Oakland in 1969. Some of its ships are of the converted and jumboized variety, with their own cranes. Some of the other respondents are either building or have announced plans for containerships. New, larger, more costly ships, both containerized and breakbulk, are being substituted for older, smaller vessels. Whereas smaller ships can call at Stockton, some of the newer ones cannot do so as the port does not have container facilities to service them. However, in the case of one newly announced joint service, the containerships designed for the trade will be able to serve both Stockton and Sacramento in most instances.

Containerships require special loading facilities, and a single place of loading in an area is generally essential for the success of their operation.

The many requirements built into containerships add to the already high cost of their construction, but some of the new conventional-type ships are as costly as containerships.

Stockton and Oakland are the two most competitive ports in the Bay area, at least for the agricultural products originating in the San Joaquin Valley (the Valley) and moving on the conference lines. The lines have indicated that they will designate only Oakland or Alameda for the first 6-month period under amended rule 10, and that the same designation would have been made in 1969 had the proposed rule been in effect.

Only two Conference vessels in each of the years 1967, 1968, and 1969 called at Stockton for a 750-ton minimum, yet the port is the nearest one, in most instances, to the Valley, with its rich agricultural out-turn. Millions of dollars have been spent by the Government for the development of the waterway from San Francisco Bay to Stockton, the present channel being 30 feet deep with a proposed depth of 35 feet. The waterway was opened to navigation in 1933. Stockton itself has spent and continues to spend large sums of money on its port facilities and improvements.

Aside from the East Bay ports, Stockton in recent years has handled more cargo for the Conference than any other port in the Bay area, and stands to be affected more than any other port by the proposed change in rule 10. Conference loadings at Stockton, as well as vessel calls, have decreased markedly since 1965, the decline being caused primarily by competition in Europe of other food-producing countries, notably Australia and South Africa. Some of the loss, of course, stems from the routing of cargo to other ports under the equalization rule.

Oakland is the only Bay area port that can handle the largest fully containerized vessels, and more cargo of the Conference lines moves through that port than any other Bay area port. Much money has been and continues to be spent on the improvement and enlargement of Oakland's terminals, some of which are leased to private companies that have their own tariffs but whose rates cannot be changed without the consent of Oakland. The port itself and not the lessee assesses wharfage, dockage, wharfage demurrage, and storage charges. Where stevedores travel from San Francisco to Oakland the travel time is an added expense; to this extent, Stockton has an advantage over Oakland. Oakland has the largest container facility in the Bay area, and all of it is not being used. If the Conference lines were to use a common terminal, Oakland could take care of their needs. Truck traffic at Oakland apparently experiences some delay at times, but port officials are confident that any problems brought about by an increase in traffic can be readily solved.

There were only 61 calls by Conference vessels during 1966–69 to load 750-ton shipments. The Conference would be willing to change the minimum to have it apply to the total to be offered by all shippers, provided a way could be found to determine where the responsibility would lie among the shippers for not tendering 750 tons since it is felt that the basic shipper cannot be penalized for the failure of the other shippers to perform. Some of the lines might feel justified in calling at Stockton for as little as 750 tons, depending upon competition, but the consensus of the testimony placed the figure at 1,000 tons or more. One joint service would not designate Stockton as the single terminal unless it was assured of between 1,500 and 2,000 tons 20 times a year.

Had amended rule 10 been in effect in 1969, Oakland would have gained 32 sailings, Alameda would have lost 31 sailings, San Francisco would have lost one sailing, and Stockton would have lost 63 sailings. Stockton would have lost 43,829 tons and the port itself would have lost revenue of $498.325. The 63 calls eliminated at Stockton represent a reduction from 274 to 211.

If a vessel proceeds to Stockton after loading at an East Bay terminal, there would be pilotage and other fees plus the loss of about 30 hours' time in the vessel's itinerary. These general figures would also be true of Sacramento. When computed on the value of new vessels in the trade, the total additional cost to the carrier in serving Stockton or Sacramento is about $5,000. For vessels of lesser value, the cost would be lower. Shifting a full containership to another terminal could cost as much as $7,500–$8,500, based upon the value of the ship and not actual cost.

Between 1968 and 1970, the lines paid shippers the sum of $53,786.34 as equalization, or an average of $1.71 a ton. Most of the payments were to shippers of raisins and canned goods. In 1969, 94.4 percent of such payments affected Stockton; 5.5 percent involved Sacramento; and 0.1 percent related to Oakland.

Eight shippers of various agricultural products to Europe testified against the amended rule. It was generally agreed by them that most shipments to that area are on an FAS or FOB basis, with the buyer paying the ocean freight. The examiner summarized this testimony as follows:

Exporter of canned peaches and fruit cocktail.—Needs an up-river port as well as an East Bay port; half of the 1969 peach pack moved through Stockton, the remainder through the East Bay; Stockton is more advantageous because of its location to points of production; packs of 500 tons originating in the Sacramento Valley should go through Sacramento rather than Stockton; made several shipments of 1,000 tons via Sacramento in 1969, and the amended rule would not affect such shipments; shipments via the East Bay entail an additional inland transportation cost, and since any increased costs must be accounted for in

the selling price, there is a possibility that its exports to Europe may be affected under the amended rule; has received no refusal from a carrier for as little as 300 tons at Stockton if the ship is scheduled; distributes cargo among all the lines, and about seven have accepted Stockton calls; it is recognized that a rule permitting calls for an aggregate minimum of 750 tons from more than one shipper might raise problems when shippers other than the principal one fail to supply the volume promised; it is not necessarily made whole by the payment of equalization since the cost incidental to preparing papers for submission to the carrier make the process uninviting.

Walnut growers association.—Its plant formerly was in southern California but was moved to Stockton because of the latter's truck and rail facilities; about 80 percent of the walnut production in California is within 50 miles of Stockton; exported approximately 200 tons to Europe in fiscal 1969, and expects to increase this figure to between 1,500 and 2,000 tons in 1970 as the crop is increasing; present shipments are in 100-pound bags, but efforts are being made to develop a market for the shelled product, thus permitting a denser commodity under better loading conditions; the industry is not able to offer sufficient volume to attract some of the ships to Stockton, hence there must be delivery to whatever ports are called by the lines; being forced to ship via East Bay ports would increase costs considerably and control of shipments would be lost, as would the liaison with Stockton; any increase in cost would affect the competition in Europe from growers in France and Italy; the world price currently is below the domestic price but the export price cannot be increased; there would be no insurance available on shipments as large as 750 tons;[1] a study is being made as to the possibility of shipping by rail to Gulf and Atlantic ports, and any increased cost of inland transportation to East Bay ports possibly could be the determining factor as to whether overland routing could be used; the retention of equalization would lessen the financial sting of shipping via ports other than Stockton.

Agricultural cooperative.—Shipped about 10,000 tons of food products principally canned peaches and fruit cocktail, to Europe in 1969, this being more than in 1968 because of the rotation of the stockpile in Germany every 3 years; has four plants in the Valley; about half of the volume moves through Stockton; unavailability of that port would necessitate the use of East Bay ports, at extra cost, where congestion occurs, a situation not encountered at Stockton; the short distance from Stockton enables a better utilization of their own trucks, particularly since they are used for the backhaul of their own cans, cartons, et cetera, thus reducing the unit cost; most cling peaches and fruit cocktail are processed in northern California; it is doubtful whether a 750-ton minimum could be assembled more than twice a year; on account of the European competition from processors in Australia and South Africa, it is problematical whether the association can stand any further increases in cost; inquiry is being made as to the feasibility of shipping overland and thence out of Gulf and Atlantic ports; there is competition between Valley canners and those in the Santa Clara Valley (south of East Bay terminals) and Oakland itself, and the latter would not be affected if Oakland were designated as the single terminal; if rule 10 were changed from a 6-month basis to a ship-to-ship basis, Stockton would have a chance of vessels calling there.

Fruit cooperative.—Ships table grapes primarily, and some pears and plums, to Europe; fruit is placed in area cold storage and shipped out as sold; even

[1] I.e., the cost for insurance on such shipments would be prohibitive.

though it might desire to use Stockton, which is somewhat closer and has ample storage facilities, it must haul the fruit to East Bay ports in refrigerated trucks to be loaded at a time specified by the carrier; weather conditions at East Bay ports ordinarily are more favorable for shipping fresh fruit, but this fact is offset at times by delays encountered by the trucks; the association does not expect the lines to call at Stockton for fresh fruit only, but it does not subscribe to the opinion of the carriers that they can do a better job of loading it at one terminal; it is not possible for the association to assemble a minimum of 750 tons of grapes at one time; the amended rule would not change appreciably the present pattern for the shipment of grapes.

Shipper of canned foods.—Ships canned peaches, fruit cocktail, and white asparagus to Europe, but competition from suppliers in other countries, especially Formosa in the case of white asparagus, has cut into its exports; about 2,600 tons of peaches go to Europe every year, principally to Germany, as well as about 2,200 tons of white asparagus; main processing plant is located a very short distance from Stockton, and across the street therefrom the company manufactures its own cans; its own trucks haul cans to its plants and return with processed food; except in peak seasons, its own trucks are used from plant to port; trucking to the East Bay area would eliminate all the benefits, advantages, and efficiencies of its total operation since about 75 percent of its combined pack moves through Stockton; Stockton would be preferred even if the equalization rule remained inasmuch as the main plant was erected at Stockton because of the existing port facilities at that place; any added expense reduces the effort to compete in foreign countries.

Raisin cooperative.—Represents the largest segment of the raisin industry and ships about 13,000 tons a year to Europe, about half moving through Stockton, which is the nearest port to the processing area; prefers to use the nearest port or to equalize via other ports; shipments can be delivered to Stockton on short notice, and this is very helpful where the raisins may not have been packed but must be shipped quickly to fill orders; the buyer specifies the ship about 80 percent of the time; the association would try to pass on to the buyer any increase in costs resulting from a change in the rule, but in that case there would be a reasonable possibility that sales in Europe would drop, there being competition from Greece, Turkey, Australia, and South Africa; it is seldom that as much as 750 tons could be assembled at one time for export (there was only one such instance in 1969); European buyers prefer smaller quantities and more frequent shipments; common carriers are used for delivery to the port where needed; applying for equalization payments takes time, the shipper's money is tied up from the time the inland freight is paid, the shipper's organization may be handicapped because of the unavailability of personnel, the carrier's office may be busy, and payment may be held up for several months.

Almond cooperative.—Handles about 70 percent of the almond production of California and exports about 17,000 tons a year to Europe; its central plant is in Sacramento, and although it would prefer to use that port, it has been shipping through Stockton and Oakland; congestion sometimes causes trouble at Oakland, which makes the use of that port particularly undesirable since the association does not use its own trucks; almost all shipments exceed 42,000 pounds but no shipment has been as much as 750 tons; the almond crop is expanding and at present there is a seller's market; the quality of California almonds is superior to that of Spain, Italy, and the Mediterranean area, but the pricing situation is quite close; the California price is higher than those of the

competitors but buyers cannot always obtain almonds from the association's competitors; any increase in costs resulting from the carriers' proposals would decrease the association's competitive ability to some extent; equalization is undesirable because of the time involved and the need for personnel to prepare the papers connected therewith, plus the fact that money must be borrowed to pay the members of the association, all of which may result in no net return.

Shipper of seeds.—Exports about 750 tons a year to Europe, using commercial vehicles for transportation to the port; many 10,000-pound parcels may go to the piers, consisting of as many as five shipments in a package; the company's freight forwarder, in seeking bookings on vessels, is requested to use Stockton, Sacramento being the second choice (the use of the latter port has about ceased); has about 200 shipments a year, with an exceptional maximum of 150 tons; for pricing purposes an effort is made to have a minimum of five tons; when less-than-truckloads are shipped to the port there is a heavy trucking penalty; the proposed changes in the rules would penalize the company because it may or may not be able to pass on to the buyer the increased costs; it would be difficult to ship via one port since the company's plants are located in various areas; equalization payments on such small shipments are not worth the effort to recoup.

Military cargo no longer moves through Stockton, and many longshoremen, most of whom live in the Stockton area, have been thrown out of steady employment. The union has been working with port officials to see if production can be improved to the point that it will be attractive for ships to call at the port. A loss of 63 calls a year at Stockton would mean a loss of $1,000 for each vessel and a corresponding hardship on the longshoremen. The union admits, however, that the Conference may have made a wise decision on its part in limiting calls to one terminal.

The Examiner's Decision

The examiner determined that the basic authority granted the Conference by agreement 5200 is not broad enough to permit the Conference to limit the terminals at which its member lines may call in the Bay area and that tariff rule 10 and any changes therein are unauthorized and that conference operations thereunder are violative of section 15.

The examiner also found that the equalization system established by tariff rule 12 is authorized by the language in the conference agreement empowering the members collectively to absorb inland transportation changes, since he concludes that the Commission and its predecessors have considered the terms "absorption" and "equalization" as interchangeable.

The examiner, in considering the effects of rules 10 and 12, concluded that a limitation of conference members' calls generally to a single terminal in the Bay area during any 6-month period, as in the proposed amendment to rule 10, could not be approved even if

submitted for approval under section 15 as a modification of the conference agreement since it would violate section 16 first of the act by subjecting Stockton and possibly other Bay terminals, the State of California and shippers in the San Joaquin and Sacramento Valleys to undue and unreasonable prejudice and disadvantage and by giving undue and unreasonable preference to shippers in Santa Clara County and Oakland. The examiner also finds that proposed rule 10 unjustly discriminates and is unfair between shippers, exporters, and ports in violation of section 15 and could work disadvantageously against U.S. exporters as compared with their foreign competitors.

The examiner concludes that proposed rule 10 does not run afoul of section 17 since he finds it is not applicable to the rule. The first paragraph of section 17, he maintains, is restricted to differences in rates and the terminal limitation rule does not create difference in rates. The second paragraph of section 17, he asserts, is concerned solely with forwarding and the operation of terminal facilities, which are not involved here.

The examiner, however, concluded that rule 10 in its present form is lawful, aside from the fact that it is not authorized by the Conference's approved agreement. He bases this conclusion on the following factors: (1) The rule has been in effect for over 5 years without complaints against it; (2) Stockton concedes that it "has not caused any appreciable hardship to the port of Stockton"; (3) hearing counsel admit that "there is no evidence of record whether the present rule 10 accomplished any significant reduction in port calls during the earlier years of its existence"; and (4) the witness for one of the largest exporters of foodstuffs stated twice that his company has no objection to a two-terminal rule.

The examiner also determined that section 205 of the Merchant Marine Act, 1936, is not applicable to the terminal limitation provisions since he holds that provision relates only to differences in "rates," not to the curtailment of service, and that the 750-ton minimum contained in the rules as a condition for calls at additional terminals does not change the rate.

The examiner ends his consideration of rule 10 by concluding that the 750-ton minimum, if not coupled with the single terminal limitation contained in proposed rule 10, is lawful.

Lastly, the examiner concludes that neither the equalization system embodied in rule 12 nor its termination is unlawful. He notes, however, that it seems unlikely that the Conference would desire to delete the system if it could not limit to one its lines' loading berths in the Bay area.

DISCUSSION AND CONCLUSIONS

I. AUTHORIZATION TO LIMIT NUMBER OF TERMINALS SERVED UNDER APPROVED CONFERENCE AGREEMENT

The Conference and Oakland maintain that the examiner erred in concluding that the Conference's actions in limiting the number of terminals at which its members' vessels may call within the San Francisco Bay area is unauthorized by the approved Conference agreement. They contend that the practice of limiting the number of terminals at which Conference members may call is authorized by the Conference's approved agreement since only Conference actions creating "new relationships" require specific approval by the Commission prior to their effectuation, and the Conference's practice of limiting berths is over 40 years old. The Conference also alludes to general language in the approved agreement as authorization for the limitation rules. We agree with the examiner's conclusion that the Conference's collective action in limiting the number of terminals served by its members requires specific approval pursuant to section 15 of the act, which has never been granted.

We have traveled much this same road with these respondents before, and we are prompted to retrace some of our steps here only by the vigor with which respondents renew old arguments. In *Pacific Coast Port Equalization Rule*, 7 FMC 623 (1963), aff'd sub nom. *American Export Isbrandtsen Lines* v. *Federal Maritime Commission*, 334 F. 2d 185 (C.A. 9, 1964), respondents sought to establish the authority in the basic agreement for a system of port equalization whereby the respondents would substitute the payment of overland freight differentials between ports for direct vessel calls at certain ports. Neither we nor the court could find any such authority. Thus, it seems to us perfectly clear that an agreement which fails to authorize equalization between ports cannot under any reasonable construction provide authority for the more severe system of explicit limitations on the number of ports served by the parties to that agreement. But it is asserted by respondents that we have injected a new criterion into the determination of whether a particular course of action is authorized by a Conference agreement.

