FEDERAL MARITIME COMMISSION

DOCKET NO. 73-3

SEA-LAND SERVICE, INC., SEATRAIN LINES, INC.
TRANSAMERICAN TRAILER TRANSPORT, INC.
GULF PUERTO RICO LINES, INC., PUERTO RICO
MARITIME SHIPPING AUTHORITY

v.

ACME FAST FREIGHT OF PUERTO RICO, ET AL.

ORDER DENYING RECONSIDERATION

December 14, 1978

The Commission has before it a petition filed by Respondent Capitol Transportation, Inc. (Capitol), requesting that the Commission reconsider its Order of August 14, 1978, adopting the Administrative Law Judge's conclusion that Capitol violated sections 16 and 18(a) of the Shipping Act, 1916, and directing that demurrage charges be paid in the amounts found to be due with interest. Capitol asks the Commission to vacate and "dismiss" its Order. In the alternative, Capitol asks that the proceeding be remanded to an Administrative Law Judge other than the Presiding Officer now assigned to the case to obtain the evidence Capitol deems indispensable to prove it owes any demurrage. Complainants Sea-Land Service, Inc., Seatrain Lines, Inc., Transamerican Trailer Transport, Inc., Gulf-Puerto Rico Lines, Inc., and Puerto Rico Maritime Shipping Authority, replied to the Petition for Reconsideration; Capitol filed a reply to this reply, which was challenged by Complainants on the ground that the Commission's Rules of Practice and Procedure do not allow the filing of a reply to a reply (46 C.F.R. 502.74).

The thrust of Capitol's contentions on reconsideration is that in the absence of bills of lading and arrival notices, the record supports neither the finding that Capitol was the consignee of the containers on which demurrage was billed to Capitol for which it was liable nor that Complainants had sent the arrival notices required by their tariffs.

While these arguments have already been fully considered on exceptions and found to be without merit, some further comments are proper.

Capitol's request is not directed at obtaining new evidence discovered after the record was closed but to evidence which might have been available had a request been timely made. Moreover, Maritime Service Corporation (MSC) invoices and the Trailer Interchange Receipts (TIR's) which served as basis for comput-

ing demurrage contain sufficient information and offer substantial support to the findings of the Presiding Officer adopted by the Commission.

The TIR's which served as the basis for computing demurrage charges were prepared by the ocean carriers in the regular course of business at the time the container and chassis were picked up following unloading from the vessel, and subsequently completed to show the date of return of the equipment to the water carrier's terminal. The evidentiary value of the TIR's is not limited, as Capitol contends, to attesting to the physical condition of the equipment at pick up or delivery. They identify by number the vessel and the voyage, the bill of lading or freight bill, and by name as well as by number, the "customer," "carrier," and/or "lessee" of the ocean carriers whose tariffs provided that, on outbound shipments, the shipper, and on inbound shipments, the consignee, was liable for demurrage. On inbound shipments, therefore, these terms can only designate the consignee, or the non-vessel operating common carrier by water, who arranged the transportation of the containers with the underlying ocean carriers,[1] and could not refer as Capitol argues, to the local truckman who picked up or returned the container. The latter would have no authority to handle the equipment in any capacity other than as agent or servant of the designated consignee.[2]

Furthermore, apart from objecting in general terms, without specificity to the amount determined to be due, Capitol has not challenged the accuracy of the information contained in the TIR's and MSC's invoices[3]. The TIR's upon which demurrage was billed to Capitol show Capitol and no one else as the "customer", "carrier", or "lessee". Hence, the reference on inbound shipments to Capitol as "customer", "carrier", or "lessee" clearly indicates that Capitol was the consignee of the containers on which demurrage accrued. That Capitol subsequently delivered the shipments to the owners of the goods or their representatives is irrevelant. In relation to the ocean carriers whose services it utilized, Capitol was the consignee and as such liable for demurrage.

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[1] The invoices prepared by MSC contain the same information. Although bills of lading referred to in TIR's naming Capitol as customer or carrier and lessee are not in the record, bills of lading covering shipments or Respondent Malabe Shipping Co., placed in evidence, show that MSC invoices and the corresponding TIR's accurately reflect the information contained in the respective bills of lading. This would also tend to indicate that bills of lading were available prior to the storage of records of some of the Complainants following the take over of their operations by the Puerto Rico Maritime Shipping Authority, in October, 1974.

[2] A letter from Du Pont Puerto Rico Inc. dated March 2, 1973, to Mr. Hiram D. Cabassa, President of MSC supports this conclusion. It reads in part:

We have just received a letter from Mr. Charles M. Darmanin, President of Capitol Transportation, advising us that you have refused to accept their check no. 5158 issued January 15th in the amount of $160.00 for demurrage charges accrued by Trailer 58486.

The two reasons cited for your stand on the matter are:

1. He is our trucker and you can only accept payment from the consignee.
2. The check was made out to Gulf P.R. and only Maritime Service Corp. can accept payment for demurrage as published in the carriers tariff.

Obviously you are correct on your second reason. However, you are definitely not correct in stating that Capitol Transportation is our trucker. *They are a moving company and as such a consignee in their own right.* Our assigned inland carrier is Luvi Trucking.

Basically a trucker will pickup merchandise at a port and deliver to the consignee who will unload or dispose of the cargo at their own convenience. The consignee has control over the equipment in this case.

A moving company's work is much more complex and requires many other arrangements besides a tractor-driver combination. Our arrangements with Capitol require that they be notified as to the arrival of HHG, and that they pick up and deliver when we so request. The consignee does not have control of the equipment.

Obviously, the disposition of the equipment is entirely in their hands. As proof of our statements we enclose photocopies of all HHG moves they have handled for our company. We had to request copies from Capitol because DuPont never received bills of lading from the ocean carriers. (Emphasis added) Exhibit No. 34.

[3] In *Richardson v. Perales*, 402 U.S. 389 (1971), the Court held that in a proceeding under the Social Security Act, uncorroborated written reports of physicians who had examined the claimant constituted substantial evidence supporting the hearing examiner's nondisability finding, noting that the "claimant had not exercised his right to supoena the physicians so as to have the opportunity to cross-examine them." 402 U.S. at 402.

Capitol's reliance on *States Marine Int., Inc. v. Seattle-First National Bank*, 524 F.2d 245 (9th Cir. 1975), is misplaced. Whereas the Court in *States Marine Int., Inc.* did advise that courts generally look to the bill of lading to determine the existence of a consignee's contractual liability for freight charges, it went on to cite with approval the Arizona Court of Appeals holding that:

> the consignee becomes liable . . . when an obligation arises on his part from presumptive ownership, acceptance of goods and the services rendered and the benefits conferred by the carrier for such charges. *Arizona Feeds v. Southern Pacific Co.*, 21 Ariz. App. 346 (1974).

Thus, in addition to whatever Capitol's obligations were under the contracts of affreightment, its acceptance and exercise of control over the containers alone would impose upon Capitol liability for the charges imposed by the tariff. For this reason also, the introduction of bills of lading into the record is unnecessary.

Likewise, we see no need to request further evidence on the receipt by Capitol of arrival notices. The fact that the TIR's indicate that the containers were in fact picked up and returned by Capitol raises the presumption that Capitol actually received arrival notices for those containers, a presumption Capitol has not rebutted.

Finally, we find Capitol's allegation of bias on the part of the Presiding Officer to be without merit. Contentions of bias and requests for disqualification should be raised at the time the conduct complained of occurs and not after the hearing has been closed and an adverse decision rendered. *Bethlehem Steel Co. v. NLRB*, 120 F.2d 641 (D.C. Cir. 1941). In any event, we have reviewed the entire record and found the Presiding Officer conducted the proceeding with fairness and impartiality and that the weight of evidence in the record fully supports the ultimate conclusions as specified herein.

In conclusion, Capitol's petition raises no new issue, offers no new evidence, states no other ground which would call for a reconsideration of our decision of August 14th.

Therefore, the Petition for Reconsideration is hereby denied.

It is so ordered.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-10

JOY MANUFACTURING COMPANY

v.

LYKES BROS. STEAMSHIP LINES

PARTIAL ADOPTION OF INITIAL DECISION
AND ORDER REMANDING PROCEEDING

December 15, 1978

BY THE COMMISSION: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice Chairman;* Karl E. Bakke, James V. Day and Leslie L. Kanuk, *Commissioners*)

On February 20, 1976, Joy Manufacturing Company (Joy) filed a complaint with the Commission alleging that Lykes Brothers Steamship Company, Inc. (Lykes), overcharged it $31,463.99[1] in violation of section 18(b)(3) of the Shipping Act, 1916. In his Initial Decision, served March 17, 1977, Administrative Law Judge Charles E. Morgan (Presiding Officer) found that Joy was the proper party to recover reparations and that of the various shipments mentioned in the complaint, some were overcharged, some were properly charged and some were undercharged. The Presiding Officer's decision left the proceedings open "so that after the primary legal issues have been resolved", specifically, whether Joy was the proper party to file a complaint and what standard determines the applicable rates to be charged, the parties could submit verified statements containing computations of the applicable charges. Exceptions to the Initial Decision were filed by both parties. Lykes filed a reply to Joy's exceptions.

BACKGROUND

Respondent Lykes is a common carrier by water engaged in transportation between New Orleans, Louisiana and Mombasa, Kenya. During the time of the shipments at issue Lykes was a member of the South and East African Conference and a party to the tariffs filed with the Commission by that conference.

Complainant Joy is a corporation whose business is the manufacture of mining machinery and equipment. Between April and December, 1974, Joy, pursuant to

[1] This amount was subsequently amended in Complainant's Reply Brief to $25,994.37 to reflect the deletion, effective August 30, 1974, of the tariff item relied upon by Joy. The complaint was not formally amended.

a contract with the Florspar Company of Kenya (FCK), made 23 shipments of various pieces of machinery and equipment via Lykes' ships. On the bills of lading relating to these shipments the consignee was designated as "Order of Shipper". The ultimate consignee as listed on the export declarations, and in fact, was FCK.

FCK operates a florspar mine approximately 115 miles northwest of Nairobi, Kenya. In conjunction with this mine, FCK also operates an ore benefication concentration plant, twenty miles away, along the Kimwarer River. FCK has not intervened in this proceeding.

The equipment involved in the 23 shipments was destined for use at the Kimwarer processing plant. All of the articles shipped were described by the shipper on the bills of lading as "Mill Flotation Machinery." Specific descriptions were included in parentheses following the general description. All of the equipment was of the type to be used in an ore benefication plant. Some of the equipment were machines designed specifically for recovery of minerals via the flotation method of ore processing. The remaining equipment was designed either to perform other parts of the ore concentration process, *i.e.*, crushers and grinding rods, or were of a general nature, *i.e.*, electrical motors.

The shipments were rated on a basis of $152.25 W/M, under Item 2140 of the South and East African Conference Southbound Freight Tariff No. 1, F.M.C. No. 2 for "Machinery, Mining and Parts, Viz: Flotation Equipment, Ore." In its complaint Joy asserted that the goods should have been classified, under Tariff Item No. 1425 of the same tariff, as "Flotation Equipment, including accessories and Parts" at a rate of $133.25 W/M.

INITIAL DECISION

In his Initial Decision the Presiding Officer found that:

(1) Joy is the proper party to bring the complaint, recover overcharges and be subject to the payment of undercharges;

(2) all of the shipments covered by the 23 bills of lading are subject to rulings as to what are the applicable rates;

(3) all of the shipments were improperly rated and charged as mining machinery under Item 2140 of the tariffs;

(4) some of the shipments made prior to August 30, 1974 should have been rated and charged under Item 1425 of the tariff;

(5) the other shipments should have been rated and charged neither under Item 1425, nor under Item 2140, but should have been rated and charged under various specific items of the tariff;

(6) some individual bills of lading contain two or more articles which must be rated and charged under two or more tariff items and that the packing lists of records contain the separate weights and measurements required to properly charge the various articles when two or more articles are covered by one bill of lading; and

(7) some articles shipped were undercharged, that some articles shipped were incorrectly rated, but correctly charged dollarwise, and some articles shipped were overcharged.

As noted above, the proceedings were left open for Commission resolution of certain basic issues and the computation of applicable charges.

Discussion

Upon careful consideration of the record in this proceeding, we conclude that the Presiding Officer's findings and conclusions (1), (2), (5), (6) and (7), as set forth in his Initial Decision are proper and well founded and we accordingly adopt them as our own. Lykes' exceptions to finding (1) and Joy's exceptions to findings (5) and (7) have been reviewed and found either to constitute reargument of contentions already properly disposed of by the Presiding Officer or to be otherwise without merit. These exceptions are accordingly rejected. Findings (3) and (4) warrant discussion.

It is the opinion of the Commission that the Presiding Officer erred in holding that all of the shipments were improperly rated and charged as mining machinery under Item 2140 of the Tariff (finding 3). The rating of the Denver flotation machines under this tariff item was proper and Lykes' exception to that effect is well taken. The Presiding Officer held that these machines should have been rated under Item 1425 "Flotation equipment, including accessories and parts." In reaching that conclusion he stated that Items 1425 and 2140 can reasonably be construed as covering the same type of goods. We disagree. We concur with Lykes that tariff Item 1425 "Flotation Equipment" refers to articles used in the process of floating or buoying up generally, while tariff Item 2140 "Machinery, Mining and Parts, viz: Flotation Equipment, Ore." refers more specifically to articles used in the *flotation method of ore processing*.[2] Lykes, in arguing that only Item 2140 applies, noted the several definitions of "flotation" and submitted that the presence of the word "ore" in Item 2140 limited that Item to the secondary use of flotation. Under the principle of *noscitur a socii, i.e.* the meaning of a word is known from the accompanying words, this is the proper construction. A further consideration adds more distance between Items 1425 and 2140. While we agree with the inherent nature standard utilized by the Presiding Officer, some weight must be given to the function a machine performs. Flotation machines are integrally related to mining as they are part of the overall process of the recovery of minerals. Therefore, we find Item 2140 is the proper rate to be applied to the Denver flotation machines.

Because of the distinctions drawn above between Items 1425 and 2140, the Commission disagrees with finding (4) of the Initial Decision. Item 1425 covering Flotation Equipment is not applicable to any portion of the shipments. Lykes' exception that the Presiding Officer erred in holding that the bar grizzlies should be rated under tariff Item 1425 is well taken. The transcript of the hearing (at page 80) states that the bar grizzlies were not unique to the flotation process. Accordingly, they are to be rated under those tariff items which are appropriate, applying the inherent nature standard.

A final point meriting discussion concerns the applicable charge for separate packages or units of a particular piece of equipment shipped on a single bill of

[2] Namely, the "separation of the particles of a mass of finely pulverized ore according to their relative capacity for floating (by virtue of the surface tension) on a given liquid, instead of according to their specific gravities." Webster's New International Dictionary, Second Edition (1935)

lading. Official notice is taken of Appendix A, page 104 of the applicable tariff which states that "all cargo shall be measured on the overall measurements of the individual packages." Tariff rules applying to weight or measurement of cargo in a manner which produces the greater revenue are common and have been applied by the Commission in the past. See *Orleans Materials and Equipment Co. v. Matson Navigation Company,* 8 F.M.C. 160 (1964). We find tariff Rule 10(a) governs the computation of the applicable charges. Therefore, the individual weighing or measuring of the units or packages of an item in a manner which yielded the greater charge was proper.

THEREFORE, IT IS ORDERED, That, to the extent specified herein, the Initial Decision is adopted as our own and made a part hereof.

IT IS FURTHER ORDERED, That this proceeding be remanded for determination of the applicable freight charges; that the parties shall in the manner and time set forth in the Initial Decision submit statements concerning such determination; and, that the Presiding Officer shall reach such determination within 60 days of the date of this Order.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 76–10

JOY MANUFACTURING CO.

v.

LYKES BROS. STEAMSHIP CO., INC.

Partially Adopted on December 15, 1978

Found (1) that the party (Joy) which initially paid the ocean freight charges is the proper party to recover overcharges and be subjected to payment of undercharges, and (2) that of certain shipments of flotation equipment, conveyors, cranes, crushers, electric motors, pumps, etc., made from New Orleans, Louisiana, to Mombasa, Kenya, covered by 23 bills of lading, some articles shipped were overcharged, some undercharged, and some were charged the proper dollar amounts. Proceeding left open for later computations of applicable charges after resolution of primary legal issues.

William Levenstein for Joy Manufacturing Co., complainant.
Edward S. Bagley, for Lykes Bros. Steamship Co., Inc. Respondent.

INITIAL DECISION[1] OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE

THE COMPLAINT. This complaint was timely filed on February 20, 1976. Joy Manufacturing Co. (Joy), the complainant, alleges that it was overcharged in violation of section 18(b)(3) of the Shipping Act, 1916, as amended (the Act), by Lykes Bros. Steamship Co., Inc. (Lykes), the respondent, a total, reduced by amendment[2] in the complainant's reply brief, of $25,994.37 on 17 shipments, generally described on the bills of lading as "Mill Flotation Machinery," made on and between April 5 and August 6, 1974, from New Orleans, Lousiana, to Mombasa, Kenya. Joy originally sought reparation on 23 shipments.

THE ISSUES. Joy asserts that this is a rate classification case, that Joy paid the ocean freight charges on the shipments thereby making Joy the proper party to bring the suit, and that Lykes improperly collected charges based on the higher rate for "Machinery, Mining and Parts, Viz: Flotation Equipment, Ore," whereas allegedly Lykes should have based charges on the lower rate for "Flotation Equipment, Including Accessories and Parts." These tariff items and others referred to herein are found in South Bound Freight Tariff No. 1 of the South and East Africa Conference.

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 13(g), Rules of Practice and Procedure, 46 CFR 502 227)

[2] The original complaint alleges overcharges of $31,463.99 on 23 shipments Six shipments which moved on and between September 3 and December 13, 1974, were deleted by Joy in its reply brief because the tariff item relied upon by Joy was deleted from the tariff effective August 30, 1974.

Lykes asks that the complaint be dismissed because another party other than Joy allegedly bore the cost of the ocean freight charges, and therefore in the view of Lykes Joy is not the proper party to bring suit. Also, Lykes disputes Joy's view of the applicable rates. Lykes further asserts that if Joy were the proper party to assert the claim herein, Joy would be liable for substantial undercharges as a result of misdeclarations made in the bills of lading furnished to Lykes. Further, it is asserted by Lykes, since Lykes does not have any prospect of reaching the Fluorspar Company of Kenya, Limited, the party which allegedly bore the charges, and since Joy is not the proper party, that in Lykes' view undercharges are foreclosed.

To determine the applicable charges on the shipments herein, it is necessary to determine the true nature of the articles shipped. Also, if it is determined that Joy is the proper party to bring the complaint, then Joy would be both the proper party to benefit from any overcharges and Joy would be the proper party to be subjected to suit for the collection of any undercharges.

Furthermore if it is determined that some of the articles shipped were undercharged, also it becomes necessary to look at the applicable rates on all 23 shipments herein, because it is the continuing duty of ocean common carriers under section 18(b)(3) of the Act *not to 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. Thus, Lykes has the continuing duty to collect undercharges on any of the 23 shipments herein.

RULINGS ON ADMISSIBILITY OF EXHIBITS AND OF LATE-FILED EXHIBITS. During the course of the hearing, Joy identified a number of exhibits, but inadvertently failed to move their admission into evidence. Accordingly, on brief Joy moves that exhibits Nos. 1 to 24, inclusive, and Nos. 30 and 31 be received. In its brief, Lykes replies, in view of Joy's alleged failure to establish its right to bring this proceeding and in view of Joy's alleged failure to afford complete discovery, that Joy's exhibits should not be received into the record.

Exhibits Nos. 1 to 23 are the bill of lading and attached packing lists for the shipments in issue. They are necessary to an understanding of what was shipped and to the charges assessed. Lykes had ample opportunity to cross-examine and in fact conducted extensive cross-examination based on these exhibits. Furthermore, the parties stipulated on page 9 of the record "that the packing lists attached to the bills of lading that will be in evidence in this case show the actual consist of the shipment under the bill of lading it is attached to." Also, Lykes received reasonably substantial responses to its discovery requests. Exhibits Nos. 1 to 23 hereby are received into the record.

Some of the bills of lading exhibits are partly illegible. The bills of lading, but not all of the packing lists, are also attached to the complaint. Where these attachments to the complaint are more legible, these attachments have been used to a minor extent to assist in the making of findings herein. Also attached to the complaint is a one-page summary listing bill of lading numbers, dates, vessels and charges paid. Here again this summary is of some assistance where the bill of lading exhibits are partly illegible.

Exhibit No. 24 is a copy of a wire dated May 21, 1974, sent to Mr. William I. Hamm, Chairman of the South and East Africa Conference, by Mr. Robert L. Hillard, Corporate Director of Traffic of Joy. This wire confirmed a telephone call made by Mr. Hillard on the same date, by which he asked that the shipments herein made prior to that date be rated and charged as flotation equipment rather than as mining machinery. Mr. Hillard asked that the flotation equipment lower rate be charged on both the past and future shipments of Joy. Opportunity to cross-examine Mr. Hillard was afforded to Lykes. Also, Lykes has attached the same wire dated May 21, 1974, as part of its late-filed Exhibit No. 32. Exhibit No. 24 hereby is received into evidence.

Exhibit Nos. 30 and 31 are tariff pages pertinent to the issues herein. If these pages had not been offered, in any event they could have been noticed as parts of tariffs on file with the Commission. Exhibit Nos. 30 and 31 hereby are received into evidence.

Lykes was given permission at the hearing to offer and has offered some late-filed exhibits. They are a four-page exhibit No. 25, picturing and describing certain equipment manufactured or sold by Joy; a two-page exhibit No. 25-A which is a summary of Export Declarations regarding exhibit Nos. 1 to 23 and listing schedule B commodity numbers and schedule B descriptions of the Department of Commerce, Classification of Exports; a one-page exhibit No. 26 which is a copy of a handwritten note of the witness Hillard and which lists various articles shipped by the complainant; a 23 page exhibit No. 26-A which consists of the Shipper's Export Declarations relative to the shipments in issue; a two-page exhibit No. 27 which is the Proforma Invoice Quotation made by Joy to the ultimate consignee of the shipments herein; an 18-page exhibit No. 28 showing numerous schedule numbers and commodity descriptions of the Classification of Exports of the Department of Commerce; a five-page exhibit No. 29 consisting of tariff pages of the Southbound Freight Tariff No. 1 of the South and East Africa Conference; and a 25-page exhibit No. 32 which is what Mr. Hamm would have testified if called upon, with numerous attachments.

Joy does not object to the admission of exhibit Nos. 25, 26 and 27, and they hereby are received into evidence.

Exhibit Nos. 25-A and 26-A are objected to by Joy on the ground that the Shipper's Export Declarations (exhibit No. 26-A) were prepared not by Joy, but by Joy's freight forwarder, and accordingly that they are not proper evidence as to what was shipped. There is no contention that the 23 pages of exhibit No. 26-A are not authentic because they were obtained from Joy by Lykes through the discovery process. Certain data on exhibit No. 25-A, and other data on exhibit No. 25-A, comes from the Department of Commerce Schedule B commodity descriptions from exhibit No. 28. Exhibit No. 25-A relates this data with Joy's exhibits Nos. 1 to 23. The objections to exhibit Nos. 25-A and 26-A are overruled and these exhibits hereby are received into the record, on the grounds that they are relative and material, and are entitled to some weight as part of the overall evidence in the proceeding.

On the same grounds, exhibit No. 28 containing Department of Commerce commodity numbers and descriptions, hereby is received into evidence. Exhibit No. 29, containing certain tariff pages hereby is received into evidence.

Exhibit No. 32 contains Mr. Hamm's 3 pages of testimony and numerous attachments concerning "Flexifloat Equipment," "Sectional Barges" and "Flotation Equipment," plus six pages concerning the shipments of Joy herein. Mr. Hamm was unable to be present at the hearing, and in lieu of prolonging the hearing Joy generally waived cross-examination of Mr. Hamm, but at the same time reserved the right to object to the relevance and admissibility of the testimony of Mr. Hamm. In particular, Joy now objects to any use of Mr. Hamm's testimony insofar as it may relate to the meaning of tariff item No. 1425 covering "Flotation Equipment, Including Accessories and Parts." This is the item and rate which Joy contends is applicable to its shipments. Joy insists that the tariff item speaks for itself, and that it is of no moment why the Conference put this item in the tariff, and that the intention of the framers of the tariff (the carriers or conference) does not govern. Joy is correct that tariffs must speak for themselves. The intention of the framers does not matter where there is no ambiguity in the tariff. Where there is some ambiguity in the tariff, its meaning generally should be taken in the usual or ordinary sense understood by the business and shipping community. Of course, where there is some ambiguity, other testimony may be relevant to a complete and fair understanding of a tariff item.

Pages 20 through 25, inclusive, of exhibit No. 32 and Mr. Hamm's testimony relating to these pages are not objected to by Joy. The other attached pages to Mr. Hamm's testimony, pages 4 through 19, inclusive, and Mr. Hamm's testimony insofar as it relates to pages 4 through 9 and the rate request of the A. P. Robishaw Engineering, Inc., are not received. Exhibit No. 32 hereby is received in part into evidence, that is, pages 20 through 25 inclusive, and related testimony. This ruling insofar as part of exhibit No. 32 is not received is based on the theory that the tariff item 1425 is not ambiguous. Of course, if said item 1425 is considered by the Commission to be ambiguous, then Mr. Hamm's testimony regarding this item may be entitled to some weight.

THE PROPER PARTY TO BRING THE COMPLAINT. On the bills of lading, Joy is listed as the shipper, and the consignee is listed as "ORDER OF SHIPPER." Under the bill of lading caption, NOTIFY PARTY, is listed R. S. Campbell and Company (1950) Ltd., P. O. Box 90153, Mombasa, Kenya. The bills of lading do not show the ultimate consignee.

In fact all of the shipments in issue were made in connection with one contract of sale between Joy, as the seller, and the Fluorspar Company of Kenya, Ltd., P. O. Box 30610, Nairobi, Kenya (FCK), as the purchaser. FCK is shown on the export declarations (exhibit No. 26-A) as the ultimate consignee in all instances except two. On these two, FCK is shown as the immediate consignee (pages 9 and 10 of exhibit No. 26-A). "FCK ORDER NO. 1168" generally is shown on the packing lists attached to the bills of lading under the item, "Packages Marked." The packing lists also show that the packages are marked "Nairobi, Kenya, via Mombasa."

Exhibit No. 27, the Proforma Invoice Quotation of Joy, shows that Joy proposed to sell to the Fluorspar Company of Kenya, Limited, the articles shipped herein, based on a price, "F.O.B. vessel closest U.S.A. Port," plus estimated ocean freight and marine insurance charges, plus miscellaneous

charges for service trips and unforeseen contingencies. The total estimated net price shown on the exhibit is $2,161,143, of which there was $189,530 listed as total estimated ocean freight and marine insurance charges.

The summary attachment to the complaint indicates that the total freight charges paid on the 23 shipments by Joy to Lykes was $173,869.15. The amount of marine insurance paid is not of record, but it is unnecessary in view of the conclusions below. One of Joy's witnesses testified that FCK was invoiced on the basis of Joy's total price for the goods shipped plus an estimated ocean freight and marine insurance charge, but this witness who was the Traffic Manager of Joy did not know whether FCK paid the invoice, as that was not his responsibility. Another witness of Joy testified that the ocean freight expense that FCK would pay to Joy under their contract of sale was a "locked in" figure and that Joy was actually running over the estimated locked in figures. It is obvious that FCK reimbursed Joy for substantially all, or in any event the greater part, of the ocean freight charges as part of the purchase price of the goods.

Nevertheless, the bills of lading show that all of the shipments were made with the "Ocean Freight Prepaid." The record shows that Joy paid the freight charges through its forwarding agent, the Lusk Shipping Co., Inc., of New Orleans, La. Joy was the listed shipper and consignee, and the only bill-of-lading party dealing with the ocean carrier—Lykes. Joy had to be the party who prepaid the ocean freight. Joy was the only party which had a contract of affreightment with Lykes for the ocean transportation of the shipments in issue.

Of course, if the ultimate consignee FCK had intervened in this proceeding, if it had offered proof that it bore the ocean freight charges, and if it had insisted that FCK and not Joy were entitled to refund of any overcharges, possibly a different conclusion than the one below may have been reached. But we are not faced with FCK as an intervener.

Both Joy and Lykes (see Lykes' motion to dismiss dated September 9 and received September 13, 1976) rely on *Davis v. Mobile & Ohio R. Co.*, 194 Fed. 374 (1912), (*Davis case*), where at page 376 the Court stated:

> Our view of the question is that the party who pays the freight or is liable for its payment, whether he be the millowner, manufacturer, shipper or consignee, is the one injured by an excessive freight charge and in him alone is vested the right to recover because of the illegal exaction.

The respondent Lykes reads the *Davis case* to mean that the party claiming reparation must be *the one on whose behalf the freight charges were paid*, whereas Joy reads the *Davis case* to mean that the party claiming reparation can be *the one who actually paid the freight*.

Joy also contends in the present proceeding that as between the rights and equities between the seller—Joy and the purchaser—FCK, that this was and is no concern of Lykes.

In *Adams v. Mills*, 286 U.S. 397, the plaintiffs were certain commission merchants, who as consignees had paid the freight charges and were subsequently reimbursed from sales of the livestock. The Court at page 407 said:

> If the defendants exacted from them an unlawful charge, the exaction was a tort, for which the plaintiffs were entitled, as for other torts, to compensation from the wrongdoer. ***As they would have been liable for an undercharge, they may recover an overcharge. In contemplation of law the claim for damages arose at the time the extra charge was paid. ***The plaintiffs have suffered injury within the meaning of section 8 of the Interstate Commerce Act; and the purpose of that section

would be defeated if the tortfeasors were permitted to escape reparation by a plea that the ultimate incidence of the injury was not upon those who were compelled in the first instance to pay the unlawful charge.

In the present proceeding, it is concluded and found that Joy paid the freight charges in the first instance, and accordingly is the proper party to bring the complaint. Likewise for similar reasons, it also is concluded and found that if there were undercharges then Joy is responsible for the undercharges. FCK is not a party to the transportation contract and has not intervened in this proceeding, and therefore all issues in this proceeding concerning overcharges and undercharges are matters between only Joy and Lykes.

THE KIMWARER PLANT. All of the items shipped were necessary to the operation of the so-called flotation process plant or mill of FCK located about 115 miles northwest of Nairobi, Kenya, on the Kimwarer River. This Kimwarer plant is located about 20 miles from the fluorspar mine of FCK. The purpose of the Kimwarer plant is at least two-fold, i.e., one, to reduce and concentrate the fluorspar, and, two, to separate the fluorspar from the unwanted gangue and from the other materials attached to the crude fluorspar ore as it comes from the mine. The Kimwarer plant's function is to process 1,000 tons of crude ore a day.

The flotation process at the Kimwarer plant uses water from the river, which has to be pumped, filtered, softened and chemically treated, necessitating the use of various pieces of equipment and supplies, including pumps, filterers, softeners, and chemical additives.

The crude ore as it comes from the mine must be reduced in size, uniformly sized, screened and floated, necessitating the use of various pieces of equipment such as flotation cells, crushers, screens, grinding balls, grinding rods, hoist and crane.

Also necessary to the overall operation are pieces of laboratory testing equipment, electric motors, electric panels, and many others.

In brief, the flotation process at the Kimwarer plant, or at some other flotation process plant, might be described as being accomplished by floating a particle of a given size with a given specific gravity to the surface, and thence the reclaiming of that particle as a flotation concentrate.

The Kimwarer plant has a number of overall groups making up the total facility for the recovery of the fluorspar. There is a sizing and reduction of the material. There is a large reagent circuit which handles the chemical flotation reagents. There is a filtration area which recovers the flotation material from the water and reduces it from a slurry to a recoverable concentrate. And there is a water filtration section for the Kimwarer River water which had to be treated so as to be of a particular pH (acidity or alkalinity), and so as to be of a particular clean quality.

In its brief, Lykes refers to Hackh's chemical definition of "flotation" below, and this definition also is endorsed by Joy in its reply brief:

A method of concentrating ores by grinding them with a frother, as oils or acids and separating the differently moistened or wetted mineral particles by floating them upon water, usually agitating the mixture by compressed air. The wet gangue settles out and the concentrated ore is skimmed off.

Obviously to accomplish the flotation process a number of pieces of equipment are needed, inasmuch as the ore must be crushed, frothed, separated,

floated, agitated, skimmed and dried. Also it is necessary that some pieces of equipment be powered by motors.

THE ARTICLES SHIPPED. While all of the articles shipped were necessary for the operation of the reduction and flotation processes at the Kimwarer plant, many of the articles shipped could be used in other types of concentration processing plants. Other types of ore beneficiation concentration equipment incude gravity separation jigging equipment (a dry process), spiral classification equipment (a wet process), solvent extraction equipment (a wet process), and ion exchange equipment (a wet process).

Generally an ore beneficiation concentration plant would be located in relatively close proximity to a mine. The Kimwarer flotation process plant was erected in conjunction with and for the use of FCK's mine. The Kimwarer plant does not perform a mining function, as such, but it does concentrate the fluorspar ore so that the mined product is reduced and concentrated to a commercially feasible concentration and size for shipment. In other words, the mine and the Kimwarer plant each are necessary adjuncts of the other for the commercial feasibility of the overall fluorspar project of FCK. For this reason the articles shipped frequently have been regarded correctly or incorrectly as mining machinery because of their use in treating ore which has been mined.

Grinding rods (listed in exhibit No. 1) are used in grinding mills. They could be used in the solvent extraction and ion exchange processes as well as in the flotation process.

The vibrating screen and vibrating machine (listed in exhibit No. 2) can be used in other processes other than the flotation process.

There are certain pumps made by the complainant, called Denver pumps, which are of various designs. The Denver SRL-C pump in exhibit No. 2 was designed for flotation froth handling specifically at the Kimwarer plant.

The so-called Denver DR fluorspar type flotation machinery is the flotation machinery itself. It is uniquely a part of the flotation facility.

The Denver laboratory jaw crusher (listed in exhibit No. 2) is laboratory equipment which could be used in any application where it were desired to test materials by reducing the size. This laboratory crusher does not have any particular application only to the flotation process. It could be used in other facilities.

The Denver laboratory batch rod mill (listed in exhibit No. 2) similar to the laboratory crusher also could be used in other facilities.

The Denver model 2S2 automatic sampler mechanism (exhibit No. 2) with some variation of its cutters also could be used in processes other than the flotation process.

In exhibit No. 4, there is electrical substation switch gear and overload protection for this equipment. It is electrical equipment furnished by General Electric and could be used in any form of industrial plant requiring some degree of electric power.

In exhibit No. 5 is a link belt screw conveyor, which is not built by the Denver Equipment Division of Joy. This conveyor could be used in other ore concentration processes, except that the conveyor must be adaptable to the specific gravity of the ore.

In exhibit No. 6, there is a bridge crane not manufactured by Denver or by Joy. While this crane specifically was necessary to the Kimwarer plant to periodically, at least every 18 months, lift impellers, motor drives and gearing connected with the six banks of flotation cells, on the other hand the same crane might be used in a variety of non-mine related, non-flotation process related industrial plants provided that these other plants required similar specifications for the crane regarding lifting capacity, length of boom, and length of travel on the bridge.

In exhibit No. 7 there are water filters for the Kimwarer plant. The flotation process of this plant deals with a delicate specific gravity and surface tension, but the general purpose was to filter impurities and hardening agents out of the water. Joy's witness was unable to answer whether or not the same process and equipment might be common to small community or municipal water plants, because the witness had no background in water utility operations.

In exhibit No. 8 there were grinding balls for a grinding mill used at the Kimwarer plant for a rougher stage of flotation, that is, where there is a rougher concentration with fairly large particles. These particles then must be further reduced in the next stage of grinding and run through a grinding bar mill for finer grinding. These same grinding balls and grinding mill could be used in other types of ore concentration processes in other manners.

In exhibit No. 9, the electrical substation could be used in other forms of industrial plants.

In exhibit No. 10, the grinding balls might be used for other purposes as in the case of the grinding balls in exhibit No. 8.

In exhibit No. 11, the electric motors have many possible uses.

In exhibit No. 12 there is a Denver filtrate receiver tank with float valves. As looked upon by a layman it would be just a tank capable of holding liquids, and capable of many other uses.

In exhibit No. 12, there is a Denver humbolt type lab sample splitter with hopper, which is a piece of laboratory equipment. It is used in the laboratory as distinguished from plant work.

In exhibit No. 12, also there is a Joy twist air compressor. It could be used in many other ways, other than its use at the Kimwarer plant in connection with the filters.

In exhibit No. 13, there are two Worthington vertical four stage submerged water pumps, used to get the water from the Kimwarer River to the flotation circuit. These pumps could be used in many other applications and are not particularly unique to the flotation process at the Kimwarer plant.

In exhibit No. 14, there are certain Denver Drum Fluorspar Type Drum Filters. They are not unique to the flotation process and have several possible other uses. In exhibit No. 14 also are motor starters furnished by General Electric, which could be used in any form of industrial plant. In exhibit No. 14 also there are chemical solution pumps, not made by Joy, but by Chemcon. These pumps could be used in a variety of other industrial applications for chemical reagents. In exhibit No. 14, also there are indoor load center substations and electrical switch gear, which could be used in a variety of industrial

applications in other types of plants. The same is true for an outdoor pole-mounted transformer and other electrical motors listed in exhibit No. 14.

In exhibit No. 15 there is a Denver screen used for sizing analysis to select a specific particle size. This particular screen could relate to other sizing techniques other than the flotation process.

The Symons Type K bar grizzly, also listed in exhibit No. 15, is unique to the flotation process.

The Worthington vertical water pump, also listed in exhibit No. 15, could be used in a number of other industrial applications.

The Denver heavy duty thickener, also listed in exhibit No. 15, could be used in other processes.

Also listed in exhibit No. 15 is an alarm annunciator panel which could be used for a variety of other industrial applications.

Also listed in exhibit No. 15 is a Denver laboratory testing sieve shaker, which is a tin can about 12 inches in diameter, and 15 inches high, with a top portion having a screen in the bottom of it.

Also listed in exhibit No. 15 is a Denver ball mill, which is a device also used in other ore concentration processes.

Listed in exhibit No. 16 are electrical motors, which could be used in other applications. In exhibit No. 17, are electrical panel boards, which could be used in a variety of industrial applications.

In exhibit No. 18, there are conveyors which could be used in a number of industrial applications. Also in exhibit No. 18 is a Denver rod mill which could be used in other concentration processes. The same is true for the Denver ball mill listed in exhibit No. 18.

Exhibit No. 19 lists a Denver heavy duty thickener, a Grieve Laboratory Electric Drying Oven and a Grieve large capacity Shelf Oven. These ovens could be used in many different industrial laboratories, and the thickener, like the one listed in exhibit No. 15, could be used in other processes.

The jaw crusher, listed in exhibit No. 20, could be used in a number of other applications not involving the flotation process. Also listed in exhibit No. 20 is a Denver type "J" Apron feeder which also could be used in processes other than the flotation process.

In summation of the uses of the articles shipped, as complainant's witness answered on cross-examination at page 85 of the transcript, all the items of equipment shipped with the exception of the flotation cells or flotation machines in virtually all instances are pieces of equipment which have the possibility of being used in some other type of mill other than the Kimwarer plant concentration and flotation mill. In fact, the electrical motors, switch panel and switch gear could be used in a variety of industrial applications having nothing to do with either ore concentration or the mineral recovery process.

Of course, all the pieces of equipment shipped were necessary equipment and accessories to the reduction and flotation process at the Kimwarer plant, and this plant could not have been operated successfully without these pieces considering the state of the fluorspar ore as it was received at the Kimwarer plant.

FURTHER EVIDENCE AS TO THE ARTICLES SHIPPED. The seventeen shipments on which complainant seeks reparation are as follows:

Bill of Lading No.	Date	Ex. No.
120	4-5-74	1
123	4-5-74	2
124	4-5-74	3
125	4-5-74	4
126	4-5-74	5
132	4-5-74	6
133	4-5-74	7
58	4-12-74	8
59	4-12-74	9
73	4-12-74	10
164	4-25-74	11
93	4-25-74	12
94	5-3-74	13
136	5-24-74	14
119	7-2-74	16
141	7-30-74[3]	15
73	8-6-74	17

The shipments were generally described on the bills of lading as "Mill Flotation Machinery." In addition, in parentheses on the bills of lading there were additional descriptions of the shipments as follows:

Bill of Lading No.	Date	Parenthesis Description	Ex. No.
120	4-5-74	(Grinding Rods)	1
123	4-5-74	(Vibrating Screens, Crusher)	2
124	4-5-74	(Crusher and Feeder)	3
125	4-5-74	(Transformers)	4
126	4-5-74	(Screw Conveyor)	5
132	4-5-74	(Hoist and Crane)	6
133	4-5-74	(Filtering Machines)	7
58	4-12-74	(Grinding Balls)	8
59	4-12-74	(Transformers)	9
73	4-12-74	(Grinding Balls)	10
164	4-25-74	(Electric Motors)	11
93	4-25-74	(As Per Rider Attached)	12
94	5-3-74	(*)	13

[*There was no parenthesis description on this bill of lading; but, the attached Packing List, also a part of exhibit No. 13 shows, "2 only, Worthington, Model 15-L110 Vertical 4-Stage Submerged Water Pumps, less 125 HP Motors.]

