DECISIONS OF THE

FEDERAL MARITIME COMMISSION

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FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

June 30, 1975

Helen Delich Bentley, Chairman
Clarence Morse, Vice Chairman
Ashton C. Barrett, Member
James V. Day, Member
George H. Hearn, Member

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AND BERNARD LANG & CO., INC.
POSSIBLE VIOLATIONS OF SECTION 16,
FIRST PARAGRAPH, SHIPPING ACT, 1916

ADOPTION OF INITIAL DECISION

August 12 1974

This proceeding is before us on exceptions to the Initial Decision of Administrative Law Judge Ashbrook P. Bryant, served December 13, 1973, in which he concluded that the record would not sustain a finding that either Bernard Lang & Co., Inc. (Lang), a licensed ocean freight forwarder acting solely in its role as a customhouse broker, or Viking Importrade, Inc. (Viking), a consignee of the shipments at issue, had violated section 16 First of the Shipping Act, 1916, by obtaining or attempting to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

Hearing Counsel excepted to the Initial Decision, while Lang and Viking supported the Judge's position.

Hearing Counsel's exceptions generally fall into two categories. They are either (1) a recapitulation of arguments which we have addressed ourselves to and answered in *Ross Products, A Division of NMS Industries, Inc. and Taub, Hummel & Schnall, Inc.—Possible Violations of Section 16, First Paragraph, Shipping Act, 1916,* 16 F.M.C. 333 (1973), and *Equality Plastics, Inc. and Leading Forwarders, Inc.—Possible Violations of Section 16, First Paragraph, Shipping Act, 1916,* Docket No. 71–94, served November 29, 1973, *Denial of Petition of Reconsideration,* served May 16, 1974, and/or (2) a reargument of contentions already advanced before the Administrative Law Judge and properly rejected by him in his Initial Decision. Therefore, upon a careful review and consideration of the record in this proceeding, as well as the exceptions and replies of counsel, we conclude that the Administrative Law Judge's findings and conclusions with respect thereto are proper and well founded and we accordingly adopt his Initial Decision as our own.

Therefore, it is ordered, That this proceeding be discontinued.

By the Commission.

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

FEDERAL MARITIME COMMISSION

No. 71-93

VIKING IMPORTRADE INC.
AND BERNARD LANG & CO., INC.
POSSIBLE VIOLATIONS OF SECTION 16,
FIRST PARAGRAPH, SHIPPING ACT, 1916

Evidence insufficient to show knowing and wilful violation of section 16 First of the Shipping Act, 1916, by respondent Viking Importrade, Inc., in connection with misdescriptions of various commodities on bills of lading and obtaining transportation by water of some of those commodities at rates lower than rates otherwise applicable.

Evidence found insufficient to establish that Bernard Lang & Co., Inc., violated section 16 First of the Shipping Act, 1916, and thus continues to qualify to be licensed as a freight forwarder.

Lawrence I. Drath for respondent Viking Importrade, Inc.
Bernard Lang for respondent Bernard Lang & Co., Inc.
Donald J. Brunner and *Joseph B. Slunt* as Hearing Counsel.

INITIAL DECISION OF ASHBROOK P. BRYANT, ADMINISTRATIVE LAW JUDGE [1]

1. Pursuant to section 22 of the Shipping Act, 1916 (the Act), the Commission on December 1, 1971, instituted this proceeding by issuance of an order directing that a proceeding be instituted to determine whether respondent Viking Importrade, Inc. (Viking), and/or respondent Bernard Lang & Co., Inc. (Lang), violated section 16 of the Act by knowingly and willfully, directly or indirectly, by means of false classification, or by any other unjust or unfair device or means obtained or attempted to obtain transportation by water of property at less than the rates or charges which would otherwise be applicable. The Commission's order further provided that a determination be made whether because of alleged activities of respondent Bernard Lang & Co., Inc., said respondent continues to qualify to be licensed as an ocean freight forwarder or whether its license should be revoked

[1] This decision became the decision of the Commission 8/12/74.

or suspended pursuant to section 44 of the Act and sections 510.9(a) of the Commission's Rules of Practice and Procedure, 46 CFR #510.9. It was alleged in the Commission's order that certain shipments consigned to Viking during the period from August 2, 1969, through December 29, 1969, appeared to have been misclassified resulting in the assessment of incorrect ocean freight charges.

2. Hearing was held at New York, N.Y., on May 9, 1973.

3. The bills of lading involved described the seven shipments as toys or novelties, whereas the customs papers, shippers invoices, and packing lists and inspections disclosed that the shipments were composed of commodities other than toys or novelties which in most cases were subject to higher freight rates. The evidence adduced through stipulation of the parties and from four witnesses and a number of papers and documents establishes the following with regard to the seven shipments here involved. The shipments in question were as follows:

4. Sea-Land Service, Inc. (Sea-Land), Bill of Lading No. 905–438097 covered the shipment of 311 cartons listed on the bill of lading as "Toy" from Kobe, Japan, to Elizabeth, New Jersey. This cargo was being shipped by the Oriental Merchandising Agency, Osaka, Japan (Oriental), to Viking Importrade, Inc., Moonachie, New Jersey. Bernard Lang & Co., Inc., acted as the customhouse broker on behalf of Viking. The cargo consisted of items which were properly described on the commercial invoice. The Consumption Entry filed by Lang with the Bureau of Customs described the cargo as: other illuminating articles non-electric, wax candles, notebooks, pencils, articles nspf of brass, rubberized linen cloth shopping bags, handbags of veg. fiber, articles of base metal, and bamboo baskets.

5. The shipment was collect and Lang paid the ocean freight charges for Viking. The charges were based on the freight rate for a shipment of toys. As a result of an inspection of the cargo by Sea-Land, Viking was billed for additional freight charges in the amount of $72.85 based on a determination by Sea-Land that the cargo should have moved at different rates. Viking by letter of December 5, 1969, challenged the freight classifications Sea-Land applied to three of the items shipped, namely that the northlite candle lamps should have moved as Lamps & Lanterns—Value under $200 per revenue ton at 38.75 per weight or measurement ton (W/M) instead of as Lamps & Lanterns—Unitized at 43.25 S/M; the jockey shoehorns should have moved as Iron & Steel Manufactures, NOS at 46.25 W/M instead of as Instruments at 54.00 W/M; and the garden tool sets should have moved as Tools, Hand, NOS-Value under $400 per revenue ton at 36.00 W/M instead of as Tools, Hand, NOS-Value over $400 per revenue ton at 46.25 W/M. Viking thus calculated the additional freight

due as $21.29, but as Sea-Land never confirmed this amount Viking did not make any additional payment to Sea-Land.

6. Sea-Land Bill of Lading No. 905–438502 covered the shipment of 275 cartons listed on the bill of lading as "Toy" from Kobe, Japan, to Elizabeth, New Jersey. This cargo was being shipped by Oriental to Viking, and Lang acted as the customhouse broker on behalf of Viking. The cargo consisted of items which were properly described on the commercial invoice. The Consumption Entry filed by Lang with the Bureau of Customs described the cargo as: bamboo fruit baskets, table knives, address books, postcard stands, boxes of papers, pencils, garden tool sets, articles for serving food, canvas saddle bags, and kerosene lamps.

7. The shipment was collect and Lang paid the ocean freight charges for Viking. The charges were based on the freight rate for a shipment of toys. As a result of a review of the shipment, Viking was billed by Sea-Land for additional freight charges in the amount of $46.35 based on a determination by Sea-Land that the cargo should have moved at different freight rates. The additional freight charges were paid by Viking.

8. Sea-Land Bill of Lading No. 937–411723 covered the shipment of 270 cartons listed on the bill of lading as "General Merchandise of Japanese Origin (Novelties & Toys)" from Yokohama, Japan, to Elizabeth, New Jersey. This cargo was being shipped by Silva Wilson & Co. Ltd., Tokyo, Japan, to Viking, and Lang acted as the customhouse broker on behalf of Viking. The cargo consisted of items which were properly described on the commercial invoice. The Consumption Entry filed by Lang with the Bureau of Customs described the cargo as: metal ash trays, toothpick holders, trick brandy glasses, candle holders, and salt/pepper sets.

9. The shipment was collect and Lang paid the ocean freight charges for Viking. The charges were based on the freight rate for a shipment of toys. As a result of an inspection of the cargo by Sea-Land, Viking was billed for additional freight charges in the amount of $62.95 based on a determination by Sea-Land that the cargo should have moved at higher freight rates. Viking by letter of February 17, 1970, challenged the freight classification Sea-Land applied to one of the items shipped, namely that the trick brandy glasses should have moved as Novelties at 36.00 W/M instead of as glass manufacturers NOS, value under $500 per revenue ton at 41.50 W/M. Viking thus calculated the additional freight due as $48.82 and upon receipt of a corrected freight bill paid this sum to Sea-Land.

10. Sea-Land Bill of Lading No. 905–401438 covered the shipment of 207 cartons listed on the bill of lading as "toy" from Kobe, Japan,

to Elizabeth, New Jersey. This cargo was being shipped by Oriental to Viking, and Lang acted as the customhouse broker on behalf of Viking. The cargo consisted of items which were properly described on the commercial invoice. The Consumption Entry filed by Lang with Bureau of Customs described the cargo as shopping bags of other materials, wooden household articles, baskets of bamboo, articles of iron or steel, and promenade bags.

11. The shipment was collect and Lang paid the ocean freight charges for Viking. The charges were based on the freight rate for a shipment of toys. As a result of an inspection of the cargo by Sea-Land, Viking was billed for additional freight charges in the amount of $49.46. The additional freight charges were paid by Viking.

12. Sea-Land Bill of Lading No. 905–404202 covered the shipment of 104 cartons listed on the bill of lading as "Toy" from Kobe, Japan, to Elizabeth, New Jersey. This cargo was being shipped by Oriental to Viking, and Lang also acted as the customhouse broker on behalf of Viking. The cargo consisted of items which were properly described on the commercial invoice. The Consumption Entry filed by Lang with the Bureau of Customs described the cargo as bamboo baskets, articles of steel, household implements of iron or steel and cotton netting.

13. The shipment was collect and Lang paid the ocean freight charges for Viking. The charges were based on the freight rate for a shipment of toys.

14. Sea-Land Bill of Lading 905–410092 covered the shipment of 1228 cartons listed on the bill of lading as "Novelties, Toys, Earthenware, Stoneware, Ironstone Ware, Bone China and Procelain Ware" from Nagoya, Japan, to Elizabeth, New Jersey. This cargo was being shipped by the Mogi Trading Co., Ltd., Nagoya, Japan, to Viking, and Lang acted as the customhouse broker on behalf of Viking. The cargo consisted of items which were properly described on the commercial invoice. The Consumption Entry described the cargo as articles of aluminum, articles of base metal, chrome plated ware, wooden household articles, table knives, cotton furnishings, table forks, plates, earthenware, and bone china ware, mugs, procelain ware, and sanitary ware.

15. The shipment was collect and Lang paid the ocean freight charges for Viking. The charges were based on the freight rates for a shipment of novelties, toys, stoneware, ironstone ware, bone china, procelain and earthenware.

16. Sea-Land Bill of Lading No. 937–414890 covered the shipment of 534 cartons listed on the bill of lading as "Wood Novelty" from Shimizu, Japan, to Elizabeth, New Jersey. The cargo was being

shipped by Kurito Bros. & Co., Ltd., Shizuoka, Japan, to Viking, and Lang acted as the customhouse broker on behalf of Viking. The cargo consisted of items which were properly described on the commercial invoice. The Consumption Entry described the cargo as wooden household articles, glass containers, household articles of plastic, articles nspf of wood, picture frames of wood, and hand tools.

17. The shipment was collect and Lang paid the ocean freight charges for Viking. The charges were based on the freight rate for a shipment of novelties.

18. The bills of lading for the above shipments were not prepared by Viking or Lang but by the shipper or its agent in Japan. Each bill made reference to an attached sheet of marks and numbers which consisted of a description of the items being shipped together with the number of cartons shipped.

19. Lang is an ocean freight forwarder licensed under the Act.

20. Lang is also a customs broker subject to the jurisdiction of the Bureau of Customs. It handles approximately 8,000 customs entries per year. Viking accounts for approximately 400 such entries. Viking is a very active importer covering a wide variety of items. Bernard Lang has been in "ownership-management of various custom brokerage firms since 1951." Lang was incorporated in July 1960.

21. In the case of import shipments—as contrasted with export shipments which are handled by Lang as a licensed freight forwarder —the importer (Viking in this case) sends Lang "the Documents" (including the bill or bills of lading) and the commercial invoice or invoices. Bernard Lang described the process on import shipments:

> . . . Viking sends me the documents for incoming shipments. Until I receive these documents I have no knowledge that anything exists. I don't know goods that have been ordered (sic). I don't know that they have been shipped. I don't know that freight has been gauged, how it has been described. At no point prior to my receiving documents from Viking am I involved in obtaining transportation by order in their behalf or anybody's behalf.
>
> The seven shipments from Viking were all handled in the same manner. Documents came down to us. Viking indicated on the document what they believed, based upon their knowledge of the commodity, should be the applicable rate of (customs) duty. These are reviewed by my office, changes that ought to be made are discussed with Viking. The duty is calculated the papers are presented to the United States Customs, together with the bill of lading as received from abroad, and the customs entry which I prepared in my office, my office prepared.

22. After the correct duty had been paid, Customs issued a permit and Lang sent it to the pier and a delivery order for the commodities was given to Viking. In each of the shipments Lang paid the ocean freight charges in behalf of Viking based on the "freight being charged" as indicated on the bill of lading. Lang made no effort to

determine whether the "correct ocean freight rate was being charged" and paid. Bernard Lang testified that his firm which acts as ocean freight forwarder on export shipments is familiar with freight rates from United States to Japan but would not have familiarity with inbound freight rates from Japan to the United States which may be quite different from the outbound rates.

23. Bernard Lang differentiates sharply between his status and responsibility as a customs broker and his duties and responsibilities as freight forwarder under the Act. He testified to his understanding of the dual relationship:

> . . . I am a customs broker and as customs broker am subject to the customs regulations of the United States, and whenever we are faced with a situation where the customs regulations of the United States are at variance with the laws of another agency, I am bound to follow those of the customs regulations since I am licensed by the Bureau of Customs to act as a customs broker and no other agency in the United States can license me to act as a customs broker other than the Bureau of Customs.

24. Bernard Lang understands that as customs broker he was required to comply with all requirements of other government agencies that are specified in the customs regulations. However, he does not have a responsibility to verify the accuracy of classifications of commodities and freight charges appearing on bills of lading covering inbound shipments for which he acts as customs broker.

25. As above stated, Lang paid the freight on behalf of Viking in each of the seven instances of shipment involved in this matter. With regard to the procedure involved in these payments Bernard Lang testified as follows:

> Q. (By Mr. Slunt) In these specific instances, do you know whether or not Sea-Land released the cargo upon receipt of this delivery order.
> A. Upon receipt of this delivery order and supporting documents, yes, sir.
> Q. Sea-Land would have released these specific shipments when they did receive these specific shipping orders and documents.
> A. Not only would they, but they did.
> Q. What were the supporting documents that go along.
> A. The original bill of lading.
> Q. Any further documents?
> A. Not to Sea-Land, other than the payment of the Ocean Freight.

26. As above stated, Viking is an importer of novelties and imports approximately 400 shipments of merchandise from the Orient each year. The 400 shipments are made up of a wide variety of items of merchandise which sell at retail in a price range of one to two dollars.

27. Viking prepares "thousands" of purchase orders which are sent to the shippers of the goods. With regard to the 55 purchase orders

involved in the seven shipments Viking's employees instructed the shipper as follows:

As to 17 such purchase orders-declare and classify "novelties."
As to 17 such purchase orders-declare and classify "cheapest applicable."
As to 3 such purchase orders-declare and classify "toys."
As to 10 of such purchase orders-declare and classify "earthware."
As to 7 such purchase orders-declare and classify ______.
As to one of such purchase orders-declare and classify "stoneware."

28. Each of the seven bills of lading involved was prepared in Japan either by the shipper or Viking's buying agent. Similarly, the rating of the cargo was done in Japan by employees of Sea-Land the carrier. Each bill of lading made reference to an attached sheet which contained a description of the items being shipped.

DISCUSSION AND CONCLUSION

Lang contends that its sole responsibility with regard to the seven shipments involved was to "clear the shipment through customs in accordance with the Customs laws and regulations." Lang further asserts that it was not authorized or empowered to obtain transportation by water for the shipments herein involved, could not do so and indeed did not do so. The first knowledge Land had as to the shipments was the receipt of documents for customs clearance. The method of transportation and the carrier had previously been selected. The bills of lading had been prepared including the commodity descriptions appearing thereon and the freight rates assessed prior to Lang even being aware that these shipments existed. According to Lang, the facts prove, beyond a doubt, that Lang was in no manner involved in obtaining or attempting to obtain transportation by water for the property subject to these proceedings. Lang, therefore, could not knowingly and willfully have been a party to obtaining such transportation at less than the rates or charges which would otherwise be applicable and, hence, could not have violated section 16 of the Act and did not do so.

This jurisdictional argument and a related argument by Viking may be dealt with quickly in view of the Commission's very recent holding in *Equality Plastics, Inc, and Leading Forwarders, Inc.,* Docket No. 71–94, served November 29, 1973. The facts in that case were in many respects identical or closely similar to those here involved. There as here Leading, the customs broker/freight forwarder, had no contact with the shipment except through the "documents" in preparation of the Consumption Entry, etc., in each instance paying the freight appearing on the bills of lading (in other instances the shipments were prepared.) The Commission said (Report, p. 8):

We think it clear that the second paragraph of section 22 empowers the Commission to concern itself with all violations of the Shipping Act, 1916, we have jurisdiction to investigate violations of section 16 by persons or entities named in that section, whether or not they are "other persons subject to [the] Act."

The argument [also made by Lang in this case] that because Leading had merely performed paper work to get the shipment through customs it could not be charged with "obtaining transportation by water" within the meaning of section 16 was rejected. The Commission said (p. 13):

. . . the legislative purpose behind the 1936 Amendment (section 16 First) was to extend coverage of the Act beyond carriers and to any party who participates in the transaction. The virtually all-inclusive language of the section makes this abundantly clear; it provides:

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

In view of this language there can no longer be doubt, if indeed any such doubt previously existed, that section 16 First was intended to and does cover transactions such as those involved in this case by any person "who participates in the transaction" and even though such participation merely has to do with necessary paper work of the kind here involved.

The proper standard to determine whether in the circumstances of this case a *party* has "knowingly and wilfully" violated section 16 is found primarily in *Misclassification of Tissue Paper as Newsprint Paper,* 4 F.M.B. 483, 486 (1954), wherein it was stated:

[T]he phrase "knowingly and willfully" means purposely or obstinately, or is designed to describe a carrier who intentionally disregards the statute or is plainly indifferent to its requirements. We agree that a persistent failure to inform or even to attempt to inform himself by means of normal business resources might mean that a shipper or forwarder was acting knowingly and willfully in violation of the Act.

In *Equality Plastics* the Commission elaborated (p. 14):

We think the term "plainly indifferent," as used by our predecessors in *Misclassification of Tissue Paper, supra,* means something more than casual indifference, and equates with a wanton disregard from which an inference can be drawn that the conduct was in fact purposeful; a standard somewhat analogous to the tort concept of "gross negligence."

The key is whether respondents were "in possession of sufficient facts to raise a doubt as to the accuracy of the bills of lading descriptions." *Equality Plastics and Leading Forwarders, supra.*

Under the test laid down by the Commission in its most recent pronouncement on the subject it does not appear that Lang can be found to have violated section 16 of the Act in the transactions here involved. Lang can only be charged with failure to make diligent inquiry into the correctness of the freight rates which it says it had no reason to make and indeed could not properly make under the regulations of the Customs Bureau. However that may be, the evidence in any event falls short of establishing gross negligence on Lang's part.

Taking into account the instructions given by Viking to its agent in Japan and the circumstances surrounding these shipments, it appears possible that Viking could reasonably have supposed that the "marks and numbers" placed on the bills of lading and attachments thereto were a sufficient augmentation of the descriptions "Toy," "Novelties," etc., as to have informed the carrier, Sea-Land, of the actual nature of the specific commodities, and that, as a result, the commodities had been rated and the freight gauged accordingly. Also, the many different inexpensive novelty items imported by Viking and the wide variety of possible descriptions involved make some latitude of description by general class convenient and, perhaps, justifiable on the face of the bill of lading.

It may be readily conceded that Viking's handling of these shipments was somewhat lax, casual and negligent. However, if we are to apply the same standard of accountability to Viking as we do to Lang —and it seems equitable that we should—in all the circumstances of this case [including the fact that some of the misclassifications carried a higher rate to be charged and paid than a more accurate classification would have required], it appears that inadvertent error, loose procedures and other types of ordinary negligence—as opposed to gross negligence—may account for the classification "errors" involved. This may be particularly true as it has not been shown that such misclassification was "persistent" or was involved in more than a minimal number of the large amount of commodity shipments handled by Viking. Nor does payment by Viking of a small amount of additional freight with regard to three of the seven misclassified shipments alter the result. There is no dispute that some of the items involved were misclassified. In some instances the freight charged for a particular item was too high, in some too low. The fact that when the deficiencies were brought to its attention Viking paid additional freight in those cases where it acknowledged that additional freight was due does not establish that it wilfully and knowingly violated the Act.

Accordingly it is found that the record does not establish the degree of negligence and culpability on the part of either respondent to establish violation of section 16 First of the Act. Respondent Lang continues to qualify to be licensed as a freight forwarder pursuant to section 44 of the Act.

The proceeding should be discontinued.

(S) ASHBROOK P. BRYANT,
Administrative Law Judge.

WASHINGTON, D.C.,
December 13, 1973.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–24

AGREEMENT NO. T-2635-2 PACIFIC MARITIME ASSOCIATION FINAL PAY GUARANTEE PLAN

ADOPTION OF INITIAL DECISION

August 12 1974

This proceeding is before us on exceptions filed by Wolfsburger Transport-Gesellschaft m.b.H. to the Initial Decision of Administrative Law Judge Ashbrook P. Bryant, served February 6, 1974, in which he found that:

> Agreement No. T-2635-2 does not give any undue or unreasonable preference or advantage to any other cargo over automobiles in violation of section 16 of the Act nor is the assessment being charged automobiles an unreasonable practice related to receiving, handling, storing or delivering property in violation of section 17 of the Act.
>
> Agreement No. T-2635-2 is not unjustly discriminatory or unfair as regards the carriage of automobiles and accordingly may be approved pursuant to section 15 of the said Act.

As they relate to Judge Bryant's conclusions of law, the exceptions merely constitute a reargument of contentions already advanced before the Administrative Law Judge and properly considered and disposed of by him in his Initial Decision.

Exceptions were also taken to certain findings of fact made by the Administrative Law Judge. Without addressing ourselves to the correctness of these findings we do find them to be of minimal importance to the ultimate disposition of the issues in this proceeding. Many of the discrepancies alluded to by Complainant are so small as to defy significance and others are simply not material or relevant to the ultimate conclusions reached.

Thus, upon careful consideration of the record, exceptions, briefs and argument of counsel, we find that the ultimate conclusions of the Administrative Law Judge are proper and well-founded and we accordingly adopt the Initial Decision as our own.

Therefore it is ordered, That Agreement T-2635-2 is approved pursuant to Section 15 of the Shipping Act, 1916.

It is further ordered, That this proceeding be discontinued.

By the Commission.*

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

*Commissioner Clarence Morse not participating.

FEDERAL MARITIME COMMISSION

No. 73–24

AGREEMENT NO. T-2635-2 PACIFIC MARITIME ASSOCIATION FINAL PAY GUARANTEE PLAN

Agreement No. T-2635-2 for assessment of PMA members to fund PMA/ILWU Pay Guarantee Plan found not to subject automobiles to any undue or unreasonable disadvantage nor to involve any unreasonable practice related to receiving, handling, storing, or delivering property, in violation of sections 16 and 17 of the Act. Said agreement is found not to be unjustly unfair or discriminatory and may be approved pursuant to section 15 of the Act.

Edward D. Ransom and *Robert Fremlin* for Pacific Maritime Association and its members.

Herbert Rubin, Cecelia H. Goetz and *Alan A. D. Ambrosio* for Wolfsburger Transport-Gesellschaft m.b.h.

Donald J. Brunner, Paul J. Kaller and *David Fisher* as Hearing Counsel.

INITIAL DECISION OF ASHBROOK P. BRYANT, ADMINISTRATIVE LAW JUDGE [1]

Background

1. On May 4, 1973, the Commission by order instituted this proceeding pursuant to sections 15 and 22 of the Shipping Act, 1916 (the Act), to determine whether because of the assessment formula contained therein and its application to automobiles, Agreement No. T-2635-2 [Pacific Maritime Association (PMA) Final Pay Guarantee Plan] (the agreement), filed December 15, 1972, for approval pursuant to section 15 should be approved, disapproved, or modified. The agreement, if approved, would finalize the assessment formula used in the Interim Pay Guarantee Plan which was first approved by the Commission on May 23, 1972, and then later extended.[2] The Interim Plan has allowed

[1] This decision became the decision of the Commission 8/12/74

[2] Agreement No. T-2635 was originally due to expire on September 30, 1972. By order of the Commission served September 29, 1972, the agreement was extended until December 28, 1972; by order served December 27, 1972, the agreement was extended until June 29, 1973; by further order on May 3, 1973, it was extended to December 31, 1973, and by order of December 27, 1973, the agreement was extended until such time as the Commission approves, disapproves or modifies the agreement.

PMA to fund the substantial weekly liability owing to the Plan which relates to a collective bargaining agreement between PMA and International Longshoremens and Warehousemens Union (ILWU).

2. In its order of May 4, 1973, the Commission noted that Wolfsburger Transport-Gesellschaft m.b.h. (Wobtrans) had filed a protest against the agreement alleging *inter alia* that the assessment formula is discriminatory with respect to automobile cargoes because the liability under the Pay Guarantee Plan is contingent upon the lack of work opportunities, a problem unrelated to the carriage of automobiles and that Wobtrans denies that automobile carriage receives any benefits proportionate to the burden of assessment. Also, the Commission directed that a determination be made whether automobiles are subject to any undue or unreasonable disadvantage because of the assessment in violation of section 16 of the Act or such assessment is an unreasonable practice related to receiving, handling, storing, or delivering property in violation of section 17.

3. Early in the proceeding the question arose whether the Order of Investigation included approval, disapproval, or modification of funding of the Pay Guarantee Plan adopted by PMA and ILWU following the July 1, 1973, expiration of the ILWU/PMA agreement. The Administrative Law Judge requested the parties to submit briefs on that question. That was done and it was held that the Commission Order covered consideration of funding of the Pay Guarantee Plan as continued and amended by the Memorandum of Understanding between PMA and ILWU dated June 9, 1973, and ratified by the parties on July 16, 1973.[3]

4. The parties agreed to submit their cases in large part by a Joint Stipulation of Facts and Affidavits. In addition, the depositions of three witnesses were taken, and later received as part of the record, and one witness testified in oral hearing on November 1, 1973.

The Parties

5. PMA is a corporation composed principally of stevedore companies and steamship lines and their agents doing business on the West Coast of the United States. Its main business is to represent its members in negotiations with various maritime unions, among which is ILWU, and to establish policy for its members in matters involving labor and labor controversy. As of early 1973, 126 companies were members of PMA.

6. Wobtrans is a corporation organized and existing under the laws of the Federal Republic of Germany with its principal place of

[3]See *Procedural Ruling*, served August 2, 1973.

business in Wolfsburg, Germany. It operates vessels engaged in the transport of vehicles from Germany to the Pacific Coast ports, among other places. The cargo is largely if not exclusively Volkswagen automobiles. Wobtrans is not a member of PMA but would be eligible for membership if it became a direct employer of longshore labor. However, the stevedores handling the cargoes of Wobtrans are members of PMA and accordingly are assessed by PMA on the automobiles handled by them.

Background of the Agreement

7. PMA and ILWU have entered into a number of collective bargaining agreements going back over many years, in which fringe benefits have progressively been included.

8. In 1960, PMA and ILWU agreed upon a new fringe benefit plan, the M & M Agreement, which included early retirement, supplemental retirement and pay guarantee benefits. This agreement has been referred to by the Supreme Court of the United States as "a milestone agreement which, it was hoped, would end a long and troubled history of labor discord on the West Coast waterfront." *Volkswagenwerk v. F.M.C.,* 390 U.S. 261, 263–264 (1968). The funding of the M & M Agreement was left to PMA, rather than made a part of the collective bargaining agreement. A determination as to the best and most efficient method of funding the M & M Agreement presented PMA with several novel and difficult problems.

9. In 1960, although mechanized operations had begun on the West Coast, such as the introduction of packaged loads and packaged lumber, a general mechanization of the industry had not yet taken place. The most obvious innovation had been the introduction of container service by Matson Navigation Company (Matson), a PMA member. As a consequence, in 1960 and 1961, few, if any, of the West Coast vessel operators, save Matson, looked for savings in manhours because of a mechanization. Therefore the PMA members were divided into two groups with opposing interests. One group, including Matson, anticipated imminent, substantial manhour savings because of its containerized service. The second group, representing more than 90 percent of the steamship company members of PMA, anticipated that for the immediate future their operations would continue to be a conventional breakbulk cargo handling type of operation. This second group opposed a manhour assessment basis for funding the M & M Agreement because, under such an assessment, their labor costs per ton would increase as a carrier with an innovative operation reduced its manhours per ton.

10. To determine an appropriate method of funding the M & M Agreement, PMA formed the M & M Funding Committee which considered a number of alternative assessment methods. The Committee finally adopted a tonnage formula which had been used for a number of years to collect PMA dues. The Committee was not completely satisfied with the assessment formula but believed it to be the best available solution.

11. Tonnage was determined for the PMA assessment by the manner in which a particular type of cargo was manifested for shipment, except automobiles, which were assessed on the basis of measurement tons, regardless of how manifested. Automobiles can be manifested by weight, by measurement or by unit. In the foreign trades automobiles are manifested on "a unit basis on chartered ships, but weight and sometimes measurement is shown." In the coastwise trade "autos are manifested and freighted by weight."

12. The decision to collect the Mech Fund through a tonnage assessment rather than a manhour assessment was due to the belief of the breakbulk operators who constituted the bulk of the membership of PMA that increased containerization was going to reduce total manhours.

13. PMA refused to make any exception to its uniform tonnage tax although it was aware that such inflexibility was unsatisfactory. It refused to do so on the ground that it was "unable to arrive at a rationale for determining how exceptions should be made."

14. At the time, a Volkswagen vehicle had an average measurement tonnage of 8.7 tons (40 cubic feet equals 1 ton) and a weight tonnage of 0.9 (2,000 lbs. equals 1 ton). Thus, an average Volkswagen vehicle had a measurement tonnage approximately ten times its weight tonnage.

15. PMA did not submit its assessment plan to the Federal Maritime Commission for its approval in accordance with section 15 of the Act, and such approval was not given prior to the time such arrangement was put into execution. When Volkswagen, which was then shipping its vehicles itself, refused to pay the PMA tonnage tax, PMA brought suit against the stevedores handling its cargo for the moneys due. While this litigation was pending, the amount of the tax was paid into an escrow fund.

16. In January 1963, Volkswagen filed a complaint with the Commission challenging the underlying agreements among members of PMA and the acts taken in execution of such agreements as violating sections 15, 16 and 17 of the Act. PMA made itself a party to this proceeding by intervening.[4] Hearings were held on June 4, 1964. The

[4] *Volkswagenwerk Aktiengesellschaft v. Marine Terminals Corp., et al.*, 9 F.M.C. 77 (1965).

Examiner found no violations of sections 15, 16 or 17. The Commission agreed and dismissed the complaint. The Court of Appeals for the District of Columbia affirmed the Commission.[5]

17. On March 6, 1968, the Supreme Court reversed the Commission and the U. S. Court of Appeals, and held the agreement to be subject to section 15, and directed that the case be remanded for further proceedings. It further held that in determining whether sections 16 and 17 had been violated the corelation between charges and benefits must be reasonable. The Court pointed out: [6]

> When the vehicles were assessed for the Mech Fund by measurement, the assessment came to $2.35 per vehicle—representing, if passed on to the petitioner, an increase in unloading costs of 22.5%. If the vehicles had been assessed by weight (0.9 tons) rather than by measurement (8.7 tons), the assessment would have been 25¢ per vehicle—an increase of about 2.4%, comparable to the average Mech Fund assessment of 2.2% for all other general cargo. Assessment by measurement rather than by weight thus resulted in an assessment rate for the petitioner's automobiles of 10 times that for other West Coast cargo—although automobiles had less to gain than other cargo from the Mech Fund Agreement.

18. On March 11, 1968, the PMA filed two documents with the Commission,[7] related to the extension of the Mech Fund agreement from June 10, 1966, to June 30, 1971. One covered walking bosses, the other longshoremen and clerks. Bulk cargo was exempted from the assessment for walking bosses. The portion of the fund applicable to clerks was raised by a manhour assessment proportionate to clerk manhours to total manhours. All this corresponded to PMA's original cooperative working arrangement.

19. The Commission approved the basic agreement but ordered an investigation to determine whether the assessment agreement met the requirements of the Shipping Act as interpreted by the Supreme Court.[8] However, in the same order, the Commission strongly urged the parties to negotiate and settle their differences. The Commission also said:

> . . . It is beyond dispute that the establishment and maintenance of the Mech Fund by PMA has been a prime factor in the continued labor peace of the Pacific Coast, Aside from the relatively limited area of dispute raised here, the agreements appear to have operated to the satisfaction and benefit of all concerned and the public as well.

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[5] 125 App. D.C. 281; 371 F 2d 747.

[6] *Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261 (1968).

[7] "MEMORANDUM OF AGREEMENTS BETWEEN MEMBERS OF PACIFIC MARITIME ASSOCIATION REGARDING LABOR COST ASSESSMENTS," FMC Agreement No. T-2148 and "MEMORANDUM OF AGREEMENTS BETWEEN MEMBERS OF PACIFIC MARITIME ASSOCIATION REGARDING LABOR COST ASSESSMENTS RELATED TO VEHICLE HANDLING," FMC Agreement No. T-2149.

[8] Docket No. 68-18, *Order of Approval and Notice of Investigation*, March 28, 1968.

As a result of the Commission's urging, PMA requested Sam Kagel to act as an impartial umpire to determine a binding assessment formula for the funding of the M & M Agreement. Its purpose was to arrive at a satisfactory solution of the conflict between the conventional and innovative cargo handling points of view as described above.

20. Sam Kagel, an arbitrator and mediator of national reputation and wide experience in many industries including the maritime industry, was asked by PMA to make a final and binding determination of an assessment formula, subject to approval thereof by the Commission, which would fairly distribute the cost of the M & M Agreement and would not fall unfairly upon the stevedoring operations of any particular shipper nor place an unfair, undue or unreasonable burden on any particular stevedoring operation. Kagel was also instructed that any formula he recommended had to be compatible with the "benefit/charges" test announced by the Supreme Court in its decision in the *Volkswagen* case. He was also specifically directed to solicit the views of Volkswagen and its stevedores, as well as all other segments of the industry. Kagel arranged numerous meetings with representatives of all segments of the industry. He met on a number of occasions with attorneys for Volkswagen and also on several other occasions discussed their views by telephone and by correspondence.

21. Kagel encountered many basic disagreements between the members of the industry as to what would be an appropriate funding formula. The breakbulk carriers disagreed with the position of the container operators, and different positions were taken by carriers of bulk cargo, lumber, vehicles and other specialty carriers and shippers. Kagel's major role was to act as a mediator between the various conflicting segments of the industry. During his deposition in the present proceeding, he described his procedure as follows:

> But my actual technique in that instance in 1968 was to meet with each of these groups and to see how I could work out a formula which would be at least acceptable to all of the parties.
>
> And in the process of doing that, came up with different approaches and a number of them were discarded as we went along until we got down to the final formula. And my recollection is when we got down to the final formula that my last meeting with any individual group was with Volkswagen Mr. Herzfeld [counsel for Volkswagen] came here to San Francisco, in my office. And at that time I showed him what I was able to get all of the other groups to agree to. And he told me that would be satisfactory so far as Volkswagen [was concerned].

22. A principal goal in arriving at a new assessment formula was to reduce Volkswagen's costs—a result which as a practical matter Kagel took to be a main thrust of the Supreme Court's opinion. This result he accomplished. Kagel stated:

One of my primary objectives was to reduce the cost to Volkswagen, because but for the *Volkswagen decision out of the Supreme Court I am assuming that that assignment* would never have been made, so far as I was concerned.

And so the name of the game . . . was very clearly, "How could I redistribute the costs," so that Volkswagen's costs would be substantially less than it had been prior to that decision.

23. On September 16, 1968, Kagel issued his report, in which he determined that the M & M Funding Agreement should be amended by, among other things, introducing two new cargo categories, namely, automobiles and cargo in containers.

24. According to Kagel, the only feasible method of solving the problem was to meet with each of the several groups with variant interests and to work out a formula which would be at least acceptable to all of the parties. This was the only method in Kagel's view through which a satisfactory result would be achieved. This is, of course, the general procedure followed in collective bargaining agreements of which process the assessment agreement was a by-product. The result was not a "scientific formula" but something:

. . . that the parties all could live with, and most of them didn't like, particularly those elements in the industry which had to pay more than they had paid previously, they obviously didn't like that.

25. In the course of the negotiations Volkswagen advised Mr. Kagel that assessment by weight tonnage rather than measurement would meet its objection to the formula and would conform to the Supreme Court's instruction. Alternatively, Volkswagen proposed that automobiles should receive the same treatment as bulk cargo. Kagel considered these suggestions in the light of all the circumstances and the need for agreement. Kagel's recommendation gave automobiles neither of the two proposed alternatives. As stated earlier, the tonnage assessment contribution for bulk cargo were reduced from one-fifth to one-seventh the amount paid by general cargo. These reductions were made on the assessments against bulk and container cargo in order to secure the agreement of their carriers to a change in the PMA tax on automobiles.

26. When Mr. Kagel was asked how he arrived at these fractions, he answered:

And when you ask me how did I arrive at one-seventh or one-tenth or one-fifteenth, I didn't arrive at that, I worked it out between the parties.

27. The reason for reducing the tax on container cargo was to compensate for the money and capital investment involved in this type of transportation.

28. In the formula recommended by Kagel automobiles and trucks

were assessed for the Mech Fund one-fifth the amount paid by general cargo, which amount had been increased by the reduction in the amounts to be contributed by bulk and container cargo. No change was recommended in the assessment on automobiles and trucks for the Walking Boss Mech Fund.

29. According to Wobtrans, Kagel's formula ameliorated but did not eliminate the disproportionate increase in labor costs experienced by automobiles as compared with general cargo due to the Mech Fund assessment. Every five automobile tons were treated as the equivalent of one breakbulk ton. Accordingly, the increase in manhour costs for automobiles were reduced from being ten times as great as those for breakbulk cargo, to being twice as great. Volkswagen agreed not to oppose approval by the Commission of the revised M & M assessment formula but simultaneously put on the record that its acquiescence was not intended to foreclose it with respect to any other or future proceedings. Among the reasons for this agreement not to oppose Kagel's report was the (1) fact that Volkswagen would receive a substantial sum of money held in escrow pending resolution of the dispute, (2) that Volkswagen was anxious to cooperate in the achievement of stable and peaceful labor conditions on the West Coast. Although it felt the new agreement was not entirely in accord with the Supreme Court opinion, Volkswagen accepted Kagel's formula as doing rough justice.

30. Kagel, mindful of the Supreme Court opinion, had recommended modifications in the assessment agreement which substantially reduced the charge on automobiles and had sought to relate the benefits derived by various classes of cargo—including automobiles—to the charges imposed. The Commission in approving the new agreement said: [9]

> Agreement T-2210 differs from the two earlier agreements in establishing lesser assessment for certain types of cargo than the assessments against general cargo. Bulk cargo is assessed at 1/7, automobiles and trucks exclusive of truck trailers at 1/5 and cargoes in containers at 7/10, the general cargo rate.No party to this proceeding voices any objection to the new method of assessment. Furthermore the method embodies what appears to be a reasonable compromise of the positions of the various parties, which the Commission encouraged in its order instituting this proceeding, and was determined by the arbitrator to be in accordance with the guidelines enunciated in *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission,* 390 U.S. 261 (1968), the case which held that the Commission had jurisdiction over PMA's assessment agreements and directed the Commission to examine their lawfulness . . . .

The Commission expressed the caveat that its approval of the agreement:

[9]Docket No. 68–18, *Approval of Agreement T-2210 and Discontinuance of Proceeding,* January 17, 1969, p. 2.

. . . does not, of course, prevent the Commission's further consideration of the lawfulness *of the assessment provided therein* should consideration in the future appear proper.

Pay Guarantee Plan

31. In 1969, PMA and ILWU began negotiating with respect to the collective bargaining agreement to succeed the agreement due to expire on June 30, 1971. Both PMA and ILWU anticipated a continuous decline in the need for longshore labor in the Pacific Coast ports because of anticipated increases in productivity, primarily containerization.

32. By 1968, average longshore productivity on the Pacific Coast had substantially increased from its Mech Fund level. Whereas in 1960 and 1961, only .84 tons were being discharged per manhour, by 1968, this figure had increased to 1.5 tons, just short of twice the earlier figure.

33. The principal change involved in automobile handling subsequent to the Mech Fund was the introduction of specially designed vessels from which automobiles can be rolled on and off [Ro-Ro] instead of being lifted on and off through the use of ship's gear [Lo-Lo]. Ro-Ro carriage requires specialized vessels and is, therefore, distinct from conventional Lo-Lo handling.

34. The difference in productivity between the Lo-Lo carriage and Ro-Ro can be seen from Wobtrans' experience in handling vehicles in the Port of Los Angeles and the Port of San Francisco, transported under FIO arrangements. Ro-Ro operations are more than two but less than three times as productive as conventional automobile carriage.

35. The innovative cargo handling methods permitted by the Mech Fund resulted in steadily increasing average productivity on the Pacific Coast. Productivity has risen 300% since the original adoption of the Mech Fund in 1960–61 and 200% since the extension of that fund in 1966. This increase in productivity has resulted in a decline in manhours of employment on the Pacific Coast despite a steady increase in tonnage every year, except 1971, when a strike disrupted the waterfront. Following a small decline immediately after the adoption of the Mech Fund in 1961, hours worked in the Pacific Coast ports remained steady or increased until 1970 when they experienced a sharp decline.

36. Manhours declined between 1969 and 1970 despite an increase in total tonnage of two million tons and declined further in 1972, the next non-strike year, while total tonnage dropped only insignificantly. Although two million more tons were handled on the Pacific Coast in 1972 than in 1969, total manhours of employment have dropped

almost one-third. Both the increase in average productivity and the sharp decline in manhours employment reflect the increase in container carriage.

37. Between 1969 and 1972 the amount of container tonnage transported to the Pacific Coast ports almost doubled increasing from somewhat more than six millions tons to twelve million tons, while breakbulk carriage suffered a corresponding decline from nineteen million tons to little less than twelve and one-half million tons.

38. One of the purposes of the M & M Agreement had been to encourage the adoption of labor-saving devices on the West Coast. Hence, it became important to furnish some form of pay guarantee to insure workers a guaranteed income as work opportunity diminished. The concept of pay guarantee had actually been part of the first five-year M & M Agreement. A substantial portion of the Pay Guarantee Plan was modeled on the pay guarantee language of the original M & M Agreement.

39. When PMA and the ILWU began negotiations for a new contract in 1970, it was clear that some type of Pay Guarantee Plan in lieu of the M & M Agreement would be a necessary part of the collective bargaining agreement. The negotiations resulted in PMA-ILWU Memorandum of Understanding of February 10, 1972, and the Pay Guarantee Plan which was incorporated therein was, in effect, an extension of the M & M Agreement.

40. By a Memorandum of Understanding, dated June 24, 1973, the Pay Guarantee Plan was extended, and the employers' annual commitment was increased from $5,200,000 to $6,000,000. Also, the liability became fixed instead of contingent as it was under the original Pay Guarantee Plan. When the Pay Guarantee Plan in the Memorandum of Understanding of February 10, 1972, was ratified, PMA had to determine an assessment formula to fund the benefits under the plan.

41. Pending the determination of a final formula to fund the Pay Guarantee Plan, PMA decided to adopt an interim funding method based upon the formula approved for the M & M Agreement. This interim funding formula was incorporated into Agreement No. T-2635, which provided for interim funding to September 30, 1972, which as above noted has been extended from time to time. The Executive Committee of PMA acted as a "Funding Committee" to consider the manner in which longshore fringe benefits should be assessed under the Pay Guarantee Plan and the other fringe benefit plans. The Committee's discussions were similar to those of the original M & M Funding Committee. Once more, there were two conflicting interests—the conventional operator and the container operator. By this time, however, many of the operators who had been in the first

group were now in the second, and consequently a far lesser proportion of the membership was concerned about the effects of a manhour assessment. It became evident after a number of meetings that the Executive Committee could not reach a consensus, and Kagel was asked by PMA to consider the problem and make an appropriate recommendation.

Pay Guarantee Plan Assessment Agreement

42. Since the initiation of the Mech Fund, there has been relatively little change in the productivity of conventional automobile carriage (Lo-Lo). However, in addition to conventional automobile carriage automobiles were now transported on vessels from which they can be driven on and off under their own power (Ro-Ro). Vessels suitable for lift-on, lift-off handling cannot be used for Ro-Ro. The use of Ro-Ro ships requires new capital investment.

43. During the last ten years, there has been a steady increase in the number of Japanese and other imported vehicles, in addition to those carried by Wobtrans, entering the Pacific Coast ports.

44. The automobile tonnage of 5,233,750 for 1972 represents an increase of more than 300% over the 1963 tonnage of 1,554,429. Employment generated by automobile carriage has likewise increased since 1963. In 1972, Wobtrans alone employed 3,375 ganghours compared with 2,400 ganghours in 1963, or roughly 25% more labor. The cost per manhour of PMA's assessment has steadily increased for all cargo because of the increase in productivity and the decline in manhours of employment. In 1961, when the Mech Fund was first adopted, manhour assessments for fringe benefits constituted only slightly more than 10 percent of total direct labor cost per manhour; by 1969, such assessments represented close to 20 percent.

45. Unlike Kagel's role in connection with the M & M assessment agreement, as to which he was asked to make a final and binding assessment determination, Kagel was retained by PMA in an advisory capacity to act as an impartial umpire in recommending a Pay Guarantee assessment formula. Upon his appointment on April 20, 1972, Kagel solicited the views of all segments of the industry to assist him. In Kagel's letter to industry representatives, he listed alternative funding methods—namely, an hourly method, a tonnage method, and an hour-ton method—which had been considered by various study groups, and he discussed these three principal funding methods in his letter. Kagel received many responses to his letter from members of the industry in which various positions were taken as to an appropriate funding method. He circulated these responses to all parties who had

replied to his initial inquiry, and received no further comments.

46. Volkswagen, through its attorneys, communicated with Kagel by letter and by telephone on several occasions to present its views. One of Volkswagen's contentions was that the carriage of automobiles was not responsible for a decline in manhours. Volkswagen also asserted that the problem before Kagel was similar to that of the NYSA manhour tonnage formula, and submitted for Mr. Kagel's review, Volkswagen's exceptions to the Hearing Examiner's Initial Decision in the *NYSA* case (*Agreement No. T-2336—New York Shipping Ass'n,* 12 S.R.R. 639 [1971]), and its reply to the other exceptions filed in that proceeding.

47. In addition to his discussions with Volkswagen and other industry representatives and his study of the industry's views submitted to him, Kagel also reviewed the materials which were presented to him in his investigation and determination of the M & M funding formula.

48. On November 21, 1972, upon completion of his investigation, Kagel issued his recommendations for funding the Pay Guarantee Plan. He recommended that the funding formula for the M & M Agreement be adopted for the Pay Guarantee Plan. As a result, automobiles and trucks, exclusive of trailers, would be assessed 1/5 of the assessment for general cargo; bulk cargo would be assessed 1/7 of the general cargo assessment; and container cargo would be assessed 7/10 of the general cargo assessment. Kagel's recommendation was approved by PMA, and the Memorandum Agreement approving his recommendation is Agreement No. T-2635-2, which is the agreement pending before the Commission in this proceeding. The pay guarantee assessment against automobiles is on a measurement ton basis.

49. As above stated, the February 10, 1972, Memorandum includes a Pay Guarantee Plan which created a contingent liability of $5,200,000 payable at the rate of $100,000 per week contingent upon lack of work opportunities. The plan guaranteed 36 straight time hours per week to "A" men and 18 straight time hours per week to "B" men. As stated, the method of raising contributions to meet the guarantee was again left to the determination of the employers. Liability under the plan is contingent on lack of work opportunities and, as indicated, the PMA members are assessed under a formula identical with that of the Mech Fund.

50. In December 1972, PMA, at Kagel's recommendation, determined to fund the Pay Guarantee Plan by the same funding formula used during the interim period and set forth in No. T-2635, and on December 15, 1972, filed with the Commission Agreement No. T-2635-2. No. T-2635-2 recites that the funding formula expressed in No. T-2635 is adopted "until termination of the aforesaid ILWU-PMA

Pay Guarantee Plan and extensions thereof." The memorandum of February 10, 1973, had an expiration date of July 1, 1973. On June 24, 1974, PMA and the ILWU entered into a new "Memorandum of Understanding" to expire June 30, 1975, which increased the amount available to the "Pay Guarantee Plan" during the two years life of that agreement to a fixed fund of $6,000,000 each year. No new Pay Guarantee Funding Agreement has been made by PMA nor filed with reference to this June 24, 1973, Memorandum of Understanding.[10]

Effect on Wobtrans of Assessments Under Agreement No. T-2635-2

51. Wobtrans does not pay any assessments to PMA under Agreement No. T-2635-2. Assessments are against Wobtrans' stevedore contractors, who may pass along to Wobtrans the PMA assessments, although Wobtrans and its stevedores could negotiate otherwise. Total vehicles discharged by Wobtrans at West Coast ports in 1972 was:

Port	*Total Number of Vehicles (F.I.O. and T/C)*
Los Angeles	45,977
San Francisco	31,219
Columbia River and Portland	5,226
Seattle	4,086

Lo-Lo unloading costs per vehicle for F.I.O. and T/C movement were:

Port	*Unloading Costs Per Vehicle*
Los Angeles	$ 8.11
San Francisco	10.13
Columbia River	8.16
Seattle	8.69

52. PMA asserts on the basis of the above figures the weighted average unloading cost per vehicle discharged from Wobtrans' vessels in 1972 was $8.87: the Pay Guarantee Plan assessment (as of August 4, 1973) for automobiles was $.032 per ton; since an average Wobtrans vehicle measures 8.577 tons, the Pay Guarantee assessment on an average Wobtrans vehicle is 8.577 × $.032, or $.274 per vehicle. The clerk manhour assessment for the Pay Guarantee Plan as of August 4, 1973, was $.29 per hour. In the San Francisco Bay area, for 1972, Wobtrans stevedore, Marine Terminals, discharged an average of 0.96 vehicles per manhour. Consequently, PMA says that if Wobtrans had been assessed on a manhour basis, the per vehicle assessment for its operations in San Francisco for 1972 would have been 0.29 divided by 0.96, or $.302. The total of Wobtrans vehicles discharged at West Coast

[10]The presiding officer on August 2, 1973, ruled that consideration of the funding of the Pay Guarantee Plan as continued and amended "... is both appropriate under and required by the Commission's Order of Investigation." *Procedural Ruling*, August 2, 1973.

ports was 86,508 vehicles in 1972, and an average Wobtrans vehicle measures 8.577 tons. Therefore, the total measurement tonnage of Wobtrans' vehicles discharged on the West Coast in 1972 was 741,979 revenue tons. The total PMA tonnage handled at West Coast ports in 1972 was as follows:

	Revenue Tons
Automobiles	5,233,750
General Cargo, including automobiles	36,002,287
All Cargo	59,437,877

Wobtrans' vehicles discharged in 1972 comprised only 14 percent of the total automobile tonnage, only 2.1 percent of the general cargo tonnage, and only 1.2 percent of all cargo.

53. None of the shippers or carriers of the remaining 86 percent of the automobile shipments has protested the assessments under Agreement No. T-2635-2.

54. As to the relative amount of Wobtrans' assessment, the total weighted PMA tonnage for 1972 was 40,689,409 revenue tons. The total assessments under Agreement No. T-2635-2 for all cargo (the full assessment) at $.16 per ton was $6,510,305. Wobtrans' assessment for the 741,979 revenue tons carried in 1972, at $.032 per ton, was $23,743. Thus, Wobtrans' assessment for 1972 was only .36 percent of the total assessments—even though it represented 1.2 percent of all cargo carried. (If experience proves that the assessment rate at $.16 per ton will result in more than the required $6,000,000, all per-ton rates will be proportionately reduced, so that Wobtrans' share of the $6,000,000 fund will be $6,000,000 × .36%, or $21,600.)

55. Wobtrans' $.274 per vehicle assessment is, when compared to its $8.87 per vehicle unloading costs, only 3 percent of its total unloading costs per vehicle. In 1972, the total West Coast longshore and clerk labor costs, exclusive of Pay Guarantee costs, were $175,867,000, and, when the $6,000,000 Pay Guarantee costs are added, the total labor cost was $181,867,000. The Pay Guarantee Plan represents 3.3 percent of the total labor costs. Therefore, under the Pay Guarantee assessment formula, Wobtrans pays a lesser proportion (3 percent) than that which the Pay Guarantee costs bear to the total labor costs (3.3 percent).

56. Whereas Wobtrans' assessment amounts to $.274 per vehicle, a commodity other than an automobile having the same measurement-to-weight ratio as Wobtrans' vehicles (8.577 measurement tons to 1.075 weight tons pays $1.37 (8.577 tons × $.16 per ton), or 5 times what Wobtrans pays. If the cargo is containerized, it pays $.96 (8.577 tons × $.112 per ton), or 3 1/2 times what Wobtrans pays. Therefore, cargo comparisons would appear to favor Wobtrans.

57. The record shows the following comparitive productivity figures for various types of cargo:

Cargo Category	*Manhours Per Ton*
Breakbulk	0.86
Lumber	0.48
Automobiles	0.12
Containers	0.28
Bulk	0.05

58. According to PMA, if these productivity figures are converted to assessments based upon manhours ($.29 per hour), the resulting manhour bases for these cargo categories can be compared with the Pay Guarantee assessment formula, as follows:

These figures show that if a manhour assessment is considered the "normal" method of allocating labor costs, automobiles and breakbulk cargoes are given a preference by the tonnage assessment of the Pay Guarantee assessment formula, whereas lumber, containers and bulk cargoes are at a disadvantage.

59. PMA says and submits detailed data analyses to prove that Wobtrans has through increased use of Ro-Ro and other innovative means increased the productivity of its labor. Beginning in 1969 there has been a steady increase in Wobtrans' use of Ro-Ro vessels as shown by the following summary:

60. The difference in productivity in San Francisco for Wobtrans' Lo-Lo and Ro-Ro vessels for 1972 was as follows:

61. PMA submits the history of Wobtrans' tonnage decline since 1969 as follows:

62. The Joint Stipulation of Facts submitted by the parties to this proceeding includes a productivity figure for automobiles of 8.6 tons per manhour as of 1972. Using this figure, PMA calculates the decline in manhours resulting from Wobtrans' decreased carryings since 1969 can be approximated as follows:

63. PMA submits that Wobtrans' increased use of Ro-Ro vessels in recent years has further contributed to a decrease in manhours because of their high productivity. Using the 2.56 comparative ratio between Lo-Lo and Ro-Ro productivity figures, PMA figures the loss in manhours from Wobtrans' use of Ro-Ro vessels since 1969 can be estimated as follows:

64. A summary of approximate decline of manhours (using 1969 as a base year) resulting from (a) Wobtrans' decreased carryings, and (b) its shift to Ro-Ro vessels, is as follows:

65. Longshore labor costs on the West Coast have increased from $4.13 per hour in 1960 to $8.87 per hour in 1972. Wobtrans' per-vehicle unloading costs have decreased from $10.45 in 1960 (the *Volkswagen* case, 390 U.S. at 265) to $8.87 in 1972. Since the productivity of Wobtrans' Ro-Ro vessels is 2.56 times that of its Lo-Lo vessels,

Wobtrans' per-vehicle unloading cost for its Ro-Ro vessels in 1972 was \$8.87 divided by 2.56, or \$3.46. Consequently, using Ro-Ro vessels Wobtrans has reduced its per-vehicle unloading costs from \$10.45 in 1960 to \$3.46 in 1972.

66. In his investigation of a Pay Guarantee assessment formula, Kagel considered the productivity increases of Wobtrans, in having an opportunity under the PMA-ILWU collective bargaining agreement to ship its automobiles to the West Coast on its highly productive Ro-Ro vessels.

67. On the basis of the data submitted by the parties and included in the record, as well as the analyses of that data both by the witnesses and in the briefs, it appears that—particularly during the period from 1969 to 1972—Wobtrans through the introduction and use of Ro-Ro vessels and other more efficient means has substantially increased—in some instances between two and three fold—the productivity of the labor engaged in its stevedoring activities. As a result, its labor costs have substantially diminished. These benefits flow from the underlying collective bargaining arrangements between PMA and ILWU which resulted in the Pay Guarantee Plan which is funded by the assessment formula under consideration herein. It also appears that, while no precise mathematical equation is practicable between benefit and burden, there does not appear to be any marked disparity between benefit and burden as between automobiles and various other types of cargo.

68. Although diminishing work opportunity was one of the principal concerns of the ILWU in seeking a Pay Guarantee Plan, the benefits which longshoremen receive under the plan are not solely related to declining work opportunity.

69. It is unlikely that the Pay Guarantee Plan will be discontinued when there is sufficient work for all longshoremen, and in fact there is presently, and was in 1972, sufficient work for most of the established work force. The principal concerns of the ILWU in negotiating the Pay Guarantee Plan were that (1) longshoring in some ports is highly seasonal, (2) because ships often arrive in groups or not at all, longshore work comes in peaks and valleys, and (3) trades may dry up and ports may die.

DISCUSSION AND CONCLUSIONS

The principles which govern this case are found in the opinions of the Justices of the Supreme Court in the *Volkswagen* case in 1968.[11] Justice Stewart for the majority found that the M & M funding agree-

[11] *Volkswagen v. F.M.C.,* 390 U.S. 261, 279, *et seq.*

ment (lineal ancestor of the agreement now before us) was required by section 15 of the Act to be "approved, disapproved or modified." Of necessity, that would require decision on remand whether sections 16 and/or 17 were violated by the agreement. Accordingly, the Justices each gave some guidance to the Commission in the "handling of these issues." [12]

Justice Stewart wrote: [13]

The Commission ruled that the petitioner had failed to demonstrate any "undue or unreasonable prejudice or disadvantage" under §16 solely because it had not shown any unequal treatment as between its automobiles and other automobiles or other cargo competitive with automobiles. In so ruling the Commission applied the "competitive relationship" doctrine which it has developed in cases concerning rates for carriage of goods by sea. But the Commission in cases not involving freight rates and the particularized economics that result from a vessel's finite cargo capacity, has often found §16 violations even in the absence of a "competitive relationship." . . . When the agreement in the present case is filed, the Commission may consider anew whether the mere absence of a competitive relationship would foreclose further §16 inquiry.

The Court's instruction with regard to section 17 was somewhat more trenchant: [14]

With respect to Section 17, the Commission found that the assessment upon petitioner's automobiles was not "unreasonable," because the petitioner had received "substantial benefits" in return for the assessment, and there was no showing of a deliberate intent to impose an unfair burden upon the petitioner. This, we think, reflects far too narrow a view of §17. It may be that a relatively small charge imposed uniformly for the benefit of an entire group can be reasonable under §17, even though not all members of the group receive equal benefits. . . . But here a relatively large charge was unequally imposed. The benefits received by the petitioner may have been substantial, but other cargo received greater benefits at one-tenth the cost. Moreover, the question of reasonableness under §17 does not depend upon unlawful or discriminatory intent. . . .[15]

The question under §17 is not whether the petitioner has received some substantial benefit as the result of the Mech Fund assessment, but whether the correlation of that benefit to the charges imposed is reasonable. The "substantial benefits" measure of unreasonableness used by the Commission in this case is far too blunt an instrument. Nothing in the language or history of the statute supports so tortured a construction of the phrase "just and reasonable." . . . The proper inquiry under §17 is, in a word, whether the charge levied is reasonably related to the service rendered.