Citing our decision in *Investigation of Overland/OCP Rates and Absorptions*, 12 FMC 184 (1969), aff'd sub nom. *Port of New York Authority* v. *Federal Maritime Commission*, 429 F. 2d 663 (C.A. 5, 1970), cert. den. February 22, 1971, respondents contend that now the question of whether particular activity is authorized by the basic agreement hinges upon the "newness" or "novelty" of that activity.

Respondents have misread the *OCP* decisions. The determination that the particular rate structure there in question was authorized by the basic agreements of the conferences employing the rates did not depend upon the length of time those rates had been in effect. Rather, it was concluded that the rate-fixing authority expressly spelled out in the agreement could reasonably be construed to include the authority to fix rates, and further that since the rates in question had been widely used continuously from a time preceding approval of the agreements, the approval when granted could be naturally interpreted to allow a continuation of that activity.

It is not the "newness" of an activity which determines whether that activity is within the scope of an approved agreement. Only the language of the agreement and its reasonable interpretation can do that.[2] This insistence on adherence to the terms of an agreement is crucial to the continued existence of the right of persons dealing with conferences and other groups enjoying antitrust exemptions under section 15 to know how they may reasonably expect to be affected by the concerted activity of such groups. It is an important feature of our responsibility for a continuing surveillance over the activities of groups operating under agreements we approve.[3]

Finally, contrary to respondents' insistence, the Conference's limitation on loading terminals has not been uninterruptedly practiced since 1927. Between 1929 and 1957, there was no Conference-imposed limitation on terminals. As shown in the record here, and as observed in *Sun-Maid Raisin Growers Association* v. *Blue Star Line, Ltd.*, 2 U.S.M.C. 31, 38 (1939), the Conference's practice seems to have been to allow "individual carriers to establish rates to Stockton and other ports which have not been designated as terminal ports."

In seeking to establish that their basic agreement does indeed cover limitations on loading berths, respondents offer the first three articles of the agreement, which provide:

1. This agreement covers the establishment, regulation and

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[2] See *Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission*, 375 F. 2d 335 (C.A.D.C., 1967), where the court held that the fact that the system of disparate rates based on vessel nationality may have been "previously used in the trade" was irrelevant to the question of whether the rates were authorized by the agreement. Respondents' seizure of the phrase "new relationship" from our decision in the *Port Equalization* case, supra, turns upon the happy accident that in that case the activity in question was indeed new. Needless to say, we do not feel that the decision was based on the fact, nor, in our opinion, did the court.

[3] Other examples of activity found not authorized by a general ratemaking and tariff authority are found in *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (C.A.D.C., 1954), establishment of a dual rate system and in *Pacific Coast European Conference—Payment of Brokerage*, 4 FMB 696 (1955) ; 5 FMB 65 (1956) ; and 5 FMB 225 (1957), prohibition against the payment of brokerage to freight forwarders who dealt with nonconference lines.

> maintenance of agreed rates and charges for or in connection with the transportation of all cargo in vessels owned, controlled, chartered and/or operated by the parties hereto in the trade covered by this agreement, and brokerage, tariffs and other matters directly relating thereto, members being bound to the maintenance as between themselves of uniform freight rates and practices as agreed upon from time to time.
>
> 2. No party hereto shall engage, directly or indirectly, in the aforementioned transportation under terms, conditions and/or rates different from those agreed upon by and between the members hereto * * *.
>
> 3. All freight and other charges for, or in connection with, such transportation shall be charged and collected by the parties hereto based on actual gross weight or measurement of the cargo or per package, according to tariff and strictly in accordance with the rates, charges, classification, rule and/or regulations adopted by the parties. There shall be no undue preference or disadvantage, nor unjust nor unreasonable discrimination, or unfair practices against any consignor or consignee by any of the parties hereto.

It is all too obvious that these provisions deal only with that general ratemaking authority found in virtually every conference agreement. They are the same provisions in which we earlier were unable to find any authority for equalization in the *Port Equalization* case, supra. At the risk of unduly prolonging this discussion, we would point out that the words "tariffs and other matters" in article 1 relate only to "agreed rates and charges * * * and brokerage," and the words "freight rates and practices" are similarly conditioned. Article 2, in requiring adherence to the "terms and conditions and/or rates * * * agreed upon * * *" obviously refers back to article 1. Lastly, the words "classification, rule and/or regulations * * *" in article 3 relate back to the words "freight and other charges" at the beginning of that provision.

While the Conference's terminal limitation rules do not limit service to specifically designated ports, they do limit the number of ports at which members may call. Thus, they are agreements "allotting ports or restricting or otherwise regulating the number and character of sailings between ports," agreements which section 15 itself distinguishes in kind from those agreements, such as respondents', which deal primarily with the "fixing and regulating of transportation rates or fares." As an agreement which at the least regulates the character of the member's sailings, it must be approved under section 15, and this approval cannot be implied from any "awareness" on the part of

the Commission of the Conference's activities. There is no room in section 15 for theories of "tacit" or "implied" approval. *Joint Agreement—Far East Conference and Pacific Westbound Conference*, 8 FMC 553 (1965). Antitrust exemptions may be enjoyed only with express Commission approval.

II. LAWFULNESS OF THE CONFERENCE'S TERMINAL LIMITATION PRACTICE APART FROM THE QUESTION OF SECTION 15 AUTHORIZATION

Stockton, Sacramento, and hearing counsel contend that the examiner erred in failing to find the Conference's terminal limitation provisions unlawful as contrary to section 205 of the Merchant Marine Act, 1936, and Sacramento in addition maintains that they are unreasonable practices within the meaning of the second paragraph of section 17 of the Shipping Act, 1916. The Conference, on the other hand, asserts that the examiner erred in finding their terminal limitation provisions unlawful in any respect.

The Conference has maintained throughout the proceeding that the Commission cannot declare its limitation rules unlawful under section 205 since the authority to administer that section was not specifically given to the Commission under reorganization plan No. 7 of 1961.[4] The plan did not repeal section 205, and so long as it continues to be a part of "the law of the land * * * [it] must be considered by the Commission in exercising its delegated functions." *Stockton Port District* v. *Pacific Westbound Conference*, 9 FMC 12, 29 (1965).

The Federal District Court for the Northern District of California, in *Sacramento-Yolo Port District* v. *Pacific Coast European Conference*, No. C–70–499RFP, in its order filed May 15, 1970, took the same view of section 205 pointing out that:

> Even if the FMC does not have responsibility for § 205, it must take account of it in its deliberations * * *. That which would contravene § 205 of the Merchant Marine Act would surely be grounds for disapproval under § 15 of the Shipping Act.[5]

That activity which contravenes the prohibitions of section 205 may not be approved under section 15 is made clear by the legislative history of section 205, which shows that the purpose of the act was to

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[4] Prior to reorganization plan No. 7, the Commission's predecessors dealt with the prohibitions of section 205 in a number of cases. See, e.g., *Encinal Terminals* v. *Pacific Westbound Conference*, 5 FMB 316 (1957) ; *Grays Harbor Pulp & Paper Co.* v. *A. F. Klaveness & Co., A/S*, 2 U.S.M.C. 366, 369–70 (1940) ; *Sun-Maid Raisin Growers Association* v. *Blue Star Line, Ltd.*, 2 U.S.M.C. 31 (1939).

[5] There is nothing unusual or unique about such an approach. For a similar treatment of section 8 of the Merchant Marine Act, 1920, yet another provision of law not specifically administered by the Commission, see *Port of New York Authority* v. *Federal Maritime Commission*, supra, at 670.

remove the agency's power to make determinations with respect to the lawfulness of the conference restrictions against federally improved ports on a case-by-case basis under sections 15 and 16 of the Shipping Act, 1916, and to make all such restrictions illegal per se. See for example, Hearings Before the Committee on Commerce, U.S. Senate, Pursuant to S. 5035, 72d Congress, 2d session (1933), 87–90, 114.

Thus, it remains only to determine whether respondents' terminal limitation rules are prohibited by section 205, which provides:

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

There is no dispute with the plainly established fact that all the ports invoking section 205 here are "port[s] designed for the accommodation of ocean-going vessels located on any improvement project authorized by the Congress or through it by any other agency of the Federal Government, lying within the continental limits of the United States."

It is equally clear that both proposed and present rule 10 "prevent or attempt to prevent * * * directly or indirectly, through the medium of a * * * conference * * * [common carriers by water] from serving" Sacramento and Stockton. A simple reading of the rules shows that they restrict service to a limited number of ports (or more exactly, terminals within such ports, which is an even more severe limitation). In addition, the record shows, and counsel for respondents admit, that the terminal limitation rules were designed as a solution of the problem of the alleged high costs of serving Stockton. The fact that certain exceptions are built into the limitations (i.e., for bulk and military cargo and for shipments of a single shipper of at least 750 short tons) does not change the essential character of the rules as restrictions on service. The exceptions only indicate differences in the degree of the restrictions, and this appears to have been recognized by our predecessor.[6] Moreover, the exceptions appear to be

[6] In *Grays Harbor Pulp & Paper Co.* v. *A. F. Klaveness & Co. A/S*, supra, at 369–70, the U.S. Maritime Commission, although finding it unnecessary to rule on the point, treated a tonnage minimum as falling within the kind of restriction outlawed by sec. 205, as did the parties to that proceeding. *San Diego Harbor Commission* v. *American Mail Line, Ltd.*, 2 U.S.M.C. 661 (1937), and *Harbor Commission of San Diego* v. *American Mail Line, Ltd.*, 2 U.S.M.C. 23 (1939), in which certain conference-imposed tonnage minimums at certain

largely immaterial insofar as Sacramento and Stockton are concerned.[7]

Even if all of the lines favor the terminal limitations, as the Conference asserts, this attitude would not mean that the Conference limitations themselves did not restrict port service. But for the existence of the limitations, each member line would be free to serve particular ports in the Bay area or not, as it chose in the exercise of its managerial discretion, subject, of course, to such limitations on this discretion which may be validly imposed by law. The limitations, however, prevent the exercise of such discretion, and it was just such a limitation on the exercise of the discretion of individual lines that convinced the Federal Maritime Board of the illegality under section 205 of the conference restrictions imposed in *Encinal Terminals* v. *Pacific Westbound Conference*, supra. In fact, as Stockton observes, if it were not the purpose of the rule to prevent the lines from exercising their discretion as to what ports they desired to serve, there would be no need for the rule at all.

The record, on the contrary, however, shows that all lines do not favor the Conference-imposed terminal limitations. The proposed version of rule 10 is contrary to the desires of some of the lines and would have, had it been in effect in 1969, actually resulted in the loss of sailings, cargo and revenue to the Port of Stockton. The single terminal limitation does not reflect the unanimous view of the member lines but was adopted as a compromise between those lines which favored continuing the two-terminal rule and lines favoring a single terminal rule, the obvious result of which is that the latter are foreclosed from serving ports which they desire to serve. Moreover, had the single terminal rule been in effect in 1969, as the examiner found, none of the member lines would have designated Stockton as their single loading terminal and that port would have lost 63 sailings, 43,829 tons of cargo, and $498,325 in revenue. In addition, testimony of witnesses for some of the member lines indicates that they would call at Stockton for cargo in the absence of amended rule 10.[8]

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ports were not held to be unlawful, are not controlling or indeed relevant here. These cases, cited to us by respondents, were complaint proceedings in which the agency was limited to the resolution of only those issues raised by the complaints and answers therein, which involved no contentions of illegality under section 205.

[7] The record herein shows that Stockton handles no bulk or military cargo, and only two vessels called there for 750 tons for one shipper in each of the years 1967, 1968, and 1969. Sacramento had only four calls in 1969 under the 750-ton minimum exception.

[8] The record, as all parties agree, fails to show whether present rule 10, in actual practice, eliminates any terminals which would be used by the member lines in its absence. This is immaterial, however, insofar as sec. 205 is concerned since the language of the rule and evidence of record show it is designed to restrict service to certain ports, and sec. 205 makes unlawful "the attempt" to prevent service as well as the actual prevention of service.

It is clear at this point that the respondents' terminal limitations do prevent conference members from serving certain ports within the Conference range, but respondents still contend that this is permissible under section 205 since the service prevented is not service "at the same rates." As respondents read section 205, they would agree that the Conference may not impose a higher rate on one port, say Sacramento, than another, say San Francisco, and then prevent a member from serving Sacramento at the same rate as San Francisco, but they may prevent members from serving Sacramento at any rate whatsoever. It is always difficult to come to grips with such a reductio ad absurdum, and we would hope that respondents' position here is prompted by that venerable but irksome penchant of advocates to use every argument a free-reined imagination can muster. The phrase "at the same rates" was obviously included to preclude the use of "ratemaking" authority as the means by which a conference concertedly refused to serve a port. Section 205 is a clear bar to any artificial limitation on service by a conference.

As the legislative history of 205 shows, its purpose was not only to prevent collective action designed to create discrimination in the form of a difference in rates at which federally improved ports are served, but more importantly to forbid conferences to impose restrictions on their member lines which would interfere with the free exercise of the lines' discretion in the determination of which ports they choose to serve. The so-called Allin amendment, which was the basis of section 205 of the Merchant Marine Act, 1936, was enacted in response to the plea of the Port of Stockton to stop conferences from engaging in allegedly discriminatory practices against the port. The hearings on the amendment disclose on page after page the intention of the Congress to outlaw Conference regulations designed to impose limitations on the free choice of their members with respect to the ports they may serve. Representative excerpts from the testimony of Colonel Allin, the chief proponent of the legislation, clearly show this:

> It is our desire that this legislation be enacted which, is purely permissive, simply enabling any steamship company which desires to go to any port which has been approved by Congress without hindrance of any other steamship company or combination of steamship companies.[9]
>
> * * * We believe that a steamship company, if it so desires of its own free will and accord, should have the right to go there [any federally improved port] and pick it [a shipment] up without being hindered.[10]

[9] Hearings before the Committee on Commerce, U.S. Senate, pursuant to S. 5035, 72d Cong., 2d sess. (1933), at p. 6.

[10] *Ibid*, at p. 7.

* * * We merely desire a line, if it so desires, to extend its service and make use of the Government waterway.[11]

* * * We do not believe in compelling a ship to go anywhere. We would like the ship to have the right to go there without hindrance of competing steamship companies, if that particular steamship line desires to do so.[12]

* * * And all we ask is that if the shipper has a shipment a boat be allowed to come in and get it; this is all.[13]

The committee chairman, in interpreting what became section 205, stated:

It simply says that a steamship company may, notwithstanding any conference agreement, if it desires—it is purely permissive in character—may go to a port and attend to the business of that port.[14]

* * * What I am driving at is this—We start, then, there with what you might term a prohibition, that is, that the steamship company shall not be denied the right, that is all, the inherent right that the carrier has to go to a particular place.[15]

The question of the rates at which federally improved ports were to be served was also important, but the question was viewed as separate from, and subsidiary to, the question of service. The intent of section 205, as shown by the Senate hearings, was first of all to protect against Conference restrictions preventing service at federally improved ports, and then, if the individual member lines of the Conference desire to serve such ports, to allow them to serve them at Conference-established rates, so long as the same rates apply to all such ports. (See hearings, supra, note 19, at pp. 89–90.)

From the foregoing, it is clear that respondents' present and proposed limitations on terminals served by Conference members are in direct contravention of section 205, and as such are contrary to the public interest within the meaning of section 15 of the Shipping Act, 1916. The rules embodying the number of ports served, including minimum tonnages or types of cargo which can be lifted at such ports, must be stricken from the tariff. Our conclusions here are not to be construed as a requirement that any particular line serve any particular port, or indeed that any line serve any port. Although the record herein does not indicate that it would be uneconomical for individual carriers to serve Stockton or Sacramento,[16] such matters are beyond the scope of this proceeding and we do not require them to serve these ports so long

[11] *Ibid*, at p. 8.
[12] *Ibid*, at p. 10.
[13] *Ibid*, at p. 13.
[14] *Ibid*, at p. 88.
[15] *Ibid*, at p. 89.
[16] Although the record herein indicates that shifting of vessels to serve different terminals entails added expense for the lines, it does not indicate either that the lines will be unduly burdened financially by such added expense or indeed that the shift may not prove desirable from the viewpoint of added revenues to be derived from cargoes supplied by the additional ports to which shifts are made.

as they are free to exercise their business judgment with respect to port service absent Conference-imposed restraints. The record shows that at the time of the adoption of the single terminal limitation, some lines desired to continue to serve more than one terminal. We merely preserve their ability to do so.[17] In view of the foregoing, it is unnecessary for us to consider other challenges to the legality of the Conference's terminal limitation rules.