136 5-24-74 (As Per Rider Attached) 14

[The packing lists attached to exhibit No. 14 list drum filters, G.E. motor starters, etc., chemical solution pumps, G.E. indoor load center substations, switch gear, outdoor pole-mounted transformers, electrical motors, and paddles for flotation machines.]

119 7-2-74 (**) 16

[**There was no parenthesis description on this bill of lading; but the attached Packing List, also a part of exhibit No. 16, shows three General Electric Motors.]

141 7-30-74 (***) 15

[***There was no parenthesis description on this bill of lading; but the attached Packing List of some 31 pages, also part of exhibit No. 15, shows parts for 4' × 10' Denver Screen, parts for 8" × 6" Denver SRL-C Pump, parts for 2-8 cell banks, "D-R" Denver Flotation Cell, parts for No. 24 Flotation

[3] The complainant in the attachment to the complaint lists bill of lading No. 141, cargo on board SOLON TURMAN, under date of June 30, 1970, whereas the bill of lading in evidence (exhibit No. 15) shows the date as July 30, 1974.

Machine, parts for 5" × 4" Denver SRL-C Pumps, parts for 3" × 3" Denver SRL-V Pumps, parts for 3" × 3" Denver SRL Pumps, parts for Duplex Denver Model E ASD Pumps, parts for 2½" × 2" Denver SRL Pump, parts for 16¼" Denver Samplers, parts for Symons Type K Bar Grizzly, parts for Worthington Vertical Water Pump, parts for Farwick Air Clutch for 7' Denver Rod Mill, parts for Farvick Air Clutch for 6' Denver Ball Mill, parts for Spencer Blowers, parts for Cleaver Brooks Boilers, parts for Joy Twistair Compressors, parts for 6" × 4" × 6" Worthington Model D-1020 Pump, parts for Worthington Model D-820 Pump, parts for Model D-520 Worthington Pumps, parts for Three-Ton Dresser Crane, parts for 12" diameter × 25' Link Belt Screw Conveyor, parts for 16 Stephens Adamson Swivel-piler, deep Denver Heavy Duty Thickener, rake assemblies, cone scraper, truss type superstructure comp. weld with walkway split in four sections, alarm annunciator panel, lamp cabinet, Denver Laboratory Testing Sieve Shaker, Denver Laboratory Flotation Machine, Denver Ball Mill, and various others.]

73 8-6-74 (****) 17

[****There was no parenthesis description on this bill of lading; but the attached Packing List, also a part of exhibit No. 17, shows General Electric electrical Panel Boards.]

133 9-3-74 (*****) 18

[There was no parenthesis description on this bill of lading; but the attached Packing List, also part of exhibit No. 18 shows parts for Conveyors, 7' diameter × 10' long Denver Rod Mill, Drum feeder, Spiral screen, parts for Denver Ball Mill, parts for Denver Rod Mill, Spare Motors, parts for Denver SRL-C Pumps, parts for Denver FLuorspar Drum Filters, parts for Denver Thickener, parts for Denver Agitators, parts for Fairbanks Morse Order 04-148400-015-1, parts for Denver Flotation Machine, and parts for Denver ASD Model E Pump.]

45 9-14-74 (-a-) 19

[-a-There was no parenthesis description on this bill of lading; but the attached Packing List, also a part of exhibit No. 19, shows parts for Denver Heavy Duty Thickener, Grieve Lab. Electric Drying Oven, and Grieve Shelf Oven.]

33 10-14-74 (-b-) 20

[-b-There was no parenthesis description on this bill of lading; but the attached Packing List, also a part of Exhibit No. 20, shows parts for Denver Type "J" Jaw Crusher.]

8 10-24-74 (-c-) 21

[-c-There was no parenthesis description on this bill of lading; but the attached Packing List, also a part of exhibit No. 21, shows motor starters, safety switches, relays, Denver Lab. Pressure Filter, parts for Hardinge Size "C" Constant Weight Feeders, parts for Western Filter Company Water Treatment Equipment, parts for water softener, parts for chemical feed pumps, parts for Denver Ball Mill, and parts for Denver Thickener.]

40 11-22-74 (-d-) 22

[-d-There was no parenthesis description on this bill of lading; but the attached Packing List, also a part of exhibit No. 22, shows parts for Denver Rod Mill, master control panels, spare motor, parts for Denver Fluorspar Drum Filters, parts for Hardinge Size "C" Constant Weight Feeders, parts for Denver SRL Pump, parts for D-R Flotation Machine, and parts for Denver Ball Mill.]

83 12-13-74 (-e-) 23

[-e-There was no parenthesis description on this bill of lading; but the attached Packing List, also a part of exhibit No. 23, shows parts for Standard Symons Crusher.]

Further evidence of the nature of the articles shipped are the items listed in exhibit No. 26 by Joy's witness Hillard. His handwritten note shows that grinding rods were shipped on April 5, 1974, with freight charges of $8,368.21 which apparently is bill of lading No. 120, exhibit No. 1; that vibrating screens were shipped on the same date with freight charges of $31,066,61 which apparently is bill of lading No. 123, exhibit No. 2; and that a crusher and feeder were shipped on the same date with freight charges of $3,707.81 which apparently is bill of lading No. 124, exhibit No. 3. Other items listed by the witness on exhibit No. 26 include agitators and pumps, belt conveyors, transformers, swivel piler, laboratory furnace, grinding balls, hoist and crane,

filtering machines, electric motors, and screw conveyor. This list referred to shipments up to and including May 25, 1974, but not later shipments.

THE RATE CHARGED. Joy as a dual rate contract signator was entitled to the applicable contract rate or rates on the shipments in issue.

All of the shipments were charged based on the basic contract rate to Cape Town of $127.25 per ton W/M[4] as provided in item 2140 of the South and East Africa Conference Southbound Freight Tariff No. 1, F.M.C. No. 12, on "Machinery, Mining and Parts Viz: Flotation Equipment, Ore." (See exhibit No. 31).

THE RATE SOUGHT BY JOY. The complainant seeks to have the charges based on the basic contract rate to Cape Town of $108.25 W/M as provided in item 1425 of the above tariff on "Flotation Equipment Including Accessories and Parts." (See exhibit No. 30).

THE MOMBASA DIFFERENTIAL AND OTHER TARIFF CHARGES. The above rates to Cape Town are subject to added port differentials. The differential to be added to the Cape Town rates is $25 for shipments to Mombasa. There apparently is no dispute between the parties, regarding a 15 percent port congestion surcharge applicable after May 31, 1974, regarding certain heavy lift charges, and regarding a bunker fuel surcharge of $17 per ton W/M.

THE RATES APPLICABLE AS SEEN BY LYKES. The respondent contends that the shipments to the extent that flotation machines and flotation cells were included were properly rated and charged. But the respondent also contends that mostly all of the pieces of equipment shipped did not fall within the description furnished by the shipper on the bills of lading, i.e., "Mill Flotation Machinery."

The respondent also contends that the rate on "Mining Machinery and Parts, Viz: Flotation Equipment, Ore," except in the case of the flotation machines, was not the proper applicable rate for most of the pieces of equipment shipped, and that these many pieces of equipment were substantially undercharged.

For examples, the respondent states that much of the equipment shipped should have been charged as cargo, NOS, at the basic rate of $233.50 plus $25 Mombasa differential, or a total of $258.50 per ton, W/M, as per item No. 630 of the above tariff; that the conveyors and cranes should have been charged at the basic rate of $150.50 plus $25 Mombasa differential, or the total rate of $175.50 per ton, W/M, as per item No. 2115; the electric motors at the basic rate of $149.50 plus $25 Mombasa differential, or the total rate of $174.50 as per item No. 2380; and the transformers and spare parts at the basic rate of $150.50 plus $25 Mombasa differential, or the total rate of $175.50 as per item No. 3885.

THE FLOTATION CELLS AND FLOTATION MACHINES. Lykes refers to *Webster's New International Dictionary,* Second Edition (1935), giving the definition of "flotation" as follows:

1. Act, process, or state of floating.
2. Method of floating or buoying up.
3. Com. & Finance. Act of financing, or floating, a commercial venture or an issue of bonds, stock or the like.

[4] Weight tons are 2,240 pounds, and measurement tons are 40 cubic feet. Whichever produces the greater revenue determines the applicable rate.

4. Ore Dressing. The separation of the particles of a mass of finely pulverized ore according to their relative capacity for floating (by virtue of the surface tension) on a given liquid, instead of according to their specific gravities.

5. Sanitary Engin. The collection of substances immersed in a liquid by taking advantage of variable specific gravities or of the buoyancy produced by the evolution of gas by chemicals or heat.

Lykes argues that the flotation equipment defined under item No. 1425 is simply that equipment which falls within the first and second dictionary definitions above, and that item No. 2140 covers the fourth dictionary definition above, i.e., the definition which refers to Ore Dressing, etc. Lykes asserts that the flotation cells and flotation machines shipped herein properly are "Ore Dressing Machinery" which is "Machinery, Mining and Parts, Viz: Flotation Equipment, Ore."

It appears that Lykes places undue stress on the word Ore. Also, the flotation cells and flotation cells and flotation machines are not inherently mining machinery. In any event, tariffs should be read in their ordinary meanings as understood reasonably by a layman. Where two tariff items may be read reasonably to cover the same article shipped, generally the tariff item with the lower rate is applicable. In the present case, it is reasonable to read that item 1425 listing "Flotation Equipment, Including Accessories and Parts" covers flotation cells and flotation machines. Accordingly, it is concluded and found that on shipments of these two articles (flotation cells and flotation machines) Joy was overcharged on shipments made prior to August 30, 1974, when the rate in item No. 1425 was effective.

ARTICLES SHIPPED OTHER THAN FLOTATION CELLS AND FLOTATION MACHINES. Also, Lykes argues that Joy is seeking to apply the specific commodity rate in item 1425 on "Flotation Equipment, Including Accessories and Parts" as though it were a "project" rate, and that thus Joy would have all of the materials which were shipped to the Kimwarer plant included under this single commodity description.

Incidentally, Lykes charged one rate on all of the different articles shipped. But, Lykes relied on the bill of ladings which uniformly described the articles as "Mill Flotation Machinery." Lykes charged the rate in item 2140 on "Machinery, Mining and Parts, Viz: Flotation Equipment, Ore," when in fact at least some of the equipment assuredly was not mining machinery. Electric motors, transformers, etc., are not inherently mining machinery.

Item No. 1425 listing "Flotation Equipment, Including Accessories and Parts," was not a project rate put into the tariff specifically for the Kimwarer plant project. This tariff item had been in the tariff for a number of years prior to the movement of Joy's shipments herein. As seen by the wire dated May 21, 1974, Joy sought to have its shipments rated under item No. 1425 at that time. In effect, this wire asked Lykes to consider Joy's shipments all as flotation equipment, but Lykes rejected the request.

Lykes argues now, because there was no single "project" rate established for shipments to the Kimwarer plant project, that each of the items shipped in issue herein must be rated and charged separately according to its true nature and description.

Both Joy and Lykes appear, at least in part, to be relying upon the same legal principle. Joy states that the purpose for which a thing is maufactured—the controlling use—determines its classification tariff wise, referring to *Hazel-Atlas Glass Co.–Misclassification of Glass Tumblers*, 5 F.M.B. 515, 518, and Lykes states that goods are rated as shipped, and not with regard to the ultimate purpose or end to which they may be put, citing *Misclassification and Misbilling of Glass Articles*, 6 F.M.B. 155, 159, wherein it was said:

Possible use does not change the essential character of the articles and is not a lawful basis for a difference in freight charges. ***The controlling use as a drinking glass determines the correctness of the tumbler classification.

Also, see the initial decision on remand in Docket No. 75-31, adopted by the Commission on February 15, 1977, wherein it was stated that, "The nature and character of each shipment at the time tendered determines its status for rate purposes, and the use which may be subsequently made of the material does not control," *Sonken Galamba Corporation v. Union Pac. R. Co.*, 145 Fed. (2d) 808, 812. It is concluded and found that each separate article shipped in the present proceeding must be rated and charged separately according to its true nature. Many articles were shipped by Joy to the Kimwarer plant. Some, such as electric motors, transformers, etc., obviously had many uses and the primary or controlling use of these electrical motors, transformers, etc., was not as an accessory to a flotation plant. Thus many of the articles shipped are not properly classifiable as flotation equipment.

Those other articles not properly classifiable as flotation equipment must take other rates. These other rates may be the same as, higher, or lower than the rates sought by the complainant. A careful check of the bills of lading, attached packing lists, and of the applicable tariff rates is necessary.

The shipment of 123,100 pounds of grinding rods in exhibit No. 1, because grinding rods can be used for various purposes, other than as flotation equipment, is properly classified as Rods, N.O.S., under item No. 1875 of the tariff, taking the basic contract rate of $67 W, plus the $25 differential to Mombasa, or a total rate of $92 per weight ton. This shipment was overcharged.

The shipment of 1318 cubic feet of transformers in Exhibit No. 9, because transformers can be used for various purposes, other than as flotation equipment, is properly classified as Transformers and Spare Parts, under item 3885 of the tariff, taking the basic contract rate of $150.50 W/M, plus the $25 differential to Mombasa, or a total rate of $175.50 W/M. This shipment was undercharged.

The shipment of 1243 cubic feet of transformers and spare parts in exhibit No. 4, likewise, was undercharged.

The shipment of 107 cubic feet of electric motors in exhibit No. 11, because these motors can be used for various purposes, other than as flotation equipment, is properly classified as Motors, Electric and Gasoline, N.O.S. under item No. 2380 of the tariff, taking the basic contract rate of $149.50 W/M, plus the $25 differential to Mombasa, or a total rate of $174.50 per ton W/M. This shipment was undercharged.

The shipment of 4,400 pounds of Worthington submerged water pumps in exhibit No. 13, because the pumps could be used for various purposes, other than as flotation equipment, is properly classified as "Machinery, Machines and

Parts (Not Store or Office or Household Labor-Saving Devices) Viz: Pumps, N.O.S.," under item 2115 of the tariff, taking the basic contract rate of $127.25 W/M, plus the $25 differential to Mombasa, as a total rate of $152.25 per ton W/M. This shipment was neither overcharged nor undercharged.

The shipments listed in exhibit No. 3 consisted of a Denver whaleback apron feeder (Joy's Item 002-1 Equipment No. 103) and parts for this feeder including chain case; also a jaw crusher, Denver Type J (Joy's Item 005-1 Equipment No. 106). Charges were assessed by Lykes on these shipments partially on a measurement basis for 582 cubic feet, and partially on a weight basis for 21,945 pounds. The attachment to the complaint of Joy indicates in its note (1) that the charges would be lower on a weight basis, and therefore that the charges should be assessed on a measurement basis. Joy would assess all of the articles listed in exhibit No. 3 on only one basis. It appears that Lykes added 21,000 pounds and 945 pounds of Joy's item 005-1 for the jaw crusher to get 21,945 pounds, and that Lykes added 370 cubic feet and 68 cubic feet of Joy's item 002-1 for the feeder and 144 cubic feet of Joy's item 005-1 for the crusher to get 582 cubic feet. Thus the charges as assessed seem to be incorrect because of the mixture of items in the measurment assessment of charges, and because all of the crusher items were not assessed on either a weight or measurement basis. Exhibit No. 3 shows in the attached packing list that the various items by skids and boxes were weighed and measured separately.

As a general rule, where two or more items listed in one bill of lading are separately classifiable in the tariff, it is appropriate that these separate items be weighed and measured separately and separately rated and charged. However, where two or more items in one bill of lading are classified and rated as one item in the tariff then the weights and measurements of these items should be totalled, and there should be one charge, either weight or measurement as provided by the tariff.

The shipment of Joy's item 005-1 equipment NO. 106, which is a jaw crusher and parts in exhibit No. 3 totals 23,170 pounds and measures a total of 460 cubic feet. It should have been charged on the basis of measurement. Likewise, the feeder and parts in the same exhibit, Joy's item 002-1 equipment No. 103, totalled 18,800 pounds and 438 cubic feet. It should also have been charged on the basis of measurement assuming that a rate W/M was applicable. The applicable rate on the crusher and parts in exhibit No. 3, because the crushers could be used for various purposes other than as flotation equipment, is the rate on "Machinery, Machines and Parts (Not Store or Office or Household Labor-Saving Devices), Viz: Crushing, N.O.S., in item 2115 of the tariff of $150.50 W/M plus the $25 differential to Mombasa, or a total contract rate of $175.50. This shipment of crusher and parts was undercharged.

The few pages of the tariff of record in this proceeding as exhibit No. 29 do not list any specific rates for feeders. Under Lykes' theory of the case, the rate on Cargo, N.O.S., under item 630 of the tariff of $233.50 W/M, plus the $25 differential to Mombasa, or a total contract rate of $258.50, should be applied.

It is not necessary to the resolution of the primary issues herein to resolve all of the applicable charges on all of the many individual articles shipped in connec-

tion with each bill of lading herein. It is deemed appropriate to leave this to the parties at a later time after the basic issues herein have been resolved.

ULTIMATE CONCLUSIONS AND FINDINGS. It is concluded and found: (1) that Joy is the proper party to bring the complaint, recover overcharges and be subject to the payment of undercharges; (2) that all of the shipments covered by the 23 bills of lading are subject to rulings as to what are the applicable rates; (3) that all of the shipments were improperly rated and charged as mining machinery under item 2140 of the tariff; (4) that some of the shipments made prior to August 30, 1974, namely shipments of flotation cells and flotation machines should have been rated and charged under item 1425 of the tariff; (5) that the other shipments should have been rated and charged neither under item 1425, nor under item 2140, but should have been rated and charged under various specific items of the tariff, such as item 1875 for rods, item 2115 for cranes, conveyors, crushers, and pumps (note that the basic Cape Town rate for cranes, conveyors, and crushers was $150.50, and the corresponding rate for Pumps was $127.25); item 2350 for electric motors, and item 3885 for transformers; (6) that some individual bills of lading contain two or more articles which must be rated and charged under two or more tariff items, and that the packing lists of record contain the separate weights and measurements required to properly charge the various articles when two or more articles are covered by one bill of lading; and (7) that some articles shipped were undercharged, that some articles shipped (pumps) were incorrectly rated, but correctly charged dollarwise, and some articles shipped were overcharged.

This proceeding will be left open so that after the primary legal issues have been resolved, then, the parties shall submit verified statements containing their computations of the applicable charges, the overcharges, and the undercharges on the articles shipped herein covered by the 23 bills of lading. Said computations should be made in accordance with the resolution of the legal issues, and should contain specific references to each article shipped, the tariff item deemed appropriate for each item, and the detailed computations of all miscellaneous charges, including port congestion, heavy lift, bunker fuel, and Mombasa differential charges. The parties need not submit such computations until 30 days after this initial decision becomes final. Should the parties then fail to agree in their computations of the proper charges, further rulings then may be made.

Of course, in the event that this initial decision is overturned in whole or in part by the Commission, further procedures will be governed by the order of the Commission.

(S) CHARLES E. MORGAN
Administrative Law Judge

WASHINGTON D.C.
March 16, 1977

FEDERAL MARITIME COMMISSION

TITLE 46—SHIPPING

CHAPTER IV—FEDERAL MARITIME COMMISSION

[GENERAL ORDER 7; DOCKET NO. 73-64]

PART 528—SELF-POLICING SYSTEMS

December 18, 1978

ACTION: Affirmance of Final Rules

SUMMARY: Petitions for Reconsideration of the Commission's September 14, 1978 Order on Reconsideration are denied.

DATES: To become effective January 1,1979, or upon completion of General Accounting Office review, whichever comes later.

SUPPLEMENTAL INFORMATION:

The Commission has before it two petitions requesting reconsideration and modification of the self-policing rules (46 C.F.R. Part 528) adopted on September 14, 1978.[1] The September Regulations were finalized following receipt and consideration of an earlier round of petitions objecting to the self-policing rules adopted in this proceeding on April 18, 1978.

Petitioners express specific concern only with section 528.1(c)(1) of the September Rules, the section which prohibits carrier conferences from blocking all Commission access to conference self-policing records. The following arguments were advanced in support of the withdrawal of section 528.1(c)(1):

(1) Section 528.1(c)(1) is invalid because interested parties were deprived of an adequate opportunity for public comment;

(2) The Commission's intention to employ self-policing information in its enforcement program was not apparent until the September Order was served, thereby depriving the public of the right to submit comments on that issue;

(3) Section 528.1(c)(1), in conjunction with section 528.3(f), is invalid because it represents an improper combination of self-policing and enforcement functions. Congress intended self-policing to be completely separate from the enforcement of the Shipping Act;

(4) Section 528.1(c)(1) will put pressure on carriers, especially foreign flag

[1] A "Petition for Reconsideration" was filed by Sea-Land Service, Inc., and by the member lines of the Far East Conference (Petitioners).

carriers from countries with blocking statutes, to withhold data and otherwise refuse to cooperate with self-policing bodies;

(5) Section 528.1(c)(1) will create pressures on foreign flag carriers to withdraw from U.S. conferences and compete as independents;

(6) Section 528.1(c)(1) could result in U.S. flag carriers being unfairly exposed to enforcement sanctions;

(7) Self-policing may not benefit the public because rebating can be viewed as a desirable manifestation of price competition between ocean carriers.

DISCUSSION

The substance of these arguments was presented to the Commission at prior stages of this proceeding where it was carefully considered and rejected.

A rulemaking proceeding is not invalid because portions of the regulations assume final form only after the agency has considered petitions for reconsideration. The fact that Petitioners were "surprised" by the inclusion of section 528.1(c)(1) in the September Rules does not mean they were deprived of sufficient notice of the "document production/enforcement of the Shipping Act" issue. These matters were identified in the Commission's October 17, 1973 Notice of Proposed Rulemaking, were discussed in the initial comments, were given further definition by the Commission's Report adopting the April Rules, and were again discussed in the reconsideration comments.

The September 14, 1978, regulations represent a compromise concerning the method by which the Commission obtains necessary information regarding the ineffectiveness of conference self-policing activities. A balance has been struck between receiving all relevant information routinely in semi-annual self-policing reports and seeking it only on a case-by-case basis. Although this balance may not please Petitioners, they have been provided an adequate opportunity to comment on the subject.

THEREFORE, IT IS ORDERED, That the "Petition for Reconsideration" of Sea-Land Service, Inc., and the "Petition for Reconsideration" of the Far East Conference are denied.

By Order of the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-24

UNITED NATIONS

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

ORDER ON RECONSIDERATION

December 18, 1978

By petition filed October 16, 1978, the Complainant, United Nations, requested reconsideration of the Commission's decision awarding reparation in a lesser amount and under a different tariff classification that it originally prayed for in its complaint.

In its petition, the Complainant admits that it has nothing new to add to the record in this proceeding. There being nothing new brought to our attention upon a record once fully considered, we find reconsideration unwarranted.*

The petition is therefore denied. The Commission's decision served September 18, 1978, is affirmed.

IT IS SO ORDERED.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

* See Rule 261 of the Commission's Rules, of Practice and Procedure.

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-34

CONCORDIA INTERNATIONAL FORWARDING CORPORATION— INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION AND POSSIBLE VIOLATIONS OF SECTION 44, SHIPPING ACT, 1916

Concordia International Forwarding Corporation, an applicant for a freight forwarder license, found unfit to possess a license on the ground that it violated section 44 of the Shipping Act by engaging in the business of ocean freight forwarding during the pendency of, and before approval of, its application.

Edward J. Sheppard for Concordia International Forwarding Corporation.
John Robert Ewers and *Joseph B. Slunt* for the Bureau of Hearing Counsel.

REPORT AND ORDER

December 18, 1978

BY THE COMMISSION: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice Chairman;* James V. Day and Leslie Kanuk, *Commissioners.* Karl E. Bakke, *Commissioner,* dissenting.)

This proceeding was instituted upon the application of Concordia International Forwarding Corporation (Concordia) for an independent ocean freight forwarder license.

Following an initial investigation, the Commission advised Concordia of its intention to deny the application[1] based upon the investigative disclosure that Concordia appeared to have violated section 44(a) of the Shipping Act, 1916, on several occasions.

Concordia requested an expedited hearing before the Commission. The proceeding was conducted upon memoranda of law and affidavits of fact submitted to the Commission. The Commission's Bureau of Hearing Counsel is a party in this proceeding by Commission Rule. The opportunity for discovery, hearing, and/or oral argument was waived by the parties following the submissions of memoranda and affidavits.

FACTS

Concordia presented the factual case for approval of its application through the affidavits of Paul Emposimato, Jr., and Kenneth J. Carroll, President and

[1] See Rule 510.8(a) of the Commission's Rules, 46 C F R 510.8(a)

FEDERAL MARITIME COMMISSION

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Vice President of Concordia, respectively. Hearing Counsel presented its factual case through the affidavit of a Commission investigator, Christopher M. Kane.

The uncontroverted testimony of the affiants reveals that both Mr. Carroll and Mr. Emposimato have many years of experience in freight forwarding. Mr. Carroll has 12 years of experience in ocean freight forwarding. In his last employment he managed a staff of 46 persons for NOVO International Corporation in its ocean freight division. Mr. Emposimato has 20 years of experience in air freight forwarding.

Mr. Carroll made application for a license in his own name on May 22, 1978. His application was amended on August 15, 1978, deleting his name as the applicant and substituting the corporate name of Concordia.

Concordia was organized under the laws of New York on June 6, 1978. Mr. Emposimato owns 50% of its shares, Mr. Anthony Marano owns 46% of its shares and Mr. Carroll owns 4% of its shares. Mr. Marano is also a Vice President of Concordia and has four years of experience in ocean freight forwarding.

Immediately upon filing his application, Mr. Carroll received a letter from the Commission's Office of Freight Forwarders which warned Mr. Carroll that engaging in the "business of forwarding" during the pendency of his application could result in the denial of a license.[2]

During the first few weeks of Mr. Carroll's pending application, he and Mr. Emposimato were employed by NOVO International Corporation, an air and ocean freight forwarding business with offices in New York City. According to their affidavits, NOVO was then in financial decline.

Mr. Emposimato resigned from NOVO on June 9, 1978, and Mr. Carroll followed on June 16, 1978. At least seven employees, including Messrs. Carroll and Emposimato, left NOVO and were subsequently employed by Concordia. On June 23, 1978, NOVO declared bankruptcy.

Concordia began engaging in the business of ocean freight forwarding as early as June 16, 1978, the same day that Mr. Carroll resigned his position with NOVO and joined Concordia.

According to Mr. Carroll's testimony, when certain shippers called the office of NOVO and found he had resigned, they contacted him at Concordia requesting Concordia's services. The only shippers of record during this period were shippers who had previously utilized the services of NOVO.

The same day Mr. Carroll joined Concordia, he called the Commission requesting that the processing of his application be expedited. Mr. Carroll apparently had no intention of operating under an individual license, however. Once his license was granted, he planned to transfer it to Concordia. According to Mr. Carroll, his attorney advised him that this course of action is quite regular.[3]

Shortly after June 16, the Commission's Atlantic District Office received reports from several carriers reporting the appearance of Concordia's name on ocean bills of lading without an FMC number. Commission employees located in

[2] Letter from Charles Clow, Chief, Office of Freight Forwarders, June 7, 1978.

[3] Letter from Kenneth Carroll to Charles Clow, June 30, 1978.

the Atlantic District Office advised them not to pay brokerage on these bills of lading and to provide the Commission with copies.

On June 30, 1978, Mr. Carroll was advised of the carrier reports regarding Concordia's forwarding activities.

After several exchanges of communications between Mr. Carroll and the Commission's Atlantic District Office, Concordia ceased its ocean freight forwarding activities on June 7, 1978. From that date forward it referred existing business to Karr, Ellis & Co. (KEC), a licensed ocean freight fowarder. It also provided KEC "administrative" assistance and staffing for the business.[4] Because we believe that there is insufficient evidence in the record to conclude that Concordia was wrongfully using the FMC license of another forwarder, this matter will not receive further attention in this decision.

DISCUSSION

The Commission must determine whether Concordia has engaged in conduct violative of the Shipping Act, and, if so, whether this conduct precludes a finding that Concordia is "fit, willing and able" to operate as an independent ocean freight forwarder.

Section 44 of the Shipping Act, 1916 states, in pertinent part, that:

(a) No person shall engage in carrying on the business of forwarding as defined in this Act unless such person holds a license issued by the Federal Maritime Commission to engage in such business. . .

(b) A forwarder 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 issued thereunder. . .

Section 1 of the Shipping Act contains the following definitions:

"carrying on the business of forwarding" means dispatching of shipments by any person on behalf of others . . . and handling the formalities incident to such shipments.

An "independent ocean freight forwarder" is a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries. . .

Concordia contends that these sections would exempt from the licensing requirement persons who provide "gratuitous" freight forwarding services. This construction is based entirely upon the language defining an independent ocean freight forwarder as one who carries on the business of forwarding "for a consideration." It ignores the plain meaning of section 44(a)'s flat proscription against dispatching shipments on behalf of others without a license.

In support of the above contention, Concordia cites *Japan Lines, Ltd. v. United States*, 393 F.Supp. 131, (N.D. Calif. 1975). That case involved "freight forwarding" under jurisdiction conferred by Part IV of the Interstate Commerce Act [49 U.S.C. section 1002(a)(5)], which reads:

The term "freight forwarder" means any person which . . . holds itself out to the general public as a

[4] Mr. Emposimato's testimony that Concordia had "no arrangement of any kind to share the revenue or expenses with [KEC]," is contradicted by Mr. Kane's testimony that his investigation disclosed that Concordia employees remained on Concordia's payroll after going to KEC and that Concordia continued to bill for certain "out-of-pocket expenses" incurred after July 7th, the date Concordia presumably referred all of its business to KEC. Further, KEC revealed to the Commission investigator that it was doing Concordia "a favor" by servicing these accounts, and would not actively solicit them.

common carrier . . . for *compensation* . . . and which [provides certain specified forwarding services]. [Emphasis added]

The Interstate Commerce Commission found that Japan Lines, in offering inland freight forwarding service free of charge to all shippers, had been "compensated indirectly" by receiving increased business and operational savings. The court rejected the I.C.C.'s interpretation, finding that "compensation", as intended by Congress in section 1002, is limited to "a bargained for reward for performance of freight forwarder services." (*Japan Lines*, 393 F.Supp. at 137) The court noted that Part IV of the Interstate Commerce Act was expressly designed to curb the practice by carrier-forwarders who discriminate against shippers by varying their charges on the forwarder side of their operations, which practice was not revealed by their published schedules. Prior to this enactment, forwarders were not required to adhere to their published schedules.

That case is inapposite to the instant proceeding. First, the words "compensation" and "consideration" are not synonymous. The record in this proceeding reveals very clearly that Concordia was formed as a profit making corporation. The fact that Concordia did not charge a fee for these "pipeline"[5] shipments from around June 16, 1978, to July 7, 1978, reveals that they were performing these services without "compensation." It does not, however, lead to the conclusion that they were performing these services without "consideration."

As the court pointed out in the *Japan Lines* case, "compensation" as used in the Interstate Commerce Act is a direct charge for rendering forwarder services. Compensation is without statutory color a narrower term than consideration. Compensaton is defined as "giving an equivalent or substitute of equal value."[6] As used in the Interstate Commerce Act, it contemplates the payment of money for services rendered.[7] "Consideration" is a broader term.[8] It encompasses an expectation of a benefit whether such benefit is tangible or not. For example, it can involve an agreement to forbear from doing something.

The court in *Japan Lines* further noted that the providing of free forwarding services by carriers who perform such services does not do any violence to the regulatory scheme of the Interstate Commerce Act, nor does it violate the language of the freight forwarder provision of that Act. Had the legislative history of that provision revealed a different remedial purpose, the context in which the word "compensation" was used may have warranted a different reading.

While a purely eleemosynary corporation may be found to perform services without consideration in the context of the Shipping Act, Concordia is not such a corporation. The circumstances of this record reveal that Concordia was doing more than acting as a good samaritan for stranded shippers when it undertook to complete forwarding services originally contracted with NOVO. The record reveals that the very day Mr. Carroll left NOVO and joined Concordia, certain

[5] Concordia has characterized all of these shipments as "pipeline" because they represent shipments for which forwarding services had been contracted with NOVO, a forwarder who went out of business prior to fulfilling its existing forwarding obligations. As some of the employees of Concordia were prior employees of NOVO, Concordia allegedly offered to perform these services without remuneration.

[6] Black's Law Dictionary, 354 (4th Ed. 1951).

[7] *Japan Lines*, *supra*, at p. 137.

[8] Black's Law Dictionary, 378 (4th Ed. 1951).

shippers advised NOVO that Concordia would complete forwarding services then in progress at NOVO. This, as indicated by the record, was occasioned by the exodus of NOVO personnel who were then hired by Concordia.

There is nothing in the record to indicate that NOVO could not have serviced these accounts, so long as it had the employees to do so. The record does reveal that shipper clients abandoned NOVO at the same time as did NOVO's employees. The record also reveals that one of the crucial reasons Mr. Carroll pressed this Commission for expedited approval of his application for a license was his fear of losing his accounts to other freight forwarders while awaiting his license.

That Mr. Carroll chose to service these accounts with the expectation of preserving his accounts constitutes, in our opinion, "consideration" as that term is used in section 1 of the Act. The affidavits in support of Concordia's application state that these particular shipments were so complicated that only qualified personnel, familiar with these accounts, could service them. These qualified personnel resigned from NOVO at the time several of the accounts required immediate servicing. Mr. Carroll, an officer at NOVO, was one of these employees. His action in resigning from NOVO evidences a disregard for the "pipeline" notion.[9] The fact that he was willing to service these clients at Concordia, a corporation in which he owns an interest, hardly leads to the conclusion that he was performing a public service. If these "pipeline" shipments represented existing shipper contracts with NOVO, Concordia would have had difficulty accepting remuneration by those shipments without interfering with NOVO's contracts. The precise meaning of the term "pipeline", however, is not indicated in the record. To illustrate, Mr. Carroll testified that there were several shipments handled by Concordia between June 16th and July 7th that have no documentation in which NOVO's name appears and furthermore, that it is "likely" that Concordia, and not NOVO, received all the documentation relating to these shipments. Nevertheless, he then attempts to characterize these as "pipeline" shipments by pointing out that these shipments moved at the same time as did shipments that contained documentation on which NOVO's name appeared. We frankly fail to discern how the timing of movement brings these shipments into the "pipeline" category of shipments.

Section 44 of the Shipping Act goes far beyond the freight forwarder requirements of the Interstate Commerce Act. It requires the Commission to make qualitative judgments concerning the business expertise and integrity of forwarder applicants before issuing a license.

Section 44 and section 1 of the Act when read together cannot reasonably be interpreted to lawfully permit the activity in which Concordia was engaged. Subsection (a) of section 44 expressly prohibits a person from engaging in the business of freight forwarding without a license. Subsection (b) allows an applicant who "*is, or will be*" an independent ocean freight forwarder, and who is otherwise qualified, to be issued a license. Concordia has openly admitted that it has always intended to become an independent ocean freight forwarder. Therefore, even were we to find that Concordia was not an independent ocean freight forwarder between June 16, 1978, and July 7, 1978, it would still be

[9] See footnote number 3.

required to apply for and receive a license before engaging in the business of freight forwarding.

Quite clearly, an applicant who is not yet an independent ocean freight forwarder can and will be issued a license if the applicant "will be" an independent ocean freight forwarder. Between the period of application and licensing, an applicant who "will be" an independent ocean freight forwarder shall not carry on the business of forwarding. The language of the statute is not difficult. It occurs to us that an applicant without any prior experience in the ocean industry would have little difficulty in ascertaining the requirements of section 44. Judged by an objective standard, the construction urged by Concordia strains credulity. Subjectively, when considered in light of the applicant's experience in the ocean industry and exposure to this agency's regulatory functions and organic statutes, Concordia's arguments must be viewed as a weak *post hoc* rationalization for willful violations of section 44.

Mr. Carroll readily admits that he scrutinized the June 7, 1978, letter from the Commission's Office of Freight Forwarders. He also admits that his review came at a time when Concordia was engaging in the business of forwarding. That letter admonished Concordia that if it "engaged in the business of forwarding" before receiving its license, that it may prejudice the issuance of its license.

We cannot countenance a flagrant disregard of the statutes we are charged with enforcing. In determining whether an applicant possesses the requisite fitness, a past violation of the Shipping Act militates against the issuance of a license. Whether the violation of engaging in forwarding without a license will result in the denial of a license depends to a great degree on whether there are any mitigating circumstances. Where, as here, the violations are committed by persons who by their own admissions have many years of experience in ocean freight forwarding, the attempt to justify their unlawful activities with a strained interpretation of the freight forwarder statute must be viewed with extreme skepticism. The applicant knew or should have known that its activities were in violation of the Shipping Act. Mr. Carroll did not attempt to justify Concordia's activities until after Concordia's forwarding activities came to the Commission's attention, as a result of inquiries from common carriers, notwithstanding the fact that during this time he had in his possession the Commission letter advising him of the consequences that prior forwarding would have on his request for a freight forwarder license. This fact is particularly damaging to Mr. Carroll's position.

The circumstances of this case require a denial of Concordia's application. If we are to adequately administor our freight forwarder functions, we must look upon an attempt to evade regulation as a significant act of unfitness.

CONCLUSION

For all the foregoing reasons, we find that Concordia is, at this time, unfit to be awarded a freight forwarder license.

THEREFORE, IT IS ORDERED, That the application of Concordia International Freight Forwarding Corporation for an independent ocean freight forwarder license is denied; and

IT IS FURTHER ORDERED, That this proceeding be discontinued.

Commissioner Karl E. Bakke, dissenting.

I concur generally in the factual findings of the majority, but dissent from the conclusion that the circumstances warrant denial of the application. In my view, probationary approval would have been a more appropriate sanction, since the statutory violations in question do not appear to raise serious questions of past or prospective moral turpitude, breach of fiduciary duty, unsavory associations or a disposition towards business methods from which shippers need to be protected.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-34

TARIFF FMC 6, RULE 22 OF THE CONTINENTAL NORTH ATLANTIC WESTBOUND FREIGHT CONFERENCE

DOCKET NO. 76-36

TARIFF RULES CONCERTEDLY PUBLISHED DEFINING PRACTICES OF CONFERENCES AND RATE AGREEMENT MEMBERS REGARDING THE ACCEPTANCE AND RESPONSIBILITY FOR SHIPPER-OWNED OR SHIPPER-LEASED TRAILERS OR CONTAINERS

Tariff rules defining "shipper-owned or leased trailers/containers" and establishing uniform conference policy with respect thereto found to be within the scope of Respondents' approved section 15 agreements.

Tariff rule prohibiting conference members from paying rental or lease charges for shipper-furnished containers found to be within the scope of an approved section 15 agreement.

Richard W. Kurrus for American Export Lines, Inc

Howard A. Levy for Continental North Atlantic Westbound Freight Conference, North Atlantic Westbound Freight Association, Scandinavia Baltic/U.S. Gulf Freight Association and their member lines (except American Export Lines, Inc.).

Leonard G. James and *David C. Nolan* for North-Europe U.S. Pacific Freight Conference, Pacific Coast European Conference, and their member lines.

Edward Schmeltzer for Intercontinental Transport (ICT) B.V.

Ronald A. Capone and *James W. Pewett* for Central Gulf Contramar Lines, Inc.

Robert J. Ables for Institute of International Container Lessors and thirteen shipper intervenors

F. Conger Fawcett for Latin America Pacific Coast Steamship Conference, Pacific Coast Australasian Tariff Bureau, Pacific Coast River Plate Brazil Conference, Pacific Straits Conference, and their member lines.

Edward D. Ransom and *Barbara H. Buggert* for Pacific Westbound Conference and Far East Conference.

Gerald H. Ullman for National Customs Brokers & Forwarders Association of America, Inc and New York Foreign Freight Forwarders and Brokers Association.

John Robert Ewers and *Carlos Rodriguez* for Bureau of Hearing Counsel

REPORT

December 19, 1978

BY THE COMMISSION: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice Chairman;* Karl E. Bakke, James V. Day and Leslie L. Kanuk, *Commissioners*)

This consolidated proceeding[1] was initiated by a *Petition for Declaratory Order* filed by American Export Lines, Inc. (AEL), a member of the Continental North Atlantic Westbound Freight Conference (CNAWFC). AEL sought a declaration that CNAWFC's proposed tariff rule relating to shipper-owned or leased containers was outside the scope of the Conference's organic agreement (FMC No. 8210). Shortly thereafter, the Commission ordered five conferences and one independent carrier[2] to show cause why tariff rules similar to the CNAWFC rule should not be cancelled as violative of Shipping Act section 15 (46 U.S.C. 814). Several parties were granted leave to intervene.[3] Comments to AEL's petition and memoranda in response to the Order to Show Cause were submitted.[4] During the course of this proceeding, all Respondents, Except PCEC, cancelled the tariff rules in question. AEL subsequently filed a Motion to Dismiss the Proceeding on the ground that it was moot.[5] Additionally, two individual carriers filed motions for their dismissal as Respondents.[6]

BACKGROUND

Immediately prior to AEL's petition, Respondents[7] filed similar tariff rules relating to shipper-owned or leased containers.[8] The tariff provision in question provided:

Any trailer/container, not owned or leased by a member line or affiliate thereof, prior to its delivery to a shipper for loading, shall be deemed to be a shipper-owned or leased trailer/container for the

[1] Dockets No. 76–34 and 76–36 were consolidated by Commission Order of *July 16, 1976.*

[2] Listed as Respondents were: CNAWFC, North Atlantic Westbound Freight Association (NAWFA), Scandinavia Baltic/U.S. *North Atlantic* Westbound Freight Conference (Scan/Balt), Continental/U.S. Gulf Freight Association (CGFA), Pacific Coast European Conference (PCEC), North Europe-United States Pacific Freight Conference (NEPC), and their member lines (except AEL), and Seatrain International, S.A.—a participant in Europe Pacific Coast Rate Agreement 10023.