Mr. Justice Harlan in his concurring opinion elaborated on the effect of the assessment agreement in the light of the commands of sections

[12] "The Commission will be called upon again to consider the effect of §§16 & 17 since an agreement that violates a specific provision of the Act must be disapproved. Accordingly, it is not inappropriate without now passing upon the ultimate merits of the §§16 & 17 issues to give brief consideration of the Commission's handling of those issues on the present record."

[13] 390 U.S. 279.

[14] *Ibid*, p. 280, *et seq.*

[15] The Court quoted the Commission:

[Sections 16 and 17] proscribe and make unlawful certain conduct, without regard to intent. The offense is committed by the mere doing of the act, and the question of intent is not involved." *Hellenic Lines Ltd.—Violation of Sections 16 (First) and 17*, 7 F.M.C. 673, 675–676 (1964).

16 and 17 of the Act. Remarking that the agreement was unlike any which had previously been considered by the Commission and involved an issue of "first impression." He then said, in part: [16]

> ... the agreement levied a "tax" on Association members, which ... would be used to pay for a general benefit to the shipping industry, but the allocation of that tax bore no direct relationship to benefits received by customers.
>
> The real difficulty in this case is to formulate a workable definition of whether the burdens have been "unfairly" allocated. ... The fact that all automobiles are treated alike should not have prevented the Commission from inquiring whether special treatment for this class of goods was necessary under the circumstances and, if so, whether the special rule adopted was the fairest that could be devised.
>
> The Commission's interpretation of §17 was also erroneous. The Commission held that since petitioner received substantial benefits from the modernization program it would not make minute inquiry into whether petitioner's benefits precisely corresponded to the costs imposed. The first difficulty is with the conclusion that petitioner received "substantial benefits." ... It may be that those who will directly benefit from modernization and those who will benefit only from increased stability during the course of a modernization program in which they have no interest (and which others have imposed on them) should both pay part of the cost of the Mech Fund. However, the existence of such a categorical difference between the benefits received by different groups should at least invite inquiry whether charges are as appropriately proportioned as would be feasible.
>
> ... Of course charges need only be "reasonably" related to benefits, and not perfectly or exactly related, *Evans Cooperage Co. v. Board of Commissioners of the Port of New Orleans*, 6 F.M.B. 415, 418, but in this case inquiry ceased before it had reached even that nearer point.

Mr. Justice Fortas, agreeing that the agreement was required to be filed under section 15, remarked that the Court's opinion did not purport to "determine the effect of §§16 and 17 [on the allocation agreement] and I believe that the Court certainly should not do so."

While Justice Douglas could not "say that the Commission erred in finding no violation of §16" he agreed that the case should be remanded to the Commission for further findings under section 17. In a footnote Justice Douglas described the impact of the agreement on the carriage of petitioner's automobiles [17] and the disproportion between the benefits received by petitioner and the charges imposed upon his cargo as compared with other cargo. He agreed that the "substantial benefit test" represents too narrow a view of section 17:

> ... To focus an inquiry solely on the benefits received may obscure the disparity between the charges ultimately falling upon petitioner and those exacted from other shippers. The Commission should compare the benefits received with the charges imposed on petitioner's cargo and with those levied upon other cargo, which receives substantially similar benefits, before the question of reasonableness can be resolved. This determination is for the Commission to make in the first instance.

[16] *Ibid*, pp. 291–295 [footnotes deleted].

[17] 390 U.S. 26; 315 (footnote 30).

Hence, without specifying what assessment allocation arrangement would satisfy the requirements of sections 16 and 17, all the Justices (save, possibly Mr. Justice Fortas) clearly indicated that the assessment formula under attack by petitioner (Volkswagen) would not. The Court pointed out that the Mech Fund assessment charged petitioner's automobiles $2.35 per vehicle representing an increase of 22.5 percent in unloading cost whereas if charged by weight the increase would have been 25¢ per vehicle—an increase of about 2.4 percent which it noted was "comparable to the average Mech Fund assessment of 2.2 percent for all other general cargo. This was the nub of the Court's consideration of petitioner's plight under the assessment agreement. The Court, quite pointedly, drew attention to the apparent inequity involved. It said: [18]

> Assessment by measurement rather than by weight thus resulted in an assessment rate for petitioner's automobiles of 10 times that for other West Coast cargo—although automobiles had less to gain than other cargo from the Mech Fund agreement.

In summary, the Supreme Court marked out the general area but not the exact bounds within which to determine whether the assessment agreement meets the minimum tests necessary to avoid the prohibition of sections 16 and 17 of the Act. However, all members of the Court concurred in the judgment which left to the Commission the duty to make the judgment initially whether in all the relevant circumstances, the agreement gave "any undue or unreasonable preference or advantage to any description of traffic in any respect whatsoever" (section 16) or imposes "unjust or unreasonable regulations or practices relating to or connected with the receiving, handling, storing or delivering of property" (section 17).[19] Specifically, the Court determined that the mere lack of a "competitive relationship should not have foreclosed further inquiry under §16" and that the "proper inquiry under §17 is, in a word, whether the charge levied is *reasonably* related to the service rendered." (Emphasis supplied.) In other words, whether, broadly speaking, the petitioner is getting a "fair shake." It was not the Court's intention to set a precedent for the substitution of its judgment for that of the Commission or to impose a rigid procedural mold on the elasticity of the administrative process in this sensitive and vital area of maritime commerce. The Court said that the "substantial benefit" test applied by the Commission to the earlier funding agreement was "far too blunt an instrument" with which to fashion compliance with sections 16 and 17 of the Act.

[18] 390 U.S. 261, 266.

[19] In the latter event the Commission may "determine, prescribe and order enforced a just and reasonable regulation or practice." 46 U.S.C. §816 (§17).

Indeed, the Court characterized the Commission's reading of the statutory phrase "just and reasonable" as "tortured." "Substantial" benefit to Volkswagen could not alone render the formula just and reasonable.

However, a fair reading of the several opinions of the Justices leads to the conclusion that in determining what is "just and reasonable" under the test laid down by the Court in the particular circumstances of a given case it is not necessary to make minute inquiry whether the benefits received by one type of cargo precisely correspond to the benefits received by a different type of cargo. It is sufficient if any disparity which may result falls within reasonable tolerances. Indeed, Mr. Justice Stewart specifically recognized that a "relatively small charge" imposed uniformly for the benefit of an entire group can be reasonable under section 17 even though not all members of the group received equal treatment [390 U.S. 281] and Mr. Justice Harlan said that disparity of benefit should at least "invite inquiry" whether the charges were "appropriately proportioned." The Court appears implicitly to have recognized that to require a precise balancing of burdens against benefits within the frame of the complicated structures and many-faceted interests which compose the maritime/labor complex on the West Coast of the United States would be impractical, if not impossible without risking serious consequences to the maritime commerce of the United States.

The new formula as above stated was worked out in protracted negotiations among the interested parties and constitutes a more reasonable a solution to the sensitive and difficult problems presented by the need for an assessment agreement acceptable to a large number of parties with variant interests than any method of theoretical evaluation of benefits against burden could have produced.

While the agreement herein may not be, and quite surely is not, in perfect accord with ideal and theoretical concepts of justice and probity, it may well be the best solution within the general frame prescribed by the Court that could be devised and agreed upon in all the circumstances by all the parties whose positions were entitled to be heard and taken into account. Certainly, it appears to constitute a rough equation of benefits against burden accruing to automobile cargo as contrasted with other types of cargo affected by the agreement.

Concededly, the burden on Volkswagen was greatly reduced—i.e., from 10 times to twice that of breakbulk. The result was not a "scientific" formula, but a negotiated settlement that all the parties accepted and could "live with" which did substantial justice within the frame set out by the Supreme Court.

It should be noted in passing that the catalyst of the Supreme Court's rejection of the Commission's "substantial benefit" test of compliance with sections 16 and 17 of the Act was the gross disparity in the effect of the original M & M assessment formula on automobiles as against other cargo. Also, PMA "was dominated by common carriers" whose intent was said to be and may well have been to "shift a disproportionate share of the Mech Fund assessment" onto Volkswagen "which did not patronize those common carriers." In a footnote to his opinion, Justice Stewart quite pointedly remarked that both the committee of PMA which devised the assessment formula and the one which later ruled on claims of inequities were made up entirely of carriers: "neither committee had a single member who was a stevedoring contractor or terminal operator although there were many such in PMA." (390 U.S. 267). While these practical circumstances of commercial "competition" may not have been definitive of the Court decision they clearly played a part and to some degree affected the result.

Also, it should be observed that it was not the use of measurement rather than weight in assessing automobiles or the fact that the formula may have been arrived at by agreement among interested parties that the Court found objectionable. Rather it was failure of the Commission to consider the relative impact of the benefit/burden realities on various types of cargo. This seems clear from the Court's emphasis on the disproportionate burden originally imposed on Volkswagen.

Wobtrans argues that PMA has made no real attempt to deal with the "central issue" in the case as defined by the Supreme Court which is whether "the special rule adopted" in the agreement with respect to automobiles "was the fairest that could be devised" which Justice Harlan said should be the objective, in his concurring opinion in *Volkswagen* (390 U.S. 293–294). Wobtrans says it is obvious that PMA made no attempt to corelate benefits and burdens, and, as Kagel "repeatedly" made clear, the formula by which the Pay Guarantee Plan is being funded was arrived at by mediation, and not through corelation of benefits and burdens. Wobtrans complains that instead of attempting any affirmative justification for its formula PMA in the record and its briefs concentrates on attempting to show that "for a variety of reasons the burden on automobiles is different from that which drew the cricicism of the Supreme Court in the earlier decision."

As indicated above, we do not read the Supreme Court's dictum or any subsequent Commission instruction to prescribe any particular method of arriving at an assessment formula under a funding arrangement such as here involved. Nor is there any indication that the courts or the Commission has proscribed mediation among interested parties —including complaining parties—as an appropriate method to arrive at a solution of such a funding problem provided the result is workable in the real world of maritime commerce and labor relations and at the same time meets the test required by the language of sections 16 and 17 as interpreted by the Commission in the light of the Supreme Court's dicta in the *Volkswagen* case. We think the agreement herein accomplishes that result.

It would be fruitless and nonproductive to expand this opinion by a further recitation, rehash and comment in detail on the plethora of statistical data, argumentation and analyses which are presented in the record and the able briefs of counsel. The exhibits and briefs have been carefully read and considered. The record fully establishes that, in arriving at the funding formula embodied in the M & M funding agreement and now carried forward into the agreement before us, Kagel, acting on the instructions of PMA and with the approval of the Commission, took adequate account of the burden/benefit requirement laid down by the Supreme Court. As appears from the findings herein and in more detail in the record and briefs of the parties upon which they are based, the formula included in the Pay Guarantee Funding Agreement—while perhaps not as favorable to Wobtrans as it could have been without tipping the scales in the opposite direction—cannot be said to be outside the perimeter of reasonable relation between burden and benefit required of such agreements by sections 16 and 17 of the Act.

Several particular matters stressed in the briefs require some comment. The Commission in a recent similar case involving some of the same issues and parties recognized the difficulty of precise equation of benefit with burden by a "scientific formula" in an assessment agreement similar to that here involved. In *Transamerican Trailer Transport, Inc. et al. v. New York Shipping Association,* 13 S.R.R. 73, 91 (subsequently referred to as *NYSA*), the Commission in determining an appropriate assessment formula within the frame laid down by the Supreme Court in *Volkswagen* frankly adopted a "reasonable compromise" between differing positions put forward by the parties to meet their contending interests.

It, in effect, "split the difference" between these various proposals in adopting the "weight-ton formula" as satisfying the Supreme Court's requirement that the "costs which automobiles suffer are reasonably related to the benefits they receive." In addition, the Commission noted the recommendation of members of the assessment committee that the weight ton formula be adopted, and the willingness of two of the interested parties to accept that formula as an "alternate solution to end litigation."

The relation of the *NYSA* case to that at hand is discussed in detail by both parties in their briefs. As above noted, Wobtrans raised the appropriate questions with Kagel and submitted the NYSA proposed findings and briefs to Kagel for his consideration. However, Kagel concluded that and we agree, the NYSA matter was a different assessment arrangement, to fund a different plan under a different collective bargaining agreement involving assessment for multiple fringe benefits. As PMA points out, the assessment discussed in *NYSA* was to meet NYSA's obligations as to (1) pensions, (2) welfare and clinics, (3) guaranteed annual income, (4) "shortfall" of actual hours worked at the Port of New York, and (5) administrative expenses of NYSA (11 S.R.R. at 836). The total obligations were in excess of $70,000,000 per year. The total obligation under the Pay Guarantee Plan is $6,000,000 and covers only a pay guarantee benefit. PMA assessment for other fringe benefits similar to those of the NYSA plan (vacations, pensions, welfare) are funded on a manhour basis. Therefore, any comparison of the West Coast situation with the *NYSA* case must take into account that *all* benefits under the NYSA plan are assessed on a manhour/tonnage basis, whereas all but one of the PMA-ILWU fringe benefits are calculated on a man-hour basis.

A number of other comparisons are made between the NYSA agreement and the PMA agreement here under consideration. A number of arguments are made by Wobtrans, most of which were rejected by Kagel which were designed to apply the weight ton formula to this case on analogy to the Commission's *NYSA* opinion. These arguments are not convincing in view of the wide differences in circumstances and arrangements underlying the two cases.

Nor do we agree with Wobtrans' position that the "Court as a whole squarely repudiated the doctrine that an assessment satisfied the Shipping Act if it was generally reasonable and administratively convenient." As above indicated, the Court was influenced by the obvious unreasonableness of the original M & M funding formula leading to a gross disproportion between burden and benefit; and the complete absence of any attempt by the Commission to relate burdens to benefits. Indeed, as we have pointed out earlier therein, not an exact or precise relation of burden to benefit but one which, after due consideration of the relevant circumstances of the particular case, reasonably relates such burdens to benefits, satisfies the requirements of the Act. If this is an improper reading of the Court's opinion it will doubtless be corrected on appeal.

Nor does the implication of unfairness or bias indicated in the Court's opinion apply to the subsequent history of the consideration and development of the present formula. There is no evidence-indeed no allegation—that the cards were stacked against Wobtrans in the selection of Kagel or in his consideration of the M & M funding formula or in his recommendation that the same or a similar formula be incorporated into the Pay Guarantee funding arrangements. It is not without significance that Wobtrans accepted Kagel's determination in the former case—albeit with some reservations.

Finally, Wobtrans says Kagel failed to take account, in his consideration of the Pay Guarantee Funding Formula, that:

(a) Volkswagen had agreed to assessments in accordance with the earlier formula in consideration of moneys from the escrow fund which balanced out the discrimination against its cargo, (b) Volkswagen had acceded to the Mech Fund formula solely by way of compromise and to maintain waterfront harmony and (c) automobiles have not been responsible for any decline in man-hours worked by ILWU members for the period from 1968 to date.

In considering both the Mech Fund formula and the Pay Guarantee formula Kagel solicited and received detailed statements from Wobtrans' counsel who were afforded an opportunity to present such views and facts as they chose. These submissions—both written and oral—were duly considered by Kagel in connection with his consideration of those submitted by other interested parties.

There appears to be no doubt that Wobtrans either fully presented or was afforded ample opportunity fully to present whatever arguments or facts it felt to be important and useful to its cause—including those it now asserts were not considered by Kagel.

While of course we cannot say that in abstract terms the funding agreement is the "fairest" that could conceivably have been devised, one who has considered the record in this proceeding cannot help but be convinced that the method used by Kagel of arriving at a funding formula was within the frame of the Supreme Court's interpretation of the Act. Indeed, it was quite probably the only reasonably feasible method in the circumstances. One must be equally convinced that, within reasonable tolerances, the result while not ideal meets the tests laid down by the Supreme Court under sections 16 and 17 of the Act.

Agreement No. T-2635-2 does not give any undue or unreasonable preference or advantage to any other cargo over automobiles in violation of section 16 of the Act nor is the assessment being charged automobiles an unreasonable practice related to receiving, handling, storing or delivering property in violation of section 17 of the Act.

Agreement No. T-2635-2 is not unjustly discriminatory or unfair as regards the carriage of automobiles and accordingly may be approved pursuant to section 15 of the said Act.

(S) ASHBROOK P. BRYANT,
Administrative Law Judge.

WASHINGTON, D.C.,
February 6, 1974.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 463

MAFATLAL LTD.

v.

SCINDIA STEAM NAVIGATION CO. LTD.

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

August 13, 1974

No exceptions having been taken to the initial decision 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 August 13, 1974.

It is ordered, That applicant is authorized to refund \$69.26 of the charges previously assessed Mafatlal Ltd.

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

"Notice is hereby given, as required by the decision in Special Docket 463 that effective April 27, 1974, for purposes of refund or waiver of freight charges on shipments which may have been shipped from India during the period from April 27, 1974, through May 10, 1974, the rate on 'Jute Bagging for Cotton Bale Covering', is \$35.25 CBM subject to all applicable rules, regulations, terms, and conditions of said rate and this tariff."

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

By the Commission.

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

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 463

MAFATLAL LTD.

v.

SCINDIA STEAM NAVIGATION CO. LTD.

Scindia Steam Navigation Co. Ltd., permitted to refund a portion of the freight charges.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE [1]

Scindia Steam Navigation Company, Ltd., has requested permission to refund a portion of the freight charges on a shipment of jute bagging for cotton bale covering under a bill of lading dated April 27, 1974. Scindia booked a shipment of 92.3523 CBM of jute bagging for cotton bale covering from Calcutta, India, to San Francisco, California. Through error Scindia charged a rate of $36.00 per cubic bale meter.

Effective March 15, 1974, there was a general increase in rates of 12.5 percent. The rate in effect prior to the increase was $31.25 per cubic bale meter. As increased it would be $35.25 per cubic bale meter. Due to clerical error a rate of $36.00 per cubic bale meter was instead published in the tariff. Therefore, the rate applicable at the time of the shipment under The Scindia Steam Navigation Co., Ltd., Tariff, F.M.C. No. 13, East Coast of India & Bangladesh to U. S. & Canadian Pacific Coast Ports, page 21, effective March 15, 1974, was $36.00 per cubic bale meter. This rate yielded a total freight for the shipment of $3,324.68. The proper rate of $35.25 would have yielded a total freight of $3,255.42.

Authority is sought to refund the difference between the applicable rate and the rate charged, or $69.26. Scindia alleges there was no other shipments of the same or similar commodity moved during approximately the same period of time at the rate applicable at the time of the shipment here involved.

Section 18(b)(3) of the Shipping Act, 46 USC 817, as amended by

[1] This decision became the decision of the Commission 8/13/74

Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92, is the applicable law. Briefly it provides that the Federal Maritime Commission may, in its discretion and for good cause, permit a common carrier by water in the foreign commerce of the United States to refund a portion of the freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where there is an error in a tariff of a clerical or administrative nature and such refund or waiver will not result in a discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment. All these requirements have been met.

Finally, the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

Applied to the instant situation, it is found that refund of the difference between the applicable rate and the rate charged may be allowed.[2] Accordingly, respondent Scindia Steam Navigation Co., Ltd., is hereby permitted to refund the sum of $69.26, which represents the difference between the rate of $35.25 per cubic bale meter and the rate of $36.00 per cubic bale meter. The notice of refund shall be published in Scindia's tariff.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D. C.,
July 18, 1974.

[2] *Hawaiian Agricide & Fertilizer Co., Ltd. v. Micronesia Interocean Line, Inc.,* Special Docket No. 404, 12 F.M.C. 322 (1969); *U. S. Department of Agriculture v. Tropwood Lines,* Special Docket No. 449, 10 SRR 1080 (1972); and *U. S. Department of Agriculture v. Waterman Steamship Corporation,* Special Docket No. 451, 13 SRR 540 (1973).

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–74

MODIFICATION OF ARTICLE 4 AGREEMENT NO. 3302—
THE ASSOCIATION OF WEST COAST STEAMSHIP COMPANIES

Evidence adduced is insufficient to render judgment that would modify the unanimity voting provision in Agreement 3302 of the Association of West Coast Steamship Companies (ASSWESTCO) as it relates to decisions affecting rates.

Proceeding is referred to the Office of Administrative Law Judges for hearing and the development of a record adequate to the formulation of a reasoned decision.

Donald J. Brunner and *Stephen T. Rudman,* Hearing Counsel.

REPORT

BY THE COMMISSION: (Commissioners Barrett, Hearn and Morse; Chairman Bentley and Vice Chairman Day concurring)
Decided 9/23/74

By Order served November 15, 1973, the Commission, pursuant to sections 15 and 22 of the Shipping Act, 1916, directed the Association of West Coast Steamship Companies (ASSWESTCO) to show cause why Article 4 of ASSWESTCO Agreement No. 3302 should not be modified "to reduce the voting requirements in any decision affecting rate changes from unanimity to something less than unanimity, such as two-thirds or three-fourths." This action was based upon information on file with the Commission indicating that member lines of ASSWESTCO have attempted in the past to reduce such voting requirements in the conference agreement from unanimity to two-thirds majority vote. However, because the institution of such a change itself requires unanimous approval of the member lines under Article 4 of the ASSWESTCO agreement now in effect, such efforts have apparently been thwarted by the lone dissenting vote of one member line, Flota Mercante Grancolombiana, S.A. (Grancolombiana).

The only response filed pursuant to the Commission's Order to Show Cause was a Memorandum of Law submitted by Hearing

Counsel. None of the respondents submitted affidavits, memoranda, or requests for hearing as permitted under the Order to Show Cause.

BACKGROUND

The unanimous voting procedure at issue was introduced at the time ASSWESTCO was organized in 1934, and has been retained through the years. It is clear from information before the Commission, however, that nine of the 10 ASSWESTCO member lines may now wish to amend the Article 4 unanimity provision and adopt a majority vote provision, but are being effectively blocked in such efforts by Grancolombiana.

The member lines' positions were last presented to the Commission on November 19, 1973, when ASSWESTCO submitted to the Commission a copy of a letter mailed to its member lines on that same day which addressed itself specifically to the Commission Order. It read in part:

> Since the Conferences' position has been clearly stated to the FMC, it is the Chairman's position that further clarification from his office is unnecessary. Should any memberline have changed their position since the last voting on this matter, we ask that the Chairman be notified at once. Should any memberline desire that the Chairman submit an affidavit, please so inform and a special meeting will be held to discuss this matter.

This informal letter was the only correspondence received by the Commission following issuance of its Order to Show Cause from either ASSWESTCO or its member lines prior to the December 17, 1973, deadline for the filing of responses thereto.

Hearing Counsel, in their Memorandum of Law submitted in response to the Order, argued that the ability of one member line to utilize the unanimity rule of Article 4 to frustrate the wishes of almost all of the other member lines of ASSWESTCO "is clearly conduct detrimental to the commerce of the United States." They therefore urged the Commission to modify Agreement No. 3302 to provide for a two-thirds majority for any decision taken by members of ASSWESTCO with regard to rate changes.

Not until January 17, 1974, did Grancolombiana submit a letter to the Commission, in which it suggested surprise at the recommendation of Hearing Counsel and reiterated its opposition to any amendment of Article 4.

DISCUSSION AND CONCLUSIONS

The Commission considers it most inappropriate that ASSWESTCO and its member lines failed to respond in this proceeding under the procedures set forth in the Order to Show Cause. While we presume that all Respondents felt that their positions on the matter at issue had previously been adequately presented, albeit informally to the Commission, with no need for restatement, the fact remains that there was a breakdown in complying with a properly issued Commission Order in a proceeding undertaken primarily to investigate and protect Respondents' individual and collective interests. While the Commission might attempt to render a judgment in this case based solely on the documentary evidence now available to it, we believe that due process considerations require that this proceeding be assigned to the Office of Administrative Law Judges for hearing. Only through the development of a complete record with full opportunity for parties to be heard will the best interests of the Association, the individual member lines and the public be served.

Therefore, pursuant to its authority under section 15 of the Shipping Act, 1916, the Commission here by refers this proceeding to the Office of Administrative Law Judges for hearing to determine whether Article 4 of ASSWESTCO Agreement No. 3302 should be modified to provide for less than unanimous voting in any decision affecting rates. An appropriate order will be entered.

Chairman Helen Delich Bentley and Vice Chairman James V. Day, concurring:

Although we are of the opinion that the documentary evidence available to the Commission in this case could be determined as sufficient to render judgment, we defer to our colleagues in the referring of this matter to the Office of Administrative Law Judges.

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–74

MODIFICATION OF ARTICLE 4 AGREEMENT NO. 3302—
THE ASSOCIATION OF WEST COAST STEAMSHIP COMPANIES

ORDER

This proceeding was initiated by the Federal Maritime Commission to determine, inter alia, whether Article 4 of Agreement No. 3302—Association of West Coast Steamship Companies (ASSWESTCO) should be amended to provide for a less than unanimous vote for any decision effecting rate changes. The Commission has fully considered the matter and has this date made and entered of record a Report containing its findings and conclusion thereon, which Report is hereby referred to and made a part hereof. The Commission found that the record in this proceeding was inadequate to formulate a fair and reasoned decision.

Therefore, For the reasons enunciated in said Report,

It is ordered, That Docket 73–74 is hereby referred to the Office of Administrative Law Judges for hearing and the development of a record adequate to determine whether modification is necessary of the unanimity provision of Article 4, ASSWESTCO Agreement No. 3302, as it relates to decisions effecting rates.

It is further ordered, That the presiding Administrative Law Judge shall, based on his findings of fact and conclusions of law, issue an Initial Decision that determines what modification, if any, is necessary regarding the unanimity provision at issue.

It is further ordered, That all member lines of ASSWESTCO shall be named respondents in this proceeding.

By the Commission.

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 72–30

COMMODITY CREDIT CORPORATION AND UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT

v.

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

NOTICE OF ADOPTION OF INITIAL DECISION

October 31, 1974

No exceptions having been filed to the initial decision of the Administrative Law Judge 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 October 31, 1974.

By the Commission.

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

FEDERAL MARITIME COMMISSION

No. 72–30

COMMODITY CREDIT CORPORATION AND UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT

v.

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

A war risk surcharge on relief shipments to Lebanese ports was not violative of sections 15, 16 and 17 because transportation factors, such as risk and port congestion, were present.

Barry D. Hersh for complainants.

Edward S. Bagley for respondents Gulf/Mediterranean Ports Conference, Lykes Bros. Steamship Co., Inc., and Hellenic Lines Ltd.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE [1]

This complaint proceeding is before me on a motion for summary judgment filed by respondents Lykes Bros. Steamship Co., Inc., Hellenic Lines Ltd., and the Gulf/Mediterranean Ports Conference. The case arose from a complaint filed by the Commodity Credit Corporation (CCC) and the Agency for International Development (AID) [2] against the North Atlantic/Mediterranean Freight Conference, and its member lines, the respondents already noted above, and the independent lines, D. B. Turkish Cargo Lines and Jan C. Uiterwyk Co.

The complaint, as amended, charges respondents with violations of sections 15, 16, 17 and 18(b)(5) of the Shipping Act, 1916 (46 U.S.C. 814, 815, 816 and 817) because of their imposition of a "war risk surcharge" on shipments to Lebanese ports. The period involved is from November 22, 1969, through February 1973. Reparation in the amount of $91,080.14 was sought by complainants.

CCC and AID are charged with the responsibility for shipping relief

[1] This decision the decision of the Commission 10/31/74

[2] AID and CCC are sometimes collectively referred to herein as the Government.

cargoes as part of programs under Title II of Public Law 480—83rd Congress, (68 Stat. 457, 7 U.S.C. 1721, *et seq.*), and the provisions of the Foreign Assistance Act of 1961, as amended, (75 Stat. 424, 22 U.S.C. 2151–2407). In discharging that responsibility, complainants use the services of the respondents.

Respondent North Atlantic/Mediterranean Freight Conference serves ports in the North Atlantic Hampton Roads/Eastport Range and ports in the Mediterranean, the Sea of Marmara, the Black Sea, and the Atlantic Coast of Morocco. It does not serve ports in Spain and Israel. Respondent Gulf/Mediterranean Ports Conference, serves ports in the South Atlantic/Gulf of Mexico Range, Cape Hatteras to Brownsville, and ports in the Mediterranean, including the Gulf of Taranto, the Adriatic Sea, the Black Sea, and the Atlantic Coast of Morocco to Port Said, inclusive. It does not serve ports in Spain.

Before proceeding to the facts such as they are, some clarification of the current status of the respondents and the issues in the case is necessary.

The North Atlantic/Mediterranean Freight Conference is no longer a party to the proceeding their motion to be dismissed as a party having been previously granted. At the hearing, complainants moved the dismissal of D. B. Turkish Cargo on the ground that they had examined the material furnished on discovery and had concluded that the surcharge of D. B. Turkish was reasonable and further proceedings against D. B. Turkish were unwarranted. Action on the motion was withheld pending decision on the motion for summary judgment and the motion is hereby granted.

Complainants' remaining allegations under 18(b)(5) have now become moot. Upon an earlier motion that part of the complaint which sought reparation under section 18(b)(5) was dismissed on the ground that until a rate has been declared unlawful by the Commission under section 18(b)(5) no reparation can be awarded on the basis of that rate. Insofar as the respondents not dismissed, the ruling left complainants free, however, to seek disapproval of the surcharge under 18(b)(5). As noted, this course has also become moot as the challenged surcharges were at the time of the hearing and are no longer in effect and any determination of their validity under section 18(b)(5) would be academic. See *Rates Hong Kong-United States Trade,* 11 F.M.C. 168 (1967). Accordingly, so much of the complaint as alleges violations of section 18(b)(5) is hereby dismissed. There remain then the asserted violations of sections 15, 16 and 17 of the Act.

Finally, complainants assert that Uiterwyk is in default for failure to answer the amended complaint and should be directed to pay the reparation requested. In view of the history of the attempted settlement of the complaint by the Government and Uiterwyk, the prolonged and confused history of the case, and the disposition of the proceeding herein, it would be unfair to require Uiterwyk to pay reparation.

As best as they can be reconstructed from the case put in by the Government, the undisputed facts are as follows.

During the period in question, respondents imposed on Lebanese ports a war risk surcharge which ranged from 3 percent to 15 percent. According to complainants, the revenue generated by the surcharge greatly exceeded the respondents' costs. While a surcharge was imposed on shipments to Lebanese ports, none was imposed on shipments from Lebanese ports to U.S. ports.

During the period here in issue, respondents Lykes and the Gulf/Mediterranean Ports Conference did not impose any war risk surcharges on shipments to Israel despite the fact, according to complainants, that the cost of war risk insurance was higher to Israeli ports than to Lebanese ports. The only surcharges imposed by Lykes on shipments to Israeli ports were those assessed when Lykes vessels experienced prolonged delays in those ports.

No war risk surcharges were imposed by other carriers or conferences on shipments from the Great Lakes and Pacific Coast ports to Lebanon despite the alleged fact that voyages from those ports of origin experienced no less hazards and risks than vessels moving into Lebanese and Israeli waters from United States Gulf ports.

Complainants dispute the surcharge on some forty-five voyages by respondents Uiterwyk, Lykes and Hellenic from U. S. Gulf to Beirut, Lebanon.

DISCUSSION AND CONCLUSIONS

A good part of the Government's argument centers around what it conceives to be the paramount issue in this case, *i.e.,* whether a "surcharge" must reflect the actual cost of the added expenses incurred by carriers as a result of war or warlike conditions. This argument unfortunately is directed to the question of whether the surcharges are or were so high or so low as to be detrimental to the commerce of the United States within the meaning of section 18(b)(5). This issue has already been dismissed as moot and the Government's argument that some level of surcharge still exists, albeit not necessarily the same level as before, will not resurrect it. Complainants would invalidate any war risk surcharge which did not exactly match the cost of the premiums for the war risk insurance. Obviously then, an entirely new set of facts is necessary before any decision can be made as to the

Government's theory as it applies to the current surcharges, if any, and whatever their level may be.

The Government would declare the surcharge unlawful under section 16 because:

> The collection of Lebanese war risk surcharges against complainants and other persons unreasonably prejudiced these persons through the payment of money for this item, since persons located in Beirut, Lebanon moving cargo to the United States, persons in Canada moving cargo to Beirut, persons in the United States Great Lakes moving cargo to Beirut, and persons in the United States West Coast moving cargo to Beirut were not burdened with the payment of monies for a Lebanese war risk surcharge.

Conversely, shippers from the Great Lakes, Canada, and the West Coast are unduly preferred by the Gulf to Beirut surcharge. At the same time and for much the same reason, the Government argues that the surcharge violates section 17.

To some extent, complainants misunderstand the law of preference, prejudice, and discrimination as it exists under the Shipping Act. To take first preference and prejudice under section 16, a competitive relationship is necessary in most cases. *North Atlantic Mediterranean Freight Conference—Rates on Household Goods,* 11 F.M.C. 202 (1967). In that case the Commission said:

> This prohibition against undue or unreasonable preference or prejudice is designed to deal with two or more competing shippers . . . receiving different treatment which is not justified by differences in competitive or transportation conditions. The classic case would be where shippers at A and B are competitive in a common market at C, the line hauls from A to B and C are the same and the same competitive influences apply to both . . . The section [16] is aimed at that favoritism by carriers which enables a shipper to reach a market and sell his goods therein at a lower rate than his competitors. . . . (Citations omitted.) (11 F.M.C. at 209/210)

By the admission of complainants' own witness, the shipment here in question did not move in competition for markets with any other shipments from any other areas. Thus the seemingly essential competitive relationship is missing.

The Government, however, challenges the need for competition citing the case of *Valley Evaporating Co. v. Grace Line Inc.,* 14 F.M.C. 16 (1970), in which the conference in revising its tariff inadvertently eliminated a commodity which under the conference's own criteria should have been retained. The inadvertence resulted in a higher rate to complainant. In finding a violation of section 16, the Commission found no competitive relationship was necessary. The retention of commodity rates was based upon a tonnage criteria—all commodities moving in excess of a stated number of tons were entitled to the retention of a commodity rate. Once the criteria was established, a simple mechanical or mathematical exercise was all that was necessary to compile the list of commodity rates, and as the Commission said:

> At this point the single question involved was whether a given commodity moved in sufficient volume or not. Questions as to the characteristics inherent in the particular commodity involved were irrelevant as well as questions of whether the particular commodity competed with any other commodity. Thus as we stated in *Investigation of Free Time Practices—Port of San Diego,* 9 F.M.C. 525, 547, (1966) the equality of treatment required in situations of this kind is "absolute and not conditioned on such things as competition." (14 F.M.C. at 22)

Thus as the Supreme Court said in *Volkswagenwerk v. F.M.C.,* 390 U.S. 261 at 279, the Commission has often found violations of section 16 without a competitive relationship "in cases not involving freight rates and the particularized economics that result from a vessel's finite cargo capacity . . ." But is this such a case? In *Violations of Sections 14, 16, 17 of the Shipping Act—Nonassessment of Fuel Surcharges,* 15 F.M.C. 92 (1972), a case not cited by complainants, the Commission said at page 98, ". . . a surcharge is not geared to either transportation factors or the differing characteristics of commodities since it is imposed on each and every ton of cargo regardless of the commodity or length of voyage." As will be noted later, that case and this one are distinguishable on the nature of the surcharges involved. There is, moreover, a second factor which renders the case inapplicable.

In the *Fuel Surcharge* case, *supra,* it was found that the American flag carriers who transported U. S. military cargo had been assessing fuel surcharges on commercial cargo but not on their military carryings. Thus, while no competitive relationship was necessary, another element essential to a finding of preference or prejudice was present —the preference and prejudice stemmed from a common source. That is the same carriers moving the commercial cargoes were responsible for the alleged preference of failing to assess the fuel surcharges on military cargoes. This is yet another essential ingredient in finding unlawful preference or prejudice. As the Supreme Court said in *Texas & Pacific Railroad Co. v. U.S.,* 269 U.S. 627:

> . . . preference or prejudice can be found only by comparison of two rates. If these are the rates of one carrier to point A and that of another to point B while a relationship of one to the other may be determined neither the first nor the second carrier alone can be held to have created the relationship. Assuming neither rate is unreasonable, the one carrier cannot be compelled to alter its rate, because the other's is higher or lower for the same service. A carrier or group of carriers must be the common source of the discrimination—must effectively participate in both rates, if an order for correction of the disparity is to run against both of them.

Complainants assert that on shipments made by them from U. S. Great Lakes and Pacific Coast ports to Beirut on conference and independent carriers no war risk surcharges were imposed. Respondents point out that none of them are members of either the Great Lakes or Pacific Coast Conferences in question, and thus they could not be the common source of such alleged preference or prejudice.

As for shipment from Beirut to U. S. ports on which no surcharge was imposed, a somewhat different problem is posed. In the *Fuel Surcharge* case, *supra,* the Commission was dealing with an across-the-board uniform surcharge necessitated by the increased cost in bunker fuel. In such a case, the Commission found no "transportation factors" or "differing cargo characteristics" were inherent in the application of the surcharge. Thus, having found unequal application, there was, under the prevailing precedent, no need for anything more to establish the violation. A different situation exists here.

Although denominated a war risk surcharge (and indeed the element of risk played a part in the decision to impose the surcharge) port congestion was a large factor in the surcharge at Beirut. Sometimes, respondents had to make double calls at Beirut to effectuate delivery.

For example, a vessel would call as regularly scheduled at Beirut but due to congestion the vessel would be given a "number", the vessel would then call at other Mediterranean ports, returning at its newly appointed time for discharge. No comparable situation existed on the inbound leg of the voyage. An additional transportation factor was the need to maintain separate fleets for service to "Arab" ports and for service to Israeli ports. Both these factors involved additional expense.

My reading of the *Fuel Surcharge* case, *supra,* would not extend its rationale and holding on section 16 to the situation involved here. Transportation factors are indeed present here and because they are it seems to me that the Government must show something more than the absence of a surcharge on shipments from Beirut to U. S. ports—they must show a competitive relationship from which the failure to impose the surcharge has harmed them.

Finally, complainants assert on brief that "no war risk surcharge was assessed on cargoes shipped from U. S. Gulf ports to Israeli ports." However, the record clearly demonstrates complainants were aware that there was a surcharge to Israeli ports denominated simply as "Israeli surcharge." Apparently, complainants' point is that the surcharge was primarily for congestion and therefore could not have been a "war risk" surcharge. As already noted, one of the products of the "hostilities" was port congestion, as indeed respondents argue. In this case, the validity of the surcharge cannot depend on so slender a reed as its appellation. Moreover, by simply denominating it as a surcharge without any qualifier, the surcharge could be "war risk" as well as "congestion", neither, or both. That such transportation factors as would take it out from under the *Fuel Surcharge* case, *supra*, are present here is obvious, and complainants have not demonstrated the requisite relationship to establish a violation of section 16.

For the foregoing reasons, complainants' allegation that respondents have violated section 16 is dismissed.

The Government, based on the same facts as they considered applicable to a violation of section 16, also charge respondents with a violation of section 17 of the Act. Complainants charge that because respondents did not impose a surcharge (1) from the Great Lakes and Canada to Beirut, (2) from the Pacific Coast to Beirut, (3) from Beirut to U.S. Gulf ports, and (4) from U.S. ports to Israeli ports, they have unjustly discriminated against complainants in violation of section 17.

In the *Household Goods* case, *supra*, the Commission held that in order for discrimination to exist under 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." (11 F.M.C. 202 at 312) Patently in none of the asserted instances of discrimination can this situation be found. Accordingly, the alleged violation of section 17 is dismissed.

Finally, complainants charge a violation of section 15 of the Act. However, complainants' sole argument on this issue consists of the final statement in their brief that:

> In addition, complainants request that pursuant to section 15, the FMC cancel or modify the agreement filed by the Gulf/Mediterranean Ports Conference on the basis that it is contrary to the public interest and in violation of the Shipping Act.

If the agreement violates section 15, it is because of the surcharge imposed under it. Yet the surcharge in question has not been found to violate any provisions of the Shipping Act and complainants give not the slightest hint as to how the surcharge is contrary to the public interest. Accordingly, the charge is dismissed.

For the foregoing reasons, the motion for summary judgment is hereby granted, and the complaint is dismissed.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D. C.,
October 1, 1974.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 462

COMMODITY CREDIT CORP.

v.

DELTA STEAMSHIP LINES, INC.

Authority to waive collection of a portion of freight charges denied.

REPORT

Nov 6 1974

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

By application received June 4, 1974, Delta Steamship Lines, Inc. requested authority to waive collection of a portion of freight charges applicable to a shipment of Soyabean Oil shipped by Commodity Credit Corporation via Delta vessel from New Orleans to Puerto Cortes, Honduras. By letter of the same date the Commission informed Delta that its filing was improper in that Delta had not, as required by law, prior thereto filed a tariff containing the appropriate new rate. Delta resubmitted its application after appropriately amending its tariff. Thereafter, Chief Administrative Law Judge John E. Cograve issued his Initial Decision. Pursuant to Rule 13(g) of the Commission's Rules of Practice and Procedure, we determined to review that Initial Decision.

FACTS

Under Bill of Lading dated January 15, 1974, Delta transported 128.817 short tons of Soyabean Oil from New Orleans to Puerto Cortes, Honduras. For this transportation Delta had apparently quoted a rate of $32.00 per short ton, while the proper rate was $36.00 per short ton.[1] When the previously quoted $32.00 figure was brought

[1]Delta Steamship Lines, Inc. Tariff FMC #36, 1st revised page 94, effective November 27, 1973.

to Delta's attention, it agreed to change its tariff to conform to that quotation.

In an attempt to make its tariff rate conform to the quoted rate, Delta, on June 10, 1974, filed its correction No. 6, 2nd revised page 94 of Tariff FMC #38,[2] effective June 7, 1974. That correction quotes a rate on Soyabean Oil of $42.00 W/M with a note which provides: "Rate of $32.00 W/M on Soyabean Salad Oil will apply from June 7, 1974 thru July 7, 1974."

In his Initial Decision, the Administrative Law Judge granted Delta authority to waive collection of the difference between $32.00 per short ton and $36.00 per short ton, or $463.74.[3] This decision was premised on the conclusion that all the statutory and regulatory requirements prerequisite to such a grant had been met by Delta.

DISCUSSION

The applicable statutory and regulatory requirements are set forth in section 18(b)(3), Shipping Act, 1916, as implemented by the Commission's Rules contained in 46 CFR 502.92(a).

Section 18(b)(3) allows for refund or waiver of collection:

> . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: *Provided further,* That the . . . carrier . . . has, prior to applying for authority to make refund, filed a new tariff . . . which sets forth the rate on which such refund or waiver would be based. . . .

Section 502.92(a) of the Commission's Rules parallels the language precisely.

In the case at hand, while it appears there were no other shipments of Soyabean Oil during the period which might otherwise have resulted in discrimination among shippers, it is not at all clear from the record or applicable tariffs that the remaining requirements of section 18(b)(3) have been met. In short, it does not appear from the record that there exists here any tariff error of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff which would warrant the relief requested.

Delta has explained that when the $36.00 rate actually charged was brought to Delta's attention, it agreed to modify its tariff to conform to the quoted rate. We do not believe this to be "an error in a tariff of a clerical or administrative nature" or "an error due to inadvertence in failing to file a new tariff." Rather, it appears that what is involved

[2]Effective April 4, 1974, rates from U.S. Gulf Ports to East Coast Ports of Honduras and British Honduras and inland points were transferred from Group II ports in Delta's FMC #36 tariff to a new FMC #38 tariff.

[3]The mathematics resulting in this figure appear to be in error. Due to our denial of this claim we only note such error but need not correct it.

here is an erroneous quotation of a rate, not an error in the tariff of a clerical or administrative nature or inadvertent failure to file an anticipated tariff.

On the basis of these determinations we conclude that the requested waiver of collection of the charges here is neither warranted nor statutorily within the authority of this Commission to grant.

The application for authority to waive collection of the charges here involved is hereby denied.

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–6

HUGO ZANELLI d/b/a HUGO ZANELLI & CO.

ADOPTION OF INITIAL DECISION

Dec 12 1974

BY THE COMMISSION: (James V. Day, *Vice Chairman;* George H. Hearn and Clarence Morse, *Commissioners*)

This proceeding is before us on exceptions to the Initial Decision of Administrative Law Judge Norman D. Kline in which he concluded that Hugo Zanelli d/b/a Hugo Zanelli and Company (Zanelli), (1) was not independent within the meaning of sections 1 and 44 of the Shipping Act, 1916 (the Act), and (2) had violated specific sections of General Order 4 [1] by acting either as a purchaser or seller of certain shipments on behalf of a foreign consignee or as the agent of the consignee in so purchasing, and obtaining a beneficial interest in such shipments. However, because Zanelli "has cooperated fully with Hearing Counsel" and "the record does not indicate that respondent engaged in the aforementioned activities in willful violation of the law", the Judge recommended that Zanelli be allowed to retain his freight forwarding license on the condition that he cease and desist from the aforementioned unlawful act ivities, and submit to the Commission a report of compliance.

In its exceptions to the Initial Decision, to which Hearing Counsel have responded, Zanelli challenges:

1. . . . the legal conclusion that his having obtained a technical beneficial interest in the shipments discussed is in violation of Sections 1 and 44 of the Shipping Act, 1916, and regulations of the Commission thereunder because Respondent refrained from collecting compensation from any ocean carrier incident to such shipments.

2. . . . the consequent order to cease and desist from such activities, contending that his operations conform to the requirements of law.

[1] Sections 510.2(a), 510.9(d) and 510.21(1).

These exceptions, as Zanelli itself concedes, generally constitute a reargument of contentions already briefed by it and considered by the Administrative Law Judge. Upon thorough consideration of the entire record in this proceeding, we are of the opinion that Judge Kline's findings and conclusions with respect thereto were proper and well-founded and we adopt them as our own. However, and without disturbing any of these findings and conclusions, there are certain matters raised by Zanelli in its exceptions which, we believe, warrant some additional discussion.

Zanelli on exceptions argues that the Court of Appeals' decision in *Norman G. Jensen, Inc. v. F.M.C.*, ____ F.2d ____ (C.A. 8, 1974) "seems to lend more support to Respondent's contention [that his interest in shipments is permissible] than was accorded to it [in the Initial Decision]". We do not agree. On the contrary, we believe that the Initial Decision more than adequately points out the significant differences between Zanelli's activities here and those of ITC found permissible by the court in *Jensen.*

In *Jensen* the court determined that the so-called prohibited beneficial interest was "something more than that which ITC has . . . because ITC's relationship to the goods could not give rise to an indirect rebate." Seizing upon this language, Respondent contends that his interest in shipments is no less permissible since it collects no compensation from carriers. Respondent's interest in the shipments which it forwards differs materially from that of ITC considered by the court in *Jensen.* As Judge Kline found in his decision:

> . . . unlike Zanelli, ITC did not make purchases in its own name, advance its own funds on the purchases, or act as purchasing agent for consignees. ITC's functions, according to the Court, were those of a service enterprise which made transportation arrangements, prepared export declarations, received purchase orders and payments, etc. . . .
>
> Actually, even if Zanelli had not obtained a beneficial interest, the mere fact that he purchased the goods shipped or acted as agent of consignees in so purchasing would be enough to violate section 1 of the Act.

Thus, while ITC's activities failed to give ITC what the court characterized as the "right to the use and enjoyment" in the property, Zanelli's interest here may be properly described as a real ownership interest. On the basis of the foregoing, we can only conclude, as Hearing Counsel argued and Judge Kline found, that when one compares the services offered by Zanelli with those offered by ITC in *Jensen,* it becomes evident that the court's holding and rationale in the *Jensen* case has no application to this proceeding.

Another matter properly disposed of in the Initial Decision to which Respondent takes exception involves Judge Kline's reliance upon certain legislative history to show that Congress in enacting the forwarder legislation intended licensees to be *totally* independent of any shipper connections. On the theory that "the legislative history of prior unadopted bills is not germane to the bill ultimately adopted by Congress", Zanelli argues that Judge Kline, in expressing his opinion that the definition of independent ocean freight forwarder in section 1 of the Act does not allow for *any* shipper connection, improperly relied on the actions of the 85th Congress to support his interpretation of legislation enacted by the 87th Congress, i.e., P.L. 87–254. In support of this position, Respondent relies on *Interstate Natural Gas Co. v. FPC,* 156 F.2d 949 (5th Cir. 1952), and specifically that portion of the court's opinion where it is noted, albeit as dicta, that the legislative history of an unadopted version of the Natural Gas Act, the Lea Bill, offered as evidence of Congressional intent in enacting the final version, was irrelevant because "from the time the Lea Bill was introduced until the Natural Gas Act was passed, the ideas of the proponents of the legislation underwent considerable change."[2] 156 F.2d 952. Explaining that the Lea Bill was local in character in that it pertained to the production and individual sale of gas at the wells, while the Natural Gas Act related to the wholesale sales of gas in interstate commerce, the court concluded that: ". . . Legislative history cannot be referred to for the purpose of construing a statute contrary to the natural import of its terms . . .", adding that "if the language be clear, it is conclusive." *(Ibid).*

While the case cited by Respondent appears to have little, if any, relevance to this proceeding and to be easily distinguishable on the facts, the argument which it allegedly supports may be more quickly disposed of on other grounds. For whatever be the merits of Zanelli's contentions with regards to the use of certain legislative history, the fact remains, as the Presiding Officer found, that:

> . . . if the earlier history is excluded from consideration and consequently there is nothing to indicate Congressional intent, we are left with clear and unambiguous language in the statute which appears to require absolute independence.

There is one final exception raised by Respondent which, we believe, warrants specific rejection. Taking issue with the Initial Decision's finding that its "contended statutory construction will 'emasculate the Freight Forwarder law' ", Respondent argues that the Administrative Law Judge has failed to find any "evil" in its challenged forwarder activities. Contrasted is Judge Kline's construction of the

[2] Even assuming that this language is applicable to the present situation, we find considerable merit in Hearing Counsel's argument that the freight forwarder legislation *can* be used: ". . . to *illustrate* the change in the thinking of the legislators reflected by the progression from General Order 72, which permitted forwarders to carry on their business regardless of shipper control or connection, to P.L. 87–254, which required total independence."

law which Zanelli suggests "will result in oppression, hardship or inconvenience." This argument ignores the clear and specific findings of the Administrative Law Judge and constitutes an obvious "clutching at straws".

Judge Kline, on pages 20–21 of his Initial Decision, makes special effort to detail the ills of allowing Zanelli to operate under its "proposed alternative standard." The undesirable consequences which the Presiding Officer views as resulting from Zanelli's activities could not be more clearly spelled out. We therefore see no merit whatever in Respondent's assertion that "[N]owhere has . . . the Administrative Law Judge shown any evil in the activities of Zanelli."

Respondent's indictment of the consequences which allegedly flow from Judge Kline's "construction" of the freight forwarder legislation is equally without foundation. Zanelli's allegations of "injustice", "hardship", "oppression" and "inconvenience" are not only grossly exaggerated and completely unsupported, but more importantly are totally immaterial to the matter at issue. In this regard, we would remind Respondent that the requirements of the law may often impose certain "hardships" and "inconvenience" which are justified by the purpose to be served by the statute. Thus, accepting Zanelli's basic contention that its activities will somehow be adversely affected by our affirmance of Judge Kline's holding that it must be totally independent of shipper connection, we are nonetheless constrained to reject Respondent's argument as irrelevant. The law clearly requires that Respondent as a licensed ocean freight forwarder maintain, as Judge Kline correctly stated, certain "standards of fitness". That compliance with these standards *may* inconvenience Respondent or cause it to alter its operations may be regrettable but is not controlling.

On the basis of all of the foregoing, we are adopting the Initial Decision in this proceeding as our own. Thus, consistent with Judge Kline's findings and conclusions, we are allowing Zanelli to retain its license, in spite of certain found violations of the Act and Commission regulations promulgated thereunder, on the condition that Respondent cease and desist from the unlawful activities and promptly submit a report of the manner in which it has complied with this requirement.

Helen Delich Bentley, Chairman, and Ashton C. Barrett, Commissioner, dissenting:

Our only complaint with the majority's opinion is that it does not go far enough. While the majority found Zanelli guilty of various violations of the Act and Commission regulations promulgated pursuant thereto, they nevertheless refused to revoke Zanelli's freight forwarding license. While this decision by the majority allowing Respondent to retain its license may be nobly motivated, it is nonetheless wholly inconsistent with the facts of record. Further, we believe that the majority's failure to take the action clearly dictated by those facts of record, i.e. revocation of Zanelli's license, compromises the Commission's regulatory responsibilities under the Act and frustrates the objectives of its own regulations.

Since the facts here are not in issue, we can only presume that the majority's failure to revoke Zanelli's license is occasioned by its inability to find the requisite "wilfullness" on the part of Zanelli.[3] In fact, however, Zanelli never disputed that he possesses a beneficial interest in goods financed by him. On the contrary, Zanelli openly admits his beneficial interest, defending his conduct on the grounds that the statute can be interpreted to allow a forwarder under certain circumstances, to have such an interest in shipments. Thus, that Zanelli clearly intended the results of its actions cannot be seriously questioned.[4]

Moreover, it is basic to the Commission's authority that a thorough examination of the circumstances surrounding violations must be conducted to determine if a licensee is still "fit, willing, and able" to be a licensed ocean freight forwarder. In view of Zanelli's activities, which, the majority themselves found were "unlawful", we question seriously whether Zanelli still maintains the presumed "fitness" required of a licensed ocean freight forwarder in view of its "unlawful activities". Weighing Zanelli's activities against the Commission's obligation to preserve the high degree of integrity incumbent upon a freight forwarder so that he may properly carry out his financial responsibilities for his shipper-clients, we believe that Zanelli has at least failed to exhibit the necessary business propriety required of a freight forwarder.

Finally, we believe that Zanelli's action draws into question its "ability" to continue in the forwarding business. A licensed forwarder is presumed to know and understand the law so that he does not run afoul of it. The record clearly demonstrates that Zanelli had knowledge of the law relevant to his prohibited activities, but instead chose

[3]On this point, we would remind the majority that it is firmly established that if one acts in contravention of a statute, even if done in good faith, he does so at a "substantial risk" and must face the consequences if proven wrong. *Consolo v. FMC,* 383 U.S. 607 (1966).

[4]The situation here can even be distinguished from the one under consideration in *Bolton & Mitchell,* 15 F.M.C. 248 (1972), another case where the majority allowed a forwarder to retain its license in spite of found violations of the Act and Commission rules. There the respondent at least not only proceeded on the assumption that his activities divested him of any beneficial interests in the financed goods, but moreover acted "upon advise of counsel". Here, Zanelli actively and blatantly pursues his financing well aware that it confers a beneficial interest in the goods forwarded.

to disregard it for his own purposes. We cannot excuse those unlawful activities where, as here, they represent a direct challenge to the Commission's established authority to regulate freight forwarders.

On the basis of the foregoing, we are of the opinion that the facts of record in this proceeding clearly dictate the revocation of Respondent's license.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–6

HUGO ZANELLI d/b/a HUGO ZANELLI & CO.

ORDER

This proceeding was initiated by the Federal Maritime Commission to determine, *inter alia,* whether Hugo Zanelli d/b/a Hugo Zanelli and Co. (Zanelli) continues to qualify as an independent ocean freight forwarder and whether its license, No. 397, should be continued in effect, suspended, or revoked. The Commission has fully considered the matter and has this date made and entered of record an Adoption of Initial Decision, containing its findings and conclusions thereon; which Adoption is hereby referred to and made a part hereof. The Commission found that Zanelli did not possess the required independence from shipper connections necessary to be an ocean freight forwarder but, because of mitigating circumstances, declined to revoke Zanelli's license as an independent ocean freight forwarder, subjecting the retention of said license, however, to certain specific conditions.

Now therefore, it is ordered, That Zanelli be allowed to retain its license as an independent ocean freight forwarder subject to the following conditions:

1. Zanelli shall immediately cease and desist from all activities found to be violative of the Shipping Act, 1916, and certain specified Commission regulations or orders; and

2. Zanalli shall submit in the form of an affidavit a full report to the Commission on the manner in which it has complied with the requirements to cease and desist, as heretofore set out, within 90 days of service of this Order. If Zanelli should fail to submit the required report, its license as an independent ocean freight forwarder will be revoked without further proceedings.

It is further ordered, That to insure compliance with this Order, a complete examination of Zanelli's activities will be made within one year from the date of service of this Order to determine whether Respondent is acting in keeping with our decision herein. By the Commission.

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

FEDERAL MARITIME COMMISSION

No. 74-6

HUGO ZANELLI d/b/a HUGO ZANELLI & CO.

Respondent, a licensed ocean freight forwarder, found to have acted as a purchaser and seller of certain shipments on behalf of Mexican consignees and to have obtained a beneficial interest in such shipments, in violation of sections 1 and 44 of the Shipping Act, 1916, and regulations of the Commission issued thereunder.

Respondent ordered to cease and desist from such activities and to conform his operations to the requirements of law, in lieu of revocation of his license.

Charles E. Orr for respondent.

Donald J. Brunner and *Marilynn J. Goldsmith,* Hearing Counsel.

INITIAL DECISION OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE [1]

This proceeding was instituted by the Commission on February 4, 1974, in order to determine whether certain practices of respondent Hugo Zanelli d/b/a Hugo Zanelli and Company (Zanelli), an ocean freight forwarder holding FMC license No. 397, disqualify Zanelli as an independent ocean freight forwarder, constitute violations of sections 1 and 44 of the Shipping Act, 1916 (the Act), and sections 510.2(a) and 510.9(d) of the Commission's General Order 4, and thereby justify suspension or revocation of Zanelli's license.

The Commission's Order recites that information has been developed showing that Zanelli acts as a purchaser of material for export in the foreign commerce of the United States on behalf of certain Mexican consignees, advances its own funds and credit for such purchases, enjoys a profit by marking up its invoices as a fee for its purchasing services, all of which activities appear to violate the laws and regulations cited above.

Since the parties were not at issue over facts, the factual record in this proceeding was developed on the basis of a stipulated set of facts based in turn on analysis of numerous shipping documents which

[1] This decision became the decision of the Commission 12/12/74

illustrate Zanelli's method of operation, i.e., purchase orders, supplier invoices, Zanelli invoices, deposit slips, checks, forwarding invoices, bills of lading, export declarations, insurance forms, and port authority invoices. These stipulated facts are set forth below.

FINDINGS OF FACT

1. Hugo Zanelli d/b/a Hugo Zanelli & Co. (Zanelli) was issued independent ocean freight forwarder license FMC No. 397 on October 15, 1963.

2. In excess of fifty percent of the activities of Zanelli and his staff of two are devoted to freight forwarding.

3. Since May 1972, Zanelli has made purchases of material for export in the foreign commerce of the United States on behalf of Mexican principals (consignees) under the factual circumstances set forth below:

a. The principals request price quotations from Zanelli on needed merchandise, usually by telephone or telex from points in Mexico.

b. Zanelli ascertains the price of the merchandise from domestic suppliers and adds to it a mark-up (fee) for his time and expenses spent locating the merchandise, ascertaining the prices, and effecting the purchases. The amount of mark-up (fee) is determined by Zanelli.

c. Zanelli transmits to his principals, by telephone or telex, the purchase price he has ascertained plus mark-up (fee). The purchase price plus mark-up (fee) is expressed as one sum.

d. Upon receipt of Zanelli's price quotations plus mark-up (fee), the principals transmit purchase orders to Zanelli made out in his name.

e. Zanelli purchases the merchandise designated therein on credit in his own name.

f. In some instances Zanelli informs the suppliers that he is making the purchases for Mexican principals.

g. Upon notification that the purchased material is ready for shipment, Zanelli forwards same to his principals. He also transmits an invoice for the purchase price plus mark-up (fee).

h. In some instances Zanelli's principals forward payment for the merchandise prior to the time Zanelli makes payment to the supplier. In other instances, Zanelli advances his own funds in payment to the supplier. Zanelli charges neither interest nor finance fee for advancing his own funds.

i. Whether Zanelli is prepaid by his principals or advances his own funds, he pays the supplier with his own check drawn on an account set aside for this purpose.

j. Zanelli prepares a separate invoice for forwarding services performed in connection with each shipment.