III. CONFERENCE AUTHORIZATION TO ESTABLISH A SYSTEM OF PORT EQUALIZATION

No party specifically excepts to the examiner's conclusion that the Conference is authorized by its presently approved agreement to establish a system of port equalization, and such conclusion is clearly proper. Subsequent to the decision in our docket No. 1102, *Pacific Coast European Conference—Port Equalization Rule*, 7 F.M.C. 623 (1963), affirmed, sub nom., *American Export Isbrandtsen Lines* v. *Federal Maritime Commission*, 334 F. 2d 185 (9th Cir. 1964), which held that, at that time, the Conference lacked authority to establish such a system, the basic agreement was amended to authorize the Conference to allow "absorption[s] at loading and discharging ports of rail, truck, or coastal steamer freights or other charges directly or indirectly * * *" upon the agreement of three-fourths of the member lines. In our order approving the amendment, we noted, "This [absorption] provision will permit the filing by the Conference of a port equalization tariff rule."

IV. LAWFULNESS OF RESPONDENTS' EQUALIZATION SYSTEM AND PROPOSED TERMINATION THEREOF

We need not dwell at length on the matters relating to the Conference's equalization system as embodied in its tariff rule 12. The Confer-

[17] The conference's contention that competitive pressures will force lines to serve terminals which they do not desire to serve is unconvincing. One of the lines operates large ships which the record indicates can only be served at Oakland. Further, the container lines, whose operations would most benefit under the rule because of the higher costs involved in shifting their larger, newer, more costly vessels, will in all probability be unaffected by it since as the examiner found, these vessels would call at one Bay area terminal, irrespective of any conference-imposed terminal limitation. Nor do we believe that the lines will call at terminals if they feel such calls are unprofitable, Conference rule or no conference rule. The record shows that in 1969, four lines declared only a single terminal in the Bay area for their vessels, two lines declared a second terminal on only two out of 13 and 14 sailings, respectively, no line came close to making the two terminal calls authorized with all its vessels, and one line, of its own managerial discretion, withdrew service to Stockton in the case of individual vessels and was considering withdrawing it altogether. The effect of the Conference's terminal limitation rules, rather than protecting the lines against wasteful competition, would be, as the examiner observed, the prevention of the noncontainerized lines, which the record herein shows to be the overwhelming majority of the Conference, "from serving other terminals where containerization might not be desirable or feasible."

ence had proposed elimination of the system to be effective concurrently with the single terminal limitation. No party excepted to the examiner's conclusion that the Conference may lawfully terminate its system by the deletion of rule 12, and we agree that nothing has been presented to indicate that such deletion would be unlawful. In the light of our holding with respect to terminal limitations, however, the Conference may desire to retain its port equalization system. We similarly conclude that nothing has been presented herein to convince us that the retention of the system is unlawful.

Only Stockton contends that the examiner erred in failing to find that the Conference's equalization system is unlawful. That port maintains that the East Bay ports and the up-river ports are in effect two different harbor complexes and geographic areas and their "naturally tributary" cargoes originate in different areas. The holding in *Stockton Port District* v. *Pacific Westbound Conference*, 9 F.M.C. 12 (1965), affirmed sub nom., *Stockton Port District* v. *Federal Maritime Commission*, 369 F. 2d 380 (9th Cir. 1966), cert. den. 386 U.S. 1031 (1967), that equalization between East Bay ports and up-river ports was unlawful was based upon the findings in that proceeding that the up-river and East Bay ports were all in the same port complex and geographic area and that the same cargo was "naturally tributary" to all of them. These findings are not controlling here, Stockton asserts, because evidence of record in this proceeding shows that the East Bay ports and up-river ports are not part of one port complex. Stockton places particular reliance for this conclusion upon the Conference's determined effort to prevent calls at Stockton, and the alleged testimony of Conference members that they do not regard Oakland as being in the same harbor as Stockton and of shippers that they consider the East Bay ports and Stockton as separate ports. The products affected by the rule, Stockton contends, also originate in separate geographical areas (i.e., the San Joaquin Valley, where Stockton is located, and Oakland and the Santa Clara Valley south of San Francisco Bay) whose shippers compete with each other and will be differently affected by the Conference's one-terminal limitation. The examiner's finding that the natural gateway for San Joaquin and Sacramento Valley products destined for Europe is Stockton and Sacramento shows that such cargoes are "naturally tributary" to those ports, and Stockton can offer adequate service to shippers of equalized cargo. Thus, under the principles established in *Pacific Westbound*, *supra*, it maintains the Conference's equalization system is unlawful in unduly prejudicing and unjustly discriminating against the Port of Stockton and unduly preferred and unjustly discriminating in favor of the East Bay ports.

Lastly, Stockton contends that the Conference's equalization rule is detrimental to commerce and contrary to the public interest because it diverts cargo "naturally tributary" to the Port of Stockton contrary to the policy of secion 8 of the Merchant Marine Act, 1920.

Contrary to the contentions of Stockton, the record herein does not show that the situation with respect to the equalized ports is other than we found it to be in *Stockton Port District* v. *Pacific Westbound Conference*, *supra*. It is clear from the examiner's discussion of the shipper witnesses' testimony, which we have reproduced at pages 272–275, supra, that he does not use the term "natural gateway" as synonymous with "naturally tributary." As an examination of this discussion shows, when the examiner spoke of Sacramento and Stockton as the natural gateways for agricultural products from the San Joaquin and Sacramento valleys, destined for Europe, he meant only that the inland transportation rates and mileages are less to Sacramento and Stockton for such products than they would be to other ports. The concept that inland transportation rates and mileages alone determine which areas are naturally tributary to which ports was specifically rejected in *Stockton Port District* v. *Pacific Westbound Conference*, supra, at pages 23–24, as well as in other equalization cases.[18] As we ruled in *Stockton*, areas are naturally tributary to ports if they are "centrally, economically and naturally" served by such ports (at 24). Nothing has been shown herein to indicate that the entire Bay area is not naturally tributary to all the ports concerned herein, as we found it to be in *Stockton*, and there is nothing in the record herein to show that the East Bay ports and up-river ports constitute two different harbor complexes and geographic areas. The Conference's attempts to prevent calls at Stockton, rather than suggest it is in a different harbor complex or geographic area, could equally well be said to suggest that it is in the same area since both ports must compete for the same cargo, otherwise there would be no reason for the Conference to attempt to restrict service at Stockton. Furthermore, the testimony of both the Conference lines and shippers herein shows, contrary to Stockton's assertions, that they consider the East Bay and up-river ports to be in the same geographic area and competitive for the same cargo, and the Conference's practice has been to define the Bay ports in its tariff to include all of the ports involved in this proceeding. Although we do not hold that, with changes in transportation circumstances, the East Bay ports and up-river ports could never constitute separate geographic areas with different tributary cargo, we conclude

[18] See, e.g., *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, 2 U.S.M.C. 699 (1943).

that nothing has been presented herein to convince us that they are such at the present time.

In conclusion, we hold that, on the basis of the record before us, the Conference may lawfully either retain or discontinue its equalization system now embodied in its tariff rule 12.

All exceptions to the initial decision or requests for findings not specifically ruled upon herein have been found to be improper or immaterial, cumulative, or otherwise unnecessary to the decision.

An appropriate order will be entered ordering both present and proposed tariff rule 10 stricken and requiring the Conference to cease and desist from in any way restricting the number of U.S. ports or terminals at which their member lines may call or the tonnage or character of cargo which may be lifted at such ports.

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 70–11

PACIFIC COAST EUROPEAN CONFERENCE—RULES 10 AND 12, TARIFF NO. FMC 14

ORDER

The Federal Maritime Commission has this day served its report in the subject proceeding which we hereby incorporate herein, in which, *inter alia*, it found unlawful any regulations imposed by the Pacific Coast European Conference restricting the U.S. ports or terminals served by its member lines, or the tonnage or character or cargo to be lifted at such ports.

Therefore, for the reasons enunciated in said report,

It is ordered, That both present and proposed tariff rule 10 of tariff No. FMC 14 of the Pacific Coast European Conference be stricken from the Conference's tariff; and

It is further ordered, That said Conference cease and desist from in any way restricting the number of U.S. ports or terminals at which its member lines may call or the tonnage or character of cargo which may be lifted at such ports.

By the Commission.

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 70–41

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION—
KEY AIR FREIGHT, INC.

Decided June 10, 1971

ORDER ON STIPULATION

On April 8, 1971, the presiding examiner served his decision in this proceeding, finding that Key Air Freight violated section 44(a) of the Shipping Act, 1916, by functioning as an ocean freight forwarder of 24 shipments between February 23, 1970, and March 13, 1970. He concluded that respondent was presently "fit" to carry on the business of forwarding and that it should be licensed conditioned upon one of its minority stockholders, Mr. Arthur B. Davidson's, continued total disassociation from respondent and disposal of his 9.5 percent stock interest in respondent within 60 days. Hearing counsel filed no exceptions to the initial decision. Respondent filed exceptions urging principally that the requirement that Davidson dispose of his stock in respondent is inappropriate, unnecessary to accomplish the objectives sought and, in any event, is a condition beyond the control of respondent.

Subsequently, a joint motion was filed by hearing counsel and respondent, the only parties to this proceeding, urging that the Commission license Key Air Freight and discontinue the proceeding on condition that Mr. Davidson will not in the future become an employee, officer, or director of respondent nor will he become involved in the day-to-day management of the business; that Mr. Davidson will not increase his stock interest in respondent beyond his existing 9.5 percent ownership; and that Mr. Davidson's stock shall be placed in a trust with an independent trustee who shall have the power to vote such stock on the basis of its independent judgment until Mr. Davidson determines to dispose of his holdings.

After careful review and consideration of the record and pleadings in this proceeding, we agree with the examiner's factual analysis and concur that the case at bar is quite similar to *Independent Ocean*

Freight Forwarder License Application—Violet A. Wilson doing business as Transmares, 13 FMC 30 (1969). The examiner stated that it would be unfair to punish the present officers, directors, employees, and stockholders of Key for the misdeeds of Davidson who is no longer active in the affairs of respondent. We agree and are of the opinion that the conditions proposed by hearing counsel and respondent in their joint motion are reasonable and proper under the circumstances.

Therefore, it is ordered, That Key Air Freight, Inc., be issued an independent ocean freight forwarder license subject to the following conditions:

1. That Mr. A. B. Davidson will not in the future become an employee, officer or director of respondent, nor will become involved in the day-to-day management of respondent;
2. That Mr. Davidson will not increase his percentage stock interest in respondent beyond his existing 9.5 percent ownership; and
3. That Mr. Davidson's stock shall be placed in a trust with an independent trustee who shall have the power to vote such stock on the basis of its independent judgment. A copy of the executed trust agreement shall be filed with the Commission and the entire matter will be reviewed 1 year from date of issuance of said license to determine the necessity for continuing the trust arrangement.

It is further ordered, That this proceeding be discontinued.

By the Commission.

[SEAL]

FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET No. 71-28

SURCHARGE OF NORTH ATLANTIC WESTBOUND FREIGHT ASSOCIATION ON COMMODITIES MOVING UNDER WINE AND SPIRITS CONTRACT

Decided June 22, 1971

Bunker surcharge imposition found to be violative of clause 9 of the wine and spirits contract between National Association of Alcoholic Beverage Importers, Inc. and North Atlantic Westbound Freight Association.

Rising bunker costs, under the facts herein, do not constitute an "extraordinary condition" within the meaning of clause 4 of the wine and spirits contract, nor do such increased costs unduly impede, obstruct or delay the carriers' service within the context of said clause.

Thomas E. O'Neill, for National Association of Alcoholic Beverage Importers, Inc.

Ronald A. Capone and *Russell T. Weil*, for North Atlantic Westbound Freight Association.

Ronald D. Lee and *Donald J. Brunner*, Hearing Counsel.

REPORT

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

This proceeding was initiated by the National Association of Alcoholic Beverage Importers, Inc. (hereinafter NAABI) against the North Atlantic Westbound Freight Association (hereinafter NAWFA).

NAABI charged that NAWFA filed with the FMC a rate surcharge of $3 per ton for the carriage of alcoholic beverages. Rates between NAABI and NAWFA are governed by the conference's wine and spirits contract, which is a dual-rate contract, the use of which was permitted by the Commission under section 14b of the Shipping Act, 1916. Clause 9 of the contract provides that "no change in rates * * * is to be made without prior consultation" with NAABI.

It is claimed that the imposition of the surcharge, having been made without prior consultation, is therefore in violation of clause 9

of the wine and spirits contract. NAABI therefore requested the Commission issue an order to NAWFA to show cause why the surcharge imposed by NAWFA should not be rescinded. NAWFA in its reply requested that the Commission deny the NAABI petition for the show cause order and hold that NAWFA's surcharge is proper and lawful on the grounds that the rising cost of fuel is an extraordinary condition, necessitating the surcharge.

On March 29, 1971, the Commission issued an order directing NAWFA to show cause why its bunker surcharge should not be canceled as violative of clause 9 of the wine and spirits contract, and not supported by clause 4 of the contract, which permits rates to be changed at any time in the event of "extraordinary conditions." As of April 16, 1971, both parties, as well as hearing counsel, had submitted briefs, and in the interest of expediency requested that no oral hearing be held.

On April 26, 1971, NAABI filed with the Commission a petition for oral hearing. Thereafter, NAWFA and hearing counsel both filed replies in opposition to the request for oral hearing.

Discussion and Conclusion

THE PETITION FOR ORAL HEARING

In its petition for oral hearing, NAABI claims that the intervention of hearing counsel, via their reply of April 16, 1971, in support of NAWFA's position, makes this proceeding something other than a "two-party controversy." Further, it is alleged that hearing counsel introduced new matters not strictly within the scope of the Commission's show cause order; i.e., that the conference has an obligation to levy surcharges against all its shippers aside from the wine and spirits contract.

NAABI argues that the issue of the foreseeability of escalating costs of bunker C fuel is an evidentiary question, best answerable through a hearing. NAABI itself, however, introduces the issue of the reasonableness of the $3 per ton surcharge, which again it contends is best resolved at an evidentiary hearing. It is also urged that hearing counsel introduced the question of the fundamental legality of the wine and spirits contract. Lastly, NAABI claims that since hearing counsel's reply supports that of NAWFA, it should have been filed by the April 9 deadline rather than by the April 16 deadline. Because of the latter filing date, NAABI was precluded from answering hearing counsel's reply and would otherwise not have conceded that an evidentiary hearing was not desirable.

Hearing counsel, in their reply to the petition for oral hearing, argue that this was never a two-party proceeding since under rule 3(b) of the rules of practice and procedure, hearing counsel automatically became a party to this proceeding when the Commission granted the original petition and issued the order to show cause.

It is contended by hearing counsel that NAABI knew that foreseeability of the price increases of fuel would be an issue when it originally petitioned the Commission. In general, the argument of hearing counsel is that NAABI has failed to show a dispute as to the relevant facts which would necessitate an evidentiary hearing.

The issue of the reasonableness of the $3 per ton surcharge, it is contended, is not within the scope of the order to show cause and it would be inequitable to permit NAABI to expand the scope of this proceeding through an evidentiary hearing. Hearing counsel vociferously deny having raised the issue of the fundamental legality of the contract.

NAWFA, in its reply to the petition for oral hearing, argues along the same lines as hearing counsel. It claims that hearing counsel have not set forth any new facts or issues which would justify an evidentiary hearing.

We conclude that NAABI has failed to demonstrate why its petition for oral hearing should not be denied. The argument that this proceeding was a "two-party controversy" is specious. It is clearly stipulated in section 502.42 of our rules of practice and procedure that hearing counsel "shall be a party to all proceedings governed by the rules in this part * * *" [rule 3(b)]. Regardless of the merits of that contention, NAABI has failed to show a dispute as to relevant facts, the only justification for an evidentiary hearing.

We have before us all the relevant facts necessary for the disposition of this controversy. The "ancillary question" of the reasonableness of the $3 per ton surcharge is not properly before us in this proceeding, and clearly the scope of this proceeding should not be expanded by the introduction of extraneous matter through an evidentiary hearing.