[3] Intervening on the side of Respondents are: *Latin America Pacific Coast Steamship Conference* (PCSC); Pacific Coast Australasian Tariff Bureau (PCATB); Pacific Coast River Plate Brazil Conference (PCRPBC); Pacific Straits Conference (PSC); Pacific Westbound Conference (PWC); and Far East Conference (FEC);

Intervening for Complainants are: Institute of International Container Lessors (IICL); National Customs Brokers and Forwarders Association of America, Inc. (NCBFA); New York Foreign Freight Forwarders and Brokers Association (NYFFBA); American *Importers* Association, Inc.; Inn Keepers Supply Co.; General Electric Company, International Sales Division; Nelson-Westerberg, Inc.; Anchor Hocking, Inc.; Eastman Kodak Company; Samsonite Corporation; Hartrodt-Schmidt, Inc.; Ford Motor Export Company; Southern Tier Hide & Tallow, Inc.; Polaroid Corporation; National Hide Association; and 3–M Company.

[4] Memoranda were submitted by: (a) *North Atlantic Conferences*—NAWFA, CNAWFC, Scan-Balt, and CGFA; (b) PSCS, PCATB, PCRPBC, and PSC; (c) PWC and FEC; (d) NEPC and PCEC; (e) NCBFA and NYFFBA; (f) IICL; (g) 3-M Company, Polaroid Corp., A.J. Hollander & Co., Inc., Southern Tier Hide and Tallow, Inc., Nelson-Westerberg, Inc., and Hartrodt-Schmidt, Inc., and (h) Bureau of Hearing Counsel *(Hearing Counsel).*

[5] The memoranda of some parties also suggested that cancellation of the tariff rules rendered this proceeding moot.

[6] Intercontinental Transport *(ICT) B.V., a joint venturer with* Hapag-Lloyd Aktiengesellschaft in Combi Line argues that it does not serve any of the trades in this proceeding nor participate individually in any of the conferences named as respondents. However, Combi Line, ICT's joint service, is a member of both NAWFA and CGFA. Clearly, Combi acts as ICT's agent in these conferences.

Central Gulf Contramar Lines, Inc. (Eurogulf) is a member of CGFA and provides LASH services. *It states that it does not carry any* containers or trailers. Shortly after the effective date of CGFA's tariff rule, Eurogulf opted, pursuant to Article 2 of Agreement No. 9988 (providing for a right of independent action on rate matters), not to be bound by the rule. Eurogulf was, however, a party to the filing of the tariff rule and was bound by it for a short period—both actions which could potentially result in section *15 liability.* Accordingly, these motions shall be denied.

[7] *PCEC has had its tariff rule in effect since August 1, 1973.* It states:

> Carriers cannot pay rental or lease charges for shipper furnished containers nor can acceptance of shipments be conditioned on a carrier's payment of rental or lease charges which at all times must be for the account of the cargo.

[8] For some time Respondents had in effect general tariff rules concerning the shipment of cargo *in containers. In addition, some* North Atlantic conferences, including CNAWFC, have had tariff rules which specifically addressed shipper-owned or leased containers and provided payments to shippers for the use thereof. See, *e.g.*, North Atlantic Continental Freight Conference, Tariff No. 25, Rule 24 III, effective April 17, 1961; North Atlantic Baltic Conference Tariff No. (13), F.M.C. *1 Rule 34 II, effective June 24,* 1965; and North Atlantic French Atlantic Conference Tariff No. (2) F.M.C. 3, Rule 13 Q, effective January 1, 1971.

purpose of this rule and once so deemed, such trailer/container shall remain shipper-owned or leased for the entire duration of its transit both by water and by land and will not be interchanged with the carrier.[9]

Under this rule, any container now owned or leased by a carrier prior to its delivery to a shipper for stuffing is deemed a "shipper-owned or leased trailer/container" and must remain so for the duration of its transit. CNAWFC carriers providing allowances to shippers for the use of other than carrier-furnished containers could continue to do so. However, conference carriers would under no circumstances pay any other charges associated with such containers. This would affect an industry practice which is known as the "neutral container system".

Under the neutral container system, which has apparently developed only on the East Coast,[10] independent container leasing companies maintain pools of containers and chassis. These containers are provided to shippers at no cost. Shippers load the containers and ship them via rail or motor carrier to an ocean carrier for the transport. Inland and ocean carriers who transport these containers do so under contracts entered into between themselves and the independent leasing companies. Thus, by arranging for a loaded container to be delivered to an ocean carrier, the shipper arranges for a leasing contract to be activated upon delivery. While a container is in its possession, the ocean carrier must also pay for the delivery of the container to a container leasing pool (drop-off charges) when its responsibility ends.[11]

POSITION OF THE PARTIES[12]

The parties to this proceeding divide into two groups as to whether the subject tariff rules violate section 15.[13] Respondents maintain the rules are within the scope of the general enabling language of the organic conference agreements. They contend that the rules: (1) involve routine and interstitial operations; (2) regulate the leasing practices of member lines, thereby controlling and preventing competition among them; (3) treat all shippers alike; and (4) do not preclude the use of shipper-owned or leased containers.[14]

Respondents also note that tariff rules relating to cargo shipped in containers have been in effect since the advent of containerization without any specific authority therefor detailed in conference agreements. They argue that if each tariff rule must be authorized by explicit language in the basic conference agreements, few of the tariff rules explaining the application of rates on

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[9] On June 17, 1976, CNAWFC modified its rule by deleting the words "and will not be interchanged with the carrier."

[10] NEPC and PCEC allege that there is no neutral container system on the Pacific Coast (Memorandum at 4). The record does not clearly establish this fact, however.

[11] This description of the neutral container system parallels that in the Order to Show Cause. No party disputed it.

[12] Arguments have not been attributed to their respective proponents unless deemed necessary for clarification. Any argument not specifically mentioned has nonetheless been fully considered by the Commission.

[13] Several parties have discussed other issues in their memoranda—*e.g.*, whether certain conferences had the authority to implement the tariff rules which provide allowances for the use of shipper-owned or leased containers. Consistent with the Order to Show Cause, we are limiting our decision to only the subject tariff rules and not to any other container related rules.

[14] CNAWFC argues that its rule would insure that conference members abide by provisions in its conference agreement which prohibit remunerations or services to shippers not contained in its tariff. CNAWFC also contends that its rule is merely an amendment to an existing rule which did not require separate section 15 approval (*i.e.*, its rule relating to shipper-owned or leased containers which provides for payment to shippers for use thereof) and as such does not require section 15 approval.

container cargo would have been made.[15] In short, these conferences argue that the conference system could not function under such a restrictive policy.[16]

Complainants contend that the tariff rules fall within our previously announced guidelines concerning arrangements requiring separate section 15 approval, because they are: (1) new courses of conduct, (2) new means of regulating and controlling competition; (3) not limited to the pure regulation of intra-conference competition, but affect third persons; and (4) activities which are not set out in adequate detail in the approved conference agreements.[17]

Complainants further argue that the rules exceed the scope of authority granted by the organic conference agreements. They do not view the rules as innocuous because, in the context of existing leasing practices, their effect is to allegedly control and regulate (if not destroy) the neutral container system. They allege various detriments of implementation of the tariff rules, including, *inter alia*: reduction of shipper flexibility; maintenance by carriers of large container inventories; dependence of NVO's upon carriers to supply containers for less than container loads (LCL); and the financial instability of container leasing companies.

DISCUSSION

All Respondents, with the exception of PCEC,[18] have cancelled the subject tariff rules. Some did so prior to their effective date, while others had the rule in effect for up to 40 days. The cancellation of the rules does not moot this proceeding. Respondents published and filed the tariff rules. This concerted action was sufficient to bring them within the ambit of section 15, regardless of their subsequent actions.[19]

The remaining issue before us is whether the concerted activity which resulted in the publication and filing of the tariff rules was taken without prior approval in violation of section 15, Shipping Act, 1916. We hold that it was not, agreeing with Proponents that the rules are routine implementations of authority contained in their basic conference agreements.

Since 1927, the Commission has recognized that routine conference activities concerning rates and other day-to-day transactions do not require section 15 filing and approval. *Ex Parte 4, Section 15 Inquiry,* 1 U.S.S.B. 121, 125 (1927).

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[15] PWC points to the model conference agreement set out by the Commission in General Order 24 (46 C.F.R. 522) and maintains that it contradicts any need for a detailed conference agreement.

[16] Respondents suggest that the Commission adopt a liberal policy concerning tariff rules and regulations authorized by the general language of conference agreements, especially because the Commission has available to it mechanisms for scrutinizing tariff rules other than separate section 15 approval, *i.e.*, sections 16 and 17. They also state that if implementation of a tariff rule (which is authorized by the basic conference agreement) is detrimental to the commerce of the United States or contrary to the public interest, the Commission can disapprove the conference agreement for the *future*, unless corrective action is taken. *Joint Agreement—Far East Conference and Pacific Westbound Conference*, 8 F.M.C. 553, 561 (1965), *aff'd in part, rev'd in part, Pacific Westbound Conference v. Federal Maritime Commission*, 440 F.2d 1303 (5th Cir. 1971), *cert. denied*, 404 U.S. 881 (1971).

[17] *The Persian Gulf Outward Freight Conference (Agreement 7700)*, 10 F.M.C. 61, 65 (1966) (Persian Gulf) *aff'd sub. nom., Persian Gulf Outward Freight Conference v. Federal Maritime Commission*, 372 F.2d 335 (D.C. Cir. 1967).

[18] Some parties have suggested that this proceeding is moot as to PCEC because there is no neutral container system on the West Coast. The record is inadequate for us to reach such a conclusion.

[19] Section 15 states:

> That every common carrier by water . . . shall file *immediately* with the Commission a true copy . . . of *every* agreement with another such carrier. . . .

An agreement subject to section 15 but not filed for approval is unlawful even though no action is taken under it. *Mediterranean Pools Investigation*, 9 F.M.C. 264, 301 (1966).

Moreover, section 15 specifically exempts from its requirement of prior Commission approval ". . . tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof . . . agreed upon by approved conferences." 46 U.S.C. 814.

The conference agreements involved herein contain general authority to agree upon and establish rates and charges for the carriage of cargo, to agree upon and establish tariffs, and to make rules and regulations for handling and carrying cargo. *See, e.g., Scan/Balt Agreement No. 9982,* Article I, sections 1, 3 and 4. None of these agreements explicitly states that the conference may issue rules regulating the use of non-carrier-furnished containers. However, we view the general authorizing language in the basic conference agreements as sufficient authority for the issuance of these rules.[20]

The rules define "shipper-owned or leased containers/trailers" and establish a conference wide policy concerning non-carrier-furnished containers. They do not prohibit the use of non-carrier-furnished containers. Their ultimate effect is to prohibit individual conference carriers from assuming rental or delivery charges. A clarifying rule on this important element of cost is appropriate, especially because there is presently no tariff rule which authorizes any Respondent conference member to make payments for rental or delivery charges on non-carrier-furnished containers.[21]

A wide variety of conference actions concerning the application of rates to the carriage of cargo have been implemented via tariff rules and regulations. We have consistently regarded them as routine activities authorized by the basic conference agreements. For instance, tariff rules relating to the handling and disposition of pallets[22] were published without the conferences seeking or obtaining specific section 15 approval. With the advent of containerization conferences published tariff rules and regulations concerning cargo shipped in containers, again without seeking specific section 15 approval.[23] Furthermore, the Commission has not required section 15 approval for the implementation of such technical innovations as Roll On-Roll-Off (Ro-Ro) and LASH service, and their attendant tariff rules.

Complainants' reliance on the Commission's decision in *Persian Gulf, supra,* is misplaced because the activity at issue here does not fall within any of the criteria articulated in that decision. The instant conference action has general and prospective application and is not, therefore, a retaliatory "new course of conduct" like that in *American Union Transport v. River Plate and Brazil Conference, et al.,* 5 F.M.B. 216 (1957) *aff'd sub. nom., American Union Transport v. United States,* 257 F.2d 607 (D.C. Cir. 1958), *cert. denied,* 358 U.S. 828 (1958). The rules require all conference members to adhere to a uniform position, thereby minimizing the competitive effects of the neutral container system on a conference of ocean carriers. The rules do not limit

[20] We have suggested a model format for section 15 agreements, General Order 24, 46 C.F.R. 522.5(a). The agreements of the Respondent conferences generally adopt our suggested language, especially that concerning actions authorized under the agreements.

[21] Although the record has not been fully developed, the payment of such allowances in the absence of an authorizing tariff rule could contravene Shipping Act section 18(b)(3).

[22] Including allowances for the use of shipper-furnished pallets.

[23] Each of the Respondents' tariffs has for some time included general container rules.

nonconference competition—they merely regulate intra-conference competition.[24] Though the rules may in some way "affect third party interests," this does not alter the fact that they are directed solely at intra-conference competition.[25] All of Respondents' conference agreements clearly detail how they work and how the conferences operate thereunder.[26]

Because the authority for the subject tariff rules springs from the basic conference agreements and not from any intermodal authority which conferences may possess, it is unnecessary to address AEL's contention that it has a right of independent action concerning conference adoption of the tariff rules.

On the basis of the foregoing, we find that Respondents were authorized to adopt the subject tariff rules pursuant to their approved conference agreements.

THEREFORE, IT IS ORDERED, That the Petition for Declaratory Order of American Export Lines, Inc. is denied; and

IT IS FURTHER ORDERED, That the Motions to Dismiss filed by American Export Lines, Inc., Intercontinental Transport (ICT) B.V., and Central Gulf Contramar Lines, Inc. are denied; and

IT IS FURTHER ORDERED, That this consolidated proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

[24] Conference actions providing a "new means of regulating and controlling competition" and "not limited to pure regulation of intra-conference competition" require separate section 15 approval. *Pacific Coast Port Equalization Rule*, 7 F.M.B. 623 (1963) *aff'd sub. nom., American Export & Isbrandtsen Line v. Federal Maritime Commission*, 334 F.2d 185 (9th Cir. 1964); *City of Portland v. Pacific Westbound Conference*, 4 F.M.B. 664 (1955).

[25] As was previously noted ". . . everything a conference does in the way of rate fixing necessarily affects some third-party interest in a greater or less degree." *Investigation of Overland/OCP Rates*, 12 F.M.C. 184, 212 (1969), *aff'd sub. nom., Port of New York Authority v. Federal Maritime Commission*, 429 F.2d 663 (5th Cir. 1970), *cert. denied*, 401 U.S. 909 (1971).

[26] *See, Joint Agreements—Far East Conference and Pacific Westbound Conference*, 8 F.M.C. 553, 558 (1965), requiring that one must be able to determine the manner and effectuation of an agreement by merely reading it.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-25

AGREEMENT NO. 7540-28, MODIFICATION OF THE LEEWARD AND WINDWARD ISLANDS AND GUIANAS CONFERENCE AGREEMENT

Amendment to conference agreement dividing two existing ratemaking sections into three ratemaking sections found lawful and approved.

Wade S. Hooker, Jr. for Leeward and Windward Islands and Guianas Conference and its member lines.

Edward M. Shea and *C. Michael Tarone* for Sea-Land Service, Inc.

George F. Mohr and *Arthur L. Winn, Jr.* for Traffic Board, North Atlantic Ports Association.

Arthur W. Jacocks and *J. Robert Bray* for Virginia Port Authority.

Shaun O'Callaghan and *Francis A. Scanlan* for Philadelphia Port Corporation, Delaware River Port Authority, City of Philadelphia, Greater Philadelphia Chamber of Commerce, Port of Philadelphia Marine Terminal Association, Philadelphia Marine Trade Association, and District Council of the International Longshoremen's Association, AFL-CIO.

John Robert Ewers and *Aaron W. Reese* for Bureau of Hearing Counsel.

REPORT AND ORDER ADOPTING INITIAL DECISION

December 19, 1978

BY THE COMMISSION: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice Chairman;* Karl E. Bakke, James V. Day and Leslie L. Kanuk, *Commissioners*)

This proceeding was initiated by Order of Investigation and Hearing to determine whether Agreement No. 7540-28[1] violated section 205, Merchant Marine Act, 1936, and whether it should be approved, modified, or disapproved pursuant to section 15, Shipping Act, 1916 (46 U.S.C. 814). Agreement No. 7540-28 is a proposed modification to the organic conference agreement of the Leeward and Windward Islands and Guianas Conference.[2] The Conference[3] covers the trade[4] between the United States Atlantic and Gulf ports and ports in

[1] Agreement No. 7540-28 was filed for approval on November 12, 1976. Protests to the Agreement and requests for investigation and hearing were filed by the North Atlantic Ports Association, the Virginia Port Authority, Port of Philadelphia Marine Terminal Association, Philadelphia Marine Trade Association, the District Council of the International Longshoremen's Association, AFL/CIO, Philadelphia Port Corporation, Delaware River Port Authority, City of Philadelphia, and Great Philadelphia Chamber of Commerce.

[2] Its member lines are: Atlantic Lines, Ltd.; Pan American Mail Line, Inc., doing business as Pan Atlantic Lines; Sea-Land Service, Inc.; and Royal Netherlands Steamship Co. Booth Lampert (J/S) resigned from the Conference during the course of the proceeding.

[3] The Conference has existed since 1942. Its basic agreement was previously amended to provide for two rate-making sections—the Atlantic and Gulf Sections. Order of Approval of Agreement No. 7540-24, April 12, 1973.

[4] The trade has been characterized as a "grocery store trade", indicating that a variety of non-industrial items are shipped, usually in small lots.

the Leeward and Windward Islands (excluding the Virgin Islands), Trinidad, Barbados, French Guiana, Surinam, and Guyana.

Agreement No. 7540–28 would: (1) divide the present Atlantic Section into two sections—the North Atlantic section[5] and the South Atlantic section[6]—while retaining the present Gulf section; (2) confer rate-setting initiative upon the individual sections; and (3) establish an Executive Committee to consider matters affecting the entire Conference. The Executive Committee, comprised of representatives of all members lines, would have the authority to overrule any action taken by individual sections, including rate setting.[7]

Administrative Law Judge Charles E. Morgan (Presiding Officer) issued an Initial Decision on June 26, 1978, holding that Agreement No. 7540–28 does not violate section 205; finding that it is lawful under Shipping Act section 15 and should be approved pursuant to that section; and discontinuing the proceeding. Exceptions to the Initial Decision were filed by Traffic Board, North Atlantic Ports Association (NAPA) and the Commission's Bureau of Hearing Counsel (Hearing Counsel).

Position of the Parties

Hearing Counsel and NAPA raise essentially the same points: (1) the Presiding Officer erred in concluding that the amendment to the Agreement meets the standards of *Federal Maritime Commission v. Akiebolaget Svenska Amerika Linien (Svenska)*, 390 U.S. 238 (1968); and (2) the Presiding Officer failed to find that the purpose of the amendment is to eliminate nonconference competition and that, consequently, the Agreement cannot be approved under section 15.

The Conference concurs in the findings and conclusions of the Initial Decision. It does suggest, however, that the *Svenska* test is completely inapplicable to this proceeding, but alternatively maintains that even if *Svenska* does apply, the test has been met.

Discussion

The arguments raised on exceptions consist mainly of matters argued before the Presiding Officer. Upon review of the entire record in this proceeding, the Commission concludes that the findings and conclusions set forth in the Initial Decision are essentially correct. Accordingly, the Initial Decision is adopted as our own except as it may be modified or clarified by the following discussion.

Agreement No. 7540–28 relates to the concerted establishment of rates. However, it neither expands nor increases the Conference's existing, previously approved price-fixing authority, but merely provides for that authority to be exercised in a different manner—*i.e.*, by three separate sections rather than two.

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[5] Covering ports form Eastport, Maine to and including Cape Hatteras, North Carolina.

[6] Covering ports from Cape Hatteras southward to and including Key West, Florida.

[7] Article 6, subsection 1 of the Agreement states in part:

> . . . if any member of a Section disagrees with any action taken by that Section or the failure of that Section to take any action under subsection (k), the member may require that the matter be referred to the Executive Committee, in which event that Committee shall have authority to decide the matter. . . .

It is therefore appropriate that Amendment No. 28, in and of itself, is not subject to the *Svenska* test.[8]

This analysis of Amendment No. 28 does not mean that amendments to conference agreements which do not increase existing ratemaking authority will be summarily approved.[9] Though the *Svenska* test might not initially apply, opponents of any such agreement could demonstrate anticompetitive effects which, if not outweighed by benefits of the agreement, could be sufficient to warrant its disapproval. Thus, the burden of demonstrating the non-approvability of the instant Agreement devolved upon its opponents. They did not demonstrate, however, that adverse anticompetitive effects are likely to occur from the implementation of Amendment No. 28 and, therefore, the Agreement will be approved.

The record does not support the position that the purpose of the amendment is to destroy the competition of the independent carriers in the trade. The instant situation is, therefore, distinguishable from that in *Federal Maritime Board v. Isbrandtsen Co. (Isbrandtsen)*, 365 U.S. 481 (1958). There, the conference employed a dual ratemaking system as a predatory device to drive the only independent carrier out of the trade. Here, there is evidence that there will always be independent carriers in this particular trade. Moreover, if a South Atlantic section established rates so low as to be noncompensatory, the nonconference carriers could obtain redress under section 15 as well as sections 16 First and 18(b)(5) of the Shipping Act.

The Presiding Officer concluded that the proposed amendment did not violate section 205, Merchant Marine Act of 1936.[10] No party excepted to this conclusion and the Commission agrees that the amendment itself does not contravene section 205. The Presiding Officer's analysis that section 205 was not violated because "[n]othing in the amendment would prevent any member of the conference from serving any Atlantic port" is incorrect, however, and is not adopted by the Commission. Once the amendment is approved, it may or may not be implemented in a manner that violates section 205. Further comment is reserved until such time as the issue is presented in a more definite factual framework.

THEREFORE, IT IS ORDERED, That the Initial Deicison issued in this proceeding is adopted to the extent indicated above, and Agreement No. 7540–28 is approved; and

IT IS FURTHER ORDERED, That the Exceptions of Traffic Board, North

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[8] Under *Svenska*, conference restraints which violate the antitrust laws will be approved only if the conference demonstrates that the agreement is: (1) required by a serious transportation need; (2) necessary to secure important public benefits; or (3) in furtherance of a valid regulatory purpose of the Shipping Act. *Svenska*, 390 U.S. at 245–246.

[9] The unique situation presented herein strongly influenced our decision. Even though the individual sections will exercise ratemaking authority, they could be overruled by the Conference's Executive Committee, comprised of representatives of all members of the Conference.

[10] Section 205 reads in pertinent part:

. . . it shall be unlawful for any common carrier by water, either directly or indirectly, through the medium of an agreement, conference, association, understanding or otherwise, to prevent or attempt to prevent any other such carrier from serving any port . . . located on any improvement project authorized by the Congress . . . *at the same rates which it charges at the nearest port already regularly served by it.* (Underscoring supplied.)

Atlantic Ports Association, and Bureau of Hearing Counsel are denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 77-25

AGREEMENT NO. 7540-28, MODIFICATION OF THE LEEWARD AND WINDWARD ISLANDS AND GUIANAS CONFERENCE AGREEMENT

Adopted December 19, 1978

Amendment to Conference's basic agreement, which divides Atlantic Coast section of Conference into two rate-making sections (North Atlantic and South Atlantic), and which provides for an Executive Committee, found lawful under section 15 of the Shipping Act. Amendment to Conference's agreement approved, and proceeding discontinued.

Wade S. Hooker, Jr., for proponents, the Leeward and Windward Islands and Guianas Conference and its member lines.

Edward S. Shea and *C. Michael Tarone* for proponent, Sea-Land Service, Inc., a member of the Conference.

George F. Mohr and *Arthur L. Winn, Jr.*, for protestants, the Traffic Board of the North Atlantic Ports Association.

Arthur W. Jacocks and *J. Robert Bray* for protestant, the Virginia Port Authority.

Shaun O'Callaghan and *Francis A. Scanlan* for protestants, the Philadelphia Port Corporation, the Delaware River Port Authority, the City of Philadelphia, the Greater Philadelphia Chamber of Commerce, the Port of Philadelphia Marine Terminal Association, the Philadelphia Marine Trade Association and the District Council of the International Longshoremen's Association AFL-CIO.

John Robert Ewers and *Aaron W. Reese* as Hearing Counsel.

INITIAL DECISION[1] OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE

The subject Agreement No. 7540-28 is an amendment to the Conference's basic agreement. This amendment would divide the present Atlantic section of the conference into two separate sections, namely the North Atlantic Section and the South Atlantic Section, respectively covering ranges of Atlantic ports north and south of Cape Hatteras. The present Gulf Section of the Conference would be unchanged geographically. The amendment also would confer the initiative for setting rates upon the sections rather than on any member of the Conference as a whole. "All rate matters with respect to each such range shall be considered and decided by the Section covering such range." The amendment also would establish an Executive Committee of the Conference comprised of senior representatives of all member lines, which would consider matters affecting the entire trade and which could establish uniform rules, regulations and practices applicable equally to all three proposed rate-making sections. There is a clause in

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227)

the part of the amendment creating the Executive Committee, which clause provides that notwithstanding certain other provisions, if any member of a Section disagrees with any action taken by that Section or the failure of that Section to take action, the member may require that the matter be referred to the Executive Committee, in which event the Executive Committee shall have authority to decide the matter consistent with the preceding sentence which refers to matters affecting the entire trade. One apparent reason for the proposed amendment is the desire of the Conference to be in a position more effectively to meet the competition of independent ocean carriers operating out of the general area of the Port of Miami, Florida. Whereas not a single independent line operates out of North Atlantic ports in the trade herein, at least six independents operate out of the Miami area.

In this proceeding, the Commission ordered an investigation and hearing, pursuant to sections 15 and 22 of the Shipping Act, 1916 (the Act), to determine whether Agreement No. 7540–28 (the amendment) between the members of the Leeward and Windward Islands and Guianas Conference (the Conference) is unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or between exporters from the United States and their foreign competitors, or detrimental to the commerce of the United States, or is contrary to the public interest, or is otherwise in violation of the Act, or is in violation of Section 205, Merchant Marine Act, 1936, and whether the Agreement No. 7540–28 should be approved, modified, or disapproved pursuant to section 15 of the Act.

The Conference has been in existence since 1942. On April 23, 1973, the basic agreement was amended to provide for two rate-making sections namely the Atlantic and the Gulf Section.

The Conference and its four member lines, namely, Atlantic Lines, Ltd. (Atlantic), Pan American Mail Line, Inc., doing business as Pan Atlantic Lines (Pan Atlantic), Sea-Land Service, Inc., and Royal Netherlands Steamship Co., were designated as proponents of the agreement in issue in the order of investigation.

Booth Lamport (Joint Service), named as a proponent in the order of investigation, was dismissed as a party at the hearing because it had resigned from the Conference and no longer operated in the trade.

Designated as protestants were the Traffic Board of the North Atlantic Ports Association, the Virginia Port Authority, and seven Philadelphia or Delaware River port organizations, namely, the Port of Philadelphia Marine Terminal Association, the Philadelphia Marine Trade Association, the District Council of the International Longshoremen's Association, AFL-CIO, the Philadelphia Port Corporation, the Delaware River Port Authority, the City of Philadelphia, and the Greater Philadelphia Chamber of Commerce. Hearing Counsel also are parties to the proceeding.

No shipper opposes the proposed amendment. One shipper, the Union Carbide Corportion, supports the amendment.

Generally the protestants and Hearing Counsel contend that the amendment is in violation of section 15 of the Act, and that the proponents have not shown that the amendment is necessitated by a serious transportation need, necessary to

secure important public benefits, or in furtherance of a valid regulatory purpose. Briefs were filed only by the proponents, by the Traffic Board of the North Atlantic Ports Association (North Atlantic Ports) and by Hearing Counsel. The North Atlantic Ports are opposed to the amendment also on the ground that it would result in disruption of parity of rates to and from North Atlantic and South Atlantic ports.

The members of the Conference operate between the Atlantic and Gulf Coasts of the United States and various islands in the Caribbean Sea and certain nearby ports in South America, as described below.

The trade served by the Conference is between U.S. Atlantic and Gulf ports on the one hand, and on the other, ports in the Leeward and Windward Islands (excluding the Virgin Islands), Trinidad, Barbados, French Guiana, Surinam[2] and Guyana.[3] The Leeward Islands are to the north and the Windward Islands are to the south, in the Lesser Antilles. The Lesser Antilles are southeast of Puerto Rico and the Virgin Islands, and north of South America.

The services of the four conference member lines vary considerably as to the ranges of ports served. Sea-Land Service, Inc., serves the ports of Boston, Mass., Elizabeth, N.J., Baltimore, Md., and Portsmouth, Va., in the North Atlantic, Charleston, S.C., and Jacksonville, Fla., in the South Atlantic, and New Orleans, La., and Houston, Texas, in the Gulf. Atlantic serves New York, N.Y., and Newport News, Va., in the North Atlantic and Miami, Fla., in the South Atlantic. Pan Atlantic serves only Miami. Royal Netherlands Steamship Company serves New York, Philadelphia, Pa., and Baltimore in the North Atlantic and New Orleans and Houston in the Gulf. The Conference member lines' services also vary considerbly as to Caribbean ports. Sea-Land has a weekly service to ten Caribbean ports. Atlantic has a monthly service to 15 Caribbean ports. Pan American offers service every two weeks only between Miami and St. Martin (Leeward Islands). Royal Netherlands offers service every two weeks to Port of Spain (Trinidad), Paramaribo (Surinam), Georgetown (Guyana) and Barbados.

The amendment in issue provides that for rate-making purposes, each of the three Sections of the Conference shall be composed of the member lines serving a port or ports in the section.

Thus, the present effect of the proposed amendment would be that in the North Atlantic Section, the member lines initiating and voting on rate-making matters would be Sea-Land, Royal Netherlands and Atlantic. (Pan Atlantic would no longer participate except to the extent of Executive Committee action, because Pan Atlantic serves only the South Atlantic.) In the Gulf Section, the member lines acting on rate-making matters would be Sea-Land, and Royal Netherlands only. (Previously all members could initiate consideration of a rate-making matter.) In the South Atlantic section, the member lines acting on rate-making matters would be Sea-Land, Atlantic and Pan Atlantic. (Royal Netherland would no longer participate in the South Atlantic since it serves only the North Atlantic and the Gulf.)

[2] Formerly Netherlands Guiana.

[3] Formerly British Guiana.

Atlantic and Pan Atlantic are both owned by Chester, Blackburn and Roder, but are separately operated. Both occupy terminal facilities at Dodge Island, Port of Miami, Biscayne Bay. The longshoremen employed by these two member lines for their services in the Conference trade at Miami are union employees of the International Longshoremen's Association (ILA).

The Conference asserts that the intent and purpose of the amendment merely is to change the procedures for Conference voting on rates, charges and other tariff matters. No longer will the rates for the entire Conference ranging from Eastport, Maine, to Brownsville, Texas, be initiated by member lines without regard to the ports of the United States which they serve. The amendment will introduce regional rate initiative or regional independent action into the Conference's deliberations.

By letter dated November 22, 1976, in reference to this proposed amendment, the General Manager of the Houston Port Bureau, Inc., stated in part:

While we have mixed feelings regarding the proposed amendment as a test or pattern for future modifications in other ocean conferences, we are not going to oppose the trisectional amendment to the Leeward and Windward Islands-Guianas Conference.

By letter dated November 11, 1976, the General Manager of the New Orleans Traffic and Transportation Bureau stated in part:

In brief, it is the opinion of New Orleans that a trisectional agreement is not conducive to retention of orderly rate relationships in and between port ranges. We believe, however, that such an arrangement, under the circumstances presented, is preferable to the introduction of separate conference agreements. No opposition will be expressed by New Orleans to the application for sectionalization of the Leeward & Windward Islands-Guiana Conference. This position is appropriate solely to the particular agreement and not as a reflection of future policy.

The above two letters were received in evidence without requiring the opportunity to cross examine the writers. The letters do not introduce factual matter, but merely state that these Gulf port interests do not oppose the particular amendment.

There are no independent ocean carriers operating out of North Atlantic ports in the Conference trade. At least six nonconference independent lines operate in the Leeward and Windward Islands and Guianas Conference trade exclusively out of southern Florida ports. Some of these independents operate out of the Port of Miami, Dodge Island, and use ILA union labor, but others of these independents operate from Miami area points and use non-union labor. Miami area points used by these and other independents for their operations include river or lake ports, such as the Miami River and West Palm Beach, Florida.

The Conference's Chairman estimates that the average rate of the independent carriers operating out of the Miami area is considerably lower than the average Conference rate. Protestant Traffic Board of the North Atlantic Ports Association disputes this. Specific rates are discussed below.

The Conference's Chairman also estimates that a Conference line operating out of the Port of New York would have a handling cost per ton of cargo considerably in excess of the cost of a Miami area independent operator. Use of non-ILA labor would result in lower longshoremen's labor costs for some Miami independent lines. An exact comparison of ILA labor costs per ton of cargo as between Miami and North Atlantic ports is not possible from the data of record herein.

The Conference Chairman is convinced that the Conference's New York member lines would be put out of business, if their Conference rates were reduced to the level of the Miami independents' rates. What the Conference is seeking to accomplish is to enable its member lines operating out of South Atlantic ports to be in a position to be competitive with the Miami independent operators. It follows that with a separate South Atlantic section of the Conference, some rates from that section would be reduced.

The Conference's Chairman anticipates that the rates of the Miami independents always will be lower than the rates of the Conference, but the Conference hopes that the independent Miami operators will peg their rates at an average of five to fifteen percent below the Conference's rates from the South Atlantic, using the Conference's rates as an "umbrella," and as the Conference's rates go up and down, hopefully the independents' rates will go up and down, maintaining the spread of five to fifteen percent.

The Conference further hopes that if the subject amendment is approved, some of the more substantial independents will join the Conference, but the Conference further believes that not all of the independents will ever join the Conference, and that under any circumstances now foreseeable, the Conference will be subject to vigorous competition by the independents.

The Conference believes that its type of service, frequency, documentation given to shippers, and marketing service will enable the Conference to offset, for example, a ten percent higher rate of the Conference compared to the independents' lower rates and less complete services.

However, according to the Chairman, the Conference is faced with the competition of not only "legitimate" independent operators who operate under the Conference's umbrella, but also the Conference faces the cutthroat competition of "fly-by-night" independent operators with freight rate differentials which are more like fifty and sixty percent below the Conference's rates.

The member lines have estimated based on their own statistical studies that as much as 20 or 30 percent of the total trade moving out of Miami goes on the independent lines. These are 1976 statistics based on Bureau of Census data, and are hearsay to the Conference's Chairman, but he relies on such hearsay. The Conference itself keeps no statistics and could not give total tonnages of the Conference, nor could it give tonnages of the non-conference competition in its trade. Thus, there are no precise tonnage estimates of record, either for the Conference or for the independent lines operating out of the Miami area.

The independent carriers operating in the Conference's trade out of the south Florida area include some lines of long standing, some lines which operate vessels which change hands every six months when the charter party expires, and some lines which are here today and gone next week.

In this trade the major independents are Tropical Shipping and Construction Co., Ltd. (Tropical), Cacena Line Ltd. (Cacena) and Nopal Carib Lines (Nopal). Tropical has been in business 30 or 40 years and is a "legitimate" independent. On the other hand, Paulrich Corp. and TEC Shipping Agency operate vessels which change hands every six months, and are considered to be fly-by-night operators. On Attachment D to Exhibit 2, the Conference lists sailings of six independent Florida lines which serve only one Florida port in the Conference's

trade. They are Cacena which serves 12 Caribbean ports every two weeks, Carib Shipping Co., which serves three Caribbean ports every three weeks, Nopal which serves three Caribbean ports every two weeks, Paulrich which serves 12 Caribbean ports every two weeks, TEC which serves Antigua and Trinidad every two weeks, and Tropical which serves Barbados and Trinidad twice every week. There are other independents besides the above six operating in the Conference's trade from time to time, but they are in existence perhaps for one voyage at a time and then literally disappears. They may leave cargo strewn all over the Caribbean with the result that a shipper may find himself addressing a post office box in Monrovia, Liberia.

One independent, Antillean Marine Line, which is a carrier in another trade, operates out of a junkyard on the Miami River, using uncles, cousins and nephews (non-union labor) to load its ships. This is not an extreme example of the way certain independents operate, as this line is the largest carrier to Santo Domingo, Dominican Republic.

The average ocean freight cost of a container in the Conference's trade according to the Chairman is about $3,000 out of the Port of New York. The same container or box out of Miami is estimated by the Chairman at about $1,200 for the ocean charge. So, when one takes an estimated $900 per box for the movement overland to Miami, the total cost to the shipper is still almost $1,000 less out of Miami than out of New York, according to the Conference Chairman's information. He relies largely on oral reports from his member lines.

The characteristic operation of a fly-by-night independent is to take a voyage charter option on a ship, contact the estimated 120 freight forwarders licensed by the Federal Maritime Commission in the Miami area, and see what kinds of deals can be made with each forwarder. The fly-by-night operator will pay six, eight, ten or fifteen percent brokerage to these forwarders, divert any freight that is obtainable, fill the ship, sail it, and then disappear, with the "legitimate" independent ocean carriers stamping their feet in frustration.

After the voyage charter is completed, the ship used by the fly-by-night operator is said to revert back to its owners, and the fly-by-night line no longer exists.

From Florida there is a very large movement by railroad of citrus products to Chicago, New York and other large centers in the north, northeast, and west. The railroads move trainloads of citrus products north, in refrigerated railroad boxcars and in refrigerated trailer trucks on railroad flat cars. In the past, this railroad equipment returned south to Florida empty for the most part. In recent years the railroads began to offer incentive rates to shippers of cargo south, particularly to Florida. As a result, the Miami area independent ocean carriers can attract export traffic by using the railroads' reduced incentive rates southbound to Miami.

Attachment E (3 pages) to Exhibit 2 shows a sample of the independent ocean carriers' loadings at Miami taken from the Journal of Commerce Export Bulletins dated November 18 and December 16, 1976. To Paramaribo, Surinam (port of discharge), are shown eight shipments ranging from 12 gallons of almond extract and 454 pounds of bandages and dressings to 2,503 pounds of piece goods. Addresses of shippers are Chicago, Indianapolis, St. Louis, Detroit,

Cedarhurst, N.Y., and Stamford, Conn. To Cayenne, French Guiana, are shown four shipments ranging from 34 pounds of 1977 Caterpillar Tractor calendars to 4,237 pounds which was a 1975 Jeep truck, with shipper addresses of Southfield, Mass., Lansdale, Pa., Paris, Ill., and Kenilworth, N.J. To Georgetown, Guyana, are shown three shipments ranging from 232 pounds of auto parts to 5,114 pounds of cotton thread, with shipper addresses of Denver, Chicago and Stamford. To Bridgetown, Barbados, are shown two shipments, one of 6,792 pounds of white laboratory sinks, and one of 64,000 pounds of cleaning compounds. To Trinidad and Port of Spain are shown nineteen shipments ranging from 389 pounds of framed pictures to 22,424 pounds of solvents. Shippers' addresses include California, Canada, Ohio, Pennsylvania, Connecticut, Michigan, Great Neck and Plattsburgh, N.Y., in addition to nine listings of New York City.

Shippers serving the Conference's trade compete with other shippers located around the world. This trade is a grocery store trade, anything and everything, thousands of diverse commodities, all moving in relatively small lots, rather than a trade which has a relatively few major commodities moving in larger lots. The Conference's trade includes both directions, but this amendment is necessitated and this proceeding is concerned only with the export trade from the United States.

Opening of rates as a competitive device is not feasible in this trade because the Conference would have to open the entire tariff of about 3,000 items. By contrast, the Conference operating in the long-haul Ecuadorian trade was able to open rates on 15 commodities and compete effectively.

One major shipper to Latin America is Dow Chemical Company, which ships many of its products out of Miami as well as out of New York and Norfolk. As a dual rate conference signatory in this trade, this American chemical company is locked into certain rates which result in making the chemical company not competitive with other chemical companies located in Japan and Germany. According to the Conference's Chairman, if this American chemical company could move cargo out of Miami at competitive conference rates it could recapture some business at destination ports in this trade.

Union Carbide Corporation, a shipper in this trade, supports the proposed amendment upon the grounds that vesting rate initiative in the lines serving a particular range of ports will benefit shippers by making the member lines more responsive to the needs of the shippers. Union Carbide's shipments in this trade average 1,500 pounds each, or about 300,000 pounds annually. Union Carbide ships in this trade principally through the Port of New York and secondarily through the Port of Hampton Roads. Union Carbide does not ship through Miami or other South Atlantic ports in this trade and does not anticipate doing so. Union Carbide uses the North Atlantic ports because of the more frequent service, and because of inland costs of transportation which are related to the fact that Union Carbide generally consolidates small shipments at its warehouses in the Port of New York area.