4. Prior to commencing purchasing activities, Zanelli had for some time rendered freight forwarding services to the aforementioned principals.

5. No written memorandum of agreement has been executed by Zanelli and his principals.

6. Zanelli has collected no compensation from ocean carriers on any shipment where he has effected the purchases in the manner described in Item 3.

DISCUSSION AND CONCLUSIONS

The controversy in this proceeding centers on a difference of opinion between Hearing Counsel and respondent as to the degree of independence which a licensed freight forwarder must observe with respect to the shipments he dispatches. Zanelli contends that neither sections 1 and 44 of the Act nor the Commission's regulations promulgated in connection therewith are designed to prevent a licensed forwarder from forwarding shipments in which he has a beneficial interest so long as the forwarder abstains from receiving any compensation, i.e., brokerage, from an ocean carrier. Hearing Counsel, on the other hand, contend that the cited statutes and legislative history thereto and Commission decisions require the absolute independence of a licensed forwarder, forbidding him from forwarding any shipments in which he has a beneficial interest or from maintaining any relationship in which he is placed under the control of a shipper. Hearing Counsel contend, furthermore, that the record demonstrates that Zanelli has acted as a purchasing agent, seller, and financier of shipments he forwards and has obtained a beneficial interest in such shipments, that consequently Zanelli does not qualify as an independent ocean freight forwarder, and that he should be required to disengage himself from these activities.

Since Zanelli does not dispute in his briefs that he has acted in the manner described by Hearing Counsel, the issue for decision is one of law only, namely, whether a person may be both an independent ocean freight forwarder with respect to shipments in which he does not have a beneficial interest and a person dispatching shipments in which he has a beneficial interest, acts as purchasing agent, seller, financier, provided that he collects no brokerage on the latter shipments.

The pertinent statutes governing the matter of freight forwarder independence are sections 1 and 44 of the Shipping Act, 1916 (46 U.S.C. 801, 841b).

Section 1 of the Act defines an "independent ocean freight 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 shipper or consignee or by any person having such a beneficial interest. 46 U.S.C. 801. (Emphasis added.)

Section 44(b) of the Act provides in pertinent part:

A forwarder's license shall be issued to any qualified applicant therefor if it is found by the Commission that the applicant is, or will be, an *independent ocean freight forwarder as defined in this Act* and is fit, willing, and able properly to carry on the business of forwarding and to conform to the provisions of this Act and the requirements, rules, and regulations of the Commission issued thereunder . . . 46 U.S.C. 841b. (Emphasis added.)

Section 44(d) of the Act authorizes the Commission to suspend or revoke a forwarder's license for "willful failure to comply with any provision of this Act, or with any lawful order, rule, or regulation of the Commission promulgated thereunder."

The corresponding regulations promulgated by the Commission are contained in General Order 4, 46 CFR 510. Part 510.2(a) repeats the statutory definition of an "independent ocean freight forwarder" set forth in section 1 of the Act. Part 510(d) provides for revocation or suspension of a forwarder's license in the event of "change of circumstances whereby the licensee no longer qualifies as an independent ocean freight forwarder." Finally, Part 510.21(1) defines the term "beneficial interest" which Zanelli does not dispute as applying to Zanelli's activities in connection with shipments forwarded to certain Mexican consignees.[2]

Zanelli acknowledges that previous Commission decisions have insisted upon the absolute independence of licensed freight forwarders. In these cases, furthermore, the Commission has made clear that the mere existence of shipper connection or control, even if such control

[2]46 CFR 510.21(1) provides in pertinent part:

The term "Beneficial interest" for the purpose of these rules includes, but is not limited to, any lien interest in; right to use, enjoy, profit, benefit, or receive any advantage, either proprietary or financial, from; the whole or any part of a shipment or cargo, arising by financing of the shipment or by operation of law or by agreement, express or implied. . . .

In view of Zanelli's activities in which he makes purchases in his own name, uses his own funds, adds a markup to the supplier's price, etc., there is little doubt that he enjoys a "beneficial interest" in the shipments concerned.

In the recent decision of the Court of Appeals (8th Cir.) in *Norman G. Jensen, Inc. v. F.M.C.*, No. 73-1514, June 5, 1974, the Court held that an exporters' consulting firm known as ITC did not obtain a beneficial interest in goods shipped but, unlike Zanelli, ITC did not make purchases in its own name, advance its own funds on the purchases, or act as purchasing agent for consignees. ITC's functions, according to the Court, were those of a service enterprise which made transportation arrangements, prepared export declarations, received purchase orders and payments, etc. Slip opinion, pp. 2,3. See also *Norman G. Jensen, Inc.*, 16 F.M.C. 365 (1973), reversed by the Court, for a fuller factual description of the activities of ITC.

Actually, even if Zanelli had not obtained a beneficial interest, the mere fact that he purchased the goods shipped or acted as agent of consignees in so purchasing would be enough to violate section 1 of the Act.

is never exercised, is enough to disqualify the licensee. In *License No. 790—North American Van Lines,* 14 F.M.C. 215 (1971), the Commission revoked the license of a forwarder merely because a holding company (PepsiCo, Inc.) owning companies engaged in exporting had purchased the stock of the forwarder. Even though the licensee never forwarded or agreed never to forward shipments for its parent or affiliated corporations, the Commission held that the forwarder did not possess the requisite independence, since the mere possibility of control, even if never exercised, was forbidden by the statute. In this regard, the Commission stated (14 F.M.C. at page 221):

> All of the legislative history points out clearly that exceptions to 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).[3]

Although Zanelli does not dispute that the Commission has required absolute independence in previous cases, he urges the Commission to reconsider these decisions in the light of the legislative history to section 44 of the Act and contends that the services which he is providing benefit and promote the commerce of the United States. Zanelli contends also that the Commission's insistence upon absolute independence exceeds the congressional purposes in enacting section 44, which he contends was enacted, firstly, in order to prevent indirect freight rebates to shippers and, secondly, to regulate the forwarding industry to prevent sharp practices. As Zanelli views the situation, if a licensee abstains from collecting brokerage from ocean carriers on those shipments in which he has obtained a beneficial interest or, presumably, acts as purchasing agent or financier, the congressional purposes are thereby subserved. The Commission, of course, has specifically rejected such a contention (See *Cady,* cited above, at page 360) and neither the language of the applicable statutes nor their legislative history lend it support.

At the very outset Zanelli is faced with the fact that the applicable statutes are unambiguous in their language. Section 44(b) of the Act, quoted above, unequivocally requires that a licensee be "an independent ocean freight forwarder as defined in this Act." Section 1 of the Act unequivocally defines "independent ocean freight forwarder" as

[3]Significantly the *North American Van Lines* case involved a shipper and forwarder who were separate corporate entities, although affiliated. In the present case Zanelli's claims to compliance with the statutory requirements are made more difficult to sustain by the fact that he is one person operating as licensee and as purchasing agent, financier, etc., with respect to certain shipments.

a person "who is not a shipper or consignee or a seller or purchaser of shipments . . . nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper, consignee, etc." It is undisputed that Zanelli acts as a purchasing agent for certain Mexican consignees, purchases shipments, has obtained a beneficial interest, etc. Therefore, it would appear that no further inquiry as to the legislative history underlying the clear language of the statute is necessary. It is a familiar doctrine in law that resort to legislative history is unnecessary if a statute is clear and unambiguous. *Sea-Land Service, Inc. v. F.M.C.,* 404 F. 2d 824 (D.C. 1968); *North American Van Lines,* cited above, at page 220; *Caminetti v. United States,* 242 U.S. 470, 485 (1916).[4] Nevertheless, since Zanelli contends that the Commission's previous decisions exceeded congressional intentions, an examination of legislative history is warranted.

The immediate stimulus to the enactment of the Freight Forwarder Law, Public Law 87–254, was the decision of the Federal Maritime Board in *Investigation of Practices, Operations, Actions and Agreements of Ocean Freight Forwarders,* 6 F.M.B. 327 (1961). In that decision the Board found that a variety of malpractices had become widespread in the freight forwarding industry, including indirect rebating to shippers in connection with brokerage payments by ocean carriers, improprieties in billing methods, discrimination, preference, and prejudice in the assessment of forwarder charges, etc. For several years, congressional committees had also been probing into freight forwarding practices and there had been numerous prior agency and court cases involving forwarder practices and compensation. *Dixie Forwarding Co., Inc. Application for License,* 8 F.M.C. 109, 117 (1964); *New York Foreign Freight Forwarders & Brokers Association v. Federal Maritime Commission,* 337 F. 2d 289, 293 (2d Cir. 1964).

As a result of its investigation, the Board revised its earlier forwarder regulations dating from 1950 and promulgated new regulations as General Order 72 Revised, which among other things, would have absolutely prohibited the payment of brokerage. The rules were to become effective 120 days after publication in the Federal Register. 6 F.M.B. at page 327. Faced with what the forwarding industry described as a substantial loss of revenue because of the proposed ban on brokerage, the forwarders appealed to Congress for the enactment of legislation which would permit such payments under appropriate safeguards. The ultimate result was Public Law 87–254. Instead of a total ban on brokerage as the Board has proposed, Congress decided

[4] As the Court stated in *Sea-Land Service, Inc. v. F.M.C.,* cited above:

Ordinarily, where the language of a statute is clear and unambiguous on its face, the thrust of that language should not be controverted by seeking to show an inconsistent legislative intent.

to permit compensation from carriers, i.e., brokerage, but only where the forwarder rendered specified services of value and remained independent, i.e., free of any affiliation with a shipper, consignee, seller, purchaser of the shipment, or with any person having a beneficial interest in the goods shipped, in order to eliminate indirect rebates to shippers. *New York Foreign Freight Forwarders & Brokers Association v. Federal Maritime Commission,* cited above, at p. 293. Additionally forwarders would be licensed and other safeguards provided to enable the Commission to cure the abuses and undesirable practices uncovered in its extensive investigations. *Id,* at p. 293; *Dixie Forwarding Co., Inc. Application for License,* cited above, at pp. 117, 118.

It is important to bear in mind that Public Law 87–254 was not enacted solely to eliminate indirect rebating but other malpractices as well and that Congress was also concerned over the need to establish and maintain standards of fitness consistent with the fiduciary nature of the forwarder's business. In this regard the Commission has stated:

> As the House Committee on Merchant Marine and Fisheries pointed out: "The intention of the . . . licensing provision [section 44] is to have every person, firm or corporation who holds himself out as a forwarder to be fully competent and qualified to act in the fiduciary relationship which such business necessitates." *Dixie Forwarding Co., Inc.,* cited above, at page 118.[5]
>
> An important matter to be considered in determining an applicant's fitness is the fact that the prospective licensee will be a fiduciary for clients and, in addition, will occupy a unique position of trust in dealing with the carriers and the public. Hence, it must appear that, as licensee, applicant will maintain a standard of professional conduct reflecting the highest degree of business responsibility and integrity, not only with clients but also with carriers and with the public. *License Application-Guy G. Sorrentino,* 15 F.M.C. 127, 134 (1972).

The above discussion provides a general framework within which one can evaluate Zanelli's contentions.

Zanelli disputes the Commission's holding in *North American Van Lines,* cited above, that "[a]ll of the legislative history points out clearly that exceptions to the clear and unambiguous language of the statute were to be excluded and that the inherent prohibition vis-a-vis control is absolute. . . ." Furthermore, Zanelli disagrees that the Court in *New York Freight Forwarders, etc.,* cited above, intended to hold that licensed forwarders may never advance funds, have a beneficial interest in goods shipped, or be shipper-connected when in this regard the Court stated:

[5] See House Report No. 1096, 87th Cong., 1st Sess., p. 3. In *Norman G. Jensen, Inc. v. F.M.C.,* cited above, the Court appears to disagree with the above discussion concerning the fact that the purposes of Public Law 87–254 were not limited merely to the prevention of indirect rebating. In a footnote to its decision the Court states that Congress did not intend to establish a fiduciary relationship (footnote 3, p. 5). The Court appears to have disregarded the remarks of the House Committee to the contrary.

> Licensed forwarders must be truly independent of shippers and not have any beneficial interest in shipments in order to prevent the illegal rebating that occurs when brokerage is received by forwarders who are also shippers, shipper-owned or shipper-connected, or have a beneficial interest in shipments. . . . Congress by its legislation . . . showed a clear intention to separate forwarders from all shipper interests. . . . 337 F. 2d at page 296.

In affirming the Commission's regulation defining "beneficial interest" so as to prohibit licensed forwarders from acquiring an interest through financing or by the right to use, enjoy, profit, benefit, or receive any advantage, etc. (46 CFR 510.21(1)), furthermore, the Court stated:

> Although the challenged rule may limit some benign financing activities by forwarders, it provides a means to curb an evil Congress sought to correct—the collection of compensation from carriers by persons who have any interest in the goods being shipped. We hold that the rule is reasonable and necessary to prevent forwarders from selling goods under the guise of "financing" and then using this subterfuge to receive a discounted freight rate. 337 F. 2d at p. 297.

The Commission, of course, has applied the law and regulations so as to prohibit licensed forwarders from "financing." See, e.g., *Bolton and Mitchell, Inc.—Independent Ocean Freight Forwarder License No. 516,* 15 F.M.C. 248 (1972); 16 F.M.C. 284 (1973); Supplemental Report, November 8, 1973; Second Supplemental Report, May 23, 1974; *New York Foreign Freight Forwarders & Brokers Association v. F.M.C.,* cited above, at p. 297. Zanelli contends, however, that the Court only intended to carry out the congressional purpose in terminating illegal rebating when shipper-connected forwarders received brokerage from carriers, not to abolish all beneficial interests or financing activities of forwarders who abstain from collecting brokerage on the shipments involved. Similarly, Zanelli contends that the Commission has misread the legislative history and that its decisions requiring absolute independence, which Zanelli points out were not appealed to the Courts, are consequently erroneous.[6]

As shown above, Public Law 87–254 abolished a remedy proposed by the Commission's predecessor in General Order 72 Revised, namely, a total ban on brokerage and permitted instead the payment of brokerage but required independent forwarders, i.e., forwarders free of shipper control, having no beneficial interest, engaging in no purchasing activities, etc. General Order 72 Revised had permitted forwarders to carry on their businesses regardless of shipper connection or control. Indeed, the regulation specifically permitted forward-

[6]After respondent's briefs were filed, one Commission decision was reversed by the Courts in *Norman G. Jensen, Inc. v. F.M.C.,* cited above. The Court held that an exporting consultant firm with which the forwarder concerned was connected had not obtained a beneficial interest in the goods shipped. As noted above, however, the consulting firm's method of operating differed in several key respects from Zanelli's.

ers to be such persons as "common carriers, manufacturers, exporters, export traders, manufacturers' agents, resident buyers, brokers, commission merchants. . . ." 46 CFR 244.1, 6 F.M.B. at page 368. Instead of this permissive system, Congress established a standard of total independence. Zanelli contends, however, that something less than total independence was also intended to be permitted, a status which one could characterize as qualified independence, wherein forwarders could operate under shipper control provided that they abstained from receiving brokerage from carriers.

As shown above, the language of Public Law 87–254 nowhere suggests that the forwarders' independence could be so qualified. But if resort to legislative history is necessary, as Zanelli would have it, in order to support a finding that the clear language of the statute means something else, that the Commission's decisions requiring absolute independence are erroneous, and that the Court's statements in the *New York Freight Forwarders and Brokers Association* case regarding Congress's "clear intention to separate forwarders from all shipper interests" must likewise be qualified, there should be some clear and convincing evidence that Congress meant to permit such a qualified independence. The legislative history, however, provides no such evidence and, if anything, confirms the Commission's and the Court's views.

In the *North American Van Lines* case, cited above, the Commission cited pertinent legislative history regarding the standard of independence mandated by Congress. The Commission cited, for example, H.R. Report No. 2333, 85th Cong., 2d Sess., respecting a previous Bill, H.R. 8382, in which "independent ocean freight forwarder" was first defined in terms virtually identical to the definition contained in Public Law 87–254.[7] The report stated:

> 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.) 14 F.M.C. at page 221.

The earlier definition, as Hearing Counsel point out, was changed slightly but in a way which made it even more clear that Congress desired total independence. Thus, the earlier definition contained the phrase, "in connection with shipments dispatched by such forwarder," which implied that forwarders need be free of shipper con-

[7] This definition stated as follows:
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. 14 F.M.C. at p. 220.

trol only on shipments dispatched by such forwarder. Theoretically, therefore, a forwarder could remain a shipper or maintain a beneficial interest in shipments so long as he did not himself perform the forwarding services on such shipments, i.e., the forwarder could carry on a mixed business, sometimes acting as shipper, sometimes as forwarder. However, deletion of the phrase in question from Public Law 87–254 can only indicate an intention to eliminate such a hybrid situation. Zanelli contends, however, that the above deletion was made by an earlier Congress, the 86th, not the Congress which actually enacted Public Law 87–254. Zanelli states that "[t]here is nothing to show that the 87th Congress gave the matter any consideration one way or the other." Zanelli cites no authority for the proposition that the work of Congresses immediately preceding the Congress which enacts legislation involving the same or related matters must be disregarded in ascertaining congressional intent as to the legislation ultimately enacted. But even if this is a proper doctrine, it lends Zanelli's contentions no support for if the earlier history is excluded from consideration and consequently there is nothing to indicate congressional intent, we are left with clear and unambiguous language in the statute which appears to require absolute independence. As the Court stated in *Alaska Steamship Co. v. FMC,* 399 F. 2d 623, 626, footnote 2 (9th Cir. 1968), in connection with the interpretation of clear statutory language:

> The legislative history of the provisions in question, on which all parties to this dispute rely, is inconclusive. . . . In the absence of a definitive explanation of congressional intent in dealing with this problem, this court will not assume that Congress intended to use the terms "through routes" and "joint rates" other than in accord with their settled meaning of more than 50 years duration.[8]

Even if we ignore the actions of previous Congresses and accept Zanelli's basic contention that Congress was focussing on the indirect rebating problem when it enacted Public Law 87–454, this still does not mean that Congress intended to authorize the type of forwarder operation that Zanelli is proposing, in which a forwarder is sometimes independent, sometimes not, with abstention from brokerage in the latter cases. Zanelli seems to be inferring that because the legislative history contains no indication that Congress considered such a hybrid operation, there was no intent to prohibit it, despite the clear language of the law ultimately enacted which granted no exceptions. Without a positive indication of congressional intent to grant such an exception, however, the statute cannot be so interpreted. *Alaska Steamship Co. v. F.M.C., Sea-Land Service, Inc. v. F.M.C.,* cited above.[9]

[8]See also *Sea-Land Service, Inc. v. FMC,* cited above, for a similar holding.

[9]These cited cases are especially illustrative. They involved a controversy between the Federal Maritime Commis-

Finally, regarding the language of the statute, Zanelli makes two arguments to support his contention that a person carrying on the business of forwarding may sometimes be allowed to have a beneficial interest in shipments. Firstly, Zanelli contends that section 44(a), which states that a "person whose primary business is the sale of merchandise may dispatch shipments of such merchandise without a license," implies that an occasional seller may hold a forwarder's license. As Hearing Counsel point out, however, the purpose of the quoted language was not to allow a licensee to be a shipper but to permit a shipper, whose business is not forwarding, to dispatch his own shipments without having to obtain a license.[10] Secondly, Zanelli contends that section 44(e) of the Act can be read to permit a forwarder to dispatch shipments in which he has a beneficial interest, so long as he abstains from collecting brokerage. This is so, argues Zanelli, because that statute provides that a common carrier by water may compensate a forwarder "in connection with any shipment dispatched on behalf of others."[11] Therefore, Zanelli infers, for his own shipments, i.e., those in which the forwarder has a beneficial interest, the forwarder need only abstain from such compensation if he wishes to dispatch the shipments. Such a reading, as Hearing Counsel point out, would emasculate the Freight Forwarder Law which, as shown above, defined "independent ocean freight forwarder" in section 1 of the Act as a person devoid of any beneficial interest in the shipments he forwards without qualification. Under recognized principles of statutory construction, section 44(e) should not be read so as to repeal section 1 by implication or to reach plainly inconsistent results. *United States v. Borden Co.,* 308 U.S. 188, 198 (1939).

It should be evident from the above discussion that Zanelli is proposing an alternative remedy which was not the one selected by Congress, namely, qualified independence based upon abstention from brokerage in shipper-connected instances. Although neither the legis-

sion and two carriers as to the meaning of Public Law 87-595 which provided that all through route and joint-rate arrangements between F.M.C.—regulated water carriers and I.C.C.—regulated motor carriers would fall under the jurisdiction of the I.C.C. The F.M.C. had held, despite clear statutory language, that certain arrangements which involved water carrier service with incidental motor carrier pickup and delivery did not fall under that law since the legislative history indicated that the genesis of the law related to a problem involving long line-haul, not incidental, motor carriage. *Sea-Land Service, Inc.—Cancellation of Rates,* 11 F.M.C. 137, 142, 143 (1967); *Alaska Steamship Co.—Cancellation of Rates,* 11 F.M.C. 314 (1968). The Courts, however, reversed the Commission and refused to carve out an exception to the clear statutory language so as to restrict its application to the type of problem which had precipitated the legislation.

[10]Hearing Before the Merchant Marine and Fisheries Subcommittee of the Committee on Interstate and Foreign Commerce, 86th Cong., 2d Sess., February 29, 1960, p. 49.

[11]The text of section 44(e) states in pertinent part:

A common carrier by water may compensate a person carrying on the business of forwarding to the extent of the value rendered such carrier in connection with any shipment dispatched on behalf of others. . . .

lative history nor the clear language of the law shows any intention on the part of Congress to permit such a standard for forwarders, Zanelli contends that no harm results if a forwarder operates under such a standard and that, on the contrary, the commerce of the United States is benefited because Zanelli assists in promoting exports by acting as purchasing agent for foreign consignees, advancing funds, financing exports, etc. The contention ignores several considerations, however.

As a matter of law, if an activity is prohibited, good intentions or beneficial results are irrelevant. Thus, if a group of companies agree to fix prices with good motives, e.g., in order to stabilize an industry or help revive a depressed economy, the activity is still unlawful. *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940). Similarly, as the Court recognized in *New York Freight Forwarders and Brokers Association,* cited above at p. 297, Public Law 87–254 and the Commission's regulation prohibiting licensed forwarders from having a beneficial interest in shipments admittedly resulted in the termination of some "benign" financing, yet such activities were found to be prohibited nonetheless. If the statute is the product of unwise legislation, because of the failure to consider the desires of some forwarders to engage in "benign" financing or act as helpful purchasing agents, however, the proper avenue of relief is to seek amendment of the legislation which can only be accomplished by the Congress, not by this Commission.[12]

A second consideration which Zanelli's argument ignores is the fact, as discussed previously, that Congress was interested not only in preventing indirect rebating to dummy forwarders but in establishing standards of fitness to insure that forwarders would act in a manner consistent with their fiduciary relationship to shippers. By establishing total independence from shippers, Congress not only stamped out indirect rebating but assured that forwarders would serve their shipper clients as disinterested fiduciaries, not as competitors. If Zanelli's proposed alternative standard is permitted, a forwarder would be allowed to dispatch not only the goods of outside shippers but of shipments in which he is either the shipper or shipper's agent and consequently may be in a position of actually competing with his shipper clients. Can an outside shipper client be assured that such a

[12]The legislative history to Public Law 87–254 indicates that some spokesmen for the law recognized that its enactment was somewhat hasty because of the forwarding industry's entreaties for prompt relief from the Board's proposal to ban brokerage. See statements of Senator Yarborough and Keating, Congr. Record, 87th Cong., 1st sess., pp. 17999–18000, 18240–241. Upon signing the Bill into law, President Kennedy also remarked in pertinent part:

> If experience should show, however, that this legislation is inadequate either to deal with the abuses or to provide necessary assistance to the shippers and carriers, I intend to recommend further remedial legislation. Statement of the President on S. 1368, signed into law as Public Law 87–254, September 19, 1961.

forwarder would accord the shipper the same care in arranging for the exportation of that shipper's goods as the forwarder would be doing with respect to the forwarder's own shipments? In all fairness to Zanelli, the record in this proceeding contains no indication that he has shown any preference to those shipments which he purchased or in which he enjoyed a beneficial interest. However, by permitting a forwarder to act in a dual capacity, i.e., as a shipper as well as forwarder, the potential for abuse is established. Furthermore, if the forwarder happens to be exporting the same type of merchandise as one of his outside shipper clients, the forwarder could conceivably have an advantage if he has access, as a forwarder, to confidential information relating to his competitor's business. Is it not more prudent to establish total independence for the forwarder instead of permitting a system whereby he may be called upon to choose between his own interests and those of his client?[13]

Finally, as the Court in *Norman G. Jensen, Inc. v. F.M.C.*, cited above, indicated, it is possible for a forwarder to assist exporters and promote the foreign commerce of the United States without acquiring a beneficial interest in goods shipped and thereby losing independence. In that case, the forwarder's connection with a firm engaged in counselling and assisting exporters was found to be lawful but significantly the firm in question was not a purchaser or seller of the goods exported.

ULTIMATE CONCLUSIONS

The plain language of the Freight Forwarder Law, Public Law 87–254, its legislative history, and all previous Commission cases on the subject indicate that the standard of independence imposed on persons wishing to hold freight forwarder licenses in absolute and that a freight forwarder cannot hold such a license if he at any time acts as shipper, agent for a consignee, seller, financier, or has obtained a beneficial interest in the goods shipped. The proposal suggested by Zanelli, namely, that qualified independence is permitted whereby the forwarder may act in the foregoing manner so long as he abstains from the collection of brokerage is an alternative not permitted by the law nor does such a proposal derive support from the legislative history.

If, as Zanelli argues, the commerce of the United States would ultimately benefit if forwarders could sometimes act like shippers or

[13]Without commenting on the truth of the allegations, the presiding judge officially notices that a complaint has been filed in Docket No. 73–70, *Inter Equip, Inc. v. Hugo Zanelli & Company*, in which complainant alleges that Zanelli has acted as a competing seller while forwarding complainant's goods and further alleging harm resulting from such activity.

obtain beneficial interests in goods exported, the proper avenue of relief is to ask Congress to amend the law. However, the present requirement that forwarders maintain absolute independence is fully consistent with the congressional intent not only to stamp out indirect rebating but to insure that forwarders would serve their shipper clients in a manner consistent with their fiduciary relationships without preference or discrimination. A standard of absolute independence is more consistent with such a purpose than one of qualified independence wherein a forwarder engaging in buying and selling may be placed in the position of competing with his own shipper clients.

Finally, as a recent court decision indicates, under certain conditions, forwarders may engage in counselling and assisting exporters without becoming purchasers, sellers, or otherwise obtaining beneficial interests in the goods shipped, thereby promoting the commerce of the United States without simultaneously losing independence.

Accordingly, it is found and concluded that the activities of respondent Zanelli as a purchaser and seller of certain shipments on behalf of Mexican consignees, in which he also obtained a beneficial interest, disqualified Zanelli as an independent ocean freight forwarder, and constituted violations of sections 1 and 44 of the Shipping Act, 1916, as well as sections 510.2(a), 510.9(d), and 510.21(1) of the Commission's General Order 4.

Since respondent has cooperated fully with Hearing Counsel and the record does not indicate that respondent engaged in the aforesaid activities in willful violation of law, an opportunity for voluntary compliance should be afforded as an alternative to suspension or revocation of respondent's license. *Del Mar Shipping Corp.*, cited above, at p. 497; *Bolton and Mitchell, Inc.*, cited above. In this regard the recent decision of the Court of Appeals in *Norman G. Jensen, Inc. v. F.M.C.*, cited above, may provide guidance as to the means by which respondent can modify his method of operating so as to conform to the requirements of law. Therefore, if respondent wishes to retain his forwarder's license, he shall cease and desist from the aforesaid activities found to be unlawful and shall submit a full report promptly to the Commission on the manner in which he has complied with this requirement.

(S) NORMAN D. KLINE,
Administrative Law Judge.

WASHINGTON, D. C.,
June 12, 1974.

FEDERAL MARITIME COMMISSION

DOCKET NO. 70–53

LEVATINO & SONS, INC.

v.

PRUDENTIAL-GRACE LINES, INC.

PARTIAL ADOPTION OF INITIAL DECISION AND ORDER ON REMAND

Dec 16 1974

This proceeding was initiated by the filing of a complaint on December 29, 1970, in which Complainant Levatino & Sons, Inc. (Levatino) alleged that Respondent Prudential-Grace Lines, Inc. (Grace), during the years 1966, 1967, and 1968, violated sections 14 Fourth, 16 First, and 17 of the Shipping Act, 1916 (the Act), by failing to provide Levatino with space accommodation for cargoes which Grace had previously contracted to carry; by unfairly and unjustly discriminating against Levatino and unduly and unreasonably preferring competitors of Levatino with regard to the furnishing of warehousing and fumigation facilities; and by entering into settlements with competitors of Levatino in satisfaction of complaints filed with the Federal Maritime Commission by such competitors.

On September 12, 1969, Levatino had commenced an action against Grace in the United States District Court for the Southern District of New York seeking compensatory damages in the sum of $3,765,000, alleging substantially the same violations of the Act, as well as violations of the common law of the State of New York. *Levatino & Sons, Inc. v. Grace Line, Inc.*, 69 Civ. 3983 (S.D.N.Y., 1969). In response to a motion to dismiss filed by Grace, the Court, by order dated August 25, 1970, stayed the action:

> . . . subject to further order of the Court, pending referral by plaintiff LEVATINO & SONS, INC. to the Federal Maritime Commission of the claims alleged in the complaint herein which are or may be within the said Commission's jurisdiction and the final disposition of any proceeding initiated by said plaintiff before said Commission. . . .

In accordance with the Court's directive, Levatino filed its complaint with the Commission. Upon motion of Respondent, however, that portion of the complaint relating to the issue of reparation was dismissed by the Commission, it appearing that the complaint was filed more than two years subsequent to accrual of the cause of action.

Administrative Law Judge Norman D. Kline issued his Initial Decision.[1] In that Initial Decision, Judge Kline found specifically that Respondent had not violated the Act with regard to the furnishing of warehouse and fumigation facilities to Complainant or with respect to entering into settlement agreements with competitors of Complainant in satisfaction of complaints before this Commission. As to the alleged violations of sections 14 Fourth and 16 First regarding the shutting out of Complainant's cargoes, Judge Kline found that while there was no showing of unjust discrimination or undue preference against Complainant by Respondent, Respondent had not conducted itself in the manner in which it was obligated to act as a common carrier by water and by a general course of conduct had treated all similarly situated shippers in an unfair manner. Judge Kline therefore concluded that Respondent had violated sections 14 and 16 of the Act by generally failing to meet the standards of conduct imposed upon a common carrier under the Act. Following issuance of this decision, both Complainant and Respondent filed exceptions to Judge Kline's Initial Decision.

Complainant Levatino excepted to Judge Kline's findings that:

1. The violations of sections 14 Fourth and 16 First by Respondent do not center on discrimination against Levatino but were random and affected numerous shippers other than Levatino;

2. Unfair treatment of Levatino in the matter of space accommodations was limited to the period January-March 1967;

3. Levatino received terminal services and facilities which did not differ significantly from those enjoyed by other importers who used Grace's sheds in Port Newark;

4. Grace did not subject Levatino to undue or unreasonable prejudice or disadvantage or unjust discrimination in the furnishing of terminal and fumigation facilities in 1966 and 1967;

5. Grace did not enter into any agreements with warehouse companies during the 1966–1967 season which were required to be filed with the Commission pursuant to section 15 of the Act; and

6. Grace's settlement in the "All-Chilean" case did not constitute rebating or the use of an unjust or unfair device or means to allow shippers to obtain transportation at lower than regular rates in violation of sections 16 or 17 of the Act.

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[1]That Initial Decision is appended hereto and made a part hereof.

Levatino lodged six further exceptions which are alleged failures to make certain findings—the converse of the six exceptions cited above. With the exception of the issue raised as to shutout cargoes (#1 & 2 above), we will discuss each of these exceptions hereinafter, and our conclusions as to each, *seriatim.*[3] Exceptions 1 and 2 dealing with the issue of shutouts will be discussed separately thereafter.

Levatino Exceptions 3 & 4. It is alleged that Judge Kline erred in finding that Grace had not discriminated against Levatino with respect to the terminal and fumigation facilities provided by Grace to Levatino and others. In support of its position, Levatino argues that Judge Kline ignored the weight of the evidence before him in reaching his conclusion, citing transcript references and various exhibits. We have reviewed Judge Kline's numerous findings of fact in regard to these alleged errors and the transcripts and exhibits on which they were based. We are unable to conclude from this scrutiny that Judge Kline could not come to the conclusions that he did based on that record. While Levatino may disagree with these findings, we have been shown nothing which would indicate that Judge Kline erred with respect to these findings. The thoroughness of Judge Kline's consideration may be seen in the lengthy findings of fact on pages 6 through 15 and his discussion on pages 25 through 28 of the Initial Decision. We conclude that Judge Kline's findings in this regard are fully supportable on the record and we therefore adopt them as our own.

Levatino Exception 5. It is alleged Judge Kline erred in finding that certain warehouse agreements entered into by Grace were not subject to section 15 of the Act and that therefore Grace's failure to file such agreements with the Commission was not a violation of the Act. Levatino has little to say in support of this claim. In sum, Levatino merely states that such an agreement between Levatino and Grace was not filed and that "through Grace's inducement, cajoling and misrepresentation Levatino signed a written agreement which did not reflect the actual oral agreement between the parties. . . ." We do not view this argument as support in any way of Levatino's claim regarding whether or not such an agreement may be subject to section 15. Nonetheless, in order to afford Levatino's claim in this exception the appropriate attention, we have carefully reviewed the record and the Initial Decision. We are not persuaded that Judge Kline erred in finding the alleged agreement not to be subject to section 15 and its filing requirements. We are of the opinion that Judge Kline's lengthy discussion of this issue (pages 29 through 34) in the Initial Decision is

[3]Conclusions of Complainant in support of its exceptions and specific allegations of these exceptions not explicitly discussed herein have been scrutinized and found to be of insufficient merit to warrant treatment here.

satisfactory as a matter of law as to the situation presented in this case. We have not been persuaded differently by the conclusory, but unsupported, statements of Complainant's exceptions.

Levatino Exception 6. It is here alleged that Judge Kline erred in finding that Grace's settlement in the All-Chilean case did not constitute rebating or the use of unjust or unfair devices to allow shippers to obtain transportation at rates below regular rates. To support its contention, Levatino again urges that Judge Kline ignores the weight of the credible evidence. Again, we turn to the reasoning of the Initial Decision and the record on which it is based to review the sufficiency of Judge Kline's conclusions. Again, we are unswayed by Levatino's unsupported factual arguments in support of its exception. The record substantiates Judge Kline's determination and whether or not some evidence is credible and some not is a determination within the discretion of the Judge. We do not see fit to overturn this decision as we find it adequately supported by the record and discussed adequately in the Initial Decision. Judge Kline's determination is far from unsupported by credible evidence and we are not impressed by the argumentative conclusions by which Levatino seeks to overturn this finding.

With respect to all issues discussed above, we have painstakingly reviewed the record of this proceeding in light of exceptions taken to the Initial Decision. As noted above, we do not find persuasive reason in any of those issues to warrant overturning the conclusions of Judge Kline. We, therefore, have adopted the findings of fact determined by Judge Kline with the exception of one factual issue raised on exception by Grace regarding Judge Kline's finding No. 40 regarding testimony as to certain percentages of cargo given by Stephen Levatino.[3]

With the exception of that single factual determination and insofar as the allegations relating to issues other than shutouts are concerned, we concur with the determinations made by Judge Kline and hereby adopt those findings as our own. Specifically, we adopt his conclusions that:

(1) Grace is found not to have discriminated against complainant unjustly or to have subjected complainant to undue or unreasonable prejudice or disadvantage in furnishing terminal and fumigation facilities during the 1966 and 1967 Chilean fruit and produce season;

(2) Grace is found not to have entered into agreements with warehouse companies in 1966 and 1967 which constituted the type of agreement required to be filed for approval by section 15 of the Act; and

(3) Grace is found not to have given rebates or to have discriminated against complainant, in violation of sections 16 First and 17 of the Act, in settling two proceedings brought before this Commission by importers of Chilean fruit and produce.

[3]See discussion of this issue below.

As noted above, Complainant takes exception to Judge Kline's treatment of the issue of shutout cargo. Likewise, Respondent filed exceptions as to this issue. In fact, Respondent's exceptions are entirely directed to this issue. Because of the issues raised on exception regarding shutout cargo, that problem will be dealt with in its entirety at this time.

Complainant, Levatino, objected to Judge Kline's conclusions regarding the shutting out by Grace of Levatino's cargo. Additionally, Respondent Grace filed a protest alleging error by the Judge as to his conclusions regarding sections 14 Fourth and 16 First violations by Grace and the various underlying findings which were used to support those conclusions.

In resolving the issue regarding shutouts in his Initial Decision, Judge Kline made no specific findings as to any unjust discrimination or unreasonable prejudice or disadvantage imposed by Grace upon Levatino. Rather, he found that the general prohibition of sections 14 Fourth and 16 First against any carrier unfairly treating any shipper had been breached by Grace with respect to both Levatino and other shippers in this trade, stating:

> In the instant case the violations of Section 14 Fourth and 16 First do not center on discrimination against Levatino, since the record clearly shows that numerous shippers suffered shutouts in addition to Levatino.

We do not necessarily agree with this conclusion or the principle of law upon which it is based. We are of the opinion that further discussion of that issue is warranted here.

As to shutouts, at issue in this proceeding was only Levatino's charge that Grace had violated sections 14 Fourth, 16 First and 17 of the Act by failing to provide Levatino with space accommodations for Levatino's cargoes which Grace had contracted to carry. While we do not insist upon overnice limitation of issues to those framed in the various pleadings, we are of the opinion that the extension of this claim to a general investigation of a course of conduct pursued by Grace with respect to many other shippers was unwarranted.

In essence, Grace claims in its exceptions that the issue defined by Judge Greer (who initially heard the case) was unequivocally limited to the question of discrimination by Grace *against Levatino,* and that the reframing of this issue by Judge Kline in his Initial Decision was an unwarranted and surprising extension of the case against which Grace had no chance to defend itself. In support of this position, Grace cited the record in which Judge Greer stated:

> It is my understanding . . . that . . . the complainant's cargo was left behind as well as the cargo of other shippers. We have established that. *We are talking about discrimina-*

tion. I don't know how you intend to show that there was discrimination in favor of someone if everybody's cargo was left behind. (Emphasis Grace's)

Grace further claims that, had it known that it was to be forced to defend itself against the broader issue of general unfairness against all shippers through a course of conduct, it could well have adduced evidence by which it could have so defended itself. It claims that it could readily be shown that Grace used procedures for loading cargo in Valparaiso for many years which worked quite to the satisfaction of all concerned shippers. Further, it claims that it could show that these procedures in fact worked well even into 1967, but that only at the height of the season and because of "unusual circumstances" did these procedures break down. Because of Grace's alleged ability to explain and to justify any general unfairness as found by Judge Kline, Grace maintains that fundamental fairness demands that it be given the opportunity to present such evidence and to be accorded the fair hearing provided by the APA, various court decisions, and the Constitution itself.

While we express no opinion here as to the merits of any evidence which Grace might proffer in this regard, we find that Grace is entitled to present whatever evidence it may wish to rebut this broader charge. The broader issue framed by Judge Kline with respect to a course of conduct constituting such violations as to all shippers in a given trade warrants further consideration, both with regard to this proceeding and as a general principle. In addition to Respondent's exceptions in this regard, Complainant also alleged in its exceptions that Judge Kline erred in his treatment of the issue of shutouts. Levatino urges that:

Judge Kline did not find GRACE discriminated against LEVATINO by shutting out LEVATINO cargo. LEVATINO submits that the failure to find discrimination against LEVATINO ignores the weight of the credible testimony.

In light of this discussion, we reserve judgment as to subjection by Grace of Complainant to unfair treatment, unjust discrimination, or undue or unreasonable prejudice or disadvantage with respect to shutout cargo. Additionally, we hereby give notice of our intention to remand this proceeding for evidentiary hearing with respect to the practices described regarding cargo loading practices by Grace in the Chilean fruit and produce trade.

One further issue raised by Grace on exception merits our consideration here. Grace alleges that Judge Kline erred in accepting certain percentages cited on the stand by Stephen Levatino regarding amounts of his cargo shut out six years prior to his testimony. Grace maintains on exception that this testimony, which conflicts with its own contemporaneous charts and figures, is inherently open to doubt because of the time elapsed between the events and the testimony. Whether or not this testimony is accurate, Grace further states, the figures provided are unnecessary to any determination made by Judge Kline. We agree that the figures provided without corroboration on the stand by a witness six years after the events are of somewhat dubious reliability. However, we also agree that acceptance or rejection by us of these figures is irrelevant to Judge Kline's treatment of shutouts. We therefore express no opinion as to their validity and refrain from adopting these figures as facts. The validity of these figures will be assessed more thoroughly upon the further hearing regarding this issue.

Therefore, it is ordered, That to the extent specified herein, the Initial Decision is hereby adopted.

It is further ordered, That there be remanded for full evidentiary hearing before an Administrative Law Judge the following matters with respect to the issue of "shutout" cargo:

1. Specific findings shall be made as to whether or not Respondent subjected Complainant to unjust discrimination or undue or unreasonable prejudice or disadvantage in violation of sections 14 Fourth and 16 First of the Shipping Act, 1916, all as alleged in the complaint filed herein.

2. Specific findings shall be made as to the amounts of cargo booked by Respondent which the actions of Respondent caused to be left on the pier and not transported (including therein a definition of what constitutes "booked" cargo).

3. Specific findings shall be made as to why Respondent's loading and booking procedures were: (1) inadequate; and (2) of sufficient extent to amount to a failure to have observed reasonable procedures and practices in violation of sections 14 Fourth and 16 First.

By the Commission.

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

FEDERAL MARITIME COMMISSION

No. 70–53

LEVATINO & SONS, INC.

v.

PRUDENTIAL-GRACE LINES, INC.

Respondent's failure to observe reasonable loading and booking procedures for a limited period of time in 1967, subjected complainant and other shippers to unfair treatment and undue and unreasonable prejudice and disadvantage, in violation of sections 14 Fourth and 16 First of the Shipping Act, 1916.

Respondent found not to have discriminated against complainant unjustly or to have subjected complainant to undue or unreasonable prejudice or disadvantage in furnishing terminal and fumigation facilities during the 1966 and 1967 Chilean fruit and produce season.

Respondent found not to have entered into agreements with warehouse companies in 1966 and 1967 which constituted the type of agreement required to be filed for approval by section 15 of the Act.

Respondent found not to have given rebates or to have discriminated against complainant, in violation of sections 16 First and 17 of the Act, in settling two proceedings brought before the Federal Maritime Commission by importers of Chilean fruit and produce.

J. Joseph Noble and *James A. Gallagher, Jr.* for complainant.
H. Richard Schumacher and *Michael R. Royster* for respondent.

INITIAL DECISION OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE [1]

This proceeding was initiated by the filing of a complaint on December 29, 1970, in which complainant Levatino & Sons, Inc. (Levatino) alleges that respondent Prudential-Grace Lines, Inc. (Grace), during the years 1966, 1967, and 1968, violated sections 14 Fourth, 16 First, and 17 of the Shipping Act, 1916 (the Act), by failing to provide Levatino with space accommodation for cargoes which Grace had previously contracted to carry, by unfairly and unjustly discriminating

[1] This decision became the decision of the Commission 12/16/74

against Levatino and unduly and unreasonably preferring competitors of Levatino with regard to the furnishing of warehousing and fumigation facilities, and by entering into settlements with competitors of Levatino in satisfaction of complaints filed with the Federal Maritime Commission by such competitors.

On September 12, 1969, Levatino had commenced an action against Grace in the United States District Court for the Southern District of New York seeking compensatory damages in the sum of $3,765,000, alleging substantially the same violations of the Act, as well as violations of the common law of the State of New York. *Levatino & Sons, Inc.* v. *Grace Line, Inc.* 69 Civ. 3983. In response to a motion to dismiss filed by Grace, the Court, by order dated August 25, 1970 stayed the action:

> . . . subject to further order of the Court, pending referral by plaintiff LEVATINO & SONS, INC. to the Federal Maritime Commission of the claims alleged in the complaint herein which are or may be within the said Commission's jurisdiction and the final disposition of any proceedings initiated by said plaintiff before said Commission. . . .

In accordance with the Court's directive, Levatino filed its complaint with the Commission. Upon motion of respondent, however, that portion of the complaint relating to the issue of reparation was dismissed, it appearing that the complaint was filed more than two years subsequent to accrual of the cause of action. See Order on Motion to Dismiss, May 20, 1971.

Hearings were held before Administrative Law Judge Herbert K. Greer in Washington, D.C. on April 23, 24, May 3 and 4, 1973. Upon the retirement of Judge Greer in June 1973 the case was reassigned to Administrative Law Judge Norman D. Kline.[2]

FACTS

The Parties.

1. Complainant is one of a number of corporate entities through which members of the Levatino family have engaged in the importation and distribution of food products from Chile, Argentina, Italy, and other countries since shortly after the Second World War. Complainant was formed on December 24, 1963 by three brothers, Stephen, Anthony, and Joseph Levatino, and three sons of Stephen and Anthony Levatino. Subsequently a fourth son was admitted to part ownership. Apart from the interest of Anthony which presumably passed to his estate at his death, these ownership interests have continued to the present.

[2]Prior to the reassignment Judge Kline attended the hearings as an observer and therefore was afforded an opportunity to assess the credibility of the witnesses through personal observation of their demeanor.

2. Complainant actively engaged in the importation of food products until late September or early October 1967 when the Levatino family reorganized their business, each of the three elder brothers forming separate importing corporations. Although complainant ceased to engage in active business, it remained in existence as a corporate shell whose only function seems to be the prosecution of this proceeding and other claims against Grace.

3. Respondent Grace is a Delaware corporation with headquarters in New York City. For many years, including the period relevant to this complaint (late 1965 through early 1968) Grace has operated ships of American registry in a scheduled common carrier liner service between the Port of New York and the West Coast of South America, including Valparaiso and other ports in Chile. Prior to January 1970 respondent was owned by W. R. Grace & Co. and was known as Grace Line, Inc. In late 1969, interests associated with the late Spyros Skouras and his family acquired Grace Line, Inc. and changed its name to Prudential-Grace Lines, Inc. This acquisition was approved by the Federal Maritime Commission. *Agreement No. 9810,* 13 F.M.C. 156 (1969). Both before and after the acquisition Grace carried substantial quantities of Chilean fruit and produce.

The Structure of the Chilean Fruit and Produce Trade

4. The annual carriage of fruit and produce from Valparaiso, Chile to the Port of New York is seasonal, occurring during the period beginning in late December until May or early June of the following year.[3] Importation of such foodstuffs depends on the temporal reversal of seasons between the Northern and Southern Hemispheres and involves the exportation to North America and Europe during the Northern Hemisphere's winter and spring of commodities grown during the Chilean spring and summer.

5. The commodities in question may be divided into two categories: (a) "fruit", which includes grapes, nectarines, plums, pears, and other so-called "soft" fruit; and (b) "produce" (known in the trade as "hardware") which includes melons, onions, and garlic. The fruit is carried aboard ship in refrigerated stowage, the produce in ventilated stowage, and are also handled differently upon discharge in the United States.

6. In the two decades between the end of the Second World War and the period in issue here, a large number of Chilean firms participated in the export of fruit and produce. The farms providing these crops generally are located in the Aconcagua Valley and other areas

[3]A particular season, unless otherwise noted, will be referred to as the year in which the season ended, i.e., "1966 season" refers to the season which began in the closing months of 1965 and concluded in late spring of 1966.

of central Chile in and about Santiago. The port of shipment is Valparaiso.

7. During the years in question (1965 through 1968), the receivers of Chilean fruit and produce in New York were a dozen or so importers, including complainant and its predecessors. These receivers competed vigorously among themselves for the available Chilean fruit and produce business, regularly sending representatives to Chile before the season to line up suppliers who would ship to them. Stephen Levatino performed this crucial function for complainant.

8. Prior to 1965, the exporters usually shipped their goods to the United States on consignment. Under this system, the importer was in substance, a receiving market broker. He sold the goods, deducted from the proceeds of sale the costs of shipment, handling, and sale plus a commission for himself and then made the remaining proceeds available to the supplier. Beginning with the 1965 season or perhaps earlier, other methods of sale came into use. Some importers sent advances to their suppliers before the planting season and deducted these advances before remitting any proceeds of sale. Some receivers began to purchase fruit outright in Chile. Others, including Levatino, instituted "joint account" sales, whereby supplier and receiver divided the proceeds in agreed percentages.

The Handling of Fruit and Produce in Manhattan

9. During the 1960's, including the years of primary relevance here, 1966 and 1967, Grace operated six vessels in a scheduled weekly service between Valparaiso and the Port of New York, usually arriving in New York on Monday. These vessels had both refrigerated and ventilated space which was used to carry Chilean fruit and produce respectively. The vessels also carried substantial quantities of coffee. During this period Grace also operated another scheduled weekly service between the Port of New York and the West Coast of South America, chiefly carrying bananas loaded at Guayaquil, Ecuador and coffee loaded in Colombia.

10. Until after the end of the 1965 season, Grace's vessels arriving from Chile discharged their cargo at the terminal which Grace maintained at North River Piers 57 and 58 in Manhattan. The terminal was heated. Each pier had two covered floors and the piers were connected through a structure at their heads. The terminal served not only vessels operating in the Chilean trade but vessels serving various routes to the Caribbean, including two passenger cruise vessels.

11. Upon arrival of a vessel carrying Chilean fruit and produce at the North River terminal, the fruit consigned to all receivers was discharged onto the pier and moved as quickly as possible into heated lighters supplied by the receivers. This movement was usually accomplished within 12 to 14 hours of the vessel's arrival. Delivery into the lighters terminated Grace's responsibilities toward the fruit. Because of this rapid movement, no free storage time was granted to receivers.

12. After delivery into the lighters, the fruit was carried down river to the Fruit Auction Pier, also called the Pennsylvania Railroad Pier, at Pier 29. This pier contained the sales rooms of the New York Fruit Auction Company, a sales agency which handled various imported fruits as well as domestic products. The cost of lighterage was borne by the receivers.

13. At the Fruit Auction Pier, stevedores removed the fruit from the lighters and placed it on the pier for inspection by the Plan Quarentine Division of the United States Department of Agriculture. The receivers paid for these stevedoring services. After inspection, the fruit was fumigated by an independent contractor pursuant to requirements instituted by the Department of Agriculture several years prior to 1965. The fumigating contractor was paid solely by the receivers.

14. During the night following fumigation, the fruit was again sorted by label and placed on the pier for inspection by prospective buyers. After inspection, it was sold at auction, the auction company receiving a commission for its services. All services were paid for by the receivers. When fruit was imported on consignment, the costs of lighterage, sorting, fumigation, etc. were a charge against the proceeds otherwise due the exporter.

15. The receivers in the Chilean trade did not consider this method of distribution to be entirely satisfactory because the movement by lighter from the Grace terminal down river to the Auction Pier was expensive and exposed the fruit to the hazards of winter weather and pilferage. Grace had at one time expended over $100,000 in renovating and equipping a portion of Pier 58 with the objective of establishing a facility for handling, fumigating, sampling and auctioning Chilean fruit. Although this plan had the support of most receivers, including complainant or its predecessors, it was aborted because of labor problems.

16. Produce was handled in a different manner from fruit after its arrival at the Grace terminal. The produce consigned to all receivers was first discharged from the ship onto the pier. It was then put on pallets and moved by stevedores supplied by Grace to a heated area of the terminal where it was sorted by bill of lading, mark and crate

size and was stored. If any crates needed recoopering, this was also done at Grace's expense. When a receiver wished to take delivery of his produce, he made an appointment and sent a truck to the terminal. The produce was then taken from the heated storage area to the tailgate of the truck by Grace's stevedores where delivery was effected. A certain period of free time was granted during which the produce could be left in the terminal without incurring demurrage charges. All of these services were included in the freight rate for produce.

17. Grace encountered some operational problems in handling Chilean produce at its North River Terminal, experiencing congestion caused by the regular weekly influx of coffee and other cargo requiring large amounts of pier space, the seasonal arrival of Chilean produce, storage of melons during periods when the market was poor, limited space for trucks to gain access, and pilferage.

The Shift to Port Newark in Late 1965

18. In the early 1960's Grace leased facilities at the Port Newark terminal on the west shore of Newark Bay. This terminal afforded upland space, useful in the operation of container ships which was not available at Manhattan's North River piers. By 1963 Grace had shifted to Port Newark its terminal operations for its service between Callao, Peru and New York. In the latter part of 1965, Grace also moved the terminal operations for its Chilean service. The latter move was prompted by the impending delivery over the next few years of six new container ships of the SANTA LUCIA class which Grace intended to use in its Chilean service. It was also felt that consolidation of both of its services to the West Coast of South America at one terminal would be more convenient for shippers of southbound cargo.

19. Grace's terminal at Port Newark consisted of two buildings, Sheds 138 and 140, on the north side of the port's north channel, and adjacent berthing facilities. Only a part of one of the two buildings was heated.

20. Grace anticipated that during the annual seasonal movement of Chilean fruit and produce, it would encounter congestion problems such as it had experienced at its North River Terminal and would not have sufficient facilities to handle the total volume of produce cargo because of the limited availability of heated space required for handling and storing both Chilean produce and coffee carried in the two services from the West Coast of South America. Grace dealt with the problem in 1966 and subsequent seasons by providing for the immediate removal of some of the incoming cargoes which would other-

wise require heated storage in Shed 140, either produce or coffee.

21. Prior to the start of the 1966 season, executives of Grace entered into discussions with two of complainant's principals, Stephen Levatino and his son Pat, regarding the problem of Grace's inability to handle the large volume of cargoes at its terminal in Newark. Grace proposed to Levatino, who received the largest volume of Chilean produce moved aboard Grace's vessels, that separate warehouse space apart from Grace's terminal be arranged for Levatino as a substitute for the terminal facilities which Grace was obligated to provide. Grace encouraged Levatino to utilize a warehouse established by a third party in order to avoid any questions of impropriety under the Shipping Act. As a result of negotiations, which were conducted on complainant's side by Stephen Levatino with the aid of counsel, in November 1965, members of the Levatino family formed Newark Dockside Warehouse Company which in turn rented three contiguous sheds, numbered 105, 106, and 109, near the Grace terminal.

22. On November 23, 1965, Newark Dockside entered into a written contract with Grace by which Newark Dockside undertook, for receivers who agreed to such handling, to remove produce by truck from Grace's pier immediately upon its arrival, carry it to Sheds 105, 106, and 109, and there provide the sorting, storage and other services normally supplied by Grace in its terminal. Grace, in turn, agreed to pay Dockside 26 cents per box for such services, an amount which studies had indicated was the cost Grace would incur for similar handling in Sheds 138 and 140. Simultaneously Levatino agreed in writing with Grace that its incoming produce cargoes could be handled in this manner during the 1966 season. This alternative method of handling was advertised to other receivers by Dockside, which published a tariff, but only Levatino and one other importer, Yeckes-Eichenbaum, Inc. chose to avail themselves of it.

23. As a result of the foregoing events, the following methods of handling produce obtained during the 1966 season. Produce consigned to receivers other than Levatino and Yeckes-Eichenbaum was delivered upon arrival into Grace Line's sheds and handled as it had always been at Pier 58, namely, placed in a heated area, segregated by bill of lading and held for ultimate delivery to the consignee upon presentation of his delivery order and arrangements for trucking. Produce consigned to Levatino and Yeckes-Eichenbaum, about one-half of the total carried by Grace, was removed by Dockside's trucks immediately upon arrival and carried to Sheds 105, 106, and 109 where it received similar handling. Grace paid more then $74,000 to Dockside for the furnishing of these services during the 1966 season.

24. In 1967, Newark Dockside and Levatino concluded written

agreements with Grace similar to those of the year before. Grace entered into similar agreements with Port Entry Expeditors, the operator of another warehouse in the Port Newark complex, and with two other warehouse companies located in Manhattan who agreed to remove the produce consigned to other receivers. During the 1967 season, 85 to 90 percent of Grace's incoming Chilean produce was removed by truck immediately upon arrival by various warehousemen, while the remainder, consigned to receivers who did not elect this form of handling, went into Sheds 138 and 140 and was processed there. Payments by Grace to Dockside during the 1967 season amount to $33,340.

25. In 1968, Grace abandoned these alternative methods of handling Chilean produce and took it all, including that consigned to the various companies with which members of the Levatino family were then associated, into Sheds 138 and 140. To make room for the produce during the period of the Chilean movement, Grace elected to provide for the removal and storage of incoming Colombia coffee in a separate warehouse maintained by the Held Company in the Port Newark complex. This procedure was followed during the Chilean fruit and produce seasons of 1969 and 1970. By 1971, Grace had cut back its Chilean service to a fortnightly schedule which eliminated the congestion problem and the need to farm out coffee.

The Handling of Fruit at Port Newark

26. During the 1966 season, all receivers of Chilean fruit carried aboard Grace's vessels, except Levatino and an affiliated company, elected to receive their fruit into lighters at Port Newark and to transport it to the Fruit Auction Pier in Manhattan for sale. The procedure was similar to that followed in earlier years for fruit delivered through Grace's North River piers.

27. For several weeks at the beginning of the 1966 season, Levatino and an affiliated company elected to meet Grace's vessels with flat-bed trucks in order to receive their fruit in these trucks rather than lighters. They then trucked it to the nearby sheds of Newark Dockside where they provided or obtained whatever processing was required, including fumigation, and sold the fruit at auction or by private sale in competition with the fruit auction in Manhattan. Early in March 1966, however, Levatino and its affiliate abandoned this procedure in favor of receiving fruit in lighters which were moved to the Fruit Auction Pier in Manhattan in the same manner as the cargo of other receivers. The costs of handling and processing fruit by the trucking method appears to have been about 7 or 8 cents a box less than those

incurred in delivery to the lighters. The Levatinos, however, were unable to attract buyers to Port Newark, according to Stephen Levatino, because of union opposition.

28. Grace had no agreement with Dockside or anyone else in connection with fruit shipments received during the 1966 and 1967 seasons. All receivers of fruit took delivery either by lighter or, in the case of a few shipments to Levatino and an affiliate, by truck. Prior to the 1966 season, the tariff of the West Coast South American Northbound Conference applicable to Grace's Chilean service was amended to provide for the immediate delivery in New York of small fruit to either lighters or trucks, provided by the receiver.

The Matter of Fumigation

29. Several years prior to 1965, the Department of Agriculture imposed a requirement that all incoming Chilean fruit, as distinguished from produce, be subjected to fumigation. That requirement has been continued. There is no dispute that with respect to fruit carried to the Port of New York by Grace, this procedure has been accomplished without exception by the receiver, at his expense, after the removal of the fruit from Grace's premises.

30. The requirement that Chilean melons be fumigated was imposed during the 1965 season, the last season in which Grace berthed its vessels on the North River. The reason for the requirement was the discovery of insects in the excelsior packing of a few shipments of melons received at Grace's terminal. The receivers of these melons requested that Grace permit them to arrange for fumigation on Pier 58 but were refused permission with the result that they were required to truck the melons to a fumigation facility elsewhere in Manhattan at their own expense before making them available for sale.

31. The infestation of occasional melon shipments and the corresponding requirement of selective fumigation continued during the 1966 season, the first in which Grace vessels berthed at Port Newark. Melons consigned to Levatino were fumigated at the sheds of Newark Dockside, to which the latter, as Grace's contractor, had removed them on arrival. Dockside supplied, without charge to Levatino, the use of floor space and pallets, but Levatino was required to pay an outside fumigation contractor for the furnishing of equipment and service and for other labor costs involved as well as the costs of installing electrical wiring, piping, and exhaust fans.