As for the issue of the fundamental legality of the contract, hearing counsel have not raised it and it is not of concern to us in this proceeding. The issue of whether the conference has an obligation to levy the $3 per ton surcharge against all its shippers, despite the contract, is a question of law and not one of fact; this too is an issue not raised by the pleadings.

The facts concerning the issue of foreseeability are before the Commission and are no different from those in docket No. 70-43, *Atlantic*

and Gulf/West Coast of South America Conference Imposition of a Bunker Surcharge on Less Than 90-Day Tariff Filing Notice, 14 FMC 166 December 21, 1970, in which the same issue was resolved.

We therefore conclude that the information before us is dispositive of this controversy and there is no need for resort to an oral hearing.

The petition for oral hearing is hereby denied.

THE ORDER TO SHOW CAUSE

Under the wine and spirits contract, although clause 9 provides that no rates shall be changed without prior consultation, clause 4(c) allows for an increase in rates "in the event of any extraordinary conditions * * * which conditions may unduly impede, obstruct, or delay the obligations of the carrier or carriers."

Thus, the issue becomes one of determining whether the rise in bunker fuel costs (an admitted fact) constitutes an extraordinary condition which unduly impedes, obstructs or delays the carrier's service.

It is NAWFA's contention that there is no question that increases in the cost of bunker fuel are just such conditions as would justify the imposition of a surcharge. These increases are referred to as "startling" and "violent" and are therefore claimed to have been unforeseeable and thus extraordinary. In a curious argument, NAWFA contends that clause 4(c) has no application where 90 days' notice of the increase has been given.

NAWFA further argues that clause 9 has no application to surcharges but refers only to "rates", and NAWFA did not intend to restrict its rights to institute surcharges by clause 9.

In countering NAWFA's argument that increased fuel costs are an extraordinary condition, NAABI contends our decision in docket No. 70–43 stands for the principle that increased fuel costs are not extraordinary conditions.

Further, NAABI claims that even if the increased costs do constitute an extraordinary condition, they are not such conditions as unduly impede, obstruct, or delay service, and therefore NAWFA has failed to sustain the burden of proof as to the legality of the surcharge.

NAABI argues that under the particular wine and spirits contract, the ordinary dual rate contract provision for increases upon 90 days' notice is not applicable.

The argument that an imposition of a surcharge is not an increase in rates is termed a legal fiction by NAABI. It is claimed that if the

carriers can vary the terms of their obligation under the contract to stand by rates specified as effective until September 30, 1971, through the use of fuel surcharges, then there is no reason why surcharges for any other costs could not likewise be imposed.

Hearing counsel in this case take a position diametrically different from that advocated in docket No. 70–43, which involved similar circumstances. In the instant proceeding, it is claimed that the increased fuel costs (no greater or different from those found in 70–43) constitute extraordinary conditions that unduly impede, obstruct, or delay service.

Curiously, hearing counsel claim that the position they advocated and the conclusion consequently reached by the Commission in 70–43 are now not applicable to this proceeding. This is said to be due to the fact that in that proceeding the issue of extraordinary conditions was treated in the context of the 30-day/90-day notice rule discussed below.

Lastly, it is claimed that NAWFA, at the inception of the contract, had no tangible evidence of "tremors" in the market for bunker fuel, and since the contract had fixed rates, nothing could be done about "tremors" even had they been perceived.

Hearing counsel's contract argument seems to conceive of the contract as something separate and apart from the intent of the parties. Had the "tremors" existed at the inception, the parties could easily enough have provided in their contract for contingencies of this nature. They didn't do it, and now NAWFA wants to rewrite its contract. Moreover, hearing counsel largely ignore the importance of the fixed rates to NAABI.

In *Surcharge at U.S. Atlantic and Gulf Ports*, 10 F.M.C. 13, 22 (1966), the Commission set forth the criteria for extraordinary conditions: "The condition must be outside or beyond the carrier's control, the condition must impede or delay the carrier's service, and there must be an emergency, or abnormal condition, or an extraordinary circumstance."

We conclude that NAWFA has failed to show cause why its bunker surcharge should not be canceled.

In the *Surcharge at U.S. Atlantic and Gulf Ports* case, *supra*, the test for extraordinary conditions was set forth by the Commission. It is clear that the test reduces to one of foreseeability. That is, should the carrier, " 'in the exercise of a high degree of diligence in the exercise of business judgment' have foreseen or anticipated the conditions upon which the surcharges are based." An affirmative answer to this question leads one to conclude that the condition is not extraordinary.

In the instant case, the issue of whether the condition of increasing bunker costs is extraordinary need not be reached. Conceding, arguendo, that such a condition is extraordinary (although, as we have stated on the facts of docket No. 70–43, it is not), we conclude that such a condition does not unduly impede or delay the carrier's service.

The only difference between the present case and docket No. 70–43 is that in 70–43 the issue was whether 90 days' notice was required for a surcharge due to the increased fuel costs. This provision was a part of the conference's dual-rate contract, just as in the instant case the contract provides for no increase at all, save for the existence of extraordinary conditions unduly impeding or delaying the obligations of the carrier. (Clause 4(c) of the wine and spirits contract.)

Thus, in 70–43, the existence of an extraordinary condition unduly impeding and delaying service would result in the imposition of a surcharge upon 30 days' notice as opposed to 90 days' notice, lacking such a condition. In the instant case, the existence of such a condition would allow for the surcharge in accordance with clause 4(c) of the contract (upon 30 days' notice) as opposed to no surcharge imposition, lacking the extraordinary condition, and lacking prior consultation with NAABI under clause 9.

The wording of the contracts in both cases is precisely identical; the only distinction between the two situations lies in the results which follow a determination of whether an extraordinary condition exists. In the one, docket No. 70–43, the surcharge will be imposed either upon 30 days' notice or 90 days' notice. In the other, docket No. 71–28, the surcharge will either be imposed upon 30 days' notice or not at all.

There would appear no reason to interfere with the parties' fundamental right to freedom of contract; the bounds of consistency and logic call for the wording of the contracts to be interpreted in a like manner. Thus, the issue presented—what is an "extraordinary condition which may unduly impede or delay the obligations of the carrier"?—should be resolved in the same way as docket No. 70–43.

In that proceeding, as pointed out above, we concluded under similar circumstances that a rise in bunker fuel costs was not such an extraordinary condition as to unduly impede or delay service. We are compelled to reach that same conclusion in this case as well.

We therefore conclude that the rise in fuel costs does not justify the imposition of a surcharge in this case in violation of clause 9 of the wine and spirits contract.

We find NAWFA's remaining arguments lacking merit. We cannot believe that NAABI would enter into a contract which specifically

stated that rates were to be fixed for a period of time, but which would allow for the imposition of surcharges at will by NAWFA simply because the contract refers to "rates" and a surcharge is not part of a rate as claimed by NAWFA. The surcharge here is but a rate increase by another name.

We argree with NAABI that the ordinary dual rate contract provision for increases upon 90 days' notice is not applicable. This is a contract freely negotiated by the parties thereto, and such a provision is clearly lacking as pointed out in hearing counsel's brief.

NAWFA has failed to meet its burden of proof in showing cause why its bunker surcharge should not be canceled. Accordingly, an appropriate order will be issued prescribing that NAWFA cancel its surcharge forthwith, retroactive to its imposition on March 21, 1971.

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-28

SURCHARGE OF NORTH ATLANTIC WESTBOUND FREIGHT ASSOCIATION ON COMMODITIES MOVING UNDER WINE AND SPIRITS CONTRACT

ORDER

This proceeding was instituted by the National Association of Alcoholic Beverage Importers, Inc. (NAABI), by a complaint filed against the North Atlantic Westbound Freight Association (NAWFA). A show cause order was issued by the Commission on March 29, 1971, directing NAWFA to show cause why a bunker surcharge imposed upon NAABI should not be canceled as violative of clause 9 of the conference's wine and spirits contract. NAWFA's response to the order to show cause, and replies 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 NAWFA has failed to show cause why its surcharge should not be canceled.

Therefore, it is ordered, That the petition for oral hearing be denied.

It is further ordered, That NAWFA forthwith cancel its surcharge of $3 per ton for the carriage of alcoholic beverages.

It is further ordered, That this order is effective retroactive to the imposition of the surcharge on March 21, 1971.

By the Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET No. 99(I)

JOSEPH AND SIBYL JAMES
v.
SOUTH ATLANTIC & CARIBBEAN LINE, INC.

July 24, 1970

ADOPTION OF DECISION

On June 8, 1970, the presiding examiner served his decision in this proceeding, finding that South Atlantic and Caribbean Line, Inc. (SACAL) had engaged in an unreasonable practice in violation of section 18(a) of the Shipping Act, 1916, by failing to give adequate notification to complainants of the arrival of their cargo. Based on this finding, complainants were awarded reparation in the amount of $198.45. On June 23, 1970, we served notice of our intention to review the decision.

While the examiner's ultimate conclusion appears fully supported by the record, his method of reaching this conclusion has given rise to a procedural difficulty. The original claim alleged a violation by SACAL of section 14 Fourth; no mention was made of section 18(a). Thus, in reaching his conclusion, the examiner has relied upon a section of the act which complainants have not alleged was violated. This was error. If section 18(a) was to be relied upon, complainants should have been required to amend their claim.

As noted previously, however, the examiner's conclusion appears to be eminently proper. It is to be noted that SACAL has informed the Commission that the reparation was made to complainants shortly after the examiner's decision. Accordingly, we adopt the examiner's ultimate conclusion as our own.

We wish to emphasize that it is not the intention of the Commission to scrutinize every minute aspect of the record in informal complaints. Such a policy would seriously distort the purpose of the small claims procedure. In the instant case, however, we have taken this action in order to provide guidance for the future.

By the Commission.

[SEAL]

FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET No. 99 (I)

JOSEPH AND SIBYL JAMES
v.
SOUTH ATLANTIC & CARIBBEAN LINE, INC.

Adopted July 24, 1970

INITIAL DECISION

Respondent's arrival notification found to be an unreasonable practice. Reparation awarded.

Joseph and *Sibyl James* for themselves.
Bradley R. Coury for respondent.

DECISION OF RICHARD M. HARTSOCK, PRESIDING EXAMINER

The essential facts involved in this complaint are not in dispute. On July 15, 1969, Mrs. Joseph James delivered a Chevrolet automobile to respondent for shipment to San Juan, P.R., on respondent's vessel *Floridian* on July 30. The carrier's bill of lading (No. 58 C), dated July 30, 1969, shows total freight charges of $218. On the lower right-hand corner of the bill, and superimposed over a part of the written matter thereon, including the name of the shipping line and a signature on behalf of the master of the ship, appears the following somewhat faint impression of a rubber stamp:

ESTE VAPOR LLEGARA
EN 8/2

AL MUELLE 8

CARGA ALMACENA
EL 8/8 4:00 P.M.

CARRIER not responsible for condition of cargo on outturn if consignee fails to take delivery of charge immediately upon trailer being made available by carrier.

The Spanish portion of the stamp translates as follows: "This ship will arrive in 8/2 at Pier 8. Cargo will begin accumulating storage charges the 8/8 at 4:00 p.m."

An invoice dated July 30, forwarded by respondent to Mrs. James in Juana Diaz, P.R., contained the total charges for the transportation service, the bill of lading number, the name of the vessel, the ports of loading and discharging, the invoice date, the voyage number, and the sailing date. The arrival date was left blank.

The invoice and the bill of lading were received by Mrs. James during the first week of August. When, by August 25, no arrival notice had been received, Mrs. James checked at San Juan and found that the automobile had arrived on August 8 and had been placed in storage for complainant's account. The automobile was released upon payment of the freight and $198.45 storage charges assessed by the local port authority. While the automobile was clean and in good condition at the time of delivery to the carrier in Miami, when it was taken possession of in San Juan the upholstery had been soiled, a cigaret lighter was missing, and the outside was encrusted with salt. No money claim is made for the physical condition of the automobile.

Mrs. James asserts that at the time she tendered the automobile to the carrier its representative advised her that she could expect it to be delivered in San Juan in approximately 4 weeks, and that she would be notified of its arrival. Further, that when she received the envelope containing the invoice and the bill of lading she examined the papers but was unable to find an arrival date and concluded that an arrival notice would come later. This conclusion was strengthened by her knowledge that friends who had shipped automobiles by other carriers had first received the shipping documents and later a clear notification of arrival, with the words "Important, Arrival Notice" printed in English on the envelope and at the head of the notice itself. Mrs. James contends that the carrier should have provided some meaningful notice of arrival and that the assessment of storage charges was the direct result of inadequate notice.

Respondent's position is that the bill of lading contained a clear notification of arrival, that the stamp has been in use since 1962, that no complaints have been received regarding its use, that Spanish is the predominant language in Puerto Rico, that pleadings in the Commonwealth court, if filed in English, must be accompanied by a Spanish translation, that road and traffic signs in Puerto Rico are in Spanish, and that utility bills to residents of Puerto Rico are in Spanish irrespective of whether they are mailed to Spanish- or English-speaking residents. It is inconceivable, respondent maintains, that the language of a foreign locale must bend to the needs or inabilities of American citizens traveling in that country. Respondent concludes that the storage charges accrued because the inability of claimant to

read Spanish, which is not the fault of the carrier. In short, it is urged that actual notice was given in the official language of Puerto Rico and that nothing further is required. As to the condition of the vehicle when received by complainants, respondent alleges that to its best knowledge and belief the vehicle was properly handled during all stages of transit.

Discussion and Conclusion

Complainants assert that the circumstances establish a violation of section 14 Fourth of the Shipping Act, 1916 (the act), which proscribes unfair treatment of a shipper in the loading and landing of freight in proper condition. As previously noted no money claim has been asserted for the condition of the automobile. The thrust of the claim is for recovery of storage charges resulting from respondent's inadequate arrival notice. The claim for storage charges is not cognizable under section 14 Fourth, because it does not concern the loading and landing of freight in proper condition.

In contrast to section 14 Fourth, section 18(a) provides:

> That every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto * * * and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

Both the bill of lading and the invoice bear the same date, July 30, 1969. Both were addressed to Mrs. Joseph James and were received by her early in the first week of August. The invoice, in English, shows a blank entry after "arrival date." The bill of lading contains in the right bottom corner a rubber stamp imprint bearly legible, which provides in Spanish that "the ship will arrive in 8/2 at Pier 8. Warehouse cargo the 8/8 4:00 P.M." [2] The stamp impression was placed over provisions of the bill of lading which provided that the conditions on the reverse side thereof were continued on the face of the bill of lading, the typed signature of SACAL of Florida Inc. signing the bill of lading as agents and the written signature of someone signing the bill of lading for the master of the ship. To persons not acquainted with the procedures of respondent in providing notification, the stamped notification would have appeared to bear some relationship to authentication of the bill of lading or some other purpose unconnected with the arrival of the vessel. The stamp itself, as placed, would

[2] This verbatim translation differs from respondent's translation, presumably because respondents' is a "free" translation carrying with it certain understanding of the words in the trade.

not put an ordinary, prudent person on notice that the matters therein were of importance.

As noted, the invoice had left blank the arrival date. Mrs. James had been advised by a representative of the respondent when tendering her automobile that it would take approximately 4 weeks for delivery from Miami to San Juan. Friends and acquaintances of hers who had shipped automobiles to Puerto Rico had first received the bill of lading and other papers and later received a clear notification of arrival by separate correspondence. For Mrs. James to have waited until August 25 before making inquiry concerning the arrival of her vehicle, in the circumstances, was not unreasonable.

It was not unreasonable for Mrs. James to have overlooked the notice of arrival in Spanish stamped on the bill of lading. While it is understood that everyday social and business affairs in Puerto Rico are conducted in Spanish, here the transaction was between an English-speaking resident of the United States and an American common carrier operating in the offshore domestic commerce of the United States. Respondent's notification of arrival was an unreasonable practice in delivering property and was the proximate cause of the accrual of storage charges.

Complainant is awarded the sum of $198.45 as reparation. Interest at the rate of 6 percent per year will be added if reparation is not paid within 30 days after the service of this decision.

RICHARD M. HARTSOCK,
Presiding Examiner.

WASHINGTON, D.C.
June 8, 1970.