Union Carbide supports the Conference in the belief that the amendment will attract more cargo to the Conference, and that as a result all shippers including

those in the North Atlantic range will benefit by the spreading of costs over more cargo.

The primary South Atlantic ports in this trade are Charleston, Jacksonville and Miami, and this is because of railroad patterns among other reasons. The port of Charleston, for example, is a primary port served by the railroads for exports, and this port has new terminals and other facilities.

The Conference believes that its division into three sections is a furtherance of valid regulatory purposes and is dictated by a number of transportation considerations. It is consistent with and intended to parallel the separate treatment accorded by the U.S. Maritime Administration (Marad) to the North Atlantic, South Atlantic and Gulf ranges of ports in the designation by Marad of essential U.S. foreign trade routes. The same divisions occur in the scope of conferences and rate agreements approved by the Commission in the trans-Atlantic trades. Also port organizations are aligned in similar fashion, their being North Atlantic ports' associations and South Atlantic ports' associations.

In the Caribbean trade, the Conference believes that geographical or mileage differences are one factor militating in favor of dividing the North Atlantic and South Atlantic ranges of ports. From New York and Miami, respectively, the Port of Spain, Trinidad, a representative Caribbean port, the distances (nautical) are 1,939 and 1,482 miles, with the distance from New York being about 31 percent more than from Miami. The mileages from Philadelphia, Baltimore and Norfolk to Port of Spain, respectively, are 1,938, 1,918, and 1,799 miles. The average from New York and these three other North Atlantic ports is 1,898.5 miles. From the South Atlantic ports of Charleston and Jacksonville, respectively, the mileages to Port of Spain are 1,682 and 1,685 miles. (Source, U.S. Naval Oceanographic Office)

The average mileage from the three South Atlantic ports to Port of Spain is 1,616.3 miles; or an average difference under the four North Atlantic ports average of 282.2 miles. The Traffic Board of the North Atlantic Ports Association insists that a difference of 282 miles cannot be characterized as great or even as significant. In any event, there is no evidence of record as to whether the mileage differences cause any significant differences in costs on the voyages.

The Traffic Board of the North Atlantic Ports Association points out that the proposed amendment cannot be justified on the basis of alleged differences in port costs. The only port costs referred to by the proponents were at the ports of New York and Miami. These alleged costs, of wharfage covering terminal overhead, and of longshoremen's union assessments for fringe benefits, were not based on reliable and comparable data. Furthermore, no costs or data were offered for North Atlantic ports other than New York, or for South Atlantic ports other than Miami. In addition, the critical facts are not port costs, but the net revenue per ton received by an ocean carrier on the cargo handled at a port. Higher port costs may reflect the handling of cargo which produces higher revenues and higher profits.

Exhibit 2, Attachment E, lists 36 shipments, as examples of independent carrier loadings at Miami. Origins or addresses of the shippers are shown to be New York, N.Y., in nine instances, Great Neck, N.Y. (nea by in Long Island), is a 10th instance, and Kenilworth, N.J. (in Union County about 8 miles from

Elizabethport or Port Newark) is an 11th instance. Cedarhurst, N.Y. (nearby Long Island), is listed twice. Stamford, Conn., is listed twice. Branford, Conn. (in the New Haven area), is listed once. Lansdale, Pa., not far from Philadelphia, is listed twice. In recapitulation 18 of the 36 listed shipper addresses are in New York City or close to New York City or Philadelphia. The Traffic Board of the North Atlantic Ports Association states that, "It remains a mystery as to how small shipments originating in the New York metropolitan area can, from an economic standpoint, possibly afford to pay land transportation costs from New York to Miami and ocean rates thence to Caribbean ports when normal Conference service at normal Conference rates is available from New York and Philadelphia."

Two exhibits were authorized to be late-filed to clear up the above mystery. Late-filed Exhibits No. 5 and No. 6, respectively, were filed by the Traffic Board of the North Atlantic Ports Association and by the proponent Conference and member lines.

A closer look at Attachment E to Exhibit 2 shows that the eighteen cited shipments consisted of piece goods, rugs, cotton sewing thread, compressors, proprietary drugs, floor tile, concrete hardener, cotton yarn, tools, life saving gear, carboard (sic), carpets, printed matter, canned meats, framed pictures, woodworking machinery, and printing paper. Weights ranged from 275 pounds (1 box of compressors) to 22,424 pounds (50 drums of concrete hardener). The shipment of printing paper weighed 21,300 pounds, and the averge weight of these 18 shipments was 4,721 pounds. These shipments are listed as having been made to Paramaribo, Cayenne, Georgetown, Trinidad, and Port of Spain.

Exhibit 5 purports to show that the lower land (railroad) costs from New York to Miami when added to the published charges of the independent nonconference carriers from Miami to the Caribbean in this trade generally exceed the published ocean rates of the Conference lines to the Caribbean from the Port of New York. The Traffic Board of the North Atlantic Ports Association feels that the independent carriers operating out of Miami are handling generally only small shipments, and that these independent carriers do not provide a serious competitive threat to the Conference lines. The Conference disagrees.

Exhibit 5 takes the normal $877 railroad TOFC[4] charge for a single trailer, maximum weight 38,500 pounds, assuming a load of 19 tons (38,000 pounds in the trailer) from New York to Miami and computes a charge per ton (of 2,000 pounds) of $46. Exhibit 5 also takes the "incentive" rate or charge of $1,254 railroad TOFC for Fruit Growers Express trailers based on two trailers, maximum of 70,000 pounds or 35 tons and computes an "incentive" rail rate to Miami from New York of $35 per ton. Protestant's witness sponsoring Exhibit 5, states that $35 is the amount per ton which would be paid by a freight forwarder to the railroad for a full trailer load, but that in fact the shipper of a small shipment (consolidated by the forwarder into a full trailer load) would pay more than $35 per ton to the forwarder.

Exhibit 5 shows on automobile parts via the independent Cacena Line, for example, the "incentive" rail rate of $35 plus ocean rate from Miami to Trinidad

[4] Trailer-on-flat-car.

of $77.50, or a total of $112.50, and compares this with Conference's rate from New York of $77.50 per ton.

Exhibit 5 does not list freight-all-kinds (FAK) rates for Conference lines, but shows such FAK rates for some of the Miami independents. Exhibit 5 shows a FAK rate of $1,500 for a 20-foot container with three or more commodities, and no commodity to be more than 55 percent of the container from one shipper to one consignee for Cacena Line from Miami to Trinidad. Note (A) to Cacena's tariff provides that effective October 19, 1977, all commodity rates in its tariff are increased by $7.50 W/M and containerload rates are increased by $75.000 each. Cacena's cargoes loaded at Miami also are subject to minimum handling charges of $6.75 W/M and minimum wharfage charges of 80 cents W, with 20-foot containers subject to a handling charge of $65 each and wharfage of $10.

Exhibit 5 shows that Nopal Line has a $1,900 FAK 20-foot container rate from Miami to Trinidad, subject to a handling and wharfage charge on containerloads loaded by shipper of $95 per unit. Paulrich Corp. of Panama has a $1,250 FAK 20-foot container rate from Miami to Trinidad (20-foot container containing 3 or more commodities and no one commodity being more than 55 percent of container, going from one shipper to one consignee in shipper's own container), subject to handling charge of $6.75 W/M and wharfage of $10 per unit.

The Conference, through its sponsorship of Exhibit 6, asserts that the conclusion in Exhibit 5 is incorrect insofar as it was concluded therein that the Conference carriers offer from New York lower charges to the Caribbean than are available to shippers by land and water from New York via Miami to the Caribbean Islands.

The lowest rate to Trinidad from Miami shown for Tropical Shipping & Construction Co., Ltd. (Tropical), as listed in Exhibit No. 5, is $65 per ton on appliance parts, whereas Exhibit No. 6 shows that the rate for Tropical from Miami to Trinidad on animal feed ranges from $24 to $32 per ton W. provided minimum lots of 1,000 tons to 80 tons are shipped to one consignee. In contrast, the Conference's rate on animal feed from New York to Trinidad is between $94.500 and $147.50 per ton W.

Also, Tropical's rate on pet food is $47 per ton W, compared with the Conference's rate of $104.50 per ton W.

The differences, between Tropical's rates and the Conference's rates are $57.50 per ton on pet food and as much as $62.50 and more in the case of animal feed. These differences exceed the so-called "incentive" rail rate of about $35 per ton shown in Exhibit No. 5. Thus, at least on these two commodities, the combination of rail and ocean rates via Miami is less than the all-water rates from New York.

The Conference asserts in Exhibit No. 6 that the majority of the cargoes carried in the Conference's trade are rated on a measurement basis, and that the assumption made in Exhibit No. 5 that the cargo in the trade moves on a weight basis is incorrect. Glass bottles move on a measurement basis. Household appliances, carpets and thread almost invariably move on a measurement basis. Many automobile parts, such as windshields, fenders and seat cushions, move on a measurement basis.

If a 40-foot trailer were filled to capacity on a measurement basis, the railroad

rate from New York to Miami would be about $17.50 per measurement ton of 40 cubic feet, rather than the $46 per ton used in Exhibit No. 5.

In this trade much of the cargo is less-than-trailerload (LTL), which is consolidated at a port of loading or inland consolidation point. Typically to maximize the utilization of the container, cargo rated on a weight basis will be placed in a small part of the container and the remainder of the container will be stuffed with cargo rated on a measurement basis. On the average, about three-fouths of the revenue tons of LTL cargo are rated on a measurement basis.

The freight-all-kinds (FAK) rates offerd by the Miami independent ocean carriers often result in significantly lower freight rates on LTL cargo than do the individual commodity rates.

There is a 25 percent Trinidad congestion surcharge applied by both the Conference lines and by the independent lines, which surcharge applies only to the ocean rates. This has a greater proportional impact on the all-water rates than on the combinations of rail and water rates via Miami.

The Conference in Exhibit No. 6 uses as an example comparison, a shipment of 10 tons of telephone appliances, of which 5 tons are placed in each of two 20-foot containers in New York, with the remaining space in both containers filled equally with thread and carpets. The volume of the two containers totals about 50 measurement tons, with not less than 20 measurement tons each of thread and carpet. The Conference in Exhibit 6 uses the rail incentive rate of $1,25 for two 20-foot trailers for the rail movement New York to Miami, adds the FAK rate of $1,250 per container, or $2,500 for two containers of the Paulrich Corp. from Miami to Trinidad, plus a Trinidad congestion surcharge (25 percent of $2,500) of $625 to obtain a total charge of $4,379 for rail-water movement via Miami. The Conference in Exhibit 6 shows the all-water costs toconsist of 10 tons of telephone equipment at $86.50 per ton or $865, plus 20 tons of thread at $114 per ton or $2,280, plus 20 tons of carpet at $123 per ton or $2,460, or a total of $5,605, plus Trinidad congestion surcharge ($25% of $5,605) of $1,401, for a grand total of $7006.

Thus the Conference computes the all-water costs on its example shipment to be $7,006, compared with railwater via Miami costs of $4,379. However, it appears that the Paulrich rate of $1,250 applies in shipper's own containers, and a more appropriate comparison might be the FAK rate of Cacena Line, Ltd., from Miami to Trinidad of $1,500 per 20-foot container, or $3,000 for two of these containers. Cacena's rates are subject to handling charges at Miami of $65 per 20-foot container, or $130 for 2 containers, and wharfage charges on general cargo of 80 cents a ton W, which on 50 tons would amount to $40. Also effective October 19, 1977, Cacena's containerload rates were increased by $75 each, or $150 for 2 containers.

Paulrich Corp. likewise subjected its cargoes loaded at Miami to a handling charge on general cargo of $6.75 a ton W/M, and a wharfage charge on general cargo of 80 cents a ton W. The Conference's rates also were subject to a terminal charge of $1.25 per ton as cargo is freighted.

On the example shiment of telephone equipment, thread and carpets, even with adjustments based on Cacena's various FAK charges on two 20-foot containers, the New York-rail-Miami-Cacena-Trinidad total charge would be

about $5,400, which is considerably below the Conference total of over $7,000 for all water service from Atlantic ports.

It is difficult to make any general conclusions and rate comparison as between the Conference's all-water service and the independents' rail-Miami-water service. However, considering Attachment E to Exhibit 2 and the testimony of record, obviously the independents must be offering lower total charges for some commodities, including freight-all-kinds in containers. The principal issue is not whose total charges are lower, but whether the Conference through its proposed amendment should be accorded another avenue of competitive initiative.

General Discussion and Conclusions

One issue in this proceeding is whether the proposed amendment is in violation of section 205 of the Merchant Marine Act of 1936, which provides in part that it shall be unlawful for any common carrier by water to prevent or attempt to prevent any other such carrier from serving any port designated for the accommodation of ocean-going vessels within the United States at the same rates which it charges at the nearest port already regularly served by it.

Nothing in the amendment would prevent any member of the Conference from serving any Atlantic port. Any Conference member may elect to serve or not serve ports in any of the three sections which would result on approval of the amendment. While it would be possible for any of the rate-making sections to adopt rules or regulations in the future which could contravene section 205, should that occur it would be that specific action which would constitute the violation, and not the proposed amendment. The Commission has held that an agreement should not be disapproved on speculation or conjecture that the parties thereto could violate the Shipping Act. A bare possibility is not sufficient. On brief no party alleges a violation of section 205. It is concluded that the proposed amendment is not in violation of section 205, Merchant Marine Act, 1936.

In *F.M.C. v. Aktiebolaget Svenska Amerika Linien (Svenska),* 390 U.S. 238, 243, the Supreme Court said that conference restraints which interfere with the policies of antitrust laws will be approved only if the conference can bring forth such facts as would demonstrate that the rule was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act.

In *Agreement No. 57–96, Pacific Westbound Conference Extension of Authority for Intermodal Services* (*PWB* case), 19 F.M.C. 289, serviced July 8, 1975 (16 SRR 159, 169), it was said:

> Even simple conference rate making arrangements involve the antitrust and public interest considerations that were present in Svenska and give rise to the doctrine adopted therein because even simple conference rate making arrangements involve the concerted fixing of rates which is per se unlawful under the antitrust laws unless specifically granted immunity under Section 15. And like all agreements contemplated by Section 15, they must be considered individually, on their own merits, based on all the available information and facts of record.
>
> But while all conference rate making agreements are required to meet the standards for approval set forth in Section 15, * * *, the extent of the justification that need be shown for such approval will, of course, vary from case to case with the intensity of the otherwise "illegal restraint" involved. Thus,

the "legitimate commercial objective" which the Commission will accept as evidencing the necessity for the restraint will generally be determined by the type and scope of the agreement under consideration. * * * "As indicated in Svenska, the scope and depth of proof required from case to case may vary in relation to the degree of invasion of the antitrust laws." Because of the intermodal aspects of Agreement No. 57-96, the Administrative Law Judge would require as justification for its approval only "the most stringent proof of a serious transportation need." We cannot agree.

Agreement No. 57-96 involves after all only an extension of the Conference's existing and approved rate making powers. The Conference's basic authority to establish rates and charges port to port, as well as OCP, have obviously already been considered by this Commission or its predecessors and found fully justified and warranted, or else it would not stand approved. So we are concerned here only with conference rate making as it applies to intermodal tariffs and traffic. Since the amendment before us represents but an extension of the Conference's established rate making authority under its organic agreement and because intermodalism, as it relates to the through movement of cargoes and the shipper benefits that may be derived therefrom, is generally desirable, we believe that the proof that need be demonstrated to support the approval of Agreement No. 57-96 is considerably less stringent than that the Presiding Officer would require.

Both the Traffic Board of the North Atlantic Ports Association and Hearing Counsel argue that the *Svenska* principle applies to this proceeding and that proponents have not met their burden of proof.

The Traffic Board of the North Atlantic Ports Association contends that we are wholly uninformed as to whether the competition of the Miami independent ocean carriers is minor, substantial or major, and that the purpose of the Conference appears to be the destruction or elimination of the Miami nnconference competition. Should the major independents (Cacena, Nopal and Tropical) join the Conferene if the proposed amendment is approved, only the less important independents would remain in the trade.

On the other hand, the Conference contends that the amendment is basially procedural, and that if it has any competitive effect it will be to increase competition between Conference carriers and independents, as well as to create a possibiity for competition between the different Conference sections. The Conference concludes that such an increase in competition is in no way contrary to antitrust law principles. In fact, the Conference argues that since there will be no less competition the amendment proposed is more in the nature of a typographical correction, than a major matter requiring *Svenska* type proof. However, in any eventthe Conference insists that *Svenska* proof has been given.

The Conference insists that the burden of proof in this proceeding is on Hearing Counsel and the protestants to the extent that they seek to have the amendment disapproved, citing the terms of section 15 of the Act, which in brief provide that the Commission after hearing shall disapprove, cancel, or modify any agreement which it finds to be unlawful, and shall approve all other agreements.

Hearing Counsel and protestants insist that the burden of proof is on the proponents.

Since there has been produced a reasonably substantial record, which party has or had the burden of proof herein is a secondary matter in this proceeding. The main question in this proceeding is whether there is enough evidence under the circumstances of this particular case to justify the proposed amendment.

Highly stringent proof (as in the *PWB* case) is unnecessary in this proceeding. Only a relatively slight change in the overall operation of the Leeward and

Windward Islands and Guianas Conference will result if his proposed amendment is approved. This amendment probably will result in lower rates (lower Conference rates, at least) from South Atlantic ports to destinations in this trade. Lower rates are beneficial generally to shipper and exporters from the United States to help them meet the competition of foreign shippers and exporters.

One shipper supports the amendment because he sees in it more Conference cargoes, and the spreading of the Conference's costs and overhead over more shipments, thereby enabling the Conference as a whole to afford better rates to shippers. No shipper opposes the proposed amendment.

It is possible that with separate rate-making actions out of the South Atlantic ranges of ports, the Conference carriers can induce more traffic and expand their services from this range of ports. In any event with intermodalism growing, the Conference lines should be free to compete by offering both all-water and rail-water services on competitive rate bases to destinations in this trade. Certainly expanded rail-water services via Miami and other South Atlantic range ports will be more likely if the Conference lines serving the South Atlantic range of ports are given more freedom to initiate and to decide on the rates from their own range of ports.

The independent lines operating out of the Miami area are free to set their own individual rates, and it appears that they are moving substantial amounts of traffic not only from areas near the North Atlantic ports but also from other areas across the country. It does not seem probable that even with lower rates from South Atlantic ports, that the Conference lines will drive out the independents from this trade, especially since some of the independents employ non union longshore labor enabling these independents to operate with lower loading costs.

The Conference's basic agreement has been approved by the Commission as well as an amendment dividing the Conference into two rate-making sections (Atlantic and Gulf). Obviously this prior agreement and amendment had to be found fully justified and warranted or else they would not have been approved. Now, we have a further amendment which would divide the Atlantic Coast into two sections. This is not a serious invasion of the antitrust laws. If anything more competition, not less competition, will result from the amendment. The antitrust laws are designed to protect the public interest. Here we have an amendment which is relatively minor and largely procedural and the amendment is in the public interest in that it will provide more competition and presumably lower Conference rates to shippers. The amendment is largely procedural because the Conference already has flagged out certain lower rates as applying only from certain Florida origin ports.

Certain shipments already are moving from points in and near New York City and Philadelphia via railroad-Miami-independent ocean carriers. The approval of the amendment would make it easier for the Conference lines to compete for this rail-ocean traffic. With the Conference offering both all-water and rail-water services, shippers would become better acquainted with the advantages and disadvantages of both of these types of services, and make intelligent choices.

Under all the circumstances of this case, the amendment in issue to the Conference's basic agreement is found to be an amendment which will not radically alter the present situation from the competitive standpoint of the

Conference. Also, it is found that the amendment will permit the Conference lines to broaden their competition with the independent lines and to some lesser extent to increase competition between lines of the Conference. This would be healthy normal competition rather than destructive competition of the type of rate wars. It is further found that the increased competition of the Conference lines probably will result in some rates which will be lower than otherwise they would be, without the approval of the subject amendment. It is further found that the overall result of this further competition generally will redound to the benefit of shippers and exporters from the United States in this trade area of the Leeward and Windward Islands and Guianas Conference.

It is further found that the standards of the *Svenska* case apply to this amendment, but in a non-stringent manner because of the relatively minor and largely procedural effect of this amendment.

It is concluded and found that the said amendment has been shown under the circumstances of this proceeding to be required by a serious transportation need, that the amendment is necessary to secure important public benefits and is in furtherance of a valid regulatory purpose of the Shipping Act.

It is further concluded and found that Agreement No. 7540–28 will not be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or between exporters from the United States and their foreign competitors, or detrimental to the commerce of the United States, or contrary to the public interest, or otherwise in violation of the Shipping Act.

An order will be entered approving the amendment, and discontinuing the proceeding.

(S) CHARLES E. MORGAN
Administrative Law Judge

WASHINGTON, D.C.
June 26, 1978

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 439(I)

MINE SAFETY APPLIANCES CO.

v.

SOUTH AFRICAN MARINE CORP.

ORDER ON REVIEW

December 21, 1978

The Settlement Officer's decision in this proceeding was served June 14, 1978, wherein claimant's request for reparation for alleged overcharges was denied. The denial was based both on claimant's failure to prove the claim and its failure to name the proper respondent. The Commission determined to review the Settlement Officer's decision.

Our determination to review related to the issue of complainant's failure to name the proper respondent. This failure presumably was occasioned by the failure of the carrier or its agent to fill in the space on the bill of lading which would identify the actual carrier. Complainant apparently either did not realize the identity of the actual carrier or did not realize that the agent could not be subjected to Commission process. The question to be determined is whether the complainant's failure to name the proper party respondent should result in denial of the claim under these circumstances.

We believe that the claim must be denied for failure to name the proper party. Claimant named "South African Marine Corporation" as respondent. It is not clear whether this was meant to refer to "South African Marine Corporation, NY" (the agent) or "South African Marine Corporation, Ltd.", one of three carriers represented by the agent. South African Marine Corporation, Ltd. answered the complaint and demonstrated that it did not carry the shipment in question, thereby precluding recovery under the second alternative. The cases cited by the Settlement Officer clearly preclude recovery under the first alternative because they stand for the proposition that a complaint which fails to name as a respondent a common carrier or other person subject to the act is jurisdictionally defective and must be dismissed. Naming the carrier's agent instead of the carrier does not cure this defect. Neither can the complaint be amended to name the proper party after the two-year period has expired.[1] While it is possible that in this case complainant relied to its detriment on an incomplete bill of

[1] *See* Dockets 76-25 and 76-39 quoted in the Settlement Officer's decision.

lading, jurisdictional questions should not turn on such equitable considerations. However, even if equities could be considered they are not one-sided. Complainant is represented by an FMC registered practitioner who has participated in numerous informal docket proceedings before this agency. A registered practitioner is expected to be familiar with the legal requirements regarding the Commission's jurisdiction to entertain a claim.

This proceeding raises the further question whether there is something inherently objectionable in the form of the bill of lading used by South African Marine Corporation (NY), as agents. The form bill contains the agent's name on top and has a space on the front for designation of the particular one of three possible carriers that is responsible for the shipment. Based on the evidence before us, use of a single form of bill of lading applicable to all three carriers represents a reasonable business judgment toward achieving simplification and economy in processing of shipments. Use of this bill of lading should present no problem to the shipper *if it is properly completed* to show the actual carrier involved on a particular shipment. The instant problem arose from failure to complete the bill of lading and it appears to be an isolated incident.[2] Hopefully, the publicity attached to this decision will cause those involved to be more diligent in the future in completing the bill of lading and to cause future complainants to be more diligent in their filings. Also, if future complaints clearly incorrectly name an agent as respondent, the Commission's Office of the Secretary will return the filing without prejudice to resubmission within the two-year limitation period. Accordingly, no further inquiry into the reasonableness of the form of bill of lading employed by South African Marine Corporation, NY will be made at this time.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[2] In Dockets 76-25 and 76-39 cited above the same bill of lading was properly completed. The difficulty there was the failure of complainant's attorney to recognize that the agent was not subject to Federal Maritime Commission process.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73-80

CARGO DIVERSION PRACTICES AT U.S. GULF PORTS BY COMMON CARRIERS BY WATER WHICH ARE MEMBERS OF THE GULF EUROPEAN FREIGHT ASSOCIATION

ORDER

January 2, 1979

On December 21, 1973, the Commission commenced an investigation (Docket No. 73-80) into port equalization, absorption, substituted service and similar activities by the seven ocean carriers belonging to the Gulf-European Freight Association to determine whether these carriers were unfairly diverting cargo from the U.S. Gulf Coast ports of Lake Charles, Orange, Galveston, Freeport, Brownsville, Beaumont and Mobile to the ports of New Orleans and Houston. Because the issues in Docket No. 73-80 were similar to those raised in a similar investigation concerning the Port of Philadelphia (Docket Nos. 71-70, 73-13 and 73-35), several parties to the Philadelphia proceeding intervened in the instant investigation, and *vice versa*.

After three years of pre-hearing manueuvering, the parties to Docket No. 73-80 concluded that it would be desirable to abandon any inquiry into *past* Shipping Act violations. Presiding Administrative Law Judge Norman D. Kline therefore stayed further proceedings therein and suggested that the Commission restructure the investigation as a rulemaking type inquiry designed to determine standards for future conduct rather than an adjudication of past Shipping Act violations.

Although the parties are unanimous in their desire to restructure the proceeding, there is little agreement between them as to the nature and scope of the restructured investigation, especially insofar as it might result in the articulation of general principles which could affect the Commission's Philadelphia proceeding. The parties are particularly divided concerning the need to investigate substituted service to "up-river" ports by LASH barge operators.

The promulgation of general rules of conduct is an inappropriate solution to the complex problems of port diversion and intermodal transportation unless there is first developed a common factual pattern to which rules would apply. The Commission's recent decisions analyzing cargo diversion by means of mini-landbridge service stress the importance of specific evidence of both unjustified competitive methods and substantial injury to legitimate local interests.[1] Facts

[1] *Council of North Atlantic Shipping Associations v. American Mail Lines* (Docket No. 73-38), 18 S.R.R.7A (1978), and *Board of Commissioners of the Port of New Orleans v. Seatrain International, S.A.* (Docket Nos. 73-42, *et al.*), 18 S.R.R. 763 (1978).

pertaining to local conditions are ordinarily best developed in individual complaint proceedings or in response to specific rulemaking proposals.

Accordingly, it is concluded that the continuation of the broad, multi-party factual investigation represented by Docket No. 73-80 would serve no apparent regulatory purpose at this time. It is sufficient that complaining Gulf Coast ports, or any other interested person, be permitted to file such particularized complaints or such petitions for rulemaking as they believe to be justified in light of the Commission's mini-land bridge decisions, *supra*, and the peculiar conditions existing in the Gulf Coast trades.[2] Rulemaking petitions should describe the regulation desired in detail and include a thorough recitation of the supporting facts which warrant its adoption.

THEREFORE, IT IS ORDERED, That Docket No. 73-80 is discontinued without prejudice to any party, or the Commission, later instituting an inquiry into the issue of intermodal cargo diversion from the ports of Lake Charles, Beaumont, Port Arthur, Orange, Brownsville, and Mobile; and

IT IS FURTHER ORDERED, That the "Petition for Expedited Handling of Docket No. 73-80" filed February 14, 1977, by the Ports of Baton Rouge, Beaumont, Lake Charles and Port Arthur is dismissed as moot.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[2] Newly instituted proceedings of this nature will not be consolidated with the pending Philadelphia diversion complaints (Dock. Nos. 71-70 and 73-13), and may be held in abeyance until a final decision is reached in that proceeding.

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-70

DELAWARE RIVER PORT AUTHORITY, ET AL.

v.

UNITED STATES LINES, INC., ET AL.

DOCKET NO. 73-13

DELAWARE RIVER PORT AUTHORITY, ET AL.

v.

SEATRAIN LINES, INC.

DOCKET NO. 73-35

INTERMODAL SERVICE OF CONTAINERS AND BARGES AT THE PORT OF PHILADELPHIA; POSSIBLE VIOLATIONS OF THE SHIPPING ACT, 1916 AND THE INTERCOASTAL SHIPPING ACT, 1933

ORDER

January 2, 1979

On June 18, 1973, the Commission commenced an investigation (Docket No. 73-35) into various practices (other than mini-land bridge) which may unfairly divert cargo from the Port of Philadelphia to other U.S. East Coast Ports.[1] Over 100 ocean carriers were originally named as respondents, but approximately half of them were subsequently dismissed from the proceeding. On November 19, 1973, this investigation was consolidated with two previously instituted complaint cases (Docket Nos. 71-70 and 73-13) dealing with the same issues.[2]

After three years of pre-hearing maneuvering, the parties to the consolidated proceeding concluded that it would be desirable to abandon any inquiry into *past*

[1] The investigation was to include the practices of all container and lighter or barge operators at Philadelphia since January 1, 1971.

[2] Docket No. 71-70 is a complaint by Philadelphia port interests against U.S. Lines, Inc., Caribbean Trailer Express Line and Spanish North American Line for allegedly diverting Philadelphia area cargo to other ports by absorbing overland transportation costs, issuing Philadelphia bills of lading without calling at Philadelphia and giving special rates, among other purportedly anticompetitive activities. Docket No. 73-13 is a similar complaint against Seatrain Lines, Inc.

Shipping Act violations in the interest of obtaining full and timely cooperation from the respondents in the development of a current evidentiary record.[3] Presiding Administrative Law Judge Norman D. Kline therefore stayed further activity in these dockets and suggested that the Commission restructure the proceeding as a rulemaking type inquiry rather than an adjudication of past Shipping Act violations.

Although the parties are unanimous in their desire to restructure the proceeding, there is little agreement between them as to the nature and scope of the restructured investigation—especially insofar as it might result in the articulation of general principles which could affect a similar Commission investigation into diversionary activities at certain Gulf Coast ports (Docket No. 73-80).[4]

The promulgation of general rules of conduct is an inappropriate solution to the complex problems of port diversion and intermodal transportation unless there is first developed a common factual pattern to which such rules would apply. The Commission's recent decisions analyzing cargo diversion by means of mini-landbridge service stress the importance of specific evidence of both unjustified competitive methods and substantial injury to legitimate local interests.[5] Such facts are ordinarily best developed in individual complaint proceedings or in specific rulemaking proposals.

Accordingly, it is concluded that the continuation of the broad multi-party factual investigation represented by Docket No. 73-35 would serve no apparent regulatory purpose at this time. Instead, it is preferable to first resolve the two original complaint proceedings as promptly as possible. Once a final decision is reached, the Commission will then undertake whatever further action (either rulemaking or adjudication) relating to the Port of Philadelphia as may be justified.[6]

The present parties may, of course, petition the Administrative Law Judge to amend the complaints in light of the Commission's mini-bridge decisions, to delete allegations of past Shipping Act violations, or to withdraw from the proceeding. It would, however, be inappropriate to increase the number of respondents, given the parties' interest in expediting a final decision.

THEREFORE, IT IS ORDERED, That Docket No. 73-35 is discontinued without prejudice to any party, or the Commission, later instituting an inquiry into the issue of intermodal cargo diversion from the Port of Philadelphia; and

IT IS FURTHER ORDERED, That the Presiding Administrative Law Judge proceed to decision in Docket Nos. 71-70 and 73-13; and

IT IS FURTHER ORDERED, That Docket Nos. 71-70 and 73-13 continue to be treated as a consolidated proceeding; and

IT IS FURTHER ORDERED, That the "Petition for Modification of Clarifi-

[3] No party now wishes to collect reparations or impose penalties for past conduct, and it is generally agreed that no evidence o unapproved section 15 (46 U.S.C. 814) activities has been uncovered.

[4] Several parties to the Gulf Coast proceeding have intervened in the Philadelphia proceeding and *vice versa*.

[5] *Council of North Atlantic Shipping Associations v. American Mail Lines* (Docket No. 73-38), 18 S.R.R. 774 (1978), and *Board of Commissioners of the Port of New Orleans v. Seatrain International, S.A.* (Docket Nos. 73-42, *et al.*), 18 S.R.R. 763 (1978).

[6] The parties to Docket Nos. 71-70 and 73-13 or any other interested person, may file a petition for rulemaking or commenc additional complaint proceedings at any time. Such matters will not be consolidated with Docket Nos. 71-70 and 73-13, however, an may be held in abeyance until a final decision is reached in that proceeding. Any petition for rulemaking should describe the regulatio desired in detail and include a thorough recitation of the facts which warrant its adoption.

cation of Petition for Rulemaking 14 SRR 631" filed April 8, 1977 by six New Orleans and Texas port interests be dismissed as moot.

By Order of the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 74-44

AGREEMENT BETWEEN PUERTO RICO MARITIME SHIPPING AUTHORITY AND PUERTO RICO MARINE MANAGEMENT, INC./PUERTO RICO MARINE OPERATING COMPANY, INC.

Determination of status of agreement between Puerto Rico Maritime Shipping Authority and Puerto Rico Marine Management, Inc./Puerto Rico Marine Operating Company, Inc., no longer serves a useful regulatory purpose in light of termination of agreement. Initial Decision of Administrtive Law Judge vacated and proceeding discontinued.

Donald J. Brunner, Charles L. Haslup III and *Bert I. Weinstein* for the Bureau of Hearing Counsel.
Mario F. Escudero and *Dennis N. Barnes* for Puerto Rico Maritime Shipping Authority.
Emmanuel Rouvelas, Jonathan Blank and *Thomas D. Shea* for Puerto Rico Marine Management, INC. AND Puerto Rico Marine Operating Company, Inc.
Edward M. Shea and *Edward A. McDermott, Jr.* for Sea-Land Service, Inc. and Gulf Puerto Rico Lines, Inc.
John R. Immer for Caribe Trailer Systems, Inc.

REPORT AND ORDER

January 3, 1979

BY THE COMMISSION: (Richard J. Daschbach *Chairman*; Thomas F. Moakley, *Vice Chairman;* Karl E. Bakke, James V. Day and Leslie Kanuk, *Commissioners*)

This proceeding was initiated by an Order of Investigation and Hearing, pursuant to sections 15 and 22 of the Shipping Act, 1916 (46 U.S.C. 814 and 821), on September 27, 1974. The primary purpose of the investigation was to determine whether the Management Services Contract between Puerto Rico Maritime Shipping Authority (PRMSA) and Puerto Rico Marine Management, Inc. (PRMMI) was subject to Shipping Act section 15, and if so, whether it should have been approved, disapproved, or modified.[1]

The matter was designated for hearing before Administrative Law Judge Charles E. Morgan (Presiding Officer). PRMSA, PRMMI, PRMMI's wholly-owned subsidiary, Puerto Rico Marine Operating Company, Inc. (PRMOCI), and the Commission's Bureau of Hearing Counsel (Hearing Counsel) were made

[1] A secondary purpose of the investigation was to determine whether the Management Services Contract was part of another agreement or series of agreements and, if so, whether such agreements are subject to section 15 of the Shipping Act and, if so, whether they should be approved, disapproved or modified.

parties to the proceeding. Seven Petitions to Intervene were filed,[2] but only three intervenors, Caribe Trailer Systems, Inc. (Caribe), Sea-Land Service, Inc. (Sea-Land), and Sea-Land's subsidiary, Gulf Puerto Rico Lines, Inc. (GPRL) participated actively in the proceeding.

The Presiding Officer issued an Initial Decision concluding that the Management Services Contract was not an agreement subject to section 15 and that no other unfiled agreements subject to the Act were shown to exist. Exceptions were filed by Hearing Counsel and Caribe. Replies to Exceptions have been filed by Caribe, Sea-Land and GPRL (jointly), and PRMMI and PRMOCI (jointly).

DISCUSSION

The determinative factor in deciding whether the PRMSA-PRMMI Management Services Contract was subject to the Shipping Act, 1916 is the relationship between PRMMI and its corporate affiliate, Sea-Land Service, Inc. Sea-Land is a common carrier by water subject to the Shipping Act, 1916. If the Commission were to treat PRMMI as the *alter ego* of Sea-Land, *i.e.*, if the Commission were to "pierce the corporate veil" between PRMMI and Sea-Land, then both parties to the Management Services Contract would have been persons subject to the Shipping Act, and the agreement could be subject to the Shipping Act. If the "corporate veil" between PRMMI and Sea-Land were not pierced, then there would be no basis in the record for finding that PRMMI is a person subject to the Shipping Act,[3] and the agreement between PRMMI and PRMSA therefore could not be subject to the Shipping Act under section 15.

On January 15, 1976, the corporate relationship which represents the central issue in this proceeding ceased to exist. PRMMI was sold by McLean Industries[4] to an unrelated company, TKM Corporation.[5] The divestiture by McLean Industries of PRMMI and PRMOCI occurred after the close of hearings but during the pendency of this proceeding before the Presiding Officer. PRMSA made a Motion to Discontinue the proceeding. All parties to the proceeding except Caribe supported the motion.[6] The Motion to Discontinue was denied by the Presiding Officer, who exercised his discretion to address the merits of the case rather than dismiss it.

On or about June 30, 1978, the Management Services Contract that constituted the subject of this investigation ceased to exist. In a well-publicized action,

[2] Petitions to Intervene were filed by: the International Longshoremen's Association, AFL-CIO; Caribe Trailer Systems, Inc., the Delaware River Port Authority, Philadelphia Marine Trade Association, Port of Philadelphia Marine Terminal Association, Philadelphia District Council of the International Longshoremen's Association, the City of Philadelphia and the Philadelphia Port Corporation (filing jointly), the Commonwealth of Pennsylvania; Sea-Land Service, Inc; Gulf Puerto Rico Lines, Inc., and the Massachusetts Port Authority.

[3] Apart from its relation to Sea-Land, PRMMI's function as the managing/operating agent of PRMMI a common carrier by water or other person subject to the Shipping Act, 1916. PRMMI is merely an *agent* of PRMSA and does not hold itself out to the public as a common carrier. Agents of common carriers, as such, are not subject to the Shipping Act. *United States-Atlantic and India, Ceylon and Burma Conference (Agreement No. 7620)*, 2 U.S.M.C. 749 (1945). This rule is subject to the *caveat*, not applicable here, that two persons subject to the Shipping Act may not avoid the Act by having one designate the the other its "agent" *See Puget Sound Tug and Barge Co. v. Foss Launch and Tug Co.*, 7 F.M.C. 43 (1962) and *In the Matter of Agreement 9597*, 12 F.M.C. 83, 100 (1968).

[4] McLean Industries was the parent holding company of PRMMI and PRMOCI. McLean also owned, and derived roughly 90% of its revenues from, Sea-Land. Hence the question whether PRMMI should be treated as the *alter ego* of Sea-Land.

[5] This fact, in addition to being a matter of general knowledge in Puerto Rico, appears from the affidavit of Charles F. Benbow, President of McLean Industries, submitted by Sea-Land as a supplement of its reply in support of PRMSA's Motion to Discontinue.

[6] Caribe opposed PRMSA's Motion on the ground that the affidavits and other matter submitted in support of it did not establish to Caribe's satisfaction that TKM Corporation was not another *alter ego* of McLean Industries. Caribe submitted no credible evidence that TKM was related to McLean.

PRMSA paid its outstanding obligations under the Management Service Contract and terminated the Contract.

In view of these post-hearing developments, the relative "staleness" of the record in this case, and the fact that the conduct of the parties with respect to the Management Services Contract does not appear to have involved fraud, bad faith, or intentional evasion of the Shipping Act,[7] it is the Commission's conclusion that no useful purpose can be served at this time by attempting to determine whether PRMMI was the *alter ego* of Sea-Land. Because the Commission does not necessarily endorse the findings, analysis or conclusions contained in the Initial Decison, it will be vacated.

THEREFORE, IT IS ORDERED, That the Initial Decision served August 5, 1977 is vacated, and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

[7] Caribe alleged throughout the proceedings that a conspiracy exists between Sea-Land, PRMSA, and Maritime Administration and numerous other persons and entities, to keep it from entering the U.S. Atlantic and Gulf Coast/Puerto Rico trades as a common carrier by water. The record does not support Caribe's allegations.

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-76

BETHLEHEM STEEL CORPORATION

v.

INDIANA PORT COMMISSION

Harbor Service Charge levied on vessels for entering a harbor is not a regulation or practice related to or connected with the receiving, handling, storing or delivering of property.

Timothy J. May and *Richard A. Earle* for Indiana Port Commission.
Paul V. Miller for Bethlehem Steel Corporation.
Eugene T. Liipfert for Midwest Steel Division, National Steel Corporation.
Scott H. Elder for Lake Carriers' Association.
John Robert Ewers, Joseph B. Slunt, and *Carlos Rodriguez* for Bureau of Hearing Counsel.

REPORT AND ORDER

January 8, 1979

BY THE COMMISSION: (Richard J. Daschbach, *Chairman*; Thomas F. Moakley, *Vice-Chairman;* Karl E. Bakke, James V. Day and Leslie Kanuk, *Commissioners*)

This proceeding was instituted by complaint filed August 6, 1971, by the Bethlehem Steel Corporation (Bethlehem), alleging that a Harbor Service Charge for the Burns Waterway Harbor levied by the Indiana Port Commission (the Port) violates section 17 of the Shipping Act, 1916 (46 U.S.C. 816). A previous Commission decision in this matter was set aside by the United States Court of Appeals. *Indiana Port Commission v. Federal Maritime Commission,* 521 F.2d 281 (D.C. Cir. 1975).