32. When confronted with this same requirement of occasional fumigation, some of the receivers of the melons which were being taken into Grace's sheds upon arrival requested, as in 1965, that they be

permitted to accomplish the necessary fumigation on Grace's premises. Grace at first denied the request because of the interference with normal pier activities and the hazards posed by the methyl bromide gas used in the fumigation process. When the receivers persisted in their requests, however, Grace agreed to permit fumigation on its pier during the weekend following the shipment's arrival, which arrival usually occurred on a Monday. This arrangement was not entirely satisfactory to receivers because they would have to wait more than a week for delivery of their melons. If receivers wished earlier fumigation, they were required to take delivery from the terminal and transport their melons elsewhere for fumigation.

33. Two receivers, on one occasion each, elected to fumigate melons on Grace's premises. On these occasions, the receivers contracted with an independent fumigation company, which brought in the necessary facilities, i.e., tarpaulins, blowers and flexihoses. The receivers paid for all these services and for the service of Grace's stevedoring contractor whose personnel moved and stacked the melons preparatory to fumigation. Grace contributed the use of its floor space and pallets on which the melons were stacked. Levatino was informed of these particular occasions, which it believed to have occurred on a Wednesday evening, and protested to Grace that it wanted all of its melons and fruit fumigated at the Grace terminal prior to delivery to Newark Dockside.

34. The need for melon fumigation substantially disappeared in subsequent seasons owing to changes in packing from excelsior to cardboard and other reforms in packing procedures instituted in Chile.

35. The fumigation operation at Newark Dockside involved fruit to a much greater extent than melons, in a ratio of two or perhaps even three to one. After Levatino chose to abandon its efforts to market fruit at Port Newark, and resumed the familiar procedure of lightering its fruit to Manhattan for fumigation and sale at the Fruit Auction Pier, Dockside's fumigation income and expense dropped substantially. Material circulated to the trade by Dockside in late 1965, furthermore, emphasizes fumigation facilities for fruit but does not even mention facilities for melons.

The Matter of Shutouts

36. A shutout occurs when cargo intended to be loaded on a ship is not loaded and is left behind when the ship sails. Shutouts are detrimental to the carrier as well as the shipper since cargo left behind does not generate freight revenue and may provide business for competing carriers.

37. During the 1967 season, one of complainant's principals, Stephen Levatino, complained to Admiral McNeil, President of Grace, about shutouts affecting complainant's cargoes in Valparaiso.[4] At or about the same time, other shippers and receivers of Chilean fruit and produce were making similar complaints about shutouts affecting their cargoes. As a result of these complaints, Grace dispatched Mr. Charles Nation, one of its executives, and the late T. D. Baker, then the head of a firm of cargo surveyors retained by Grace, to Chile in March 1967, with directions to investigate the problem and solve it. Mr. Nation arrived in Chile on March 6, 1967, and remained until April 7, 1967. Mr. Baker remained about 10 or 12 days.

38. Upon his arrival in Chile, Mr. Nation proceeded directly to Valparaiso. He was approached by a Mr. Pesut of Cia. Frutera Sud-Americana, a major shipper of fruit and produce, doing business with receivers other than complainant, Mr. Pesut and several shipping brokers complained bitterly to Mr. Nation about the shutouts. On the same day, Mr. Nation personally observed the loading of Grace's vessel SANTA CLARA which was then on berth in Valparaiso and which left fruit and produce behind on the dock when she sailed. Mr. Nation informed Grace's executives in New York that the carrier had a problem and was directed by Admiral McNeil to take charge of the situation and to remain until the problem was solved.

39. According to a chart prepared at Mr. Nation's direction by Grace's staff in Valparaiso, fruit and produce cargoes were shutout from the first seven voyages of the 1967 Chilean fruit season. The chart shows, furthermore, that cargo offered by exporters who dealt with Levatino was shut out and that cargo offered by exporters who dealt with other receivers in New York was also shut out. The shutouts appear to have affected cargoes offered by a large number of shippers intended for a large number of receivers without consistent pattern.

40. Although cargoes consigned to receivers other than Levatino were also shut out, the volume of shutouts affecting Levatino were significant, and on at least one occasion, the voyage of the SANTA ELISA sailing on January 27, 1967, only cargo consigned to Levatino, consisting of 2,000 boxes of melons, appears to have been shut out.[5] For example, 30 percent of Levatino's cargo was shut out on the aforementioned voyage of the SANTA ELISA; 20 to 30 percent on the voyage of the SANTA ISABEL sailing on February 2 or 3, 1967; 40 to

[4]On brief, complainant contends that it also experienced shutouts during the 1966 season. At the hearing, however, complainant's witness, Stephen Levatino, denied that this had occurred. If shutouts did in fact occur in 1966, however, the record fails to explain the circumstances, unlike the situation in 1967.

[5]Levatino contends that it was the only receiver suffering a shut out on the voyage of the SANTA OLIVIA sailing on March 4 or 5, 1967. The chart prepared by Grace's staff, however, indicates that numerous cargoes were shut out, not just those of shippers doing business with Levatino.

50 percent on the voyage of the SANTA CATALINA sailing on February 10 or 12, 1967. On the February 17 voyage of the SANTA CRUZ, 15,000 boxes of melons consigned to Levatino were left behind. In a number of instances shutout cargoes were loaded aboard vessels of carriers competing with Grace, i.e., Flota Mercante Grancolombiana or the Chilean Line. In other instances they were loaded on Grace's vessels sailing at a later date.

41. Mr. Nation ascertained that the shutout problem had two major causes. First, Grace's booking procedure, as Mr. Nation described it, was "very sloppy." It consisted of a call to shippers each Thursday asking them what they had to offer for the following week's sailing. This procedure led to unreliable and inflated bookings and made it impossible for Grace to obtain in advance an accurate estimate of the amount of cargo which would actually be delivered to the pier for loading. Second, inadequate advance planning for loading often resulted in the Grace ships being forced to sail before loading operations were completed.

42. While in Chile, Mr. Nation devised and instituted new booking and load-planning procedures. A practice was instituted by which Grace's staff would call shippers and offer them definite bookings, for example, 7,000 cases of grapes, in an effort to obtain an accurate and firm commitment from the shipper. The shipper might suggest the need for more or less space and adjustments would be made where possible, but in any event, Grace would obtain a more or less fixed commitment. Load-planning procedures were improved by laying out the loading plan for the vessel on the Tuesday of the week prior to the vessel's arrival in consideration of a number of factors such as capacity, anticipated port time, etc. and relaying the proposed plan to the ship's Master for his approval or alteration. After these reforms were instituted, no further shutouts occurred.

The All Chilean Settlement

43. On November 22, 1966, a proceeding entitled *All Chilean Fruit Corp. et al.* v. *Grace Line, Inc.*, Docket No. 66–64, was commenced by the filing of a complaint with the Federal Maritime Commission. The complainants were ten companies and individuals who were competitors of Levatino. On December 19, 1966, a similar complaint was filed by another receiver of Chilean fruit and produce in a proceeding entitled *Arthur Schwartz and Justamere Farms, Inc.* v. *Grace Line, Inc.*, Docket No. 66–69. The two proceedings were consolidated and will be referred to hereinafter as the "All Chilean" case.

44. The complainants alleged various violations of the Shipping Act, 1916, consisting of several instances of purported discrimination by Grace in favor of Levatino. The crux of the complaints, however, was a contention that Grace had paid to Levatino a rebate of 26 cents per box on all fruit and produce received by Levatino during the 1966 season. The complainants in Docket No. 66–64 sought reparation in the amount of $1,400,000 and those in Docket No. 66–69, $100,000.

45. A prehearing conference was held in April 1967 before Presiding Examiner Benjamin A. Theeman. Informational material was exchanged among the parties and filed with the Examiner in October 1967, followed by motions addressed to the alleged inadequacy of the complainants' submissions.

46. Grace signed a settlement agreement with the complainants in Docket 66–64 on December 14, 1967 and with the complainants in Docket 66–69 on January 22, 1968. The agreements provided that the attorneys of the respective parties would present the proposed settlement to Examiner Theeman pursuant to Commission Rule 6(c) and would request dismissal of the complaints. If such dismissal were forthcoming, Grace would then forthwith deliver against releases a single check for $80,000 to the order of complainants'attorneys in Docket No. 66–64 and a single check for $1,000 drawn to the order of complainants' attorneys in Docket No. 66–69. The settlements were presented to Examiner Theeman who entered an order dismissing both complaints on January 23, 1968. On January 26, 1968, counsel exchanged the prescribed checks and releases.

47. In the current proceeding, Levatino took the depositions of seven officers or former officers of complainants in Docket No. 66–64. Each of these individuals indicated that he and his company had participated in the suit in good faith.

48. The settlement was negotiated solely by the parties' attorneys and was fixed by them as a lump sum. The complainants did not know the figure until they were informed of it by their attorneys. Several of them thought it was inadequate.

49. Grace made a single $80,000 payment to the complainants' attorneys, who, after deducting their fee, sent each complainant a check for its share of the balance. This balance appears to have been allocated among the complainants in accordance with the relative volumes of their business by means of a formula devised by the complainants and their attorneys.

50. Representatives of the complainants in the All Chilean case testified that they had never discussed the allocation of the settlement payment with Grace's attorneys or any other representative of Grace.

Apparently, Grace had no knowledge of that allocation until after the commencement of the present proceeding.

51. In presenting the proposed settlement to Examiner Theeman in January 1968, Grace's counsel expressed the view that a full-scale defense of the two complaints, however successful, would cost Grace more in legal fees than the projected settlement. According to the testimony of Jerome Doyle, Esq., a senior member of the law firm of Cahill, Gordon and Reindel which had represented Grace inthe All Chilean case, an attorney with over 25 years of experience in the conduct and settlement of litigation, the settlement in the All Chilean case was prudent. According to Mr. Doyle, costs of litigation accelerate substantially as the case proceeds from the early stages of discovery to trial and appeal, costs accruing during the latter two stages usually being double and triple respectively the costs of the early stage. When the All Chilean case was settled, costs incurred by Grace had come to approximately $70,000. Had the case gone to trial, Mr. Doyle was of the opinion that Grace would have incurred additional legal expenses of $120,000 to $130,000 for its counsel's conduct of the trial and post-trial briefing. Mr. Doyle testified that recommendations for settlement take into consideration future costs of litigation aside from the merits of the case and that settlements are prudent if a defendent can obtain a settlement for less money than it would have to expend to defend a case successfully.

DISCUSSION AND CONCLUSIONS

Levatino contends that the issues in this case simply involve discrimination practiced by Grace against Levatino and rebating in favor of competitors of Levatino. More specifically Levatino categories its contentions as follows:

1. Grace shut out quantities of Levatino's cargoes from its ships loading at Valparaiso on certain occasions in 1966 and 1967, thereby discriminating against Levatino, in violation of sections 14 and 16 of the Act.

2. Grade did not provide terminal and fumigation facilities for Levatino but did so for other receivers of fruit and produce at Grace's terminal in Port Newark during 1966 and 1967, thereby forcing Levatino to bear the expense of providing its own facilities, in violation of sections 16 and 17 of the Act.

3. Grace entered into agreements with Levatino and a warehouse company established by Levatino which provided space for the storage of fruit and produce, without filing these agreements with the Federal Maritime Commission as required by section 15 of the Act.

4. Grace effected a settlement with importers of fruit and produce other than Levatino who had filed formal complaints with the Federal Maritime Commission in two docketed proceedings whereby Grace paid such importers a total of $81,000, which constituted a rebate, in violation of section 16 and 17 of the Act.

Except for the first contention regarding shutouts, the record fails to demonstrate that any of these contentions has merit. Levatino, furthermore, cites few authorities for its various contentions and in one instance, alleges a violation of section 15 on brief although no mention of such violation had been made in its complaint or in any of its previous pleadings.

The Issue of the Shutouts

Levatino contends that the shutouts which it suffered on the first seven voyages of the 1967 season were the product of discrimination against it as well as other shippers who were likewise affected. Grace admits that these shutouts occurred but argues that they merely represent "commercial inefficiency" rather than violation of law and that in any event the situation affected a wide range of shippers indiscriminately.

Section 14 Fourth of the Act provides in pertinent part that no common carrier by water shall, directly or indirectly:

> unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition . . .

Section 16 First of the Act makes it unlawful for a common carrier by water:

> To make or give any undue or unreasonable preference or advantage to any particular person, locality or description of traffic in any respect whatsoever, or to subject any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Although Levatino concentrates on the issue of discrimination in contending that sections 14 and 16 have been violated, it is not the question of discrimination that is determinative on the present record but rather the question whether Grace complied with its statutory obligation to treat shippers fairly in the matter of space accommodation and to avoid subjecting any person to undue or unreasonable prejudice or disadvantage in any respect whatsoever. Considering evidence adduced by Grace itself that Grace failed to observe reasonable booking and preplanning procedures for a brief period in 1967, it is clear that Levatino and other shippers whose cargoes were shut out were not treated fairly and were subjected to undue and unreasonable prejudice and disadvantage.

It is, of course, the basic duty of a common carrier to take the goods of all who offer unless his complement for the trip be full. *Banana Distributors, Inc.* v. *Grace Line, Inc.*, 5 F.M.B. 615, 620 (1959), affirmed sub. nom. *Grace Line, Inc.* v. *Federal Maritime Board,* 280 F. 2d 790 (2d Cir. 1960), cert. denied, 364 U.S. 933 (1961). It has also long been recognized that where the demand for space exceeds the supply, a common carrier must equitably prorate its available space among shippers. *Banana Distributors, Inc.* v. *Grace Line, Inc.*, cited above, at page 625; *Penna. R.R. Co.* v. *Puritan Coal Co.*, 237 U.S. 121 (1915); *Boston Wool Trade Asso.* v. *Merchants & Miners Trans. Co.*, 1 U.S.S.B. 32, 34, 35 (1921).

A carrier must establish a reasonable plan in order to cope with periods of congestion and must fill its capacity in a reasonable and just manner when such periods occur. *Archibald* v. *Pan American World Airways, Inc.*, 460 F. 2d 14 (9th Cir. 1972). A carrier should, furthermore, exercise some care in avoiding continual overselling which results in refusals to honor commitments. *Wills* v. *Trans World Airlines, Inc.*, 200 F. Supp. 360, 368 (S.D. Calif. 1961).

A failure to apportion available space in proportion to cargo offerings may result in undue prejudice to shippers. *Patrick Lumber Co.* v. *Calmar,* 2 U.S.M.C. 494, 498, 499 (1941); *R. Hernandez* v. *A. Bernstein Schiffahrtsgesellschaft,* 1 U.S.M.C. 686, 691 (1937). In short, the booking of cargo imposes on the carrier certain obligations of fairness and impartiality in dealing with shippers. *Hellenic Lines, Ltd.—Section 16 First and 17 Violations,* 7 F.M.C. 673, 675 (1964).

In the instant case the violations of section 14 Fourth and 16 First do not center on discrimination against Levatino, since the record clearly shows that numerous shippers suffered shutouts in addition to Levatino. It is this indiscriminate pattern, however, which pointedly demonstrates that Grace had, for a time, exercised no care in booking cargo or in preplanning the loading of the vessel. The result was a random pattern of shutouts affecting shippers in varying degrees from voyage to voyage. There is no dispute as to the cause of this problem, Grace admitting that its booking procedure had been "very sloppy" and its preplanning for loading vessels inadequate, and that once reforms were instituted, no further shutouts occurred.

The admittedly inadequate procedures followed by Grace cannot be reconciled with the standard of conduct expected of carriers under sections 14 Fourth and 16 First of the Act, which provide that no common carrier shall "unfairly treat" any shipper in the matter of space accommodations or "subject any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." This is not a case of an occasional shutout which might be considered to be an unfortunate but unavoidable fact of life in the shipping business rather than an unlawful practice. *Investigation of Practices of Stockton Elevators,* 8 F.M.C. 181, 200, 201 (1964). Instead, this was a continuous practice which continued unabated throughout seven voyages with the result that hardships were visited upon shippers who tendered their cargoes to Grace in the expectation that the carrier had taken care either to have space available or had established a plan to apportion space in some fair and reasonable manner if demand for space exceeded supply.[5] During this period of time, however, Grace had exercised no care and had established no discernible plan. The fact that Grace subsequently took steps to institute reforms, and quite commendably so, does not alter the fact that its previous practices did not comport with the conduct which the law expects of a common carrier. The failure of a common carrier to treat shippers fairly and impartially in the absence of standards or to apply its standards fairly constitutes a violation of section 16 First. *General Mills, Inc.* v. *State of Hawaii, Department of Agriculture,* 13 SRR 991, 994 (1973); *Valley Evaporating Co.* v. *Grace Line, Inc.,* 14 F.M.C. 16, 22 (1970).

Accordingly, it is found and concluded that during a limited period of time between January and March, 1967, in connection with the first seven voyages of the Chilean fruit and produce season, Grace unfairly treated Levatino and other shippers in the matter of space accommodations and subjected Levatino and other shippers to undue and unreasonable prejudice and disadvantage, in violation of sections 14 Fourth and 16 First of the Act.

The Providing of Terminal and Fumigation Facilities

Levatino contends that Grace did not provide it with terminal and fumigation facilities but did so for other receivers of fruit and produce at Grace's terminal in Port Newark during 1966 and 1967, and that as a consequence, Levatino was forced to provide its own facilities. Such conduct on the part of Grace is alleged to have resulted in undue or unreasonable prejudice or disadvantage and unjust discrimination as against Levatino, in violation of sections 16 and 17 of the Act.

Grace contends that Levatino suffered no prejudice or discrimina-

[5] As was stated in *Intercoastal Investigation, 1935,* 1 U.S.S.B.B. 400, 454, 455:

... it is the right of shippers to ship in any quantity they choose and the obligation of carriers to carry the quantity tendered to them, due regard being had for the proper loading of the vessel and the available tonnage ...

tion since Levatino was provided with substantially similar terminal and fumigation facilities by means of Grace's arrangement with Newark Dockside Warehouse, which facilities, if anything, were superior to those provided at Grace's terminal at Port Newark.

Section 16 First of the Act, as seen above, makes it unlawful for a common carrier by water to give any "undue or unreasonable preference or advantage to any particular person" or to subject any such person to "any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 17 of the Act provides that a common carrier by water shall not:

> . . . demand, charge or collect any rate, fare or charge which is unjustly discriminatory between shippers or ports . . .

Section 17 further provides that a common carrier by water or other person subject to the Act shall:

> . . . establish, observe, and enforce, just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivery of property.

Violations of section 16 or 17 are not shown by the mere existence of preference, prejudice, or discrimination. In order to constitute violations, such preference, prejudice, or discrimination must be "undue", "unjust", or "unreasonable", which are factual questions to be determined by the Federal Maritime Commission in its discretion. *A.P. St. Philip, Inc.* v. *Atlantic Land & Improvement Co., etc.*, 13 F.M.C. 166, 174 (1969); *Agreements Nos. T-2108 and T-2108-A*, 12 F.M.C. 110, 122 (1964); *Investigation of Practices of Stockton Elevators*, cited above, at pp. 199, 200.

The record fails to demonstrate that Levatino suffered from undue or unreasonable prejudice or disadvantage or unjust discrimination or that its competitors enjoyed undue or unreasonable preference. What the record does show is that Grace, with the cooperation of Levatino, took steps to cope with an anticipated problem concerning congestion at its terminal in Port Newark before the start of the 1966 Chilean fruit and produce season. The transfer of terminal operations to Port Newark and the consolidation of Grace's South American services at that location convinced Grace that its Port Newark facilities could not handle all Chilean fruit and produce, together with large quantities of coffee and other cargoes moving in the various services. The solution to the problem was to provide alternative storage space to those Chilean produce importers who desired it. Grace, of course, as a common carrier, was obliged to provide a safe and convenient terminal space for the receipt and delivery of cargo. *Truck Loading and Unloading Rates at New York Harbor,* 13 F.M.C. 51, 62 (1969). In order to relieve the problem of congestion and to fulfill its common carrier obligations, Grace arranged to provide alternative storage space to Levatino and later to other importers who desired it by means of arrangements with separate warehouse companies. It is in the public interest to relieve congestion, indeed, the public interest requires that congestion be minimized in the interest of efficient water transportation. *Free Time and Demurrage Charges on Export Cargo,* 13 F.M.C. 207, 215 (1970); *Free Time and Demurrage Charges-New York,* 3 U.S.M.C. 89, 103 (1948). It is also not unlawful for a common carrier to contract out part of its obligations with outside companies. *Free Time and Demurrage Charges on Export Cargo,* cited above, at pp. 213–214; *Banana Distributors, Inc.* v. *Grace Line, Inc.,* cited above at p. 622.

The record fails to demonstrate that Levatino, in using the facilities of Newark Dockside Warehouse rather than Grace's terminal at Sheds 138 and 140, was deprived of terminal services and facilities which differed significantly from those enjoyed by other importers who did not avail themselves of the option to engage the services of outside warehouse companies such as Newark Dockside. On the contrary, produce consigned to Levatino was carried by truck to Newark Dockside at Grace's expense and as far as can be seen from the evidence of record, received handling services similar to those provided other importers in Grace's Sheds 138 and 140. In fact, evidence of record indicates that this alternative storage and handling, if anything, were superior to similar operations at Sheds 138 and 140. One cannot conclude from these facts that Levatino was subjected to undue or unreasonable prejudice or disadvantage or unjust discrimination.[6] Indeed, as the record shows, Levatino renewed its arrangements with Newark Dockside and Grace for the 1967 season and apparently the idea of such alternative storage and terminal service appealed to numerous other importers who entered into similar arrangements utilizing the services of other warehouse companies at Grace's expense.

There is similarly no factual basis to the contention that Levatino suffered undue or unreasonable prejudice or unjust discrimination on the grounds that it was forced to fumigate at Newark Dockside because Grace would not permit it to fumigate at Sheds 138 or 140. Although Grace did in certain instances permit fumigation at its sheds, its policy was to confine fumigation to weekends because of the dangers associated with the process. Even in the two instances where this

[6] Levatino also contends that it suffered financial losses in the operation of Newark Dockside, a separate corporation. The record, however, indicates that Dockside almost broke even in 1966 and if anything enjoyed a modest profit in 1967.

was permitted, it was limited to certain shipments of melons and the costs of the fumigation were borne by the importers concerned, not by Grace.[7] In any event, the major costs of fumigation borne by Levatino at Newark Dockside involved fruit rather than melons and the record nowhere suggests that Grace at any time permitted fumigation of fruit at Sheds 138 or 140 or bore any costs associated therewith. Therefore, at worst, Grace provided space and pallets to two importers who paid for the costs of fumigating certain melons in two isolated instances whereas Levatino utilized the space and pallets provided by Newark Dockside when fumigating. There is no showing that Levatino suffered any disadvantage in using space provided by Newark Dockside, much less undue or unreasonable disadvantage.

The Alleged Unfiled Section 15 Agreement

Although not alleged in its complaint or in any of its pleadings, Levatino on brief contends that the various arrangements which Grace entered into with Levatino and Newark Dockside Warehouse were the type required to be filed with the Commission pursuant to section 15 of the Act and that by failing to file, Grace violated that law. This is a curious contention considering that, if valid, Levatino and its warehouse company would likewise be in violation of law and that at the time the agreements were executed, Levatino's previous counsel did not believe that they were required to be filed.

Grace replies that these agreements did not fix or regulate rates, give special rates, accommodations or other special privileges or advantages, or provide for an exclusive, preferential or cooperative working arrangement, or in any other manner fall within any of the seven categories enumerated in section 15. Although this particular issue is outside the scope of the pleadings, Grace has addressed itself to it and has not claimed that it has been deprived of an opportunity to make a proper defense. Under these circumstances, and considering that the facts have been developed and argued by the parties, it is proper to render a decision on the issue. *City of Portland* v. *Pacific Westbound Conference,* 5 F.M.B. 118, 129–130 (1956); *Stockton Port District* v. *Pacific Westbound Conference,* 9 F.M.C. 12, 33 (1965); *Kuhn* v. *Civil Aeronautics Board,* 183 F. 2d 839 (D.C. Cir. 1950).

Levatino cites *Volkswagenwerk* v. *FMC,* 390 U.S. 261 (1968) as authority for its proposition that "the Act was meant to apply to all agreements or arrangements which steamship lines may have entered into with other steamship lines, with shippers, or with other carriers

[7] Even if in these two instances the melons were fumigated on a Wednesday evening, as Levatino contends, that fact does not show that Levatino suffered as a result.

and transportation agencies." If such were the law, one wonders why Congress was so careful to set forth the requirement that the agreements must fit into one of seven specified categories. Thus, section 15 states that agreements subject to the Act are those:

> . . . fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement.

Volkswagenwerk does not stand for the proposition that the seven categories have been eliminated from section 15. The Supreme Court merely held that section 15 was broad enough to cover an agreement among carriers and other persons subject to the Act assessing themselves for the payment of obligations under a labor contract, without a showing that the agreement had affected competition. The Court stated that the statute uses "expansive language" (390 U.S. at p. 273) but never held that section 15 was designed to apply to all agreements between carriers and other persons subject to the Act of whatever type. Even when referring to the legislative history of the Act which the Court held to evidence a Congressional intent to have the Commission scrutinize the "myriad" of agreements found in the maritime industry, the Court limited these to "restrictive" agreements (390 U.S. at p. 276) and certainly never held that an agreement between a carrier and a shipper was subject to the Act, contrary to Levatino's contention.

The Commission and the Supreme Court itself in a later case have made it perfectly clear that section 15 does not embrace every agreement between carriers and persons subject to the Act regardless of type. In *Hong Kong Tonnage Ceiling Agreement,* 10 F.M.C. 134, 140 (1966) the Commission stated:

> In order for the Commission to have jurisdiction, there are three necessary elements. There must be: 1. an agreement among 2. common carriers by water or other persons subject to the Act 3. to engage in anticompetitive or cooperative activity of the types specified in section 15 . . . [W]here there is an agreement between persons subject to the Act, but the cooperative conduct is not of the type specified in section 15, the agreement is also beyond the reach of our jurisdiction. *D. J. Roach, Inc.* v. *Albany Port District, et al.,* 5 F.M.B. 333 (1957).[8]

In *Federal Maritime Commission* v. *Seatrain Lines, Inc. et al.,* 8 SRR 20,908 (1973), the Supreme Court held that none of the seven catego-

[8] See also *Boston Shipping Assn.* v. *Port of Boston Marine Terminal,* 11 F.M.C. 1, 5 (1967); *Section 15 Inquiry,* 1 U.S.S.B. 121, 125 (1927).

ries enumerated in section 15 applied to agreements which provided for acquisition of assets or mergers without continuing responsibilities among the parties.

In view of the foregoing, it becomes necessary to determine whether the arrangement between Grace and Newark Dockside Warehouse, Inc. falls into one of the aforementioned seven categories. Grace admits that Newark Dockside, which appears to have been carrying on the business of furnishing a warehouse in connection with a common carrier by water, is an "other person subject to the Act." [9] Grace, contends, however, that the only categories specified by section 15 which have any relevancy to the subject agreement are those which "fix or regulate transportation rates," give "special rates, accommodations or other special privileges or advantages," or provide for an "exclusive, preferential, or cooperative working arrangement." Grace contends that none of these applies since the agreements were "simply means by which Grace Line procured some of the services which it provided every produce shipper and receiver as part of its freight tariff."

As noted above, the arrangement which Grace had with Newark Dockside in 1966 and 1967 provided Levatino and one other importer of produce with alternative storage and handling not significantly different from the storage and related services provided to importers who utilized Grace's regular terminal at Sheds 138 and 140. This alternative was open to any importer who elected to utilize the services of Newark Dockside, and in 1967 a number of similar elections were made by importers in connection with other warehouses. The cost of transferring produce from shipside to Newark Dockside was borned by Grace which paid to Newark Dockside (and other warehouses in 1967) the amount of 26 cents per box. Grace provided alternative storage space to any importer who desired to avoid the congestion at Sheds 138 and 140, at Grace's expense, in recognition of its obligations to provide adequate terminal facilities to all shippers using its services.

An arrangement such as the above does not fix rates, give "special rates, accommodations, or other special privileges or advantages," or constitute an "exclusive, preferential, or cooperative working arrangement" within the meaning of section 15. First, the election by an importer of alternative warehousing had no effect on the payment

[9] Of course, if Newark Dockside were merely the alter ego of the shipper Levatino and was created to avoid regulation, the corporate veil could be pierced, in which case section 15 would not apply for want of personal jurisdiction over one of the parties to the agreement. *Hong Kong Tonnage Ceiling Agreement*, cited above; *Agreement 9597 Between Flota Mercante G. C., et al.*, 12 F.M.C. 83, 101, 102 (1968). However, the record shows that Newark Dockside was a separate corporation formed by the Levatino interests which published its own tariff (which was not filed with the Commission as required by General Order 15, 46 CFR 533) and to some extent advertised for business.

of the line-haul rate published in Grace's tariff since the movement from shipside to the off-dock warehouse was at Grace's expense. Second, although storage accommodations at Newark Dockside might have been physically different from the facilities at Sheds 138 and 140, there was nothing "special" about them since they were open to any importer who wished to use them and notified Grace and Dockside of that election. Similarly, the off-dock accommodations conferred no "special privileges or advantages" for the same reason.[10]

Third, Grace's willingness to pay for the cost of moving produce to an off-dock warehouse in fulfillment of its common carrier obligations did not constitute an "exclusive, preferential, or cooperative working arrangement" within the meaning of section 15, again for the reason that any importer of produce was free to elect this alternative warehousing. Indeed, in the 1967 season so many importers chose alternative warehousing that Grace's Sheds 138 and 140 were left to handle only 10 to 15 percent of the total volume of incoming produce. An "exclusive, preferential, or cooperative working arrangement", according to the Supreme Court in the *Seatrain* case, cited above, is one which is similar to one of the six types of agreements previously enumerated in section 15.8 SRR at p. 20,913.[11] In this instance, the relevant type is that pertaining to "special rates, accommodations, or other privileges or advantages", as discussed above.

In short, these arrangements merely gave importers of produce the option of choosing substitute warehousing in lieu of Grace's Sheds 138 and 140, at Grace's expense, with no special privileges, preferences, or advantages provided by Grace pursuant thereto.

Levatino cites no authority for the proposition that a carrier, in contracting out part of its obligations, must file its agreement with the Commission pursuant to section 15, in the absence of special privileges, preferences, advantages, exclusions, or anything else which would bring it within one of the seven categories enumerated in section 15. In addition to *Volkswagenwerk*, the only cases cited which bear on section 15 are *City of Los Angeles* v. *Federal Maritime Commission*, 385 F. 2d 678 (D.C. Cir. 1967) and *Carnation Co.* v. *Pacific Westbound Conference*, 336 F. 2d 650 (9th Cir. 1964). *City of Los Angeles* involved a terminal agreement which, among other things, provided for a preferential berthing assignment with a special maximum-minimum payment provision. Such an arrangement is therefore "preferential" and "special", similar to a number of terminal

[10] A "special rate" or "accommodation", furthermore, is only a type of "special privilege or advantage", as section 15 is worded, since the statute specifically refers to "special rates, accommodations, or *other* special privileges or advantages." [Emphasis added]

[11] The Court also held that this last category in section 15 was meant as a "catchall" provision, "intended to summarize the type of agreements covered." 8 SRR at p. 20,913.

leasing agreements approved on the West Coast. See, e.g., *Agreements Nos. T-2108 and T-2108-A*, 12 F.M.C. 110 (1968); *Agreement No. T-4; Term. Lease Agree., Long Beach, Calif.*, 8 F.M.C. 521 (1965). The *Carnation* case cited by Levatino was reversed by the Supreme Court, *Carnation Co.* v. *Pacific Westbound*, 383 U.S. 213 (1966), and, in any event, involved the interrelationship between section 15 and the antitrust laws rather than any issue relevant to the present proceeding.

Accordingly, it is found and concluded that the arrangements by which Grace provided alternative storage to importers desiring to use space other than Grace's Sheds 138 and 140 were neither special, exclusive, nor preferential, conferred no special privileges or advantages, and did not fall under any of the seven categories enumerated in section 15.

The All Chilean Settlement

Levatino's final contention is that Grace entered into an unlawful settlement with importers of fruit and produce other than Levatino in satisfaction of formal complaints with which had been filed with the Federal Maritime Commission. By the terms of this settlement, Grace paid over to these importers the sum of $81,000, an act which Levatino contends was "discriminatory" and a "rebate", in violation of sections 16 and 17 of the Act.[12]

Grace replies that the settlement represented a prudent expenditure which saved Grace considerable amounts of money by terminating litigation. Grace, furthermore, contends that no rebating was involved since the lump sum settlement was negotiated by the parties' attorneys and was subsequently distributed to the various complainants in a manner decided upon by complainants and their counsel without the knowledge or participation of Grace.

Section 16 Second of the Act makes it unlawful for a common carrier by water:

> To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

The law, of course, encourages settlements and every presumption is indulged in which favors their fairness, correctness, and validity generally. *General Discount Corp.* v. *Schram*, 47 F. Supp. 845 (D. Ct.

[12]Although Levatino alleges a violation of section 17, the gravamen of its complaint centers on "rebating" and on allegations relating to an "unjust device or unfair device or means", which pertain to section 16 Second, not section 17. Levatino also alleges that the settlement resulted in the destruction of its business because its reputation with Chilean suppliers was injured. Evidence of record refutes this contention but, in any event, it is only relevant to the issue of reparation which is not present in this proceeding, as noted earlier.

E.D. Mich. 1942); *Florida Trailer & Equipment Company* v. *Deal,* 284 F. 2d 567, 571 (5th Cir. 1960). Settlements, furthermore, are not ordinarily open to collateral attack by third parties. *United States* v. *Blue Chip Stamp Co.,* 272 F. Supp. 432 (D. Ct. C.D. Calif. 1967), affirmed, sub. nom. *Thrifty Shoppers Scrip Co.* v. *United States,* 389 U.S. 580 (1968). Levatino cites one authority for the proposition that the settlement was in reality a rebate and an "unjust or unfair device or means" to obtain transportation at less than the regular rates or charges, namely, *Hohenberg Brothers Co.* v. *Federal Maritime Commission,* 316 F. 2d 381 (D.C. Cir. 1963). That case, however, hardly provides support for Levatino's contention since it involved a shipper who demanded a rebate on the basis of a claim which the shipper knew to be false and both the carrier and the shipper had engaged in false billing in such a way that competitors were unaware of what had transpired. In the All Chilean case the record cleary indicates that complainants had filed their claims in good faith and had openly pursued the matter in a public forum, i.e., the Federal Maritime Commission, with no intention to conceal these activities from competitors.[13]

The essence of an "unjust or unfair device or means" prohibited by section 16 Second is an element of deception or concealment. In *Pacific Far East Lines-Alleged Rebates,* 11 F.M.C. 357, 364 (1968) the Commission stated:

> ... [T]he unjust or unfair device or means must partake of some element of falsification, deception, fraud, or concealment ...

In *Prince Line, Ltd.* v. *American Paper Exports, Inc.,* 55 F. 2d 1053, 1055 (2d Cir. 1932) Judge Learned Hand stated:

> The law did not forbid all concessions to a shipper; apparently it assumed that if these were above board, and known or ascertainable by competitors, the resulting jealousies and pressures upon the carrier would be corrective enough. But it did forbid the carrier to grant such favors, when accompanied by a concealment, and its command in that event was as absolute as though it had been unconditional.

Even a rebate is not held to be in violation of section 16 Second, unless it is founded on a false claim, etc. *Hohenberg Brothers Co.* v. *Federal Maritime Commission,* cited above, at p. 385, note 11.

The record is abundantly clear that the settlement which Grace entered into in the All Chilean case was free of any element of falsification, deception, fraud, or concealment. Unrefuted testimony of record demonstrates that Grace's decision to make a lump sum payment to complainants' counsel was a prudent decision designed to save Grace considerable amounts of money by terminating costly litigation. There

[13]Indeed, among the things that Levatino complains about is the fact that news of the All Chilean litigation was published in the New York Times and circulated in Chile.

is, furthermore, no evidence that Grace's decision was based upon a desire to discriminate against Levatino nor is there any evidence that the lump sum payment which Grace made to complainants' counsel in satisfaction of the complaints was designed by Grace to have some relationship to particular rates paid by complainants. On the contrary, the record shows that ultimate distribution of the lump sum to complainants was accomplished by complainants' counsel in a manner as to which Grace had no knowledge or control.

Accordingly, it is found and concluded that the settlement of the All Chilean case was an exercise of prudent managerial discretion by Grace, in no way constituting rebating or the use of an unjust or unfair device or means, in violation of section 16 Second of the Act.

ULTIMATE CONCLUSIONS

For a limited period of time between January and March 1967, in connection with seven voyages loading at Valparaiso, Chile, Grace unfairly treated Levatino and other shippers in the matter of space accommodations and subjected Levatino and other shippers to undue and unreasonable prejudice and disadvantage, in violation of sections 14 Fourth and 16 First of the Act, on account of Grace's failure to observe reasonable loading and booking procedures.

Grace did not subject Levatino to undue or unreasonable prejudice or disadvantage or unjustly discriminate against Levatino in the furnishing of terminal and fumigation facilities during the 1966 and 1967 Chilean fruit and produce seasons.

Grade did not enter into any agreements with warehouse companies during the 1966 and 1967 seasons which were of the type required to be filed with the Commission pursuant to section 15 of the Act.

Grace's settlement with complainants in the All Chilean case did not constitute rebating nor the use of an unjust or unfair device or means to allow shippers to obtain transportation for less than regular rates, in violation of section 16 Second of the Act, nor in any way violate section 17 of the Act.

(S) NORMAN D. KLINE,
Administrative Law Judge.

WASHINGTON, D.C.,
August 17, 1973.

FEDERAL MARITIME COMMISSION

DOCKET NO. 72–61

IN THE MATTER OF AGREEMENT NOS. T-2455/T-2553 BETWEEN PHILADELPHIA PORT CORPORATION AND DELAWARE RIVER TERMINAL AND STEVEDORING CO., INC./ LAVINO SHIPPING COMPANY, RESPECTIVELY

Agreement Nos. T-2455 and T-2553, as amended, are agreements subject to the provisions of section 15 of the Shipping Act, 1916.

Agreement Nos. T-2455 and T-2553, as amended, are true and complete copies of the understandings and/or arrangements between the parties.

The parties have implemented said agreements prior to receiving approval by the Commission pursuant to section 15.

The situation brought about by the subject lease agreements (i.e., the operation of all modern full-container ship handling facilities within a port by a single operator) is found to be so anticompetitive as to be detrimental to the commerce of the United States, in violation of section 15.

The intra-port anticompetitive aspects of the subject operations warrant disapproval by the Commission of Agreement No. T-2455 on the basis of undue or unreasonable preference or privilege to the Lavino interests to the detriment of other competing terminal operators/stevedores in violation of section 16 First.

Approval of the Agreement No. T-2455 would establish or enforce unjust or unreasonable practices in violation of section 17 of the Act.

Agreement No. T-2455, as amended, is disapproved, subject to approval upon resubmission to the Commission if within 90 days of service of this report, no tenant or consortium thereof has submitted an acceptable bid for operation of the Tioga facilities as set forth herein.

Agreement No. T-2553, as amended, is approved.

Edward Schmeltzer and *Edward J. Sheppard IV* for Philadelphia Port Corporation, respondents.

Francis A. Scanlan and *Sean J. O'Callaghan* for Lavino Shipping Company and Delaware River Terminal & Stevedoring Co., Inc., respondents.

Martin J. McHugh and *James A. Leonard* for Atlantic & Gulf Stevedores, Inc., petitioners, and Independent Pier Company, intervenor.

Donald J. Brunner, Paul J. Kaller and *David Fisher,* Hearing Counsel.

REPORT

Decided 12–6–74

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

This proceeding arises under a Commission Order of Investigation served December 5, 1972, naming Philadelphia Port Corporation (PPC), Lavino Shipping Co. (Lavino) and Delaware River Terminal & Stevedoring Co., Inc. (DRT&S), as respondents. Atlantic & Gulf Stevedores, Inc. (A&G) was made petitioner. Hearing Counsel participated in the proceeding. On February 21, 1973, the petition of Independent Pier Company, Inc. (Independent), for leave to intervene was granted. The investigation relates to lease agreements covering container facilities in the Port of Philadelphia (Port).

The Commission's Order of Investigation requires a determination of the following questions:

(1) Whether Agreements Nos. T-2455 and T-2553, as amended, are agreements subject to the provisions of section 15 of the Shipping Act, 1916 (hereinafter the Act);

(2) whether Agreements Nos. T-2455 and T-2553, as amended, are true and complete copies of the understandings and/or arrangements between the parties;

(3) whether the parties have in any manner implemented said agreements, understandings, or arrangements prior to receiving approval by the Commission pursuant to section 15;

(4) whether the agreements are unjustly discriminatory or unfair as between carriers or operate to the detriment of the commerce of the United States or are contrary to the public interest in violation of the standards of section 15;

(5) whether said agreements should be approved, disapproved, or modified pursuant to section 15;

(6) whether the agreements grant undue or unreasonable preference or advantage to D.R.T.&S. and/or Lavino or subject A&G or others to any undue or any unreasonable prejudice or disadvantage in violation of section 16 First; and

(7) whether the agreements establish or enforce unjust and unreasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property in violation of section 17.

Sixteen days of hearings were held in Philadelphia and in Washington. There were 23 witnesses, 133 exhibits, and 2,611 pages of testimony.

In his Initial Decision served January 17, 1974, Administrative Law Judge Stanley M. Levy concluded that the subject agreements, as amended, should be approved. In so doing, he found that the subject leases are agreements subject to section 15 of the Act, that the subject

*Commissioner George H. Hearn did not participate.

leases are true and complete copies of the understandings and/or arrangements between the parties, and that the subject leases do not violate the standards of sections 15, 16 First, and 17 of the Act, as set forth in the Order of Investigation. He did find, however, that the parties had implemented the agreements prior to obtaining approval from the Commission pursuant to section 15.

Exceptions and replies to exceptions were filed by all parties to the proceeding. Oral argument was held before the Commission on June 12, 1974.

THE PARTIES

PPC is a nonprofit, nonstock corporation whose Board of Directors represents the City of Philadelphia, the Chamber of Commerce of Greater Philadelphia, the Commonwealth of Pennsylvania, the Delaware River Port Authority, and the general public. PPC was formed in 1965 to be an intermediary party between the City of Philadelphia, which owns most of the marine terminals in Philadelphia, and private terminal operators who lease and operate such facilities. Marine terminal facilities in Philadelphia were leased to PPC pursuant to two leases with the City.

Lavino, a terminal operator, agent, and stevedoring company, is the lessee of the Packer container terminal. DRT&S, the terminal operating company which leases the Tioga container terminal, is a wholly-owned subsidiary of J. A. McCarthy which, in turn, is a wholly-owned subsidiary of Lavino. Lavino, McCarthy, and DRT&S have interlocking directorships and common officers and for all practical purposes comprise a single entity.

In addition to its leases at the Packer and Tioga terminals, hereinafter set forth in detail, the Lavino organization operates in the Port of Philadelphia 17 general cargo berths at various piers.

A&G is a wholly-owned subsidiary of John W. McGrath Corporation and operates seven general cargo berths in the Port.

Independent, a stevedore in the Port of Philadelphia since 1876, presently operates 13 general cargo berths, 4 of which are scheduled for demolition.

THE AGREEMENTS AND FACILITIES

Agreement No. T-2455 is a sublease between PPC and DRT&S for Container Berths 4 and 5 at the Tioga Marine Terminal. It was entered into on August 7, 1970, and filed with the Commission for approval pursuant to section 15 on September 21, 1970.

Agreement No. T-2553 is a sublease between PPC and Lavino for

Container Berths 4 and 5 at the Packer Avenue Marine Terminal. It was entered into on August 6, 1971, and filed with the Commission for approval pursuant to section 15 on August 27, 1971.

Interim rental agreements, intended to allow operation of the container berths as they might be completed in whole or in part, were entered into on April 2, 1971, and on June 29, 1971, for Tioga and Packer container berths, respectively. These were filed for Commission approval on August 27, 1971.

On December 28, 1971, amendments to both Agreements were filed with the Commission by PPC.

The Tioga I marine terminal was constructed on a fill site on the Delaware River. The facilities leased to DRT&S pursuant to Agreement T-2455 comprise only a portion of the Tioga terminal complex, and are referred to as "Tioga I (Berths 4 & 5)."[1] Tioga I (Berths 4 & 5) consists of the two upstream marginal berths totalling 1,272 feet in length together with approximately 22 acres of contiguous paved container handling and storage area, a Kocks container crane, crane rails and rail tracks, and was substantially completed as of August 1, 1972. An additional Kock's crane is being added to the terminal.

Packer II (Berths 4 & 5), like the Tioga I facility, is constructed on a fill site; and, like Tioga I, is part of a larger terminal complex (the Packer Avenue I & II marine terminals). Packer II (Berths 4 & 5) consists of two downstream marginal berths totalling 1,211 feet in length and storage area, a Kock's container crane, crane rails and rail tracks. An additional Kock's crane is being added to the terminal.

BACKGROUND

In reaching a determination of the issue of monopolization of all modern container facilities in the Port, it is necessary to develop the history of the advent of containerization in Philadelphia which culminated in the subject lease agreements.

From the late fifties to 1970, the Port of Philadelphia was in a state of decline. The marine terminal facilities of the Port were deteriorating. Shipping lines were abandoning the Port. The Port was falling behind its competitor ports in cargo tonnage and in the development of modern cargo-handling facilities. Diversion of cargo away from the Port to competing ports was increasing. The momentum of the container revolution was increasing and was threatening the Port with further loss of cargo. The Port seemed to be dying.

[1] The remaining Tioga facilities ("Tioga II") consist of 3 marginal berths, 2 slip berths (1 of which is a ro/ro berth), a 300,000 square-foot transit shed, and approximately 20 acres of paved storage area. These facilities are leased by Sea-Land Service, Inc., DRT&S and Thur-Chem Service, a division of DRT Industries, Inc.

This situation was a major reason for the formation of PPC in 1965.

PPC, under terms of a lease agreement with the City, dated May 24, 1966, as amended, assumed the administration of the City's existing leases with pier tenants and agreed to pay the City annual rentals through 1998 for the use of these facilities. This lease with the City is entitled the Consolidated Lease Agreement.

PPC entered into a separate agreement with the City with respect to the planning, constructing, extending, and improving of additional facilities. This agreement was executed on September 23, 1966, and is entitled the Port Improvements and Lease Agreement (Port Improvements Lease).

PPC is the lessee/sublessor of 38 different parcels of real estate pursuant to its leases with the City. These consist of both waterfront property, operated as marine terminals by the sublessees, and property near the water utilized as terminal backup areas.

PPC's tenancy of the Tioga I and Packer II terminals is derived from the Port Improvements Lease.

PPC receives income basically from three sources: (1) subsidies from the City of Philadelphia and the State of Pennsylvania; (2) rental income from piers and facilities other than Packer and Tioga; and (3) rental income from Packer and Tioga.

For all practical purposes rental income from other piers and facilities equals the debt service and retirement requirements on outstanding bond issues for those facilities (old debt).

Rental income from Packer and Tioga does not presently equal debt service and retirement requirements on outstanding bond issues for these facilities (new debt). To the extent that rental income is insufficient, the balance to meet debt service requirements is paid out of funds received from the City and State. This difference is denominated in this proceeding as a "subsidy", distinguished from "full formula rental" which is a rental equal to meet debt service requirements. Based on cargo forecasts and five-year lease renewal terms, rentals for the container terminals are estimated to reach "full formula rental" in the sixteenth year. Thereafter, rental income should exceed debt service requirements.

In 1967, PPC commissioned McKinsey & Co. to undertake a study as to the future needs and potential of the Port. That report was completed in September 1968. It indicated that the prospects for attracting container traffic to the Port were very poor and that the Port had already been bypassed. However, the report found that although the situation for Philadelphia was difficult, it could be redeemed if Philadelphia immediately began work on constructing modern containerized terminal facilities. It recommended that only one new facility be developed and that the facility be an integrated container-breakbulk facility.

PPC, rejecting the limiting recommendation of the McKinsey Report, decided to proceed with the development of two integrated breakbulk-container terminals. They were to be located at Tioga and at Packer. PPC had commenced a search for interested tenants of these proposed facilities early in 1967. PPC's search period for tenants continued for approximately 20 months.

PPC called general public meetings on July 6, 1967, and February 13, 1969, to describe the proposed facilities and to discuss its views for the lease of the facilities, including proposed rental payments.

A major point of contention in this proceeding is whether the annual rental figures quoted at these meetings, i.e. $165,000 to $175,000 per berth plus the costs of ancillary facilities, were negotiable or nonnegotiable.

Protesting witnesses contend that they relied on the PPC memorandum distributed at the first meeting which stated in pertinent part that each prospective tenant must assure that it "is prepared to accept rental rates in the range discussed verbally". Protestants thus argue that the rentals quoted to all prospective tenants were thought by them to be nonnegotiable. However, the record in this proceeding discloses that the rents were never actually described as nonnegotiable.

PPC contends that its price policy is found in its letter of June 29, 1967, inviting the prospective tenants to the July 6, 1967 meeting. The following quotes are deemed to reflect their position:

> Since the facilities are now under construction, the Corporation is in a position to initiate discussion with prospective tenants.
>
> Rental rates will be set at a figure competitive with comparable facilities at other ports. There will be no bidding for facilities.

In addition to possible rental rates, the possibility of a consortium to operate the terminal was broached. Over the next several months, the Port renewed its efforts to interest various companies in leasing the terminal. The concept of a consortium was one of the major methods PPC considered to overcome the reluctance of individual terminal operators to consider leasing a terminal on their own behalf.

PPC proposed at the 1969 meeting that it might assume 51 percent of the interest and obligation of such a consortium in order to minimize the financial risk of the private operators involved. Once again, as in the July 1967 meeting, there was little interest among those people participating in renting the terminals. Shortly after the February 1969 meeting, A&G and Independent informed

PPC that a consortium did not appear feasible at that time.

At this point PPC, having no other companies interested in the terminals, devoted itself to negotiating the best possible terms it could from the only two companies with any interest in the terminals, i.e., Lavino and DRT&S. Negotiations over terms, conditions and rental rates continued over the next several months. These negotiations were protracted, and involved substantial controversy over lease terms and conditions. Eventually the two leases were executed, the Tioga lease on August 7, 1970, and the Packer lease on August 6, 1971.

Instinctive in the question raised by the Order of Investigation for determination is whether it is in the public interest to have the only two modern container terminals in the Port of Philadelphia in the hands of Lavino. In resolving this question, it is necessary to understand the events leading to the execution of the leases for those terminals.

PACKER NEGOTIATIONS

Prior to the formation of PPC, the City of Philadelphia (City or Philadelphia) began a program in the late 1950's to rehabilitate the Port when Piers 38–40 were modernized. Thereafter, the City began planning the Packer Avenue Terminal and first approached U.S. Lines. After U.S. Lines withdrew from the negotiations the City, in 1962, approached Lavino and ultimately leased it the facility known as Packer I (a breakbulk facility).

From the time the Packer negotiation commenced in the spring of 1962, numerous difficulties as to the physical configuration and conflicts with adjacent tenants were encountered. When agreement with an adjacent tenant for the construction of a new berth at the northern end of the terminal site could not be resolved, the City decided to extend the proposed facility further downstream. As a result of this change in plans, a right of first refusal was granted Lavino on any downstream berths which might be constructed later. The redesigned Packer I (upstream breakbulk berths) then became three marginal berths running a length of 1,823 feet and covering roughly 38 acres. When an agreement was finally executed in 1965 between the City and Lavino, the rental for Packer I came to $665,000 per year for a 15-year term. Although construction at Packer I began in 1965, it was not completed and operational until 1968 because further design problems created delays.

By this time PPC had been created and in late 1968 PPC informed Lavino that it intended to proceed with the development of the Packer Avenue extension (Packer II); that it would be designed for containers; and that all other terminal operators in the Port were being advised that they could negotiate for this facility. On October 18, 1968, PPC asked Lavino whether it would be willing to enter into a consortium of terminal operators to operate Packer II and whether Lavino would be willing to waive its right of first refusal which was contained in its lease agreement with the City for Packer I. Lavino responded on November 1, 1968, stating it would be inclined to agree to enter into a consortium and that it would be willing to waive its right of first refusal for a period of five years.

Subsequently, a meeting was held with prospective tenants on February 13, 1969. Shortly thereafter, General Clark, Executive Director of PPC, informed Lavino that there was insufficient interest in the consortium on the part of the terminal operators and that PPC had decided to negotiate exclusively with Lavino regarding the Packer container terminal (Packer II). As a condition of leasing Packer II, PPC required that Lavino lease also the roll-on/roll-off berth at full formula rental of $325,000 per year. The lease for Packer II (container berths 4 and 5) for a 5-year term provided for a minimum annual rental of $100,000, with a $10 rental on all containers handled in excess of 10,000 per year with renewal options at higher rentals. The total guaranteed rental for Packer I and II is $1,090,000 per year when fully operational.

The lease for Packer II (Agreement No. T-2553) was executed between PPC and Lavino on August 6, 1971, and filed with the Commission August 27, 1971.

On June 29, 1971, PPC and Lavino entered into an interim rental agreement (submitted to the Commission on August 27, 1971) covering use of a new Kock's container crane at Packer II (Berths 4 & 5) upon its certification by the City, and of the limited facilities which were then, and soon would become available. The crane was certified for use on July 7, 1971, and the interim agreement became effective as of that date. Further facilities became available, and rental was increased accordingly on May 11, 1972, and then on July 21, 1972. The first container was handled there on July 9, 1971.

One of the issues raised in the proceeding was the effect of Lavino's right of first refusal to lease additional facilities to be constructed at the Packer Avenue Terminal. Those opposing the approval of the Agreements contend that this right gave Lavino such an undue advantage that it rendered fruitless any effort on their part to obtain a lease for the container berths and, hence, they did not make a strong effort to do so.

As set forth previously, this right of first refusal stemmed from an earlier lease between Lavino and the City of Philadelphia under which Lavino leased other portions of the Packer complex. The right of first refusal allowed Lavino to lease the facility if it were willing to pay rental equal to that offered by any other prospective tenant.

Any prospective tenant could *outbid* Lavino by any minimal amount. If Lavino refused to meet the additional offer, the other operator would obtain the lease. The advantage to Lavino was that it could obtain the lease by merely meeting the other offer. The disadvantage to other parties was that they had to exceed Lavino.

In spite of PPC's letter of June 29, 1967, inviting prospective tenants to the July 6, 1967 meeting, which stated that the rental rates would be "set" and that there would be "no bidding", protestants' argument of undue advantage to Lavino insofar as the Packer Avenue facilities are concerned is well founded. The fact that Lavino would waive its right of first refusal for five years would not give a potential consortium of tenants much in the way of long-term prospects for operation of the Packer container berths.

TIOGA NEGOTIATIONS

In 1967, PPC proposed to develop a new terminal at Tioga. Whereupon DRT&S was approached by PPC and agreed to the cancellation of a leasehold interest in a 20-acre tract and to the sale in 1968 of a 25-acre parcel of land to PPC. These parcels were needed in order to develop the proposed new terminal at Tioga.

As a condition to DRT&S agreeing to cancel its leasehold interest and sell its 25-acre parcel, PPC granted DRT&S a right of first refusal on the two downstream breakbulk berths (Berths 1 and 2) to be constructed at Tioga. No right of first refusal was ever granted to DRT&S or anyone else with respect to the upstream container berths (Berths 4 and 5) at Tioga.

As previously stated, little interest was shown in leasing the Tioga facilities after either the 1967 or 1969 meetings. After several discussions with officials of DRT&S, PPC suggested that DRT&S should undertake to lease and operate the entire Tioga complex.

The terms of the proposed lease were to be a minimum guaranteed rental of $100,000 per year for the two container berths, plus a $10 charge for each container handled over 10,000 containers up to a maximum of $400,000 per year, on condition that DRT&S also agreed to take the lease on the adjacent breakbulk berths at full formula rental of approximately $700,000 per year. This resulted in a minimum rental of $806,250 per year and a maximum of approximately $1,100,000 per year for all the Tioga berths.

DRT&S and PPC also agreed that a condition of the lease would be that the terminal was to be designed so as to allow for a single terminal operator and stevedore, as this would result in significant operating cost advantages. DRT&S further agreed that if PPC received an offer from another potential tenant for the three up-stream (two container and one breakbulk) berths, DRT&S would stand aside. There were no other such prospective tenants.

Because of continuing construction delays, Luckenbach Steamship Co. withdrew from its partnership with DRT&S for operating Tioga in October 1969. This left DRT&S without an experienced stevedoring company, with the resultant loss of shipping contracts necessary to obtain business for Tioga. In February 1970, DRT&S commenced negotiations with International Terminal Operating Company, Inc. (ITO), as a potential partner or associate in leasing the Tioga Terminal, but in June 1970, ITO indicated that it was not prepared to enter into such an arrangement at that time. During these negotiations, General Clark of PPC was kept informed of progress as the leases for Tioga originally contained a clause allowing assignment to ITO should it change its position. In April 1970, DRT&S also approached Lavino with the aim of exploring acquisition by Lavino, but Lavino stated that it wished to await ITO's eventual decision. On June 10, 1970, a meeting was held between Robert P. Levy and Robert J. Tarr of DRT&S and Mr. Harry Galfand, City Director of Commerce and member of PPC Board of Directors, General Clark, and Irving Good, who was then the City's Deputy Director of Commerce, at which time ITO's decision and negotiations between DRT&S and Lavino were discussed. Although PPC raised no objection to the negotiations with Lavino, General Clark informed his Executive Committee that he doubted that it would be in the best interests of the Port to concentrate such a large proportion of its new facilities in the hands of one operator. He remained pessimistic about the possibility of any alternative, however, and advised the Committee there were no other interested tenants and the most important single factor was to generate commerce in the Port.

On June 15, 1970, a general agreement on terms of acquisition had been reached by DRT&S and Lavino. DRT&S orally kept PPC informed of its negotiations with Lavino, but neither Lavino nor DRT&S ever requested in writing a formal legal opinion from PPC whether the acquisition by Lavino presented any problems to PPC.

Throughout DRT&S's discussions with PPC regarding negotiations with Lavino, PPC never advised DRT&S that it had any objection to Lavino's taking over the Tioga Terminal. A letter of intent to lease Tioga was submitted to PPC by DRT&S on July 13, 1970. A meeting between DRT&S and PPC was held August 3, 1970, at which time it was reported that virtually all matters relating to the acquisition of DRT&S by the Lavino subsidiary, J. A. McCarthy, Inc., had been settled and that a contract of sale had been entered.

On August 7, 1970, PPC, in its capacity as tenant from the City, entered a lease agreement with DRT&S for Tioga I (Berths 4 & 5) for a 5-year term with renewal options. The lease agreement (Agreement No. T-2455) was filed with the Commission on September 21, 1970.

Another lease covered Berths A (ro/ro), 1, 2 and 3 (breakbulk). Each lease contained a provision permitting the assignment of the lease to ITO in the event that negotiations between DRT&S and ITO were resumed and became successful at a later date. Each of the assignment clauses required that ITO would have to take over all the berths referred to in the other lease. In other words, ITO would not have the right to take over Berths 4 and 5 (container) without also taking over the other berths. This provision for assignment was retained in the September 17, 1970 settlement between DRT&S and McCarthy, at which time McCarthy purchased all of the DRT&S stock equipment. ITO never expressed any interest thereafter and Lavino consequently never assigned to ITO its rights under the lease.

Under the Tioga I (Berths 4 & 5) sublease (Agreement No. T-2455), PPC agreed to make available portions of the terminal for use by DRT&S as they might be completed in whole or in part. The sublease provides that the initial rental for such partial occupancy would be negotiated and agreed to in advance.

By letter of September 24, 1970, PPC advised DRT&S that the new Kock's container crane and a limited container storage area would become available in the near future. In its letter, PPC proposed that the incomplete facility would be leased to DRT&S at a rental rate computed at 25 percent of the applicable rental set forth in the Tioga sublease.

On April 2, 1971, PPC and DRT&S entered into an interim rental agreement (submitted to the Commission on August 27, 1971), for partial use of Tioga I (Berths 4 & 5), effective as of April 5, 1971, and on September 1, 1971, the rental was further increased as more facilities were completed. The first container was handled there on August 19, 1971.