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ABSORPTIONS

Agreement among Japanese lines to maintain containership service between Japan and ports in Washington and Oregon will not be modified by prohibiting issuance of bills of lading to ports other than those ports specified in the bills of lading which are served directly by the vessel on the voyage on which the cargo is carried. The purpose of the modification requested by Hearing Counsel is to insure that Portland's growth potential as a container port is not arrested by absorption practices which divert cargo. However, the validity of port-to-port absorption practices was not in issue. Absorption between Seattle and Portland is under investigation in another proceeding to which Seattle, Portland and the Japanese lines are parties. The public interest is adequately safeguarded because of that proceeding. It is not necessary to modify the "Sailings" clause of the agreement to substitute "by unanimous assent" for "agreement." The terms of the agreement contemplate the unanimous action of the parties. Agreement No. 9835—Japanese Lines' Pacific Northwest Containerships Service Agreement, 203 (209).

Approved agreement authorizing a conference to allow "absorption[s] at loading and discharging ports of rail, truck or coastal steamer freights or other charges directly or indirectly" permits the filing by the conference of a tariff rule providing for equalization of shippers' inland transportation costs from point of origin to loading terminal. Retention of the system would not be unlawful. Pacific Coast European Conference—Rules 10 and 12, Tariff No. FMC 14, 266 (285–286).

The record does not show that the situation with respect to equalized ports in the San Francisco Bay area is other than the Commission found it to be in a prior case [9 FMC 12]. When the examiner spoke of Sacramento and Stockton as the natural gateways for agricultural products from the San Joaquin and Sacramento Valleys, he meant only that the inland transportation rates and mileages are less to Sacramento and Stockton for such products than they would be to other ports. The concept that inland transportation rates and mileages alone determine which areas are naturally tributary to which ports has been specifically rejected by the agency in other equalization cases. Areas are naturally tributary to ports if they are "centrally, economically, and naturally" served by such ports. The record does not show that the entire Bay area is not naturally tributary to all ports involved in the proceeding, and there is nothing to show that the East Bay ports and up-river ports constitute two different harbor complexes and geographic areas. Conference attempt to prevent calls at Stockton, rather than suggest it is in a different harbor complex or geographic area, could equally well be said to suggest that it is in the same area since both ports must compete for the same cargo, otherwise there would be no reason for the confer-

ence to attempt to restrict service at Stockton. Pacific Coast European Conference—Rules 10 and 12, Tariff Nó. FMC 14. Id. (287).

AGREEMENTS UNDER SECTION 15: See also Terminal Leases.

—In general

Every agreement filed with the Commission for approval must be tested under the criteria of section 15. When prior to approval of an agreement one party repudiates or withdraws from the agreement, a completely new set of relationships arises, and normally a new beginning is required. Should the remaining parties to the agreement desire approval even without the withdrawing party, it is incumbent on them to reformulate the terms of the agreement so that it may be tested under the criteria of section 15. Inter-American Freight Conference—Cargo Pooling Agreements Nos. 9682, 9683, and 9684, 58 (62).

On the basis of a literal interpretation, any agreement falling within any one of the seven categories of activity enumerated in section 15 is subject to filing and approval, notwithstanding the degree or extent of its involvement or the subjective intent of the parties in entering into the agreement. The Supreme Court has held that section 15 requires the filing of every agreement in any of the seven categories. The legislative history supports this literal interpretation. American Export Isbrandtsen Lines, Inc., Order to Show Cause, 82 (85).

A stipulation entered into during a hearing before the Maritime Subsidy Board and consisting of promises by a subsidy applicant that it would not seek or accept operating-differential subsidy for military carryings and that it would seek to have included in any new agreement a formula for abatement of subsidy similar to that for domestic intercoastal service; and of promises by an unsubsidized carrier and an association whose membership includes unsubsidized carriers that they would withdraw their objections to the subsidy application and would not oppose any use by the applicant of any nonsubsidized vessel in any nonsubsidized service, provided for an exclusive preferential, or cooperative working arrangement, constituted a special privilege or advantage, and controlled, regulated, prevented, or destroyed competition. American Export Isbrandtsen Lines, Inc., Order to Show Cause. Id. (86).

Stipulation entered into during a hearing before the Maritime Subsidy Board, providing for nonacceptance of subsidy for military carryings by a subsidy applicant in return for withdrawal from the hearing by nonsubsidized interests and a promise not to oppose use by the subsidy applicant of any nonsubsidized vessel in any nonsubsidized service was a section 15 working arrangement. The promise not to oppose use of unsubsidized vessels accorded the subsidy applicant a "special privilege or advantage" not available to others. The agreement also came within the provision of section 15 on competition. The subsidy applicant's promise not to seek or accept subsidy for military carryings affected competition for such cargoes. Inter alia, the competitive positions of both subsidized and unsubsidized carriers would be restructured to some extent. American Export Isbrandtsen Lines, Inc., Order To Show Cause. Id. (86–87).

To interpret section 15 as applying only to those agreements enumerated therein which are restrictive, anticompetitive operating arrangements is not in accord with the literal language of the section or with recent judicial interpretations. American Export Isbrandtsen Lines, Inc., Order To Show Cause. Id. (87).

Stipulation concerning subsidies for military carryings, entered into during a hearing before the Maritime Subsidy Board, was not constitutionally exempt

from Commission control or interference on the basis that it was joint or several representation to the government. The stipulation did not involve the "concerted action" envisioned in the constitutional right to petition the government or its representatives, and did not involve the right to join together to obtain judicial redress of constitutionally guaranteed rights. It involved instead individual understandings or agreements which were not submitted to the government with any specific intent of exerting influence to obtain an objective from the government. American Export Isbrandtsen Lines, Inc., Order To Show Cause. Id. (87–88).

Agreement providing merely for the sale of four vessels by one carrier to another, with no commitments, understandings or undertakings of any nature between the parties, is approved. The agreement appears to afford substantial benefits to foreign commerce and to the public interest. Inter alia, the high speed of the vessels will permit the purchaser to increase its port coverage, thus allowing shippers a more comprehensive direct service and benefitting added ports as well. Agreement No. 9905, 163 (164–165).

The Commission is charged with disapproving a section 15 agreement based on the following four standards: unjust discriminations; detriment to commerce; contrary to the public interest; and violation of the 1916 Act. The Commission must be presented with substantial evidence to support a finding under one or more of these standards. Substantial evidence cannot be found on the record to justify disapproval of an agreement among Japanese lines to maintain containership service between Japan and ports in Washington and Oregon. A proper judgment on balance must be that operations under the agreement will not be unjustly discriminatory in any true sense of the word, will be beneficial to commerce, in keeping with the public interest, and not a violation of the Act. Agreement No. 9835—Japanese Lines' Pacific Northwest Containerships Service Agreement, 203 (207).

Agreement among Japanese lines to establish and maintain a three vessel containership service between Japan and ports in Washington and Portland was full and complete as filed. Matters such as schedules, advertising, space charters, mutual accounting procedures and container interchanges do not speak to the essence of the agreement. Formalization of remaining details will not constitute creation of a new agreement or arrangement requiring separate section 15 approval. Rather, they are "interstitial sort of adjustments." Agreement No. 9835—Japanese Lines' Pacific Northwest Containerships Service Agreement. Id. (208).

Collective action of conference in limiting the number of terminals served by its members in the San Francisco Bay area requires specific approval pursuant to section 15. An agreement which fails to authorize equalization between ports cannot under any reasonable construction provide authority for the more severe system of explicit limitations on the number of ports served by the parties to that agreement. Pacific Coast European Conference—Rules 10 and 12, Tariff No. FMC 14, 266 (277).

The question of whether a particular activity is authorized by the basic conference agreement does not hinge on the "newness" or "novelty" of that activity. The determination that the particular rate structure in the Overland/OCP case was authorized by the basic agreements of the conferences employing the rates did not depend on the length of time those rates had been in effect. Rather, it was concluded that the rate-fixing authority expressly spelled out in the agreement could reasonably be construed to include the authority to fix rates, and further that since the rates in question had been widely used continuously from a time preceding approval of the agreement, the approval when

granted could be naturally interpreted to allow a continuation of that activity. Pacific Coast European Conference—Rules 10 and 12, Tariff No. FMC 14. Id. (277–278).

It is not the "newness" of an activity which determines whether that activity is within the scope of an approved agreement. Only the language of the agreement and its reasonable interpretation can do that. This insistence on adherence to the terms of an agreement is crucial to the continued existence of the rights of persons dealing with conferences and other groups enjoying antitrust exemptions under section 15 to know how they may reasonably expect to be affected by the concerted activity of such groups. Pacific Coast European Conference—Rules 10 and 12, Tariff No. FMC 14. Id. (278).

Provisions of its agreement, cited by the conference as authority to limit loading berths, deal only with that general ratemaking authority found in virtually every conference agreement. Pacific European Conference—Rules 10 and 12, Tariff No. FMC 14. Id. (279).

While the conference's terminal limitation rules do not limit service to specifically designated ports, they do limit the number of ports at which members may call. Thus, they are agreements "alloting ports or restricting or otherwise regulating the number and character of sailings between ports," agreements which section 15 itself distinguishes in kind from those agreements which deal primarily with the "fixing and regulating of transportation rates or fares." As an agreement which at least regulates the character of the members' sailings, it must be approved under section 15, and approval cannot be implied from any "awareness" on the part of the Commission of the conference's activities. There is no room in section 15 for theories of "tacit" or "implied" approval. Antitrust exemptions may be enjoyed only with express Commission approval. Pacific Coast European Conference—Rules 10 and 12, Tariff No. FMC 14. Id. (279–280).

Reorganization Plan No. 7 of 1961 did not repeal section 205 of the Merchant Marine Act of 1936, and so long as the section continues to be a part of the law it must be considered by the Commission in exercising its delegated functions. The legislative history of section 205 makes it clear that activity which contravenes the prohibitions of the section cannot be approved under section 15 of the 1916 Act. The purpose of section 205 was to remove the agency's power to make determinations with respect to the lawfulness of conference restrictions against federally improved ports on a case-by-case basis under sections 15 and 16 of the 1916 Act, and to make all such restrictions illegal per se. Pacific Coast European Conference—Rules 10 and 12, Tariff No. FMC 14. Id. (280–281).

Conference tariff rules limiting the number of loading terminals in the San Francisco Bay area to one or two, resulting in prevention of service to Sacramento and Stockton, violate section 205 of the 1936 Merchant Marine Act which makes it unlawful for a conference to prevent carriers from serving any port designed for the accommodation of ocean-going vessels located on any improvement project authorized by the Congress or through it by any other agency of the government, lying within the continental limits of the United States, "at the same rates" which it charges at the nearest port already regularly served by it. The phrase "at the same rates" was obviously intended to preclude the use of "rate making" authority as the means by which a conference concertedly refused to serve a port. Section 205 is a clear bar to any artificial limitation on service by a conference. Pacific Coast European Conference—Rules 10 and 12, Tariff No. FMC 14. Id. (281–283).

As the legislative history of section 205 of the Merchant Marine Act of 1936 shows, its purpose was not only to prevent collective action designed to create discrimination in the form of a difference in rates at which federally improved ports are served, but more importantly to forbid conferences from imposing restrictions on their member lines which would interfere with the free exercise of the lines' discretion in the determination of which ports they choose to serve. The question of the rates at which federally improved ports were to be served was also important, but the question was viewed as separate from, and subsidiary to, the question of service. The intent of section 205, as shown by the Senate hearings, was first of all to protect against conference restrictions preventing service at federally improved ports and then, if the individual lines desire to serve such ports, to allow them to serve them at conference-established rates, so long as the same rates apply to all such ports. Pacific Coast European Conference—Rules 10 and 12, Tariff No. FMC 14. Id. (283–284).

Present and proposed conference rules limiting the numbers of loading terminals in the San Francisco Bay area are in direct contravention of section 205 of the Mercrant Marine Act of 1936, and as such are contrary to the public interest within the meaning of section 15 of the Shipping Act, 1916. The rules embodying the number of ports served, including minimum tonnages or types of cargo which can be lifted at such ports, must be stricken from the tariff. This is not to be construed as a requirement that any particular line must serve any particular port, or, that any line serve any port. Pacific Coast European Conference—Rules 10 and 12, Tariff No. FMC 14. Id. (284).

—Antitrust policy

Agreement of the New York Shipping Association, providing for a man-hours/tonnage assessment formula to meet fringe benefit obligations in union contracts, is not violative of the antitrust laws. The agreement is not a price-fixing arrangement as it merely provides an assessment arrangement to meet the costs of a separate labor contract. If the agreement were to be considered one of a nature contemplated by the antitrust laws, it would nevertheless have to be approved under the Shipping Act, because there is such a compelling transportation need for the agreement to avert chaos at the Port of New York. Agreement No. T–2336—New York Shipping Association Cooperative Working Arrangement, 94 (145).

Agreement to permit six Japanese lines to establish and maintain a three vessel containership service between Japan and Ports in Washington and Oregon affords transportation benefits, including regularity of service and efficient utilization of high cost equipment, which far outweigh any relevant antitrust considerations which could be marshaled against its approval under section 15. The agreement merely provides for a cooperative working arrangement covering space chartering and interstitial agreements on future sailings and administrative details. Agreement No. 9835—Japanese Lines' Pacific Northwest Containerships Service Agreement, 203 (207).

—Assessment formula

Although there is no trade between the Port of New York and Alaska, it is advisable to place cargo between those places in the excepted category under the agreement of the New York Shipping Association providing an assessment formula to meet fringe benefit obligations in union agreements, in order to encourage such cargo to move if and when some trade develops. Agreement No.

T-2336—New York Shipping Association Cooperative Working Arrangement, 94 (101, 133, 148).

Excepted status is proper for cargoes in the trade between New York and Hawaii in connection with the assessment formula of the New York Shipping Association. Westbound trade is not extensive at present and there is no eastbound common carrier service. There is substantial justification for considering the trade between New York and Hawaii as consisting of marginal cargoes highly subject to diversion to other routes and therefore these cargoes should be placed in the excepted status. Agreement No. T-2336—New York Shipping Association Cooperative Working Arrangement. Id. (101, 133, 134, 148).

Excepted status is proper for cargoes in the southbound as well as in the northbound segment of the trade between New York and Puerto Rico, in connection with the assessment formula of the New York Shipping Association. The trade, fully containerized, has provided a steady growth for years in increased work opportunities. The assessment under excepted cargo status provides for rate of reimbursement to the ILA for every item of increased labor costs with the exception of "shortfall" which is that item of annual expense attributed to the failure of the Port of New York to obtain a total of 40 million man-hours of labor. The trade between New York and Puerto Rico did not cause the shortfall. In partially exempting the trade the examiner was properly concerned with the employment and economy of Puerto Rico and with the "Fomento" industrialization program. These factors and the record as a whole clearly establish the adverse effect the assessment formula would have upon the entire trade, both northbound and southbound. Agreement No. T-2336—New York Shipping Association Cooperative Working Arrangement. Id. (97-99, 134-136).

Approval of the agreement of the New York Shipping Association, providing for a combined man-hours/tonnage assessment formula to meet fringe benefit obligations in union contracts is conditioned on modification of the agreement to expand the definition of who may request modification of the tonnage definitions to include persons substantially affected thereby, rather than limiting review by the Tonnage Review Committee to requests by members of the Association. Agreement No. T-2336—New York Shipping Association Cooperative Working Arrangement. Id. (102, 136-137, 148).

Agreement of the New York Shipping Association providing for a combined man-hours/tonnage assessment formula to meet fringe benefit obligations in union contracts, need not be amended in its tonnage definition of tons of automobile, trucks, and buses to specify calculation at 18 percent instead of 20 percent of the cubic measurement of the vehicles. Review of the record does not convince the Commission that the 20 percent of measurement tonnage is unfair. The prime factor is the significantly higher productivity in the handling of automobiles vis-a-vis breakbulk operations. Furthermore, the additional costs to the motor vehicle carriers under the agreement are not substantial and are offset by the substantial benefits applicable to automobile carriers. Automobiles, trucks, and buses as treated under the agreement should be approved as submitted. Agreement No. T-2336—New York Shipping Association Cooperative Working Arrangement. Id. (100-101).

Agreement of the New York Shipping Association providing for a combined man-hours/tonnage assessment formula to meet fringe benefit obligations in union contracts should be modified to provide that bananas be calculated at 55 percent of cubic measurements of the boxes in which they are shipped as part of the tonnage definition of the agreement. Agreement No. T-2336—New York Shipping Association Cooperative Working Arrangement. Id. (101, 145, 148).