BACKGROUND

Burns Waterway Harbor (the Harbor) is located in Portage, Indiana on the southern tip of Lake Michigan. It is the product of years of planning and negotiation among the United States Army Corps of Engineers (the Corps), Bethlehem, the Midwest Steel Division of National Steel Corporation (Midwest), and the State of Indiana (the State) and its instrumentality, the Port. The Harbor was originally envisaged as a federal project, but the opposition of environmentalists to the construction of the Harbor frustrated the State in its efforts to have the Harbor federally funded. The Port then began building a

Harbor with its own funds, with the understanding that the Corps would reimburse the Port for certain of its expenditures. Bethlehem and Midwest constructed large portions of the Harbor as well.[1]

The Harbor became operational in 1970, and on April 3, 1970, the Port instituted a Harbor Service Charge (the charge), included as Item Nos. 348–356 in its Harbor Tariff No. 1. The charge is levied on all commercial vessels entering the physical limits of the Harbor, and is assessed per gross registered ton of the vessel.[2]

Most of the vessels entering the Harbor, and therefore most of those on which the charge is assessed, are those utilizing the Bethlehem docking facilities in the East Harbor Arm. Vessels arriving at the Port's public terminal facilities and at Midwest's facilities in the West Harbor Arm are less numerous, and account for a smaller percentage of the total assessments.[3]

Bethlehem and Midwest have consistently refused to pay the charge, prompting a lawsuit brought by the Port in state court on July 28, 1971, to compel payment. Bethlehem removed the action to the United States District Court for

[1] A diagram of the Harbor area is included in the appendix.

[2] The charge is described in the Port's original tariff as follows:

HARBOR SERVICE CHARGE

All commercial vessels entering the physical limits of the Port of Indiana—Burns Waterway Harbor engaged in import, export, and/or lake traffic shall be assessed a Harbor Service Charge to assist in defraying the expense of the administration and maintenance of the Port, with the view of preventing collisions and fires, policing the harbor and dock areas, aiding in the extinguishing of fires in vessels and their cargoes, on wharves and other facilities and equipment.

HARBOR SERVICE CHARGE PER VESSEL

SIZE In Gross Registered Tons	CHARGE Per Gross Registered Ton or Vessel
Vessels under 100 Gross Registered Tons	$2.50 per vessel per entry
Vessels of 100 Gross Registered Tons and Under 500 Gross Registered Tons	$5.00 per vessel per entry
Vessels of 500 Gross Registered Tons or Over	$0.01 per Gross Registered Ton

Gross registered tonnage of a vessel will be as shown in Lloyd's Register of Shipping or as shown on vessel's register; however the COMMISSION reserves the right to admeasure any vessel when deemed necessary, and use such measurements as the basi of the Harbor Service Charge.

Every vessel by its master agent or owner shall pay to the INDIANA PORT COMMISSION the amount due for the Harbor Service Charge upon presentation of an invoice by the COMMISSION.

The Harbor Service Charge applies to all commercial vessels entering the physical limits of the Port of Indiana—Burns Waterway Harbor engaged in import, export, and/or lake traffic, with specific exceptions as noted below:

a. Vessels calling at the harbor for the sole purpose of receiving bunker fuel and/or ship supplies or changing pilots, and remaining less than twenty-four hours in the harbor.

b. Vessels passing through the harbor and remaining less than twelve hours and not receiving or discharging cargo.

c. Government vessels not engaged in carrying cargo, troops or supplies.

d. Vessels using the harbor as a harbor of refuge.

If any of the services enumerated above should be rendered by this COMMISSION to a vessel which has not paid the Harbor Service Charge, or to a vessel which is exempt from the payment of the Harbor Service Charge for the protection of bulkheads piers, wharves, buildings, appurtenances,or other property of third persons, such service, (including the cost of labor and materials used) shall be charged to the vessel receiving such services, or charged to the lessee of such bulkheads, piers wharves, buildings, appurtenances, or other property, in accordance with prices fixed by this COMMISSION. Nothing herein contained, however, shall be construed as obligating this COMMISSION to render such services, or as making it liable for the failure or refusal to render such services.

We take official notice that the above provisions were superseded by Port Tariff FMC-T No. 2, effective May 21, 1976, but the revised tariff makes no substantive change regarding the Harbor Service Charge.

[3] The charge is based upon weight. The Bethlehem-owned vessels also tend to be of greater tonnage than other vessels entering the Harbor.

the Northern District of Indiana, and on August 6, 1971, filed its complaint with this Commission.[4] The Port moved to dismiss the complaint for lack of jurisdiction, claiming that it was not an "other person" under Shipping Act section 1 (46 U.S.C. 801). This motion was denied by the Administrative Law Judge and his ruling was adopted by the Commission on May 12, 1972, and again on reconsideration, on November 10, 1972. On March 4, 1974, the Commission found that the Port's assessment of the charge was an unreasonable practice in violation of section 17. The Commission held that a charge is reasonable under section 17 only if there is some service performed or benefit conferred on those so assessed, and, in the case of the Port, found that it performed no service and conferred no benefit upon every vessel entering the harbor.

On appeal, the court rejected this conclusion and indicated that such a benefit may have been conferred by the Port's construction of portions of the Harbor. The court stated that Bethlehem could recover its construction costs via the profits from its private enterprise, but that the Port could obtain a return from its share of the costs only by charging the vessels who obtain a benefit from the Port's contributions.[5]

The Commission reopened the proceeding to resolve these questions and certain additional issues. In an Initial Decision, served March 14, 1977, Administrative Law Judge Stanley M. Levy (Presiding Officer) concluded that each party's contribution benefitting the general users of the Harbor is proportionate to its investment in the project as a whole; that the services performed by the Port are insubstantial and do not justify the harbor charge; and that the charge is unreasonable as applied to users of both public and private terminal facilities and violative of section 17.

Position of the Parties

Exceptions were filed by the Port and by the Commission's Bureau of Hearing Counsel (Hearing Counsel).[6] The Port's series of exceptions protests the general conclusions and determinations which led the Presiding Officer to his decision that the charge was unreasonable. Hearing Counsel argues only that the Presiding Officer did not first decide the issue of whether the harbor charge was related to or connected with the receiving, handling, storing, or delivering of property and, therefore, subject to section 17.[7]

Bethlehem, Midwest, and Lake Carriers, in filing Replies, generally support the findings and conclusions in the Initial Decision. They seek to rebut Hearing Counsel's exception by claiming that the charge is in fact related to section 17 activities, and that this has already been determined as the law of the case upon

[4] The federal court proceeding was stayed by order of that court on October 21, 1971, pending disposition of the Commission proceeding.

[5] Specifically, the court instructed that the Commission on remand make the following determinations

(1) Precisely which contributions of each of the four parties contribute benefits to vessels using the Harbor itself;

(2) How much each of these contributions are [sic] worth to these vessels using the Harbor;

(3) In light of (1) and (2), is the Harbor Service Charge contained in the Port Commission's Tariff just and reasonable with regard (a) to vessels using the public terminal and (b) to vessels using Bethlehem's facilities. *Id.*, at 287

[6] Hearing Counsel, Midwest and Lake Carriers' Association (Lake Carriers) had been granted leave to intervene in the reopened proceeding.

[7] Hearing Counsel does not address the issues raised in the Port's exceptions, and the Port takes no position on Hearing Counsel's exceptions.

the Commission's denial of the Port's motion to dismiss for lack of jurisdiction in 1972.

DISCUSSION

A threshold issue requiring determination is whether the charge is related to or connected with the receiving, handling, storing, or delivering of property.

The contention that the law of the case doctrine bars consideration of Hearing Counsel's exception is without merit. Section 17 applicability was not directly decided in the previous rulings of the Commission or the Court of Appeals. The jurisdictional issue passed upon by the Commission in 1972 was not whether harbor entry was a section 17 activity, but whether the Port was an "other person" within the meaning of Shipping Act section 1.[8] The relation of the harbor charge to section 17 activities was not mentioned by any party in this proceeding until raised by Hearing Counsel subsequent to the remand.

The law of the case doctrine provides that questions of law decided by appellate courts become the "law of the case" on remand to the lower court or agency, and upon subsequent appeal. It does not prevent administrative agencies from further considering or reconsidering previous rulings and findings. The doctrine is only a discretionary rule of practice and does not bar an administrative agency from ruling on unconsidered, open questions upon remand. *United States v. United States Smelting, Refining & Mining Co.*, 339 U.S. 186, 199 (1950). *See also, Southern Ry. Co. v. Clift*, 260 U.S. 316, 319 (1922).

It does not follow that all of the Port's activities are subject to section 17 simply because the Port is a terminal operator or "other person" with respect to some of its practices and regulations. Neither does the issue turn solely on whether the vessels on which the charge is levied enter the harbor for the purpose of loading or unloading cargo. The fact that most of the vessels' business in the Harbor is cargo-related is, taken alone, an insufficient justification for classifying the charge as one "relating to or connected with the receiving, handling, storing or delivering of property."

The Court of Appeals has dichotomized the Harbor's functions as navigational on the one hand, and terminal-related on the other. The court repeatedly emphasized the

distinction between the construction of the *harbor itself, i.e., the container for the water to a navigable depth*, in contrast with the construction of the pier facilities, *i.e.*, unloading cranes, warehousing, wharfage facilities on top of the sides of the artificial harbor. *Indiana Port Commission, supra*, at 285. (Emphasis added.)

It is undisputed that the Port has the right to charge for services rendered at its public terminal facilities; this is the means by which the Port can recoup its investment in that part of its construction. The proposed justification for the charge, however, is based upon the Port's investment in the construction of the Harbor as a "container for water"; the court stated:

[T]he only way the Port Commission, in contrast to the private profit-making steel companies, can

[8] The Port had unsuccessfully contended that it was not an "other person" subject to the Act because its activities dealt primarily with contract carriers, and that, therefore, there was an insufficient connection with common carriers by water to render it an "other person" under section 1.

hope to get back its investment in the construction of the Harbor is to charge vessels coming into the Harbor for the use of the Harbor itself. *Id.*, at 286.

It is clear, therefore, that the purpose of the harbor charge is unrelated to cargo handling. The charge is based on the *navigational* aspect of the Harbor, whereas it is the *terminal* portion of the Harbor, which the court says does not justify the harbor charge, that truly relates to the receiving, handling, storing, or delivering of property under section 17.

We conclude that there is insufficient relation between the harbor charge and the receiving, handling, storing or delivering of property to render the charge applicable to section 17 of the Shipping Act. It is inappropriate, therefore, to consider the reasonableness of the charge under section 17.

THEREFORE, IT IS ORDERED, That the Exception of Hearing Counsel is granted; and

IT IS FURTHER ORDERED, That the complaint of Bethlehem is denied; and

IT IS FURTHER ORDERED, That the Harbor Service Charge be stricken from the Indiana Port Commission's F.M.C. Tariff; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-8

CIRCLE INDUSTRIES CORP.

v.

NORTHEAST MARINE TERMINAL COMPANY, INC.

NOTICE

January 9, 1979

Notice is given that no appeal has been filed to the December 4, 1978, order of dismissal of the Administrative Law Judge in this proceeding and the time within which the Commission could determine to review that order has expired. No such determination has been made and, accordingly, review will not be undertaken.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-8

CIRCLE INDUSTRIES CORP.

v.

NORTHEAST MARINE TERMINAL COMPANY, INC.

DISMISSAL OF PROCEEDING

Finalized on January 9, 1979

Complainant, Circle Industries Corp., alleges that respondent, Northeast Marine Terminal Company, Inc., has violated sections 16 and 17 of the Shipping Act, 1916, by the improper application of "heavy lift" charges to certain of Circle's shipments. Circle seeks reparation of $47,750.74.

Circle's claim for reparation is based on Northeast's application of "heavy lift" charges to some 2,689 crates of gypsum, wallboard and other building materials which were mounted on skids and delivered to Northeast on flatbed trucks. The skids ranged in weight from 5,700 lbs. to 7,700 lbs. Circle claims that Northeast "utilized the same type of equipment and the same procedures to unload all the skidded crates." Northeast's charges for unloading skidded cargo from open flatbed trucks are graduated according to the weight of the individual skid. As of October 1, 1976, these charges were said to be $2.39 per skid of less than 6,000 lbs.; $21.99 per skid of from 6,000 to 7,500 lbs.; and $29.38 per skid of 7,501 to 10,000 lbs.

Based upon its assertion that all of the skids were unloaded using the same type of equipment and the same procedures, Circle says that all of the skids should have taken the $2.39 charge. This would, it is claimed, have resulted in a total charge of $5,817.26. However, Northeast assessed heavy lift charges on 2,434 of the skids which totaled $53,568.00. Thus, the claim for $47,750.74 ($53,568.00-$5,817.26).

Northeast's answer to the complaint denied that it had violated sections 16 and 17, and after discovery was commenced, a prehearing conference was held at which it was agreed that a good many of the facts relevant to the case could prove the subject of stipulation between the parties. For a number of reasons, a stipulation was never reached, and a further prehearing conference was called.

At the second prehearing conference, a firm offer of $35,000 was made by Northeast in full settlement of Circle's claims in the case.[1]

On November 27, 1978, the parties filed a Stipulation of Settlement and Motion to Withdraw Complaint. It states in full:

> Complainant Circle Industries Corp. ("Circle") and Respondent Northeast Marine Terminal Company, Inc. hereby advise and stipulate that they have achieved a settlement of all claims asserted in this proceeding. In light of the settlement, Circle hereby moves for permission to withdraw its Complaint, filed on April 10, 1978.

Although the stipulation does not state the amount of the settlement, counsel for Circle has informed me that he has Northeast's check for $35,000, which he is holding pending disposition of the present motion.

The decision to settle this case is an economic one. The proof of and defense against the claim here has already involved some 39 pages of interrogatories and threatens to branch out into the calling of a number of Northeast personnel, as well as an indeterminate number of expert witnesses.[2] Such a proceeding could well cost more than the complainant would get by reparation if he prevailed and more than the respondent would save if he prevailed. Accordingly, in line with the general principle that the law encourages settlements and the Commission's decision in *Robinson Lumber Company, Inc. v. Delta S.S. Lines, Inc.*, Docket No. .75-22, FMC Notice of Determination Not to Review, served August 28, 1978, I hereby approve the stipulation of settlement and grant the motion to withdraw the complaint. The proceeding is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

December 4, 1978

[1] *See* Transcript, Prehearing Conference, September 27, 1978, at page 26.

[2] *See* Transcript, Prehearing Conference, September 27, 1978, at pages 12-16.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-42

HEAVY LIFT PRACTICES AND CHARGES OF HAPAG-LLOYD, A.G., THE NORTH ATLANTIC WESTBOUND FREIGHT ASSOCIATION AND ITS MEMBER LINES AND EUROPE CANADA LAKES LINE (ERNST RUSS) IN CERTAIN UNITED KINGDOM TRADES

ORDER ADOPTING INITIAL DECISION

January 10, 1979

This proceeding was instituted on August 4, 1976, to determine whether certain practices and activities related to heavy-lift charges published in the tariffs of Hapag-Lloyd, A.G. (Hapag), Europe Canada Lakes Line (ECLL), Ernst Russ (Russ) and the North Atlantic Westbound Freight Association (NAWFA) and its member lines violated sections 16, 17 and 18 of the Shipping Act, 1916. In an Initial Decision issued on May 24, 1977, Administrative Law Judge Norman D. Kline found and concluded that: (1) Respondents' heavy-lift practices did not violate section 16 First; section 17, First Paragraph; or section 17, Second Paragraph, of the Shipping Act, 1916; and (2) the publication of a "to be negotiated" tariff item did not violate section 18(b)(1) provided that rates actually negotiated pursuant thereto were timely filed with the Commission prior to shipment. The Presiding Officer withheld decision on whether Respondents' use of a tariff provision permitting them the option of discounting certain heavy-lift charges by 10% is violative of section 18 (b)(1), of the Shipping Act,* because Respondents offered to settle that issue. No exceptions were filed to the Presiding Officer's decision but the Commission issued a Notice of Determination to Review on June 24, 1977.

On August 25, 1977, the Commission issued an order declining Respondents' offer to exclude the "optional 10% discount" from future tariffs if the Commission agreed not to seek any civil penalty for Respondents' past use of the optional discount clause. The Commission suspended further proceedings in Docket No. 76-42 in order to allow Respondents an opportunity to settle the "optional 10%" issue with the Commission's Office of the General Counsel. Respondents have deleted the "optional 10%" provision from their tariffs and have now entered into a settlement agreement which provides, *inter alia*, for the payment of $1,000 in civil penalties. This resolves the need to continue the 18(b)(1)

* The Provision in question states that the carrier shall have "the liberty to apply a reduction of 10% of the freight when three or more lifts of over 10 tons are tendered to one vessel by the same shipper for transportation between the same ports."

investigation. As to the remaining issues, we have reviewed the Initial Decision of the Presiding Officer and have determined that his findings and conclusions were proper and well founded.

THEREFORE, IT IS ORDERED, That the Initial Decision issued in this proceeding is adopted and made a part hereof; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By The Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 76–42

HEAVY LIFT PRACTICES AND CHARGES OF HAPAG-LLOYD AKTIENGESELLSCHAFT, THE NORTH ATLANTIC WESTBOUND FREIGHT ASSOCIATION AND ITS MEMBER LINES AND EUROPE CANADA LAKES LINE (ERNST RUSS) IN CERTAIN UNITED KINGDOM TRADES

Adopted January 10, 1979

During various periods of time in the past, respondents ECLL and NAWFA published in their tariffs certain provisions for special types of heavy-lift shipments. These provisions stated that for shipments over 50 tons or 10,000 kilos (NAWFA) rates were "to be agreed," and that for three or more lifts over 10 tons or 10,000 kilos (NAWFA) carriers "have liberty to apply a reduction of 10 percent off the freight." Furthermore, during the period August 4, 1974 through July 9, 1975, respondent Hapag Lloyd, operating as a party to ECLL, maintained higher heavy-lift charges to Great Lakes ports than to North Atlantic ports as a member of NAWFA. On the basis of the evidence presented in this record, it is found as follows:

(1) The "to be agreed" provision did not violate section 18(b)(1) of the Shipping Act, 1916, because it merely constituted an offer to negotiate an acceptable rate with shippers for unusually large shipments and absent evidence that the rates negotiated were not filed, the purposes of section 18(b)(1) are not defeated.

(2) Respondent Hapag did not unduly prejudice anyone or unjustly discriminate in violation of sections 16 First and 17, first paragraph, by maintaining higher heavy-lift rates nor did respondents ECLL or NAWFA and its members violate these laws in the use of the "to be agreed" and "liberty" provisions since the record shows no similarity between heavy-lift shipments actually moved or competitive relationships among shippers, cargoes, or ports, and no movements of like traffic over the same lines between the same points under the same circumstances and conditions.

(3) Respondent ECLL did not violate section 17, second paragraph, since the record shows that heavy-lift charges related to line-haul services performed from ship's tackle to ship's tackle and not to terminal services where such law applies.

Respondents have renewed their offer to enter into a type of consent order to terminate this proceeding as to the issue concerning lawfulness of the tariff provisions authorizing "liberty" to apply the 10% discount. Since the subject provision has been canceled and was applied only once without showing of harm to anyone and the record shows other equitable factors, and since this offer raises important policy considerations regarding the use of consent orders which make no findings of violations of law, the determination of this issue is reserved pending Commission consideration of the renewed offer and subsequent instructions.

Howard A. Levy and *Patricia E. Byrne* for respondents North Atlantic Westbound Freight Association (NAWFA) and its member lines and for respondent Hapag-Lloyd A.G., former party to respondent Europe Canada Lakes Line (ECLL).

Werner Scholtz for respondent Ernst Russ, now operating as ECLL.

John Robert Ewers, Director, Bureau of Hearing Counsel, and *Alan J. Jacobson* as Hearing Counsel.

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

This is an investigation instituted by the Commission's Order of Investigation and Hearing, served August 4, 1976, into practices and activities related to heavy-lift charges published in the tariffs of respondent carriers Hapag-Lloyd A.G. (Hapag), Europe Canada Lakes Line (ECLL), a joint service to Great Lakes ports consisting of Hapag and respondent Ernst Russ (Russ) until December 31, 1975, thence only Russ, and the North Atlantic Westbound Freight Association (NAWFA) and its member lines. The Commission's Order listed 10 members of NAWFA as respondents. It framed four separate issues applicable in some instances to one respondent, in others to all respondents. In addition, the time periods under which these issues were to be determined varied from approximately one year to five years. The four issues concerned the lawfulness of respondents' heavy-lift charges and practices with respect to (1) sections 16 and 18(b) of the Shipping Act, 1916 (the Act); (2) section 17, second paragraph; (3) section 18(b)(1); and (4) sections 16 and 17.

BACKGROUND—THE ACE MACHINERY COMPANY CASE

The issuance of the Order commencing this proceeding was an outgrowth of a complaint case which had been dismissed. In Docket No. 76-5, *Ace Machinery Company v. Hapag Lloyd Aktiengesellschaft,* complainant Ace alleged that it had imported a 44-ton knuckle press carried by respondent Hapag from Grangemouth, United Kingdom, to Chicago, Illinois, during August 1974. Ace alleged violations of sections 16, 17 and 18 of the Shipping Act, 1916, and sought reparation. Ace alleged that Hapag's heavy-lift charges into Chicago were extraordinarily high and discriminated against Chicago-area ports compared to Atlantic Coast ports where heavy-lift charges were much lower, that Hapag's tariff was ambiguous and permitted discrimination among shippers, and other things. Hapag moved to dismiss the complaint contending that it was defective as a matter of law and that reparation could not be granted. The presiding judge granted the motion. Complainant moved the Commission to vacate the presiding judge's order of dismissal. The Commission, however, refused to vacate the judge's order, finding Ace's demands for reparation to be "clearly frivolous." However, the Commission took issue with the judge's statement that there was no reason for the Commission to launch its own investigation into the matters alleged apart from the reparation claim. Accordingly, the Commission stated that "we have this day commenced a separately docketed investigation into Hapag's heavy lift charges and practices in the United Kingdom/U.S. trade," hence the institute of this investigation. See Docket No. 76-5, *Ace Machinery Company v. Hapag Lloyd Aktiengesellschaft,* Order Denying Motion to Vacate, August 4, 1976.[2]

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227(a), Rules of Practice and Procedure, 46 CFR 502.227(a)).

[2] Some time after this action by the Commission, Ace filed a petition for reconsideration attempting to reinstate its complaint, contending that it had corrected some of the earlier defects in its case, such as the fact that it had not paid the freight when it had filed its complaint although it had claimed as reparation not only the amount of the heavy-lift charge involved ($7,719.30) but total freight plus

THE NEED TO CLARIFY THE ORIGINAL ORDER

At a meeting of counsel held in my office on August 27, 1976, the parties expressed difficulties on account of certain areas of the Commission's Order which were subject to different interpretations. Although the paragraphs framing issues in the Order did not always refer to specific subsections of the Act (for example, issue (1) referred to section "16" and issue (4) to sections "16" and "17"), it was apparent from the preamble and context of the Order that sections 16 First and 17, first paragraph, were intended, and I so ruled. See Report of Meeting and Rulings, August 27, 1976. However, in the case of issue (1), where the Commission referred to section "18(b)," it could not be determined whether section 18(b)(1) or 18(b)(5) was intended from the context or otherwise. Accordingly, it became necessary to seek clarification. In order to promote expedition in resolving this problem, I dismissed the particular portion of the paragraph containing the ambiguous statutory reference, thus giving Hearing Counsel an automatic right of appeal to the Commission within 15 days. See Rule 227(b), 46 CFR 502.227(b).[3] Following such appeal, the Commission served its Order of Clarification.

THE COMMISSION'S ORDER OF CLARIFICATION

The Commission served its Order of Clarification on October 4, 1976. It essentially confirmed my interpretation of all issues arising under sections 16 First and 17, first and second paragraphs. It resolved the ambiguity regarding the issue arising under section 18(b) by specifying that the Commission wished to determine whether all respondents had violated section 18(b)(1) of the Act during the period August 4, 1974 through August 20, 1976, and were violating that law at the present time by publishing heavy-lift charges in their tariffs which were not sufficiently definite so as to meet the standards required of tariff publications by that law.[4]

THE ISSUES AS CLARIFIED

As clarified, there are four provisions of the Shipping Act under which various respondents' heavy-lift charges and practices are to be tested. These are section 16 First, section 17, first and second paragraphs, and section 18(b)(1). More specifically, the issues are whether respondents ECLL and the members of NAWFA violated section 18(b)(1) both in the past period cited and the present by

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attorneys' fees and punitive damages, adding up to a claim of $131,215.39. The Commission found, among other things, that Ace had not prosecuted its claim in a timely or conscientious manner and that it would be unfair to Hapag to subject it to further litigation on the question of reparation. See Order in above-cited case, October 7, 1976.

[3] For a full discussion of the problems involved, see Report of Meeting and Rulings, cited above.

[4] As discussed below, the Commission's Order of Clarification also established five paragraphs framing issues (numbered as (1), (1a), (2), (3), and (4) falling under the four different statutory provisions mentioned (sections 16 First, 17, first paragraph, 17, second paragraph, and 18(b)(1) of the Act). They now cover four separate time periods depending upon the particular issue (August 4, 1974 through August 20, 1976, August 4, 1974 through July 9, 1975, August 4, 1971 through August 4, 1976, and the present) and apply sometimes to one respondent, other times to ten or more (i.e., Hapag, Ernst Russ, ECLL, once consisting of Hapag and Russ, now only of Russ, and ten members of NAWFA designated in the appendix to the Commission's original order, as well as additional unspecified carrier members of NAWFA who may have operated under a NAWFA tariff during the period August 4, 1974 through August 20, 1976. (See Order of Clarification, cited above, p. 3, footnote 1.)

publishing heavy-lift charges in an insufficiently definite form;[5] whether respondent Hapag violated section 16 First and section 17, first paragraph, during the period August 4, 1974 through July 9, 1975, by giving undue or unreasonable preferences or advantages or subjecting any person, locality, or traffic to undue or unreasonable prejudice or disadvantage, or by charging discriminatory rates; whether respondent ECLL and any member had engaged in similar practices in violation of section 16 First and section 17, first paragraph, during the period August 4, 1971 through August 4, 1976; and finally, whether respondent ECLL had engaged in unreasonable practices with respect to the receiving, handling, storing, or delivering of property in violation of section 17, second paragraph, of the Act during the period August 4, 1974 through July 9, 1975.

Because of the variety of issues arising under different sections of law, applicable to different respondents, and different periods of time, I established a table in outline form as a convenience to the parties in discussing, litigating, and briefing the issues. In outline form, the issues as framed by the Commission's Order of Clarification are as follows:

ISSUES

Statute	Time Period	Respondents
1.a S. 18(b)(1)	August 4, 1974—August 20, 1976	ECLL and members of NAWFA
b. S. 18(b)(1)	the present	ECLL and members of NAWFA
2.a. S. 16 First S. 17 first paragraph	August 4, 1974—July 9, 1975	Hapag-Lloyd A.G.
b. same	August 4, 1971—August 4, 1976	ECLL and any NAWFA member
3. S. 17, second paragraph	August 4, 1974—July 9, 1975	ECLL

Note: Respondent ECLL consisted of respondents Ernst Russ and Hapag Lloyd prior to December 31, 1975, and solely of Russ after that time. (See Commission's original Order, August 4, 1976, page 2, footnote 4)

DEVELOPMENT OF THE RECORD

Hearing Counsel developed the evidentiary record by means of the discovery procedures provided by the Commission's Rules of Practice and Procedure, 46 CFR 502.201 *et seq*. By means of interrogatories and depositions, Hearing Counsel ascertained relevant facts concerning the heavy-lift provisions and practices under investigation over the time periods specified above. Information concerning the publication of the tariff provisions in issue was obtained and specific details relating to shipments subject to heavy-lift charges was furnished by respondents. After this information was accumulated, Hearing Counsel and

[5] There were two tariff provisions, now deleted from respondents' tariffs, which gave the Commission concern under section 18(b)(1). The first provision, as paraphrased in the original Order, provided that shipments of 50 tons or more would be charged a rate "to be agreed upon." The second provision provided that respondent carriers would have "liberty" to apply a reduction of 10 percent off the freight if a shipper tendered three or more lifts of over 10 tons in one vessel from one port of loading to one port of discharge. See original Order, p. 2.

respondents were able to narrow issues and agree to facts, thereby avoiding the need to conduct a trial-type hearing. Of the various legal issues set forth in the Commission's Order of Clarification, Hearing Counsel and respondents reached agreement on all but one, that concerning the lawfulness of respondents' former tariff provision granting a carrier "liberty" to apply a 10 percent discount on certain types of shipments. This provision had actually been removed from the tariff of respondent NAWFA and its members even before this proceeding commenced and was removed from the tariff of respondent ECLL (Russ) shortly after commencement of the proceeding. Respondents' removal of this provision generated several requests for settlement and discontinuance of this litigation, but under certain conditions. These requests will be discussed in greater detail below.[6]

FACTUAL BACKGROUND

The relevant facts necessary to a determination of the issues which I decided below are undisputed and were offered into evidence by all parties by joint motion. They consist of facts pertaining to the publication, modification, and cancellation of pertinent heavy-lift provisions in respondents' tariffs and detailed facts relating to shipments arrived under the pertinent provisions. They are presented here briefly as a background to my discussion and conclusions regarding the issues.

RESPONDENTS' HEAVY-LIFT TARIFF PROVISIONS

1. NAWFA's tariffs have published a separate scale of heavy-lift charges for cargoes between 5 and 100 tons, later (January 1974) between 5,000 and 100,000 kilos, i.e., 5 and 100 metric tons. Hapag and Russ have similarly published a scale of heavy-lift charges for shipments weighing between 5 and 100 (later 50) tons in the ECLL tariff. Hapag, however, discontinued its participation in the ECLL joint service on December 31, 1975. These heavy-lift charges are additional to those provided under the regular commodity rate section of the tariffs and, as more fully described below, cover extra costs of loading, discharging, securing, etc. The scale of charges per ton or per 1,000 kilos (i.e. per metric ton) increases as the category of weights increases. For example, in the current NAWFA tariff, heavy-lift shipments between 5,000 and 10,000 kilos are assessed $16.50 per 1,000 kilos. However, at the next category (10,000 to 15,000 kilos) the charge is $30.25 per 1,000 kilos.

[6] The Commission's original Order, as mentioned above, had questioned two provisions in respondents' tariffs, one a provision that shipments of 50 tons or more will be charged a "to be agreed upon" rate and the other a provision that "for three or more lifts of over 10 tons in one vessel from one shipper . . . the line[s] have liberty to apply a reduction of 10 percent off the freight." Order, p. 2, footnote 4. Hearing Counsel take no issue as to the lawfulness of the first provision, but contend that the second violates the standards of section 18(b)(1) of the Act. In any event, even at the time the Order was served, the tariff page cited by the Commission shows that no NAWFA carrier had "liberty" to apply the discount and, in addition, NAWFA had converted from "tons" as shown in the Order to "kilos." See NAWFA-FMC Tariff No. 36, Original page 7, effective April 6, 1976, found in Appendix A to the Joint Submission of Stipulated Record and Proposed Findings of Fact, March 18, 1977. Moreover, NAWFA canceled the "to be agreed" provision, effective January 1, 1977. See NAWFA Tariff FMC No. 37 1st Rev. Page 7. Respondent Russ canceled both the "to be agreed" and "liberty" provisions in its tariff, effective September 15, 1976. See Europe Canada Lakes Line Tariff, FMC 3, 1st revised page 31, found in Appendix A to the Joint Stipulation, cited above. Although Russ moved to be dismissed from the proceeding because of these tariff changes, I denied its motion since the Commission's Order of Clarification made clear that the question of past violations was to be determined and that such questions could not be "settled" by the present amendments. See Order of Clarification, p. 3; Motion to Dismiss Respondent Ernst Russ Denied, October 11, 1976.

2. In addition to the graduated scale of charges, there were two special categories of heavy-lift shipments which were treated in a different manner. The first involved shipments over 100 tons (later 100,000 kilos) for NAWFA and shipments over 100 (later 50) tons in the ECLL tariffs. As discussed in the next paragraphs, these oversized heavy-lift shipments had been subject to the "to be agreed" provisions which are under investigation in this proceeding. The second type of special heavy-lift shipment involved three or more lifts of over 10 tons (or later for NAWFA, over 10,000 kilos) tendered by one shipper form one port of loading to one port of discharge. This type of shipment had been subject to a provision giving carriers "liberty" to apply a 10 percent discount, the second provision under investigation in this proceeding. Both the "to be agreed" and "liberty" provisions have been deleted for some time, as described below.

3. From April 4, 1973, through March 28, 1974, Ernst Russ published the following heavy-lift charges in its Europe Canada Lakes Line (ECLL) tariff on file with the Federal Maritime Commission:

a. For pieces and packages over 100 tons, the heavy-lift charge is "to be agreed."

b. "For three or more lifts of over 10 tons in one vessel from one Shipper from one Port of Loading to one Port of Discharge the Lines have liberty to apply a reduction of 10% off the freight."

4. From March 29, 1974, through September 14, 1976, Ernst Russ published the following heavy-lift charges in its Europe Canada Lakes Line (ECLL) tariff on file with the Federal Maritime Commission:

a. For pieces and packages over 50 tons, the heavy-lift charge is "to be agreed."

b. "For three or more lifts of over 10 tons in one vessel from one Shipper from one Port of Loading to one Port of Discharge the Lines have liberty to apply a reduction of 10% off the freight."

5. Effective September 15, 1976, Ernst Russ canceled the charges set forth in paragraph 4 above, and it published specific heavy-lift charges for pieces and packages over 50 tons.

6. From April 4, 1973, through March 28, 1974, Hapag-Lloyd published the following heavy-lift charges in its ECLL tariff on file with the Federal Maritime Commission:

a. For pieces and packages over 100 tons, the heavy-lift charge is "to be agreed."

b. "For three or more lifts of over 10 tons in one vessel from one Shipper from one Port of Loading to one Port of Discharge the Lines have liberty to apply a reduction of 10% off the freight."

7. From March 29, 1974, through December 31, 1975, Hapag-Lloyd published the following heavy-lift charges in its ECLL tariff on file with the Federal Maritime Commission:

a. For pieces and packages over 50 tons, the heavy-lift charge is "to be agreed."

b. "For three or more lifts of over 10 tons in one vessel from one Shipper from one Port of Loading to one Port of Discharge the Lines have liberty to apply a reduction of 10% off the freight."

8. From August 4, 1971, through December 31, 1973, the NAWFA tariff on file with the Federal Maritime Commission provided:

"For three or more lifts of over 10 tons in one vessel from one Shipper from one Port of Loading to one Port of Discharge, the Lines have liberty to apply a reduction of 10% off the freight."

9. From January 1, 1974, through April 5, 1976, the NAWFA tariff on file with the Federal Maritime Commission provided:

"For three or more lifts of over 10,000 kilos in one vessel from one Shipper from one Port of Loading to one Port of Discharge, the Lines have liberty to apply a reduction of 10% off the freight."

10. Effective April 6, 1976, the NAWFA tariff, as shown in paragraph 9 above, was amended to read:

"For three or more lifts of over 10,000 kilos in one vessel from one Shipper from one Port of Loading to one Port of Discharge, the Lines have liberty to apply a reduction of 10% off the freight."

11. From August 4, 1971, through December 31, 1973, the NAWFA tariff on file with the Federal Maritime Commission provided:

For pieces and packages over 100 tons, the heavy-lift charge is "to be agreed."

12. From January 1, 1974, through December 31, 1976, the NAWFA tariff on file with the Federal Maritime Commission provided:

For pieces and packages over 100,000 kilos, the heavy-lift charge is "to be agreed."

13. Effective January 1, 1977, NAWFA published specific heavy-lift charges for pieces and packages over 100,000 kilos.

Facts Relating to Actual Heavy-Lift Shipments

14. During the period August 4, 1974 through July 9, 1975, as framed in the Commission's Order of Clarification, Hapag carried heavy-lift shipments both to the Great Lakes ports and to North Atlantic ports under its ECLL and NAWFA tariffs respectively. The record shows 12 shipments to Lakes ports and 13 shipments to North Atlantic ports. Almost all the shipments were rated under the "Machinery N.O.S." category in the respective tariffs and consisted of different types of machinery and equipment. For example, shipments to the Lakes ports consisted of such items as "Bliss Toledo Knuckle Joint Press," "Horizontal Boring Machine," "Lancer Bass Heavy Duty Side Loader," "Helical Gear Units," "Spindle Bar Automatic Lathe." The weights of each of these shipments varied widely. All were shipped out of Grangemouth, Scotland. Hapag's shipments to North Atlantic ports consisted of different types of machinery and equipment from that shipped to the Lakes, for example, "Mining Machinery," "Milling Machinery," "Sawing Machinery," "Pumping Machinery," "Water Filtering Machinery," and a crankshaft. Again, the weights varied widely. All were shipped out of Greenock, Scotland, except for one shipment out of Felixstowe, England. Shippers and consignees involved in the shipments to the Lakes ports were not the same as those to the North Atlantic ports.

15. Only three shipments moved under the "to be agreed" provisions in both

the ECLL and NAWFA tariffs. Hapag carried a 129,920-lb. transformer and a 184,016-lb. bookbinding machine from Middlesbrough, England, to Detroit and Cleveland in August 1971 and June 1972, respectively. Atlantic Container Line (ACL) carried a 174-ton turbine rotor from Liverpool, England, to New York in February 1975, for which a lump sum total freight of $36,000 was filed before the cargo moved. See NAWFA Tariff No. 34, 3rd revised page 168A.

16. Eleven shipments moved under the "liberty" to apply a 10% discount provision, all under the ECLL tariff. Ten moved on Hapag's vessels and one on a Russ vessel. The items consisted of different types of machinery, mostly moving out of Middlesbrough, England, but some from Grangemouth, Scotland. The machinery consisted of such items as "Rotor Milling Machine and Form Cutter Sharpening Machine," "Crate Machinery," "Cradle Machinery," "P/P Piece Machinery," "Skid Machinery," "offset press," "Cincinnati Press Brake," "water filtering machinery." The shipments varied in weights and different types of cranes were used to handle the shipments. Ports of discharge included Milwaukee, Chicago, and Toledo. On only one occasion was the 10% discount applied, to a unique shipment of five cases of water filtering machinery packaged in five cases, moving from Grangemouth, Scotland, to Chicago in July 1974. The shipper and consignee were similarly unrelated to other shippers and consignees involved in the other 10 shipments. The shipper was "Crane Ltd." and the consignee, "Crane Co., Cochrane Div.," located in King of Prussia, Pennsylvania. None of the 11 shipments moved in containers.

17. The record contains the testimony in deposition form of Mr. Donald Wierda and Captain Peter Richters, both officers of U.S. Navigation Company, general agents of numerous carriers including Hapag, serving North Atlantic and Great Lakes ports, having 30 and 22-years' experience, respectively. These gentlemen described the handling characteristics of heavy-lift shipments. Heavy-lift charges are designed to cover extra costs incurred by the vessel in loading and unloading oversized shipments and in securing these shipments on board the vessel. Because of the nature of these oversized shipments, ongoing attention is given them during the voyage to insure that the shipment will not move around during the voyage. Care must be taken to stow the shipment in a proper part of the ship, such as center lower hold and to maintain ship's stability. Heavy-lift shipments can be unloaded by ship's own gear (boom or derrick) but on some occaslons, such as when the cargo cannot be reached by the ship's gear or the gear is not operating properly, shoreside cranes furnished by the carrier's stevedore are utilized. Heavy-lift shipments are tendered to the carrier in various ways. They can be tendered in a packaged or unpackaged form and in awkward shapes for loading. Some types of heavy-lift cargo, such as machinery, have normally been packaged in order to protect it. Packaging of these shipments is the responsibility of the shipper, not the carrier, and movement beyond ship's tackle on either end of the voyage is likewise for the account of the shipper, not the carrier. Heavy-lift charges, accordingly, are considered to be part of the line-haul transportation service performed by the carrier separate and apart from any handling, packaging, or storing performed at terminals beyond ship's tackle. Such is the understanding regarding berth term, i.e., tackle-to-tackle, service performed in connection with heavy-lift shipments involved in this case.

DISCUSSION AND CONCLUSION

The following discussion of the issues conforms to the outline set forth above except that the unresolved issue concerning respondents' former "liberty" provision will be discussed last.