On November 21, 1972, PPC and DRT&S agreed to delay commencement of the five-year term in Agreement No. T-2455 until August 1, 1973. The agreement also provided that DRT&S would begin paying the annual rental for Tioga I (Berths 4 & 5), retroactive to August 1, 1972.

Protestants contend that an "equalization clause" in the Tioga lease for Berths A- 1-2-3 (ro/ro and breakbulk) absolutely prohibited, as a practical matter, PPC from giving consideration to the leasing of the container berths at Tioga to any tenant or group of tenants at less than standard rental. The full equalization clause states the following:

If during the original term of this Lease, or any renewal or extension thereof, Lessor shall, directly or indirectly, lease, license, grant or otherwise permit any third party to use any marginal berth forming part of the Tioga Terminal for general cargo purposes on more favorable terms, conditions and rates than those herein specified or otherwise charged to Lessee with respect to the Demised Premises, including abatements, if any, then the terms, conditions and rates herein set forth or otherwise charged to Lessee shall be made to conform to such more favorable terms, conditions and rates; provided, however, that *this clause shall not apply* to any arrangement made by Lessor with PGW for the handling of liquefied natural gas or *to any arrangement made by Lessor for the use of the remaining berths of the Tioga Terminal primarily for the handling of containers.* Lessor will promptly disclose to the Lessee the facts representing such more favorable terms, conditions and rates. [Emphasis added.]

The equalization clause thus states clearly that its provisions are not applicalbe for any arrangement whereby the Tioga berths are leased primarily for the handling of containers, but was only effective should PPC desire to lease the additional Tioga berths for breakbulk use.

It is important to note, however, that the record indicates that General Clark of PPC *mistakenly believed* that the equalization clause *did* apply to the lease of the Tioga container berths to anyone other than DRT&S (Exhibit 17, p. 4). Operating under this misapprehension, PPC's officials only pursued negotiations for Tioga Berths 4 and 5 with DRT&S.

ADDITIONAL CONTAINER SITES AND FACILITIES

In determining the issue of monopoly raised in this proceeding it is appropriate to determine the position of PPC regarding additional container facilities in the Port, and whether potential sites exist for construction of additional facilities.

Various PPC witnesses testified that PPC is ready to develop a third container facility in addition to Tioga and Packer for any qualified tenant who is willing to commit itself with the lease.

A number of potential sites exist for development of a modern container terminal.[3] None of these sites is without problems. Some land acquisition would be necessary, as in the case of the Schuykill River and Reading Terminal and Northern Metal sites. Some turning basin problems exist, as in the case of the Schuykill River site. Some

[3]South Philadelphia—Penrose and Schuykill River sites. Mid Philadelphia—Area of piers 40–57 and Reading Terminal (Port Richmond) sites. North Philadelphia—Northern Metals site.

upstream navigational problems exist, as in the case of the Northern Metals site.

Unquestionably, Packer and Tioga are the most modern and efficient container facilities available in the Port. The record establishes, however, that there are at least three other container-handling terminals: Northern Metals, and across the river Camden Marine Terminal, and Holt, none of which has the modern equipment and capability (speed) for handling the larger fully-containerized vessels that exist at Packer and Tioga. In addition, deck containers aboard breakbulk vessels are handled at other general cargo piers. Of the approximately 34,700 containers handled in the Port in 1972, approximately 29,300 were handled at Packer and Tioga and approximately 5,400 at other facilities.

CONSORTIUM

Under the same terms and conditions as contained in the present leases, A&G would be willing to join a consortium to operate both Packer Avenue and Tioga berths 4 and 5; the entire Tioga terminal; or Tioga berths 4 and 5. A&G alone would undertake to operate Packer and Tioga berths 4 and 5; or Tioga berths 4 and 5, but not the entire Tioga terminal. Independent would join A&G, even if no other terminal operators in Philadelphia were willing to commit themselves to a consortium, to receive assignment of the present leases, under terms and conditions now applicable, for Packer Avenue and Tioga berths 4 and 5; or 4 and 5 at Tioga only.

Other terminal operators have indicated an interest in joining such a consortium. A&G believes it could form a consortium of at least five members.

In any event, only A&G has indicated any interest in forming a consortium for the operation of the entire Tioga terminal. All other expressions of possible interest have been limited to joining a consortium only to operate the container berths and not to take over the obligations of the breakbulk and ro/ro berths. A&G does not offer to operate the entire Tioga terminal alone.

As has been previously discussed in detail, whatever favorable terms for leasing the container berths were granted by PPC they were granted only on condition: that the lessee lease the third breakbulk and ro/ro berths at Tioga; the lessee lease the ro/ro berth at Packer. The terms and conditions set forth in the agreements, in effect, are a package.

The physical configuration of the terminals, primarily because of the location of the transit sheds for breakbulk operation and because of the railroad track locations at each terminal, more particularly at Packer, make it very difficult, though not impossible, to operate either complex as separate breakbulk and container terminals. Thus, unless a consortium could be formed to operate an entire complex (breakbulk, ro/ro, and container berths), or a single operator were willing to take over the entire complex, the present operator would have to continue to operate because of lack of a viable alternative.

INITIAL DECISION

A. Jurisdiction

The Administrative Law Judge found that PPC was an "other person" subject to the Act by virtue of the fact that it still retained "control" over the use of the facilities subject to the leases in question. Citing the Commission's interpretive rule, published at 46 CFR 530.5(b)(2),[3] Judge Levy concluded that one aspect of the lease indicates that PPC retains oversight control over the use of the facilities, i.e., the "use" clauses of the two leases.[4] The "use" clauses, in light of the alleged anticompetitive effects that flow from the subject agreements, are found by the Administrative Law Judge to subject the agreements to the section 15 jurisdiction of the Commission.

Inasmuch as Lavino and DRT&S are undisputedly "other persons" subject to the Act, the agreements as such fall within the Commission's jurisdiction. The Commission must examine not only the terms of an agreement, but also the competitive consequences which may be expected to flow from the agreement and other facts which show the objective and results of the agreement. Citing *Agreement No. T-4: Terminal Lease Agreement at Long Beach, California,* 8 F.M.C. 521, 529 (1965).

Thus, PPC and the lessees are persons subject to the Act and the leases are such agreements as are required to be filed for approval in accordance with section 15 of the Act.

B. Implementation Prior to Approval

Section 15 requires that every person subject to the Act shall immediately file with the Commission a true copy of every agreement entered into with another person subject to the Act and makes it

[3]This rule includes as persons subject to the Act: Landlords, when not acting merely in the capacity of lessor of realty, but who maintain some control over lessee's rates or competitive practices either by unilateral action or by mutual agreement.

[4]Clause 4(a) of each lease, which provides:

. . . these facilities are primarily for the handling of containers moving in waterborne commerce through the Port of Philadelphia and other uses will be so controlled as not to interfere with this primary use. Lessor shall have the right of inspection and review of such other uses.

unlawful to carry out "in whole or in part, directly or indirectly", any such agreement before approved by the Commission.

The Administrative Law Judge rejected PPC's argument that even if the leases are subject to section 15, they have not been implemented since the only provisions of the leases which make them subject to that section are the "use" clauses. Since the use clauses have not been implemented, and PPC has taken no steps to enforce them, it claims that the leases, to the extent that they are subject to Commission jurisdiction, have not been implemented. Judge Levy found that once it is determined that a particular part requires that the agreement be filed pursuant to that section, the statute is clear that the entire agreement must be filed—not only the clause giving rise to jurisdiction. And that before approval, no part of that agreement may be implemented. Hence, since the record established that the terminals have been operated pursuant to the leases since 1971, PPC, Lavino and DRT&S have been in violation of the Act since then.

C. Sections 15, 16 First and 17

Section 15 requires that agreements between persons subject to the Act found to be unjustly discriminatory, unfair, detrimental to the commerce of the United States or contrary to the public interest be disapproved, cancelled or modified. Citing the standards enunciated in the decision of the U.S. Supreme Court in *FMC v. Svenska Amerika Linien,* 390 U.S. 238 (1968), Judge Levy concluded that while Lavino's alleged monopoly might otherwise be contrary to the public interest, there is evidence of record which establishes that a sufficient justification would fairly detract from a finding that the agreements are contrary to the public interest, hence rendering them approvable within the meaning of section 15. The Judge cites the following bases as the overriding justification for approval of what would otherwise be agreements, the terms of which are contrary to the public interest: (1) the beneficial growth in overall tonnage shipped through Philadelphia; (2) the influx of containership operators to the Packer and Tioga facilities contrary to the pessimistic attitudes of many observers; (3) the efficient and economical service currently being rendered at the two facilities; and (4) the conclusion that the operation of both terminals by Lavino resulted from the failure of any other operator to undertake the operational risks and commit the necessary working capital. Likewise, the Administrative Law Judge concludes that the record does not substantiate a finding that the agreements afforded any undue or unreasonable preference or privilege to DRT&S and/or Lavino or subject A&G or others to any undue or unreasonable prejudice or disadvantage in violation of section 16 First. Judge Levy found that PPC has repeatedly indicated a willingness to construct a third container facility if a responsible operator were willing to enter into a letter of intent for the leasing of that facility upon mutually agreeable terms and that no such firm expression of interest in a third facility has been forthcoming from any party protesting the agreements in issue. Nor was it found that there had been a showing of the establishment of any unjust and unreasonable practices and regulations in the conduct of the terminal operations such as would be prohibited by section 17 of the Act. Contrary to any such showing, Judge Levy concludes that the preponderance of the evidence reveals that the conduct of Lavino and DRT&S in their operation of the container facilities has been fair and equitable, even to the extent of voluntarily offering an opportunity for open stevedoring to all interested and qualified parties at the Tioga facility.

In conclusion, the Administrative Law Judge pointed out the Commission's inherent power to review continuously any agreement filed with the Commission, and to withdraw prior approval where it is shown that the public interest is no longer being served.

EXCEPTIONS

Exceptions and replies were filed by all parties to the proceeding.

Lavino and DRT&S jointly except only to that portion of the Initial Decision which found that they have violated the Act by implementation of the subject agreements prior to Commission approval. In essence, they argue that the necessity to begin operations as soon as possible because of the expenses already incurred, the commitment to service container ships being urged to call at Philadelphia, and the fact that they did file amended agreements for temporary operating approval, to which even A&G did not object, should indicate the necessity to begin operations as soon as practical. They argue that there was no intent on the part of respondents to implement the agreements so as to violate section 15.

PPC excepts to the Judge's finding that it had implemented the agreements in violation of section 15 on the same basis as do Lavino and DRT&S. In addition, it excepts to the Judge's conclusion that it is an "other person" subject to the Act, stating that it falls within the Commission's exclusionary rule under 46 CFR 530.5(b)(2); i.e., that of a landlord who has relinquished all control over a terminal facility.

A&G and Independent in a joint memorandum except to all findings in the Initial Decision which approve the leases and allow the continued existence of what they contend to be the monopolistic control by Lavino of all modern container terminal handling facilities in the Port of Philadelphia. In addition, A&G and Independent allege numerous instances in the Administrative Law Judge's conduct of the hearing which they contend evidence "substantial, material, and continuing bias and prejudgment which impaired his ability to function as an impartial judge of the facts and the law."

Specifically, A&G and Independent allege that Judge Levy erred in failing to consider the *potential* detriment accruing from the leases and in failing to consider the detriment to Lavino's *local* competition as a result of the alleged monopoly. They allege error for failure to find that the leases involved the *potential* of serious economic detriment to the Port, to the container lines serving the Port, to other terminal operators in the Port, to other ships' agents in the Port, to the taxpayers whose tax investment will not realize an adequate return, and to all business interests whose economic well-being depends upon a flourishing and competitive economy within the Port.

Furthermore, A&G and Independent allege that the finding of the Administrative Law Judge that PPC had accorded all port interests equal and fair treatment in its dealings with the Port community regarding the Packer and Tioga leases was in error. They further allege error in the finding that Lavino had made bona fide efforts to accommodate the interests of other stevedores in the Port regarding the operation of the container facilities. Finally, they allege error in various evidentiary and procedural matters in the conduct of the hearings resulting in recommended approval of the proposed lease agreements, and in the failure of the Administrative Law Judge to make specific recommendations for the protection of protestants and others similarly situated in the Port, to the end that such interests be accorded fair and equal access to the Port's publicly-built modern container terminal facilities.

The alleged procedural error on the part of Judge Levy involves charges of "advocacy" questioning of witnesses so as to elicit answers favorable to the respondents' position; failure to afford counsel for A&G and Independent, as well as Hearing Counsel, the opportunity to clarify testimony of witnesses favorable to protestants' position whose testimony had been changed somewhat after the "advocacy" questioning of the Judge had elicited answers contrary to their earlier testimony; and a general trend of bias in the manner in which the proceeding was conducted.

Hearing Counsel except to the Initial Decision to the extent that it recommended approval of the lease of the Tioga container facilities. Specifically, Hearing Counsel contend that the entire history surrounding the negotiations which led to the subject leases is clouded with misunderstanding and misinformation to the extent that the protestants and others similarly situated were never afforded the same treatment by PPC as were Lavino and DRT&S. The resultant discrepancy between the rental costs offered the public and those granted Lavino and DRT&S, coupled with the "right of first refusal" on the Packer container berths held by Lavino by virtue of its lease for the Packer breakbulk berths and PPC's misinterpretation of the effect of the "equalization clause" contained in the lease for the Tioga breakbulk berths, evidence the fact that the Lavino interests had an undue advantage and/or preference in obtaining the rights to these facilities.

In addition, Hearing Counsel contend that the Administrative Law Judge had disregarded certain critical facts in arriving at his conclusion of the lack of harmful effects brought about by the Lavino monopoly; i.e., the lack of a timely available third potential container facility comparable to Packer or Tioga; the lack of existing facilities capable of conversion to full-container ship service in the scope of Packer or Tioga; and the wide operational disparity in terms of size between the facilities operated by the Lavino interests and all other facilities in the Port in terms of the percentage of scheduled sailings handled, scheduled *container* sailings handled, and total containers handled, all in the year 1972 (Exhibits, 91, 98 and 99, respectively). In addition, Hearing Counsel contend that a finding that there was no planned monopoly clearly overlooks the fact that the takeover of DRT&S by Lavino's subsidiary, J. A. McCarthy, Inc., was contingent upon the signing by DRT&S of the leases for the entire Tioga complex (Exhibit 90, paragraph 1(a)).

Furthermore, Hearing Counsel dispute the Judge's conclusion that the favorable competitive situation in container traffic now being enjoyed by Philadelphia as opposed to that of its major port competitors, New York and Baltimore, does not show that the Lavino monopoly is detrimental to the Port of Philadelphia. They contend that this conclusion clearly overlooks the point of issue in this proceeding, the lack of competition in container traffic among terminal operators/stevedores *within* the Port.

Hearing Counsel further contend that the speculative conclusion of Judge Levy that the three consortium proposals expounded by A&G are unworkable is clearly contrary to the record. Hearing Counsel offer as an alternative proposal that the Commission disapprove the Tioga lease only on the condition that the Commission approve, upon resubmission within 45 days of its final order in this proceeding, the lease between PPC and DRT&S for Tioga if during that period, no tenant or consortium of tenants makes itself available to PPC for assignment of the lease.

Finally, Hearing Counsel contend that the Administrative Law Judge committed reversible error in the handling of testimony of four witnesses during the proceeding, citing a verbatim account from the transcript of the testimony surrounding each allegation. These allegations of error for the most part deal with the refusal of Judge Levy to allow further questioning after he, the Administrative Law Judge, had questioned the witnesses following complete examination by the various counsel. Hearing Counsel contend that the Judge's questions opened new areas of testimony which they were not allowed to pursue.

Hearing Counsel and A&G and Independent requested oral argument, which was granted and, as previously noted, held before the Commission on June 12, 1974.

REPLIES TO EXCEPTIONS

Lavino and DRT&S filed a reply to the exceptions of protestants and Hearing Counsel. With regard to the allegations of error on the part of the Administrative Law Judge, the respondents contend that protestants and Hearing Counsel are substituting a personal attack on the presiding judge in lieu of their inability to produce on the record evidence of a harmful monopoly in the hands of Lavino. Respondents conversely argue that the presiding judge exhibited a totally unbiased and impartial demeanor throughout the proceeding.

In addition, respondents contend that the Administrative Law Judge correctly found that:

1. While all prospective terminal operators were offered full and fair opportunities to secure the subject leases, they refused to commit themselves;
2. There was no evidence of detrimental effect on competition within the port and that, should such ever arise, its cure lies in a commitment of Lavino's competitors to operate additional container facilities in the port;
3. The power of the Commission continuously to review and, if necessary, disapprove the subject leases provides a sufficient safeguard to any anticompetitive effects that may arise in the future;
4. The lease agreements have benefitted the port; and
5. The consortium proposals are illusory and would prove unworkable to the jeopardy of the recent competitive gains made by the port.

PPC replied to the exceptions of Hearing Counsel and the protestants on basically the same grounds as did Lavino and DRT&S. It concludes, however, with the contention that the real aim of A&G in the proceeding is "to attempt to use the Commission and the maritime laws as a tool to reverse an unfortunate business judgment made by A&G in the 1960's"; i.e., the decision not to pursue the leaseholds on either or both of the container facilities. In conclusion, they contend that the Administrative Law Judge correctly found that the public benefits to be derived from the leases more than balance any potential detriment to competition flowing therefrom.

A&G and Independent replied to the exceptions of PPC and Lavino/DRT&S by a reiteration of their position in support of the Commission exercising jurisdiction over the subject lease agreements and over PPC as a person subject to the Act. Similarly, they argue that for the reasons set forth earlier, the subject lease agreements had been implemented prior to Commission approval.

Hearing Counsel's reply to exceptions is a restatement of the arguments of protestants and findings of the Administrative Law Judge with respect to the jurisdiction of the Commission over PPC and the subject lease agreements, as well as with respect to the implementation of the agreements prior to approval.

CONCLUSION

We concur with the findings of the Administrative Law Judge with regard to the issues of the jurisdiction of the Commission (1) over PPC as an "other person" subject to the Act, and (2) over the subject leases as being agreements required to be filed under section 15 of the Act.

Specifically, section 1 of the Act defines an "other person" as:

> . . . any person not included in the term "common carrier by water," carrying on the business of . . . furnishing wharfage, dockage, warehouse, or other terminal facilities in connection with a common carrier by water.

PPC clearly falls within this definition, albeit indirectly by leasing facilities to terminal operators. The fact that Lavino and DRT&S are "other persons" was not contested.

Having established that the subject leases are between persons subject to the Act, we must find that the two leases do in fact fall within one of the seven section 15 conditions. These terminal lease agreements, when looked upon separately, would clearly fall within the section 15 conditions. Further, when viewed together in light of the fact that they provide for lease of the only two truly modern container-handling facilities in the port, they clearly fall within the specific condition of section 15 which requires the filing of agreements "controlling, regulating, preventing, or destroying competition" (46 U.S.C. 814).

For these reasons, we adopt the specific findings of Judge Levy that PPC is an "other person" subject to the Act and that the involved leases are agreements subject to the requirements of section 15 of the Act.

Furthermore, we concur in the findings of the Administrative Law

Judge that the subject lease agreements have been implemented prior to Commission approval in violation of section 15. We therefore adopt those findings of the Administrative Law Judge set forth earlier in this Report under our discussion of his Initial Decision.

The key issue which remains to be resolved in this proceeding, therefore, is whether in fact implementation of these agreements has created a monopoly in the hands of Lavino in the operation of virtually all of the modern container handling facilities in the Port of Philadelphia. If so, we must then determine whether the existing monopoly is detrimental to the waterborne commerce of the United States or contrary to the public interest, or whether the monopoly operates as an undue or unreasonable preference or privilege to the Lavino interests to the detriment of other competing terminal operators and/or stevedores in the Port of Philadelphia. In addition, we must determine whether approval of the leases as presently being implemented would establish or enforce unjust or unreasonable practices in violation of section 17 of the Act.

The record of the proceeding clearly substantiates a finding that a monopoly does in fact exist. Lavino and PPC have for the most part admitted as much. Those facilities which are capable of handling containers in quantities less than carried by full container ships are not viable competitors to Lavino. Nor does the promise of future full container handling terminals offer an alternative competitive situation to that which presently exists in Philadelphia. The record indicates that it would take at least three years to construct a competing facility, sufficient time to give Lavino an even greater stronghold on container traffic moving through the Port. In addition, it is uncertain that there is currently sufficient containerized traffic at the Port to warrant operation of a third container terminal.

The evidence does not, however, warrant a finding by the Commission that the monopolistic situation existing at the Port was the result of wrongdoing on the part of either PPC, Lavino or DRT&S. The Port needed a tenant for its container facilities. Lavino was the natural choice for the Packer facility because of its right of first refusal on the container berths. DRT&S needed an operating partner in order to operate the Tioga container berths, and kept PPC fully informed as to its negotiations with Lavino. The only fault arising under the negotiations lies in the mistaken belief by PPC that the equalization clause in DRT&S's lease of the breakbulk berths at Tioga was operative over any lease agreement to be negotiated for the Tioga container berths. It would therefore appear that PPC, though unintentionally, did limit its negotiations for the Tioga container berths to DRT&S, even though it appeared that there was some concern on its part that by so doing they would be placing in the hands of one operator (Lavino) all modern container handling facilities within the Port.

We conclude that the present operation of the Packer and Tioga container facilities by Lavino is so anticompetitive as to be detrimental to the commerce of the United States in violation of section 15 of the Act. Furthermore, we hold that the intra-port anticompetitive aspects of the subject operations warrant disapproval by the Commission of Agreement No. T-2455 between PPC and DRT&S for the Tioga container berths, such disapproval being based upon the undue or unreasonable preference or privilege to the Lavino interests to the detriment of other competing terminal operators/stevedores in violation of section 16 First of the Act. Finally, we conclude that Agreement No. T-2455 must be disapproved in that approval of that agreement in concert with Agreement No. T-2553 (Packer) would establish or enforce unjust or unreasonable practices in violation of section 17 of the Act.

We approve Agreement No. T-2553, for by so doing, we do not deprive Lavino of all of its container operations at the Port, but allow it to retain its leasehold on what the record indicates is the most utilized modern container facility at the Port, namely Packer.

Our disapproval of Agreement No. T-2455 is conditional, however. The Port is hereby directed to solicit bids for operation of the entire Tioga I complex, both breakbulk and container. These bids will be solicited on the basis of separate offers for the breakbulk and for the container facilities. The Port in its discretion, subject of course to Commission approval, may select a new tenant to operate the entire Tioga complex, or it may continue its present lease with DRT&S for the Tioga breakbulk berths and select the most advantageous proposal for operation of the Tioga container berths from among those qualified bids. Lavino or any of its subsidiaries or affiliates will not, of course, be qualified to bid on the container facility. Should the Port determine after examination of all qualified bids that the present lease between PPC and DRT&S for the Tioga breakbulk berths is more advantageous to its operations, it may continue that lease and enter into a new agreement with that bidder whose proposal for lease of the Tioga container berths is the most advantageous to the Port. Should the Port determine after examination of all qualified bids that it would be more advantageous to enter into a new agreement for operation of the entire Tioga complex by an entirely new operator or consortium of operators, it may accept this bid and file the subsequent agreement with the Commission for approval. No bid has to be accepted, the rental terms of which are less in amount than those currently found in Agreement No. T-2455. If, within 90 days of the service of this

Report, no bid acceptable to both PPC and the Commission has been received from a new tenant or consortium thereof, PPC shall resubmit Agreement No. T-2455 for Commission approval pursuant to section 15 of the Act. Acceptance or rejection of bids for operation of the Tioga facility shall, of course, be subject to Commission review as to the misuse by PPC of the discretionary power granted herein.

There is one further matter which requires our attention. Various allegations have been made by the Commission's Hearing Counsel and by counsel for A&G and Independent regarding possible bias and error on the part of the Administrative Law Judge. Subsequently, they have set forth several instances which they contend amount to reversible error by the Judge. The charges made were based upon rulings made by the Administrative Law Judge involving the issues of the unjustifiable monopoly, unreasonable privilege or advantage, and unreasonable practices.

Inasmuch as our decision in this proceeding reverses Judge Levy on these issues, no useful purpose would be served in reversing and remanding on the merits of these allegations. It suffices to say, however, that when new matter is raised through examination of witnesses, reasonable opportunity to cross-examine must be provided.

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 72-61

IN THE MATTER OF AGREEMENT NOS. T-2455/T-2553 BETWEEN PHILADELPHIA PORT CORPORATION AND DELAWARE RIVER TERMINAL AND STEVEDORING CO., INC./ LAVINO SHIPPING COMPANY, RESPECTIVELY

ORDER

12/23/74

The Federal Maritime Commission has on December 20, 1974, served its Report in the subject proceeding, which we hereby incorporate herein, in which we found:

1. That the Agreements therein are subject to the provisions of section 15 of the Shipping Act, 1916;

2. That said Agreements have been implemented prior to receiving approval by the Commission pursuant to section 15;

3. That the operation of all modern full-container ship handling facilities within a port by a single operator, as brought about by the subject lease agreements, is found to be so anticompetitive as to be detrimental to the commerce of the United States, in violation of section 15;

4. That the intra-port anticompetitive aspects of the subject operations warrant disapproval by the Commission of Agreement No. T-2455 on the basis of undue or unreasonable preference or privilege to the Lavino interests to the detriment of other competing terminal operators/ stevedores in violation of section 16 First of the Shipping Act, 1916;

5. That approval of the Agreement No. T-2455 would establish or enforce unjust or unreasonable practices in violation of section 17 of the Shipping Act, 1916;

6. That Agreement No. T-2455, as amended, be disapproved, subject to approval upon resubmission to the Commission if within 90 days of service of this Report, no tenant or consortium thereof has submitted an acceptable bid for operation of the Tioga facilities as set forth herein; and

7. That Agreement No. T-2553, as amended, be approved.

Therefore, for the reasons enunciated in said Report,

It is ordered, That pursuant to sections 15, 16, and 17, Agreement No. T-2455, as amended, be disapproved, subject to the conditions set forth above.

It is further ordered, That pursuant to section 15, Agreement No. T-2553 as amended, be approved.

It is further ordered, That in the public interest to assure continued operations of container facilities in Philadelphia the effective date of disapproval of Agreement No. T-2455, as amended, be stayed for a 90-day period from service of the subject Report in order to meet the conditions set forth therein.

It is further ordered, That Respondent Philadelphia Port Corporation shall submit to the Commission on or before January 22, 1975, a plan and schedule indicating how it intends to comply with paragraph 6 hereinabove. If Philadelphia Port Corporation fails to submit such a schedule in a timely fashion, the stay of this order, pursuant to the immediate preceding paragraph will be immediately vacated on January 23, 1975.

Finally, it is ordered, That the plan and schedule of Philadelphia Port Corporation and the effectuation thereof shall be subject to Commission surveillance and may be subject to further Commission Order as conditions warrant.

By the Commission.

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 71–29

BATON ROUGE MARINE CONTRACTORS, INC.

v.

CARGILL, INCORPORATED

Charges assessed and conditions imposed by respondent upon all stevedores operating at its leased terminal facility do not constitute a modification to an approved section 15 agreement for which further Commission approval is required.

No unreasonable preference or privilege as contemplated by section 16 First of the Shipping Act, 1916, resulted from the imposition by respondent of charges and conditions on all stevedores, including respondent's subsidiary.

The relationship between a terminal operator and a wholly-owned stevedore does not *ipso facto* render charges assessed and conditions imposed equally on all stevedores as unduly anticompetitive or discriminatory, especially in the absence of proof of actual damage to the complainant.

Assessment of charges and imposition of conditions upon stevedores found not to be reasonably related to the economic and commercial benefits derived by the stevedores, and thus to be an unjust and unreasonable practice within the meaning of section 17 of the Shipping Act, 1916.

Failure to file new assessed charges and imposed conditions in terminal tariff found to be an unjust and unreasonable practice within the meaning of section 17 of the Shipping Act, 1916.

The matter is remanded to the Administrative Law Judge for resolution of the sole issue of achieving a proper allocation formula with regard to actual benefits derived by stevedores from use of terminal facilities and for arriving at a proper charge against stevedores based thereon.

Edward S. Bagley for Baton Rouge Marine Contractors, Inc.
Edward Schmeltzer and *E.J. Sheppard IV* for Cargill, Incorporated.
Donald J. Brunner, Margot Mazeau and *Patricia E. Byrne* as Hearing Counsel.

REPORT

Decided Jan 3 1975

BY THE COMMISSION: (Helen Delich Bentley, Chairman, and James V. Day, Vice Chairman. Ashton C. Barrett and Clarence Morse, Commissioners, concurring and dissenting. George H. Hearn, Commissioner, concurring and dissenting.)

I. PROCEEDING

This proceeding arises from a complaint filed by Baton Rouge Marine Contractors, Inc. (BARMA or complainant) on March 29, 1971, alleging that Cargill, Inc. (Cargill or respondent) has violated and continues to violate sections 15, 16, and 17, Shipping Act, 1916 (the Act), by unilaterally modifying a lease agreement between Cargill and the Greater Baton Rouge Port Commission (Port), which agreement had previously been approved by the Commission. The subject modification allegedly imposed unlawful charges and conditions upon stevedores conducting business at the marine grain elevator at Port Allen (Baton Rouge), Louisiana, and was not filed with the Commission. BARMA seeks a cease and desist order.

Cargill denies any modification of the lease agreement, unilateral or otherwise, or that it has violated the Act. Respondent admits to having informed BARMA that it would not deliver grain from the elevator to any vessel employing a stevedore who had not agreed to certain proposed charges and conditions, but maintains that such action was lawful, proper and within the terms of its lease agreement. Hearing Counsel intervened in the proceeding.

Hearings were held in New Orleans, Louisiana on November 30 and December 1, 2, and 3, 1971, and on April 24 and 25, 1972, in Washington, D.C.

In his Initial Decision served December 1, 1972, Administrative Law Judge Ashbrook P. Bryant concluded that the charges assessed and the conditions imposed by Cargill upon the stevedores as a prerequisite to loading grain on vessels at Port Allen constitute a modification of the lease agreement between Cargill and the Port previously approved by the Federal Maritime Commission, and the execution of that modification without prior filing with and approval by the Commission violates section 15 of the Act. He also found that the charges and conditions imposed by Cargill, with minor exceptions, were not reasonably related to the economic or commercial benefit of the stevedore from the use of facilities and services provided by the terminal, and thus constitute unjust and unreasonable practices violative of section 17 of the Act. Accordingly, the Administrative Law Judge found that Cargill should cease and desist from assessing, charging and collecting the fees and charges and imposing the regulations found to be unlawful.

As to the possible section 16 violations, the Administrative Law Judge found that the relationship between a terminal operator and a wholly-owned stevedore does not in and of itself render charges assessed and conditions imposed equally on all stevedores unlawful as unduly anti-competitive and discriminatory, especially in the absence of proof of actual damage to the complainant. While a substantial competitive advantage may accrue to the parent-subsidiary combination from the assessment of charges and imposition of conditions on all stevedores, including the subsidiary, no unreasonable preference or privilege of the type contemplated by section 16 First of the Act has been shown.

BARMA filed exceptions to the Initial Decision on December 15, 1972, as did Cargill and Hearing Counsel on December 18, 1972. All parties filed replies to exceptions on January 12, 1973. Oral argument was held on March 7, 1973.

II. FACTS

Parties

BARMA, a Louisiana corporate entity, is equally held by four contracting stevedores and/or steamship agents, T. Smith & Son, Inc., Strachan Shipping Company, Atlantic & Gulf Stevedores, Inc. and Texas Transport and Terminal Co., Inc.

Cargill is incorporated in Delaware and with home offices located in Minneapolis, Minnesota. It is engaged in selling, loading, unloading, storing and delivering grain and related commodities, exporting much of the grain through 12 terminals it operates, including the Baton Rouge facility. At Baton Rouge, Cargill is engaged in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with common carriers by water.

Rogers Terminal and Shipping Corporation (Rogers) is a wholly-owned subsidiary of Cargill and operates as a general cargo and grain stevedore company/steamship agent with operative offices at Baton Rouge.

The Port owns the grain elevator herein discussed, and is a regulatory agency of the State of Louisiana. The Port is engaged in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with common carriers by water.

History

In 1955, the Port leased the grain elevator and wharf at Baton Rouge to Cargill. The four stevedore firms mentioned earlier, following encouragement by the Port, and with the assurances of Cargill that the elevator would remain open competitively, formed

BARMA to compete for stevedoring operations at the grain facility.

In August 1956, Cargill replaced BARMA with Rogers, its subsidiary, as sole stevedore on the grounds that BARMA's performance was deficient. Complainant was advised that it was no longer welcome at the elevator.

In March 1957, the Port and Cargill agreed that Rogers should be the exclusive stevedore at the elevator. BARMA refused to withdraw and protested the exclusive stevedore arrangement which was provided for in the lease which the Port and Cargill filed with the Federal Maritime Board (Board) for approval.[1]

While the Board approved the original lease (Agreement No. 8225), the amendment (Agreement No. 8225–1) was found to "create in Cargill a monopoly over activities which take place exclusively on the vessels and not on terminal property" and to be "detrimental to the commerce of the United States", and that its operation would constitute an unjust and unreasonable practice relating to the receiving, handling and storing of property in violation of section 17 of the Act.[2] The amendment was not approved. Accordingly, BARMA continued to operate as stevedore at the terminal on an "open" basis.

The lease

The lease, a comprehensive and detailed contract covering waterfront land and improvements, is for a term of 20 years from September 7, 1955 to September 6, 1975, with options to renew under certain conditions for additional periods of 10 years each. Cargill has the right to "have, hold, occupy, possess and enjoy the leased premises" during the term and any renewal periods "to the exclusion of all others save and except those using said leased premises with the consent, express or implied, of lessee." The obligations of both lessor and lessee with respect to repairs, renewals, maintenance, replacement and restoration of the premises not reimbursed through insurance proceeds are specified within the agreement, and the rights and obligations of the parties are to be integrated with the overall operations of the Port insofar as is possible without violating the other provisions of the lease. The leased facilities are to be maintained throughout the period of the lease, or any extended period thereof, as a public port facility.

[1]See *Agreements Nos. 8225 and 8225–1,* 5 F.M.B. 648 (1959). The further agreement [8225–1] was as follows: Cargill further is required to and agrees to provide and furnish stevedoring services to vessels loading or unloading at the wharf, it being recognized that vessels loading or unloading should be integrated into the overall elevator operations so as to provide efficient service, both to such vessels and to persons depositing commodities into the elevator. It is to be a reasonable rule and regulation in the operation of the wharf which is part of the leased property, for Cargill to condition the loading or unloading of a vessel upon the requirement that Cargill's integrated stevedoring service be used by such vessels.

[2]*Agreements Nos. 8225 and 8225–1, supra* note 1.

Lessee agrees that it will establish and enforce reasonable rules and regulations for the operation of the facility and will maintain and operate it in an efficient manner and will accept grain without "discrimination between persons desiring to avail themselves of such facilities, as to rates and services." To the extent feasible, lessee agrees to give "preference to this grain elevator over other grain elevators operated by lessee in the Gulf area." Further, lessee agrees to publish rates and charges for the handling and storage of grain competitive to those for similar services at New Orleans and other competitive Gulf ports so as to insure a schedule of rates, rules and regulations competitive and comparable to those maintained in New Orleans and other competitive Gulf ports.

So far as may be lawful, the Port agrees to give lessee "preferential privileges in and to the docks, wharves, roads, and railroad facilities necessary or convenient to the efficient and economical operation of the leased premises and the business conducted therein and thereon." The Port agrees to give Cargill the most favorable rates for services and facilities granted to any other person. The Port's rates shall be "competitive with, and not greater than rates for similar services and privileges charged at other Gulf ports, including but not limited to New Orleans, Louisiana; Galveston and Houston, Texas." Nothing contained in the lease shall be construed as prohibiting the Port from charging normal and competitive dockage fees chargeable to ships using the facilities, but wharfage charges chargeable against the grain shall not be charged by the Port. Cargill shall have the exclusive right to operate a public grain elevator "as defined by law" within the Port area and shall have right of first refusal on any additional grain storage and handling facilities which the Port may construct in the event that the present facilities become inadequate, "on such terms and for such payments as the Port is prepared to make to responsible third persons in good faith."

As before stated, the Board refused to approve the Cargill/Rogers exclusive stevedoring arrangement at Baton Rouge. This decision was appealed; and the Court of Appeals affirmed the Board's decision.[3]

In its report, the Board had described in some detail the relationships among vessel, master, stevedore, and elevator.

The relation between vessel and stevedore involves trust, reliance, and dependence on the skill, reliability, and efficiency of the stevedore in the performance of an important ship-operating function. Under the form of grain charter used in the Gulf, including Baton Rouge, the vessel owner appoints the stevedore, except where by special provision the right of appointing is given the charterer. In all instances, the decision on all matters of loading rests with the master, the vessel and her owners are legally and

[3]See *Greater Baton Rouge Port Commission v. United States*, 287 F.2d 86 (1961), cert. den. 368 U.S. 985.

contractually responsible for the proper loading and seaworthiness of the vessel, and they pay the cost of loading.

There is a complete separation of the function of the elevator in delivering grain and that of the vessel in receiving and stowing it. There is no physical connection between vessel and elevator except mooring and guide lines. The latter hold the spout which discharges the grain into the hatch under control of the stevedore. The elevator has completed delivery when the grain flows out of the spout. All remaining functions are those of the stevedore, who in effect takes over the ship's operation for the time being. The elevator personnel perform no function on the vessel; the stevedore personnel perform no services in the elevator or on the wharf. There is, of course, necessity for cooperation between the two groups as the stevedores must signal terminal personnel in order to control the flow of grain. (p. 651)

The division of responsibility and authority as defined by the Court and the Board remain largely unaltered and are presently operative at Port Allen.

In *New Orleans Steamship Assn.* v. *Bunge, Etc.*, 8 F.M.C. 687 (1965), an exclusive stevedoring arrangement was not ruled on by the Commission because it was determined that Bunge was not "an other person subject to the Act", and hence we had no jurisdiction. Subsequent to that decision, the Department of Justice, Antitrust Division, instituted an investigation into the exclusive stevedoring at Gulf grain terminals. Consent decrees were entered against several elevators, including Bunge and another elevator located on the Mississippi River below the Port of Baton Rouge, whereby the defendant elevator owners were enjoined and restrained from imposing "any requirement or understanding that stevedoring services of any particular person be utilized" at the elevators by vessels loading there and from "denying or otherwise restricting any person access to and the use of the facilities at the terminal or dock of an elevator in order to provide stevedoring services for loading at the elevator."

The injunctions did not, however, prohibit the elevator operator from establishing reasonable regulations for access and use of the facilities if such regulations were applicable to all.

In 1966 Cargill was served with a civil investigation demanded by the Justice Department concerning its elevator at Port Arthur, Texas, and had not, in the interim period, imposed any restrictions on the stevedores at Baton Rouge.

Cargill feels that marine terminal elevators provide benefits to stevedores for which the elevator should be compensated. In 1967, when the Houston elevator opened, Cargill instituted the stevedore agreement which has been in existence since that time. All of BARMA's members except T. Smith & Son, Inc., which does not operate at Houston, signed the agreement without complaint.

In 1970, four other Louisiana grain terminals instituted charges and agreements similar to the one at issue. Consequently, Cargill, in a letter of February 4, 1971, and revised February 10, 1971, informed BARMA and other stevedores using its Baton Rouge facility of certain conditions the stevedores must meet to use elevators. The basic agreement now in force provides as follows:

The stevedore will provide sufficient crews of longshoremen so that the elevator may operate at capacity. The stevedore will pay $100.00 per hour if he fails to provide enough longshoremen. The stevedore will post a $2,000.00 deposit to secure this obligation, and Cargill will pay interest on the deposit.

The stevedore will pay 5¢ per ton of grain handled for services and facilities provided to it by Cargill, and will pay $50.00 per vessel to defray the cost of cleaning the grain dock. The stevedore will post a $1,500.00 deposit to secure these obligations.

The stevedore will adhere to federal equal employment guidelines and regulations.

The stevedore will use utmost care in his operations, will hold Cargill harmless from damages caused by the stevedore's operations, and will provide evidence of adequate liability insurance coverage by companies acceptable to Cargill.

The stevedore will provide adequate supervision for his operations, which will be performed in a "workmanlike" manner.

BARMA protested the agreement, but was advised by Cargill that no vessels would be loaded unless the agreement was executed. Accordingly, BARMA signed the agreement under protest. BARMA and Rogers thereafter raised their rates to compensate for the charges imposed by Cargill.

Cargill's initial charges were 5¢ a ton. During the course of the hearings in this case, on December 17, 1971, Cargill advised the stevedores that the 5¢ charge would be increased to 8¢ per long ton, "effective 30 days after the date of the Federal Maritime Commission's decision in Docket 71–29. . . ."

By letter of February 13, 1971, the Port protested the proposed increase and requested Cargill to cancel or postpone the increase until it could be considered and legally resolved. While the Port did not intervene in the proceeding, its executive director testified that the Port considers Cargill's action in imposing "charges on vessels utilizing the facility or the stevedores hired by them to serve those vessels" as a violation of the lease agreement, "detrimental to the Port of Greater Baton Rouge", and tending to reestablish Rogers as an exclusive stevedore through the manipulation of the access charges and stevedoring rates. Since there are no access charges at the Public Grain Elevator in New Orleans, which is the primary competitor of the Baton Rouge Grain Elevator, the Port Commission fears that the Cargill charges against stevedores, which are being passed on to the vessel, may render the Port noncompetitive; however, there is no apparent substantiation of this fear.

III. INITIAL DECISION

The Administrative Law Judge initially looked to the lawfulness of the charges and conditions imposed by Cargill. Cargill's position, as earlier stated, is that its actions are, within the authority and powers granted to it under the lease, completely legal and no modification of its section 15 agreement has been effected.

BARMA and Hearing Counsel urge that Agreement No. 8225 has been unlawfully modified by Cargill's unilateral action. The Administrative Law Judge, in his consideration of the matter, reviewing the lease arrangement at Baton Rouge, found "reasonable doubt" that the original lease intended to and did clothe Cargill with authority to impose the charges and conditions it did.[4] In its brief, Cargill further contends that, *arguendo,* even if its actions resulted in a modification of the agreement, since that modification was unilateral (the Port having no part in the assessment of charges and conditions upon the stevedores) and not "joint or cooperative" as envisioned by section 15, such modification would not be subject to section 15 and thus not need Commission approval.

Hearing Counsel point out that there is no precise precedent for a unilateral modification within the purview of section 15, but that since section 15 agreements are not private contracts between private parties, the Commission has the duty to oversee such arrangements where they affect the maritime industry. Hearing Counsel argue that the fact that Cargill acted alone in imposing the charges and conditions does not divest the Commission of its authority to consider the import of the agreement.

The Administrative Law Judge determined that the Act does not permit substantial changes in the effect of a section 15 agreement to be taken lightly. Since the Act is remedial in this nature, any doubt should be resolved in favor of the applicability of section 15, and any modification of such an agreement except in unusually clear cases should be scrutinized by the Commission.

The Administrative Law Judge further observed that the modification did introduce an element into the agreement which was not contemplated at the time the lease was negotiated and, accordingly, ruled that the charges and conditions contained in Cargill's letters of February 10 and December 17, 1971, constituted a

[4]Cargill explains that the lease gives it only "preferential" and not exclusive use of "the docks, wharves, roads, etc." only because of a "peculiarity" of Louisiana law which prohibits a state body from "leasing" certain waterfront facilities, such as docks, to any person. Cargill asserts that in order to comply with this law and still give terminal operators and others a maximum degree of control over "premisses for which they are paying", the Port Commission has adopted a concept of "privileged use", which, according to Cargill, in every material respect is the same as a full lease.

modification of an approved agreement requiring section 15 approval.

The Administrative Law Judge, in viewing the Cargill/Rogers relationship found a situation "fraught with potential abuse", but found no specific evidence on the record to substantiate charges of undue economic disadvantage to BARMA or other stevedores and shippers. He found little doubt that a substantial competitive and economic advantage would accrue to the Cargill/Rogers arrangement from the imposition of the charges herein considered, but, said the Administrative Law Judge, it does not follow *ipso facto* that the charges and conditions are unlawful since the charges and conditions are imposed equally on all stevedores.[5] Accordingly, while the Administrative Law Judge felt the potential anticompetitive effect flowing from the parent-subsidiary relationship should be reason enough to closely scrutinize its charges and conditions for reasonableness, he found no proof of actual damage to BARMA and no unreasonable preference or prejudice resulting simply from the Cargill/Rogers relationship.[6]

As the "crux" of the case, the Administrative Law Judge addressed himself to the question as to whether the charges and conditions imposed on stevedores by Cargill as a prerequisite to doing business at Baton Rouge may be fairly and directly related to benefits derived from the use of the terminals, facilities and services performed by Cargill.

The Administrative Law Judge felt that no violence would be done to generally accepted principals of fairness if such were the case to require BARMA and others to pay for the benefits they receive.

Cargill maintains that the charges and conditions are fair. BARMA and Hearing Counsel contend that the facilities and services for which charges and conditions are imposed are not primarily for the benefit of stevedores, and hence, with a minor exception, are unfair and unreasonable.

The Administrative Law Judge then proceeded to discuss the Edwards-Differding Formula and the later Freas Formula used for the determination and allocation of costs in marine terminals in relation to the testimony of Philip E. Linnekin, Cargill's expert witness. Essentially, the Administrative Law Judge, in sifting down the testimony, came to the conclusion that the applicability of the Freas Formula can be affected by the judgment of a trained analyst, by agreement, and/or by custom and usage. To apply the Freas Formula, which

[5] Citing *Pittston Stevedoring Corp.* v. *New Haven Terminal Inc.*, 13 F.M.C. 33, 35 (1969).

[6] Citing *Lake Charles Harbor and Term. Dist.* v. *Port of Beaumont*, 12 F.M.C. 244, 248 (1969); *Phila. Ocean Traffic Bureau* v. *Export S.S. Corp.*, 1 U.S.S.B.B. 538 (1936); *Port of New York Authority* v. *AB Svenska, et al.*, 4 F.M.B. 202 (1953).

historically was applied to general cargo terminals allocating costs between vessel and cargo, to cargo and stevedores, while novel, does produce certain workable data, which the Administrative Law Judge referenced at length in his Initial Decision. Applying that data to formulate charges and conditions and thereafter imposing these charges and conditions upon stevedores is not unlawful, he found, provided the charges and conditions are fair, reasonable and related to facilities and services provided stevedores for their benefit. As support for this position, the Administrative Law Judge noted that several competitive grain elevators now assess similar charges and conditions, and there is no evidence of record that Baton Rouge has lost any vessels to the public grain elevators at New Orleans, although that elevator does not impose like charges and conditions.

The Administrative Law Judge discussed particular "benefits" to stevedores including a shipping gallery and grain dock. The shipping gallery is a "highly refined" mechanical conveyor system for delivering grain from the elevator to the vessel, without which it would take "scores of longshoremen moving grain in bags" to convey equal amounts of grain. The grain dock, a platform at the river end of the gallery, houses the machinery and the spouts which bring the grain into a position where it can be dumped into the vessel. Additionally, water, toilets, telephones, utilities and dock clean-up and liaison service are also benefits to the stevedores for which it is contended they should pay. Additionally, the Linnekin study allocates land rental charges to the stevedores.

The Administrative Law Judge then discussed each facility and service and arrived at the following conclusions:

1. *The shipping gallery.* According to the rule enunciated in *Greater Baton Rouge Port Commission* v. *United States, supra,* note 3, the function and responsibility of the stevedore does not attach until the grain is discharged from the loading spout over the hold of the vessel. The loading spout can be equated with "ships tackle" or "point of rest" wherein general cargo is considered delivered to the ship. The speed of transit of the gallery is an advantage to the elevator, not the stevedore. The Linnekin study allocated costs initially at the rate of 75 percent of the gallery rental to the stevedore, 25 percent to the cargo; then 50–50. The constructed charges under this theory appear duplicative of the charges to the holders of warehouse receipts, and accordingly the Administrative Law Judge found that the cost of the shipping gallery is not shown to be a proper and reasonable charge against the stevedores.

2. *Grain dock-wharf.* Linnekin states the wharf benefits stevedores because it allows ingress and egress to and from the vessel. However,

the Administrative Law Judge found that the vessel is the primary beneficiary of the wharf. However, the cost had been allocated 100 percent against the stevedores. The wharf included the entire barge unloading facility, pile clusters, the dust collection system, a multi-platform structure, upper and lower catwalks and the spouts. The Administrative Law Judge found that the barge unloading facility is used strictly for Cargill's benefit, the pile clusters are used exclusively by the vessels, and the dust collection system is used to avoid grain dust explosions.

3. *Water, toilets, telephones and utilities.* These items total $933.00 per year and include certain unsubstantiated charges. Basically, the stevedores are being charged for a Cargill-supplied sound powered telephone, fixtures, fuses, bulbs and labor and Cargill-furnished electricity for lighting the wharf. Under Cargill's tariff, the vessel is required to furnish adequate lighting for night reception of cargo.

4. *Dock clean-up and liaison service.* These items were allocated at four man-hours per day and costs thereof. The Administrative Law Judge found that the dock is cleaned only sporadically and "liaison fees" of $25,000 a year are unsubstantiated.

5. *Overhead expenses.* These were allocated at 2.3 percent to the stevedores. Such expenses included Cargill's overall terminal elevator administrative expenses (of which 16.88 percent was allocated to Baton Rouge), Minneapolis branch office administrative expenses, management fees, and New York office expenses.

The Administrative Law Judge summarized his findings as follows:

On the basis of the record the costs allocated to stevedores as the basis for the charges and conditions imposed by Cargill have not been shown to be reasonably related to use or benefit to stevedores from services and facilities provided by Cargill. The principal facilities upon which the charges and conditions are sought to be justified by Cargill are the shipping gallery and the wharf. Neither facility is maintained and operated principally for the benefit of stevedores. The contention that the "benefit" to the stevedore from the shipping gallery and the grain dock is the transportation of the grain one thousand feet from the elevator to the vessel is not valid. The stevedoring function and, hence this "benefit" to stevedores, does not begin, for all practical purposes, until the grain is delivered at the end of the spout. The fact that the mechanism of the shipping gallery permits more rapid delivery of the grain at the end of the spout benefits the cargo and, perhaps, the vessel. It does not appreciably benefit the stevedore. His function is to properly load the vessel with grain "delivered" by the terminal at the end of the spout over the hold. Cargill's function is to make grain available for loading the vessel by delivering it at that point. Without the shipping gallery in its entirety, Cargill could not deliver the grain from elevator to spout end. Also, the charge to stevedores for the shipping gallery duplicates the charge on holders of warehouse receipts for the same facility. No cost allocable to the shipping gallery may properly be charged to the stevedore.

Since the Port Commission, under the terms of the lease, charges vessels for the use of the wharf through dockage fees, no part of the cost of the wharf may properly be charged to stevedores. It does not appear that either the clean-up charge or the liaison charge is justified on the basis of this record. Nor is the allocation of overhead justified on the basis of the record.

The Administrative Law Judge thereafter discussed the four regulations Cargill has imposed upon the stevedores, to wit: (1) requiring execution of an agreement that the stevedores will exercise "utmost care" in conducting their operations, coupled with a contractual indemnity agreement; (2) insurance coverage in specified amounts written with companies acceptable to Cargill's reasonable satisfaction; (3) \$100.00 per hour liquidated damages for delays caused by stevedores; and (4) deposits totaling \$3500.00 to secure payment of the charges. The Administrative Law Judge found the standard of "utmost care" unreasonable and the indemnity agreements unfair as against public policy. He found the insurance requirement susceptible to abuse in that Cargill must be "reasonably" satisfied as to which company writes the policy. The \$100.00 per hour liquidated damage provision is a one-sided arrangement. The Administrative Law Judge felt that BARMA was entitled to a reciprocal clause. Lastly, he found the deposit of \$1500.00 to secure payment of the access and dock cleaning charge to be unreasonable and unsupported by facts; however, the \$2000.00 deposit to secure payment of liquidated damages was found to be reasonable, if Cargill posted a similar deposit for delays it caused.

One argument raised by Hearing Counsel in its Answer and rebutted by Cargill in its Reply was that Cargill's failure to file the subject charges and regulations in its terminal tariff is violative of section 17 of the Act. The Administrative Law Judge did not address himself to this issue in the initial decision, but we will consider it in our final determinations.

IV. *EXCEPTIONS*

Exceptions and replies were filed by all parties in the proceeding.

BARMA excepts to the initial decision on the single ground that it is in error as a matter of law, in that it fails to hold that the compulsory imposition of the charges against stevedores by Cargill in its dual role as a terminal operator and stevedore is unlawful *per se*, is unduly anticompetitive and discriminatory, constitutes an unreasonable preference or privilege in violation of 16 First of the Act, and is an unjust and unreasonable practice in violation of section 17 of the Act.

Complainant urges that because of the status of the Cargill/Rogers arrangement, it competes with BARMA and is thus levying charges against competitors, an illegal, anticompetitive practice. BARMA calls the Cargill/Rogers relationship a "sham", urging that all that transpires is that when Rogers pays the charges, money merely passes from one pocket to the other. Complainant compares this case to the Commission's decision in *California Stevedore & Ballast Co., et al.* v. *Stockton Elevators, Inc.*,[7] (hereinafter *Stockton*) and argues that *Stockton* demonstrates precisely why Cargill's scheme is unlawful: i.e., where a terminal operator seeks to compete as a stevedore, either directly or through a stevedore subsidiary, affiliate or subcontractor, any compulsory charge imposed by it against competing stevedores will be unlawful *per se*.

BARMA urges that the substantial competitive and economic advantage obtained by the Cargill/Rogers arrangement constitutes actual damage to BARMA, and because Cargill is capable of absorbing the cost, the practice will eventually put BARMA out of business.

Cargill, in its exceptions, supports the Administrative Law Judge's decision insofar as it finds that the charges and conditions imposed by Cargill have not harmed BARMA, are neither preferential nor discriminatory, and do not violate section 16 of the Act. Cargill takes issue with that portion of the initial decision which concludes that the charges and conditions constitute an unfiled modification of a section 15 agreement and that they are unjust and unreasonable practices in violation of section 17 of the Act. Cargill argues that the Administrative Law Judge erred in concluding that this case is an extension of its previous litigation, and contends that the two cases are not related at all.

Cargill essentially reargues its position that it acted unilaterally, and hence the charges it has established were not instituted pursuant to an agreement between Cargill and the Port. Respondent then cites several Commission cases wherein it was held that we have no jurisdiction under section 15 over unilateral action.[8] Cargill urges that it has not modified the initial lease agreement, and that a fair reading of the lease indicates that the Port meant to transfer plenary power to Car-

[7] 8 F.M.C. 97 (1964).

[8] See, *Agreement No. T-2423 Between the Port of Seattle, Washington & Pacific Molasses Co.*, FMC Docket No. 70–35, 12 S.R.R. 221, 222 (1971); *Agreement No. 9431, Hong Kong Tonnage Ceiling Agreement*, 10 F.M.C. 134, 140 (1966).

gill to deal with stevedores or any other third party at the elevator.

Cargill maintains that lease disputes should be settled by the parties and that the Commission should not act as an umpire of section 15 agreements. As further support for its arguments, Cargill cites *Boston Shipping Assn.* v. *Port of Boston Marine Terminal Ass'n.*,[9] where the Commission held certain joint activities, to wit: a change in allocation of a charge by parties to an approved section 15 agreement, did not constitute a new agreement or modification of the existing agreement. Cargill maintains that the present case, except for the joint activity, is identical, merely involving the shift of a charge from one party to another.

Cargill further argues that the Linnekin studies establish that benefits do accrue to the stevedores, contrary to the Administrative Law Judge's findings that the costs are not reasonably shown to be related to use or benefit to stevedores. Cargill calls this decision erroneous, stating that it demonstrates a complete lack of understanding of the Freas Formula and its use. Cargill urges that the Commission decision in *Rates and Practices of the Pacific Northwest Tidewater Elevators Ass'n.*,[10] in which the Commission at page 390 of that decision adopted the standard suggested by Mr. Linnekin that the Freas Formula (that the loading operation begins somewhere along the shipping gallery) should be controlling, and that the Administrative Law Judge rejects this holding without explanation.[11] Cargill urges reversal of this portion of the initial decision.

Cargill cites several "glaring errors" in the initial decision and discusses them as follows:

1. The Administrative Law Judge dismissed the "substantial testimony" that the stevedores benefit from the high output and rapid speed of the elevator.

2. The cost allocated to the stevedores "appears to be duplicative of the charges to holders of warehouse receipts"; Cargill does not find this on the record.

3. A cost item of $933 per annum for water, toilets, telephones and utilities was not susceptible to verification from underlying data. Cargill states its witness Pederson was available for cross-examination.

4. There are no figures to substantiate the sum of $25,000 for liaison

[9] 10 F.M.C. 409 (1967).

[10] 11 F.M.C. 369 (1968).

[11] Cargill surmises the reason for the Administrative Law Judge's rejection of the "controlling rule" is that the presiding Judge apparently thought that *Pacific Northwest Elevators, supra*, note 10, was inconsistent with the earlier court decision in *Greater Baton Rouge Port Commission, supra*, note 3. The two decisions are in no way inconsistent, says Cargill; *Greater Baton Rouge Port Commission* simply found that the Federal Maritime Board had jurisdiction over marine terminal elevators. In the *Pacific Northwest Elevators* case, seven years later, the FMC exercised this jurisdiction and set principles for cost allocation at the marine terminal elevators. In the instant case the presiding Judge was bound by the *Pacific Northwest Elevators* cost allocation principles.

services. Cargill states that, while it furnished no figures, it did give testimony of its liaison functions and employed full time help in this capacity.

5. Lastly, Cargill says the initial decision rejects any allocation for cost for overhead to stevedores, despite testimony of two expert accountants.

In summation, Cargill requests reversal of the initial decision and dismissal of the proceeding.

Hearing Counsel fully subscribe to the Administrative Law Judge's ultimate conclusions, except to strike and correct certain statements of fact,[12] listing them as follows:

1) Correct certain quoted language from the lease to conform to the specific language of Articles 7, 10 and 17 of the lease.

2) Modify the quoted conditions imposed by Cargill as set forth earlier in this report to read as follows: [13]

> The stevedore will use utmost care in his operations, . . . and will provide evidence of liability insurance coverage with limits as follows:
> Workmen's Compensation—as required by statute:
> Employers' liability including coverage under Federal Longshoremen's and Harbor Workers Compensation Act—$100,000;
> Comprehensive general liability including automobile:
> (i) bodily injury—$200,000 each person;
> (ii) $500,000 each accident;
> (iii) property damage—$500,000 each accident.

V. *REPLIES TO EXCEPTIONS*

BARMA replied to Cargill's exceptions urging that Cargill has a monopoly in the elevator pursuant to the section 15 agreement and that any actions taken under the agreement are subject to the agreement. BARMA then rebuts Cargill's reference to the "unchallenged" rule of *Boston Shipping, supra,* note 9, urging that the Commission is well aware that the Court of Appeals for the First Circuit reversed the Commission decision,[14] and that the controlling theory in this matter

[12] Such facts have been corrected herein, as necessary.

[13] The original language in the initial decision did not specifically state the limits and categories of insurance to be provided.

[14] See *Port of Boston Marine Terminal Ass'n.* v. *Boston Shipping Assn.*, 420 F.2d 419 (1st Cir.1970). BARMA urges, *inter alia,* that this case stands for the fact that modifications of section 15 agreement as well as the original agreement need Commission approval, quoting as follows:

> . . . Section 15 requires that "modifications", as well as the original agreement, receive the prior approval of the Commission. In Boston Shipping the Commission, without any discussion of the broad language of the act held that where, under the already approved agreement, there was power to fix charges, a change in incidence, as to who was obligated to pay, was not a modification requiring Section 15 filing and approval. In the light of the strictures expressed in VW, supra, n. 1, *this holding seems unsupportable. While, with some consistency, it represented the Commission's past reading of the statute, the Court in VW pointed to the "expansive language" of Section 15 and specifically rejected the binding effect of the Commission's administrative construction.* 390 U.S. 261, 272–73. (BARMA's emphasis).

is represented by *Volkswagenwerk* v. *F.M.C.*[15] BARMA urges again that Cargill's charges and conditions are not justified, and provide no benefit to the stevedore, and that, contrary to Cargill's contention, the decision in *Rates and Practices of Pacific Northwest Tidewater Elevators Ass'n., supra,* note 10, is erroneous and not controlling.