Agreement of the New York Shipping Association, providing for a combined man-hours/tonnage assessment formula (to replace the old man-hours formula) to meet fringe benefit obligations in union agreements, is approved with modifications. The agreement has not been shown to be, and is not, unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, and as modified, will not operate to the detriment of United States commerce or be contrary to the public interest. Agreement No. T–2336—New York Shipping Association Cooperative Working Arrangement. Id. (102, 146, 148).

—Burden of proof

The burden of proof with respect to approval of a section 15 agreement ultimately rests with the Commission. The burden of proof has not been transferred to protesting carriers by the issuance of a show cause order. The proponent of an agreement may be required to come forward with information concerning the agreement. Requirement that protestants show cause why the agreement should not be approved merely places them under obligation to come forward with information in support of allegations made in their protests. Agreement No. 9905, 163 (165).

—Conference membership

Section 15 and General Order 9 impose two obligations: on the one hand, conferences are obliged to allow their members to withdraw from conference membership "without penalty" when the withdrawing member gives "reasonable notice"; while on the other, the withdrawing member, if it desires to avoid penalty, is obliged to give the conference the required notice of its intention to withdraw. The conference conclusion that under no circumstances may a withdrawal be effective until the expiration of the notice period completely writes out of the statute and the General Order the words "without penalty." If a line could not effectively withdraw from a conference until the expiration of the notice period, it would be impossible for it to breach the agreement by failing to give adequate notice of withdrawal and thus a withdrawing line could never be subjected to a penalty for improper withdrawal. North Atlantic French Atlantic Freight Conference—Petition for Declaratory Order, 46 (49–50).

Examination of the legislative history of section 15 and the rulemaking proceeding in which General Order 9 was promulgated reveals no indication whatsoever that the requirement of reasonable notice of withdrawal from conference membership was to act as a bar on withdrawal on less than such notice. The power to withdraw was necessary to preserve nonconference competition since former conference members, as well as new carriers and presently operating independents, were viewed as necessary sources of nonconference competition. Absent the expression by the Congress of an intention to allow parties to conferences to bargain away their historic right to operate in any lawful fashion they feel to be in their best interests, the legislature preserved the right of members to resign from conferences at will. This does not negate or cast doubt on the obligations of a member line fully to perform strictly in accordance with the conference agreement so long as it remains a conference member. North Atlantic French Atlantic Freight Conference—Petition for Declaratory Order. Id. (50).

The addition of the words "for such withdrawal" to the section 15 provision that "any member may withdraw from [conference] membership upon reasonable notice without penalty for such withdrawal" can only be explained as intended to relate back to withdrawal upon reasonable notice, and hence the conclusion is

inescapable that a penalty was to be permissible for withdrawal on other than reasonable notice. North Atlantic French Atlantic Freight Conference—Petition for Declaratory Order. Id. (51).

In General Order 9 the Commission gave content to the abstract statutory requirement of "reasonable notice" for withdrawal from conference membership by specifying "at least 30 days" as the notice period and providing that "any party may withdraw from the conference without penalty by giving at least 30 days' written notice of intention to withdraw." The contention that this provision of General Order 9 was intended to forbid the assessment of any penalty for withdrawal has the same defect as the contention that no penalties were to be assessed under the general withdrawal authority set forh in section 15—it reads the language "without penalty" out of the provision. North Atlantic French Atlantic Freight Conference—Petition for Declaratory Order. Id. (52).

There is no necessary relationship between the 90-day notice provision in a conference agreement for withdrawal from conference membership and the 90-day notice which is required under section 14b of the Shipping Act and the Commission's General Order 19 for certain changes in rates and charges subject to dual rate contracts. To the extent that rights of shippers under dual rate contracts could be affected by a carrier's withdrawal from a conference, they are protected by the specific requirements of section 14b and General Order 19. North Atlantic French Atlantic Freight Conference—Petition for Declaratory Order. Id. (52).

Conference suggestion that any conclusion which leaves lines free to withdraw from a conference on less than reasonable notice on payment of a penalty amounts to excusing the failure to perform a contractual duty by the payment of money is without merit since it rests on an incorrect assumption. It assumes that there has been a failure on the part of the withdrawing member to perform in accordance with the terms of the conference agreement, i.e., that the carrier had a duty to remain in the conference, or at least not operate an independent service, for 90 days following its notice of intention to withdraw. Rather, the duty of the withdrawing line is to give notice under section 15 and General Order 9, and if the line fails to give reasonable notice, here 90 days as stated in the approved conference agreement, the line has breached its agreement and is liable to a penalty. North Atlantic French Atlantic Freight Conference—Petition for Declaratory Order. Id. (52–53).

Once a conference member has withdrawn from conference membership, as authorized by statute, regulation and conference agreement to withdraw at any time, it was free to operate as an independent carrier, and nothing in connection with its operation from that date may be considered in setting a penalty for breach of the withdrawal provision of the conference agreement. Important considerations in assessing a penalty would include, inter alia, the amount of notice actually given and any adjustments that were required within the conference as a result of the withdrawal. If all of the activities of the withdrawing member prior to the expiration of period specified in the conference agreement for notice of withdrawal constituted breaches of the agreement, the conference could treat each shipment made under an individual bill of lading as a separate breach. The result could be astronomical and confiscatory penalties such as to drive the carrier from the trade to the detriment of commerce and contrary to the public interest. North Atlantic French Atlantic Freight Conference—Petition for Declaratory Order. Id. (53).

—Jurisdiction

Stipulation concerning subsidy for military carryings, entered into during a hearing before the Maritime Subsidy Board, did not involve only matters within the sole jurisdiction of that Board. Admittedly, Subsidy Board settlement of litigation incorporating an agreement intended to be within the scope of the Shipping Act, 1916, would not be immune from review and approval by the Commission. The settlement agreement was subject to section 15. It is well settled that two separate government agencies may each have jurisdictional interests in the same event or transaction or series of events or transactions. American Export Isbrandtsen Lines, Inc., Order To Show Cause, 82 (89).

The Commission did not lack jurisdiction ab initio over the agreement of the New York Shipping Association because the agreement was opposed by three lines. Such contention was earlier rejected. The by-laws of the Association provide that a majority vote is sufficient to support adoption of the agreement. Agreement No. T-2336—New York Shipping Association Cooperative Working Arrangement, 94 (101–102, 144).

Agreement of the New York Shipping Association, providing for a man-hours/tonnage assessment formula to meet fringe benefit obligations in union contracts, does not control or regulate labor and collective bargaining. It is an agreement between the Association members, in the form of a cooperative working arrangement and is clearly subject to section 15 and to the jurisdiction of the Commission under the standards of the Volkswagenwerk case. Agreement No. T-2336—New York Shipping Association Cooperative Working Arrangement. Id. (145).

The Commission has no jurisdiction over the payment of operating-differential subsidy and the use made by carriers of vessels operating pursuant to such subsidies. Agreement No. 9905, 163 (164).

—Modification of agreements

Position of the Commission that it has no jurisdiction under section 15 where a party has withdrawn from a new agreement prior to approval is not inconsistent with the Commission's power to modify agreements under section 15. The power to modify is not the power to compel acceptance. When a new agreement filed for approval comports with section 15, save in one or a number of its provisions, the Commission is empowered to modify the objectionable provision and condition approval on acceptance of the modifications. The parties are free to reject the modifications and continue their operations as before. Inter-American Freight Conference—Cargo Pooling Agreements Nos. 9682, 9683, and 9684, 58 (62).

—Pooling agreements

Where a signatory withdraws from a pooling agreement prior to Commission action on the agreement, the Commission has no jurisdiction to act. Withdrawal of even one party presents a whole new picture and requires that the remaining parties present the Commission with the new agreement representing readjustments made necessary by the change in relationships. Where the agreement is repudiated in one form or another by all parties except one, the Commission does not have even the semblance of an agreement before it, and failing this it simply has no jurisdiction under section 15. Inter-American Freight Conference—Cargo Pooling Agreements Nos. 9682, 9683, and 9684, 58 (61–62).

The problems with which section 15 sought to deal were created by private (as opposed to governmental) arrangements between carriers. A country's efforts

to foster the well-being of its merchant fleet did not at that point in history take the form of overt governmental intervention designed to acquire a given percentage of a country's import and export trade for carriage of its own lines. From its inception, section 15 presupposed an absence of overt governmental intervention into the otherwise private and economically motivated arrangements between competing steamship lines operating the United States foreign trade. The language of government-to-government dealings in foreign commerce now includes such terms as "emerging nations," the "national interest factor," and "bilateralism." The "national interest factor" is that concept which would give to the exporting and importing countries at either end of the trade route a "predominate" share of the water-borne traffic between the two countries. "Bilateralism" denotes the result of the application of the national interest factor. Inter-American Freight Conference—Cargo Pooling Agreement Nos. 9682, 9683, and 9684. Id. (67–68).

Where a party signs a pooling agreement under "duress" (of government decrees) to avoid governmental exclusion from a trade, there is a ab initio no "agreement" of the kind over which the Commission may exercise jurisdiction under section 15. There is no room under section 15 for approval of a pooling agreement which embodies discriminatory or unfair quotas dictated by governmental law, regulation, decree, ukase or fiat. Inter-American Freight Conference—Cargo Pooling Agreements Nos. 9682, 9683, and 9684. Id. (72).

Pooling agreements are the ultimate in anticompetitive combinations. It is thought that by assigning each carrier in the trade a percentage of the traffic which bears some reasonable relationship to his past carryings, and by penalizing carriage over that quota, the incentive to rebate is removed since the rebate is designed to secure more business. The injection of national interest, however, only further disrupts a trade since its sole aim is the preferment of the national flag lines over the other flag lines. National interest seeks to nullify of all of the only valid considerations which are relevant to the Commission's deliberations under section 15. All of which inevitably destroys that equality of treatment, regardless of flag, on which the regulatory laws are based. Just as the Commission is not at liberty to "promote" our own merchant marine, it cannot, in the guise of approving agreements under section 15, acquiesce in the efforts of other nations to do the same when those efforts run counter to the laws administered by the Commission. Thus, so long as any nation attempts to utilize an "agreement" under section 15 as a vehicle for the enhancement of its own national fleet to the detriment of other carriers serving our foreign commerce, the Commission will be compelled to disapprove those agreements. Inter-American Freight Conference—Cargo Pooling Agreements Nos. 9682, 9683, and 9684. Id. (72–73).

Bilateralism, if it is to become the martime policy of this country, must do so as the result of efforts other than those of the Commission. The Commission is precluded from participating in the kind of government-to-government negotiations which lead to adoption of bilateralism as national policy. The Commission must make its determination in controversial cases under section 15 only on the record after an opportunity for hearing has been afforded to all who would be affected by the decision. Inter-American Freight Conference—Cargo Pooling Agreements Nos. 9682, 9683, and 9684. Id. (73)

Pooling agreements between United States and Brazilian flag lines in the southbound trades from Atlantic and Gulf ports to ports in Brazil were approved. The agreements would contribute substantially to stability in the trades, and were necessary under present conditions in the trade. The agreements met the standards that the restraints interfering with antitrust law policies were required by

a serious transportation need, necessary to secure public benefits or in furtherance of a valid regulatory purpose. The agreements make participation in the cargoes otherwise largely inaccessible to non-Brazilian lines available to signatory lines. Third-flag lines remain free to compete on equal terms for carriage of nongovernment-controlled cargo. The evidence did not support the contention that third-flag carriers would be driven from the trades or irreparably damaged. Limitations on third-flag lines were caused basically by Brazilian and United States laws, not by the agreements. The agreements may be reexamined at a future date if changed conditions bring about changed results. Agreement Nos. 9847 and 9848—Revenue Pools, United States/Brazil Trade, 149 (155 et seq.).

Something more than a fear of increased competition is necessary to justify a finding that an agreement is unjustly discriminatory or unfair as between carriers, contrary to the public interest, or otherwise merits disapproval under section 15 of the 1916 Act. Agreements Nos. 9847 and 9848—Revenue Pools, United States/Brazil Trade. Id. (158).

Decision to approve pooling agreements is not in conflict with the guidelines established in the Commission decision in Inter-American Freight Conference, 14 FMC 163. It was not intended in that case to render a blanket prohibition against approval of all pooling agreements. It was intended to forewarn potential parties to such agreements that pools not grounded on economic or commercial reality and based instead on grounds of national interest without deference to shipper desires, or the efficiency of the operator, or the worth of the service rendered, would not meet the criteria under section 15 for Commission approval. There is no room under section 15 for approval of a pooling agreement which embodies discriminatory or unfair quotas dictated by governmental law, regulation, decree, ukase or fiat. Agreement Nos. 9847 and 9848—Revenue Pools, United States/Brazil Trade. Id. (159–160).

DISCRIMINATION

Unlike section 16, first, which prohibits "any" unjust preference or prejudice between shippers and commodities "in any respect whatsoever," the first paragraph of section 17 of the 1916 Act concerns itself only with an unjustly discriminatory "rate, fare, or charge." To establish unjust rate discrimination within the meaning of section 17, there must be two shippers of like traffic over the same line between the same points under the same circumstances and conditions but who are paying different rates. Thus, where complainant was only shipper of the particular commodity involved, there could be no violation of section 17. Valley Evaporating Co. *v.* Grace Line, Inc. et al., 16 (25–26).

A claim for storage charges resulting from a carrier's inadequate notice of arrival of a shipment is not cognizable under section 14 Fourth because it does not concern the loading and landing of freight in proper condition. Joseph and Sibyl James *v.* South Atlantic & Caribbean Line, Inc., 300 (303).

DUAL RATE CONTRACTS: See also Surcharges.

Conference is required to offer its dual rate contracts separately in each trade area served by it. The record does not support conclusions that the present contract rate system has resulted in improved service in the conference trade or rate stability. Nothing is shown in the way of transportation need, important public benefits to be secured or valid regulatory purpose to be achieved by the present system of requiring shippers to commit exclusive patronage in all the trade areas. Agreement No. 8660—Latin America/Pacific Coast Steamship Conference and Proposed Contract Rate System, 172 (176–185).

As to the contention that the present improved level of service provided by the conferences is a result of the present contract rate system which requires shippers to commit exclusive patronage to the conference in all five trade areas, it is just as easily concluded from the testimony that the establishment and approval of the "super conference" was the cause of the increased service level. The real difficulty lies in concluding that it was the present contract rate system that produced the alleged result. Agreement No. 8660—Latin America/Pacific Coast Steamship Conference and Proposed Contract Rate System. Id. (176–177).

Nothing in the record supported the conclusion that rate stability is dependent on the present contract system of the conference which requires shippers to commit exclusive patronage to the conference in all five trade areas. The choice is not between the present contract or no contract at all. The Commission does not insist that a shipper be allowed the choice of conference or nonconference within a "trade area," but only that a shipper be allowed to choose whether or not to sign a contract for each of the five trade areas. Agreement No. 8660—Latin America/Pacific Coast Steamship Conference and Proposed Contract Rate System. Id. (179).

As to the contention that the present contract rate system of the conference, requiring shippers to commit exclusive patronage in all five trade areas, acted as an inducement to a carrier to increase service and investment in the trade, the complete testimony does not demonstrate that the carrier's plans are dependent on continuation of the present system. Rather, they are tied to the continuing carriage of certain "base parcels cargo." Even without the single contract system if a nonconference carrier wishes to carry base cargoes, he would have to offer a lower rate and convince the base cargo shipper that regular and dependable nonconference service will be provided. Agreement No. 8660—Latin America/Pacific Coast Steamship Conference and Proposed Contract Rate System. Id. (179–180).

Testimony of record did not bear out the conclusion that requiring the conference to offer its contract rate separately in its five ratemaking areas would prove detrimental to the commerce of the United States and would adversely affect the public interest. The nonconference competition which the carrier members of the conference cry would wreak havoc and chaos in the trade, if its present system were modified to require that contracts be offered separately, reduces itself to some nine lines which might be "interested in joining" the conference if it appears that the members were "unable to cope with the tonnage moving" but which also remain ever ready to "lift an occasional parcel" when the offerings in their own trade become disappointing. Agreement No. 8660—Latin American/Pacific Coast Steamship Conference and Proposed Contract Rate System. Id. (180–182).

Nothing in the record causes the Commission to change its mind that the conference should be required to offer its contract rate separately in all five of the conference's trade areas. There was nothing offered in the way of transportation need, important public benefits to be secured or valid regulatory purpose to be achieved by the present system of requiring shippers to commit exclusive patronage to the conference in all five trade areas. The vast bulk of testimony was either speculative as the consequences of modifying the present system or led to the conclusion that factors other than the contract rate system had been the causes of rate stability, dependable service, etc. Agreement No. 8660—Latin America/Pacific Coast Steamship Conference and Proposed Contract Rate System. Id. (183).