The "To Be Agreed" Provision—Section 18(b)(1)

The Commission's original Order stated that at least since August 1974, the tariffs of respondent NAWFA and ECLL have provided that shipments of 50 tons or more will be charged a "to be agreed upon" rate. The Commission questioned the lawfulness of such provisions, stating that section 18(b)(1) of the Act "has long been construed to require an exact statement of all applicable tariff charges, without the possibility of discretionary judgments by the carriers" and that "[t]he purpose of section 18(b) is to provide the public with advance notice of the rates certain to be charged and which will be charged equally to all shippers for the same services." Order, p. 3.[7] The Commission, therefore, raised the issue as to whether such provisions informed shippers of the exact charges as may be required by section 18(b)(1). In its Order of Clarification the Commission amplified the issue to determine whether the tariff provisions were "sufficiently definite" and whether respondents had violated section 18(b)(1) by operating "without filing tariffs which plainly and precisely stated the heavy lift charges to be assessed by them. . . ." Order of Clarification, p. 4. The Commission included ECLL and members of NAWFA, both for the period August 4, 1974, through August 30, 1976, and for the present. As mentioned, this provision has been canceled by all respondents. Respondent Russ (the only member of ECLL after December 31, 1975) canceled effective September 15, 1976. Respondent NAWFA canceled effective January 1, 1977. On and after those dates, respondent ECLL (Russ) and NAWFA applied a scale of specific heavy-lift charges for cargo over 50 tons and 100,000 kilos respectively.[8]

Hearing Counsel urge no finding of violation of section 18(b)(1) as regards this provision. They concede that section 18(b)(1) has been construed to require an exact statement of all applicable tariff charges so as to exclude the possibility of discretionary judgments by the carriers, referring to the Commission's original Order, but contend that common sense indicates that that law "cannot mean that carriers must maintain filed rates on every imaginable tariff item." (Hearing Counsel's Memorandum of Law, p. 3.) They argue that section 18(b)(1) is satisfied when a commodity is to be carried if a carrier files an exact and certain rate leaving no room for discretionary judgment. Since heavy-lift shipments over 50 tons (or 100,000 kilos) are relatively rare on non-specialized ships, carriers ought to be allowed to negotiate rates prior to shipment, as has been done in the past, so long as the carriers thereupon file such rates. Hearing

[7] The Commission cited two cases regarding the question of exactitude of statements and carriers' discretion, namely, *Eastbound Intercoastal Rates on Squash Seed*, 1 U.S.S.B.B. 355 (1935) and *Sea-Land Service, Inc v. TMT Trailer Ferry, Inc.*, 10 F.M.C. 395, 399 (1967).

[8] The ECLL (Russ) tariff now provides that for pieces or packages over 50 tons "add 3.75£ W for every 5 tons in excess of 50 tons or fraction thereof." ECLL Tariff F.M.C.-3, 1st Rev. Page 31. NAWFA's tariff provides that for pieces and packages over 100,000 kilos "add $2.00 for each additional 5,000 kilos or part thereof." NAWFA Tariff (F.M.C. No. 37), 1st Rev. Page 7. A "kilo" or kilogram equals 2.2046 lbs.; 1,000 kilos, a metric ton, is therefore 2,204.6 lbs., or approximately one long ton; 100,000 kilos is therefore 100 metric tons or roughly 100 long tons.

Counsel cite *United States v. Columbia Steamship Co., Inc.*, 17 F.M.C. 8, 9 (1973), adopting with approval that portion of the presiding judge's initial decision holding that prior agreement as to rate is lawful provided that the agreed rate is filed prior to shipment. (13 SRR 733, 738.) Whether to negotiate a rate prior to booking and file the rate or to establish a scale of rates, as respondents have now chosen to do, is, argue Hearing Counsel, a business judgment best made by the carriers themselves.

Not surprisingly, respondents agree with Hearing Counsel. They add that it is impractical for carriers to quote specific rates for every imaginable service especially when, as here, the commodity is so extraordinary as to move rarely. For such reasons, carriers often usually publish N.O.S. rates. This technique also enables carriers, when they do negotiate a rate on any item, to establish a rate that reflects current market conditions.

Whatever the requirements of section 18(b) may be with respect to exactitude and prevention of discrimination among shippers, the arguments of the parties that prior negotiation of rates with subsequent filing does no violence to the letter or purpose of section 18(b)(1) I find to be valid. The publication of an exact agreed-upon rate in a tariff certainly prevents discrimination among shippers since all shippers of the commodity concerned could enjoy the published rate. There is furthermore no evidence presented in this record that carriers using this infrequently applied and now canceled provision of the tariff have failed to file an agreed-upon rate.

As I discuss later, the underlying purpose of section 18(b)(1), as with all tariff-filing statutes, is to prevent discrimination among shippers and enable shippers to determine their costs of transportation. These purposes, however, are not defeated if a shipper and carrier wish to negotiate a fair and reasonable rate when there is no suitable rate published in the carrier's tariff.

The case of *United States v. Columbia S.S. Company*, cited by Hearing Counsel, is informative. In that case, the shipper desired to ship unboxed trucks on the carrier's vessel. The carrier had no specific rate for this item in its tariff at the time of negotiation. After the parties agreed upon a rate, the carrier filed a specific rate but by error filed a rate lower than that agreed. Nevertheless, the carrier charged the higher rate previously agreed upon. The shipper sued on the basis of the lower published rate which had been erroneously filed. Although the Commission found a violation of section 18(b)(3) because the carrier had charged a higher rate than that on file, it refused to award reparation on equitable grounds, considering that the shipper had reneged on its agreement. 17 F.M.C. at p. 10. For purposes of this present case, the significant fact is that the violation was not caused by the fact that the shipper and carrier had negotiated and agreed upon a rate at a time when no specific rate was published in the carrier's tariff. Indeed, such a practice was specifically found not to be unlawful in the words of the presiding judge which were adopted by the Commission as follows:

> The Act does not prohibit agreements between shippers and carriers provided that, prior to shipment, a rate is filed in accordance with the agreement, which rate is available to all shippers. 17 F.M.C. at p. 19.

There are numerous examples of tariff-filing practices which have developed during the years in which negotiations between shippers and carriers have

become an accepted custom provided that the specific rates are eventually filed with the Commission. For example, it is customary for the Military Sealift Command to request proposals from American-flag carriers who bid for the carriage of military goods. The lowest bid is generally accepted by MSC and the rate filed. This system is sanctioned by the Commission's regulations. *See* 46 CFR 536.14; *North Atlantic Mediterranean Freight Conference,* 11 F.M.C. 202, 203 (1967); *Regulations Governing Level of Military Rates,* 13 SRR 411 (1972). No one has contended, as far as I am aware, that the absence of the rate in the carriers' tariffs at the time of negotiation is in violation of 18(b)(1).

A similar custom is found in the area of "cargo N.O.S." rates. Numerous carriers file tariffs containing "cargo N.O.S." (not otherwise specified) rates usually fixed at rather high levels. These rates are sometimes applied to actual shipments, but very often they merely serve as a means for the carriers to negotiate a lower rate with shippers, which rate is then filed effective immediately. *Cf. Investigation of Ocean Rate Structure,* 12 F.M.C. 34, 45–46, 63–64 (1968); *Disposition of Container Marine Lines,* 11 F.M.C. 476, 484 (1968); 46 CFR 536.5(j).

Other examples abound. For instance, there is the open-rate custom among conferences in which, to meet outside competition or for some other reason, the conferences vote to open rates, i.e., to allow each member carrier to negotiate and file its own rates on the commodity concerned. The conferences' tariffs are not held in violation of section 18(b)(1) because they do not specify in their conferences' tariff page any particular conference rate. Indeed, sometimes the Commission itself has ordered conferences to open rates. *See, Imposition of Surcharge by the Far East Conference,* 9 F.M.C. 129 (1965). Of course, if any member wishes to carry the commodity, it must file the specific rate on which the parties have agreed. See 46 CFR 536.5(n); 536.5(c). A variation of this practice involves discretion granted to members of conferences facing outside competition at particular ports who are permitted to depart from the regular conference rate and file lower rates after negotiation with shippers. *See Rejection of Tariff Filings of Sea-Land Service, Inc.,* 13 F.M.C. 200, 202 (1970).

In some instances, discussed at greater length below, carriers' tariffs may not even specify charges to be applied in the event of extraordinary external events which prevent the carriers from carrying out their obligations and necessitate extra services. *See Overseas Freight and Terminal Corp. (All Cargo Line)–Extra Charges Due to Delay in Unloading Caused by Longshoremen Strike,* 8 F.M.C. 435 (1965), affirmed, *sub. nom. International Packers, Ltd. v. F.M.C.,* 356 F.2d 808 (D.C. Cir. 1966); *Leavell & Co. v. Hellenic Lines, Ltd.,* 13 F.M.C. 76 (1969).

Finally, if it has not already been established that prior negotiation by shippers and carriers is perfectly lawful, even if the carriers' tariff does not contain the rate ultimately agreed upon at the time of negotiation, one can consider the innumerable special docket cases arising under section 18(b)(3). *See* 46 CFR 502.92. In these cases, shippers and carriers usually agree upon a rate for a specific shipment, but the carrier inadvertently fails to file the conforming rate in the tariff. Prior to the amendment of section 18(b)(3) in 1968, no relief could be granted in shipments moving in foreign commerce because of the requirement of

strict adherence to filed tariff rates. *See* discussion in *United States v. Columbia S.S. Company,* cited above, 17 F.M.C. at pp. 19, 20. Section 18(b)(3), however, was amended by Public Law 90–298 to relax the inequitable situation. The legislative history of the amendment shows no intention of upsetting the custom of permitting shippers and carriers to negotiate rates when whatever rates published in the carriers' tariffs at the time of negotiation are deemed unacceptable to the shipper. On the contrary, the legislative history acknowledged the practice of prior negotiations and gave the Commission authority to effectuate the results of such negotiations by permitting corrected tariff filings to be applied retroactively. *See House Report No. 920* (90th Cong. 1st Sess.), November 14, 1967, pp. 3, 4; *Senate Report No. 1078* (90th Cong. 2d Sess.), April 5, 1968.

Accordingly, I find that the provisions which formerly appeared in the tariffs of respondents ECLL and NAWFA stating that for pieces or packages over 50 tons (ECLL) or over 100,000 kilos (NAWFA) the rates were "to be agreed" merely constituted offers to negotiate an acceptable rate and absent a showing on this record that carriers failed to file whatever rates were negotiated, such provisions did not violate section 18(b)(1) of the Act.

Illegal Preference, Prejudice, or Discrimination—
Sections 16 First; 17, First Paragraph

As amended by the Commission's Order of Clarification, the Commission wishes to determine whether respondent Hapag violated section 16 First of the Act or section 17, first paragraph, during the period August 4, 1974, through July 9, 1975, by charging disparate heavy-lift charges between "England" and U.S. North Atlantic ports and "England" and U.S. Great Lakes ports. The Commission also wishes to determine whether respondent ECLL or any member of NAWFA has also violated these laws during the period August 4, 1971 through August 4, 1976, by offering or accepting different heavy-lift charges for similar services from different shippers either under the "to be agreed" provision discussed above or the "liberty" to apply a 10% discount tariff provision which was in effect during that period of time. Section 16 First of the Act prohibits a common carrier by water from making or giving 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, etc., to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Section 17, first paragraph, forbids common carriers by water from demanding, charging, or collecting any rate, fare, or charge which is unjustly discriminatory between shippers or ports.

Hearing Counsel take the position that no findings of violation of either section of law can be made on this record. They argue that the prejudice or discrimination must be shown to be undue or unjust, that the discrimination must further be shown to have caused injury to the disadvantaged, and that there must be a competitive relationship between the advantaged and disadvantaged. Cited for these propositions are *Port of New York Authority v. Ab Svenska,* 4 F.M.B. 202, 205 (1953); *Philadelphia Ocean Traffic Bureau v. Export S.S. Corporation,* 1 U.S.S.B.B. 538, 541 (1936); *Port of Houston Authority v. Lykes Brothers Steamship Company,* 19 F.M.C. 192 (1976); and *Nickey Brothers, Inc., v.*

Associated Steamship Lines (Manila Conference), 5 F.M.B. 467, 476-477 (1958). They argue furthermore that a section 16 violation requires two or more competing shippers or localities receiving different treatment not justified by differences in competitive or transportation services, citing *North Atlantic Mediterranean Freight Conference–Rates on Household Goods*, 11 F.M.C. 202, 209 (1967), reversed on other grounds *sub. nom. American Export Isbrandtsen Lines, Inc., v. F.M.C.*, 409 F.2d 1258 (2 Cir. 1969), and *Valley Evaporation Co. v. Grace Lines, Inc.*, 14 F.M.C. 16, 21 (1970). For a section 17 violation, they argue 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, citing the *Household Goods* case, cited above, at p. 213.

Hearing Counsel acknowledge that during the period August 4, 1974, through July 9, 1975, Hapag quoted heavy-lift rates to Great Lakes ports in it ECLL tariff which were considerably higher than such rates quoted to North Atlantic ports in its NAWFA tariff. However, Hearing Counsel point to evidence of record showing that the commodities actually carried to Great Lakes ports via Hapag were not similar to commodities carried by Hapag to North Atlantic ports and a lack of competitive relationship necessary for a finding of violation of section 16 First. Furthermore, argue Hearing Counsel, the heavy-lift commodities actually carried were not similar, the actual shipments varied in size and weight and were carried on different types of ships (container vs. breakbulk) using different heavy-lift equipment, and the shipments originated in and terminated at different places. Therefore, Hearing Counsel contend that the record will not support a finding that Hapag violated either sections 16 First or 17, first paragraph.

As to possible violations of sections 16 First or 17, first paragraph, by respondents ECLL or members of NAWFA during the five-year period cited above, under either the "to be agreed" or "liberty" to apply a 10% discount provision, Hearing Counsel submit that the record shows no facts which would support findings of such violations. They contend, and I so find, that the record shows that only three shipments occurred under the "to be agreed" tariff provisions of any respondent. Respondent Hapag (as ECLL) carried two of them, a 129,920-pound transformer from Middlesbrough, England, to Detroit in August 1971, and a 184,016-pound bookbinding machine from Middlesbrough, England, to Cleveland in June 1972. Respondent Atlantic Container Line (a member of NAWFA) carried the other shipment, a 174-ton turbine rotor in February 1975 from Liverpool, England, to New York. These shipments are dissimilar as to commodities and ports. Under the "liberty" to apply a 10% discount provision, Hearing Counsel cite evidence that only respondent Hapag has carried more than one applicable shipment, having carried 10 shipments pursuant to the subject provision in which only one actually obtained the discount.[9] The shipment afforded the discount consisted of five cases of water filtering equipment weighing 10.5 tons per case, shipped from Grangemouth,

[9] Actually, as noted above, Hapag carried these 10 shipments as ECLL, and Russ carried one such shipment under the ECLL tariff, a total of 11 shipments. No discount was granted to the Russ shipment; therefore, only one shipment out of 11 was granted the discount under the ECLL tariff according to the evidence presented.

Scotland, to Chicago, in July of 1974. The other nine shipments consisted of various types of machinery other than water filtering machinery, eight of which were shipped from Middlesbrough, England, to Midwest destinations, none shipped later than November 1973. The ninth shipment consisted of three canvas-covered "Cincinnati Press Brakes" of 15.3 tons each carried from Grangemouth to Toledo, Ohio, in November 1973. Hearing Counsel again argue that competing shippers were not involved, as required for a finding of violation of section 16 First and that the shipments were not "the same traffic over the same line between the same points under the same circumstances and conditions," as required for a finding of unjust discrimination under section 17, first paragraph. As to the two shipments moving out of Grangemouth (five cases of water filtering equipment, 10.5 tons per case; three canvas-covered "Cincinnati Press Brakes" of 15.3 tons each), Hearing Counsel point to different handling characteristics inherent in shipments of five boxed articles of equipment compared to three large, unboxed presses.

Again, not surprisingly, respondents agree with Hearing Counsel's arguments and emphasize that the facts of record show that the applicable heavy-lift provisions were not applied in a manner having unlawfully prejudicial or discriminatory results.

Applicable Principles of Law

In arguing that no violations of sections 16 First or 17, first paragraph, can be found on this record, Hearing Counsel emphasize that case law establishes that some degree of comparability or competition must be shown, among other things, factors which are not shown on this record. Under sections 16 First or 17, first paragraph, it has long been held that prejudice is not unlawful unless facts show it to be undue or unreasonable nor discrimination unlawful unless shown to be unjust. *See, e.g. Port of Houston Authority v. Lykes Bros.*, 19 F.M.C. 192, 199 (1976) and the many cases cited therein; *A.P. St. Philip, Inc., v. Atlantic Land & Improvement Co.*, 13 F.M.C. 166, 174 (1969); *Agreements Nos. T-2108 and T-2108-A*, 12 F.M.C. 110, 122 (1964). The Commission has further emphasized that "the existence of unjust discrimination or prejudice must be demonstrated by substantial proof." *Port of Houston Authority v. Lykes Bros.*, cited above, at p. 199 citing *Philadelphia Ocean Traffic Bureau v. Export S.S. Corporation*, 1 U.S.S.B.B. 538, 541 (1936), and *Lake Charles Harbor and Terminal District v. Port of Beaumont Navigation District*, 12 F.M.C. 244, 248 (1969). Furthermore, to establish a case of violation of these laws, the Commission has said that here must be a "definite showing" of specific effect on the flow of traffic involved and an existing and effective competitive relation between the prejudiced and preferred shippers, localities, or commodities. *Port of Houston Authority v. Lykes Bros.*, cited above, at p. 200, citing *Philadelphia Ocean Traffic Bureau v. Export S.S. Corporation*, cited above, at p. 541.

The Commission has consistently reiterated these principles. In *Nickey Brothers, Inc., v. Manila Conference*, 5 F.M.B. 467, 476–477 (1958), the Commission stated:

> In order to sustain the charge of unjust discrimination, under these provisions of the Shipping Act, complainant must prove (1) that the preferred port, cargo, or shipper is actually competitive with the

complainant, (2) that the discrimination complained of is the proximate cause of injury to complainant, and (3) that such discrimination is undue, unreasonable, or unjust. [Citations omitted.]

Also in this regard, the Commission stated in *Surcharge on Cargo to Manila*, 8 F.M.C. 395, 400 (1965):

There can be no undue or unreasonable preference or advantage to one and no undue or unreasonable prejudice to another "person, locality, or description of traffic" absent a real competitive relationship between the one advantaged and the one disadvantaged . . . . [Citations omitted.] In order to demonstrate unjust discrimination[10] and undue prejudice, the evidence must disclose an existing and effective competitive relation between the prejudiced and preferred shipper, localities or commodities . . . . [Citation omitted.] Prejudice to one shipper to be unjust must ordinarily be such that it constitutes a source of positive advantage to another . . . . [Citation omitted.] The competitive relationship is necessary not only to show the extent to which the complaining shipper was damaged by the alleged preference, prejudice or discrimination; its establishment is also necessary to prove the violation itself . . . . [Citation omitted.]

In *North Atlantic Mediterranean Freight Conference–Rates on Household Goods,* cited above, the Commission discussed these principles at great length and for the first time distinguished between undue preference, prejudice, etc., arising under section 16 First and unjust discrimination under section 17, first paragraph.[11] The Commission found these provisions of the Shipping Act to be derived from corresponding sections of the Interstate Commerce Act (ICA) (section 3(1) and section 2 respectively). Significantly, the requirement that one show a competitive relationship to prove a case of unjust discrimination under section 17 was eliminated. The Commission summed up the distinctions between sections 17 and 16 as follows:

To constitute unjust discrimination [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. In such a case it is immaterial that the shippers are not in competition with each other. Where the service is different—e.g., different commodities—or the transportation is between different localities, it is a case of undue or unreasonable preference or prejudice [section 16 First] unless the many relevant considerations render the different rates reasonable. Ordinarily, the shippers involved must be competitors. 11 F.M.C. at p. 213.

Elsewhere the Commission further explained these principles. Thus, a carrier unjustly discriminates among shippers if it charges different rates although providing "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. . . ." 11 F.M.C. at p. 211. However, in the case of undue or unreasonable preference or prejudice, i.e., a section 16 First violation (section 3(1) of the ICA), one needs to show "two or more competing shippers or localities receiving different treatment which is not justified by differences in competitive or transportation conditions." 11 F.M.C. at p. 209. "[T]he allegedly preferred shipper must ordinarily

[10] As discussed below, this holding regarding the need to show a competitive relationship in cases involving unjust discrimination under section 17 has been modified so as to eliminate that particular requirement. See *North Atlantic Mediterranean Conference–Rates on Household Goods,* 11 F.M.C. 202 (1967), reversed on other grounds *sub. nom. American Export Isbrandtsen Lines v. F.M.C.*, 409 F.2d 1258 (2 Cir. 1969). In certain limited circumstances, also discussed below, this requirement has been relaxed even in cases involving undue prejudice under section 16 First.

[11] In reversing this decision of the Commission, the Court of Appeals did not disturb the thorough discussion of the principles of law discussed by the Commission. The Court reversed because it believed that the facts of the case did not establish that respondent carriers were responsible for the discriminatory rates involved. The Court found fault with the shipper alleging discrimination for not seeking more favorable treatment in a diligent fashion. *See* American Export Isbrandtsen Lines, Inc., v. F.M.C., 409 F.2d 1258 (2 Cir. 1969). For a recent decision requiring a showing of similar commodities under section 17, 20 F.M.C. 496 (1977), *Household Goods Forwarders Assoc. v. American Export Lines, Inc.*

be in competition with the allegedly prejudiced shipper." 11 F.M.C. at p. 210. This is because sections 16 First and 3(1) are designed "to prevent unlawful favoritism among competitors in the same marketplace . . . . " 11 F.M.C. at p. 210. A "mere showing of lower rates between competing shippers" does not make out a case of undue prejudice. 11 F.M.C. at p. 210. Many factors may justify a difference in rates, such as cost of the respective services, values of such services, or other transportation conditions, fair interest of the carrier, relative quantities of the traffic moved, situations and circumstances of the respective customers, relative distances, competition from another carrier at the allegedly preferred point of destination or origin, etc. 11 F.M.C. at p. 210.

With this legal background in mind, it is understandable why Hearing Counsel do not contend that findings of violations of sections 16 First or 17 can be made. The first of the issues arising under those laws concerns whether respondent Hapag violated those laws by maintaining disparate rates during the period August 4, 1974, and July 9, 1975. During that period of time, Hapag's heavy-lift charges were considerably higher in movements from English ports to Great Lakes ports under its ECLL tariff than from English ports to North Atlantic ports under its NAWFA tariff. (These charges have since been reduced by ECLL.)[12] The mere fact that rates were lower to Great Lakes ports than to North Atlantic ports, however, does not establish a case of undue or unreasonable prejudice, preference or advantage, as discussed above. *North Atlantic Mediterranean Freight Conference*, 11 F.M.C. at p. 210. As Hearing Counsel point out, the heavy-lift shipments involved dissimilar commodities and no showing of competitive relationship. Originating and destination ports differ and there is no showing that Great Lakes ports were competing with North Atlantic ports for the particular oversized commodities which moved under heavy-lift provisions of the tariffs or that the shippers were competitors. There is no "substantial proof" nor "definite showing" of competition and effects on movement which, according to the case law discussed above, is required. This is not surprising considering the relatively unusual nature of heavy-lift items shown by the evidence, e.g., a 129,920-pound transformer, a 184,016-pound bookbinding machine, water filtering equipment weighing 10.5 tons per case, "Cincinnati Press Brakes," a 174-ton turbine rotor, etc. Hearing Counsel submit no evidence nor do they contend that there was favoritism among competitors in the same marketplace, something which a law like Section 16 First is intended to prevent, as the Commission has stated. Not having profferred any such evidence, there is no need to examine whether there are factors which might have explained the large disparity in Hapag's heavy-lift charges which existed during the time period framed in the Commission's Order, among which could have been different conditions prevailing as between Great Lakes and North Atlantic ports with respect to handling of heavy-lift shipments.

For similar reasons, Hearing Counsel do not contend that Hapag has unjustly discriminated between shippers or ports in violation of section 17, first para-

[12] According to the tariffs shown in the record, effective March 29, 1974, ECLL's (i. e. Hapag and Russ) heavy-lift charges ranged *from* £15.00 W for packages between 5 and 10 tons to £103.00 for packages between 45 and 50 tons. However, at least by September 15, 1976, the comparable charges were only £12.00 W and £51.75 W respectively To cite one example of the reduction, for packages between 35 and 40 tons, the charge had been £81.00 W but has been reduced to £44 25 W See ECLL Tariff No. 2 (F.M.C 17), Original page 31 and ECLL (Ernst Russ) Tariff No 1 (F.M.C 3), 1st Rev Page 31.

graph. There has been no showing of two shippers moving *like* traffic over the same line between the same points under the same circumstances and conditions. On the contrary, the shippers, commodities, and ports were different. In this particular issue, of course, the destination ports are not the same (Great Lakes vis-a-vis North Atlantic ports) and even if that fact alone were not enough to remove section 17 from consideration, there is no evidence that conditions at Great Lakes and North Atlantic ports are the same or substantially similar. On the contrary, the evidence suggests that ports vary with respect to equipment and conditions as regards the handling of heavy-lift shipments.

The present case is, therefore, quite unlike a situation in which a carrier imposes a higher charge at one port than at another without just cause, the ports and shippers are competitive, and the commodities are similar. In such cases, the Commission has not hesitated in finding unjust discrimination between ports and undue prejudice between exporters of the United States and their foreign competitors. *See Surcharge on Cargo to Manila,* 8 F.M.C. 395, 401–402 (1965); *Imposition of Surcharge by the Far East Conference,* 9 F.M.C. 129, 130–132 (1965). Although, in those cases, the Commission seems to have confused some of the distinctions between discrimination and prejudice which it later unravelled in the *North Atlantic Mediterranean Conference* case, cited above, the Commission made clear findings of competitive relationships, identity of commodities (newsprint) and similar transportation conditions between the ports in these cases, all of which factors are lacking on this record.

Accordingly, I find no evidence to sustain a finding that respondent Hapag violated sections 16 First or 17, first paragraph, when it maintained higher heavy-lift charges from English ports to Great Lakes ports than to North Atlantic ports during the period August 4, 1974, through July 9, 1975.[13]

The second of the two issues framed by the Commission under sections 16 First and 17, first paragraph, concerns whether all respondents (ECLL and its members and NAWFA and its members) violated those provisions of law during the period August 4, 1971 through August 4, 1976, in the use of two heavy-lift tariff provisions, i.e., rates on lifts over 50 tons, etc., "to be agreed" and the carrier's having "liberty" to apply a 10% discount to three or more lifts of 10 tons or 10,000 kilos. More specifically, the Commission questions whether these respondents have "offered or accepted different heavy-lift charges for similar services from different shippers." As in the case of the issue pertaining to Hapag's disparate heavy-lift charges, the evidence presented by Hearing Counsel again shows lack of competitive relationships, similarity of commodities or transportation conditions, making it impossible to sustain a finding of undue or unreasonable prejudice under section 16 First or unjust discrimination under section 17, first paragraph.

[13] The issue such as the one discussed concerning rate disparities has usually been litigated under section 18(b)(5) of the Act to determine whether a higher rate should be disapproved because it is "so unreasonably high . . . as to be detrimental to the commerce of the United States." 46 U.S.C. 817(b)(5). *See, e.g., Investigation of Ocean Rates Structures,* 12 F.M.C. 34 (1968); *Iron and Steel Rates, Export-Import,* 9 F.M.C. 180 (1965); *Outbound Rates Affecting Export–Hight Pressure Boilers,* 9 F.M.C. 441 (1966). In such cases it could be found that a high rate, unjustified by costs, which impeded movement of traffic should be disapproved. Even in such cases, however, the comparison with lower rates referred to rates on similar commodities in trades having similar transportation conditions. In any event, the Commission made clear that section 18(b)(5) is not involved in this case and, indeed, since the higher charges in question have been reduced, section 18(b)(5), which applies to rates currently on file and acts prospectively, could not be invoked against those canceled charges. *Cf. Commodity Credit Corporation v. American Export Lines, Inc.,* 15 F.M.C. 171, 191 (1972); *Federal Maritime Commission v. Caragher,* 364 F.2d 709. 717 (2 Cir. 1966).

During the entire five-year period specified by the Commission, the evidence shows only three shipments in which the "to be agreed" provision was applied. Respondent ACL carried a 174-ton turbine rotor in February 1975, from Liverpool, England, to New York, and respondent Hapag carried one shipment consisting of a 129,920-pound transformer from Middlesbrough, England, to Detroit in August 1971 and another shipment consisting of a 184,016-pound bookbinding machine from Middlesbrough to Cleveland in June 1972. These are, of course, three quite different types of commodities involving different ports. There is no showing that conditions at these ports were similar much less that there was competition among the shippers or the ports concerned for these types of articles. Without a showing of competitive relationships among shippers, commodities, or ports, favoritism in the marketplace, preference to one shipper or port and disadvantage to another, etc., I cannot find a violation of section 16 First. Similarly, there is no evidence regarding these three shipments showing like traffic moving over the same line between the same points under the same circumstances and conditions. Indeed, considering the significant differences in types of commodities shipped and the special handling necessary for each shipment, the evidence would suggest rather different services provided. Accordingly, no finding of violation of section 17, first paragraph, can be made on this record.

As to the tariff provision regarding the carrier's "liberty" to apply a 10% discount, the evidence presented by Hearing Counsel shows that ECLL carried 11 shipments subject to that provision, 10 on a Hapag vessel and one on a Russ vessel. The discount was granted on only one of the 11 shipments, as Hearing Counsel noted earlier, by Hapag on a shipment of five cases of water filtering machinery carried on July 7, 1974, from Grangemouth, Scotland, to Chicago. There is no evidence presented that any shipments subject to this particular tariff provision were carried by any NAWFA member during the applicable period of time.

The particular shipment on which the discount was granted bears no resemblance to the other 10 shipments either in type of commodity, packaging or handling characteristics. The shippers and consignees are different and there is no showing that they are competitive. Ports of origin and destination vary as well. The discounted shipment consisted of five cases of water filtering machinery, weighing 10.5 tons per case. The shipper was a company called "Crane Ltd." and the consignee a company called "Crane Co., Cochrane Div.," located in King of Prussia, Pennsylvania. The other shipments consisted of various types of machinery, such as "crate machinery," "cradle machinery," "P/P Piece Machinery," "Skid Machinery," "offset press," "Cincinnati Press Brake," and "Rotor Milling Machine and Form Cutter Sharpening Machine." (See Appendix C to Stipulation, last two pages.) The shippers and consignees of the other 10 shipments are all different from those involved in the shipment receiving the discount and in only one instance involving a shipment by Russ of 5 cases of a "Rotor Milling Machine and Form Cutter Sharpening Machine" carried on July 17, 1976, were the ports of origin and destination repeated (Grangemouth, Scotland to Chicago). Furthermore, different equipment was generally employed on the 11 shipments (e.g., a "Lima 200-ton Crawler Crane" on seven

shipments, a "Lucas Crane" on another, a shore crane on two others, etc.). Sometimes the shipments were in cases or crates, sometimes covered by canvas and the weights all varied substantially. It is, therefore, impossible on the basis of this evidence to find that competing shippers or ports are involved or that there was favoritism practiced in the marketplace because of the one discounted shipment or that the services provided to each shipper or traffic handled were substantially similar. Absent all of these factors, as applicable case law shows, I cannot find a violation of either section 16 First or 17, first paragraph, in connection with respondent ECLL's application of the discount provision formerly published in its tariff.[14]

The "Reasonable Practices" Issue—Section 17, Second Paragraph

Under this issue, the Commission wishes to determine whether respondent ECLL has engaged in unreasonable practices with respect to the receiving, handling, storing, or delivering of property in violation of section 17, second paragraph, during the period August 4, 1974 through July 9, 1975. In its original Order, the Commission explained that the subject heavy-lift charges "may have been so high as to have been unreasonable within the meaning of section 17," but this might be so "to the extent a heavy lift charge is a charge for 'receiving, handling, storing, or delivery of property' . . ." (Order, p. 2). The Order of Clarification made no change in this issue. The Commission, therefore, acknowledges that application of this section of law depends upon whether the subject heavy-lift charges can be construed to be the type of regulation or practice contemplated by the second paragraph of section 17 which states:

> Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing or delivering of property . . . . 46 U.S.C. 816.

As Hearing Counsel correctly state, therefore, it is necessary to determine at the threshold whether the ECLL heavy-lift charge in issue can be construed to fall within the purview of this particular provision of section 17.

Hearing Counsel contend that the Commission had established that the type of practice covered by this particular law does not relate to tackle-to-tackle ocean freight service, i.e., line-haul transportation, but instead refers to so-called terminal services. Terminal services are such activities as carloading and unloading, handling of cargo from place of rest to ship's tackle and the reverse, and free

[14] I am aware of the fact that in some cases arising under section 16 First, the Commission has relaxed the requirement that a competitive relationship be shown between shippers. The Supreme Court had noted some of these cases in *Volkswagenwerk v. Federal Maritime Commission*, 390 U.S. 261, 279–280 (1968). The Court was quick to point out, however, that the cases were those "not involving freight rates and the particularized economics that result from a vessel's finite cargo capacity. . . ." (390 U.S. at p. 280.) The cases actually concerned terminal-type services, such as storage, free time, and also freight forwarders' fees, i.e., services applied across the board regardless of type of cargo. See cases cited by the Court and *Violations of Secs. 14, 16, and 17, Shipping Act, 1916*, 15 F.M.C. 92, 98 (1972), a case involving a fuel surcharge, in which the Commission noted that the type of charge involved "is not geared to either transportation factors of the differing characteristics of commodities since it is imposed . . . regardless of the commodity or the length of the voyage." *Id.*, at p. 98. *See also Commodity Credit Corp. v. Lykes Bros. S.S. Co., 18 F.M.C. 50, 54 (1974) and Commodity Credit Corp. v. American Export Isbrandtsen*, 15 F.M.C. 171, 190 (1972), in which the presiding judge observed that the noncompetitive relationship cases did not concern freight rates for transportation by sea. This background explains why *Valley Evaporating Co. v. Grace Line, Inc.*, 14 F.M.C. 16 (1970) and *General Mills, Inc., v. State of Hawaii*, 14 F.M.C. 1 (1973), where no competitive relationship was found necessary under section 16 First, are inapposite. As the Commission stated in *Commodity Credit Corp. v. Lykes Bros. S.S. Co., Inc.*, cited above, *Valley Evaporating* (and by analogy *General Mills*) did not involve characteristics inherent in particular commodities. Heavy-lift cargoes, of course, are unavoidably concerned with peculiar handling characteristics, a vessel's finite cargo capacity, and transportation factors.

time and demurrage practices relating to the storing of cargo at the terminal. Hearing Counsel cite *Los Angeles By-Products Co. v. Barber S.S. Lines, Inc.*, 2 U.S.M.C. 106, 114 (1939), which stated that section 17, second paragraph, "relates to services performed at the terminal as distinguished from the carrying or transporting by the vessel." Hearing Counsel contend furthermore that non-terminal activity has been held to fall within the scope of section 17, second paragraph, only to the extent that such activity is performed by a terminal operator or becomes intimately related to terminal operation through the action of a terminal operator, citing *A.P. St. Philip, Inc., v. Atlantic Land and Improvement Co.*, 13 F.M.C. 166 (1969); *Truck and Lighter Loading and Unloading Practices at New York Harbor*, 9 F.M.C. 505 (1966); *California Stevedore and Ballast Co. v. Stockton Port District*, 7 F.M.C. 75 (1962).

Hearing Counsel cite evidence of record showing that the subject heavy-lift charges are related to tackle-to-tackle ocean freight services and are designed to cover expenses occurring on the voyage and not beyond ship's tackle at either end of the transportation. The subject heavy-lift charge, accordingly, is a charge by the carrier assessed against the shipper for costs incurred by the carrier for services performed during the carrier's tackle-to-tackle operation. It would, according to Hearing Counsel, be part and parcel of the carrier's ocean freight rate, but is broken out separately in the tariff for heavy-lift cargo because of the extra time, labor and equipment needed to carry heavy cargo. The charge does not relate to the movement of cargo at the terminal facility nor, according to Hearing Counsel, is it intimately related to the supplying of equipment by the terminal. Its only connection to the terminal is the fact that part of the service is performed at dockside. Therefore, section 17, second paragraph, does not apply and there is no need to conduct an examination into the level of the charge.

Respondents agree with Hearing Counsel and amplify considerably on Hearing Counsel's arguments. They argue that the Commission had held that section 17, second paragraph, applies only to those engaged in transportation in the U.S foreign commerce[15] and that the Commission has distinguished its domestic regulatory statutes such as section 18(b) from section 17, second paragraph, and flatly stated that the latter law "is confined to the receiving, handling, storing, or delivering of property, to the exclusion of transportation and rates, fares, and charges in connection therewith." *Bills of Lading–Incorporation of Freight Charges*, 3 U.S.M.C. 111, 113 (1949). This corroborates the earlier decision cited by Hearing Counsel *(Los Angeles By-Products Co. v. Barber S.S. Lines, Inc.)*. In still other decisions cited by respondents, the Commission has continued to apply section 17, second paragraph, to forwarding and terminal operations as opposed to transportation rates and charges. Cited are *Time Limit on Filing Overcharge Claims*, 10 F.M.C. 1, 7 (1966) (section 17, second paragraph confined to "forwarding and terminal operations"); *Terminal Rate Increase–Puget Sound Ports*, 3 U.S.M.C. 21, 23–24 (1948) (distinguishing between terminal charges and transportation charges); *Time Limit on Filing Overcharge*

[15] The statute itself indicates the truth of this assertion. However, respondents cite *Macon Cooperage Co. v. Sudden & Christensen*, 1 U.S.S.B.B. 591 (1936), and *Johnson Puckett Rope Co. v. Dollar S.S. Lines, Inc.*, 1 U.S.S.B.B. 585, 586 (1936), which confirms their contention.

Claims, cited above, (section 17, second paragraph, not applicable to carrier-imposed rule limiting time to file claims for rate adjustments); *D. L. Piazza Co. v. West Coast Line, Inc.*, 3 F.M.B. 608, 616 (1951) (not applicable to carrier's refusing exclusive use of vessel because of shipper's failure to tender required minima); and *Beaumont Port Commission v. Seatrain Lines, Inc.*, 3 F.M.B. 556, 561–562 (1951) (inapplicable to carrier's equalization and absorption rates and practices). Respondents argue that the common factor to all of these cases is that practices pertaining to the transportation portion of a carrier's service have not been held to be within the ambit of section 17, second paragraph. Finally, respondents cite Joint Committee of *Foreign Freight Forwarder's Association v. Pacific Westbound Conference*, 4 F.M.B. 166, 170–171 (1953), in which the Commission squarely faced the issue whether the conference's heavy-lift charges were "transportation charges" as opposed to "charges . . . . assessed by ocean carriers to reimburse themselves for actual and indirect expenses incident to the handling of such shipments . . . ." 4 F.M.B. at p. 170. The Commission held that such charges were "part of the total from the general category of freight charges where both parts must necessarily be paid for the transportation of the items of cargo in question" and that "the special charges named are part of the total freight charges . . ." 4 F.M.B. at p. 171.

Consequently, respondents, citing the same evidence as did Hearing Counsel regarding the fact that the subject heavy-lift charges related to transportation services and not terminal services, submit that section 17, second paragraph, is not applicable.

In view of the ample case law cited to me, as well as pertinent facts describing the characteristics of the subject heavy-lift charges and for other reasons, I find that section 17, second paragraph, whatever its application may be to special charges in other trades among other carriers, is not applicable to ECLL's heavy-lift charges.

As Hearing Counsel have noted, at least as early as 1939, the Commission held that section 17, second paragraph, applied to "services performed at the terminal as distinguished from the carrying or transporting by the vessel." *Los Angeles By-Product Co. v. Barber S.S. Co. Lines, Inc.*, cited above, 2 U.S.M.C. at p. 114. In that case, complainants had alleged that the charging of a separate handling charge beyond ship's tackle was an unreasonable practice in violation of section 17, second paragraph. The Commission held otherwise and, in so doing, recognized that a handling service beyond ship's tackle was to be distinguished from transportation services which were performed by the carrier from ship's tackle to ship's tackle. The distinction was preserved even though it was recognized that consignees could not take possession of their goods at ship's tackle and some additional handling service to a place of rest on the wharf or on the dock was necessary. (2 U.S.M.C. at p. 113)[16]

The holding of the *Los Angeles By-Products* case has been confirmed by the Commission in more recent cases. In *Time Limit on the Filing of Overcharge*

[16] Although not finding that respondent carriers had violated section 17, second paragraph, the Commission did suggest that the total charges, (i.e., ocean line-haul rates plus handling charges) could have been investigated under section 15 of the Act as being so unreasonably high as to be detrimental to the commerce of the United States, since respondents were organized under conferences agreements. However, this matter was not in issue and no relevant evidence was consequently offered (2 U.S.M.C. at p. 114). Similarly, in the instant case, section 15 is not involved, although respondent ECLL operated as a joint service presumably with section 15 approval.

Claims, cited above, the Commission cited Los Angeles By-Products and stated that the application of section 17, second paragraph, "has thus been confined to forwarding and terminal operations." 10 F.M.C. at p. 7. The Commission found that law inapplicable to carriers' practices in processing claims for the adjustment of freight charges, i.e., overcharge claims. In a case which could hardly be more specific for our purposes, the status of heavy-lift charges was determined by the Commission to be part of total "freight charges" rather than charges for recovery of "expenses incident to the handling of . . . shipments. . . ." *Joint Committee of Foreign Freight Forwarder's Association v. Pacific Westbound Conference*, cited above, 4 F.M.B. at pp. 170–171. In *Bill of Lading–Incorporation of Freight Charges*, cited above, moreover, the Commission again carefully spelled out its holding that section 17, second paragraph, is confined to terminal-type services "to the exclusion of transportation and rates, fare, and charges in connection therewith." 3 U.S.M.C. at p. 113. The other cases cited by respondents and referred to briefly above, further confirm this holding.