Cargill replied to the exceptions of BARMA and Hearing Counsel, urging that contrary to the position of BARMA, a terminal operator affiliated with a stevedore operating at that terminal may impose uniform charges against all stevedores operating at the terminal. To support this premise Cargill again cites the *Stockton Elevator* case,[16] urging that no evil results from its relationship with Rogers, as Rogers is also assessed the charges and such charges are reflected in Rogers' tariff. Cargill then refutes BARMA's claims of antitrust monopoly, and urges that BARMA's claims of economic injury are speculative and should be dismissed, as found by the Administrative Law Judge.

Lastly, Cargill urges that BARMA's attack upon the Linnekin study is improper and in error. Cargill agrees with Hearing Counsel's factual exceptions, but disagrees with Hearing Counsel's statement that the errors of the Administrative Law Judge do "not vitiate the ultimate conclusions reached by the Presiding Officer." Concluding its reply, Cargill urges rejection of BARMA's exceptions.

Hearing Counsel replied to Cargill's and BARMA's exceptions and attempted to clarify the record.

Hearing Counsel first address themselves to complainant's exceptions wherein BARMA urged that the Administrative Law Judge failed to find that where a terminal operator seeks to compete as a stevedore either by itself or through a subsidiary, any charges it assesses against competing stevedores would be unlawful *per se.* Hearing Counsel state that the Administrative Law Judge addressed himself to that point and properly decided that charges of this type need not be prohibited solely because one party against whom such charges are assessed is a wholly-owned subsidiary of the operator of the elevator.

Hearing Counsel then reviews complainant's argument concerning the *Stockton* case, wherein BARMA urges the Commission to impose a rule to prohibit any terminal operator with a stevedore subsidiary from assessing any compulsory charge, for any reason. Hearing Counsel say *Stockton* does not support such a conclusion.[17] In *Stockton,* it

[15] 390 U.S. 261, 19 L.Ed.2d 1090, 88 S. Ct. 929 (1968).

[16] See also, *Pittston Stevedoring Corp.* v. *New Haven Terminal, Inc.* 13 F.M.C. 33 (1969).

[17] Stockton was an elevator operator which employed Jones as its stevedoring subcontractor. It imposed a 15 cent noncompulsory equipment rental charge on all stevedores operating at its elevator *except* Jones. Stockton would bill the vessel on the basis of a flat charge which included all service rendered, the 15 cent charge, and its profit. In at least one instance, the 15 cent charge was not included in Stockton's bill to the vessel. In holding the charge violative of section 17, the Commission said:

We agree with respondent that the employment of one stevedoring subcontractor in preference to another or even was the ambiguous tariff, not the terminal operator/stevedore combination, that was the unreasonable practice.

BARMA, say Hearing Counsel, has been attempting to show an antitrust monopoly on Cargill's part. However, say Hearing Counsel, no facts have been adduced to prove this point.

Hearing Counsel then cite Commission precedent in similar matters as follows:

1. A terminal operator is entitled to a fair return on its investment and may make a fair and nondiscriminatory charge for the use of its facilities, citing *Stockton;*

2. Such a fair and nondiscriminatory charge may be assessed against stevedores, provided such a charge is reasonably related to services rendered by the terminal operator to or for the benefit of the stevedore, *Crown Steel Sales, Inc., et al.* v. *Port of Chicago,* 12 F.M.C. 353, 373 (1967); and *Pittston Stevedoring Corporation* v. *New Haven Terminal, Inc., supra,* note 5; and,

3. No discrimination results where charges are uniformly applied, *Boston Shipping Association* v. *Port of Boston Marine Terminal, supra* note 9; and *Terminal Charges at Norfolk,* 1 U.S.S.B.B. 357, 358 (1935).

Hearing Counsel submit that the Administrative Law Judge properly examined the evidence and applied the foregoing standard.

Turning its attention to Cargill's exceptions, Hearing Counsel state that respondent, in citing several cases,[18] misses the point of the decision in these cases, which, contrary to Cargill's interpretation, were decided on the single issue that no agreement was presented since one of the parties in each proceeding had withdrawn.

Hearing Counsel then argue that the Administrative Law Judge correctly determined that the charges and conditions constituted a modification of the section 15 agreement, which modification had not been filed with the Commission for approval.

Hearing Counsel take issue with Cargill's statement that it has plenary power to deal with stevedores and others. Stevedores, say Hearing Counsel, are hired by the vessel and subject to the master of the vessel. Further, the Port has promulgated rules for stevedores, and it

to the exclusion of another does not necessarily constitute an unreasonable regulation or practice under section 17 . . . [citation omitted]. But that is not the question here. The issue here does not concern who is to be respondent's subcontractor, rather it is the difference in treatment accorded by respondent to Jones, and to itself as a stevedore, on the one hand, as compared with the treatment of complainants on the other. This difference in treatment results from the imposition of the rental charge upon complainants, but not upon Jones. Moreover, it is not imposed *by* respondent acting as owner and operator of the terminal *upon* respondent acting in the capacity of a stevedore, in the same manner as it is imposed upon complainants. (Emphasis added.)

[18] *Agreement No. T-2423 Between the Port of Seattle, Washington and Pacific Molasses Co., supra* note 8; *Inter-American Freight Conference—Cargo Pooling Agreements,* 14 F.M.C. 58 (1970); and *Agreement No. 9431, Hong Kong Tonnage Ceiling Agreement, supra* note 8.

is therefore illogical to assume that the Port was transferring "plenary" powers to Cargill to deal with stevedores.

Hearing Counsel then argue that in spite of Cargill's urgings, the Administrative Law Judge distinguished the cases in relying upon the proper cases [19] rather than *Pacific Northwest, supra,* note 10, and properly rejected portions of Mr. Linnekin's testimony. Hearing Counsel find Mr. Linnekin's total testimony in the proceeding to be worthless.

Lastly, Hearing Counsel specifically refute Cargill's five specific errors as being without merit. Hearing Counsel, in summation, find the exceptions of both complainant and respondent erroneous, and urge their dismissal.

VI. *ISSUES*

The basic issues to be resolved by the Commission are as follows:

Section 15

Do the charges assessed and conditions imposed by Cargill on the stevedores as a prerequisite to loading vessels at Port Allen as set forth in Cargill's letters of February 10 and December 17, 1971, constitute a modification of the approved lease agreement between the Port and Cargill?

Section 16

1. Have Cargill's actions resulted in actual damage to BARMA?

2. Does the relationship between Cargill/Rogers *ipso facto* render the charges and conditions imposed on all stevedores equally unlawful as unduly anticompetitive and discriminatory?

3. Has unreasonable preference or privilege as contemplated by section 16 First of the Act been established from the charges and conditions imposed on all stevedores, including Cargill's subsidiary, Rogers, although substantial competitive advantage exists in the Cargill/Rogers relationship?

Section 17

1. Are the following charges and conditions reasonably related to economic or commercial benefits to stevedores from the use of the facilities and services provided by Cargill:

(a) Eight cents per ton of grain handled for services and facilities provided by Cargill;

[19] *Agreement Nos. 8225 and 8225-1, supra,* note 1; *Greater Baton Rouge Port Commission* v. *U.S., supra* note 3.

(b) $100.00 per hour liquidated damages for failure to provide sufficient crews of stevedores so that the elevator may operate at capacity;

(c) that stevedore will use "utmost care" in his operations;

(d) that stevedore will provide evidence of adequate insurance liability by companies acceptable to Cargill; and

(e) that deposits totaling $3,500.00 will be posted by the stevedore to secure payment of access, dock cleaning fees and liquidated damages for delays?

2. Should Cargill be ordered to cease and desist from those actions cited under the aforementioned issue found not to be reasonably related to economic or commercial benefits to stevedores?

3. Does the failure to file with the Commission notice of new charges and conditions imposed upon stevedores in Cargill's tariff result in an unjust and unreasonable practice in violation of section 17 of the Act?

VII. *CONCLUSIONS*

Section 15

It is our opinion that the Administrative Law Judge erred in finding that the charges and conditions imposed by Cargill's letters of February 10 and December 17, 1971, constituted a modification of the Commission-approved lease agreement between Cargill and the Port. Nowhere in the lease is there any restriction on lessee's granted authority to establish and maintain rates for the handling and storage of grain, saving only (a) lessee could not access dockage charges, that being reserved to the lessor, and (b) the rates for storage and handling grain must be competitive and comparable with rates at New Orleans and other competitive Gulf ports (Art. 10 of lease—Agreement FMC 8225).[20] In all other respects, relative to rates, rules, and regulations, Cargill was as free of restrictions as it would have been had it owned the facilities.

The lease did not require identical rates. The lease required only "competitive" rates, and, according to the record in this case, the fact that grain has moved and is moving in capacity volume via Baton Rouge is persuasive evidence that the rates are competitive. Some or all of the rates could even be higher than rates at New Orleans and other Gulf ports and still be "competitive" if Baton Rouge were a more efficient elevator, for it is the *aggregate* costs to the merchant (inclusive of speed in loading, waiting time, distance from the Gulf, dockage, etc.) which establish whether the rates are competitive.

[20] Article 10 of the lease also provides in part that the rates, rules, and regulations shall be subject "to the approval of public regulatory bodies having jurisdiction thereof."

What was the extent and scope of the approval given to this lease by the Federal Maritime Board in 1959? We take official notice of our own records relating to that approval action.[21] Our examination thereof discloses there are no conditions, restrictions, or qualifications contained in the Board's order approving the lease, and no record indication of Board consideration ever having been given to imposing conditions, restrictions, or qualifications on lessee's plenary power over rates, rules, and regulations. The Federal Maritime Board having approved plenary rate authority, this Commission may not lawfully modify, reduce, or restrict that approval without initiating and following the notice and hearing procedures established by section 15, Shipping Act, 1916, and section 9, Administrative Procedure Act.

The lease authorized lessee to establish *any* competitive rates for storing and handling grain, and that authorization was not restricted only to those rates or charges which may have been in effect when the lease was adopted. This was a long-term lease and the parties used broad, expansive language in the grant of ratemaking authority, for conditions and needs change with passing time. To have attempted to define every conceivable item of use or service for which lessee was free to assess charges or to make rules and regulations in this long-term lease would have been difficult.[22] Instead, the drafters wisely limited themselves to identifying only those things which the lessee was not permitted to do.

Cargill is operating under authority granted to it by and within the limits of the approved lease. The charges assessed by Cargill against stevedores constitute actions taken within the lease authority and do not constitute either a modification of the approved agreement or

[21] *Swift & Company* v. *Federal Maritime Commission*, 306 F.2d 277 at 281 (D.C. Cir. 1962).
". . . The Board must be given reasonable leeway in delineating the scope of the agreement and therefore the extent of its prior approval."
Trans-Pacific Freight Conference of Japan v. *FMC*, 314 F.2d 928 (9th Cir. 1963).

[22] An incomplete list of services, facilities, and uses made available by port elevators as indicated by terminal tariffs on file with this Commission (Koppel Bulk Terminal Tariff No. 1, FMC-T No. 1; North Pacific Grain Growers, Inc., Tariff No. 3) include the following:

Receiving (elevation) from truck, rail cars, barge
Shipping to vessels, rail cars, barges, trucks

Weighing in	Weighing out	Cleaning
Storage	Segregation	Drying
Smutting	Fumigation	Treating for weevil
Blending	Aeration	Cooling
Binning	Turning	Sampling and inspection
Wharfage	Dockage	Line handling charges

Fresh water
Rental of marine leg or sucker
Rental of spreaders and other equipment
Rental to stevedores of storage and office space
Electric power to vessel
Electric power to grain spreaders
Service and facilities charge

independent action by Cargill taken outside its lease authority. Thus, the charges and conditions imposed on the stevedores by the Cargill letters do not require further approval by the Commission under section 15. We, therefore, reverse those findings of the Administrative Law Judge with respect to the section 15 issue.

Section 16

With regard to the issue of actual damages to BARMA as a result of imposition of the new charges and conditions, we concur with the Administrative Law Judge. No evidence of record has been presented to show actual damage to BARMA as a result of the new charges and conditions.

We further concur with the Administrative Law Judge in his finding that the relationship between Cargill and Rogers did not in and of itself render unlawful the imposition of the charges and conditions imposed equally upon all stevedores. The record, while indicating that a situation exists that could give rise to discriminatory practices, does not indicate that any unlawful situation does in fact exist.[23] The Commission has long recognized the legality of terminal operators also conducting stevedoring operations. So long as the Cargill/Rogers relationship remains at arm's length, Rogers pays to Cargill the same eight cents per ton charges as BARMA and other stevedores and no competitive advantage is given Rogers over BARMA and its members, no unreasonable preference or privilege exists that would be violative of section 16 First of the Act.[24]

Reasonableness of Charges and Conditions

The primary issue before the Commission in this proceeding is whether the charges and conditions imposed upon the stevedores by Cargill are just and reasonable within the meaning of the second paragraph of section 17 of the Act, which provides:

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

[23] The record establishes that Cargill has billed and collected the charge in question both from BARMA and from Rogers. If, in order for Cargill to realize a fair return from capacity use of the facilities, Cargill requires, say, $100,000 revenue per year from the assessment on stevedores, then it is obvious that Cargill must collect the full charge per ton no matter who does the stevedoring. Thus, this is not a situation where Rogers will receive a competitive advantage for Rogers must pay the charges in order for Cargill to be made whole. The factual situation here is quite unlike that which existed in *California Stevedore & Ballast Co. v. Stockton Elevators, Inc.*, 8 F.M.C. 97 (1964), where the port elevator failed to assess a charge against its "house" stevedore but did assess the charge against all other stevedores.

[24] *Ballmill Lumber v. Port of New York Authority*, 11 F.M.C. 494 (1968); 12 F.M.C. 29 (1968); 13 F.M.C. 262 (1970); *Chr. Salvesen & Co., Ltd. v. West Mich. Dock & Market Corp.*, 12 F.M.C. 135, 141 (1968).

Respondents, in the operation of their grain terminal elevators, are "other persons" within the meaning of section 17 and as that term is defined in section 1 of the Act.[25]

Furthermore, the term "practice" as used in section 17 of the Act is associated with rates and charges.[26] We will thus discuss each charge and condition separately.

1. The service and facilities charge.

As previously discussed, this charge is to be assessed at eight cents per ton of grain handled for services and facilities provided by Cargill. Respondent contends that this charge is based upon the benefits derived by stevedores for use of its facilities, for which it contends it should be reimbursed. We accept this basic contention. The question then is whether the practices of respondent in its determination and allocation of costs are reasonable. We will examine only the factors which were used to determine the charge as to the reasonableness of each such factor. It therefore follows that if any one or all such underlying factors are found to be unreasonably related to the benefits derived therefrom by stevedores, then the practice of assessing charges based upon those factors is itself unreasonable.[27] This finding would not therefore preclude respondent from assessing a charge against stevedores based upon those supplied services and facilities that were found to be of actual benefit to stevedores.

The basis upon which Cargill seeks to assess the eight cents per ton charge arises under the following services and facilities provided: 1) the shipping gallery; 2) the grain dock-wharf; 3) water, toilets, telephones and utilities; 4) dock clean-up and liaison service; 5) overhead expenses; and 6) trimming machines.[28]

The specific description of each of the above services and facilities has heretofore been discussed under our review of the Administrative Law Judge's initial decision. We will thus only consider the underlying costs to Cargill of each item, the allocation of any or all of that cost to stevedores, and the reasonableness of such an allocation based upon the actual benefits derived by stevedores from the use or availability of that service or facility.

First, we will look at the shipping gallery. Respondent contends that one-half of the benefits derived by use of the shipping gallery flow to

[25]*California* v. *U.S.*, 320 U.S. 577 (1944).

[26]*Intercoastal Investigation, 1935*, 1 U.S.S.B.B. 400, 432 (1935).

[27]*Transamerican Trailer Transport Inc., et al.* v. *Federal Maritime Commission*, No. 24,019, 492 F.2nd 617, 624 (D.C. Cir., Jan. 28, 1974).

[28]By its letter of December 17, 1971, respondent advised the stevedores of its intention to raise the initial five cents charge (now in effect) to eight cents thirty days after the effective date of a decision by the Commission in favor of Cargill. This charge would absorb the earlier sought $50 per vessel dock clean-up charge, as well as one cent per ton charge for the use of trimming machines which was not contested.

the stevedores, the other half flowing to the cargo. Past applications of the Freas Formula to grain elevator operations have normally assessed one-half of the costs of the shipping gallery to the cargo and one-half to the *vessel.* The Commission has previously approved this allocation. *Rates of Pacific Northwest Tidewater Elevators Association, supra,* note 10. There, as here, Linnekin contended that the cargo benefits equally from the faster loading and greater efficiency made possible by the gallery by lowering the loading expenses. We concur with this contention. The controversy arises, however, over the allocation of the remaining full fifty percent to the stevedores.

The normal practice followed in past Commission proceedings would allocate this latter fifty percent to the vessel. Stevedores do not benefit from the speed and efficiency of the shipping gallery to the same extent as does either the cargo or the vessel under past applications of the Freas Formula. As stated above, the cargo benefits by incurring lower loading expenses. The vessel benefits by having to spend fewer days in port for loading operations, thus allowing it to transport more shiploads over a shorter period of time. But no such benefit can be equated to stevedores. In fact, it can be argued that the speed and efficiency of the shipping gallery works to the detriment of stevedores, providing shorter working hours by fewer men and therefore less revenues to the stevedores. We recognize that the costs associated with the use of the shipping gallery are allocable to those who derive an economic and commercial benefit from the use thereof. We do not, however, recognize that the stevedores fall into this recipient category, at least not to the degree as that of the cargo or the vessel.

As Linnekin has stated and past Commission decisions have approved, the cargo benefits to the extent of fifty percent of the allocable expenses associated with the shipping gallery. The remaining fifty percent of allocable expense is thus attributable to the other two beneficiaries, namely the vessel and the stevedore. But not all of this remaining fifty percent can be attributable to the stevedore or the vessel individually. A portion of this remining fifty percent is allocable to each, and any charge sought to be imposed upon either must be based entirely thereon. Therefore, the allocation of a full fifty percent of the costs of the shipping gallery to the stevedores is an unreasonable practice within the meaning of section 17 of the Act.[29]

A similar conclusion is reached with regard to the allocation of the

[29] The charges associated with the shipping gallery are "wharfage" within the definition of that term under Commission rules (46 CFR 533.6(d)(2)). Inasmuch as the lease only precludes Cargill from assessing "dockage" against the vessel (46 CFR 533.6(d)(1)), this charge would be assessable against the vessel to the extent sought to be imposed on the stevedores.

total costs of the grain dock and wharf to the stevedores. The Commission in the *Pacific Northwest Elevators* case approved allocation of the total costs of the grain dock to the *vessel*. However, in this proceeding the terms of the lease between Cargill and the Port preclude Cargill from charging dockage to vessels calling at its facilities. Charges associated with use of the grain dock-wharf analogous to normal dockage charges against vessels are not chargeable to the stevedores. There is, however, no prohibition against charging wharfage to the vessel.

Stevedores benefit from the privilege of ingress and egress from the vessel and to some degree from the use of the spouts, but in no way can the total cost for the use of the dock be attributed to stevedores. The cargo benefits from the use of the spouts, as does the vessel for the same reasons they benefit from use of the shipping gallery. We, therefore, concur with that finding of the Administrative Law Judge that the charge, inasmuch as it relates to use of the barge unloading facility, the pile clusters, the dust collection system, and the spouts to the extent assessable against cargo or vessel, is an unreasonable practice under section 17.

The record provides scant evidence regarding the assessments of charges for the various utilities and overhead expenses associated with Cargill's operation. However, the allocation to stevedores of $933.00 per year for water, toilets, telephones and utilities does not appear to be so unreasonable as to justify disapproval. Nor does the amount of overhead expenses allocated to the stevedores appear to be unreasonable. The costs associated with the use of the trimming machines were not contested.

Those costs, however, which are associated with dock clean-up and liaison service have not been justified on the record. The evidence presented shows that the docks are cleaned only sporadically and that the $25,000 per year for liaison services was unsubstantiated. Those portions of the overall costs which are based upon these factors have therefore not been shown to be reasonably related to the benefits derived therefrom by the stevedores. As such, we find the assessment of any charges based upon these services and facilities to be unreasonable practices within the meaning of section 17 of the Act.

In weighing the overall effect of the various factors used to derive the eight cents per ton charge, we find sufficient unwarranted allocations of costs to stevedores to sustain a finding that the imposition of any charge which was compiled by use of any of the aforementioned unwarranted cost factors to be an unreasonable practice under section 17. Respondent should thus cease and resist from assessing such charges where based upon costs of services and facilities found herein to be unassessable against stevedores.

2. The conditions sought to be imposed.

We find that the imposition of an indemnity requirement of $100 per hour for delays caused by failure to provide sufficient numbers of longshoremen to be an unreasonable practice within the meaning of section 17. This is a one-sided requirement with no compensation awarded to stevedores for delays caused by Cargill. Likewise, the requirements for use of "utmost care" in its operations, for evidence of adequate liability insurance coverage insofar as the insurance companies must be acceptable to Cargill, and for posting deposits to secure payment of the service and facilities charge and the delay indemnity charges are found to be equally one-sided and thus unreasonable practices within the meaning of section 17. With regard to the insurance requirement, it would appear to be sufficient to accept insurance coverage from any company licensed to do business in Louisiana.

Failure to File Schedule of Charges.

The Commission's General Order 15 (46 CFR 533) provides in section 533.3 that all terminal operators (with certain exceptions not applicable here) file ". . . a schedule or tariff showing all its rates, charges, rules, and regulations relating to or connected with the receiving, handling, storing, and/or delivering of property at its terminal facilities." As noted earlier, the Administrative Law Judge did not address this issue in his Initial Decision. We, however, consider that respondent's failure to comply with the aforementioned provision to be an unreasonable practice in violation of section 17 of the Act, and as such do hereby order that respondent file forthwith any and all charges and conditions within the limits authorized by this decision which Cargill intends to impose. We further direct Cargill to cease and desist from all practices found unreasonable herein.

REMAND TO ADMINISTRATIVE LAW JUDGE

We adopt the recommendation of Commissioners Barrett and Morse in their concurring and dissenting opinion that the case be remanded to the Administrative Law Judge for a resolution of the sole issue of the proper allocation of services and facilities benefits to stevedores based upon actual use as outlined in this report, in order to arrive at a charge that can be properly assessed against the stevedores.

Commissioners Ashton C. Barrett and Clarence Morse, concurring and dissenting:

We are not appointed to simply call "balls and strikes". Rather, we are appointed to develop a full record in all cases and to decide matters on their true merits and in the overall public interest and not on mere procedural shortcomings or on incomplete or inadequate record.[30] If there is any question still remaining in the minds of the majority that there exists a reasonable relationship between costs/ benefits and the assessment charge in this proceeding, we recommend the matter be remanded for a resolution of this issue, including additional evidence, if necessary.

We are in agreement with Chairman Bentley and Commissioner Day that the charges assessed and the conditions imposed by respondent upon all stevedores operating at the leased terminal facility constitute activities and charges falling within the scope of Agreement No. 8225 and do not constitute a modification to an approved section 15 agreement for which further Commission approval is required.[31]

We are in agreement with Chairman Bentley and Commissioners Day and Hearn that no unreasonable preference or privilege as contemplated by section 16 First of the Act resulted from the imposition by respondent of charges and conditions on all stevedores, including respondent's subsidiary.

We are in agreement with Chairman Bentley and Commissioners Day and Hearn that the relationship between a terminal operator and a wholly-owned stevedore does not *ipso facto* render charges assessed and conditions imposed equally on all stevedores unduly anticompeti-

[30] *Isbrandtsen Co., Inc.* v. *United States,* 96 F.Supp. 883 at 892 (1951), aff'd. per curiam 342 U.S. 950, quoting with approval: ". . the following views of Commissioner Aitchison of the Interstate Commerce Commission concerning the obligations of administrative agencies: 'They are not expected merely to call balls and strikes, or to weigh the evidence submitted by the parties and let the scales tip as they will. The agency does not do its duty when it merely decides upon a poor or nonrepresentative record. As the sole representative of the public, which is a third party in these proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are adduced when the parties have not put them in . . . The agency must always act upon the record made, and if that is not sufficient, it should see the record is supplemented before it acts. It must always preserve the elements of fair play, but it is not fair play for it to create an injustice, instead of remedying one, by omitting to inform itself and by acting ignorantly when intelligent action is possible . . .' "

[31] It has been contended that these actions by Cargill constitute an unapproved "unilateral modification" of the approved lease. Absent implied, tacit, or actual consent by Port to the "unilateral modification", we are unable to find an "agreement" between two or more persons approvable under section 15. *American Mail Line Ltd.* v. *Federal Maritime Commission,* ___ F.2d ___ (CA-DC, June 28, 1974), Slip Opinion page 19: "A unilateral undertaking by a single party does not constitute a section 15 agreement." There may be unilateral action taken by one person beyond the scope of the approved section 15 agreement, but that purely unilateral action is not, itself, a section 15 "agreement". As said in *Transshipment Agreement,* 10 F.M.C. 199, 215 (1966): "It Takes Two to Tango". One who acts unilaterally beyond and outside the scope of an approved agreement subjects himself to the penalties of the Shipping Act, 1916, as well as to antitrust. *Carnation,* 383 U.S. 213.

Commissioner Hearn interprets the approval of Agreement No. 8225 as not authorizing Cargill to make the 5¢ charge against stevedores. Although in this respect the majority is opposed to Commissioner Hearn's views, additional comment is appropriate. *Swift & Company* v. *F.M.C.,* 306 F.2d 277, 281 (1962) holds:

"The Board must be given reasonable leeway in delineating the scope of the agreement and therefore the extent of its prior approval."

In our opinion, a "delineation" may only be made with the greatest of caution and only after a thorough review of the record and with all appropriate due process safeguards, for, unlike a "modification" under section 15 which has only prospective application and is made only by order, after notice and hearing, a "delineation" has both prospective application and retroactive application, with possible serious economic, Shipping Act, 1916, and antitrust implications, particularly in respect to activities taken prior to the "delineation". Such a review has not been made by the Commission in this case.

tive or discriminatory. On this record there was no proof of undue competition or discrimination.

We are in agreement with Chairman Bentley and Commissioners Day and Hearn that respondent's failure to publish and file the charges and conditions in its terminal tariff is an unjust and unreasonable practice within the meaning of section 17 of the Act.

We agree with Chairman Bentley and Commissioners Day and Hearn that the $100 per hour liquidated damages for delay provision is an unreasonable practice under section 17 of the Act.

We differ with Chairman Bentley and Commissioners Day and Hearn in their conclusions that the 5¢ service and facilities charge [32] is an unreasonable practice under section 17 of the Act.[33] We find and conclude that said charge is lawful, is adequately justified on this record, and its determination, assessment, and collection is not an unreasonable practice under section 17 of the Act.

We adopt the findings of fact set forth in Part II of the above report of Chairman Bentley and Commissioner Day which are not in conflict with the following supplemental findings:

BARMA has been operating continuously as a stevedoring contractor [34] at the Cargill elevator since the inception of the latter's operations in 1955. In 1956, Rogers, Cargill's wholly-owned subsidiary, began operating in competition with BARMA.

Under the lease, dockage is the only fee the Port may charge vessels calling at the grain elevator. The Port's tariff states that all other fees, rules, and regulations pertaining to the grain elevator are to be found in Cargill's tariff.

The charges and regulations complained of herein are similar to those presently in force at a number of grain elevators in the Gulf area, including Cargill's elevator at Houston, and have been assessed by Cargill to all stevedores operating at Port Allen, including its wholly-owned subsidiary Rogers.

Cargill retained Mr. Phillip E. Linnekin, a partner in the interna-

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[32]The majority's consideration of the projected 8¢ charge rather than the 5¢ charge now assessed by Cargill is a source of confusion. The charge in effect at the time of hearing and at the present time is 5¢. The 5¢ charge may be raised in the future to 8¢. At the 5¢ rate, Cargill also assesses an additional $50 per vessel to cover dock cleaning. This $50 charge will be eliminated when the 8¢ charge goes into effect. As a result, discussion of the $50 dock cleaning charge with respect to the 8¢ rate is irrelevant and results in a finding of unreasonableness with respect to a nonexisting charge.

[33]The majority states that "Charges associated with use of the grain dock-wharf analogous to normal dockage charges against vessels are not chargeable to the stevedores." The 5¢ charge, however, is neither "analogous to a normal dockage charge" nor is it associated with docking. Dockage is strictly limited to the vessel's *privilege of berthing*—a "parking fee" for vessels. Cargill's 5¢ charge, on the other hand, is a charge for the *use* of the terminal facilities and equipment furnished by Cargill and used by the stevedores in the *handling of cargo.* 46 CFR 533.6(d)(1); *Pacific Northwest Elevators Ass'n, supra,* at 403.

[34]Sometimes referred to as "the stevedore". The term "stevedore" as used herein may mean either the stevedoring company (for example, BARMA), or the employee of the stevedoring company. The employee of the stevedoring company is more accurately called a longshoreman, but is not infrequently called a stevedore. Hence, when the term "stevedore" is used it may mean, depending upon the context, either the stevedoring company or the longshoreman. As used herein, the term "stevedore" usually refers to the stevedoring company.

tional certified public accounting firm of Main Lefrentz & Co., to study the propriety and reasonableness of these charges. Mr. Linnekin, an expert in this field, has appeared before the Commission in numerous proceedings and assisted in the development of the so-called Freas Formula which forms the basis for his allocations and methodology in this proceeding. Previous studies in other proceedings were initiated for the purpose of allocating terminal costs between vessel and cargo only. Mr. Linnekin's study in this proceeding considers and justifies the imposition of charges against stevedores on the ground that the stevedores use the terminal facilities and receive benefit from the use thereof.

Mr. Linnekin classified the leased property into the categories of "land" and "improvements". He valued the land on the basis of its original cost, and the improvements on the basis of the original undepreciated construction cost.[35] He determined that the percentages these two categories bear to the total combined value of the land and improvements amounted to 5.4% and 94.6% respectively. Applying these percentages to Cargill's annual rental payments of $673,600, he determined the amount of said payments applicable to each category as $36,374 to land and $637,226 to improvements. Of the land rental, he allocated 7% to the stevedore for the grain dockwharf, and 93% to cargo.

The largest item allocated to the stevedore is rental allocable to the shipping gallery and to the grain dock-wharf.

The shipping gallery is a conveyor system for the delivery of grain, approximately 1,000 feet long, running from the elevator headhouse to the loading spouts situated on the wharf. It delivers the grain at a loading speed of 1,000 tons per hour and thus permits a faster loading of the vessel than would be possible at a less efficient and less modern facility or by manual loading and stowing of the vessel.

Improvements made by Cargill to the elevator terminal facilities increased the annual volume of grain available for shipment and hence the loading capacity. The turnover rate is 16.5, i.e., the elevator is emptied and refilled sixteen and one-half times during a one-year period. The loading capacity of the elevator has been increased from the original 20 million bushels a year to 113 million bushels in 1971.

Inasmuch as the flow of grain to the vessel is directed by the stevedore's employee (the longshoreman) in respect to the loading and trim of the vessel, the stevedore's function commences at a point somewhere between the headhouse and the water end of the shipping gallery. It is unnecessary in this proceeding to determine where precisely that "point" lies.[36]

[35]Utilization of fair market value or original cost depreciated or other valuation formula would have had but *de minimis* effect on the end results in this proceeding.

Questions of ultimate responsibility as to the delivery of the grain at the end of spout or elsewhere, or questions when transfer of title to the grain ultimately occurs, or questions whether the shipper, the vessel, or the consignee ultimately pays the stevedore are questions arising under sales contracts and charter parties and have nothing to do with the question whether the stevedore receives a benefit from the use of the shipping gallery and of the wharf for which a charge may be made.

Mr. Linnekin excluded the portion of the shipping gallery which extends over the wharf from his definition of the shipping gallery. He allocated 50% of the balance of the shipping gallery to stevedores and 50% to cargo.

The wharf, referred to herein also as grain dock-wharf, situated at the water end of the shipping gallery, houses the loading spouts through which grain is discharged into the hold of the vessel. The lower part of the wharf is also used by the stevedore for access to the vessel. Mr. Linnekin defined the wharf so as to exclude the barge unloading facility and dust collection system and to include that portion of the shipping gallery which extends over the wharf from the point that the two form a "T". He allocated 100% of the rental allocable to the wharf to the stevedore.

The spillage of grain on the wharf as well as dust generated by loading operations creates a safety hazard which requires cleaning of the grain dock-wharf after vessel loading. Cleaning the grain dock-wharf requires approximately 16 man hours and may be done only when the dock is free of vessels.[37] Cargill's personnel spent an average of four man hours a day on dock cleaning, at a cost to Cargill in 1971 of $6,045. The $50 per vessel charge will be incorporated in the proposed charge of 8¢ per ton loaded.[38]

A full-time employee of Cargill is available 24 hours a day, seven days a week, for liaison service to the stevedore. This includes the relay of messages to and from the stevedore and assisting the stevedore in planning and preparing stowage of the vessel, at a cost to the

[36]The statement in *Greater Baton Rouge Port Commission*, 5 F.M.B. 648 at 651, quoted in the majority report, that the function and responsibility of the stevedore does not attach until the grain is discharged from the loading spout is misleading. It is true that physical contact by the stevedore does not occur prior to that time, but directive control over the movement of the grain from the headhouse at the elevator end of the shipping gallery, through the shipping gallery, and thence to the loading spouts is vested in the stevedore's employee (longshoreman) and is effected by signals from the longshoreman to the elevator employee at the headhouse controls. Furthermore, the longshoreman manually moves the direction of the spouts to assure that the grain flows into the proper hatches and areas within the ship's holds. Thus, it is clear that for the purpose of allocating costs as between elevator, cargo, ship, and stevedore, the "point of rest" is definitely somewhere in the area between the headhouse and the wharf. Linnekin utilized that point of rest for cost and benefit allocation purposes.

[37]143 vessels spent 260 loading days at the terminal in 1971.

[38]The Port Commission tariff also contains a similar charge of $50 per vessel of 3,000 net tons or more, for the cleaning of its general cargo docks.

respondent of $25,000 per annum. In light of the services rendered the stevedore, the liaison charge is fully justified.

The 2.3% of the total elevator overhead allocated to the stevedore is based on the percentage that total projected annual revenue from charges against the stevedore bears to the elevator's constructive gross revenue.

The lease authorizes Cargill to assess a facilities and user's charge against stevedores.

The rates and charges assessed by Cargill for the handling and storage of grain are competitive with rates and charges for similar services at other Gulf ports, including, but not limited to, New Orleans.

There is no duplication between the charge assessed by Cargill against the stevedore and the dockage charge assessed by the Port against the vessel, or Cargill's charge to holders of warehouse receipts.

In determining if the 5¢ charge against stevedores is lawful and justified on this record, we must apply the following basic principles of law applicable to terminals:

1. Our ratemaking jurisdiction over rates of terminals rests solely on the second paragraph of section 17 of the Act.

2. We do not have ratemaking power, comparable to our ratemaking authority over common carriers in our domestic off-shore commerce, to establish the rates to be charged.[39]

3. We have jurisdiction only to halt rates or practices which we find are unreasonable or unjust and have limited power to translate these statutory prohibitions into "dollars and cents" terms by establishing a minimum or maximum rate.[40]

4. It is an unjust and unreasonable practice for a terminal to provide free or charge noncompensatory rates for services or use of facilities for such practice results in imposing a disproportionate share of the

[39] The Commission does not possess the ratemaking authority over terminal operators under section 17 to the extent of that authority which is held over carriers by authority of the Intercoastal Shipping Act of 1933. *California v. U.S., supra. City of Los Angeles* v. *F.M.C.*, 385 F.2d 678 (1967). In this area, there need be only a reasonable relationship between the charges assessed and the services or benefits provided. *Volkswagenwerk* v. *F.M.C., supra*, at 282. *Evans Cooperage Co.* v. *Board of Commissioners*, 6 F.M.B. 415, 418 (1961).

[40] *City of Los Angeles* v. *F.M.C., supra*, at 681:

"The tariff filed by a port is significantly different from the tariff filed by a common carrier. With respect to the former, the Commission is only authorized to halt rates or practices which are unreasonable or discriminatory. Subject to its limited power to translate these statutory prohibitions into 'dollars and cents' terms by establishing a maximum or minimum rate, the Commission has no ratemaking power with respect to ports. The situation is much different with respect to common carriers, for Section 18 of the Act, 46 U.S.C. §817, explicitly gives the power to establish the rates to be charged and the carrier is obligated to abide by its effective tariff without exception on pain of criminal fines. We are not prepared to say that the Commission was required to do what Congress has refrained from doing and expand section 18 so as to include ports."

Rates and Practices of the Pacific Northwest Tidewater Elevators Assn., supra—see disclaimer at 371.

This is not intended to suggest that we do not have jurisdiction to correct undue preferences or advantages, etc., under section 16 and other sections of the Act.

cost of the terminal on other users of other terminal services or facilities.[41]

5. In establishing the lawfulness of a charge under section 17, a terminal need establish only that the charge is reasonably related to the service or benefit.[42]

Several things are to be borne in mind. First, the Freas Formula which has been utilized by the Commission is but one formula or means which may be utilized to equitably spread the costs of owning and operating a port terminal amongst the various users of the facility. The Freas Formula does not purport to be the sole formula or necessarily the best formula. It is adequate, well recognized, and widely used on the Pacific Coast. It should not be used to defeat charges which legitimately should be assessed. The "objective" of the Freas Formula "is to determine costs"; hence, "no consideration was given to value of service and other factors which must be considered in determining the level of the rates." Its objective is explained in *Terminal Rate Structure—California Ports,* 3 U.S.M.C. 57, 59–61 (1948), where all wharfinger expenditures were apportioned to vessel and cargo *only* because in that proceeding vessel and cargo were the only interests involved. A vessel was held liable to the terminal for all usages and services from, but not including, point of rest on outbound traffic; all other wharfinger costs were assessed against cargo.

Second, because under the original Freas Formula, all wharfinger costs were allocated as between vessel and cargo, it would appear unnecessary to belabor the fact that a charge may nevertheless be

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[41] *Practices, Etc., of San Francisco Bay Area Terminals,* 2 U.S.M.C. 588, 603 (1941). *Investigation of Wharfage Charges at Pacific Coast Ports,* 8 F.M.C. 653, 657 (1965): The Commission, in Docket 555, ". . . found also that the failure of a port terminal to charge compensatory rates for a particular service casts an unfair burden on users of other service in violation of sections 16 and 17 of the 1916 act."

[42] *Volkswagenwerk Etc.* v. *F.M.C., supra,* at 282: The test is ". . . whether the charge levied is reasonably related to the service rendered."

Evans Cooperage Co. v. *Board of Commissioners, supra,* at 418:

"The first, second, fourth, sixth and tenth exceptions in effect say that the charges are unreasonable because no specific service is rendered to the complainant and that the Examiner did not consider the evidence showing this. The Examiner, however, considered evidence that wharf tollage does not necessarily cover expenses and services directly rendered to the cargo and also gave weight to the opinions of complainant's witness on this point. The Examiner found that complainant's barge and the cargo involved enjoyed substantial benefits from the services and facilities provided by the respondent. Complainant's barge was tied to the ship and such mooring would not be possible unless the water berth was dredged deep enough to accommodate the ship and unless the mooring facilities were adequate for the ship. Police protection was also present and not denied to the complainant regardless of the fact that direct vision by the policeman might be difficult. The fire tug was available for protection without extra charge having been levied thus far except for the cost of chemicals used in fire fighting. Both forms of protection had to be paid for by users of respondent's property as well as those who shared in overall benefits, including incidental benefits, of the commission's facilities. The fact that the operators of the ship must also pay charges was considered and not found to be controlling.

"Complainant contends that by definition it is an essential element of wharf tollage that the cargo pass over the wharf and that the charge should be for the use of the wharf to avoid being unreasonable. We do not need to be too concerned about other definitions of wharf tollage. The commission has made a charge to help defray its costs of operating facilities as measured by cargo handled in the area and the only question is whether its facilities are being used and the commission is performing a service reasonably related to its charges. The Examiner considered the evidence and found that it was."

assessed against stevedores or carloaders or other persons for services provided to them or for facilities made available to them and from which they derive benefits. Hence, if a terminal makes a grain spreader available to a stevedore, the Freas Formula does not prevent the terminal from assessing a fair charge for use of that grain spreader. See *Crown Steel Sales, Inc., et al.* v. *Port of Chicago, supra.* The same reasoning applies to a charge against stevedores for benefits received by them in respect to utilization of the terminal facilities.

Chairman Bentley and Commissioners Day and Hearn concur in the view that a charge would lie against stevedores for benefits from utilization of the facilities, but, so they contend, the record fails to disclose that "the practices of respondent in its determination and allocation of costs are reasonable." We disagree with that latter conclusion. This is not a conventional rate case. The proofs required to establish a reasonable relationship between the charges assessed and the benefits received need not be made with anything like the degree of precision required in a rate case. See *Evans Cooperage, supra,* where the Commission allowed a charge, stating at 419:

> In view of the finding that there can be no precise equivalence between services rendered and the charges, we would agree with the Examiner that the record contains no basis upon which reasonable allocation of costs could be made. *Terminal Rate Structure—California Ports,* 3 U.S.M.C. 57, 60, 69 (1948).

Despite absence of basis upon which reasonable cost allocations could be made, the charge was allowed because of an affirmative finding that on the facts of that case there could be no precise equivalence between services rendered and the charge assessed. The same principle applies here.

The error of Chairman Bentley and Commissioners Day and Hearn lies in a too narrow adherence to the principles of the original Freas Formula, entirely overlooking and disregarding the stated objective in *that* case of allocating wharfinger *costs* as between vessel and cargo *only.* Actually, the Freas Formula promulgated in 1948 in *Terminal Rate Structure—California Ports, supra,* has been expanded in *Investigation of Wharfage Charges at Pacific Coast Ports, supra,* to authorize wharfage charges at grain terminals (which terminals did not exist on the Pacific Coast at the time the Freas Formula was adopted) as being wharfinger "special facilities" and in *Crown Steel Sales, Inc., et al.* v. *Port of Chicago, supra,* it was recognized that the Freas Formula "must be varied to recognize local differences in practices, procedures and objectives." That case held, in part, at 373:

> All costs should be apportioned to the various services concerned. There is no question that facility costs are being incurred in connection with (a) stevedoring, (b) truck loading, and (c) wharfage. These costs should be distributed accordingly and the stevedoring

portion recovered by the stevedoring business through their contract rates charged the vessel, the truck loading portion by the terminal operators through their truck loading charges or some tariff charge against the cargo, and the wharfage portion through wharfage charges coupled with reduced rents. Although no exhibit was presented, Mr. Linnekin testified that, using actual costs revealed in respondents' operating statements which were disclosed to complainants, he calculated and applied facility costs in accordance with the service apportionment provisions of the Freas Formula. Eventually, of course, the apportionment of terminal service costs for given commodities, as between cargo and vessel, becomes academic because all such costs as well as those of the water transportation are ultimately borne by the cargo importer.

Chairman Bentley, Commissioners Day and Hearn state:

The normal practice followed in past Commission proceedings would allocate this latter fifty percent to the vessel. Stevedores do not benefit from the speed and efficiency of the shipping gallery to the same extent as does either the cargo or the vessel under past applications of the Freas Formula. As stated above, the cargo benefits by incurring lower loading expenses. The vessel benefits by having to spend fewer days in port for loading operations, thus allowing it to transport more shiploads over a shorter period of time. But no such benefit can be equated to stevedores. In fact, it can be argued that the speed and efficiency of the shipping gallery works to the detriment of stevedores, providing shorter working hours by fewer men and therefore less revenues to the stevedores.

Crown Steel squarely refutes the generalized statement that "The normal practice followed in past Commission proceedings would allocate this latter fifty percent to the vessel."

That statement is also misleading when it "argues" that "less revenues [accrue] to the stevedores." If it means fewer longshoremen are employed and less longshore wages paid, then it is correct. But longshoremen are not parties to this proceeding, and the impact on them was not an issue in the case. If it means what it says that less "revenues" accrue to the stevedoring contractors (Rogers or BARMA) it is incorrect. The record is clear that at this facility stevedores are paid on tonnage of grain loaded to vessel and that stevedore revenue is not computed on longshore labor costs plus a mark-up for overhead and profit or some other formula; hence, the stevedoring rate per ton multiplied by the number of tons loaded establishes the compensation paid to the vessel's stevedore, and this is so whether a given tonnage takes 24 hours to load or 72 hours to load or whether one gang of longshoremen or ten gangs of longshoremen are utilized.[43] Obviously, with a given tonnage loaded to vessel, the shorter the loading period and the fewer longshoremen employed, the greater the profit to stevedore.

Chairman Bentley and Commissioners Day and Hearn further state:

[43] Mr. James F. Carrier, General Manager of Rogers, stated on cross-examination that although he anticipated making a profit of 75¢ per ton on grain loaded and stowed manually in sacks, "percentage-wise" he was happier with the slightly more than 2 cents per ton profit on grain loaded in bulk at Baton Rouge elevator.

". . . We recognize that the costs associated with the use of the shipping gallery are allocable to those who derive an economic and commercial benefit from the use thereof. We do not, however, recognize that the stevedores fall into this recipient category, at least not to the degree as that of the cargo or the vessel . . . Therefore, the allocation of a full fifty percent of the costs of the shipping gallery to the stevedores is an unreasonable practice within the meaning of section 17 of the Act.

They assert in Footnote [29] ". . . this [wharfage] charge would be assessable against the vessel to the extent sought to be imposed on the stevedores." "Wharfage" would be directly assessable against the vessel only if the tariff so provided, and the Cargill tariff herein does not so provide. Under our General Order 15 (46 CFR 533.6(d) (2)), wharfage may be assessed against cargo or vessel or both.[44] Whether the ultimate cost may end up as being for the expense of the vessel turns on the terms of the applicable sales contract and charter party. But even if that is the ultimate end result, it is no answer to our problem. *Rates of Pacific Northwest Elevators Ass'n, supra,* at 388. There is neither reason nor logic, other than General Order 15, to restrict the charge to cargo *or* to vessel if in fact an interest other than cargo or vessel receives a direct benefit from use of the facility. This is recognized in *Crown Steel, supra,* when part of the costs of the facility were allocated to stevedoring, part to truck loading, and part to wharfage (cargo), whereas on the Pacific Coast all "this cost is allocated to wharfage." In fact, where two different persons each receive a benefit from a given facility, we have often held it improper to assess the entire charge for that benefit against only one of the recipients. No one contends that the stevedore is not using the terminal facilities and services furnished by Cargill or that the stevedore does not receive some benefit therefrom. Footnote [29] would do violence to the principle that each recipient should bear its fair share of the charge when it states that the 5¢ charge "would be assessable against the vessel to the extent sought to be imposed on the stevedores."

From the above-quoted statements of the majority, it is implicit the majority recognizes that stevedores are recipients of benefits from the efficiency of the shipping gallery, albeit, so they contend, not "to the same extent as does either the cargo or the vessel *under past applications of the Freas Formula*" [45] (underscoring supplied) and "the steve-

[44] In Footnote [29] the majority labels (or likens) the charge assessed for the use of the shipping gallery to "wharfage". "Wharfage", however, as defined in 46 CFR 533.6(d) (2) is a charge assessed against cargo or vessel for the movement or passage of cargo "over, onto, or under wharves or between vessels . . . when berthed at wharf". It is solely a charge for use of the wharf and does not cover the cost of services or the use of any equipment, such as the shipping gallery by which the cargo is moved to the wharf. The shipping gallery here is a piece of equipment similar in its function to a gantry crane or a pipeline. A fee for the use of the shipping gallery may be assessed, therefore, in addition to and separately from "wharfage", just as fees are charged for the use of gantry cranes, forklifts or other terminal equipment as listed in the tariffs of terminal operators generally, and of the Baton Rouge Port Authority specifically.

[45] Under the Freas Formula costs and charges were distributed initially to vessel and cargo. Generally, expendi-

dores fall into this recipient category, . . . [but] not to the degree as that of the cargo or the vessel" and "a portion of this remaining fifty percent is allocable to" stevedore and a portion to the vessel.

Here, then, is the crux of our differences. The majority, while recognizing that stevedores are users of the facilities and do receive a benefit therefrom, would disallow all charges against the stevedores solely on the basis that while in past cases costs were allocated, on a judgment evaluation of benefits, 50% to cargo and 50% to vessel, here Linnekin failed to apportion the vessel's 50% of the benefits (or costs) as between stevedore and vessel. Thus, they reason, when cargo is benefited to 50% and vessel and stevedore combined are benefited by a given facility for the remaining 50%, to allocate this full remaining 50% to stevedores only is an unreasonable practice. But it automatically follows that to deny all charge against stevedores because of an imperfect allocation would result either in imposing all 50% against vessel or would deny Cargill a fair monetary return, and if the first allocation (all to stevedore) is an unreasonable practice when the two interests (stevedore and vessel) benefit, then the latter allocation (all to vessel, as recommended by the majority in Footnote [39]) must also be an unreasonable practice.[46] But the basic issue here is not whether stevedores should have been allocated 50% or 40% or 20% or 5% of the aggregate benefits, but rather whether the 5¢ charge is fairly related to the benefits actually received by stevedores. We find the record establishes such fair relationship. Finally, under *Volkswagenwerk*, there need be only a reasonable relationship between benefit and charge—not the strict mathematical and direct relationship between rates and fully allocated costs as required in a domestic rate case and which the majority appears to apply to this case.

With respect to dock cleaning, no one disputes that grain spillage creates a safety hazard which requires periodical cleaning of the grain dock. BARMA's witness recognized that at one time two men spend 8 or 9 hours washing down the dock with hoses. Considering that cleaning can be done only when the dock is empty and keeping in mind that ships often dock at short intervals or even one right following the other and are loaded at any time during the day or at night, it is evident that dock cleaning cannot be done after every vessel. The $50 per vessel charge therefore is no more than a reasonable and fair

tures were assigned to the activities in whose furtherance they have been incurred. Contributions of both labor and facilities were measured by the proportionate use made thereof. Proportionate use was determined generally on a time, space, or value basis where possible; otherwise, judgment was used (*Terminal Rate Structure—California Ports, supra,* at 61–62). Judgment was the determinant in arriving at the proportionate uses of the wharf and shipping gallery in the instant case.

[46] *Investigation of Free Time Practices—Port of San Diego,* 9 F.M.C. 525 (1966) at 549.

method of uniformly allocating the cost of dock cleaning, whether or not it is done after every vessel.

It is of more than passing interest to note that BARMA stated on this record there would be no great difference to competing stevedores if the charge in question is assessed provided Rogers does not compete for stevedore business at this facility.[47] This comment is indicative of the fact that one of BARMA's primary purposes is to force Rogers to cease doing business at the facility rather than to eliminate the charge assessed equally against all stevedores.

Mr. Linnekin's formula for allocating costs and services between cargo, vessel, and stevedores constitutes a fair and equitable method of allocating costs amongst those interests and establishes a reasonable relationship between the charges assessed and the services and benefits provided.

The stevedoring contractor who charges an agreed rate *per ton* loaded into the vessel benefits directly from the increased loading capacity of the Port Allen grain elevator as well as from the high efficiency of its loading equipment, including the shipping gallery and the grain dock-wharf.

There is a reasonable relationship between the charge to stevedores and the benefits received by the stevedore from the services and facilities including dock cleaning and liaison services.

In turn, Cargill is entitled to compensation for these provided services and facilities.

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[47]Tr. of Oral Argument of March 7, 1973, pages 46–47:

"Commissioner Morse: It seems to me I saw somewhere in the brief, perhaps not in your brief, . . an allegation to the effect that . . this type of . . . a shipping elevator, should not be permitted to . . . also conduct stevedoring operations on the premises.

Mr. Bagley [Counsel]: Yes, I think that the elevator has a choice, that it should be made by this Commission to have a choice.

"If it does not compete with stevedores, it will really make no great difference to stevedores, whether or not such a charge is imposed on them.

"In other words, if a reasonable and proper charge should be made by an elevator against some part of the shipping operation and there is no competition between the elevator through its subsidiary or its affiliate with the stevedores working at the elevator and all stevedores are standing in the same position and each one is an independent contracting stevedore, not an affiliate, then the fact that this charge is imposed uniformly across the [board] on each of these stevedores will not in any manner affect their competitive relationship."

The assessment in question was 5¢ per ton at the time the case was heard by the Administrative Law Judge, but will be subsequently raised to 8¢ per ton. BARMA's basic fear is further explained in the following colloquy (Tr. of Oral Argument of March 7, 1973, page 50):

"Mr. Bagley: I think that where you have a tax imposed upon one or two competitors and the tax is imposed by the parent of the one, the house stevedore, you fairly obviously have in the hands of the parent and its subsidiary, the right to control competition between those two.

"I frankly do not recall those figures that were referred to today. But, any time that Cargill wants to put Baton Rouge Marine Contractors out of business, all it has to do is lower the rates by Rogers to something which will be below Baton Rouge Marine Contractors.

"When it does, this Cargill will have a five cent increment which will be profitable on every ton it loads, which will be compensation received by it over and above its cost load.

"We say that in this is the danger which we do not believe should be allowed by this Commission under an agreement regulated by it."

The record discloses that Cargill has never failed to assess the 5¢ charge against Rogers.

The assessment of the charges against stevedores is necessary in order that Cargill achieve a fair return on the leased facilities.

Therefore, we conclude that the charge sought to be assessed against all stevedores operating at the Cargill-leased facility is reasonably related to the economic and commercial benefits derived by the stevedores and the assessment thereof is a just and reasonable practice within the meaning of section 17 of the Act.

The Order. We object to the breadth and scope of that paragraph of the Order which provides:

It is further ordered, That no charge to stevedores for use of respondent's services and facilities based upon allocations of costs found therein to be unreasonable may be imposed by respondent until such charge has been found reasonable on remand and until a tariff reflecting such charge has been filed with the Commission.

In our opinion, and on this record, we have no jurisdiction to issue an order which forbids *any* charge against stevedores until such charge has been found by us to be reasonable. On this record, and for the period of time to which the record speaks, four of five Commissioners have found that respondent provided services and facilities to stevedores and that stevedores received benefits therefrom for which *a* charge could be assessed—only the level of the charge being unresolved by us. Had the above-quoted order been restricted to the 5¢ charge and to the period of time covered in these proceedings, there conceivably might be support, in law, for such order. But it is not so restricted, for on its face it is broad enough to apply to a charge of *less* than 5¢ applicable during the period covered by this record and which charge may be supportable by other cost allocations or modifications of those cost allocations used in this proceeding and even to a new charge established as of today based on today's costs and benefits and which respondent might now file with us under our General Order 15, 46 CFR 533. In our opinion we may not, even on this record, prohibit either of such new filings for it amounts to an exercise of injunctive power which on this record and in this situation we do not have. *Transpacific Freight Conf. of Japan* v. *FMB*, 302 F.2d 875 (D.C. Cir., 1962).

Our jurisdiction over tariff filing practices of terminals is based on Section 17, Shipping Act, 1916, and upon our General Order 15, 46 CFR 533. It is inherent in General Order 15 that a terminal tariff rate filing is effective the day the tariff is filed with us unless the filing itself specifies a deferred effective date.[48] As to terminal tariff filings, we do not have suspension authority as we do have in respect to tariff

[48] As originally proposed General Order 15 would have required 30 days' advance filing of terminal tariff rates, rules, and regulations. The 30-day rule was objected to because of lack of authority to prescribe such advance filing and the requirement was dropped. 30 Federal Register 12681 (1965).

filings by common carriers in our domestic offshore commerce under Section 3, Intercoastal Shipping Act, 1933 (46 U.S.C. 845), nor do we have specific statutory authority to reject a terminal tariff filing as we do have in respect to filings by common carriers by water in our foreign commerce under Section 18 (b) (4), Shipping Act, 1916 (46 U.S.C. 817).

Hence, if we have terminal tariff rejection authority, absent a hearing and a finding of a violation of the Shipping Act, 1916, it is only when based on the premise that the filing is so defective in form or substance as to be patently a nullity as a matter of substantive law and that administrative efficiency and justice are furthered by such rejection. *Municipal Light Board etc.* v. *Federal Power Commission,* 450 F.2d 1341 (D.C. Cir., 1971). We do not have such a nullity before us. See also *Arrow Transportation Co.* v. *Southern Ry Co.,* 372 U.S. 658 (1963); *United States* v. *Scrap,* 412 U.S. 669, 697–699 (1973); *Continental Air Lines* v. *CAB,*, ___ F.2d ___ (D.C. Cir., 1974); *Rejection of Tariff Filings,* 13 F.M.C. 200 (1970); *Australia/Atlantic and Gulf Conference,* 16 F.M.C. 27, 32 (1972).

The effect of the Order is even more drastic than a suspension order. It purports to give us jurisdiction to approve the level of a rate before the rate may become effective and with no limit on how long our determinations may require. That quoted portion of the Order is illegal and void for want of jurisdiction.

Commissioner George H. Hearn, concurring and dissenting:

I agree that there are no violations of section 16. As to section 17, I concur in the conclusions set forth by Chairman Bentley and Commissioner Day. I disagree with the conclusion with respect to section 15, and find a violation thereof.

It is to some degree true that the lease agreement between Cargill and the Port permits Cargill a broad range of discretion on matters concerning operation of the terminal; but as concluded by the Administrative Law Judge it is not apparent that the agreement permits the type of activity engaged in by Cargill with respect to stevedores. Substantial evidence of the initial intended and approved perimeters of the agreement can be found in the statement of one of the parties. The General Counsel of the Port Commission requested Cargill to at least postpone the imposition of the charges and conditions until approved by the Commission.[49]

[49]Initial decision, fn. 10 and accompanying text.

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.[50]

If one of two parties to an agreement cannot find authority in the agreement for the specific activity, it must be presumed that third parties will be in no more advantageous position to construe the agreement.

Clearly, the filing and approval requirements of section 15 cannot be defeated by the contention that the modification of the agreement is unilateral. It has been recently held [51] that the fact of there being parties to an agreement not subject to the Shipping Act does not remove the agreement from section 15 jurisdiction. Were it otherwise parties to an agreement could avoid FMC jurisdiction by the simple device of including a person not subject to the Act.

Similarly, to accept Cargill's argument would allow parties as herein to avoid approval of agreement modifications by formulating them as the acts of only one party.

(S) FRANCIS C. HURNEY,
Secretary.

[50] *Pacific Coast European Conference—Rules 10 and 12*, 14 F.M.C. 266, 278 (1971). See, also, *Joint Agreement—Far East Conference and Pacific Westbound Conference*, 8 F.M.C. 553, 558 (1965).
[51] *NYSA & ILA v. FMC*, ___ F.2d ___ (1974).

FEDERAL MARITIME COMMISSION

DOCKET NO. 71–29

BATON ROUGE MARINE CONTRACTORS, INC.

v.

CARGILL, INCORPORATED

ORDER

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

Therefore, it is ordered, That respondent cease and desist from assessing those charges and imposing those conditions found to be unlawful therein.

It is further ordered, That this proceeding be, and the same hereby is, remanded to the presiding Administrative Law Judge for further proceedings to determine the proper charge, if any, assessable against complainant and those similarly situated for services and facilities provided by respondent which are properly allocable to complainant and those similarly situated.

It is further ordered, That the presiding Administrative Law Judge issue a supplemental decision of his findings in the proceeding on remand.

It is further ordered, That should it choose to impose certain conditions, respondent immediately file with the Commission a tariff reflecting those conditions, within the guidelines set forth in our Report herein, sought to be imposed.

It is further ordered, That no charge to stevedores for use of respondent's services and facilities based upon allocations of costs found therein to be unreasonable may be imposed by respondent until such charge has been found reasonable on remand and until a tariff reflecting such charge has been filed with the Commission.

By the Commission.

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

FEDERAL MARITIME COMMISSION

No. 74–9

CONSOLIDATED INTERNATIONAL CORPORATION

v.