FREIGHT FORWARDING

A freight forwarder which is neither an independent, nor a qualified ocean freight forwarder, cannot qualify to be licensed as such. Speed Freight Inc., 1 (9).

The freight forwarder licensing statute, like other licensing statutes, should be applied with a liberal attitude to the end that licenses may be granted to qualified applicants, but if the applicant is not fairly within the definition of ocean freight forwarder, there is no room for the exercise of liberality. Speed Freight Inc. Id. (9).

Where a freight forwarder maintained the closest imaginable cooperative and supporting relationship with a shipper of goods by water in foreign commerce, this alone was sufficient to revoke its license. Speed Freight Inc. Id. (9).

Where a freight forwarder was controlled by a shipper in foreign commerce, submitted false statements in connection with its application for a license, changed its personnel to the extent that it no longer qualified as an independent ocean freight forwarder, and failed to report such changes to the Commission, the forwarder's license was revoked. Speed Freight Inc. Id. (9–10).

Freight forwarder violated the Commission's rules and regulations by permitting his license to be used by another party. A fair and reasonable penalty is a 90-day suspension of license. Independent Ocean Freight Forwarder License No. 1132—Mario J. Macchione, 200 (202).

The prohibition of the freight forwarder law against forwarder shipper relationships is absolute. The definition of "independent ocean freight forwarder" in section 1 of the 1916 Act is clear and unambiguous, and requires no statutory interpretation. The legislative history points out clearly that exceptions to the clear and unambiguous language of the law were to be excluded and that the inherent prohibition vis-a-vis control is absolute and the Commission has so hold in numerous proceedings. Thus, where a freight forwarder is or can be controlled by a shipper, it cannot qualify as an independent freight forwarder by definition, and therefore is not entitled to conduct the business of a freight forwarder. Independent Ocean Freight Forwarder License No. 790—North American Van Lines, Fort Wayne, Ind. 46801, 215 (220–221).

Forwarders who control or are controlled by shippers in the ocean-going commerce of the United States are absolutely disqualified from licensing. It is immaterial that such control arises after a license is issued rather than prior to the application therefor. The Commission lacks statutory authority to allow continuance of a license on condition that the licensee will not ship for the exporter controlling it. Shipper control negates the Commission's authority not only to issue a license in the first instance, but to allow it to continue, regardless of any condition that the licensee may propose. Section 510.9(d) of General Order 4 imports that not only to initially qualify for a license but also to prevent a discretionary revocation, a licensee must undergo "no change of circumstances whereby * * * [it] no longer qualifies as an independent ocean freight forwarder." Independent Ocean Freight Forwarder License No. 790—North American Van Lines, Fort Wayne, Ind. 46801. Id. (222).

Freight forwarder license application is granted on condition that a 9.5 percent stockholder, who had been guilty of violating the freight forwarder law, will not become an employee, officer, or director of the licensee; will not become involved in the day-to-day management of the business; will not increase his percentage stock interest; and that his stock will be placed in a trust to be voted on the basis of the independent judgment of the trustee. Key Air Freight, Inc., 290 (291).

GENERAL ORDER 9: See Agreements Under Section 15.

POOLING AGREEMENTS: See Agreements under Section 15.

PORT EQUALIZATION: See Absorptions.

PRACTICE AND PROCEDURE

—In general

Where the Commission issued an order directing a conference to show cause why its bunker surcharge should not be cancelled as violative of its dual rate wine and spirits contract and not supported by a clause of the contract permitting rates to be changed at any time in the event of "extraordinary conditions," petition for oral hearing, sought by the alcoholic beverage importers, was denied. Argument that the proceeding was a "two-party controversy" was specious. The rules of practice and procedure clearly provide that hearing counsel is a party to the proceeding. Regardless of the merits of that contention the importers failed to show a dispute as to relevant facts, the only justification for an evidentiary hearing. The ancillary question of the reasonableness of the surcharge was not in issue in the proceeding. The issue of the fundamental legality of the contract had not been raised and was not of concern in the proceeding. The issue of whether the conference had an obligation to levy the surcharge against all shippers was a question of law and not one of fact. That issue was also not raised by the pleadings. The facts concerning the issue of foreseeability were before the Commission and were no different from those in a prior case, in which the same issue was resolved. Surcharge of North Atlantic Westbound Freight Association on Commodities Moving Under Wine and Spirits Contract, 292 (294–295).

The Commission does not intend to scrutinize every minute aspect of the record in informal complaints. Such a policy would seriously distort the purpose of the small claims procedure. Joseph and Sibyl James *v.* South Atlantic & Caribbean Line, Inc., 300.

PREFERENCE AND PREJUDICE

While an effective "competitive relationship" is a necessary part of liability under section 16 in situations where allegedly preferential or prejudicial rates or charges are geared to transportation factors or the differing characteristics of commodities, it is not required where the carrier's obligation to render a particular service is "absolute" and not dependent on such factors or differences. Valley Evaporating Co. *v.* Grace Line, Inc. et al., 16 (21).

Where, in an effort to delete "paper rates," a conference and its members adopted a "sufficient volume" criterion for retention of specific rates, application of the criterion in a totally fair and impartial manner was required. Questions as to the characteristics inherent in a particular commodity were irrelevant as were questions of whether the particular commodity competed with any other commodity. The equality of treatment required in this situation was "absolute and not conditioned on such things as competition." The conferences and its members violated section 16 when they failed to adopt a commodity rate on a particular commodity, although rates were established on other items that had moved in smaller quantities. This established a clear situation of undue prejudice to a "description of traffic." Valley Evaporating Co. *v.* Grace Line, Inc. et al. Id. (21–23).

Where carriers and a conference violated section 16 of the 1916 Act by failure to adopt a commodity rate, the failure was not excused because it was ascribed to an inadvertent "oversight." Respondents' good faith will not save an otherwise unjustly prejudicial practice from condemnation. The equality of treatment required by section 16 is not conditioned on a carrier's intention. Valley Evaporating Co. *v.* Grace Line, Inc., et al. Id. (23).

If the Commission were considering a request for reparation based on unlawful preference or prejudice in rates based on transportation factors or commodity characteristics, it would be inclined to agree that proof of the character, intensity, and effect of the competitive relationship would be necessary to prove the amount of damages and sustain an award of reparation. In such cases the injury sustained may be greater or less than the amount of the difference between the rates charged the prejudiced shipper and those charged for the preferred shipper. The Commission has historically recognized that the extent of damages in rate discrimination cases, being dependent largely on competitive factors, is a question of fact which must be clearly demonstrated by substantial proof. However, where the equality of treatment required is "absolute" and not conditioned on competition, the "character, intensity, and effect" of competition is irrelevant and the measure of damages is the difference between the rate charged and collected and the rate which would have applied but for the unlawful discrimination or prejudice. To the extent that the proper measure of damages is the amount of unlawful excess exacted, it is akin to an "overcharge" and the same principles apply. Valley Evaporating Co. *v.* Grace Line, Inc., et al. Id. (24–25).

RATES: See also Discrimination; Preference and Prejudice; Reparation; Surcharges; Tariffs.

The Commission was not bound to follow the rule making method in investigating the lawfulness of rate increases of nonvessel operating common carriers in domestic offshore commerce. While rule making may be appropriate in proceedings designed to establish formulae by which the reasonableness of rates may be measured, it is not necessary to enable the Commission solely to investigate the reasonableness of rates of particular carriers without establishing any such formulae. Transconex, Inc.—General increase in Rates in the U.S. South Atlantic/Puerto Rico–Virgin Islands Trade, 35 (43).

Rates of NVOCC's in the Puerto Rican trade were not shown to be other than just, reasonable, and lawful. Income tax expenses of the carriers were properly taken into account. Failure to consider taxes as an expense creates an inaccurate picture of the earnings available to a corporation for distribution and capital investment and, consequently, its need for additional revenue. The Commission's treatment of taxes as an expense to be considered in determining reasonableness of rates accords with the general approach of courts and administrative agencies. Transconex, Inc.—General Increase in Rates in the U.S. South Atlantic/Puerto Rico–Virgin Islands Trade. Id. (43).

Considerations with respect to rates of NVOCC's must necessarily be somewhat different from those which are of prime importance in proceedings dealing with reasonableness of rates of vessel owning carriers. Generally, the reasonableness of the rate of return of equipment owning carriers has been based on that percentage of their "rate base," i.e., the property devoted to the relevant trade plus sufficient working capital, which is necessary to allow them to earn a reasonable return in light of the peculiar risks of the service involved. Where a carrier has little investment in equipment, an important factor is the "operating

ratio," i.e., the margin between revenues and expenses of operation. However, the ratio by itself fails to indicate the existence and degree of need for additional capital and revenue. The reasonableness of increased rates of NVOCC's was strongly suggested by increased costs of operation; sharp competition in the trade which is ordinarily a strong control over rates; and the substantial value of the services rendered to small shippers. There was no basis for finding that increased charges of NVOCC's were unlawful. No operating ratio derived from any of various computations exceeds the 93 percent which the ICC appears frequently to have approved when considering rate increases of carriers owning little or no equipment. There was no showing that a 93 percent operating ratio was necessarily proper or a standard for NVOCC's and the Commission is not implying that such ratio is in fact proper, or a standard. Since the traditional rate base approach cannot be applied to NVOCC's, at least where there has been no showing of any relationship between such rate base and the carrier's operating ratio, the rate increases cannot be disapproved. There was some indication of need for the increases, and no computation shows them to be improper. Those challenging rate increases where such increases have not been suspended must bear the consequences of the failure of the record to contain adequate support for their disapproval. Transconex, Inc.—General Increase in Rates in the U.S. South Atlantic/Puerto Rico–Virgin Islands Trade. Id. (43–45).

In so-called general revenue cases, two principal matters for determination are whether a respondent common carrier by water is operating at a profit in a trade, and if at a profit whether it is earning a reasonable rate of return on its investment. Lykes' operations in the United States Gulf/Puerto Rico trade are conducted at a loss. Past losses continued in 1969 notwithstanding that most of the increased rates under investigation were in effect for most of 1969. Lykes would suffer a greater loss from the operation of its newer Gulf Pride class vessels than from use of its C–2 vessels as at present. The conclusion is that the increased rates and other rates of Lykes are just and reasonable and not shown to be unlawful. General Increases in Rates in the United States Gulf/Puerto Rico Trade, 212 (213).

Increased rates of Gulf-Puerto Rico in the United States Gulf/Puerto Rico trade are just and reasonable and not shown to be unlawful. The operations were conducted at a loss in 1969 and the projected loss in 1970 was higher than in 1969. Evidence to show the future profitability of all-containership operation was not persuasive and was irrelevant to the main controlling issue of the profitability of the existing service. A common carrier cannot be compelled to offer service in the trade, and it follows that management cannot be told to provide a particular type of ship or other equipment to service the trade. Withholding of approval of a rate increase bceause Gulf-Puerto Rico has not placed full containerships into the service would be dictating the type of vessels to be used and usurping a management prerogative. The Commission may encourage Gulf-Puerto Rico to convert to containership service as soon as feasible. General Increases in Rates in the United States Gulf/Puerto Rico Trade. Id. (214).

REPARATION

Carrier was permitted to refund a portion of freight charges on shipments foreign of building material where the shipper's agent was erroneously informed that the conference tariff contained a project rate for the cargo; the conference had previously published a project rate but had canceled it because cargo for the project had not been offered to the conference or any of its members; and the conference had not been promptly notified by the carrier that the cargo had

been offered and, if it had been, it would have promptly reestablished the project rate. The carrier's failure to notify the conference until after the bills of lading had been issued and the cargo had been shipped was an error due to inadvertence which prevented the timely filing of the new rate. The Eregli Purchasing Mission, Eregli Iron & Steel Works Co., Eregli Turkey *v.* Lykes Bros. Steamship Co., Inc., 12 (14–15).

In enacting section 18(b) of the 1916 Act, Congress did not intend to repeal the other substantive provisions of the Act and leave carriers free to charge unreasonable and unjustly discriminatory or prejudicial rates by the simple device of first filing such rates with the Commission. The distinction is between a rate that is lawful and one that is merely legal. In dealing with shippers the carrier is required under section 18(b)(3) to conform the freight charges actually collected to the amount fixed in its published tariffs. In that sense the published rate in effect at the time of the movement is the "legal rate." But the rate may be unlawful if it violates other provisions of the Act. Thus, in publishing a rate, the carrier or conference acts under the admonition of the statute, and, if it establishes a rate which is unreasonable or unduly discriminatory or prejudicial, it may be subject to the payment of reparation for any injury caused by such rate. Valley Evaporating Co. *v.* Grace Line, Inc. et al., 16 (19–20).

While the publication of rates by carriers and conferences operating in the foreign commerce of the United States in the manner required by section 18(b)(3) of the 1916 Act fixes the standard of legal rates for the time being and so long as such published rates are in effect, this standard is not conclusive of their reasonableness and justness under other provisions of the Act. The mere publication of a rate cannot make that rate lawful in the sense of being immune from attack, either with respect to past or future shipments, if it is otherwise unjust or unreasonable. Valley Evaporating Co. *v.* Grace Line, Inc., et al. Id. (20–21).

The Commission does not agree with the examiner's dismissal of respondents' "oversight" in failing to adopt a commodity rate as not of the type falling within the scope of Public Law 90–298 which permits refund of freight charges in foreign commerce in cases of administrative or clerical error. It would appear that Public Law 90–298 would have permitted corrective action, but the Commission does not decide the merits of that issue. The issue is moot in view of failure timely to file a refund application. Valley Evaporating Co. *v.* Grace Line, Inc., et al. Id. (23).

Once having found a violation of the Shipping Act, the Commission is empowered, under section 22 of the Act, to "direct the payment * * * of full reparation to complainant for the injury caused by [such] violation." Valley Evaporating Co. *v.* Grace Line, Inc., et al. Id. (24).

If the Commission were considering a request for reparation based on unlawful preference or prejudice in rates based on transportation factors or commodity characteristics, it would be inclined to agree that proof of the character, intensity, and effect of the competitive relationship would be necessary to prove the amount of damages and sustain an award of reparation. In such cases the injury sustained may be greater or less than the amount of the difference between the rates charged the prejudiced shipper and those charged the preferred shipper. The Commission has historically recognized that the extent of damages in rate discrimination cases, being dependent largely on competitive factors, is a question of fact which must be clearly demonstrated by substantial proof. However, where the equality of treatment required is "absolute" and not con-

ditioned on competition, the "character, intensity, and effect" of competition is irrevelant and the measure of damages is the difference between the rate charged and collected and the rate which would have applied but for the unlawful discrimination or prejudice. To the extent that the proper measure of damages is the amount of unlawful excess exacted, it is akin to an "overcharge" and the same principles apply. Valley Evaporating Co. *v.* Grace Line, Inc. et al. Id. (24–25).

Section 18(b)(5) of the 1916 Act does not by its terms forbid any specific activity. It merely empowers the Commission to disapprove a rate or charge which it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States. The section is purely prospective in nature. Only after the Commission has determined a particular rate to be unreasonable under section 18(b)(5) may a carrier's continued assessment of that rate be considered a violation of section 18(b)(5) for which reparation may be awarded. Valley Evaporating Co. *v.* Grace Line, Inc. et al. Id. (26–27).

Carrier is authorized to refund a portion of freight charges on a shipment from Hong Kong to Los Angeles, where the carrier inadvertently left a blank space in the rate column after the commodity description which would have covered the goods involved. Air America Ltd., Hong Kong *v.* Trans-Pacific Freight Conference of Hong Kong, 32 (33).

Carrier is permitted to refund a portion of freight charges for certain heavy lift services in the movement of specially fabricated parts for the Saudi Arabian (missile) program. Prior to formation of the conference, the heavy lift services involved were exempt as part of the project rate, and the conference staff in preparing and publishing a project rate failed, through oversight, to include the same exemption when the project rate was filed. This inadvertence was an error which prevented the timely filing of a new rate. Raytheon Co. Andover *v.* States Marine—Isthmian Agency, Inc., 78 (80–81).

Where conference members, at a regular meeting, voted to reduce the rate on commodities involved in certain shipments, but inadvertently failed to file a tariff amendment reflecting the reduction, the shipper was entitled to a refund of overcharges. Revell Inc. *v.* Pacific Westbound Conference, 197 (199).