Of special significance, perhaps, is the case of *Beaumont Port Commission v. Seatrain Lines, Inc.*, cited by respondents. In that case, the Commission held section 17, second paragraph, inapplicable to a carrier's equalization rates although such rates included "charges for the services at the receiving and at the delivering end of the voyage. . . ." 3 F.M.B. at p. 561. What is enlightening is the Commission's rationale for this holding. The Commission held that if it chose to apply section 17, second paragraph, this action would be tantamount to determination of reasonable rates in foreign commerce, an authority which existed only with respect to certain domestic offshore carriers. In this regard, the Commission stated:

> The rates under the circular, to be sure, include charges for services at the receiving and at the delivering end of the voyage as is true generally of freight rates of water carriers. If we were to say that such incidental element in the rates gave us full jurisdiction to enforce reasonable rates for carriers in foreign commerce, we should be disregarding the difference of our authority over such carriet [sic] under sections 16 and 17 of the Act from our juriadiction over certain offshore carriers in interstate commerce where, under section 18 of the Act, as amended, we are authorized to enforce reasonable rates. 3 F.M.B. at pp. 561–562.

Of course, subsequent to the *Beaumont Port Commission* case, which was decided in 1951, Congress amended the Shipping Act, 1916, by enacting section 18(b)(5) in 1961, which does give the Commission some authority over reasonableness of rates in foreign commerce. However, as the legislative history to the amendment indicates, Congress had no intention to thrust the Commission into domestic-type rate cases. Thus, the sponsor of the amendment which became section 18(b)(5), Senator Kefauver, stated:

> It is not the intention of this amendment to institute a ratemaking scheme such as that of the Interstate Commerce Commission or that of some of the other regulatory agencies. Index to the Legislative History of the Steamship Conference/Dual Rate Law, 87th Cong. 2d Sess., Document No. 100, p. 424.

In response to a question by Senator Engle as to whether the amendment was designed to "authorize the . . . Commission to go into a ratesetting procedure or a ratemaking procedure," Senator Kefauver stated:

> It is not the intention of the amendment to authorize the Commission to try to fix specific rates. Index, cited above, p. 426.

Therefore, the Commission still does not have full-blown ratemaking authority in foreign commerce similar to that which it possesses in domestic offshore commerce. Section 17, second paragraph, authorizes the Commission, once it has found a practice to be unjust and unreasonable, to "determine, prescribe, and order enforced a just and reasonable regulation or practice." Therefore, the use of section 17, second paragraph, against carriers' heavy-lift rates and charges, which are tacked onto base ocean rates and sometimes even included in a lump sum, negotiated total freight charge (as, for example, the ACL shipment of the 174-ton rotor in which a negotiated total charge of $36,000 was filed; Stipulation, Appendix C) would mean that the Commission would be determining, prescribing, and ordering a just and reasonable rate in foreign commerce. Such authority may well be contrary to that intended by Congress, as seen from the legislative discussions of Senators Kefauver and Engle since it resembles domestic ratemaking authority, as the Commission noted in the *Beaumont Port Commission* case, cited above.[17] As to rates in foreign commerce, of course, section 18(b)(5) only permits the Commission to "disapprove" rates which it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.[18]

Of course, if the facts in this case established that heavy-lift charges were in reality applicable to terminal-type services, one could argue that section 17, second paragraph, could be invoked. However, the testimony of Mr. Donald Wierda and of Captain Peter Richters, both officers of U.S. Navigation Company, general agents of numerous carriers serving North Atlantic and Great Lakes ports, having 30 and 22 years' experience in the shipping business respectively, establishes the line-haul, non-terminal nature of heavy-lift services and charges. According to their testimony, heavy-lift charges do not extend beyond ship's tackle on either end of the voyage and are designed to cover extraordinary expenses incurred by the vessel in loading and unloading and securing the cargo on the vessel, including the utilization of special cranes when necessary. Packaging is the responsibility of the shipper, not the carrier. See Depositions, pp. 5–13; 17–25; 27–29; 32–33; 35–38; 40–41; 58–59; 63; 68. These facts characterize all carriers' heavy-lift operations during the subject period to the ports mentioned. Depositions, p. 33.

Accordingly, I find that the subject heavy-lift charges of respondent ECLL were not charges for the "receiving, handling, storing, or delivery of property" within the meaning of section 17, second paragraph, and therefore that respondent ECLL's applications of such charges during the period August 4, 1974, through July 9, 1975, could not have constituted unreasonable practices in

[17] The limitations on the Commission's authority to determine lawfulness of rates in foreign commerce as compared to the Commission's ratemaking authority in domestic commerce was recognized by the Joint Economic Committee of the 89th Congress which investigated discriminatory foreign rates and balance of payments problems. The Committee observed:

> . . . [T]he Shipping Act does not confer upon the Federal Maritime Commission power to fix reasonable rates in foreign trade. It may under section 17 correct unjust discriminations of a limited character, and under section 18 it may disapprove a rate that is so high or so low as to constitute a detriment to commerce, but these are narrower, and as yet unexercised powers. . . . The fact remains that they fall markedly short of true ratemaking in domestic transportation. *Discriminatory Ocean Freight Rates and the Balance of Payments, A Report of the . . . Joint Economic Committee*, 89th Cong., 2d Sess., August 1966, p. 19.

[18] If an investigation into the reasonableness of the level of ECLL's heavy-lift charges were warranted, as I have noted, it would be possible to invoke section 15 or section 18(b)(5). However, the particular charges in issue have long since been reduced.

violation of section 17, second paragraph, on the evidence presented in this record.[19]

Section 18(B)(1)—The Provision Regarding "Liberty To Apply A 10 Percent Discount"

I now turn to the only matter in which the parties are at issue, that regarding the lawfulness of provisions which formerly appeared in the tariffs of respondents ECLL and NAWFA which had provided that if a shipper tendered three or more lifts of over 10 tons and later of over 10,000 kilos (NAWFA) from one port of loading to one port of discharge, "the lines have liberty to apply a reduction of 10% off the freight." The Commission's Order stated that these provisions have appeared at least since August 4, 1974. Actually they have appeared prior to that time (according to the evidence admitted, at least since April 4, 1973, for ECLL and since August 4, 1971, for NAWFA). Of course, as already mentioned, this "liberty" provision was canceled by NAWFA, effective April 6, 1976, that is, prior to the commencement of this investigation. Russ, presently the only member of ECLL, canceled the provision, effective September 15, 1976. The record, furthermore, shows no evidence that any member of NAWFA carried any shipments under the "liberty" provision during the time period framed in the Commission's Order under this issue and even prior to that time, dating back to August 4, 1971, the first time in which the record shows the provision to be published by NAWFA. At present, therefore, the tariffs have removed the "liberty" provision. NAWFA now seems to make the discount mandatory, stating "the Lines to apply a reduction of 10% off the freight" assuming, of course, that the proper tender of three or more lifts is made.

As mentioned above in connection with my discussion of the "to be agreed" provision, the Commission questions the lawfulness of these canceled provisions on the grounds that they might have been insufficiently definite, not plain or precise, and therefore might not have met the tariff filing standards of section 18(b)(1) of the Act. The Commission amplified on the purposes of section 18(b)(1), that is, "to require an exact statement of all applicable tariff charges, without the possibility of discretionary judgments by the carrier" and "to provide the public with advance notice of the rates certain to be charged and which will be charged equally to all shippers for the same services." Order, p. 3.

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[19] Although not conclusive, one other fact suggests that section 17, second paragraph, was intended to be limited to terminal rather than line-haul transportation services. Thus, section 18(a) of the Act has a comparable requirement that carriers in domestic commerce "shall establish, observe, and enforce just and reasonable regulations and practices . . . relating to or connected with the receiving, handling, transporting, storing, or delivering of property." The use of the word "transporting" suggests an intended distinction between line-haul services and the other activities. Note, however, that the word "transporting" is omitted from section 17, second paragraph.

Hearing Counsel has cited three cases in which the Commission has extended the concept of terminal operations to areas which otherwise might be considered to be part of a carrier's transportation service. However, I agree with Hearing Counsel that because of the peculiar circumstances involved, these cases do not contravene my findings that non-terminal activity is outside the scope of section 17, second paragraph. In *A.P. St. Philip, Inc. v. Atlantic Land and Improvement Co.*, 13 F.M.C. 166 (1969), respondent terminal operator granted exclusive rights to provide tugboat services for carriers to one operator, depriving carriers of free choice. The Commission found that tugboat service did not ordinarily constitute a terminal service but here the terminal operator had usurped the carrier's freedom of choice and made the very access to the terminal facilities dependent upon use of the favored tugboat operator. The tugboat service accordingly became "intimately related" to terminal services. 13 F.M.C. at p. 172. Likewise, in *Truck and Lighter Loading and Unloading Practices at New York Harbor*, 9 F.M.C. 505 (1966), the Commission found that a terminal operator had usurped the carrier's obligations of loading and unloading, which are normally not terminal functions. See also 13 F.M.C. at p. 172 explaining the case. In *California Stevedore and Ballast Co. v. Stockton Port District*, 7 F.M.C. 75 (1962), two terminal operators established a stevedoring monopoly for the unloading of bulk grain. Again, the Commission found that carriers were deprived of freedom of choice of stevedores. 7 F.M.C. at p. 82. None of the unusual circumstances of the three cases is present in the instant case.

Hearing Counsel contend that the "liberty" provision constituted a violation of section 18(b)(1). They state that "[i]f amorphous tariff provisions such as the 'liberty' provision here are permitted to remain in tariffs, the purpose of tariff filings expressed above the goals of uniformity of charges and rates, prevention of discrimination and stability in rates, cannot be achieved." Hearing Counsel urge the Commission to make a finding that tariff provisions allowing discretionary judgments by carriers are violative of the Shipping Act. However, Hearing Counsel point out that the tariff provisions in question have been canceled, that the provision was used on only one occasion during the five-year period investigated and without proof that such use resulted in unjust discrimination, and that respondents state they have no intention of reinstituting the provision and are willing to enter into a binding agreement to that effect. Hearing Counsel note furthermore that there is no evidence that respondents acted in bad faith or had evil motives in maintaining the "liberty" provisions or derived any benefit from the violation of law, and that respondents have offered to prove that these provisions have appeared in respondents' tariffs for at least half a century. Furthermore, state Hearing Counsel, other carriers have published the same provisions which respondents have canceled.[20] Hearing Counsel, therefore, strongly urge that the Commission not pursue the matter of seeking civil penalties considering all of these factors and the law's abhorrence of "selective law enforcement," citing *Pacific Far East Lines v. F.M.C.*, 409 F.2d 257, 259 (D.C. Cir. 1969). In effect, Hearing Counsel urge the Commission to accept respondents' offer of settlement, find that the past publication did not meet the standards required by section 18(b)(1) of the Act, and discontinue the proceeding.

Respondents mount numerous arguments to support their position that the subject "liberty" provision cannot be found as a matter of law or as a mixed matter of fact and law to have violated section 18(b)(1). They argue that a violation of section 18(b)(1) can be found only upon a finding of failure to file a tariff rate, rule, or regulation. As they say, there were no unfiled or secret tariff provisions in this case. They take issue with the use of what they call "non-statutory criteria" to prove unlawful conduct, specifically, the reliance upon the words "exact and certain," "sufficiently definite," "plainly and precise," or "discretionary judgment," to determine whether the requirements of section 18(b)(1) are met. Respondents contend that they have found no previous Commission decision holding a violation of section 18(b)(1) in reliance upon such words and find nothing in the Commission's pertinent regulations (G.O. 13) suggesting that these words constitute valid criteria. Respondents contend also that there is no evidence that shippers were confused by the language of the subject provision and that they can prove that the provision was sufficiently definite and plain to the shipping public. Furthermore, respondents point out that they have filed the subject provisions with the Commission without adverse

[20] With respect to the "to be agreed" or similar provisions offering to negotiate rates for oversized heavy-lift shipments, a cursory survey of tariffs on file with the Commission has shown me that they still exist. However, I have found that the other carrier which had published a "liberty" provision in its tariff, namely, Baltic Shipping Company, has canceled this provision. See Baltic Shipping Company, Westbound Freight Tariff No. 15 F.M.C. No. 15, 2d Rev. Page 6, effective October 4, 1976. I am not aware of any other tariff presently containing a "liberty" provision and have been unable to find any such provisions following a personal survey of tariffs covering several different trade areas around the world.

comment or rejection by the Commission for many years and should therefore not be found to be a violator of law in the past, citing *NLRB v. Guy F. Atkinson Co.*, 195 F.2d 141 (9 Cir. 1952). In other, more serious cases of violations arising under section 15, respondents note that reliance on past administrative practice has been found to be a valid defense to a charge of past violations, citing *Mediterranean Pool Investigation*, 9 F.M.C. 264 (1966), and *Investigation of Overland/OCP Rates and Absorptions*, 12 F.M.C. 184 (1969). Respondents assert finally that "there are literally thousands of tariff filings in effect which could be deemed to flunk the *per se* litmus tests which are described in the Commission's Order of Clarification and Hearing Counsel's Memorandum." Respondents' Joint Memorandum, p. 21.

The Offer of Settlement

In view of respondents' renewed proposal to dispose of this proceeding by entering into a type of consent order, my lack of authority to accept the proposal, and the important policy considerations which relate to the matter of pleas for settlement by consent order, I feel obliged to advise the Commission and request instructions before proceeding to decide the issue involved.

Both Hearing Counsel and respondents see no purpose in expending further time and expense on litigating this case. Respondents have gone so far as to waive their procedural rights and appear even willing to acquiesce in a finding of violation of section 18(b)(1), if necessary, and enter into a binding agreement not to republish the subject tariff provision on the condition that Hearing Counsel join in their plea that no civil fine or penalty should be imposed in the event a violation is found and the Commission adopts the joint plea.

However, if the Commission does not accept this plea, i.e., if penalties are to be sought, respondents request the opportunity of presenting full evidence and legal argument on this particular issue.

As respondents note (memorandum, p. 9), the Commission has ordered that a determination as to past violations of section 18(b)(1) be made regardless of the fact that respondents have canceled the tariff provisions in issue and has furthermore stated that each issue cannot be "settled" merely because of these tariff amendments. Order of Clarification, p. 3. Normally, I would proceed to make the determination. However, there are critical considerations which persuade me that I ought to pursue an alternative course and seek Commission instructions.

Legal and Policy Matters Concerning Settlements

It is axiomatic that the law and Commission policy favor settlements. *See, e.g., Consolidated International Corporation v. Concordia Line*, 18 F.M.C. 180, 183 (1975), *Merck, Sharp & Dohme International, a Division of Merck & Company, Inc., v. Atlantic Lines*, 17 F.M.C. 244, 247 (1973), Rule 91, 46 CFR 502.91. Furthermore, it has been recognized in administrative law that a party has the right to seek settlement and thus avoid the expense of trial by entering into consent orders. In many cases, the agency may issue an order even though the party has not admitted to violations of law and no findings of violation are made. An agency may not be required to accept an offer of settlement but at least should consider such an offer and, if it will result in an action which was all that could be

compelled by the agency had the proceeding gone forward to trial, it is especially desirable. In the Final Report of the Attorney General's Committee on Administrative Procedure (1941), which report was considered later by Congress in formulating the Administrative Procedure Act (APA),[21] the Committee commented favorably upon the practice of several agencies in accepting settlements and issuing consent orders so that long and expensive trials could be avoided and the agency could obtain the result desired by consent instead of litigation. The Committee commented:

From the point of view of both the public and the private interest, it seems highly desirable in cases of this sort to permit consent to the entry of an enforceable order without requiring admissions. Report, p. 42.

The Committee noted furthermore that the validity of consent orders and their enforceability had been "emphatically upheld" by the Supreme Court, citing *Swift & Co. v. U.S.*, 276 U.S. 311 (1927). *Id.*, p. 42.

The right of parties to seek settlement was codified in the APA. Section 5(b)(1), now U.S.C. 554(c)(1), states:

The agency shall give all interested parties opportunity for—(1) the submission and consideration of . . . offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit. . . .

The Attorney General's Manual on the APA (1947) discusses this provision of the law as follows:

Agencies must in some way provide opportunities for informal disposition of controversies. However, the precise manner in which such opportunities are to be afforded has been deliberately left by Congress to development by the agencies themselves. (Reference omitted.) AG Manual, p. 48.

The Manual proceeds to discuss procedures by which the agency may consider offers of settlement but states that these procedures "should enable parties to present their proposals for settlement to responsible officers or employees of the agency." Manual, p. 49. The use of consent decrees, orders, or stipulations to cease and desist is especially encouraged as follows:

In the settlement of cases pursuant to section 5(b), agencies may, as heretofore, require parties to enter into consent decrees or orders or stipulations to cease and desist as a part of the settlement. As Representative Walter stated: *"The settlement by consent provision is extremely important because agencies ought not to engage in formal proceedings where the parties are perfectly willing to consent to judgments or adjust situations informally."* (Reference omitted.) (Emphasis added.) Manual, p. 49.

The Manual discusses instances when agencies may properly reject an offer of settlement, such as when a party declares that he does not intend to comply with an agency requirement or an informal settlement will not insure future compliance with law. Manual, p. 49. However, the quoted statement makes clear a policy not to engage in formal proceedings needlessly when parties are willing to make adjustments desired by the agency. Moreover, the Commission has adopted a rule implementing the settlement policy embodied in the APA, virtually copying the language of section 5(b). See Rule 91, 46 CFR 502.91. In addition, the Commission's rule states that parties have the right to submit offers of settlement "without prejudice to the rights of the parties."

[21] See Administrative Procedure Act, Report of the Committee on the Judiciary, No. 752, 79th Cong. 1st Sess., November 19, 1945, p. 190.

In view of the foregoing statements of law and policy and the Commission's rule cited, I feel obliged to call the Commission's attention to the fact that respondents are again offering a settlement and that because of certain facts which have now been established but which the Commission did not know when it issued its Order of Clarification, the Commission ought to have the opportunity of considering the complete terms of respondents' offer in the light of those facts and of determining whether this proceeding should continue.[22] Furthermore, the entire matter of the Commission's issuance of consent orders to terminate controversies is, in my opinion, one of policy. Should the Commission decide that it should embark upon a policy of settling cases, under certain circumstances, by means of consent orders without seeking to make findings of violations of law, a policy which the Attorney General's Committee favored, this might serve as a means to expedite and conclude Commission investigations promptly. The Commission has been especially interested in streamlining its procedures and has expressed concern over the length of time consumed in hearings, as seen in the numerous changes which the Commission has made to its rules of practice over the past several years. If the Commission wishes to follow such a policy, a decision on the particular issue involved which respondents again offer to "settle" may discourage any future respondents from offering to enter into consent orders to avoid needless litigation since even if they are willing to cease and desist from any questionable practice, they run the risk of adverse findings and possible penalties. We are, therefore, in an area of policy making which may have great significance in the conduct of future Commission investigations. Therefore, I feel bound to certify the matter to the Commission and await its instructions.[23]

ULTIMATE CONCLUSIONS

Provisions formerly appearing in respondents' tariff which stated that for shipments over a certain weight (50 tons or 100,000 kilos) rates were "to be agreed upon" did not violate the tariff-filing requirements of section 18(b)(1) of the Act. These provisions merely notified the shipping public that for such unusually heavy shipments, the carriers and shippers could negotiate a mutually acceptable rate. Absent evidence showing that the rate actually negotiated was not published and thereby made available to all similarly situated shippers, the purpose of section 18(b)(1) regarding uniformity, prevention of discrimination and ability of the shipper to determine his costs of transportation are not

[22] Among the facts which the Commission may wish to consider are those stated by Hearing Counsel above, such as the fact that the subject provision was used only once in five years, that no one objected to its use, that there was no evidence that anyone suffered harm as a result, that the provision had been accepted for filing by the Commission for many years, and that it has been canceled. As I mentioned above, furthermore, I have been unable to find that such provision exists in any other tariff on file with the Commission now that Baltic Shipping Co. has canceled its comparable provision. If such provision no longer appears in any tariffs, the Commission may wish to decide whether continued litigation involving these respondents is necessary, just, or fair, especially when they have offered to enter into binding promises not to reinstitute the provision.

[23] Since the Commission's Order of Clarification instructed me to make a finding as to the particular issue and rejected the idea of settlement, I am without authority to accept respondents' renewed offer and I cannot, of course, give repsondents any assurance as to whether the Commission might wish to seek penalties. Furthermore, I have no authority to amend the Commission's Order to remove the issue of possible past violations. See Order of Clarification, p. 2. Cf. *Unapproved Section 15 Agreements–South African Trade*, 7 F.M.C. 159, 166 (1962); *Unapproved Section 15 Agreements–Japan, Korea, Okinawa Trade*, 7 F.M.C. 606, 607 (1963); *Agreement No. 5200–26*, 13 F.M.C. 16, 24 (1969). Even the Commission's amendment to rule 147(a), 46 CFR 502.147(a), authorizing presiding judges to "amend" Commission orders, limits such authority to exectuion of the Commission's intent. See Docket No. 76-27, *Miscellaneous Amendments*, 16 SRR 1387, 1388 (1976). It is precisely because I do not know what will be the Commission's intent after consideration of all the facts and policy questions relating to respondents' renewed offer that I feel bound to certify the matter to the Commission.

defeated. Both case law and various other types of negotiated rate systems such as that pertaining to military rate tenders, N.O.S. rates, conference open rates, and special docket proceedings, further establish the lawfulness of the practice.

The record does not establish that respondent Hapag unduly prejudiced or unjustly discriminated against any person, cargo, or port in violation of sections 16 First or 17, first paragraph, by maintaining higher heavy-lift charges to Great Lakes ports than to North Atlantic ports during the period August 4, 1974, through July 9, 1975. Nor does the evidence of record show that any other respondent violated these laws during the period August 4, 1971, through August 4, 1976, by assessing different heavy-lift charges for similar services to different shippers under the "to be agreed" or "liberty" to apply a 10% discount provision formerly published in their tariffs. The basis for these findings is the fact that heavy-lift shipments moving under these provisions were highly dissimilar and no competitive relationship was established between shippers, cargoes, or ports, as required for a finding of violation of section 16 First, at least when cargo characteristics and vessel capacity are critical elements, as they are in handling heavy-lift shipments. For similar reasons, no violations of section 17, first paragraph, can be found on this record, since there is no showing that shippers of like traffic moved cargo over the same line between the same points under the same circumstances and conditions. As for the "to be agreed upon" provisions, furthermore, the evidence shows that only three shipments moved during the entire five-year period of investigation consisting of three highly different types of equipment varying substantially in weight. As for the "liberty" provision, the evidence shows that only 11 shipments were carried during the five-year period, none by members of NAWFA. These shipments likewise varied in types, sizes, packaging, and ports and the discount was granted to only one shipment of a unique type of machinery carried on behalf of a unique shipper and consignee.

The record will not support a finding of violation of section 17, first paragraph, by respondent ECLL during the period August 4, 1974, through July 9, 1975, because in practice, heavy-lift charges are considered part of the line-haul freight and relate to services performed between ship's tackle on either end of the voyage. Ample case law holds that the "reasonable regulations and practices" requirements of section 17, second paragraph, refers to services performed at terminals beyond ship's tackle. Only under unusual circumstances, not present here, where terminal operators have usurped functions of carriers or have established restrictive conditions governing access to their facilities have other than strictly terminal-type services been found subject to this particular law. The attempt to utilize section 17, second paragraph, as a means to determining the level of a heavy-lift rate or charge, furthermore, could be an improper extension of authority beyond that conferred in the Commission by other provisions of the Shipping Act dealing with unreasonably high rates in foreign commerce, namely, section 18(b)(5), and could thrust the Commission into ratemaking in the area of rates in foreign commerce, an activity which Congress specifically intended the Commission not to do, when enacting section 18(b)(5).

The parties disagree as to whether respondents' former tariff provision allowing carriers "liberty" to apply a 10% discount off the freight under certain

conditions violated section 18(b)(1). Hearing Counsel contend that such a provision is insufficiently definite and permits unlawful discrimination among shippers, although none in fact occurred while the provision was in effect. Respondents argue that filing of the provision satisfied the requirements of section 18(b)(1) and offer to prove that the provision was well understood by the shipping public. In view of respondents' renewed offer to settle by entering into a type of consent order, the cancellation of the subject provision, the fact that it was applied only once, many equitable-type factors developed on the record, and the significant policy matters to be considered by the Commission regarding the use of consent orders to terminate proceedings without findings of violations, decision on this particular issue will be reserved pending Commission instructions.

(S) NORMAN D. KLINE
Administrative Law Judge

WASHINGTON, D.C.
May 24, 1977

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-45

MATSON NAVIGATION COMPANY—
PROPOSED DELETION OF REFRIGERATED
CHRISTMAS TREE RATES, U.S. WEST COAST TO HAWAII

NOTICE

January 15, 1979

Notice is given that no appeal of the Administrative Law Judge's order of discontinuance in this proceeding has been filed and the time within which the Commission could determine to review that order has expired. Determination to review has not been made and, accordingly review will not be undertaken.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 78-45

MATSON NAVIGATION COMPANY—PROPOSED DELETION OF REFRIGERATED CHRISTMAS TREE RATES, U.S. WEST COAST TO HAWAII

Finalized on January 15, 1979

1. POSTPONEMENT OF PREHEARING CONFERENCE

2. ORDER AUTHORIZING RESPONDENT TO FILE SPECIAL PERMISSION APPLICATION TO REPUBLISH ORIGINAL TARIFF MATERIAL

3. ORDER DISMISSING INVESTIGATION & DISCONTINUING PROCEEDING SUBJECT TO GRANT OF SPECIAL PERMISSION APPLICATION AND REPUBLICATION OF ORIGINAL COMMODITY RATE ON CHRISTMAS TREES MOVING IN REFRIGERATED CONTAINERS

1. The respondent herein, Matson Navigation Company (Matson or respondent), has filed a motion to stay the scheduled prehearing conference in this proceeding (Washington, D.C., November 29, 1978) pending a ruling upon Matson's November 15, 1978 Motion "for an Order Authorizing (Matson) to Republish . . . First Revised Page 163 to its Tariff FMC-F No. 167" (which re-established its original commodity rate on Christmas trees shipped in refrigerated containers).

Hearing Counsel has already advised the presiding Administrative Law Judge that they have no objection to either the stay of the prehearing conference or a dismissal upon republication of the original Christmas tree commodity rate. In view of the fact that the republication intended and requested by Matson would restore the *status quo* as it existed before the Commission's issuance of its Order of Investigation and Suspension (November 9, 1978), and would thereby render *moot* the very question the Commission sought to investigate (and satisfy the essence of the complaints filed by the protestants), the scheduled prehearing conference is, at least for the time being, unnecessary. Accordingly, the prehearing conference that had been scheduled for Washington, D.C., on November 29, 1978, is hereby postponed *sine die*. (If this proceeding is not reopened by Order

of the Commission or otherwise for good cause shown, the prehearing conference will be deemed cancelled.)

* * * * *

2. By Motion dated November 15, 1978, the respondent has moved that the presiding Administrative Law Judge issue an Order (1) authorizing Matson to issue a 3d Revised Page 163 and a 2d Revised Title Page to Matson Westbound Container Freight Tariff No. 14–F, FMC-F No. 167 "on short notice with an effective date one day after filing with the Commission for the purpose of republishing the material found on 1st Revised Page 163 and cancelling Suspension Supplement No. 1 to tariff FMC-F No. 167," and (2) an Order dismissing the investigation and discontinuing the investigation.

As mentioned above, the intended reinstatement of the original Christmas tree commodity rate would *moot* the subject matter of the Commission's ordered investigation and, in effect, grant the protestants the relief they requested. Accordingly, Matson's motion for authorization to file and issue new tariff pages as set forth above is granted subject, of course, to Matson's complying with the Part 531 Special Permission Application requirements in making such formal request to the Commission, 46 CFR 531.18.

* * * * *

3. Provided that the respondent execute the tariff actions set forth above and in its motion dated November 15, 1978, the investigation will then be deemed DISMISSED and the proceeding DISCONTINUED. (In view of the fact that, with the Christmas tree season already upon us, time is of the essence and the nature of this proceeding calls for prompt action, the usual 15-day rule for replies has not been followed, and the action taken herein will be subject to reconsideration in the event that any forthcoming timely replies to the subject motion *establish good cause* for such reconsideration.)

(S) THOMAS W. REILLY
Administrative Law Judge

WASHINGTON, D.C.
November 21, 1978

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-36

IN RE: BALTIC SHIPPING COMPANY—RATES AND PRACTICES IN THE U.S. GULF COAST/NORTH EUROPE TRADE

ORDER AND NOTICE OF DEFAULT

January 17, 1979

On October 5, 1978, the Commission issued to respondent Baltic Shipping Company (Baltic) an Order to Show Cause why it should not be found to be in violation of section 21 of the Shipping Act, 1916 (46 U.S.C. 820), by reason of its failure to comply fully with the Commission's Orders of April 17, 1978 and May 26, 1978.[1] The proceeding was limited to the submission of affidavits of fact and memoranda of law addressing foreign Commission's Orders. On October 25, 1978, Baltic filed its Answer to the Commission's Order to Show Cause. The Commission's Bureau of Hearing Counsel (Hearing Counsel) submitted a reply to Baltic's Answer on November 9, 1978, and Baltic filed a response to Hearing Counsel's reply on November 20, 1978.

The purpose of the Show Cause proceeding was to give Baltic an opportunity to articulate more fully the foreign laws objection it had raised somewhat obliquely during the earlier stages of the Commission's investigation.[2] In its Answer to the Show Cause Order, Baltic referred to its previous foreign law objection as "conditional", indicated that its response to the Commission's Orders has *not* been restricted by considerations of foreign law, and stated that "the conditional objection made by Baltic is not applicable and is withdrawn." In light of these assertions by Baltic, and the lack of any evidence to the contrary in this proceeding, the Commission concludes that no valid excuse or affirmative defense of foreign law exists in this case, and that Baltic has in any event chosen to waive any such excuse or defense.[3]

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[1] These Orders were issued to obtain information available to the Commission only through Baltic and essential to the Commission's inquiry into Baltic's practices in the foreign commerce of the United States. The inquiry was prompted by information indicating to the Commission that Baltic may be, or may have been, engaged in a course of conduct violative of section 15, 16, 17 and 18 of the Shipping Act, 1916 (46 U.S.C. 814, 815 and 816).

[2] The entirety of Baltic's earlier presentation as to foreign law was stated in its legal objections filed on June 13, 1978, as follows:

> To the extent that certain documents or information requested by the Commission exist and are in the care, custody, or control of Baltic outside the United States, the production of such documents is barred by the laws of the country(ies) in which such documents or information is located.

The earlier stages of the investigation are summarized at note 4, *infra*.

[3] Baltic's foreign law objection orginally applied to all information located outside the United States sought by the Commission's Order of April 17, 1978 (April Order). In its Answer to the Show Cause order, Baltic indicated that its "conditional" foreign law objection turned out not to be applicable to different parts of the Commission's April Order for different reasons.

Instead of addressing in any detail the foreign law issues which were to be the sole topic of discussion in the Show Cause proceeding, Baltic reiterated, in its Answer to the Show Cause Order, and in its response to Hearing Counsel's reply, the non-foreign law legal objections it previously had raised for Commission consideration. The Commission previously gave full consideration to these objections,[4] and rejected them in its Show Cause Order. These arguments are again rejected, for the reasons previously stated in the Show Cause Order.

In its Answer, the Baltic also "demands its right to a 'full hearing' on its scope of authority objection." Baltic seeks an evidentiary hearing on this matter. In the second ordering paragraph of the Show Cause Order, Baltic was advised that: "Should any party feel that an evidentiary hearing is required, that party must accompany any request for such hearing with a statement setting forth in detail the facts to be proven, their relevance to the issues in this proceeding, a description of the evidence which would be adduced to prove those facts, and why such proof cannot be submitted through affidavit." The purpose of this requirement was to permit the Commission to determine the necessity and appropriateness of an evidentiary hearing. Baltic has made no serious attempt to comply with this requirement, and has not established the need for an evidentiary hearing. The request therefore is denied.[5]

Baltic has been afforded at least two hearings to date:[6] (1) on June 13, 1978, it submitted legal arguments concerning the scope of the Commission's authority under Shipping Act section 21, followed by a response on July 12, 1978, to Hearing Counsel's reply to its arguments; and (2) it reiterated these legal arguments (in lieu of addressing foreign law in detail) on October 25, 1978, in its

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As to paragraphs (A)(1) through (A)(3)(d), and (C)(3) through (C)(5) of the April Order, Baltic stated that "there are no documents or information requested by the Commission as to which copies do not exist in the United States." In its Show Cause Order, the Commission found that Baltic's response to these paragraphs was adequate. Therefore, the foreign law question never was posed, and Baltic is correct in asserting that the issue is inapplicable.

As to paragraphs (B)(1) through (B)(3), Baltic stated in its Answer that "it has now been ascertained that there are not any documents outside the United States. . . ." responsive to the April Order. If this is so, Baltic is correct in asserting that the question of foreign law does not arise. It should be noted, however, that Baltic's answer to paragraphs (B)(1) through (B)(3) of the April Order, to the effect that no responsive documents exist within or outside the United States, is not adequate because it still has not been verified by a principal of Baltic as specifically required by the Commission's May 26, 1978, Order and its Show Cause Order.

As to paragraphs (A)(3)(e), (C)(1) and (C)(2), Baltic indicated in its Answer that it has no *documents* or *records* which are responsive. It was made clear in the April Order, and again in the Show Cause Order, that these paragraphs do not apply only to documents and records, but call for the production of *all* information available to Baltic whether or not it is in the form of business records. Baltic did not represent in its Answer that it does not possess the information sought in these paragraphs, but stated, rather that: ". . . to the extent that paragraphs (A)(3)(e), (C)(1) and (C)(2) call for the submissin of information not found in Baltic's records, Baltic renews its objection that section 21 does not authorize the Commission to demand the submission of information which is neither contained in any record nor required to be kept." Thus, it appears that there may be information covered by paragraphs (A)(3)(e), (C)(1) and (C)(2) of the April Order in Baltic's possession outside the United States. Baltic has chosen not to address the possible application of foreign law to this information after being specifically directed to do so in the Show Cause Order. The Commission will treat this choice as a waiver of any possible foreign law objections.

[4] On May 17, 1978, Baltic requested that the Commission reconsider its original Order of April 17, 1978, directing Baltic to produce certain information pursuant to section 21 of the Shipping Act, 1916. By Order dated May 26, 1978, the Commission rejected Baltic's arguments and denied its Petition for Reconsideration except that the Commission did extend the time for Baltic's compliance with the April Order in response to Baltic's objections as to the burdensomeness of a faster compliance. At that time, the Commission also gave Baltic an opportunity to be heard on any legal objections it might have to the April Order, as modified by the Order of May 26, 1978. Baltic availed itself of this opportunity by filing legal objections with the Commission on June 13, 1978. The Bureau of Hearing Counsel replied to Baltic's legal objections on June 30, 1978, and Baltic filed its response to Hearing Counsel's reply on July 12, 1978. In its Show Cause Order, dated October, 5, 1978, the Commission notified Baltic that its legal objections to the April Order had been considered and rejected by the Commission except that further elucidation was sought as to the possible application of foreign law.

[5] Baltic further requested an opportunity to make an oral argument on its "scope of authority" objections and argued that it has a due process *right* to make oral argument if an evidentiary hearing is not granted. Apart from the fact that Baltic seeks to present oral argument on an issue other than foreign law, the hearing of oral argument is a matter within the Commission's discretion, not a matter of right. *See* notes 7 and 10, *infra*, and accompanying text.

[6] Baltic first raised legal objections to the April Order in its Petition for Reconsideration of May 17, 1978. *See* note 4, *supra*.

Answer to Show Cause Order, and again on November 20, 1978, in its response to Hearing Counsel's reply. In the latter hearing, Baltic was given the opportunity to demonstrate the need for a further, evidentiary hearing, of which it chose not to avail itself. Baltic will not now be heard to complain that it has not been afforded a "full hearing" with regard to its objections to compliance with the Commission's investigatory Order of April 17, 1978, as modified by its Order of May 26, 1978.[7]

It should be noted that, although Baltic has at least twice been afforded a hearing on its legal objections in accordance with the Administrative Procedure Act (APA), the procedural requirements of that Act probably do not apply to this proceeding. The Commission's Orders of April 17, 1978, and May 26, 1978, were *investigative acts* of the Commission seeking information from Baltic concerning its activities in the foreign commerce of the United States. These Orders are subject only to the lawfulness requirements of APA section 555.[8] The Show Cause Order is merely an attempt to enforce these investigatory Orders, which are analogous to subpoenas. Accordingly, any further rights to a "full hearing" must yield to the "manifest and historically recognized need for agencies to be able to issue subpoenas and conduct other investigative activities without constraint of the procedural requirements that the APA established for essentially regulatory actions."[9]

Subsequent to the issuance of the Show Cause Order in this proceeding, Baltic submitted supplemental responses to the Commission's section 21 inquiry. On January 12, 1979, Baltic submitted additional voyage manifests to clarify the extent of activities of its vessel, the S. VUCHETICH. On January 15, 1979, Baltic submitted a further response which contained the follow items: (1) a partial list of tariff item numbers and tariff authority for certain manifest items in response to paragraph (A)(3)(e) of the Commission's April 17, 1978 Order; (2) an affidavit from its U.S. agent concerning the difficulty of providing all the tariff information requested in paragraph (A)(3)(e); and (3) an affidavit from its U.S. agent in response to paragraphs (B)(1) through (B)(3) of the Commission's April 17, 1978 Order. The January 15, 1979, response also contained certain unsworn representations by counsel with respect to paragraphs (C)(1) and (C)(2) of the Commission's Order and a motion to discontinue this proceeding.

Item (1) is not a full and complete list as required by the April 17, 1978 Order; item (2) is not responsive to the Commission's orders; and item (3) still is not verified by a principal of Baltic as required by the Commission's Order of May 26, 1978. Representations by counsel are not evidence, and therefore Baltic has not yet complied with paragraphs (C)(1) and (C)(2) of the April 17, 1978 Order. Baltic still is in default of paragraphs (A)(3)(e), (B)(1) through (B)(3), (C)(1)

[7] What constitutes a "full hearing" in a particular case may vary, depending upon the issues involved and other attendant circumstances. The Commission may exercise some flexibility in structuring the hearings before it. *See United States Lines, Inc. v. Federal Maritime Commission*, 584 F.2d 519 (D.C. Cir. 1978).

[8] U.S.C. 555.

[9] *Guardian Federal Savings and Loan Association v. Federal Savings and Loan Insurance Corporation*, 589 F.2d 658 (D.C. Cir. 1978) (Slip Op. at 8). *See also Monship Lines, Ltd. v. Federal Maritime Board*, 295 F.2d 147, 154 (1961) and *In Re FTC Line of Business Report Litigation*, 595 F.2d 685 (D.C. Cir. 1978), where the court observed that: "[t]he issuance of agency orders to compel the filing of informational reports was plainly regarded an investigative act by the drafters of the APA, not a rule or adjudication."

and (C)(2) of the Commission's Order of April 17, 1978 as modified by its Order of May 26, 1978. Baltic's motion to discontinue this proceeding accordingly is denied.

DISCUSSION

Baltic Shipping Company has failed to provide any adequate justification or excuse for its failure to comply fully with paragraphs (A)(3)(e), (B)(1) through (B)(3), (C)(1) and (C)(2) of the Commission's Order of April 17, 1978 as modified by its Order of May 26, 1978. Baltic's noncompliance is unlawful. It is found and concluded that Baltic is in default of the Commission's Order of April 17, 1978, as modified, and has been in default of this Order since June 30, 1978.

THEREFORE, IT IS ORDERED, That Baltic Shipping Company is hereby notified that it is in default of the Commission's Order of April 17, 1978, as modified, and that it has been in default since June 30, 1978, in violation of section 21 of the Shipping Act, 1916; and

IT IS FURTHER ORDERED, That the requests of Baltic Shipping Company for a further evidentiary hearing in this matter to present oral argument, are denied; and

IT IS FURTHER ORDERED, That Baltic Shipping Company's motion to discontinue this proceeding is denied; and

IT IS FURTHER ORDERED, That Baltic Shipping Company shall comply forthwith and fully with the Commission's Order of April 17, 1978, as modified, and that Baltic Shipping Company shall cease and desist immediately from its failure and refusal to comply with said Order.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-43

AGREEMENT NO. 10286, ITALY-U.S.A. NORTH ATLANTIC POOL AGREEMENT

Revenue pooling agreement found lawful under section 15, Shipping Act, 1916 and approved, if modified as provided herein.

Stanley O. Sher and *John R. Attanasio* for American Export Lines, Inc. (now Farrell Lines, Inc.), Black Sea Shipping Company, Costa Armatori, S.p.A., "Italia", S.p.A;, Jugolinija, Turkish Cargo Lines, and Zim Israel Navigation Co., Ltd.

Paul J. McElligott, John Mason and *Donald J. Brunner* for Sea-Land Service, Inc.

James P Denvir, Paul A. Mapes, Janice M. Reece and *Daniel F. VanHorn* for United States Department of Justice, Antitrust Division.

John Rober Ewers, Paul J. Kaller, Bert Weinstein and *Deana E. Rose* for Bureau of Hearing Counsel.

REPORT AND ORDER ADOPTING INITIAL DECISION

January 26, 1979

BY THE COMMISSION: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice Chairman;* Karl E. Bakke, James V. Day, *Commissioners;* and Leslie Kanuk, *Commissioner* concurring.)*

This proceeding was initiated by the Commission to determine whether Agreement No. 10286[1] should be approved, disapproved, or modified pursuant to section 15, Shipping Act, 1916 (46 U.S.C. 814). Agreement No. 10286 is a revenue pooling agreement covering all cargo carried westbound from Italian ports to United States Atlantic Coast ports north of Cape Hatteras.[2] Membership in the pool is open to members of the West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference (WINAC), an existing rate making body

* Commissioner Kanuk's concurring opinion to follow.