CONCORDIA LINE, BOISE GRIFFIN
STEAMSHIP COMPANY, INC. AS AGENTS

NOTICE OF ADOPTION OF INITIAL DECISION

Jan 9 1975

No exceptions having been filed to the initial decision 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 January 9, 1975.

By the Commission.

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

FEDERAL MARITIME COMMISSION

No. 74–9

CONSOLIDATED INTERNATIONAL CORPORATION

v.

CONCORDIA LINE, BOISE GRIFFIN STEAMSHIP COMPANY, INC. AS AGENTS

An agreement to settle a proceeding brought under Section 22 of the Shipping Act, alleging a violation of Section 18(b)(3) of the Shipping Act, can be approved only upon an affirmative finding that such violation occurred.

Cameras and enlargers are within classification of "machines" under respondent's tariff. "Machines" include any device consisting of static or moving parts (or both) which utilize and convert energy, motion or force from one form into another to perform a useful function.

Settlement of reparation proceeding approved, with modification.

C. J. Meyers (Mrs.) and *William Levenstein* for complainant.
Stanley O. Sher for respondent.

INITIAL DECISION OF SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE [1]

By complaint filed pursuant to the provisions of Section 22 of the Shipping Act, 1916,[2] and served February 25, 1974, Consolidated International Corporation, complainant, asks reparation in the amount of $7,530.73, with interest, from Concordia Line, respondent. The claim arises from fourteen shipments of cameras, photographic enlargers and their parts from Alicante, Spain to Philadelphia, Pennsylvania aboard respondents ships during the period from December 24, 1972 through November 30, 1973. By joint motion, the complainant and respondent request authorization to settle for the full amount of the claim, but without interest.[3]

[1] This decision became the decision of the Commission 1/9/75

[2] 46 USC §821.

[3] The complaint does not contain an express prayer for interest, but it does pray for "such other sums as the Commission may determine to be proper as an award of reparation." The quoted term has been construed by the Commission as a prayer for interest. However, by subsequent agreement, a shipper, injured because it was assessed an unlawful rate, may elect to waive interest on its claim. *United States Borax & Chemical Corporation* v. *Pacific Coast*

Briefly, the complaint alleges violations of Section 18(b)(3) of the Shipping Act, 1916,[4] in that the respondent charged and collected the tariff rate for Cargo, N.O.S. for the fourteen shipments, instead of the tariff rate for Business and Industrial Machines, N.O.S. The answer consists of what is, in effect, a general denial and three affirmative defenses.

Inasmuch as the answer also states that the respondent cannot determine whether to consent to shortened procedure on the present state of the record (an interesting allegation in the light of subsequent events), I urged the parties to confer with a view toward entering into a stipulation of facts which would permit disposition under the shortened procedure of Rule 11 of the Rules of Practice and Procedure.[5]

The parties conferred and, after some delay, they filed a stipulation of facts, accompanied by a letter from complainant requesting a belated briefing schedule. The respondent did not explicitly alter its representation concerning shortened procedure, but it did acquiesce in the briefing schedule suggested by complainant. Since the briefing proposal expressly invoked Rule 11 procedures, the respondent is deemed to have assented to the conduct of this proceeding without the need for oral hearing.

The briefing schedule which the parties requested was approved but briefs were not filed. Before the due date for the opening brief, respondent made its offer of settlement. By letter, the complainant advised me of the offer and of the forthcoming motion to approve the settlement. In addition, complainant wrote that "the offer to settle obviates the necessity for going forward with briefs." The meaning of the quoted remark is not entirely clear, but in the context of the limited scope of the stipulation and motion (both printed in full, below) it raises this threshhold question—When an offer of settlement is made and accepted by the parties to a reparation proceeding is the Commission nevertheless required to exercise its decisional function [6] by making findings and a judgment on the merits or is it simply obliged to mechanistically place its imprimatur of approval on the arrange-

European Conference, 11 FMC 451, 470 (1968). In any event, the award of interest is discretionary on the part of the Commission. *Flota Mercante Grancolombiana, S.A. v. Federal Maritime Commission*, 373 F 2d 674, 681, (D.C. Cir. 1967).

[4] 46 USC §817(b)(3). It provides, as pertinent: "No common carrier by water in foreign commerce or conferences of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs:"

[5] 46 CFR 502.181–502.187. Under Rule 11 a complaint proceeding may be conducted under shortened procedure, without oral hearing, with the consent of the parties.

[6] It is the function and power of the presiding Administrative Law Judge to act upon offers of settlement. Rule 10(g) of the Rules of Practice and Procedure, 46 CFR 502.174.

ment. In my judgment, the Commission is not relieved of the decisional responsibility in these circumstances.

It is true that the Commission is guided, generally, by the principle that settlements of controversies are to be encouraged,[7] but this approach is available only within the boundaries of the underlying statutory scheme, which, as provided in Section 18(b)(3), directs common carriers to collect the rates and charges specified in their tariffs and forbids rebates, remissions or refunds of lawful charges. It follows that an agreement to settle a proceeding, brought under Section 22 of the Shipping Act, alleging a violation of Section 18(b)(3), can be approved only upon an affirmative finding that such violation occurred. Cf. *Ketchikan Spruce Mills* v. *Coastwise Line*, 5 FMB 661, 662 (1959); cf., also, Rule 6(c) of the Rules of Practice and Procedure 46 CFR 502.93, applicable to Special Docket applications which provides, in pertinent part, that "satisfied complaints will be dismissed in the discretion of the Commission." Here, to support a finding of violation, it must be shown that the respondent did charge and collect a greater compensation than its tariffs authorized. With the foregoing discussion in mind, it is appropriate to go on to the facts of the matter.

The parties stipulated to the following facts pertaining to the fourteen shipments: [8]

1. The complainant is incorporated in the State of Delaware. It is located at 4501 South Western Boulevard, Chicago, Illinois. Its principal business is the Marketing of graphic arts equipment.

2. The respondent is a common carrier by water in the trade from Spain to U.S. North Atlantic Ports and is subject to the jurisdiction of the Federal Maritime Commission in accordance with the provisions of the Shipping Act, 1916, as amended.

3. The complainant paid and bore the freight charges assessed by respondent for the shipments in controversy. Said charges were paid less than two years prior to the date the complaint was filed with the Federal Maritime Commission.

4. All of the shipments in question were transported by respondent from Alicante, Spain, to Philadelphia, Pa., U.S.A.

5. All of the shipments in question consisted of one or more of the following articles:

(a) Consolidated Fast Darkroom Cameras, 24″ size, approximately 10′ long, by 4′7″ wide by 6′9″ high.

(b) Consolidated C-16 Color Enlargers, approximately 8′6″ long, by 3′8″ wide, by 5′ high, weighing approximately 2085 pounds.

[7] *Merck, Sharp & Dohme International A Division of Merck & Company, Inc.* v. *Atlantic Lines*, 14 SRR 232, 235 (1973), adopted SRR (January 2, 1974).

[8] The stipulation encapsulates material set forth more comprehensively in the complaint.

(c) Consolidated Super 100 Cameras, approximately 12′ long by 3′10″ wide, by 6′3″ high.

(d) Lensboard Assemblies, Rear Cases, Vacuum Packs and Copyboards.

6. The articles shipped are all used commercially in the Graphic Arts industry and for commercial photography and are fully described in Attachments 1, 2, and 3.[9]

7. At the time the shipments moved, page No. 53 of respondent's tariff (Spain/U.S. North Atlantic Westbound Freight Conference Tariff F.M.C. No. 6) specified rates for "Cargo, N.O.S." and page No. 66 published rates for "Machines, N.O.S.", "Machines, Business, N.O.S." and "Machines, Industrial, N.O.S." There are no qualifications restricting these descriptions. The rates for the three "Machines" entries are identical.

8. Respondent's tariff does not list any article specifically describing Cameras, Enlargers or parts for Cameras or Enlargers.

9. Respondent's tariff, effective at the time the shipments in question moved, provided in Rule 3, page 22, as follows:

Shipments of Parts: Integral parts of commodities listed herein, unless otherwise specified, will be accorded the rate basis for the commodity.

10. Complainant contends that the applicable rates for the transportation services rendered by respondent in connection with the 14 shipments in question are those published in Spain/U.S. North Atlantic Westbound Freight Conference Tariff F.M.C. No. 6 for "Machines, N.O.S.", and that it has overpaid respondent the sum of $7530.73 for the 14 shipments.

The motion for authorization to settle reads as follows:

The parties have agreed to settle the claims which are the subject of the complaint in this proceeding, as follows:

1. Respondent will pay complainant the sum of $7,530.73, without interest, in settlement of the 14 claims listed in the complaint.

2. The parties agree that said settlement should be based upon the rates published in Spain/U.S. North Atlantic Westbound Freight Conference Tariff F.M.C. No. 6 for "Machines, N.O.S.", with due regard to the Stipulation of Facts filed June 17, 1974.

3. Payment will be made within 30 days from the date of Commission authorization.

4. A Motion to dismiss the proceeding with prejudice will be made by complainant upon receipt of payment.

[9] The attachments are advertising brochures containing the specifications of the commodities transported. Attachment 1 describes the Consolidated Fast Darkroom Camera; attachment 2—the Consolidated C-16 Color Enlarger; Attachment 3—the Consolidated Super 100 Camera and parts shown in paragraph 5(d) of the stipulation.

The parties request authorization to make the aforesaid settlement.

The stipulation and motion do not present the entire picture. However, when their contents are read in conjunction with the complaint, it seems reasonable to conclude that the parties intend to agree that the respondent charged the higher "cargo" rate [10] for the shipments, but that the respondent now concedes that it should have charged the lower "machines" rate.[11] Respondent's reason for the application of the "machines" rate rather than the "cargo" rate is left unstated. Thus, despite any presumption favoring the fairness, correctness and validity of the settlement,[12] there remains the question whether the cameras and enlargers are classified as "machines" or whether they take the broader classification of "cargo", since there is no specific tariff classification for cameras or enlargers. This is the issue on which approval of the settlement turns.

The brochures disclose that the enlarger and the cameras have components consisting of a complex of moving and stationary parts. Some of the parts are powered electrically while others, such as worm gears, are operated manually. To state the obvious, the cameras are designed to photograph particular copy on film and the enlarger is designed to enlarge or reduce filmed transparencies. Conforming to applicable precedent, those qualities entitle the commodities and their parts to be classified as "machines."

In *United Nations Childrens Fund* v. *Blue Sea Line,* 12 SRR 1067 (1972), the carrier initially assessed a lower "machinery" rate for commodities, but later rebilled the shipper at a higher "cargo" rate for the shipment there involved. In dealing with the question of which rate was applicable as a matter of novel impression, the Commission explained that in a tariff interpretation problem the threshhold determination is whether there is an ambiguity in the tariff and, if it is found to exist, to then strictly construe the tariff provisions against the carrier, resolving any doubt in favor of the shipper, 12 SRR at 1069–1070; see also, *United States* v. *Interstate Commerce Commission,* 198 F. 2d

[10]Page 53 of respondent's tariff, which specifies the rate for "cargo" was revised several times during the pertinent period. At the time of the first three shipments the contract rate was $106.25 W/M, per 2nd revised page 53, effective December 19, 1972; the same rate remained in effect at the time of the fourth shipment, per 3rd revised page 53, effective March 6, 1973; at the time of the next seven shipments the rate was $117.00 W/M, per 5th revised page 53 in effect when the last 3 shipments were made, but the rate for all W/M basis rates were increased by $2.50 per 2nd revised page Title A, effective September 25, 1973; at the time of the last shipment there was a 7% bunker surcharge, per 3rd revised page 49, effective November 18, 1973.

[11]Page 66 of respondent's tariff, specifying the rate for "machines" was also revised a number of times during the pertinent time period. Per 4th revised page 66, effective November 7, 1972, in effect at the time of the first shipment, the contract rate was $81.50 W/M; the rate remained the same for the next three shipments, per 5th revised page 66, effective February 6, 1973; the rate for the following six shipments was $89.75, per 8th revised page 66, effective September 20, 1973; 9th revised page 66, effective September 12, 1973, in effect at the time of the last four shipments retained the rate shown in 8th revised page 66, but the last three shipments took the $2.50 increase noted in n. 10, *supra,* and the last shipment took the 7% bunker surcharge mentioned in n. 10.

[12]See n. 7, *supra.*

958, 966 n. 5 (D.C. Cir. 1952). The Commission went on to find an ambiguity by virtue of the fact that the commodities could come within either of the two classifications. In reaching that result, the Commission found that the definition of "machine" includes any device consisting of static or moving parts (or both) which utilizes and converts energy, motion or force from one form into another to perform a useful function.

Thus, applying the usual canons and techniques of interpretation and noting no real uncertainty as to the tariff standard, see *National Daily Products Corporation-Kraft Foods Division* v. *Missouri-Kansas-Texas Railroad Company,* 385 F. 2d 173, 177 (5 Cir. 1967), I find that the cameras and the enlargers, are "machines" and that respondent should have charged the rate for that classification.[13] "Where a commodity shipped is included in more than one tariff designation, that which is more specific will be held applicable.[14] And where two descriptions and tariffs are equally appropriate, the shipper is entitled to have applied the one specifying the lower rates." *United States* v. *Gulf Refining Company,* 268 U.S. 542, 546 (1925); Accord: *Norfolk and Western Railway Company* v. *Permaneer Incorporated,* 455 F. 2d 76, 78–79 (8 Cir. 1972).

I find that the respondent charged, demanded and collected a greater compensation for the transportation of property than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time of the fourteen movements in violation of Section 18(b)(3). The motion for authorization to settle is granted and respondent is ordered to pay complainant the sum of $7490.86,[15] without interest, in full settlement of this reparation proceeding within 30 days. This is a final order and it hardly seems necessary to require complainant to file another motion to dismiss the proceeding with prejudice as the motion to settle would have the complainant do upon receipt of payment.

(S) SEYMOUR GLANZER,
Administrative Law Judge.

WASHINGTON, D.C.,
December 13, 1974.

[13] Given the classification of "machines" in respondents tariff, it is inexplicable why respondent's agent rejected the implementation of that rate for cameras and enlargers on January 4, 1974, in the following words: "With respect to the above account and your memo dated October 18, 1973 attaching invoices covering various shipments on Concordia vessels covering reproduction machinery and requesting refunds for same. We regret we cannot alter the rates as assessed since our tariff does not provide any classification for these machines. Thus, general cargo rates are applicable."

[14] Citations omitted.

[15] In computing its claim for refund for the twelfth shipment made on October 4, 1973, claimant overlooked the $2.50 rate increase which went into effect on September 25, 1973. Recalculated, the claim must be reduced by the sum of $39.87.

FEDERAL MARITIME COMMISSION

DOCKET NO. 72–39

OCEAN FREIGHT CONSULTANTS

v.

ROYAL NETH. STEAMSHIP CO.

Reparation granted.

Henry S. Wegner for Complainant.
A. J. Rosner for Respondent.

REPORT

Decided Jan 27 1975

BY THE COMMISSION: (Helen Delich Bentley, *Chairman* and James V. Day, *Vice Chairman*)

This proceeding comes before the Commission on a petition for reconsideration filed by Ocean Freight Consultants (OFC), following the issuance of the Commission's Notice of Adoption of Initial Decision. In his Initial Decision, Administrative Law Judge Stanley M. Levy dismissed OFC's complaint, determining that OFC had not sustained its case, failing to shoulder its heavy burden of proof.

FACTS

OFC instituted this proceeding as assignee of Johnson & Johnson International, seeking reparation in the amount of $383.44. OFC contended that Respondent Royal Netherlands Steamship Company (RNS) erroneously assessed a freight rate higher than that payable under the tariff. The circumstances follow.

On April 23, 1971, Respondent's vessel, the CHIRON, sailed from New York to Puerto Cabello with, among other items, 27 bags of Cab-O-Sil, measuring 184 cubic feet, weighing 459 pounds. The bill of lading, dated April 23, 1971, listed these items as 27 bags of Cab-O-Sil and assessed to this cargo the Cargo, N.O.S. rate of $86 per 40 cubic feet. Upon arrival in Puerto Cabello, the vessel was unloaded, the cargo claimed by the consignee, and the freight paid.

On post audit, the shipper discovered the alleged error and, on October 22, 1971, filed a claim with the carrier for $395.60, alleging that the cargo in question was 99 percent silicon dioxide and should have been rated at $53 per 2,000 pounds, the rate for silicon dioxide under Respondent's applicable tariff. The carrier rejected OFC's claim by letter of November 10, 1971, on the basis of a tariff rule requiring that articles be described not by their trade names but rather by the common name applicable to said articles.[1]

In support of its position, Complainant provided a letter from the manufacturer of "Cab-O-Sil", confirming that the product is, in fact, 99 percent silicon dioxide. Additionally, Complainant presented a statement from the chairman of a conference not here involved supporting its position.

THE INITIAL DECISION

Judge Levy dismissed the complaint, concluding that:

> [This] . . . is not a case of inadvertent misdescription. The choice of description was clearly before the shipper. It elected a particular description. The tariff provided different rates in accordance with the description selected by the shipper.

Complainant in its exceptions took issue with the Administrative Law Judge's findings and argued that his decision opens the door to the "very discriminations and prejudices that section 18(b) of the Shipping Act was designed to preclude." OFC cited pertinent portions of the Harter Act in an attempt to show thatthe carrier has certain responsibilities to determine that what is actually shipped is in fact described on the bill of lading, contending that the carrier should not be permitted to profit from its failure to assure that the bill of lading properly describes the shipment. In conclusion, Complainant submitted that it had presented uncontroverted evidence as to what was shipped. Respondent did not raise any issues as to the proof of what was actually transported.

Respondent, in its reply, restated its position that under the applicable provision of the Conference's tariff, the carrier can only assess the

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[1]Item 2(h), original page No. 9 of U.S. Atlantic & Gulf Venezuela & Netherlands Antilles Conference, Freight Tariff F.M.C. No. 2, states:

> Bills of Lading describing articles by trade name are not acceptable for commodity rating. Shippers are required to describe their merchandise by its common name to conform to merchandise descriptions appearing herein. Bills of Lading reflecting only trade names will be automatically subject to application of the rate specified herein for Cargo, N.O.S. as minimum.

Cargo, N.O.S. rate to articles described by trade names only on bills of lading.

By Notice of October 29, 1973, the Commission, having reviewed this case on exceptions and replies, adopted the Initial Decision albeit on dissimilar grounds. In its present petition for reconsideration, OFC again urges that it must have sustained its case since its evidence is uncontradicted. Additionally, OFC claims that insufficient treatment was given OFC's Harter Act claims as to the burden imposed upon a carrier.

DISCUSSION AND CONCLUSION

We have reviewed the record of this proceeding in light of the issues raised in the pending petition for reconsideration and have concluded that reparation should be granted. We think that by the evidence presented by Complainant, which is unrefuted by Respondent, the Complainant has been shown to have met the heavy burden of proof which must be sustained in cases such as this. The record evidence shows without contradiction that "Cab-O-Sil" consists of 99% Silicon Dioxide and therefore should have been so rated by Respondent. We have also spent a great deal of time and exertion in examining the defense relied upon by Respondent herein. We conclude that the defense put forward merits discussion here.

Respondent alleges that the rule in his applicable tariff mandates the application of a Cargo, N.O.S. rate to cargo described by trade name only. We have accepted a similar defense with respect to a tariff rule regarding contested weights or measures of cargo in our recent case of *Kraft Foods v. Moore McCormack Lines, Inc.* There is, however, a glaring dissimilarity between this case and *Kraft.* In the *Kraft* case we permitted the carrier to rely upon a tariff rule which stated, in pertinent part:

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

There, the rule was clearly stated and left the carrier no discretion, either to consider or refuse to consider a claim filed with it after the cargo had left its custody. This is clearly distinguishable from the rule with which we are here presented.

The applicable rule sought to be relied upon in the present proceeding permits a carrier to apply the Cargo, N.O.S. rate *as a minimum* to cargo described by trade name only. This sort of flexible standard presents the opportunity for discrimination between shippers and as such cannot be relied upon by a carrier.

Since we will not allow reliance on the rule here, the shipper is free to show, by whatever evidence he may adduce, the nature of the cargo transported. If he can do so in satisfaction of the heavy burden of proof placed upon him, he is entitled to reparation. Here, we conclude that Complainant has sustained his burden. His evidence is unrefuted and therefore, under our rules,[2] is accepted as fact.

We hasten to add, however, that we confess sympathy for a carrier faced with rating a cargo described only by trade name. His position is as defenseless as was the carrier's position in *Kraft Foods.* That being so, we note that in the future, we are inclined to look more favorably upon a defense such as that proposed here *provided* the rule sought to be relied upon is, in fact, a rule. Should such a rule mandate the application of the Cargo, N.O.S. rate to cargo described by trade name, not "as minimum" but as the only rate applicable, we would be more favorable to sustaining reliance on that rule. We are unable to do so here, however, for the reasons stated above.

We note the disagreement of Commissioners Barrett and Morse with our conclusion as to the validity of the rule here in question. That dissent, however, is premised on hypothetical facts which obviate the need for a rule such as that before us. The need for a "trade name rule" arises when the carrier is not informed of the commodity being shipped except by its trade name description. To assume, as do Commissioners Barrett and Morse, that a determination of the proper rate (whether Cargo, N.O.S. or higher rates under a discretionary rule) will be made by the carrier's agent also assumes perforce that that agent knew the actual description of the commodity shipped. In such a case there would be no need for a rule such as Item 2(h) because the person rating the shipment would know what the rule assumes he does not know.

Reparation granted.

Commissioner George H. Hearn, concurring and dissenting:

The Commission issued its original decision in this case [3] on October 29, 1973. I am now glad that the interval has brought two other members of the Commission into agreement with at least the result of my dissenting opinion on that first occasion when I would have granted reparation. However, I am unable to accept the rationale of Chairman Bentley and Commissioner Day. I do not agree either with their treatment of the tariff rule (or with that of Commissioners Barrett and Morse) or with their gratuitous advice as to an "acceptable" rule.

[2] Rule 5(d), 46 CFR §502.64.

[3] Adoption of Initial Decision, 14 SRR 139.

Chairman Bentley and Commissioner Day reject the respondent's defense based on the tariff rule, and I agree. My decision to grant reparation, however, is based solely on the complainant's ability to meet its burden of proof, and not on the wording of respondent's rule. There is no need, therefore, to distinguish between the tariff rule in this case and the one in *Kraft Foods v. Moore McCormack Lines, Inc.*,[4] or to decide whether the words "as minimum" are determinative.[5]

In essence the Bentley/Day and Barrett/Morse views are no different. They disagree only as to the effect of the words "as minimum". Ultimately, under both views, if the tariff rule is in "proper" form the shipper is to be denied reparation *ipso facto*. The intent either way is evident in the Bentley/Day opinion: here the carrier's "position is as defenseless as was the carrier's position in *Kraft Foods*". The result is that not only does the majority provide the carrier with a defense but with an irrebuttable presumption, rendering the shipper actionless.[6]

Inasmuch as I concur in the grant of reparation in this case, we will have to await another case to see the possible full effect of the majority view. Thus the advice offered in the Bentley/Day opinion on how to defeat shippers' claims is not just a matter of "sympathy" for carriers' "defenselessness" but a forecasting of a misapplication of section 18(b) of the Shipping Act further to that of *Kraft*.

The claimant here bases its claim in part on the Harter Act, 49 U.S.C. 193, which places on the carrier the burden of issuing the bill of lading to the shipper. It may be that this does not provide grounds for an action under the Shipping Act.[7] Yet, the provisions of the Harter

[4] 14 SRR 603 (1974), Petition for Reconsideration denied December 13, 1974.

[5] While I agree with Commissioners Barrett and Morse that their "trade-name rule is but an extension of *Kraft*", there is no error as they ascribe to me concerning trade-name cases and misrating cases. Rather I find the error to be in their majority *Kraft* decision in the first instance and would allow a complainant to meet the burden of proof in all these cases, regardless of the type or existence of a tariff rule.

[6] It is unnecessary for me to decide the effect of the words "as minimum". I find the use of the tariff rule (with or without those words) as a means of barring reparation to result from an improper interpretation of section 18(b)(3) of the Shipping Act. (See my dissent in *Kraft*, 14 SRR 603, 606.) If, however, it were necessary to decide the validity of the tariff rule with and without "as minimum", I could not choose because I find both invalid when used as a bar to shippers' claims. Without those words the rule is unlawful for the reasons set forth in the Barrett/Morse opinion. With "as minimum" the rule is unlawful because it discriminates between two types of shippers: one whose shipment would qualify for a commodity rate higher than the Cargo, N.O.S. rate and another whose shipment would qualify for a lower than Cargo, N.O.S. rate. As to the former the Barrett/Morse rule would require application of the commodity rate, leaving the shipper unpenalized and no worse off than if he had not used the trade name. As to the shipper whose cargo would take a lower than Cargo, N.O.S. rate, the Barrett/Morse rule would mandate the Cargo, N.O.S. rate, penalizing the shipper for using the trade name. Thus the shipper of lower rated goods would be penalized for using the trade name, but not the shipper of higher rated goods. This is unfair and unlawfully discriminatory treatment. (See, *e.g.*, *Valley Evaporating Co. v. Grace Line, Inc.*, 14 F.M.C. 16, 21 (1970).) These difficulties in agreeing upon and formulating a rule which conforms with section 18(b)(3) and other Shipping Act requirements illustrate my view that no such rule should be accepted as a complete bar to reparation. The problems would be obviated by adhering to my views expressed in the *Kraft* case.

[7] *Royal Netherlands SS Co. v. FMB*, 304 F.2d 938 (1962), *OFC v. Royal Netherlands S.S. Co.*, Adoption of Initial Decision, 14 SRR 139, 141 (1973).

Act taken together with section 18(b)(3) of the Shipping Act clearly evince a congressional intent to weigh the balance evenly between the shipper and the carrier and not so heavily in favor of the carrier as the majority proposes to do here.

Consequently, based upon my views set forth in *Kraft* [8] which I incorporate herein by reference, I concur in the grant of reparation. For the same reasons I dissent from the grounds stated by Chairman Bentley and Commissioner Day, from their anticipated enforcement of the form of tariff rule they suggest, and from the conclusions reached by Commissioners Barrett and Morse.

Commissioners Ashton C. Barrett and Clarence Morse, dissenting.

We would deny reparations.

After many months of consideration, the Commission, by vote of Chairman Bentley, Vice Chairman Day, Commissioners Barrett and Morse, Commissioner Hearn dissenting, issued its decision in *Kraft, supra,* and just recently denied a petition for reconsideration.

The basic and controlling principle enunciated in *Kraft* is set forth in the following excerpt [14 SRR 603 at 606]:

> Section 18(b)(3) makes it abundantly clear that a carrier is strictly bound to the terms of the tariff as filed. This mandate applies not only to the rates published therein, but to the various terms, rules, regulations and conditions included within that tariff which are as much a part of the tariff as are the rates themselves. [Footnote omitted.] Likewise, unless in an appropriate proceeding we find tariff rules and regulations to be in violation of the Shipping Act, 1916, they must be strictly applied by us.

"Appropriate proceeding" means, here, proper notice and opportunity for hearing re lawfulness of tariff trade-name rule. 5 U.S.C. 551 et seq.

Under *Kraft,* the *first* issue to be resolved here is the question whether Tariff Item 2(h) which provides:

> Bills of Lading describing articles by trade name are not acceptable for commodity rating. Shippers are required to describe their merchandise by its common name to conform to merchandise descriptions appearing herein. Bills of Lading reflecting only trade names will be automatically subject to application of the rate specified herein for Cargo, N.O.S. as minimum.

is or is not lawful under the standards of the Shipping Act, 1916. It is only in the event that we should find Tariff Item 2(h) unlawful, which we do not so find, would we ever reach the *second* question in these reparation cases, which question is whether the shipper has sustained its burden of proof in its contention that the shipment was misrated

[8] 14 SRR 603, 606.

by the carrier.[9] We adhere to the principles of *Kraft* and its application to Tariff Item 2(h).

Chairman Bentley and Vice Chairman Day assert that the trade-name rule, Tariff Item 2(h), establishes a flexible standard and presents an "opportunity for discrimination between shippers and as such cannot be relied upon by a carrier" and conclude the tariff rule is unlawful. We disagree.

We contend that a reasonable and realistic reading of Tariff Item 2(h) establishes a rate rule which leaves no room for qualification or discretion. Tariff Item 2(h) declares that if there is a tariff commodity rate applicable to a shipment described by the shipper by trade name, and which rate is *higher* than the Cargo, N.O.S. rate, then that higher commodity rate must apply—not the lower Cargo, N.O.S. rate.[10] In another situation in which a shipper describes the shipment by trade name, the Cargo, N.O.S. rate applies even where, as in *this* case, the tariff contains a *lower* commodity rate which would have applied had the shipment been described by commodity rather than trade name. In either situation there is and can be but one lawful rate applicable. These applications of rates are mandated by Tariff Item 2(h) when it uses the words "will be" and "automatically". This language leaves the carrier's rating clerk no room for discretion or flexibility. This is not to say that a rating clerk may not make a mistake—i.e., misrate a given shipment—but the possibility of that human error exists no matter how artfully worded a tariff rule may be.

On the present record we find and hold that Tariff Item 2(h) is a reasonable and lawful effort by the carrier and conference to ensure that all shippers be treated alike; the rule requires that all shippers declare to the carrier the true nature of the shipment in order that the shipment be properly rated by tariff commodity descriptions, rather than declaring the shipment by a trade name, in which latter event the carrier would not be advised of the true nature of the shipment and therefore might not be able to provide like treatment to different shippers. To assure that the true description of the shipment is given, Tariff Item 2(h), in the usual situation, imposes what in essence amounts to an added freight charge—the spread between the commodity rate and the usually higher Cargo N.O.S. rate—on the shipper who declares the shipment only by trade name. Tariff Item 2(h), inclusive of the phrase "as minimum" assures *absence* of discrimination. If the phrase "as minimum" is omit-

[9]Commissioner Hearn appears to classify the trade-name rule as falling within the principles applicable to errors in description and misclassification. In this he errs, for the tariff trade-name rule is but an extension of *Kraft* rather than a dispute as to proper rating of a shipment in which latter situation the burden of proof is critical.

[10]The term "commodity rate" is used only as an example. The appropriate applicable rate, whether specific, generic, or class, would be applied by the carrier.

ted, a loophole is left open which could result in discrimination.

There are only three conceivable factual possibilities in the trade-name situation: One, the Cargo, N.O.S. rate *exceeds* the commodity rate; Two, the Cargo, N.O.S. rate is *less* than the commodity rate; and Three, the Cargo, N.O.S. rate and the commodity rate *coincide*. The third possibility, coincidence of rate, cannot conceivably raise a problem in the area in which we are now concerned and will not be discussed further.

Accordingly, the problem can best be explained by giving two examples (in each instance the shipment being described only by trade name); the *first* example being a situation where the tariff commodity rate is *less* than the Cargo, N.O.S. rate; and the second example being a situation where the tariff commodity rate is *greater* than the Cargo, N.O.S. rate.

First example. Assume the commodity rate is $50 and the Cargo, N.O.S. rate is $60. Under Tariff Item 2(h), *supra,* if the shipper declares the shipment by trade name he is *"automatically"* assessed the $60 rate, no more (because here there is no applicable commodity rate in excess of the Cargo, N.O.S. rate) and no less (because of the mandate "as minimum" of Tariff Item 2(h)). If Tariff Item 2(h) provided precisely as it now provides except that the phrase "as minimum" were omitted—and this would be a trade-name rule to which Chairman Bentley and Vice Chairman Day state:

> We hasten to add, however, that we confess sympathy for a carrier faced with rating a cargo described only by trade name. His position is as defenseless as was the carrier's position in *Kraft Foods.* That being so, we note that in the future, we are inclined to look more favorably upon a defense such as that proposed here *provided* the rule sought to be relied upon is, in fact, a rule. Should such a rule mandate the application of the Cargo, N.O.S. rate to cargo described by trade name, not "as minimum" but as the only rate applicable, we would be more favorable to sustaining reliance on that rule.

—then, in applying that abbreviated rule one can reach but one answer, namely, that in this first example situation the carrier "automatically" would have to assess the Cargo, N.O.S. rate. Therefore, it is obvious that merely declaring the "as minimum" portion to be illegal will not help claimant—one would have to declare the *entire* trade-name rule unlawful (i.e., have *no* trade-name rule at all) in order to support an order herein in favor of claimant. Even if we followed the Bentley/Day philosophy (which we do not), we (and from the quotation, *supra,* seemingly, they) would not be justified in holding unlawful Tariff Item 2(h) absent "as minimum", and, again, applying such an abbreviated Tariff Item, reparations herein would be denied.

Second example. Assume, however, the situation where the Cargo, N.O.S. rate is *less* than the commodity rate. For example, the Cargo, N.O.S. rate is $75 and the commodity rate is $100. In this factual situation but with a Tariff Item 2(h) which has the phrase "as minimum" *omitted*, the rating clerk will apply the Cargo, N.O.S. rate initially (initially, for he may have no information before him justifying application of a commodity rate and because of the mandate in Tariff Item 2(h) to "automatically" assess the Cargo, N.O.S. rate of $75), and even when the carrier ascertains the true nature of the shipment, the carrier nevertheless must *continue* to apply the $75 Cargo, N.O.S. rate rather than the $100 rate, for the tariff rule (absent "as minimum") mandates that in such situation the Cargo, N.O.S. rate, and only that rate, "automatically" applies.[11] This is a loophole which could be seized upon by the unscrupulous shipper and would result in discrimination in favor of such a shipper who would be assessed a $75 rate (absent "as minimum") and against the honest shipper who would give the proper tariff commodity description of the shipment and pay the $100 rate. If, however, the Tariff Item 2(h) *includes* the phrase "as minimum", then when a shipment is declared by trade name, it is rated at $75 in the first instance, for want of more complete description, but when the true nature of the shipment becomes known to the carrier the shipment must be rated according to its correct commodity rate of $100. With the phrase "as minimum" *included*, the carrier has no choice or flexibility if it abides by its filed tariff, for general principles of tariff construction *obligate* the application of a specific commodity rate, if one exists, in preference to and to the exclusion of the application of a Cargo, N.O.S. rate. Thus, it is clear that the "as minimum" phrase does not grant an "opportunity for discrimination". On the contrary, its presence closes a loophole which would otherwise exist permitting discrimination if the "as minimum" is deleted from the rule.

Having found Tariff Item 2(h) to be lawful, the shipment having been declared to the carrier by trade name only, the commodity rate being lower than the Cargo, N.O.S. rate, and the Cargo, N.O.S. rate having been assessed by the carrier, as mandated by Tariff Item 2(h), that concludes the matter.

By the Commission.

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

[11]From the various common carrier tariffs on file in this agency we take official notice that it is not uncommon to see a carrier or a conference publish commodity rates at a level higher than its published Cargo, N.O.S. rates. This may occur, for example, in respect to rates covering chemicals, fresh produce, refrigerated cargo, and other merchandise where special handling, refrigeration, or hazard may be involved.

FEDERAL MARITIME COMMISSION

DOCKET NO. 72–48

PACIFIC MARITIME ASSOCIATION—COOPERATIVE WORKING ARRANGEMENTS; POSSIBLE VIOLATIONS OF SECTIONS 15, 16 AND 17, SHIPPING ACT, 1916

The ILWU-PMA Nonmember Participation Agreement between the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union is subject to the jurisdiction of the Federal Maritime Commission under section 15 of the Shipping Act, 1916.

The ILWU-PMA Nonmember Participation Agreement is not "labor exempt".

Thomas J. White, Norman E. Sutherland, Alex L. Parks, Manley B. Strayer, Cleveland C. Cory, and *Gary R. Bullard* for Petitioner Ports.

Edward D. Ransom and *Robert Fremlin* for Pacific Maritime Association.

Norman Leonard for International Longshoremen's and Warehousemen's Union.

Thomas N. Gleason for International Longshoremen's Association.

Gerald Grinstein, Michael P. Crutcher, Louis F. Nawrot, Jr., Robert A. Koelker, and *Richard F. Ford* for Port of Seattle.

Francis Scanlan and *C. P. Lambos* for North Atlantic Shipping Association.

Paul J. Kaller and *Donald J. Brunner* as Hearing Counsel.

REPORT

Decided Jan. 27, 1975

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

Background

This proceeding was instituted to determine whether a master collective bargaining contract and a Supplemental Memorandum of Understanding No. 4 (SMU 4), entered into by the Pacific Maritime Association (PMA) and the International Longshoremen's and Warehousemen's Union (ILWU), embody any agreements between and among the members of PMA which are subject to the requirements of section 15 of the Shipping Act, 1916 (the Act); whether the implementation of these contracts by the PMA and the ILWU would result in any practices which are violative of sections 16 and 17 of the Act; and finally, whether there are any labor policy considerations which would operate to exempt such agreements or practices from any provision of the aforementioned sections of the Shipping Act, 1916.

The Commission's investigation was initiated at the request of the petitioner ports,[1] who maintain that the subject agreements, providing for the employment of longshore labor, are "agreements" within the meaning of section 15 of the Act, which should have been filed for Commission approval pursuant to that section.

On October 19, 1972, the Commission issued its First Supplemental Order Severing Jurisdictional Issues. In that Order, the Commission decided to determine separately the matter of its jurisdiction under section 15 over the subject agreements. Additionally, the Commission advised therein that it would consider whether any labor considerations would operate to exempt those agreements or the practices resulting therefrom from the provisions of sections 15, 16, and 17 of the Act.

Thereafter, petitioner ports submitted a revised version of the SMU 4, entitled "ILWU-PMA Nonmember Participation Agreement", which was made part of the collective bargaining agreement under consideration in this proceeding. In its Second Supplemental Order Consolidating Jurisdictional Issues, served January 30, 1974, the Commission found that the "ILWU-PMA Nonmember Participation Agreement",[2] was the same in all its substantive essentials as the SMU 4, ". . . the only difference between the two being that the revised agreement was embodied in the master collective bargaining agreement between the PMA and ILWU."[3] The Commission proposed,

[1]The Ports of Anacortes, Bellingham, Everett, Grays Harbor, Olympia, Port Angeles, Portland and Tacoma.

[2]For the sake of convenience we will refer to the ILWU-PMA Nonmember Participation Agreement as the Revised Agreement. The Revised Agreement, like its predecessor SMU 4, requires that: (1) nonmembers join the PMA for an indefinite period as a condition to the direct employment of any member of the joint PMA-ILWU work force; (2) any separate contract with ILWU conform to the provisions of the Revised Agreement and the Pacific Coast Longshore and Clerks Agreement; (3) nonmembers employ members of the joint work force only through PMA allocation procedures and the ILWU-PMA dispatching halls; (4) nonmembers pay dues and assessments and accept proportional liability as to obligations of the PMA; and (5) nonmembers adhere to PMA decisions as to work stoppages, strikes and lockouts.

[3]PMA takes issue with the Commission's statement that "the only difference" between SMU 4 and the Revised Agreement is that the latter "is embodied in the master collective bargaining agreement". PMA believes that this language may create the false impression that "there was some difference in treatment of the nonmember participation agreement in 1973 by PMA and ILWU in order to avoid FMC jurisdiction over the agreement." PMA, in order "to dispel any notion" which may arise from the Commission's statement, point out that while the Revised Agreement

therefore, to (1) grant the supplemental petition of the petitioner ports, and (2) include the "ILWU-PMA Nonmember Participation Agreement" in the current deliberations rising out of the First Supplemental Order. In order to accord every possible due process, parties were afforded an additional opportunity to address themselves to these actions by the Commission. The comments submitted in response thereto have been fully considered by the Commission and found, for reasons stated below, not to dissuade us from our earlier views.

Before addressing ourselves to the jurisdictional question at issue here, we should first like to dispose of a preliminary matter raised by Hearing Counsel. Hearing Counsel have suggested that because the master collective bargaining agreement, including the Revised Agreement, "involve antitrust and related labor policies" and require a determination of whether parties engaged in collective bargaining have exceeded the scope of legitimate bargaining, the Commission should defer jurisdiction to either the NLRB or the courts and await their decision. If the agreements are found lawful, Hearing Counsel would then have the Commission examine the implementation of the agreements in the light of sections 16 and 17 of the Act.

As we noted in *New York Shipping Association—NYSA-ILA Man-Hour/Tonnage Method of Assessment; Possible Violation of Sections 15, 16 and 17, Shipping Act, 1916,* 16 F.M.C. 381, 397–398 (1973), the matter of deferring the legality of a bargaining agreement to the exclusive primary jurisdiction of the NLRB was presented to, and disposed of by, the Supreme Court in *Meat Cutters Union v. Jewel Tea Co.,* 381 U.S. 676 (1965). In *Jewel Tea,* it was alleged that the union and other retail stores had conspired to prevent the retail sale of meat before 9:00 A.M. and after 6:00 P.M. The prohibition was contained in a collective bargaining agreement, and the question of the "labor exemption" from the antitrust laws was presented. The union attacked the appropriateness of the District Court's jurisdiction on the ground that the controversy was within the exclusive primary jurisdiction of the NLRB. The Supreme Court rejected this contention on the

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was physically incorporated into the 1973 master collective bargaining agreement whereas SMU 4 was simply made a supplement to the 1972 master collective bargaining agreement, the agreements are not at all unlike since both form part of their respective master collective bargaining agreements.

While we do not share PMA's concern that the challenged language in our Second Supplemental Order may create misleading impressions, in order to allay PMA's fear and to avoid any further misinterpretation, we wish to state on the record that we have never doubted that either SMU 4 or the Revised Agreement was part of the master collective bargaining agreement in effect at the time, nor was it our intention to question the parties' motives in treating the two agreements differently. In fact, however, PMA's apprehension is nonconsequential since either method of incorporation has the same effect. It is the substance, and not a change in form, of the agreement with its corresponding impact upon employers in the industry that concerns the Commission.

ground that the NLRB jurisdiction was primarily restricted to the policing of the collective bargaining process and was not concerned with the substantive merits of the agreement once it was signed. As it was in the *New York Shipping* case, this holding is dispositive of the suggestion made here that we defer jurisdiction over the Revised Agreement to the NLRB.

Before us is a complaint that alleges not that the parties have refused to bargain, but rather that they have entered into an agreement in violation of the shipping and antitrust laws. As a result, the NLRB is without "available procedure" to investigate the legality of the "ILWU-PMA Nonmember Participation Agreement".[4] This Commission, however, has been vested with authority over the approvability of this agreement and the exercise of such authority is consistent with the principle of primary jurisdiction as acknowledged by the Court in the *Jewel Tea* case that preliminary resort should be had to the agency which administers the statutory scheme in order to protect the integrity of that scheme. See *Port of Boston Marine Terminal Assn., et al. v. Rederiaktiebolaget Transatlantic,* 400 U.S. 62 (1970).

Hearing Counsel's alternate suggestion that the Commission defer the present matter to the courts is equally without merit. Since the Commission has already intervened in the counterpart District Court case and requested that court to stay its proceeding therein, which it has done, until the Commission has had an opportunity to pass upon the status of pertinent agreements under the Shipping Act, it would be both inconsistent and counterproductive for us to now ask that the matter be litigated before the court. More importantly, we believe that consideration of the Revised Agreement in light of the requirements of the Shipping Act is a legitimate concern of this Commission and one that is properly before us. The Commission simply cannot defer to the courts matters which are so intricately involved with its responsibilities under the shipping statutes. As we said in *United Stevedore Corp. v. Boston Shipping Association,* 16 F.M.C. 7 (1972), when establishing the applicable criteria, a labor-related agreement:

> . . . must be scrutinized to determine whether it is the type of activity which attempts to affect competition under the antitrust laws or the Shipping Act. The impact upon business which this activity has must then be examined to determine the extent of its possible effect upon competition, and whether any such effect is a direct and probable result of the activity or only remote. Ultimately, the relief requested or the sanction imposed by law must then be weighed against its effect upon the collective bargaining agreement.

[4]See discussion of Supreme Court on this point in *Meat Cutters Union v. Jewel Tea Co., supra,* at page 687.

Accordingly, we believe that under the circumstances this would be an inappropriate case for the Commission to withhold its determination out of deference to the "expertise" of either the NLRB or the courts. With this in mind, we proceed with a discussion of the jurisdictional issues involved.

Initially, Respondent PMA and Intervenors ILWU and CONASA [5] raised the same objections to the Commission's jurisdiction over the parties to the master collective bargaining agreement as were advanced by NYSA in *New York Shipping, supra.* Specifically, these parties contend that: (1) since PMA is an association with some members who are not "common carriers" or "other persons subject to this Act", and (2) since one of the parties to the collective bargaining agreement is a labor union, the Commission has no jurisdiction over the agreement.

These arguments were not only laid to rest by this Commission in our decision in the *New York Shipping* case, *supra,* but also rejected by the court in *NYSA and ILA v. FMC,* 495 F.2d 1215 (2nd Cir. April 8, 1974), cert. denied. ___ U.S. ___ (October 29, 1974). In supporting the Commission's jurisdiction over a multiemployer bargaining association and the agreement entered into among its members, the court there stated:

> We find the merits considerably less difficult than the issue of reviewability; indeed, given the decision in *Volkswagenwerk* [390 U.S. 261 (1968)], we see no need for making such heavy weather on the subject as the Commission did. [Footnote omitted.]
>
> The assessment agreement fits the definition of §15 since it imposes obligations on common carriers by water and other persons subject to the Shipping Act, to wit, terminal operators, see 49 U.S.C. §801. An agreement to which such persons are parties is not taken out of §15 by the fact that persons not fitting that definition, to wit, stevedoring contractors who are not terminal operators, are also bound. *Volkswagenwerk* established that an agreement among water carriers, stevedoring contractors and terminal operators allocating assessments for benefits negotiated with a longshoremen's union requires approval under §15. The FMC took jurisdiction of T-2390, the predecessor of the present assessment formula, apparently without objection, and directed certain modifications; its action has been sustained, without any suggestion that the FMC lacked jurisdiction over the agreement, in a comprehensive opinion by the District of Columbia Circuit, *Transamerican Trailer Transport, Inc. v. FMC, supra.* The petitioners urge that the present case is distinguishable on the basis that the agreements in *Volkswagenwerk* and *Transamerican Trailer Transport* were solely among stevedoring contractors, terminal operators and carriers, while the ILA took an active part in negotiating and is a party to the agreement here at issue. This is a distinction without a difference. To be sure, the FMC has no concern with so much of the agreement as provides what wages and other benefits shall be paid to the longshoremen, grievance procedures and similar matters. But even though we fully accept that the ILA has an important stake in the existence of a workable and reliable assessment formula, this does

[5] For the sake of convenience, PMA, the ILWU and the Council of North Atlantic Shipping Associations (CONASA) will hereinafter be collectively referred to as "Respondents".

not relieve the FMC of its duty to determine whether the formula is reasonable in its effects on shipping. That inquiry is just as important as under the predecessor agreement and under the agreement in *Volkswagenwerk*. (Id., pages 27, 35–36)

Further, we find that the Revised Agreement before us is factually substantially similar to the assessment agreement which the Supreme Court found subject to section 15 in *Volkswagenwerk v. FMC, supra.* Consider the parallels. In *Volkswagen:* (1) the ILWU and the PMA had laboriously negotiated on the establishment of the Mech Fund, which, in part, liberalized the union's fringe benefit program, (2) the only interest of the ILWU was to insure that payments were made into the fund, and (3) the PMA wanted to reserve to itself how the payments were computed and the ILWU left that to PMA. Here, (1) PMA and the ILWU have stated on the record that they have over a period of years negotiated a program of fringe benefits and that this program was supported by the payments of both members and nonmembers of the PMA, (2) the only interest of the ILWU is allegedly to assure that all industry users of ILWU labor made payments into the fringe benefit fund, and (3) PMA wants to reserve to itself all control of industry users of labor.

In spite of these obvious similarities, Respondents here contend that the rationale of the *Volkswagen* case is inapplicable here because the assessment agreement under consideration in *Volkswagen* was exclusively concerned with "the relationship between association members and their customers", while SMU 4 and its successor, the Revised Agreement, involve matters of fundamental concern to the union and its members.[6]

Whatever be the merits of this argument, PMA itself readily admits that the purpose of the supplemental agreements is to do away with the "free ride" previously enjoyed by Petitioners and other similarly situated ports and to place nonmembers on the same "competitive" basis as members of the PMA. In short, the effect of the Revised Agreement is to control or affect competition between members and nonmembers.[7] Section 15 of the Shipping Act specifically subjects to Commission jurisdiction all agreements between persons subject to the Act which control, regulate or prevent competition.[8] Thus, we conclude that the Revised Agreement must be filed for Commission approval unless it is entitled to a "labor

[6]Petitioners, however, continually allude to the lack of any "legitimate" interest of the ILWU in the PMA's attempt to control the "competition between members and nonmembers".

[7]In response to our Second Supplemental Order, all the parties to this proceeding have incorporated by reference their remarks concerning SMU 4 and have asked the Commission to apply them equally to the Revised Agreement. Consequently, we have substituted the term "Revised Agreement" wherever an argument was used with reference to SMU 4.

[8]PMA, for example, would bind nonmembers to PMA "lockouts", thus preventing a nonmember from continuing operations while members' facilities are shut down.

exemption".[9] For reasons stated below, we find that the Revised Agreement is not entitled to such an exemption.

The nature and scope of the so-called "labor exemption" from the antitrust and shipping laws have been considered and discussed at considerable length by the Commission in its decision in *Boston Shipping, supra.* In that case the Commission, in reviewing three labor-related agreements, applied doctrines of law which had evolved through the courts in a number of cases arising under the antitrust laws. Recognizing the judicially-accepted principle that the fruits of collective bargaining are generally excepted from the application of the antitrust statutes, the Commission explained therein that:

> The "labor exemption" originated in the area of accommodation of the labor laws and the antitrust laws. To preclude the application of the antitrust laws to various collective bargaining agreements entered into between labor and management, the courts carved out of the antitrust laws a "labor exemption", by means of which such agreements were held to be immune from attack under antitrust laws. Thus, the analogy to a "labor exemption" from the shipping laws is obvious. (16 F.M.C. 11)

In determining whether labor-related agreements are subject to the provisions of the Shipping Act, 1916, or "labor exempt", the Commission has advised that just as in the courts' accommodation of the labor laws and the antitrust laws, it would proceed on an ad hoc case-by-case basis and apply "the various criteria" evolved in the courts as guidelines or "rules of thumb" for each factual situation. As detailed in the *Boston Shipping* case, these criteria are as follows:

> 1. The collective bargaining which gives rise to the activity in question must be in good faith. Other expressions used to characterize this element are "arms-length" or "eyeball to eyeball".
>
> 2. The matter is a mandatory subject of bargaining, e.g. wages, hours or working conditions. The matter must be a proper subject of union concern, i.e., it is intimately related or primarily and commonly associated with a bona fide labor purpose.
>
> 3. The result of the collective bargaining does not impose terms on entities outside of the collective bargaining group.
>
> 4. The union is not acting at the behest of or in combination with nonlabor groups, i.e., there is no conspiracy with management.

[9] Seattle has presently petitioned for severance and stay from this proceeding all issues relating to the master collective bargaining contract except for the Revised Agreement. Because the Revised Agreement is different in operation from the remaining sections of the collective bargaining contract, Seattle maintains that the latter is immaterial to the Commission's concern, especially since it raises issues already decided by the NLRB. (See *ILWU, et al., and California Cartage Company, et al.*, 208 NLRB No. 124 (February 15, 1974), wherein the NLRB found a substantial portion of the master collective bargaining contract unlawful.) As heretofore mentioned, because there are involved in the National Labor Relations Act and the Shipping Act, 1916 (the Act) two different purposes, it would not necessarily follow that a holding under NLRB concepts would be equally applicable to our responsibilities under the Act. Consequently, while we can agree with Seattle that the Revised Agreement within the collective bargaining contract is the *only* agreement among and between members of PMA having section 15 ramifications, there still remains the question of the legality of the agreements among and between members of PMA under sections 16 and 17 of the Act. For this reason, we are denying Seattle's petition. For purposes of this interlocutory proceeding, however, we are hereinafter limiting our discussion solely to the Revised Agreement.

Failure of an agreement to meet any one of these criteria is sufficient to consider withholding a labor exemption. As we explained in the *Boston Shipping* case, "[t]hese criteria are by no means meant to be exclusive nor are they determinative in each and every case." (16 F.M.C. 12)

There is considerable factual conflict among the affidavits from officials of various organizations and purported "notes" taken at PMA meetings as to whether the Revised Agreement was the simple product of, as PMA asserts, "eyeball to eyeball" good faith bargaining or, as contended by Petitioners, was insisted upon by PMA "as a part of its longrange program to force all persons and entities utilizing longshore labor to join PMA as a member and to subscribe to and follow PMA's labor policies." Whatever be the merits of the parties' arguments, we need reach no conclusions on this issue since our finding that the Revised Agreement is not entitled to a labor exemption rests entirely on other grounds.

As to the second criteria, sections 8(a)(5) and 8(d) of the National Labor Relations Act (49 Stat. 452) define the "mandatory" issues of collective bargaining as "wages, hours, and other terms and conditions of employment". Although the National Labor Relations Act does not define what constitutes "terms and conditions of employment", other than wages and hours, the NLRB, with the approval of the courts, has initiated a system of classification by dividing subjects of bargaining into three categories: mandatory, permissive and illegal. Whether or not a subject of bargaining is mandatory or permissive depends upon the extent to which the agreement addresses itself to the labor relations of the contract employer, vis-a-vis his own employees.[10] Obviously, while union and management may bargain on mandatory and other issues, this does not necessarily mean that any agreement concluded will not violate the antitrust laws and/or the Shipping Act.

Petitioners submit that at best the subject of the Revised Agreement is permissive only. In support thereof, Petitioners advance a three-prong argument, the substance of which alleges that the ILWU gained nothing that it did not already have by the terms of the overall PCLCA.[11] Petitioners first contend that, notwithstanding the Revised Agreement, nonmembers would continue to contribute to the fringe benefit programs in the same amounts as PMA members and signified their willingness to continue to do so. Secondly, they maintain that while the Revised Agreement resolved the "problem" of "steady

[10]See *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1968); *Nat'l Woodwork Manufacturing Assoc. v. NLRB*, 386 U.S. 612 (1967).

[11]PCLCA (Pacific Coast Longshore & Clerk Agreement), which established the PMA-ILWU joint work force in 1935, is the basic collective bargaining agreement which has been amended to include a Memorandum of Understanding in which the Revised Agreement is a part thereof.

men" by requiring uniformity with PCLCA's provisions, this was in actuality PMA's problem and not that of the ILWU, who allegedly had no interest therein. Finally, Petitioners argue that the requirement that participating nonmembers would pay dues and assessments into PMA to support labor relations programs and would adhere to PMA labor policies had no relationship to "hours, wages, or working conditions".[12]

Thus, Petitioners' position here is that the issue here does not involve altering or modifying the wages, hours or working conditions of the ILWU—areas which would understandably be of primary concern to the union—but rather involves the matter of what a nonmember must agree to as a condition to directly employing ILWU labor.

Respondents argue that contrary to the belief of Petitioners, the Revised Agreement relates directly to a mandatory subject of bargaining. Moreover, Respondents point out that there has been a long bargaining history of nonmember participation in both the PMA-ILWU hiring hall and fringe benefit systems.[13]

The Revised Agreement, insofar as it changes the treatment of "steady men" and requires all direct hiring to be in accordance with PMA procedures, obviously affects hours or working conditions. The question is, however, whether the agreement is directed to the labor relations of the contracting employer, vis-a-vis his own employees. We think not. Since the primary purpose of the Revised Agreement is to bring nonmembers into the PMA "camp", that it affects the hours or working conditions of some of the members of the ILWU would appear to be only incidental to the main purpose of the agreement. Thus, we can only conclude that the matter of the Revised Agreement is not a mandatory subject of bargaining. While this finding may be sufficient to consider withholding a "labor exemption", our ultimate conclusion that the Revised Agreement is *not* entitled to a labor exemption rests on additional grounds.

Respondents have devoted much argument in their memorandum to support their contention that the Revised Agreement does not, as Petitioners have insisted, impose such terms upon persons or entities outside the bargaining group as would justify the denial of a labor exemption. In fact, Respondents, in furtherance of their argument that there are "a number of significant differences" between SMU 4 and the Revised Agreement, advise that one of the "changes" incorpo-

[12]This conclusion is primarily founded upon the remarks of Mr. Flynn, President of PMA, to wit:

A nonmember share is measured by all the obligations included in the nonmember participation agreement, not just a monetary contribution (p. 9 of Mr. Flynn's affidavit).

[13]See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 211 (1964), wherein the Court held that in determining whether or not a matter is a mandatory subject of bargaining, it is appropriate to consider bargaining history.

rated in the Revised Agreement was intended to allay any fears on the part of Petitioners that the Agreement imposed terms on outsiders. Notwithstanding such assurances and for reasons stated below, we agree with Hearing Counsel and Petitioners that the Agreement is specifically designed to compel nonmember entities to join PMA under threat of exclusion from the ILWU work force. As such it clearly imposes terms and conditions upon persons outside the bargaining group.

To "remove any doubt" that the agreement between PMA and ILWU restricted the latter in its bargaining with nonmembers, Respondents explain that the note after Paragraph 3(b) of SMU 4 was deleted from the Revised Agreement. This note provided that:

> If a prospective nonmember participant has an agreement with the ILWU which provides for utilization of the joint work force at terms and conditions of employment more favorable to the nonmember than those provided under the PCLCA, including the CFSS [Container Freight Station Supplement], such nonmember must alter the agreement to conform to the PCLCA, including the CFSS, in order to become a nonmember participant.

Seattle and Petitioners view this deletion as being cosmetic only and in no way altering the effects of the agreement. In support of its position that PMA is still utilizing the joint work force as a means of controlling the labor policies of nonmember ports, specific reliance is placed on Paragraphs 2, 3, 6 and 12 of the Revised Agreement, to wit:

> 2. The nonmember participant's separate ILWU contract must conform with the provisions hereof, and the provisions of the PCLCA governing the selection of men for inclusion in the joint work force.
>
> 3. A nonmember participant will share in the use of the joint work force upon the same terms as apply to members of PMA. For example a) the nonmember participant shall obtain men on the same basis as a PMA member from the dispatch hall operated by ILWU and PMA through the allocation system operated by PMA,
>
> b) if a work stoppage by ILWU shuts off the dispatch of men from the dispatch hall to PMA members, nonmember participants shall not obtain men from the dispatch hall,
>
> c) if during a work stoppage by ILWU, PMA and ILWU agree on limited dispatch of men from the dispatch hall for PMA members, such limited dispatch shall be available to nonmember participants.
>
> The essence of b) and c) of this section is the acceptance by nonmember participants of the principle that a work stoppage by ILWU against PMA members is a work stoppage against nonmember participants.
>
> 6. For purposes of 1.53 through 1.57 of the Container Freight Station Supplement (CFSS) of the PCLCA, a nonmember participant who uses the joint work force at terms and conditions of employment no more favorable to the nonmember participant than those provided under the PCLCA, including the CFSS, may be deemed to be a "member of PMA" insofar as it is so using the joint work force.
>
> 12. the ILWU-PMA Nonmember Participation Agreement shall be binding and continue in effect until terminated on such terms and conditions as may be mutually agreed to by the PMA, the ILWU and the participant. An entity that terminates its participation

shall at such time no longer be eligible to employ men in the joint work force nor to participate in the Pension, Welfare, Vacation and Pay Guarantee Plans existing between ILWU and PMA.

Consequently, while nonmembers are allowed to negotiate separate contracts, the contracts must, nevertheless, conform with the provisions of both the Revised Agreement and the master collective bargaining contract (Paragraph 2). Moreover, and notwithstanding the further deletion by PMA of Paragraph 9 of SMU 4 from the Revised Agreement,[14] Paragraph 3 of the Revised Agreement still requires, in effect, that nonmembers adhere to PMA labor policies pursuant to a work stoppage by ILWU.