Where a claim for reparation based on a misdescription of goods was duly presented to the Commission and reparation was sought based on the contract rate and the clamant was found not to be entitled to the contract rate, reparation should have been awarded on the basis of the noncontract rate. The claim was not fatally defective and now time barried. Assertion of reparation based on a contract rate did not go to the substance of the complaint which was a misdescription. Dismissal of the complaint as time barred assumed the continued running of the statute of limitations during the pendency of the proceeding, an unwarranted assumption where the gravamen of the complaint, a misdescription, had been established. Where a complaint is "defective" only as to a question of the appropriate remedy, or in any manner not involving the substance or gravamen of the claim, the 2-year period of limitations is tolled once a claim is submitted to the Commission for adjudication. Heterochemical Corp. *v.* Port Line, Ltd., 228 (229).

The small claims procedure was established to facilitate the settlement of claims with a minimum amount of administrative or regulatory action. Therefore, it is incumbent on claimants to be meticulous and precise with submission of their claims as well as prompt in compliance with Commission inquiries or requests. Notwithstanding that claimant had been reticent in enabling the Commission to promptly dispose of its claim, reparation was awarded in the interest

of insuring just charges between shippers and carriers, and in the interest of terminating the proceeding as equitably as possible. Heterochemical Corp. *v.* Port Line, Ltd. Id. (229).

Waiver of a portion of freight charges previously assessed the shipper is permitted where the carrier failed to notify the conference of an open rate change due to inadvertence. The situation fell within the purview of Public Law 90–298 and the application was timely filed. American Trade Sales A/C Consulate of Indonesia *v.* Lykes Bros. Steamship Co., Inc., 230 (232).

Section 18(b)(3) of the Shipping Act, 1916, recognizes that error in a tariff may occur by reason of clerical or administrative error. But, in such case, the statute only provides retroactive relief for the shipper and none for the carrier. Recognizing the possibility of tariff error the intent of the statute appears to be that if the error causes a lesser tariff to be published than intended, no more than the published rate can be charged; whereas, if the error results in the publication of a higher rate than intended, a refund or waiver of the excess may be permitted. Correction of error in a tariff or a clerical or administrative nature which will result in an increase in cost to a shipper can only be accomplished by publication of a new tariff. United States *v.* Hellenic Lines Ltd., 254 (259–260).

Claim for reparations was not time barred where it was filed more than 2 years after the shipment was received and delivered by the carrier and after the date of billing, but within 2 years of the time when the freight charges were paid. United States *v.* Hellenic Lines Ltd. Id. (260–261).

Where claimant misdescribed a shipment as "Amine 220 F.P. 465° F, not inflammable" on the bill of lading and on the export declaration as "scheduled B No. 512.0943—Aminies N.E.C.," and the carrier charged the rate for Chemicals, N.O.S., but Amine 220 is a trade name of an organic compound of nitrogen demulsifier and is a surface active (cationic) wetting agent and the carrier had a rate for Compounds, Surface Active (Wetting Agents or Emulsifiers), the shipment should have been rated at a lower rate and reparation is awarded. The case presented the classic dilemma between the concept that what was actually shipped determines the applicable rate and the carrier's need to have the shipper accurately describe the shipment in order that the carrier may assess the lawful rate. Claims for reparation involving alleged errors of description can be allowed only if the claimant meets the "heavy burdens of proof" once the shipment has left the custody of the carrier. Here, the claimant met that burden. Union Carbide Inter-America *v.* Norton Line, 262.

While the examiner's ultimate conclusion that complainants were entitled to reparation was fully supported by the record, the method of reaching the conclusion presented a procedural difficulty. The original claim alleged a violation of section 14 Fourth and no mention was made of section 18(a) which the examiner relied on. If section 18(a) was to be relied on, complainants should have been required to amend their claim. Reparation has been made. The examiner's ultimate conclusion is adopted. Joseph and Sibyl James *v.* South Atlantic & Caribbean Line, Inc., 300.

Where a shipper of an automobile to Puerto Rico receives an invoice in English, showing a blank entry after "arrival date," and also receives a bill of lading containing a rubber stamp imprint barely legible, which gave the arrival date in Spanish; the stamp, as placed, would not put an ordinary, prudent person on notice that matters therein were of importance; and friends of the shipper who had shipped automobiles to Puerto Rico had first received the bill of lading and later a clear notification of arrival, complainant was awarded reparation in the amount of storage charges which had accumulated between time of arrival and

the time (several weeks later) when complainant discovered that the automobile had arrived. The carrier's notification of arrival was an unreasonable practice under section 18(a) of the 1916 Act in delivering property and was the proximate cause of the accrual of storage charges. Joseph and Sibyl James *v.* South Atlantic & Caribbean Line, Inc. Id. (303–304).

SURCHARGES

Imposition of bunker surcharge on less than 90-day notice was a violation of Section 14b(2) of the 1916 Act and of the conference merchant's freighting agreement. Current conditions caused by increased bunkering costs were neither "extraordinary" within the meaning of the agreement, nor did they represent an undue impediment or obstruction to the carriers' obligations. The shortage of residual fuel oil had been developing since 1960, with the current crisis in supply starting at least 2 years ago. Price information showed that the behavoir of the prices was such that a vessel operator using a reasonable degree of care could have foreseen that the prices were climbing to present levels. Atlantic and Gulf/West Coast of South America Conference Imposition of a Bunker Surcharge on Less Than 90-Day Tariff Filing Notice, 166 (168–169).

Carriers must provide 90 days' notice of rate increase to dual-rate shippers if the conditions that give rise to the need for the increase are "normal," that is, foreseeable by the carriers. For example, where such conditions as rising salaries, costs of vessels, fuel, or increased stevedoring expense require additional freight revenue, then 90 days' notice is required because the carrier is expected to anticipate these needs. This is so because exporters need the stability afforded by a guarantee of 90 days' notice. Carriers have a strict duty to anticipate the need for rate increases and to give timely notice to dual-rate signatories. Atlantic and Gulf/West Coast of South America Conference Imposition of a Bunker Surcharge on Less Than 90-Day Tariff Filing Notice. Id. (170).

Even if the Commission found an existing extraordinary condition for imposition of a bunker surcharge on less than 90 days' notice, the increased costs would not unduly impede, obstruct, or delay the carrier service as required by a provision of the conference freighting agreement for increasing rates. Without more facts, the Commission cannot treat the suggested relationship between the cost of fuel and withdrawal of service as anything more than conclusory and self-serving. Delays of long-awaited capital expenditures and delays in service as a direct consequence of the rise in fuel price were conclusory and self-serving statements. Increase in fuel prices was not a circumstance outside or beyond the control of the carrier. Carriers must be held to a high degree of diligence with regard to shippers and the implementation of rate increases after proper notice. Atlantic and Gulf/West Coast of South America Conference Imposition of a Bunker Surcharge on Less Than 90-Day Tariff Filing Notice. Id. (170–171).

Where the dual rate contract provided that no rates should be changed without prior consultation, and that an increase in rates was permitted "in the event of any extraordinary conditions * * * which conditions may unduly impede, obstruct, or delay the obligations of the carrier or carriers," the question of whether the conference could impose a surcharge for the carriage of alcoholic beverages depended on whether the admitted rise in bunker fuel costs constituted an extraordinary condition which unduly impeded, obstructed or delayed the carrier's service. The condition must be outside or beyond the carrier's control, must impede or delay the carrier's service, and there must be an emergency or abnormal condition, or an extraordinary circumstance. The test is one of foreseeability.

If the carrier, in the exercise of a high degree of diligence in the exercise of business judgment, should have foreseen or anticipated the conditions on which the surcharge is based, the condition is not extraordinary. Assuming that the condition is extraordinary in the present case, the condition does not impede or delay the carrier's service. Thus, the rise in fuel costs does not justify the imposition of a surcharge. The importers would not have entered into a contract which specifically stated that rates were to be fixed for a period of time, but which would allow the imposition of surcharges at will, simply because the contract refers to "rates" and a surcharge is not part of a rate. Surcharge of North Atlantic Westbound Freight Association on Commodities Moving Under Wine and Spirits Contract, 292 (295–298).

TARIFFS

The value of goods shipped is an element in establishing rates. But it is not the only element. Among other considerations are method of packaging, volume, weight, perishability, hazardousness, and distance freighted. In any given circumstance one or more of these elements may be given more weight in establishing the tariff. The weight to be given any factor is to be determined by the drafter of the tariff. But whatever factor or factors are determinative, the tariff as published must make the end result clear. United States *v.* Hellenic Lines Ltd., 254 (256–257).

Where the conference had a tariff item for clothing in cases or cartons, the item covered new as well as old clothing shipped in cartons. If the conference desired or intended to exclude new clothing it could easily have set forth such exclusion. The fact that a predecessor tariff indented "in cases" to modify old or used clothing did not support the contention that the conference carriers intended only the N.O.S. rate for clothing to apply to new clothing in cases, and that the failure to indent in the new tariff was the result of an inadvertent error. An interpretation of the predecessor tariff was not in issue, and, if it were, it could not be said what classification would ultimately be determined for new clothing in cases. Tariff classification determination should not be dependent on typesetting. United States *v.* Hellenic Lines Ltd. Id. (257–258).

The N.O.S. classification is a catchall which is applicable if no other classification is or can be specified. While one should not unduly strain to find a classification for goods, nevertheless, an N.O.S. classification is a classification which should not be resorted to if a reasonable classification can otherwise be found in the tariff. Whether a classification is reasonable and not inconsistent with another classification depends on the inclusionary or exclusionary language of the item in conjunction with the inclusionary or exclusionary language of other items in the tariff. New clothing in cases is within "clothing in cases or cartons (NOT Barrels, Drums, Suitcases, Trunks)" and nothing in the classification "Old or Used (NOT Effects, Personal) in bags, bales, bundles" is inconsistent with or precludes such classification for new clothes in cases. United States v. Hellenic Lines Ltd. Id. (258–259).

It is vital to the interest of the carrier and the shipper that a tariff be free from ambiguity or doubt. While conciseness is to be striven for it should not be achieved at the sacrifice of preciseness. Where a tariff is ambiguous or doubtful it should be construed against the carrier who prepared it. United States *v.* Hellenic Lines Ltd. Id. (260).

TERMINAL LEASES

Minimum rentals contained in a terminal lease agreement must be sufficient to assure that the lessor will not furnish the facilities at less than cost during any year of the pendency of the agreement. Unlike the situation in Agreement No. 2214, 13 FMC 70, where the Commission permitted a 10-year lease to be "less than fully compensatory" the first year because of "substantial investment" in terminal equipment, no justification was demonstrated in the present case for waiving the requirement that the minimum guarantee must be compensatory for each year of the term of the lease. Agreement No. T-2227 Between the San Francisco Port Authority and States Steamship Co., 233 (238).

The Examiner did not err in refusing to consider the alleged unlawfulness of a terminal lease agreement under sections 16 and 17 of the 1916 Act. The order of investigation specifically directed that the issues be confined to the compensatoriness of the rentals. The implication is clear. If the agreement is compensatory, there can be no unlawful discrimination. If it is not compensatory, it will be disapproved and thereby denied effectiveness. In either event, the question of the lawfulness of the agreement under other sections of the Act need never be reached. Agreement No. T-2227 Between the San Francisco Port Authority and States Steamship Co. Id. (238).

Whatever merit there may be to arguments that terminal operators must realize a return on investment, and the amount of the return must be sufficient to carry out the operator's responsibilities, they have no application to leases of public terminals. The Commission has recognized the right of terminal operators of publicly owned terminals to a fair return on investment, and such operators can, if they so desire, allow for such a return in their leases. Publicly owned terminals need not provide in their leases for a reasonable rate of return on investment for the particular facilities in question. Agreement No. T-2227 Between the San Francisco Port Authority and States Steamship Co. Id. (239-240).

Operators of publicly owned facilities are entitled to a fair return on investment and accordingly can, if they so desire, allow for such a return in their terminal leases, but they are not required to do so. Public terminals are in essence public utilities and are only required to set their rentals at a level which will produce revenues to cover the economic costs of doing business, which includes, but need not be limited to, operating expenses, maintenance and depreciation. A public terminal lease is compensatory if the annual minimum rentals cover all fully distributed costs. Agreement No. T-2227 Between the San Francisco Port Authority and States Steamship Co. Id. (240).

It was wholly immaterial what tariff factors the Port Authority based its minimum terminal lease rental on so long as that minimum was compensatory in terms of recouping all applicable direct and prorated costs for the lessee's portion of the pier involved. That the agreement did not specifically include the wharf rental charge was not controlling if the lease was otherwise compensatory. Agreement No. T-2227 Between the San Francisco Port Authority and States Steamship Co. Id. (240).

Interest expense attributable to construction bonds issued by a port authority must be considered a cost in arriving at a compensatory rental for terminal facilities. Financing costs constitute a basic and undeniable element of total development costs which must be considered in ascertaining the compensatoriness of a terminal lease. It follows, therefore, that to properly establish whether the minimum annual rental for pier facilities is compensatory, it is essential that the total bonded indebtedness, allocated to the pier, and more specifically to the

lessee's portion of the pier, be taken into consideration, along with other cost involved, in arriving at a minimum rental. Agreement No. T–2227 Between the San Francisco Port Authority and States Steamship Co. Id. (241).

Whether interest on bonded indebtedness of a port is considered as an operating expense or as a charge against the return, it must be taken into consideration in arriving at a minimum rental for pier facilities, "for interest expense constitutes a very real charge, and the net return that the port realizes must be sufficient to meet this charge." The Commission has always considered the cost of servicing bonds which fund the construction or improvement of terminal facilities as being relevant to a determination of a minimum rental, Agreement No. T–2227 Between the San Francisco Port Authority and States Steamship Co. Id. (241).

Accounting system adopted by the State of California, which would allocate bond interest, as it does all other costs, among all the revenue producing port facilities not of a specialized nature built for a special user, is a valid and widely recognized and utilized system. So long as a particular system of accounting is generally acceptable and all legitimate costs and expenses are considered and properly allocated thereunder, the Commission will not require its abandonment to adopt another "acceptable" system. Agreement No. T–2227 Between the San Francisco Port Authority and States Steamship Co. Id. (242).

In addition to taking into account interest on bonded indebtedness of a port in arriving at a minimum rental for pier facilities, the pier, being a revenue producing facility must be assigned its proportionate share of the portwide interest on additional contemplated indebtedness when incurred. Agreement No. T–2227 Between the San Francisco Port Authority and States Steamship Co. Id. (243).

In order to determine whether the minimum rental under a terminal lease agreement is compensatory, the lesser is directed to submit information as to its present and contemplated bonded indebtedness; total interest expense to be incurred to service the indebtedness; the portion of the total port-wide interest which must be allocated to the port's revenue producing marine piers and specifically to the lessee's portion of the pier to be rented; and the basis on which the interest allocations were made, taking into consideration the possible deactivation of any revenue producing marine piers. Agreement No. T–2227 Between the San Francisco Port Authority and States Steamship Co. Id. (244).

Interest expense attributable to construction bonds issued by a port authority cannot be ignored in evaluating the minimum rental under a terminal lease. Bond interest expense need not include interest on revenue bonds issued to construct a LASH facility. The LASH facility is a specialized facility built for a particular user and under the Port's accounting procedure which was expressly endorsed, all items relating thereto, including the revenue bonds, should be maintained in a separate account. Agreement No. T–2227 Between the San Francisco Port Authority and States Steamship Co., 247 (250–251).

The Port's System of using interest income from "other surplus funds" to offset interest expense, in conformity with the long established bookkeeping practice at the Port, is proper. The surplus funds, invested as are bond funds, are not ordinary income of the Port, but reserves that are put with the bond funds to protect the bond funds in the event of delays of sale or other contingencies. Agreement No. T–2227 Between the San Francisco Port Authority and States Steamship Co. Id. (251).

The Port's method of allocation whereby the net interest expense is allocated 76.8 percent to revenue producing marine piers, 9.2 percent to other piers and 14 percent to other facilities, appears to be wholly valid and unobjectionable on

the basis of data furnished. To allocate all interest incurred on construction costs at all facilities at the port only to revenue producing marine piers, is totally unrealistic. Agreement No. T-2227 Between the San Francisco Port Authority and States Steamship Co. Id. (251).

On the basis of additional information submitted, it is found that minimum rentals provided for in a terminal lease agreement are compensatory in all years of its pendency. The minimum rentals not only recover operating plus interest expenses but return earnings over the term of the lease. Agreement No. T-2227 Between the San Franicsco Port Authority and States Steamship Co. Id. (252).

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