Additionally, Paragraph 6, by providing that if nonmembers use the ILWU work force on terms more favorable than to PMA members, the nonmembers will be deprived use of the PMA-ILWU joint work force, appears to allow for the imposition of work rules on nonmembers.[15]

As a further indication that PMA is still controlling labor policies of nonmembers, we note that the substance of the termination provision of Paragraph 12 of the Revised Agreement is akin to that of Paragraph 13 of SMU 4. Whereas Paragraph 13 provided that a contract could only be terminated by the joint action of PMA and ILWU, Paragraph 12 requires that the nonmember be included as part of this joint action. In effect, therefore, under either paragraph, the nonmember is still bound to the agreement for an indefinite period of time since the nonmember cannot unilaterally terminate the agreement but can only do so upon such "terms and conditions" as may be "mutually" agreed to by PMA and ILWU.

The foregoing, we believe, makes it clear that no substantial differences exist between the old SMU 4 and the Revised Agreement. Whatever revisions were made in the Revised Agreement are changes in form only which in no way substantially alter the effect or impact of the agreement. The effect of the Revised Agreement, we find, is to require entities outside the bargaining group to either submit to its terms or incur the sanctions contained therein, i.e. deny nonmembers participation in PMA hiring halls and fringe benefit funds as well as the use of ILWU labor. In this regard, we agree with Hearing Counsel that the agreements at issue here "bear a striking resemblance" to that found unlawful under the antitrust laws in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

In the *Pennington* case, a group of large employers in the mining

[14]Paragraph 9 of SMU 4 provided that if there were a cessation of work at the end of the contract period of the PCLCA and related agreements, the labor policy of PMA shall continue to apply to nonmember participants, and that nonmember participants shall continue to accept PMA's labor policy as their own.

[15]Paragraph 6 of the Revised Agreement is identical in intent to Paragraph 3(b) of SMU 4.

industry had agreed with the union to impose its wage and royalty scale on smaller nonunion operators outside the immediate bargaining group. Plaintiff there contended that this scheme was intended to eliminate from competition the smaller mine operators who allegedly could not withstand the costs of the particular terms and conditions of employment which would be forced upon them. The Court concluded that while a union may make wage agreements with a multiemployer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers, it:

> . . . forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours, or other conditions of employment from the remaining employers in the industry. (381 U.S. at pages 665–66.)

We believe that the Court's rationale in *Pennington,* which is clearly not limited to the imposition of a wage scale but could involve any other labor standard, such as labor relations policy, is applicable to the agreements before us. Instead of a system of computing wages, which because of difference in methods of production would be more costly to one set of employers than another, the PMA and ILWU here have devised a scheme whereby the elimination of all local agreements between nonmembers and the ILWU would result in higher costs to one set of employers (the nonmembers) than to another (PMA members); particularly, since the differences in methods of operation and locality are ignored.[16]

Respondents read *Pennington* as establishing only the principle that a union may not by agreement with one employer restrict its right to bargain with other employers. Such a reading of *Pennington* is far too restrictive and totally ignores the real issue in the case, i.e., the *imposition* of terms on persons outside the bargaining group. The fact that the scheme employed in *Pennington* required the UMW to surrender its freedom of action is only incidental to the Court's ultimate holding that a union and employers in one bargaining unit "are not free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry". (381 U.S. at 666.)

[16]Petitioners cite as an example the Port of Olympia. Under its agreement with Local No. 47 in the Olympia area, the local provides, among others, checkers. If the Port were required to abrogate its local agreement and adhere to the requirements of the Coast Agreement, members of the ILWU Checkers' Union in Seattle would have to be employed, thus increasing the cost to the Port of Olympia by the amount of payments for travel time to and from Seattle. The same situation prevails at the Port of Port Angeles. This shift in costs directly affects the Ports' costs of providing terminal services and thereby the rates paid by the shipping public.

Even assuming that Respondents' interpretation of *Pennington* is correct, the Revised Agreement is still clearly inconsistent therewith, as clearly indicated by Paragraphs 2, 3, 6 and 12 of the aforementioned agreement, delineated earlier. Under Respondents' own interpretation of *Pennington,* the Revised Agreement restricts nonmembers' right to bargain and thereby imposes such terms upon entities outside the collective bargaining unit as to preclude the granting of a "labor exemption".

Addressing themselves to the fourth "labor exemption" criterion, Petitioners challenge PMA's contention that "no conspiracy" existed between PMA and ILWU. PMA argues that there is nothing in the Revised Agreement that precludes the ILWU from making whatever arrangements it and the nonmembers can negotiate. Seattle, on the other hand, refers to the ILWU's chief negotiator's remarks during negotiations over SMU 4 that the ILWU would cooperate with PMA and provide PMA with "insurance" against "legal entanglements" if PMA would be cooperative in other areas. In view of our finding here that the Revised Agreement is not entitled to a labor exemption by virtue of the fact that it imposes terms on parties outside the bargaining unit and is not a subject of mandatory bargaining, we find it unnecessary to resolve the merits of the "conspiracy" issue.

In the "final analysis", our assertion of jurisdiction over a labor-related agreement requires, as we noted in *Boston Shipping,* a consideration of the impact of such agreement on the competitive conditions in the industry, vis-a-vis its impact on the collective bargaining process. On this basis, and taking into consideration several past court decisions [17] involving labor-related agreements, we find that while the Revised Agreement has a minimal effect on the collective bargaining process, it has such a potentially severe and adverse effect upon competition under the Shipping Act as would justify our consideration of its approvability under the standards thereof. Without passing on the individual merits of each of their contentions, we believe that Petitioners have generally demonstrated the possible adverse impact of the Revised Agreement and the effect its implementation could have on their ability to compete with PMA members. As Petitioners have pointed out, their failure to sign the Revised Agreement could well result in the closing of their facilities and the cessation of operations because (1) they will be denied ILWU personnel from the joint hiring hall; (2) if they employ non-ILWU personnel, ILWU personnel utilized by PMA stevedoring companies to load and unload cargo to and from

[17] See *Allen Bradley Co. v. Local 3 International Brotherhood of Electrical Workers,* 325 U.S. 797 (1945); *Meat Cutters Union v. Jewel Tea Co., supra; United Mine Workers v. Pennington, supra; Volkswagenwerk v. FMC, supra;* and *NYSA and ILA v. FMC, supra.*

ships will refuse to work the cargo; and (3) the ILWU would undoubtedly put up picket lines at the entrances of all ports' terminals, thus effectively stopping the movement of all cargo being delivered to or taken from such terminals by other union personnel.[18] It follows, therefore, that the implementation of the Revised Agreement, as it may affect the receiving, handling, storing and delivery of cargo at petitioner ports, may involve violations of sections 16 and 17 of the Shipping Act, 1916.

On the other hand, we find that the Revised Agreement has little if any effect on the collective bargaining process. With or without the Revised Agreement, the provisions for fringe benefits, which are the main concern of the ILWU, remain unchanged.

Further, if petitioner ports contracted with PMA stevedoring companies (employing ILWU personnel) to perform all the terminaling services now directly performed by the ports themselves, the ports would be precluded from any decision-making power with respect to the performance of services at their terminals. Consequently, as a practical matter, Petitioners would be delegating to such stevedoring companies all ratemaking decisions, and thus, being profit-motivated, these companies would have discretion and incentive to divert cargo from one port to another by simply granting different rates for each area.

Finally, we should like to point out that we do not view our exercise of jurisdiction over the Revised Agreement as interfering with the collective bargaining process within the maritime industry. Such an assertion of jurisdiction does not violate the right of employees to bargain collectively through representatives of their choice. Further, we disagree with Respondents that our jurisdiction over the Revised Agreement will preclude the remaining sections of the master collective bargaining agreement from being implemented. At issue here is only the Revised Agreement which we consider severable from other provisions of the master collective bargaining agreement, i.e. the amount and kind of fringe benefits to be paid the union. The obligation of PMA to pay those benefits remains unimpaired. Consequently, the Commission's assertion of jurisdiction will have no effect upon PMA's obligations under the labor contract.

Therefore, weighing the various Shipping Act and labor interests raised by the Revised Agreement, we conclude, consistent with the court's holding and directives in *NYSA and ILA v. FMC, supra,* that the many and potentially severe shipping problems raised by the

[18]Although conceding that longshoremen and clerks are available outside the PMA-ILWU joint work force, Petitioners submit that these types are not suitable for employment as they are unskilled labor; skilled labor can only be gotten from the ILWU work force.

Revised Agreement balanced against the minimal impact our regulation thereof would have on the collective bargaining process fully warrants our denial of a "labor exemption" in this proceeding. While the court in *NYSA and ILA v. FMC, supra,* concluded that on the basis of facts involved therein it was "enough" for the Commission to find that the shipping interests outweigh the labor interests in asserting jurisdiction over a labor-related agreement, we believe that our discussion of the Revised Agreement in light of the four "exemption" criteria, is not only responsive to the pleadings of the parties but also lends additional support to the conclusion reached here.

Commissioner Clarence Morse, dissenting.

I dissent.

We are in an area which involves not only the Shipping Act, 1916, but also the antitrust laws and the labor laws, and it becomes a matter of judgment and line drawing in determining whether we should retain jurisdiction [19] or whether we should grant labor exemption and leave the matter for resolution by the courts and the NLRB. Under our decision in *Boston Shipping,* 16 F.M.C. 7, it remains within our sound discretion whether to grant labor exemption even when an agreement fails to meet one or more of our announced criteria.[20] It is my view that the impact of the Revised Agreement vis-a-vis the collective bargaining process outweighs the impact of that agreement on the competitive conditions within the industry. In all events, the courts in the pending antitrust cases and the NLRB have far greater expertise in this antitrust and labor law area, and more flexible tools by way of treble damages, injunctive process, and otherwise, than do we to assure that the rights of all interested parties will be duly protected.[21]

[19] As to *subject matter,* the intra-PMA agreement concerning the ILWU-PMA Nonmember Participation Agreement is clearly a section 15 agreement. Whether such agreement meets section 15 standards as to *parties* is not established on this record and, with due respect to *NYSA & ILA* v. *FMC, supra,* I would have fundamental jurisdictional problems if, in fact, "mixed membership" exists within PMA. Under *Boston Shipping,* it would appear that PMA itself is primarily a collective bargaining unit and should receive labor exemption. However, that does not resolve the problem, for to find existence of a section 15 agreement between "common carriers by water" and "other persons subject to the Act" we must consider the membership of PMA, since the functions of PMA, a corporation, itself are neither that of a common carrier by water nor an "other person subject to the Act". ILWU is clearly neither of the described type of persons.

[20] In *United Stevedoring Corp.* v. *Boston Shipping Assoc.,* 16 F.M.C. 7 at 15 (August 24, 1972) we stated in part: "While we cannot here decide that every such collective bargaining agreement is entitled to a labor exemption, Hearing Counsel and the Department of Justice recommend the consideration of a section 35 rulemaking proceeding in order to exempt for the future this class of agreements from some or all of the requirements of section 15 of the Shipping Act, 1916, thereby not jeopardizing collective bargaining by any threat of pre-approval implementation penalty. This we intend to do." I again ask *WHEN* is this Commission proposing to initiate such a proceeding?

[21] In my opinion, the majority ignore the reality of labor-management relations when they suggest that denial of labor exemption to the Revised Agreement "will have no effect upon PMA's obligations under the labor contract." This is another indication of our lack of expertise in this labor-management field. An earlier example is the Court's reaction stated in its Opinion on Motion to Remand in *Boston Shipping Assoc.* v. *USA* (CA-1, No. 72-1004, May 31, 1972) when commenting on our earlier report in *United Stevedoring Corp.* v. *Boston Shipping Assoc.,* 15 F.M.C. 33 (1971).

I would grant labor exemption and stay our proceedings without prejudice pending resolution of the pending court cases, and if the involved agreements are found lawful by the courts and the parties carry out specific practices in a manner which may violate sections 16 or 17 of the Shipping Act, then Shipping Act concern may become substantial and the obligations of members of the PMA under the Shipping Act (and also the ILWU as "any other person" under section 16) may have to be determined by the Commission.

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 72–48

PACIFIC MARITIME ASSOCIATION—COOPERATIVE WORKING ARRANGEMENTS; POSSIBLE VIOLATIONS OF SECTIONS 15, 16 AND 17, SHIPPING ACT, 1916

ORDER

The Federal Maritime Commission instituted this proceeding to determine, *inter alia,* whether the master collective bargaining contract entered into by the Pacific Maritime Association (PMA) and the International Longshoremen's and Warehousemen's Union embody any agreements between and among members of PMA, which agreements are subject to section 15 of the Shipping Act, 1916; and whether there were any labor policy considerations which would operate to exempt such agreements or practices from section 15 of the Shipping Act, 1916. The Commission having this date made and entered its report stating its findings and conclusions with respect thereto, which report is made a part hereof by reference:

Therefore, it is ordered, That pursuant to section 22 of the Shipping Act, 1916 (46 U.S.C. 821), and consistent with the Commission's Order of September 6, 1972, as amended by its Orders of October 19, 1972 and January 30, 1974, the investigation in this docket shall proceed to determine:

1. Whether the "ILWU-PMA Nonmember Participation Agreement" (Revised Agreement), which is embodied in the ILWU-PMA master collective bargaining contract and which we have found to be subject to and must be filed in accordance with the requirements of section 15 of the Shipping Act, 1916 (46 U.S.C. 814), should be approved, disapproved, or modified pursuant to that section;

2. Whether the implementation by PMA and the ILWU of the provisions of the Revised Agreement and/or the master collective bargaining agreement will result in any practices which will subject any person, locality or description of traffic to undue or unreasonable prejudice or disadvantage in violation of section 16 of the Shipping Act, 1916 (46 U.S.C. 815);

3. Whether the implementation by PMA and ILWU of the provisions of the Revised Agreement and/or the master collective bargaining agreement will result in any practice which is unjust or unreasonable in violation of section 17 of the Shipping Act, 1916 (46 U.S.C. 816);

4. Whether any labor policy considerations would operate to exempt these agreements or practices resulting therefrom from any provision of sections 16 or 17 of the Shipping Act, 1916; and

It is further ordered, That the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union, and their respective members are hereby made respondents in this proceeding; and

It is further ordered, That a public hearing be held before an Administrative Law Judge of the Commission's Office of Administrative Law Judges at a date and place to be determined and announced by the Administrative Law Judge; and

It is further ordered, That notice of this order be published in the *Federal Register* and that a copy thereof and notice of hearing be served upon Petitioners and both the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union, individually, and on behalf of their respective members; and

It is further ordered, That notice of this order and notice of hearing be mailed directly to the Department of Justice, the Department of Labor and the National Labor Relations Board; and

It is further ordered, That all future notices issued by or on behalf of the Commission in this proceeding, including notice of time and place of hearing or prehearing conference, shall be mailed to Petitioners, the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union, individually, and on behalf of their members, and any other person made a party of record to this proceeding; and

It is further ordered, That any person other than those named herein who desires to become a party to this proceeding and to participate herein, shall file a petition to intervene in accordance with Rule 5(l) (46 CFR §502.72) of the Commission's Rules of Practice and Procedure.

Finally, it is ordered, That Seattle's Petition for Severance hereby is denied.

By the Commission.

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

FEDERAL MARITIME COMMISSION

No. 73–46

PACIFIC ISLANDS TRANSPORT LINE—PROPOSED GENERAL RATE INCREASES BETWEEN PACIFIC COAST AND HAWAII PORTS OF CALL AND PAGO PAGO, AMERICAN SAMOA

NOTICE OF ADOPTION OF INITIAL DECISION

Jan 30 1975

No exceptions having been filed to the initial decision 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 January 30, 1975.

By the Commission.

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

FEDERAL MARITIME COMMISSION

No. 73–46

Pacific Islands Transport Line—Proposed General Rate Increases Between Pacific Coast and Hawaii Ports of Call and Pago Pago, American Samoa

Respondent Pacific Islands Transport Line found to have shown a need for additional revenue and to have sustained its burden of proving that its rate increases are just and reasonable within the meaning of section 18(a) of the Shipping Act, 1916, and sections 3 and 4 of the Intercoastal Shipping Act, 1933.

In view of continued and expected losses by respondent and lack of substantial evidence on point, suggestions by parties representing American Samoa that the subject general rate increases should be modified by altering individual commodity rates or by changing the outbound/inbound rate levels cannot be implemented under applicable principles of law.

F. Conger Fawcett for respondent.

C. Brewster Champman, Jr., for complainant U. S. Department of the Interior and intervener Government of American Samoa.

George A. Wray for complainant American Samoa Chamber of Commerce.

Donald J. Brunner and *C. Douglass Miller,* Hearing Counsel.

INITIAL DECISION OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE [1]

This proceeding was instituted by order of the Commission served August 3, 1973, to determine whether certain rate increases filed by respondent Pacific Islands Transport Line (PITL) are just and reasonable within the meaning of section 18(a) of the Shipping Act, 1916, and sections 3 and 4 of the Intercoastal Shipping Act, 1933. The subject rate increases applied to cargo moving outbound from the U. S. Pacific Coast to American Samoa, with certain exceptions, in the amount of 23 percent and to cargo moving inbound from American Samoa in the amount of 12 percent. The rate changes were scheduled to become effective on June 15, 1973, but were postponed by PITL until August

[1] This decision became the decision of the Commission 1/30/75

13, 1973, in order to comply with the then current Presidential order freezing prices. The Commission, however, suspended the effective date until December 1, 1973.

Protests to the subject increases were filed by a number of parties representing American Samoan interests who were named as complainants in the Commission's Order. Only two protestants actively participated throughout the entire proceeding, namely, the Department of the Interior and the Government of American Samoa, both represented by the Assistant Solicitor, Territories, Department of the Interior. The American Samoa Chamber of Commerce appeared at the hearing represented by counsel and furnished a witness but ceased thereafter to respond to pertinent pleadings and rulings issued subsequent to the hearing and filed no brief.

Hearing was held in San Francisco, California, on April 2 and 3, 1974. In view of the unique nature of this case involving a foreign-flag carrier headquartered in Norway, provision was made for a post-hearing analysis of financial data by Hearing Counsel obtained through the cooperation of respondent from its overseas location and opportunity for presentation of further evidence was afforded if necessary. As discussed below, this necessity did not arise.[3]

General Description of the Trade, the Service, and the Line

PITL is a Norwegian-owned steamship operation, based in Sandefjord, Norway. It is owned by A/S Thor Dahl, which also operates vessels in other trades not connected with the United States of America. PITL is its only U.S.-connected service, which operates in the U.S. Pacific Coast/American Samoa trade by virtue of a special statutory exemption, as noted previously. General Steamship Corporation, Ltd. (GenSteam) acts as the Line's general agents responsible for soliciting and booking cargo and, in conjunction with the vessel's Master, for the day-to-day operations of the Line. Overall policy and planning, manning and provisioning the vessel, executing bunker contracts and purchases (as opposed to merely arranging for the physical bunkering itself) and insurance are functions of the owner in Sandefjord.

[3]The unique status of this case relates to the fact that although regulated under section 18(a) of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, as regards the West Coast/American Samoan trade, PITL is a foreign-flag operator which by special statute is permitted to serve this "domestic offshore" trade, which would be otherwise restricted to vessels registered under the laws of the United States. See 48 U.S.C. 1664; 46 U.S.C. 883. In recognition of the peculiar difficulties arising out of this situation with regard to the filing of financial reports pursuant to the Commission's General Order 11, an accord has apparently been reached with the Commission's staff permitting certain modifications to the reports. In another proceeding in which it is proposed that General Order 11 be modified in a number of respects, it has been found by Administrative Law Judge Levy that foreign-flag carriers such as PITL operating in "domestic offshore" trades be exempt from the filing requirements altogether. See Docket No. 67-57, *Significant Vessel Operating Common Carriers in the Domestic Offshore Trades, Etc.*, Initial Decision, October 10, 1974, pp. 45-47.

PITL commenced serving the U. S. Pacific Coast/American Samoa trade on a regular basis in July of 1955. At that time the only carrier serving the trade was Matson Navigation Company through its Oceanic Steamship Company. In 1966 a third carrier operated by Marine Chartering Co., Inc., like PITL, of foreign-flag status, joined Matson and PITL. In January 1971, Matson withdrew its operations in the trade and sold the assets of Oceanic to another U. S.-flag operator, Pacific Far East Line (PFEL), which continues to operate in the trade. Meanwhile in the latter part of 1967, the identity of the Marine Chartering Co. operation underwent a change with the result that its operations were assumed by Polynesia Line, Ltd. Presently, therefore, there are three carriers serving the trade, namely, PITL, Polynesia Line, Ltd., and PFEL, the first two carriers operated by foreign corporations.

American Samoa is a territory of the United States consisting of six inhabited islands isolated in the middle of the South Pacific Ocean approximately 2,300 miles southwest of Honolulu. The distance between the U. S. Pacific Coast and Pago Pago, the capital, is some 4,163 miles.

Until mid-1973 PITL served a full range of South Sea Islands destinations, including Tahiti (Papeete), Western Samoa (Apia), Fiji (Suva), New Caledonia (Noumea), in addition to American Samoa (Pago Pago). Occasionally through 1972 PITL served the additional Fiji port of Lautoka, two ports in the New Hebrides and even New Guinea. The round-trip steaming distance for a typical voyage of this sort is approximately 14,200 nautical miles and encompasses some 80 days.

In mid-1973, PITL instituted a pared-down and anticipatedly more economical service, serving only the three major island ports of Pago Pago, Apia, and Papeete, reducing the round-trip steaming distance to 11,450 nautical miles and the turn-around time to some 48 days. Although in the recent past, PITL had operated at least three vessels in the trade, under the reduced service pattern described the line operated and continues to operate one vessel, the *M/V Thorsisle,* and breaks the 48-day round-trip voyage into segments of two thirds (33 days) for the outbound leg and one-third (15 days) for the inbound.

Because of the nature of the trade and the revenues to be derived from it, PITL has not utilized modern, highly-mechanized, expensive ships but rather has relied on older, conventional break-bulk vessels. The single ship presently employed, the *M/V Thorsisle,* built in 1953, however, has a substantially larger deadweight tonnage capacity than her two predecessors, at 9,530 long tons. Her bale cubic capacity is also larger, at 527,445 cubic feet, including 25,695 cubic feet of space for refrigerated cargo.[3] This ship is also equipped with two side-ports gaining entrance to her 'tween-deck spaces. Side-port operations, which are faster than the conventional, and for which the stevedores have allowed a rate discounted by about one-half, have proved feasible only for the relatively large quantities of uniform, unitized cargo represented by the canned fish moving inbound, from one port of loading to one port of discharge. They are utilized for that movement wherever possible. Occasionally, however, because of additional cargoes on board, considerations of vessel stability hamper such use.

Neither the *Thorsisle* nor its predecessors are or have been "containerized" in the customarily accepted sense of that term. The vessels are not especially designed to carry containers and have problems in accommodating any great number of them. As a result, by far the greatest percentage of PITL's cargo complement is loaded in break-bulk, unitized parcels. Containerized movement is not entirely absent, however. At the present time PITL routinely carries between 20 and 30 20-foot containers as well as some 8-foot containers. The inbound canned fish movement is rapidly approaching the point of being suitable for a fully containerized service and PITL is exploring the possibilities. The unsuitability of the many ports previously served by PITL under its former multi-island schedule had inhibited development of such an operation.

In terms of cargo characteristics, the outbound movement to American Samoa and the other South Sea Islands is essentially a "grocery-store" type of trade. One commodity, knocked-down cans, for the two large fish canners located in American Samoa, Van Camp and Starkist, provides the single dominant outbound cargo, amounting in revenue tonnage to between 17 and 25 percent of PITL's total outbound cargo in the four years immediately prior to the current rate increase (1969–72). With the sole exception of vegetable oil in 1970, no other outbound cargo has reached even 10 percent.

Inbound, from all of the South Sea Islands, there are essentially but two commodities, both moving from the two large canners in Pago Pago, overwhelmingly, canned fish, and considerably less fishmeal and pet food of fish derivation, almost all discharged at Los Angeles. This essential difference in the cargo characteristics between the outbound and inbound movements as well as the multiplicity of loading and discharging ports on the outbound movement accounts for the 2:1 time differential between the outbound and inbound legs mentioned above.

[3]The two predecessor ships were the *M/S Thorsgaard*, built in 1952 (renovated in 1966) with capacity of 7,850 deadweight tons and 423,090 cubic feet and the *M/S Thor I*, built in 1956, having 7,850 deadweight tonnage and 432,510 cubic feet.

A Brief Description of American Samoa

The Department of the Interior and Government of American Samoa (hereinafter "the Samoan interests") have furnished descriptive evidence relating to the islands. As mentioned, American Samoa is a territory of the United States lying in geographic isolation in the South Pacific. Its population approximates 30,000 people essentially of Polynesian heritage, all of whom are either U. S. citizens or U. S. nationals. United States sovereignty results from two treaties of cession with the chiefs of the various islands entered into at the beginning of this century and ratified by the U. S. Congress. See 48 U.S.C. 1661. In 1951, administration of the civil government of American Samoa was assigned to the Secretary of the Interior where it has remained ever since. See Executive Order 10264. In time, however, a central American Samoan government was created with executive, legislative, and judicial branches. See Revised Constitution of American Samoa (1967), American Samoan Code, pp. 19–40. The executive branch of government is headed by a Governor and Lt. Governor appointed by the Department of the Interior. Top and middle management come primarily from overseas contract employees hired for two-year periods but increasing numbers of Samoans are assuming positions of responsibility. The United States contributes approximately $14 million annually in general grant money and $5 million in categorical grants for the operation of the Government of American Samoa and its programs. Approximately $19 million is also derived from local revenue sources.[4]

An Office of Economic Development and Planning was created within the Government of American Samoa several years ago whose purpose is to foster and implement a plan to effectuate economic stability under an era of controlled gorwth and change. The Assistant Director of the Office testified as to the economic situation prevailing on the islands. He indicated that although some growth had been achieved at least in the visual sense (*i.e.*, more cars, better homes, better health) inflationary problems had worsened the economic situation and nullified progress that had been made. He was accordingly apprehensive about the possible adverse effects on the Samoan economy flowing from the subject rate increases. Not only are the islands geographically isolated but they are extremely dependent upon shipping for the importation of goods. In fiscal 1973, for example, 97 percent of the value of imports from the U. S. Pacific Coast, or

[4]This information is derived from U. S. Department of the Interior Budget Justifications FY 1975. Although not technically offered into evidence by the Samoan interests, it has not been disputed and official notice may be taken of the documents cited. Rule 13(f), 46 CFR 502.226.

$22,300,000 out of $23,000,000, were brought into American Samoa by the three ocean carriers operating in the trade, PITL, Polynesia, and PFEL. Although there are outside sources of supply, according to Commerce Department statistics, furthermore, approximately two-thirds of the imports into the islands have in recent years come from the United States.

The Samoan interests contend that the cost of living on American Samoa is "extremely high." Two exhibits prepared on two different occasions (the former in December 1973; the latter in late March of 1974) indicate that for those times shelf prices in a leading retail store appeared to be on the high side.[5] There is no evidence of record comparing each item with prices prevailing in the United States during similar times nor evidence measuring the effect of the subject rate increases on retail prices in American Samoa. The witness presented by the American Samoa Chamber of Commerce, an operator of a wholesale import business, did testify that the subject increases had caused some loss or slowdown in sales to American Samoan retailers. This witness also testified, however, that he bases his markup to retailers on landed CIF cost in Samoa. This would enable him to pass rate increases onto retailers but he also indicated that in some instances he may have reduced his customary percentage markup following the 23 percent rate increase. Interestingly, the second study of the retail shelf prices prepared in late March 1974, almost four full months after the effective date of the subject rate increases, shows no pattern of price increases over those prevailing at the time of the first study in December 1973, some items increasing, some decreasing, some remaining unchanged.[6]

These facts do not refute the contentions of the American Samoan interests regarding the dependence of the islands on ocean shipping, the rather high cost of living on the islands, or the economically depressed nature of the islands especially in view of further statistical evidence demonstrating that the islands are indeed economically depressed. For example, data pertaining to the years 1972–73 show an average salary per Samoan employee to be $3,000 per year and only $800 per capita. If higher salaried state-side workers are eliminated from consideration, moreover, average salary drops to $2,600 per annum and $650 per capita. The average minimum wage is $1.20 per

[5]For example, the exhibit prepared in December 1973 (Ex. 20D) showed hamburger at $1.54/lb., T-bone steak at $3.20/lb., hot dogs at $1.49/lb., tomatoes at $.80/lb., sugar at $1.12/5-lb., cooking oil at $6.20/gal., and coffee at $1.54/lb.

[6]As PITL points out, the second shelf-price study (Ex. 29) prepared about four months after the effective date of the rate increase was not offered as evidence showing the effect of the increase. Even if it were, however, the results are inconclusive since no pattern of increases is established. For example, although a T-bone steak rose from $3.20 to $4.16/lb., canned beef actually dropped from $1.56 to $1.46/12 oz. and reconstituted milk remained at $.40/quart.

hour and the average Samoan family consists of seven people. Some 60 to 80 percent of the Samoan wage earner's salary, furthermore, is spent on food alone. These factors have caused the Samoan household to have two, three, or four workers per household in order to afford what they need.

Of further significance, since it becomes an issue in relation to the subject rate increases, is the effort of the U. S. Congress to assist American Samoan as well as other insular possessions of the United States to export their manufactured products to the United States free of tariff duty. This assistance is provided in the General Headnotes to the Tariff Schedules of the United States, 19 U.S.C. 1202, at Headnote 3(a), and provides duty exemptions to any goods manufactured in American Samoa provided that they do not contain foreign materials to the value of more than 50 percent. To put it simply, American Samoan manufacturers can import materials from foreign sources of supply, double their value on the islands, and export the finished products to the United States duty free. Although the Samoan interests acknowledge that this system "is a significant concession by the United States Congress to benefit the economies of our island territories through the development of light industries," they express some apprehension over the effect which increases in shipping costs may have on the program. As discussed later, however, there is no substantial evidence that these apprehensions will ripen into reality.

DISCUSSION AND CONCLUSIONS

The ultimate issue for decision is whether the subject rate increases are just and reasonable within the meaning of section 18(a) of the Shipping Act, 1916, and sections 3 and 4 of the Intercoastal Shipping Act, 1933. Respondent is required by law to sustain the burden of proving that its proposed increases comport with the standards enunciated in the cited statutes. Section 3, Intercoastal Shipping Act, 1933, 46 U.S.C. 845. Cf. also *The Commonwealth of Puerto Rico v. Federal Maritime Commission,* 468 F. 2d 872 (D.C. Cir. 1972).

Subsidiary issues raised by the Samoan interests concern (1) whether there is a possibility of such adverse effect on the economy of American Samoa resulting from the subject rate increases that they cannot be found to be justified and (2) whether, in lieu of the proposed increases, some alternative rate changes should be ordered, which similarly satisfy the financial needs of the carrier, such as selectively increasing rates on "luxury" items while holding down rates on necessities, or imposing a greater share of the increases on the inbound movement to the United States, consequently diminishing the increase on the outbound movement.

PITL contends that it has amply demonstrated the need for the subject increases and that standing alone, "there is no way the rate increases here involved can be held to be unjust, unreasonable, and/or unlawful." PITL bases its argument on the fact that incontrovertible evidence of record demonstrates that at least since 1970, the year of PITL's last general increase (10 percent) the trade has never turned a profit for the carrier and that no matter how much adjustment is made to the financial exhibits or disallowance of expenses which is made because of inability to verify some expense items for one reason or another, there is no way to show that PITL will make any profit whatsoever from this particular operation. We thus never reach the question of reasonable return to the carrier, argues PITL, and are compelled, absent any other considerations, to conclude that the rate increases cannot be found to be unjust or unreasonable under the law. *Increases in the U. S. Gulf/Puerto Rican Trade,* 14 F.M.C. 212, 213 (1971), *Transamerican Trailer Transport—Increase in U. S. Atlantic/Puerto Rico Trade,* 14 SRR 645, 658 (Initial Decision, proceeding discontinued by the Commission as moot, March 21, 1974).

PITL observes that it has demonstrated over the years a firm commitment to serve the American Samoan trade but that it is free to leave and that it enjoys no outside subsidy to offset its losses in the trade which presumably must be made up from other operations in which its owners engage. PITL furthermore observes that the record shows no evidence of gross mismanagement or inefficiencies of the type which could justify the Commission in disallowing the proposed rate increases. See, *e.g., Matson Navigation Co.—Increased Rates, Hawaiian Trade,* 16 F.M.C. 96, 99, 100, 117 (1973). On the contrary, PITL has taken steps to economize, as noted above, by reducing the number of vessels employed in the trade as well as the lengthy itineraries while maintaining an equivalent number of calls without reduction in carrying capacity.

The 23 percent increase on the outbound movement, PITL asserts, is the first general increase since 1970 and on an annualized basis, is actually lower than the overall cost-of-living increase, as shown in the Department of Labor's Consumer Price Index. While not insensitive to the concern of the Samoan shippers and economists, PITL points out that the record does not contain "hard evidence, or even projection, of economic impact at all." Nor was there any persuasive evidence showing that the "Headnote 3 (a)" program designed to assist and stimulate light industry on the islands and promote exports to the

United States, would be significantly hampered by PITL's proposed rate increases.

Finally, PITL provides reasons for the differential in the percentage increases, *i.e.,* 23 percent outbound, 12 percent inbound to the United States, in terms of additional ports of call on the outbound leg, additional time consumed on the leg in steaming and loading loose, non-uniform cargoes, in contrast to the relatively simple operations on the inbound leg, with uniform cargo (canned fish) moving from one port of loading to one port of discharge, quicker handling, and cheaper stevedoring costs. A competitive factor exists in the inbound movement as well, according to PITL, since one competing carrier maintains a lower rate in this essentially single-commodity movement.

The Samoan interests, as discussed previously, express apprehension over the possible adverse effects of the proposed rate increases on the Samoan economy whose problems they have amply described. They do not take issue with PITL's contentions regarding the carrier's financial straits and, indeed, acknowledge on brief that "the U. S. Government cannot ask PITL, or any other carrier for that matter, to subsidize the local economy by operating at a loss." They furthermore acknowledge that "PITL is expected to be allowed to make a reasonable profit in this trade; but the amount of this profit must be kept at a minimum to lessen the obvious impact any rate increase will have on the people and economy of American Samoa." These interests state that they are relying on this Commission to prevent excessive profits and further request the Commission to examine alternatives to the proposed increases, discussed above, which would alter the rate profile in the tariffs for example by allowing increases only on "luxury" items and not necessities.

Hearing Counsel agree that PITL has shown a need for the proposed rate increases and therefore urge that they be approved. They are not insensitive to the possible adverse effect which any rate increase may have on the people of American Samoa but argue that without the increase PITL would be forced to curtail its service, an event with more harmful consequences to the people of American Samoa than those which may flow from the proposed rate increases.

Hearing Counsel do not agree with every item of expense shown on PITL's exhibits but after conducting a post-hearing audit and verification procedure and making appropriate adjustments, acknowledge that despite the rate increase, PITL will still operate at a loss. Hearing Counsel do not suggest, as do the Samoan interests, that PITL's rate profiles be restructured as between "luxury" items and necessities nor do they recommend that the inbound rates ought to be increased further with a consequent reduction in the outbound rate increase.

Hearing Counsel, furthermore, do not agree with all of PITL's justifications for the lower 12 percent level of increase in the inbound movement and doubt that the inbound rates recover fully distributed costs but because of competitive factors and under applicable principles of law, contend that it was properly within the managerial discretion of PITL to hold the inbound increase on canned fish to 12 percent.

As to the ultimate issue in this proceeding regarding the justness and reasonableness of PITL's rate increases and its need for increased revenue there can be no question but that PITL has sustained its burden of proof. While there may be some question as to methodology employed in allocating certain expenses or in determining cost differences between the outbound and inbound leg, these questions do not affect the inevitable ultimate conclusion stated above. Furthermore, with regard to the issues raised by the Samoan interests concerning alteration of the rate profile or adjustment of the outbound-inbound percentages of increase, this record simply does not contain evidence sufficient to offset the fundamental conclusion that PITL's financial needs justify its proposed rate increases nor to enable this judge or the Commission to devise specific alternative rate changes which would satisfy what no party can dispute is the right of PITL to operate without incurring losses. In virtually every respect PITL's contentions, which are summarized above, as they pertain to the ultimate determinative issues in this case are supported by the record, as I now discuss.

In earlier years PITL's exhibits prepared generally in accordance with the Commission's General Order 11 format showed continual sizeable losses. For example, in calendar year 1970 the loss amounted to $198,091; in 1971, $730,463; in 1972, $435,646, despite the retirement of the line's oldest and least-efficient vessel and an upsurge of volume of cargo. Two projections made by PITL and entered into the record continued to show losses, the first, covering the period December 1, 1973—December 1, 1974, in the amount of $838,893 and the second, based upon additional experience, for the calendar year 1974, in the amount of $371,812.

The preparation of profit and loss exhibits by PITL was not accomplished without difficulty owing to the peculiar nature of PITL's operation and location. Certain items were available from the line's agent in San Francisco, GenSteam, such as revenue and port, cargo, and brokerage expense, but data relating to other critical items, such as vessel expense, depreciation, administrative and general, and other voyage expense are located in Norway. In some instances, allocation methods, such as those used to derive administrative and general expense were not only based upon data located in Norway but upon a basis other than the conventional General Order methodology, which, in this instance, is the so-called vessel-operating-expense ratio. At the hearing PITL provided explanations as to how its exhibits were formulated. Furthermore, as mentioned above, after the hearing, at the invitation of the Presiding Judge and with the concurrence of all parties and the commendable cooperation of PITL, special efforts were made to obtain further data from Norway in order to assist Hearing Counsel and the Commission's staff to attempt to verify as much of PITL's financial evidence as possible. This unusual procedure was adopted to meet the unusual nature of this case, to which I have alluded previously, to wit, the practical problem of auditing and verifying financial statements of foreign-flag carriers with overseas locations and worldwide operations who attempt to conform their reporting requirements to the format of the Commission's General Order 11 which was designed with domestic carriers in mind.

In a continuing effort to project operating results more accurately, PITL revised its earlier calculations and prepared its final statement (Exhibit 3) approximately one month prior to the hearing held in early April 1974. The results, while showing a considerable reduction in losses from the earlier projection (from $838,893 to $371,812) still show a substantial loss despite further experience with the line's newly reduced operating pattern and utilization of revenue figures and other data from the line's most successful voyage in 1973, No. 219. Expense data from that voyage, furthermore, were averaged in with two other voyages to arrive at final figures. Vessel and other expenses allocated to the trade on the revenue ton-mile relationship basis, as currently prescribed by the Commission's General Order 11, by utilizing data from the last three voyages in 1973, Nos. 217, 218, and 219, had the result of reducing these expenses to be allocated to the trade. The post-hearing audit indicated some differences between PITL and Hearing Counsel on some of the data and certain methodologies employed, but PITL's revised computations, reducing expenses and increasing revenues substantially, as they did, tend to establish greater credibility since they run contrary to PITL's own interests, which, in a normal rate case, would be to project greater expenses and fewer revenues. PITL's final estimates are shown in the table below in summarized fashion:

PACIFIC ISLANDS TRANSPORT LINE
UNITED STATES/PAGO PAGO
INCOME ACCOUNT
ESTIMATED YEAR
1974

Operating Revenue	$2,554,500
Vessel Operating Expense	2,773,156
Gross Profit	($218,656)

Deduct:	
Administrative and General Expense	77,283
Depreciation and Amortization	75,873
Other	—
Total Loss	($371,812)

As a result of the post-hearing audit conducted by the Commission's staff, Hearing Counsel advised on brief that certain expense items could not be verified because of certain discrepancies which Hearing Counsel contend exist between PITL's exhibits and underlying materials furnished by PITL. Since Hearing Counsel acknowledge that even with adjustments made to conform with their recommendations, PITL may still expect a loss, albeit smaller, in the trade despite the proposed rate increase, there is little point in pursuing the matter of these discrepancies.[7]

It must therefore be found and concluded that PITL has shown the need for additional revenue since by anybody's calculation, PITL's or Hearing Counsel's, the line will still suffer losses in the trade despite PITL's efforts to reduce itineraries and to employ its most efficient ship in the trade. Absent any evidence of serious mismanagement or inefficiencies,[8] and putting aside for the moment considerations raised by the Samoan interests concerning PITL's rate profile, this financial evidence becomes determinative. *Seatrain Lines, California, General Increases in Rates in the U.S. Pacific Coast/Hawaiian Trade,* 14 SRR 209 (1973), *Increases in the U.S. Gulf/Puerto Rican Trade,* 14 F.M.C. 212 (1971), *Transamerican Trailer Transport—Increase in U. S. Atlantic/Puerto Rico Trade,* 14 SRR 645, 658 (Initial Decision, proceeding discontinued as moot, March 21, 1974).

I now turn to a discussion of the issues raised by the Samoan inter-

[7]Technically, Hearing Counsel's summarizing statement showing a significant loss appears on brief and is not part of the evidentiary record. If the matter were to be pursued, the record could be reopened to allow Hearing Counsel to present witnesses for cross-examination and to permit PITL to present rebuttal evidence if the line so chose. Under the circumstances, this would be a waste of time.

One further matter bears mentioning, *i.e.,* administrative and general expense. Hearing Counsel would disallow this item entirely since it was partially allocated on a "ship basis" rather than the Vessel Operating Expense ratio method prescribed in General Order 11. General Order 11, while prescribing the VOE ratio, also permits a carrier to "present additional material by way of alternative methods of allocation or other approaches to the problems inherent in this type of reporting" if they are "explained and fully reported." 46 CFR 512.3(f). The Commission furthermore specifically allowed for possible departures from the prescribed allocation methods "where in its opinion the application of such rules and regulations create unreasonable results," 46 CFR 512.3(g), and denied a claim that General Order 11 is inflexible. Docket No. 1152, Report on Adoption of Rule, 3 SRR 1083 (1964).

Since the parties have waived filing of reply briefs, this particular issue has not been fully argued nor would a detailed exploration of PITL's "ship basis" allocation change the outcome of the proceeding, as explained. In this regard, Hearing Counsel on brief specifically state: "However, we submit that it is unnecessary to decide whether Administrative and General Expenses as reported by PITL should be disallowed." Opening Brief of Hearing Counsel, p. 5.

[8]See, *e.g., Matson Navigation Co.—Increased Rates, Hawaiian Trade,* cited above, at p. 117, and cases cited therein; also *D.C. Transit Sys. Inc. v. Washington Met. A. Transit Com'n,* 466 F. 2d 394 (D.C. Cir. 1972), cert. denied, 93 S. Ct. 688.

ests. Although they express concern over the impact of the proposed rate increases on the economy of American Samoa, as discussed previously, they acknowledge that PITL cannot be expected to continue operating at a loss. They therefore urge that the Commission examine alternative rate changes that may perhaps minimize any possible impact.

Every party to this proceeding, in my opinion, has shown respect for the concern of the Samoan interests. But if the Commission is to devise alternative rate changes it can only do so on the basis of substantial evidence in any formal proceeding conducted under the Administrative Procedure Act. Yet neither the limited evidence of record on point nor applicable principles of law, as discussed below, enable the Commission to find that the rate increases, considering the overall loss position of the carrier and other evidence, should be adjusted in a particular fashion either as among individual commodities or by changing the outbound/inbound levels.

It is contended that the proposed rate increases will have an adverse impact on the economy of American Samoa. As PITL points out, while American Samoa is dependent on ocean shipping without question, the evidence submitted by these interests does not gauge the extent of such impact, and indeed their witness acknowledged on cross-examination that the effect was "incapable of being measured." As mentioned previously, two exhibits showing retail shelf prices in Pago Pago in early December 1973 and late March 1974, while indicating relatively high prices, are not conclusive, and it was not even established that the second study reflected the effect of the subject rate increases.

There is scant evidence in the record exploring the distribution system in American Samoa, for example, the role of the importer/wholesaler and the markup system which might shed some light on the ultimate effect of any rate increase on retail prices. A leading importer/wholesaler who testified indicated that his business suffered some loss or slowdown in sales to retailers but that in some instances he would curtail his customary markup as a result of the rate increases. This would indicate that to some extent the effect of rate increases can be softened as far as the ultimate consumer is concerned. As far as the inbound rate increase is concerned, a matter more fully discussed below, this amounts to approximately one-half the percentage increase applicable to outbound cargoes, to wit, 12 percent, and there is similarly a dearth of evidence showing that canned fish exports from American Samoa would be significantly hindered in the American market. In fact, the Samoan interests suggest that the inbound rates might even be raised with corresponding reduction of the opposite rate increase.[9]

On the basis of this record, therefore, and the quite proper concession by the American Samoan interests that PITL cannot be expected to operate at a loss, PITL cannot be found to have acted contrary to law in seeking additional revenue despite possible adverse impact on the economy of American Samoa. The situation here in this respect resembles somewhat that in *Transamerican Trailer Transport, Inc. Increase in Rates in U.S. Atlantic/Puerto Rico Trade,* cited above, where Administrative Law Judge Marshall stated:

> There is no denying the fact that increased freight rates increase cost to shippers and thereafter consumers. But it is equally undeniable that, after a point, increased freight rates are unavoidable if the carriers are to stay in business and the trade is to continue to receive necessary transportation services. However, it is worthy of passing note that the severity of the impact of rate increases sometimes goes beyond the reach of this Commission. This is true to the extent that it concerns the actual increases paid by the consumer and not simply the freight increases paid by the shipper. (Footnote omitted.) The carriers are under no obligation to subsidize the trade. The Commission's primary concern under the law is with the satisfaction of the island's requirement for transportation services at rates which are just, reasonable, and otherwise lawful. To be lawful the rates must be compensatory. 14 SRR at pp. 658, 659.

There remain the questions raised by the Samoan interests of the reasonableness of PITL's decision to assess the increases on commodities uniformly [10] and to hold down the inbound increases to 12 percent. Hearing Counsel, it should be noted, do not challenge the lawfulness of these decisions, and find support for the latter decision on the basis of competitive factors.

As mentioned above, however, there is insufficient evidence of record to enable the Commission to devise alternative rate changes or to alter the uniform nature of the rate increases as suggested by the Samoan interests even if applicable principles of law permitted the Commission to do so. It is true that in appropriate cases the Commission, out of concern for the economy of certain areas, *e.g.*, Puerto Rico, has applied the principle that some commodities may have to bear a higher rate than other, basic subsistence commodities. See, *e.g.*, *Reduced Rates on Autos—N. Atl. Coast to Puerto Rico,* 8 F.M.C. 404, 408–10 (1965), *Reduced Rates on Machinery and Tractors to Puerto*

[9] This suggestion that the inbound rates might be raised appears to be somewhat inconsistent with another contention of the Samoan interests, namely, that the proposed increases in their present amounts would in some fashion interfere with the purposes of the "Headnote 3(a)" program, which, as discussed above, exempts American Samoan products from U. S. tariff duties and applies to the inbound movement to the United States unless the raw materials in the products are more than 50 percent of foreign origin. Even at the present 12 percent level, PITL correctly points out deficiencies in or the absence of evidence showing how or to what extent the canned fish movement, which is the prime inbound cargo, would be hampered or for that matter to what extent other cargo movements inbound would be hindered by PITL's proposed rate increases.

[10] There were three exceptions to the uniform 23 percent outbound increase, to wit, refrigerated cargo, lumber, and bulk vegetable oil, which were increased by 6, 6, and 10 percent respectively. No party contested these particular increases and PITL furnished explanations based upon reasonable rate-making factors affecting those items. (Exhibit 7)

Rico, 9 F.M.C. 465, 480–81 (1966). But, as noted previously, exports to American Samoa consist essentially of "grocery store" items, *i.e.*, foodstuffs. (Exhibit 20 A). Furthermore, the record does not identify and the Samoan interests do not specify which commodities are not essentials and should bear higher rates, if any such items exist. Even if this were done, however, there is a serious impediment as a matter of law to such tampering with PITL's rate profile. In addition to the fact that the principle under discussion was applied in commodity rate cases rather than general revenue proceedings,[11] the problem is that the principle stems from the Supreme Court's decision in *B & O R.R. v. United States*, 345 U.S. 146 (1953), which the Commission cited in *Reduced Rates on Autos—N. Atl. Coast to Puerto Rico*, cited above at p. 408. In the *B & O* case the Court indicated that the principle applies only if the carrier is permitted an adequate return from its traffic as a whole. In this regard the Court stated:

> So long as a railroad is not caused by such regulations to lose money on its over-all business, it is hard to think that it could successfully charge that its property was being taken for public use "without just compensation." 345 U.S. at p. 148.
>
> And so long as rates as a whole afford railroads just compensation for their over-all services to the public the Due Process Clause should not be construed as a bar to the fixing of noncompensatory rates for carrying some commodities when the public interest is thereby served. 345 U.S. at p. 150.

See also *Increased Rates on Sugar, 1962*, 7 F.M.C. 404, 412 (1962), *Pan American World Airways v. Civil Aëronautics Board*, 256 F. 2d 711, 712–13 (D.C. Cir. 1958), cert. denied, 358 U.S. 836 (1958).

With a history of continued losses and expectation of the same situation for the at least immediate future, it is obvious on this record that the principle of adjusting rate profiles as between subsistence and "luxury," non-essential items cannot be applied by the Commission.

The final suggestion of the Samoan interests that perhaps PITL's inbound rate increases from American Samoa to the United States might be raised somewhat with a corresponding reduction of the outbound increases is similarly too unspecific and lacking in support either on the record or under applicable principles of law. In making this suggestion, furthermore, even the Samoan interests indicate that there "may be a risk here" referring presumably to their earlier contentions that rate increases inbound from American Samoa to the

[11] Since this proceeding is a so-called "general revenue" investigation into an across-the-board revenue increase, the Commission's Order of Investigation and Suspension does not specify any issues pertaining to individual commodity rates. Under these circumstances, as the Commission has stated in a comparable situation, "it is doubtful whether such an exercise [*i.e.*, taking evidence on indivudual rates] would be proper in a general revenue proceeding where the issue is not raised by the Order of Investigation." Docket No. 74-36, *Matson Navigation Company—Increase in Rates on Motor Vehicles*, Order on Investigation and Suspension, served August 29, 1974, p. 2, 39 *Federal Register* 32057.

United States may reduce the competitive advantages enjoyed by American Samoan exports under the "Headnote 3(a)" program and jeopardize the continued operation of the tuna industry on the islands.

The Samoan interests do not challenge the 23 percent outbound rate increases in any specifics nor do they show that this particular level was unnecessary or unreasonable. Their contention essentially consists of a suggestion that "it may well be that the outbound freight from American Samoa could bear a greater share of the increase than is presently proposed." Although not spelled out in detail, presumably a larger inbound increase would enable PITL to reduce the outbound increases to some figure below 23 percent.

The record contains detailed explanations by PITL as to how it derived the 23 percent figure for the outbound increases, which were not challenged or disputed on brief. Very briefly, the particular increase is due to increases in expense, principally in U. S. longshore wages (amounting to just under 40 percent in the three years since the previous rate increase in 1970) and an estimated annual 10 percent increase in vessel operating expense. Since the last general rate increase in the trade occurred on June 1, 1970, this percentage approximates 7 percent per annum measured from the previous increase or to less than 6.5 percent if we consider that the proposed increases were delayed another half year until December 1, 1973. PITL submitted further evidence showing that from January 1, 1966, to January 1974, a period covering the earlier 1970 increase as well as the present, PITL's rates increased only some 35 percent, a figure lower than the corresponding rise in the Consumer Price Index in the United States, occurring between January 1, 1966, and September 30, 1973, which was 41.9 percent.

Since the Samoan interests have not shown or contended that the 23 percent level of increase or the particular calculations employed by PITL to derive this figure are unreasonable or that the increase will even enable PITL to turn a profit in the trade, I cannot find any violation of law in connection with this particular figure.[12] Nor can I find on this record and under applicable principles of law that the inbound rate increase should be raised above the 12 percent level in the hopes that this might result in a reduction in the outbound increases.

Under applicable principles of law, a carrier may hold down increases on certain commodities provided that the resulting rates produce revenues sufficient to cover at least out-of-pocket costs so that no

[12] As discussed below, Hearing Counsel also do not contend that the 23 percent increase is unreasonable although disputing PITL's statements that vessel expense for the outbound leg is twice that for the inbound and PITL's consideration of vessel days on each leg as a factor in comparing vessel expense for each leg.

other rate payers are burdened with direct costs attributable to the lower-rated cargoes. In fixing rate levels between direct costs, *i.e.*, the extra expenses incurred as a result of carrying the particular commodity and fully distributed costs including overhead, depreciation, and a reasonable profit, a carrier may consider competitive factors and the possibility that further increases may result in cessation of movement or loss of the commodity to a competing carrier. These principles have been followed by the Commission in a number of cases.[13]

A recent case in which these principles were applied is *Matson Navigation Company—General Increase in Rates in the U. S. Pacific-/Hawaiian Trade*, 16 F.M.C. 96 (1973). In that case the carrier increased outbound rates by 12–1/2 percent but filed no increase at all on inbound containerized cargoes, principally canned pineapple. The Commission specifically rejected the idea that the carrier should have imposed an increase on the inbound cargoes so as to reduce the 12–1/2 percent level of the outbound increase since the carrier had shown that the increased revenue would not result in an excessive return and the record did not show that the lower inbound rates fell below out-of-pocket costs so as to burden outbound rate payers. 16 F.M.C. at pp. 100–103. Furthermore, the Commission found that the holddown on the inbound pineapple rate was a reasonable business judgment based upon competitive factors, principally a strong possibility of diversion to other carriers with consequent loss of revenue and increased upward pressure on outbound rates.

In the present case, PITL did not, like Matson, exempt inbound commodities, principally canned fish, from any rate increase. As we have seen, these rates were increased by 12 percent. Furthermore, PITL justified the decision on several grounds, namely, costs and competition. PITL cites the fact that one competing carrier maintains a lower rate and that further increases imposed on the PITL rate would lead to erosion of traffic to the lower-rate competition. As PITL points out and as the Commission noted in the *Matson* case, the loss of revenue could lead to further increases in the outbound rates. This contention is supported by the fact that PITL estimates for the year 1974 that canned fish moving inbound will produce roughly one-half of PITL's total revenue tons moving in both directions and over 40 percent of total revenue.[14]

[13]See, *e.g.*, *Matson Navigation Company—Reduced Rates on Flour*, 10 F.M.C. 145, 148, 149, 153 (1966), *Investigation of Increased Rates on Sugar/Puerto Rico Trade*, 7 F.M.C. 404, 411–13 (1952), *Aleutian Marine Transport Co.—Rates Between Seattle and Ports in Alaska*, 7 F.M.C. 592, 596 (1963).

[14]The figures as shown on Exhibit 3, Schedule V, are as follows:

Canned Fish (inbound)	25,538 revenue tons	$1,042,500
All other (outbound)	25,867 revenue tons	1,512,000
	51,405	$2,554,500

Like the situation in the *Matson* case, furthermore, competition on the inbound movement from American Samoa seems to be intense. There are two large canneries that control virtually all of the canned fish moving inbound and two other carriers with whom PITL must compete, one of whom maintains a lower rate as mentioned.[15]

PITL also offered cost increases to justify the 12 percent inbound rate increase. It was explained that increased labor costs on the Pacific Coast and increases in vessel expense which together totalled slightly over $4.00 per revenue ton justified the increase in the subject rate from $33 to $37 per ton, or 12 percent. Hearing Counsel take no issue with PITL's need for additional revenue on the inbound leg because of these cost increases. Furthermore, Hearing Counsel submit that the rate for canned fish appears to cover loading and unloading expenses and makes some contribution to vessel expense, although doubting that the rate recovers fully distributed costs. If so, the rate is not unlawfully depressed under applicable principles of law explained above. There is some record support for Hearing Counsel's statements, although no fully distributed cost study was entered into the record.[16] PITL submitted evidence, moreover, tending to explain the lower inbound percentage increase on the grounds of the uniform nature of inbound cargo and consequent efficiencies in loading and unloading, resulting in lower handling costs compared with cargo moving outbound. Hearing Counsel do not take issue with these facts nor with PITL's decision to limit the inbound rate increase to 12 percent, as I have mentioned above.[17] Therefore, in consideration of

[15]According to tariffs on file with the Commission, the competing carrier having the lower rate is PFEL. As of December 1, 1973, when PITL's rate increases went into effect, PFEL maintained a rate of $36 per 2,000 lbs. on canned fish compared to PITL's rate of $37. Even after the imposition of bunker surcharges, effective February 15, 1974 (12 percent for PFEL, 10 percent for PITL), PFEL's total charge remains slightly below that of PITL although the differential has narrowed. See PFEL America Samoa Freight Tariff No. 1, FMC-F No. 6, 4th rev. page 18 and previous pages 18, 5th rev. page 15; PITL Tariff FMC-F No. 2, 4th rev. page 17, 4th rev. page 14A.

[16]The canned fish rate with the proposed increase is $37 per ton. Costs of discharging at the Pacific Coast increased from $9.00 to $12.53 (Exhibit 6). Even if this expense is doubled to cover loading costs in Pago Pago, although costs there are cheaper, so as to produce stevedoring costs of approximately $25, the rate is obviously well above that level.

[17]Hearing Counsel do take issue, however, with PITL's statements that vessel expenses on the outbound leg are twice as much as those on the inbound, owing to greater number of ports covered, more vessel days, overtime, etc. Hearing Counsel dispute furthermore that consideration of vessel days rather than ton-miles is proper, citing *Alcoa Steamship Co., Inc.—General Increase in Rates in the Atlantic Gulf Puerto Rico Trade*, 9 F.M.C. 220 (1966). In view of the overwhelming showing of need for additional revenue by PITL, Hearing Counsel's support for the rate increases both inbound and outbound on other grounds, the lack of showing that PITL's methodology resulted in high rate increases not otherwise justified, and the further fact that this allocation issue has not been fully argued since the parties waived the filing of reply briefs, this particular issue, as was the case with the issue regarding PITL's allocation of administrative and general expense, need not be resolved. Since even with a 23 percent increase outbound, PITL still stands to suffer losses and has justified its holddown on inbound increases on other grounds to 12 percent, it is pointless to pursue this particular allocation issue further. Had there been a viable rate of return issue in this proceeding and lack of independent justification for the inbound holddown, the issue of allocation of vessel expense between outbound and inbound legs might have become critical. PITL acknowledges that its methodology in deriving these rate increases may not be perfect but correctly points out that exactitude is not required in such cases. *Sea-Land Service, Inc.—Increases in Rates in the Pacific Coast/Puerto Rico Trade*, 15 F.M.C. 4, 9-10 (1971).

the facts and applicable principles of law, as discussed above, I find nothing unlawful in PITL's decision to limit the inbound rate increase to 12 percent.

ULTIMATE CONCLUSIONS

Respondent PITL has shown a need for its general rate increases on the basis of increased costs and continued losses in the subject trade. Even with the benefit of such increases, furthermore, the record shows that PITL will still suffer losses. Accordingly, respondent has sustained its burden of proving the subject increases to be just and reasonable as required by law.

The economy of American Samoa is highly dependent on ocean shipping and suffers from economic problems relating, among other things, to low income and rather high retail prices. This situation, of course, is of concern to the Commission but standing alone is insufficient to offset PITL's right to seek additional revenue, the need for which PITL has shown. Since PITL continues to be in an overall loss position, furthermore, and since the record is lacking in specific evidence on the point, the Commission cannot invoke the doctrine, as it sometimes does, of altering the nature of PITL's rate profile, as the Samoan interests suggest, *e.g.*, by raising rates on non-essential items and holding down rates on subsistence items. Nor is there sufficient support in the record or under applicable principles of law for the Commission to order PITL's inbound rate increase to be raised above the 12 percent level, which level PITL has justified on the basis of competitive factors.

PITL, a foreign-flag operator serving an isolated American territory, cannot be compelled to continue serving that area or to continue operating at a loss. On the present record, denying the proposed rate increase or otherwise attempting to modify it without providing the carrier with compensating revenue might remove any incentive for the carrier to continue to serve the trade or possibly cause a curtailment of service, as Hearing Counsel suggest. It might well be, as Hearing Counsel further suggest, that withdrawal of PITL from the trade would do far more harm to the people of American Samoa than the requested rate increases. In any event, PITL has proven its case and there is no need to take the gamble.

(S) NORMAN D. KLINE,
Administrative Law Judge.

WASHINGTON, D.C.,
January 7, 1975.