[1] Agreement No. 10286 was initially filed for approval on February 14, 1977. Protests were subsequently filed by the United States Department of Justice (DOJ), the National Association of Alcoholic Beverage Importers, Inc. (NAABI), and the Wines and Spirits Wholesalers of America, Inc. (WSWA). Following service of the Commission's August 12, 1977 Order of Investigation and Hearing, NAABI and WSWA did not participate further in the proceeding.

[2] The original Proponents of the Agreement were: American Export Lines (AEL), American President Lines (APL), Black Sea Shipping Company (Black Sea), Costa Line (Costa), Italia, S.p.A. (Italia), Jugolinija, Sea-Land Service, Inc. (Sea-Land), D. B. Turkish Cargo Lines (Turkish Cargo), and Zim Israel Navigation Co., Ltd. (Zim). APL was dismissed from this proceeding on February 1, 1978, because it discontinued its service in the trade and resigned from the subject conference.

American Export Lines was acquired by Farrell Lines, Inc. after the close of the record. Though we will contine to refer to "AEL", the pool agreement must obviously be amended to reflect this change.

operating under FMC Agreement No. 2846. Not all conference members are parties to the pool agreement, however. The pool is comprised of WINAC members which carry cargo only in containers and some which have both container and breakbulk capability.[3]

BACKGROUND

From its inception in 1934, the WINAC trade has experienced overtonnaging. Vessel capacity has traditionally increased faster than available cargoes. This in turn, has spawned various malpractices, the most serious and prevalent being rebating. These problems are in some measure traceable to the unique role of the Italian freight forwarder in this trade.[4]

The trade has been the subject of Congressional scrutiny[5] and Commission investigation.[6] During the 1960's the Commission approved a pool in the trade (Agreement No. 8680); but the pool dissolved after only a few years of operation. In the spring of 1976, AEL, Sea-Land, APL, and Prudential left WINAC, but rejoined it a year later. More recently Atlantica, APL, and Prudential left the trade entirely.[7]

Containerized cargo in the WINAC trade has increased dramatically in the past decade. Presently 85 percent of WINAC cargo is containerized. However, the trade remains overtonnaged, with an excess capacity of approximately 76 percent.[8] Many WINCAC carriers are owned or controlled by their governments[9] and may not respond to market forces during adverse conditions in the same manner as might a privately owned carrier.[10] Since 1972 cargo growth has been minimal and is not expected to increase in the near future. WINAC carriers face outside competition through Northern European ports[11] and from nonconference carriers serving the Middle East trade, but returning empty to the United States.

Under the pool agreement each carrier is allocated a maximum and minimum market share.[12] If during any yearly accounting period a carrier exceeds its share,

[3] WINAC carriers who are not pool members include: Concordia Line, Constellation Line, Egyptian Navigation Company, Hansa Line, Hellenic Lines, Ltd., and Seatrain International, S.A. All except Seatrain are breakbulk carriers and do not generally compete with the pool members for cargo. Seatrain only recently entered the trade.

[4] The Italian freight forwarder acts as a broker for United States importers by selecting and obtaining commodities for them. The forwarder also acts as the shipper, controlling routing of the cargo and the selection of the ocean carrier. The forwarder receives renumeration from the shipper and from the carrier, in addition to any rebate received. Approximately 81 percent of cargo originating in Italy is handled by 12 major forwarders.

[5] *Report on the Ocean Freight Industry*, Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, H.Doc. No. 1419, 87th Cong., 2d Sess.

[6] *See, e.g., Pracitices af Fabre Lines and Gulf Mediterranean Conference*, 4 F.M.B. 611 (1955); *Mediterranean Pools Investigation*, 9 F.M.C. 264 (1966); *Investigation of Practices, Operations, Actions and Agreements West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Trade*, 10 F.M.C. 95 (1966).

[7] Atlantica left even though it was the largest carrier in the trade and was operating almost full ships.

[8] Though 4,250 TEU's per month would accommodate the cargo in the trade, approximately 7,500 TEU's per month are offered by the parties to the pool.

[9] Black Sea, Italia, Jugolinija, Turkish Cargo, and Zim.

[10] Italia reportedly lost $20,000,000 in 1977 even after receiving a government subsidy of about $20,000,000.

[11] Approximately 10 percent of all Italian exports are handled by Northern European ports. Much of this cargo consists of highly rated industrial commodities originating in the north of Italy.

[12] The "Basic Pool Shares" are:

AEL	19.12%
Black Sea	6.82%
Costa	12.04%

penalties are imposed and the proceeds therefrom distributed among the other carriers. The Agreement also establishes minimum port call requirements, but allows carriers to make as many calls as they wish at loading ports.[13] These service obligations are expressed in both yearly and quarterly requirements. The theory of the pool is, that by allocating shares and providing penalties if they are exceeded, it reduces carriers' incentive to place excess vessel capacity in the trade and discourages malpractices necessary to obtain additional cargo to fill underutilized vessels.

Administrative Law Judge William Beasley Harris (Presiding Officer) issued an Initial Decision on August 31, 1978 approving Agreement No. 10286 on the condition that: (1) the WINAC neutral body police all aspects of the pool: (2) the Commission be included among those to whom certain items shall be made available; (3) a copy of all records concerning the pool and its members be kept in the United States; (4) the Agreement be limited to a period of two years; and (5) any modifications occasioned by APL's withdrawal from the pool be explained. Exceptions to the Initial Decision were filed by Sea-Land, seven proponent carriers,[14] and DOJ. The Commission's Bureau of Hearing Counsel (Hearing Counsel), Sea-Land, and Proponents replied to DOJ's exceptions. Oral argument was heard on November 22, 1978.

Position of the Parties

Proponents agree with the Presiding Officer's ultimate conclusion that Agreement No. 10286 should be approved.[15] They disagree, however, with several of his proposed modifications, stating that: (1) the requirement that the neutral body police all aspects of the pool is unnecessary and redundant because the WINAC tariff, to which all pool members are subject, is already policed by the conference neutral body; (2) the reporting requirements are burdensome and unnecessary; and (3) the two-year limitation is unfair and unsupported by the record.

DOJ contends that the Initial Decision is incorrect and the Agreement should be disapproved because: (1) there is insufficient evidence to conclude that the WINAC trade is plagued by serious malpractices or "economically meaningful overtonnaging", and (2) even assuming malpractices and overtonnaging, a pooling agreement is not the least anti-competitive means of correcting those problems.

Hearing Counsel opposes DOJ's exceptions, concluding that the record supports the Presiding Officer's ultimate conclusions. In addition, Hearing Counsel supports conditioning the Agreement upon policing by the WINAC neutral body. They would modify the reporting requirement slightly and would limit the pool to a three-year term, with no automatic extension.

Italia	19.12%
Jugolinija	12.04%
Sea-Land	19.12%
Turkish Cargo	2.62%
Zim	9.12%

[13] Appendix A of the Pool Agreement requires at least 360 calls per year at Italian ports. Carriers are not required to call at any particular port.

[14] AEL, Black Sea, Costa, Italia, Jugolinija, Turkish Cargo, and Zim (hereafter Proponents).

[15] Sea-Land excepted only to modification No. 4—the 2-year limitation on the Agreement with no automatic renewal. Sea-Land's exceptions and reply to exceptions will be subsumed within the discussion of Proponents' positions.

Discussion

The arguments raised on exception are largely matters previously presented to and disposed of by the Presiding Officer. Upon review of the entire record in this proceeding, the Commission concludes that findings and conclusions set forth in the Initial Decision are essentially correct. Accordingly, the Initial Decision will be adopted as our own except as it may be modified or clarified by the following discussion.

The proposed pooling agreement is *per se* violative of the antitrust laws and is, therefore, subject to disapproval under the public interest standard of section 15 unless sufficiently justified. The Agreement can be justified by showing that it is: (1) required by a serious transportation need; (2) necessary to secure important public benefits; or (3) in furtherance of a vaild regulatory purpose of the Shipping Act. *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien (Svenska)*, 390 U.S. 238, 245–246 (1968). A thorough review of the record indicates that Proponents have offered sufficient evidence to establish the existence of serious overtonnaging and widespread malpractices thereby justifying the pool.

Proponents established the existence of malpractices primarily through the sworn testimony of two witnesses with over 60 years combined experience in the WINAC trade. Both stated that malpractices have historically plagued the WINAC trade and are continuing to do so. Testimony of direct payments or receipts of rebates or participation in other forms of malpractices was not necessary to establish the existence of an unstable competitive environment. The propriety of using hearsay evidence in an administrative proceeding is well settled. *Cohen v. Perales*, 412, F.2d 44 (5th Cir. 1969), *rev'd on other grounds*, 402 U.S. 389 (1970). One court has even held that hearsay standing alone can constitute substantial evidence in administrative proceedings. *School Board of Broward County, Florida v. H.E.W.*, 525 F.2d 900, 906–7 (5th Cir. 1976). Hearsay testimony of individuals knowledgeable with the trade constitutes sufficiently probative evidence of malpractices. This is especially true when that evidence which was introduced was not rebutted.[16]

DOJ concedes that 4,250 20-foot equivalent units (TEU's) per month would be sufficient to serve the WINAC trade, but that 7,500 TEU's are offered. It argues, however, that this overtonnaging is not "economically meaningful" because the excess capacity is the natural result of the WINAC trade's heavy imbalance on its eastbound leg.[17] This argument runs counter to the Presiding Officer's specific finding of fact that "[c]argo eastbound to Italy is less than the westbound cargo." (I.D. at 5). This finding is supported by the record and will not be overturned. If DOJ seriously wished to advance its "economically meaningful overtonnaging" argument, it should have offered the necessary facts upon which to support this position.

[16] In *Malpractices—Brazil/United States Trade*, 15 F.M.C. 55 (1971), uncorroborated hearsay was found to constitute substantial evidence to support the administrative finding that rebates were paid and sections 16 and 18(b)(3) of the Shipping Act were violated.

We note also that in the instant case, the record reveals that several United States-flag carriers withdrew from WINAC in 1976 because of alleged malpractices and that malpractices were cited as the cause of Prudential's subsequent withdrawal from the trade. We further noted that DOJ has instituted a civil action against Atlantica Lines for engaging in malpractices in the WINAC trade. *United States v. Deutsche Dampfschiffahrts*, (S.D.N.Y., 77 Civ. 2737).

[17] DOJ relies heavily on the Presiding Officer's comment, in a footnote, that "[t]hese figures of 4,250 TEU's and 7,500 TEU's do not settle the question of whether overtonnaging exists." (I.D. at 5, fn. 4).

As discussed above, the record in this proceeding reveal overtonnaging and vessel underutilization in the WINAC trade, resulting in a variety of malpractices. Implementation of the proposed Agreement No. 10286 should eliminate these malpractices, prevent the withdrawal of private carriers from the trade, thereby providing the shipping public with a range of competing carriers, and alleviate overtonnaging by encouraging carriers to withdraw some of their excess capacity without fear that this will result in a diminution of their share of cargo. For these reasons, we find Agreement No. 10286 justified under the *Svenska* standard and, therefore, approve it subject to certain conditions.

The Presiding Officer required that Agreement No. 10286 be modified:

"to contain language which obligates the WINAC conference neutral body to police all aspects of the Pool and which obligates the Pool members to be subject to enforcement authority of the conference."

Proponents are all WINAC members and are already subject to self-policing by the WINAC neutral body. Nothing in the record indicates that an extension of self-policing to "all aspects of the Pool" is necessary or desirable. At the most, such an extension would cover the distribution of proceeds from overcarriage, something we can assume the carriers involved will closely monitor. We will not, therefore, condition approval on this particular modification.[16]

Article 4.3 of the Agreement provides that ". . . all manifests, as well as any supporting documents, wherever located, shall be made available to the Pool Administrator and Pool Auditor . . . on demand. . . ." The Presiding Officer included the Commission among those to whom this information shall be made available. He also required that all records in connection with the pool and its members be kept in the United States. We find these requirements to be an unnecessary precaution, especially in light of our recent self-policing requirements for section 15 agreements. 46 C.F.R. 528 *et seq.* We have, accordingly, adopted the reporting requirement suggested by Hearing Counsel (modified Article 5.3) and have clarified the Presiding Officer's ordering language concerning Article 4.3 of the pool agreement.

The Presiding Officer's two-year limit on the existence of the pool agreement appears to be unduly brief in this particular case. A three year period will allow the parties sufficient time to begin pool operations and to develop information which may establish its predicted efficacy. We will, accordingly, approve the Pool for a three-year term, with no automatic renewal.

During the course of the proceeding Proponents introduced an exhibit which modified the pool agreement to reflect changes occasioned by APL's withdrawal. However, no amended agreement has been filed with this Commission as is required by section 15. Though Proponents need not explain modifications brought about by APL's withdrawal or by AEL's acquisition by Farrell Lines, Inc., they must submit an amended agreement which reflects the present agreement among the parties.

[16] We note with some concern that Proponents have established the existence of malpractices in the WINAC trade, but the existing WINAC self-policing arrangement has had little success in discovering such malpractices or in reporting them to the Commission. We will, therefore, direct the Commission's staff to investigate the operations of WINAC's self-policing system. All involved persons are expected to cooperate fully with our investigation. Failure to assist our investigation or to implement its recommendations could result in disapproval of applicable agreements subject to section 15 of the Shipping Act.

THEREFORE, IT IS ORDERED, That the Initial Decision issued in this proceeding is adopted to the extent indicated above, and made a part hereof; and

IT IS FURTHER ORDERED, That Agreement No. 10286 is approved upon the condition that:

1. The parties to Agreement No. 10286 modify their agreement to read as follows:

Article 4.3. "Each member line agrees that all manifests, as well as any supporting documents, wherever located, shall be made available to the Pool Administrator, the Pool Auditor, and the Federal Maritime Commission, or their representatives, on demand, in order to permit verification of the accuracy of any data report or manifest."

Article 5.3. "The Pool Administrator shall submit to the Federal Maritime Commission copies of all Final Statements issued in accordance with Article 5.2. At the same time, the following information shall be submitted to the Commission: total number of sailings, total revenue tons, and total gross revenue computed for each Member Line during each Pool Period."

Article 14.1. "This Pool Agreement shall commence on the first day of the month following its approval by the Federal Maritime Commission and shall continue for three years.

2. The parties to Agreement No. 10286 modify their agreement to reflect all changes due to membership activity since its original filing; and

3. The Commission receives, on or before April 1, 1979, a complete copy of Agreement No. 10286, modified as required in clauses (1) and (2) of this paragraph and signed by all parties thereto; and

IT IS FURTHER ORDERED, That the approval contained herein shall become effective on the date all of the conditions set forth in the above ordering paragraphs are met; and

IT IS FURTHER ORDERED, That the Exceptions of the United States Department of Justice be denied and the Exceptions of American Export Lines, Inc., Black Sea Shipping Company, Costa Armatori, S.p.A., Italia, S.p.A., Jugolinija, Turkish Cargo Lines, Zim Israel Navigation Co., Ltd., and the Exceptions of Sea-Land Service, Inc. are granted to the extent indicated above and denied in all other respects; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 77-43

AGREEMENT NO. 10286,
ITALY-U.S.A. NORTH ATLANTIC POOL AGREEMENT

Adopted January 26, 1979

The proponents of the Pool Agreement have failed to produce direct evidence of serious malpractices existing in the WINAC trade and there is absolutely no data in the record to show whether rebates are in fact being paid. The record shows only rumors as to malpractices including rebating.

It is in the public interest to rid the WINAC trade of overtonnaging, rebating and all malpractices.

Having noted that positive proof on various aspects of the case as to malpractices including rebating was simply not available, one way or the other, that based on inferences generally or, as here, on the Commission's special familiarity with the WINAC trade in the shipping industry, inferences on these points may be and are drawn from the incomplete evidence that was available.

The Pool Agreement is to be modified as provided herein and upon proof thereof, satisfactory to the Commission, the Pool Agreement will stand approved and this proceeding discontinued.

Stanley O. Sher and *John R. Attanasio* for parties to Agreement 10286 except Sea-Land Service, Inc.

Paul J. McElligott, John Mason and *Donald J. Brunner* for Sea-Land Service, Inc., a party to Agreement 10286.

Bert Weinstein, Deana E. Rose, Paul J. Kaller and *John Robert Ewers,* Deputy Director and Director, respectively, of the Commission's Bureau of Hearing Counsel, for Hearing Counsel.

James P. Denvir, Paul A. Mapes, Janice M. Reece and *Daniel F. VanHorn,* Antitrust Division, Department of Justice, for the Department of Justice.

INITIAL DECISION[1] OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

This proceeding pursuant to sections 15 and 22 of the Shipping Act, 1916, as amended, is ". . . to determine whether Agreement No. 10286 is unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of the Shipping Act, 1916, and whether Agreement No. 10286 should be approved, disapproved, or modified pursuant to Section 15 of the Shipping Act, 1916."[2] The underlying conference formed in 1934 serving in the trade involved in this proceeding, the West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference (WINAC), is FMC Agreement No. 2846.

[1] This decision will become the decision of the Commision in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFT 502.227).

[2] Commission's Order of Investigation and Hearing herein served August 12, 1977, mimeo p. 3 (published in *Federal Register* August 17, 1977, Vol. 42, No. 159, page 41473 and 41474).

In an Appendix A, the said August 12, 1977, Order of Investigation and Hearing named as proponents (signatories to Agreement No. 10286) the following:

American Export Lines
American President Lines[3]
Black Sea Shipping Company
Costa Line
Italia, S.p.A.
Jugolinija
Sea-Land Service, Inc.
D.B. Turkish Cargo Lines
Zim Israel Navigation Co., Ltd.

Protestants were listed in Appendix B to the August 12, 1977, Order as follows:

National Association of Alcoholic Beverage Importers*
Wines and Spirits Wholesalers of America, Inc.*
Donald I. Baker, Assistant Attorney General
Jonathan C. Rose, Deputy Assistant Attorney General
Donald L. Flexner, Attorney, Antitrust Division
Elliott M. Seiden, Attorney, Antitrust Division
Janice M. Reece, Attorney, Antitrust Division, Department of Justice

BACKGROUND

Pursuant to notice served August 25, 1977, a prehearing conference was held in this proceeding on September 12, 1977. The official stenographic transcript of that prehearing conference consists of pages 1 through 62.

Hearings began herein on February 14, 1978, and the official stenographic transcript of the proceedings total 597 pages. The transcripts of the hearings were identified as follows:

Date of Hearing	Vol. No.	Pages
February 14, 1978	Vol. 1	Pages 1 thru 199
February 15, 1978	Vol. 2	Pages 200 thru 335
March 21, 1978	Vol. 1	Pages 1 thru 90
March 22, 1978	Vol. II	Pages 91 thru 242
March 23, 1978	Vol. 3	Pages 243 thru 264

(For clarity transcript references herein will be preceded by date of hearing.)

During the course of the hearings three (3) witnesses were presented; two (2) witnesses were presented by the proponents, Captain Luigi Scaffardi, who has been in the WINAC trade 16 years (February 14, 1978, TR 33), and Dr.

[3] In a motion for dismissal of it from this proceeding, served January 20, 1978, American President Lines, Ltd. (APL), stated, *inter alia*, that it discontinued its Italy-USA service in July of 1977; on October 4, 1977, it submitted its resignation to WINAC and said resignation became effective December 4, 1977. On January 1, 1978, APL and the United States of America, as represented by the Maritime Subsidy Board and the Assistant Secretary of Commerce for Maritime Affairs, entered into a new long-term Operating-Differential Subsidy Agreement. This agreement does not provide for subsidized service from Italy to the United States which was authorized under previous subsidy agreements; accordingly, APL has no intention of operating an unsubsidized service in this trade within the foreseeable future; that if Agreement No. 10286 is approved by the Commission, APL will not be a party to the agreement; that APL is no longer interested in the agreement or the Commission's proceedings regarding approval pursuant to section 15 of the Shipping Act, 1916, as amended. The motion for dismissal of APL from this proceeding was granted February 1, 1978.

APL's Pool Share was to have been only 4.44 percent. In view of such a small share the pool agreement was not sent back for a new beginning. *See Inter-American Freight Conference–Cargo Pooling Agreements Nos. 9682, 9683, and 9684*, Docket No. 68-10, 14 F.M.C. 58 (1970).

* Did not participate in this proceeding.

Francesco Pracentini, Manager of the Cargo Department of Costa and a participant in conference and pool matters during the past 25 or 30 years (Exh. 3, p. 1). One (1) witness, Dr. Edwin G. Dolan, an economist (Exh. 5), was presented by the Department of Justice. Five (5) exhibits were introduced and all five were received in evidence.

The parties, as to briefing, agreed to file opening briefs simultaneously on or before May 5, 1978, and closing briefs on or before June 2, 1978 (March 23, 1978, TR 263). Opening and closing briefs were filed by the proponents, Hearing Counsel and the Department of Justice. Sea-Land filed only an opening brief and in a letter dated June 6, 1978, said it would not file a reply brief as its views were expressed by the other proponents.

The official stenographer's report of the hearings held herein as indicated above, the exhibits and documents received in evidence as stated, together with all papers and requests filed in the proceeding constitute the exclusive record for the facts found herein and the decision made.

The proponents (except Sea-Land Service, Inc.) in an opening brief of 66 pages used 46 of these pages to propose 86 findings of fact. Sea-Land Service, in its opening brief, proposed 10 findings of fact in addition to or restatements of the ones proposed by counsel for proponents (footnote 1, page 2, of Sea-Land brief) which Sea-Land supports. Hearing Counsel in its opening brief proposed 37 findings of fact. The Department of Justice in its opening brief (denominated Initial Post Hearing Brief) proposed 25 findings of facts. The Presiding Administrative Law Judge has considered all of the proposed findings of facts and acted upon them by granting or granting in substance or denying them as the facts found and decision made herein reveals.

FACTS

1. The basic problem in the WINAC trade is overtonnaging (Exh. 3, p. 4); 4,250 twenty foot equivalent units (TEUs) container slots per month would accommodate the entire WINAC trade (Exh. 2, p. 24). At the present time approximately 7,500 container slots of TEUs are being offered each month in the WINAC trade (*Ibid.*, p. 21).[4] Cargo eastbound to Italy is less than the westbound cargo (February 15, 1978, TR 204).[5] There is no pooling agreement out of the United States, only in the Mediterranean area (*Ibid.*, TR 207).

2. No individual or representative of any line has testified that their line was actually engaged in a malpractice in the WINAC trade (*Ibid.*, TR 212).

3. The stated purpose of the instant pool agreement is ". . . to establish and maintain superior common carrier shipping services from Italian ports to United States North Atlantic ports and to ensure that such services will be provided to the shipping public from and to all areas covered by this Agreement, with frequent and regular sailings consistent with the requirements of the trade, at fair, reasonable and stable rates." (Exh. 1, p. 2).

[4] These figures of 4,250 TEUs and 7,500 TEUs do not settle the question of whether overtonnaging exists. It is argued by some that the Italy to North America trade does not exist in isolation, but is one part of a world-wide transportation network (Exh. 4, p. 2)

[5] Some say it is natural for there to be a lower degree of capacity utilization on the westbound routes. This is not overtonnaging in an economically meaningful sense. It is tonnage that is there and should be there as a byproduct of necessary service to other parts of the world-wide transportation system (*Ibid.*, p. 3).

4. The stated duration of the Pool Agreement is that it ". . . shall commence on the first day of the month following its approval by the Federal Maritime Commission and shall continue until the December 31st following the third anniversary date of such approval. Thereafter it will be automatically extended for one successive additional three-year term." (Exh. 1, p. 32)

5. Membership in this Pool Agreement is open to any line which is, or becomes, a member of the underlying conference serving in this trade, FMC Agreement No. 2846, West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference (WINAC). (August 12, 1977, Order of Investigation and Hearing herein, p. 1, Exh. 1, pp. 1, 3) All of the members of the WINAC conference are not members of the Pool Agreement. (See September 12, 1977, Prehearing TR 9.)

6. There are, at present 13 members of WINAC, of whom 8 are parties to the Pool Agreement. The members of the Pool Agreement, the flag of vessels operated and type of service are:

Name	Flag of Vessels Operated	Type of Service
American Export Lines	United States	Full Container and Ro-Ro
Black Sea Shipping Company	U.S.S.R.	Full Container
Costa Line	Italy	Break Bulk and Container
"Italia" S.p.A.	Italy	Full Container, Ro-Ro and Break Bulk
Jugolinija	Yugoslavia	Full Container
Sea-Land Service, Inc.	United States	Full Container
Turkish Cargo Lines	Turkey	Break Bulk and Container
Zim Israel Navigation Company, Ltd.	Israel	Full Container

(Exh. 1, p. 1; Exh. 2, p. 15)

(Besides U.S. flag lines American President Line, referred to in note above, another U.S. flag line, Prudential Line, discontinued service in the WINAC trade (Exh. 2, pp 34, 40, 43) as did Atlantica.)

Carriers in the trade not parties to the Pool are:

Name	Flag of Vessels Operated	Type of Service
Concordia Line	Norway	Break Bulk
Constellation Line	Greece	Break Bulk
Egyptian Navigation Co.	Egypt	Break Bulk
Hansa Line	Germany	Break Bulk
Hellenic Lines, Ltd.	Greece	Break Bulk

(Exh. 2, p. 15; February 14, 1978, TR 135)

Other carriers have recently come into the WINAC trade. Some are Governmentally owned or controlled, such as Black Sea—owned by the Russian Government and Italia Line—owned by the Italian Government. Jugolinija Line—owned indirectly by the Yugoslavian Government (February 15, 1978, TR 250). Seatrain has come into the trade (*Ibid.*, p. 203).

7. Sea-Land in 1969 was the first container operator to enter the WINAC trade (February 14, 1978, TR 33). Today, approximately 80% of the WINAC

trade is carried in containers and the remaining 20% is break bulk (*Ibid.*, pp. 5, 35). With the inception of containers in the WINAC trade there was a tremendous increase in capacity and overtonnaging which still exists. (*Ibid.*, p. 81; Exh. 2, p. 25; Exh. 3, p. 7).

8. Freight forwarders are influential in all Italian trades (Exh. 3, p. 6) and play an important role in the WINAC trade. Article 1739, Paragraph 3, of the Italian Civil Code, provides that any rebate or advantage received by a forwarder be passed along to the shipper unless the forwarder and shipper agree otherwise (Exh. 3, p. 6). This is used to support contention that rebates are not illegal in Italy for the United States trades.

9. The parties agreed that a stipulation between Hearing Counsel and proponents could be read into the record; read into the record was Interrogatory No. 20 propounded by Hearing Counsel September 23, 1977, and the response thereto by Costa Line (February 15, 1978, TR 277–279).[6]

10. Each member line agrees that the Basic Pool Share shall be:

American Export Lines	15.34%
American President Lines	4.44
Atlantica S.p.a.	15.34
Black Sea Shipping Co.	5.47
Costa Line	9.66
"Italia" S.p.a.	15 34
Jugolinija	9.66
Sea-Land Service, Inc.	15.34
Turkish Cargo Lines	2.10
Zim Israel Nav. Co. Ltd.	7.31
Total	100.00%

(Exh 1, p. 24 and Appendix B)

Discussion, Reasons, Findings and Conclusions

The proponents, including Sea-Land Service, Inc., would have the Agreement No. 10286 approved. Hearing Counsel urges the pool be approved

[6] Interrogatory "With reference to self-policing activities of WINAC, describe in detail (a), the manner in which self-policing activity is funded by WINAC, (b) the amount in U S. dollars and exchange rate at the time of payment paid by each proponent as assessment for conference self-policing on yearly basis, January 1, 1972 to the present, and whether any of such amounts represents payment as penalties, fines or liquidated damages as a consequence of an allegation of finding of malpractices or other violations of the WINAC agreement by the self-policing body"

Response "(a) Prior to February 11, 1977, the date of approval of Agreement No 2846–29, there was no separate assessment for the costs of self-policing activities of the owners committee. Such costs were covered out of general conference revenue With the implementation of Agreement No 2846–29, such costs are assessed on each carrier on the basis of its participation in the trade

"Part (b) During the period requested, there has been only one assessment for self-policing. That assessment made after the implementation of Agreement 2846–29 was as follows

American Export Lines	16.958
American President Lines	436
Black Sea Shipping Company	3,530
Concordia Line	1,706
Constellation Line	982
Costa Line	11.246
Egyptian Navigation Co.	188
Hansa Line	10
Hellenic Lines Ltd.	1,299
Italia	26,021
Jugolinija	9,708
Sea-Land Service, Inc.	16,611
Zim Israel Navigation Co	10,006

None of the foregoing amounts represents payment of penalties, fines or liquidated damages."

conditionally, that is, that approval of the pool be conditioned upon amending Agreement No. 10286 to contain language which obligates the WINAC conference neutral body to police all aspects of the pool and which obligates the pool members to be subject to the enforcement authority of the conference's neutral body (Opening Brief of Hearing Counsel, p. 24). The Department of Justice would have approval of Agreement 10286 denied, because, Justice says, (1) the Agreement has not been shown to be required by a serious transportation need, necessary to secure important public benefits, or necessary to further a valid regulatory purpose and (2) the Agreement is contrary to the public interest (Opening Brief, p. 30).

The Department of Justice contends the proponents have not met the proponents' burden of adducing factual evidence in the record of this proceeding demonstrating a serious transportation need for the agreement substantial enough to overcome the strong presumption that the agreement is contrary to the public interest (Opening Brief, p. 12). It is submitted by the Department of Justice that in Canadian-American Working Arrangement, Docket No. 75-56, 16 SRR 733 (1976), the Commission set forth in detail the type of evidentiary record it would insist upon as a *sine qua non* for the approval of an anticompetitive agreement, such as the one at hand. The DOJ argues that Canadian-American Working Arrangement says there must exist a *serious* transportation need or an *important* public benefit, further the agreement proffered for Commission approval must be *necessitated* by *that* important public benefit (*Ibid.*, p. 737).

The proponents in their reply brief (p. 4) assert they have come forward in this proceeding with massive production of evidence (citing Exh. 2 and its Attachments A thru M)[7] substantiating the view that the Pool Agreement is required by a serious transportation need. They argue that the WINAC trade is (A) overtonnaged (*Ibid.*, pp. 10 to 17), (B) unprofitable (pp. 17 to 28) and (C) plagued by malpractices (pp. 28–33). The proponents in their opening brief, too (pp. 47–49), assert the Pool Agreement is necessary to meet a serious transportation need, without saying specifically what the need is, but arguing the trade is overtonnaged, vessels underutilized by about 50% and the trade is plagued by malpractices.

The Department of Justice, on the other hand, counters the proponents have failed to show that serious malpractices exist in the WINAC trade and that there

[7] Attachments A thru M show (A) Cargo loaded at Italian ports for transportation to United States North Atlantic Range ports, by carrier, by year 1972–1977—464,579 weight tons (1,000 kilos) in 1972, 468,044 weight tons (1,000 kilos) in 1977; (B) Gross Freight earned at Italian Ports in the WINAC trade 1972–1977–$54,866,481—(1972), $56,093,884—(1977); (C) Market Share of U.S. Flag Carriers in the WINAC trade by tonnage loaded 1972–1977 (Weight tons of 1,000 kilos) all carriers 464,579, U.S. carriers 189,660 = market share 40.85%—1972; all carriers 468,044, U.S. carriers 147,386 = market share 31.97%—1972; (D) Market Share of U.S. Flag carriers in the WINAC trade by Gross Weight Freight earned 1972–1977—all carriers $54,866,481, U.S. carriers $22,825,729 = market share 41.60% (1972), all carriers $56,093,884, U.S. carriers $16,565,177 = market share 28.57% (1977); (E) Tonnages loaded in WINAC trade by leading commodities 1972–1977 (weight tons of 1,000 kilos)—(leaders—(1) tomatoes—44,445 (1972)—9,088 (1977), (2) wines—38,937 (1972)—38,737 (1977), (3) shoes NOS 34,997 (1972)—8,461 (1977), (4) refrigerators 25,611 (1972), (5) tires 19,695 (1972)—6,242 (1977); (F) Cargo loaded in the WINAC trade by Port, by year 1972-1977 (weight tons of 1,000 kilos) 1972—Genoa 188,743, Leghorn—183,540, Naples 71,556, other Italian ports 20,740, total 464,579; 1977—Genoa 179,940, Leghorn 145,487, Naples 48,706, other Italian ports 93,911, total 468,044; (G) Value of Italian Lira (Lira per Dollar); (H–1) American Export Lines' present fleet servicing WINAC trade—total container capacity 6,782 TEU, frequency of service at Italian ports—every 7 days; (H–2) Black Sea Shipping Co.'s present fleet servicing WINAC trade—total container capacity 1,488 TEU, frequency of service at Italian ports—every 10 days; (H–3) Costa Line's present fleet servicing WINAC trade—total container capacity 600 TEU, frequency of service at Italian ports—every 14 days.

is absolutely no data in the record to show whether rebates are in fact being paid (Opening Brief, p. 22) and if so, at what levels and with what frequency.

Sea-Land Service, Inc. (opening brief, p. 6), says, ". . . the record is replete with references to malpractices which are common in the trade. True, *there is no hard evidence of malpractices* sufficient to find a carrier or shipper in violation of the Shipping Act. . . ." (Emphasis supplied.)

Hearing Counsel (Reply Brief, p. 17) says that in the present proceeding, although *direct evidence of rebating was not available* (emphasis supplied), witnesses who were directly involved with the WINAC trade for many years were certainly qualified to offer reliable hearsay evidence of probative value. Further, according to Hearing Counsel, it is highly unrealistic to expect lines in the trade to actually confess to illegal rebating in this proceeding and DOJ could not present any evidence to refute the existence of malpractices. Hearing Counsel says the cumulative consistency of the history in the trade, the testimony of two knowledgeable witnesses, are sufficient to support a finding that malpractices are a serious problem in the WINAC trade (p. 17).

The instant record as to direct evidence of malpractices and rebates in the WINAC trade leads the Presiding Administrative Law Judge to *find* and *conclude* he agrees with the Department of Justice that the proponents have failed to produce direct evidence of serious malpractices existing in the WINAC trade and that there is absolutely no data in the record to show whether rebates are in fact being paid. The record does show that in addition to Sea-Land's assertion, ". . . there is no hard evidence of malpractice sufficient to find a carrier or shipper in violation of the Shipping Act," witness Scaffardi, when asked, "Has anybody, a representative of a line, ever told you that their particular line pays rebates or engages in any other sort of malpractices?" (February 15, 1978 TR 212), replied, "Yes, in the form of rumors. I understand that one forwarder says that one line says that another agent is being told, but always in the form of rumors and the only two basic cases which everybody seems to know pretty well is the case of Atlantica Line which is the case pending with the FMC now and the other is the Sea-Land case."[8] Witness Piacentini testified that the type of malpractices in the 1960's—i.e., misdeclarations, misdescription of cargo, cargo rebates, services rendered and not paid, exist today (TR 306).

Hearing Counsel, saying malpractices represent a very serious problem, does not point to any part of the record in this proceeding which substantiates malpractices. Hearing Counsel, saying evidence of rebating was not available, resorts to using the 1962 Celler Committee report and *The Investigation, Practices, etc. WINAC/North Atlantic Range Trade,* Docket No. 916, 10 F.M.C. 95 (1961), and asserts (Reply Brief, p. 16), "Rumors of malpractice" can be probative evidence citing *Malpractices–Brazil/United States Trade,* Docket No. 68–44, 15 F.M.C. 55 (1971).

[8] The Q & A continued:
Q. Do you know if the Sea-Land case involved payments in the Italian Trade? I, frankly, am not familiar with the Sea-Land case.
A. No.
Q. You don't know?
A. I don't know.
Q. But is it correct to say that no individual or representative of a line has told you that their line has actually engaged in a malpractice.
A. Absolutely no one.

Hearing Counsel (reply brief, p. 14) contends ". . . that malpractices have existed for many years in the WINAC trade, exist now, are likely to continue unless checked, and represent a very serious problem. The conditions in the WINAC trade which have permitted malpractices and rebates to flourish have been the object of concern by the Commission for many years and were investigated by the Celler Committee. In 1962 the conditions of the Italian trade were described and reported by the Celler Committee.

In Italy, throughout modern time, Hearing Counsel argues, the rebate and special discount has been a typical, lawful, and proper way of conducting business, that:

In *Investigation, Practices, etc., WINAC/North Atlantic Range Trade, supra,* the Commssion investigated the practices of the WINAC trade and described it as follows: (quoting from 10 F.M.C. 95, at 97)

> . . . Despite the fact that the WINAC Conference Agreement forbids discounts, payments, or returns to shippers without unanimous consent of all parties and provides that tariffs shall be strictly observed, concessions and rebates of one type or another have consistently plagued the WINAC trade. . . .
>
> The Commission in approving the prior WINAC pool in 1966 found these same conditions persisting in the trade: (quoting from *Mediterranean Pools Investigation,* Docket No. 1212, 9 F.M.C. 264, 270 (1966)).
>
> Since World War II rebates and special concessions have, in the opinion of the witnesses, been perpetuated by the seriously overtonnaged state of the WINAC trade. With every line seriously short of sufficient cargo to fill the available space, the pressures toward rebates and other concessions were formidable. Those pressures toward malpractice were made almost irresistable by the power of the Italian forwarder who through his control over the booking of the cargo sought and often obtained rate concessions from the carriers in his efforts to remain competitive with the forwarders. An added impetus toward malpractice was a lack of confidence among the lines. The witnesses testified that when a forwarder undertook to play one line off against another, his statement of concessessions offered would ordinarily be accepted as substantially true.

Hearing Counsel also argues that the present conditions of the WINAC trade as described by proponents' witnesses reflect and are a continuation of its turbulent history; that Documentation of incidents of rebating which DOJ requires is not necessary to meet that standard of proof which the Commission has required on previous occasions; that "Rumors of Malpractice" can be probative evidence. Hearing Counsel cited in *Malpractices–Brazil/United States Trade, supra,* the Commission found sufficient, reliable evidence to corroborate hearsay evidence supporting a finding of malpractices in the Brazil trade. The Commission stated that hearsay evidence "must be judged by . . . the convincing quality of the particular hearsay . . . the opposing evidence or lack of it, and the circumstances."

The Supreme Court in *F.M.C. V. Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238, 19 L Ed (2d) 1071, 88 S.Ct. 1005 (1968), suggested a memorandum of justification be required to be submitted with each agreement filed for Commission action to provide a basis for its evaluation under the antitrust test vis-a-vis the public interest standard and that such memorandum shall demonstrate that the agreement is required by a serious transportation consideration. Unfortunately in this proceeding no such memorandum was required.

The Presiding Administrative Law Judge fathoms, from the arguments of the proponents of the Agreement and their assertion that Rumors of Malpractices can be probative evidence, that the 1966 decision in the WINAC trade and the 1962 Celler Committee Report assertions as to malpractices continue today, etc., that the serious need in the WINAC trade is, in the public interest, to rid the WINAC trade of overtonnaging, rebating and all malpractices.

It is deemed that this record shows only rumors as to rebating and malpractices. It is deemed that the Department of Justice (Opening Brief, p. 24) is correct in stating that rumors do not constitute substantial evidence, quoting from *NLRB v. Remington Rand,* 94 F. 2d 862, 873 (CA 2–1938), in which Judge Learned Hand wrote:

> . . . That does not mean that mere rumor will serve to "support" a finding, but hearsay may do so, at least if more is not conveniently available and if in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs."

As to rumor and substantial evidence, *see School Board of Broward County, Florida v. H.E.W.,* 525 F. 2d 900 (CA 5–1976); *Richardson, Secretary of H.E.W. v. Perales,* 402 U.S. 389 (1971).

The proponents contend that serious problems threaten the future of the WINAC trade; that the problems are myriad and serious (opening brief, p. 47), including overtonnaging as a result of Italy's geographic location, excessive service competition, underutilization of vessels, no expectation of cargo growth in the future, malpractices, etc. It is argued that by reducing wasteful competition, including overtonnaging and malpractices, a pool will alleviate the revenue and cost squeeze by reducing carrier costs yet not increasing rates (*Ibid.*, p. 49); that approval of the present Pool Agreement would be consonant with the public interest in that any competition which would be curtailed by the Agreement is destructive and wasteful and in itself tends to work hardship on shippers through discriminatory rebates and the creation of rate instability (*Ibid.*, p. 50). The proponents assert that "A pool is the only means by which overtonnaging can be eliminated without at the same time eliminating the service in the trade of a range of competing carriers." (*Ibid.*). They contend "the Pool Agreement would, in fact, preserve the necessary competition of a wide range of carriers in the trade by reducing excessive competition which only serves to make service more costly than necessary, and unprofitable." (*Ibid.*, p. 54).

The proponents besides arguing (*Ibid.*, p. 56) that the pool is necessary, and will be effective, to eliminate malpractices in the trade, urge that a pool is the only satisfactory answer because it provides the only mechanism for eliminating the incentive to engage in malpractices (*Ibid.*, p. 59). And, the Pool Agreement will have no adverse effect whatsoever on the shipping public (*Ibid.*); and competition would not be completely eliminated under the proposed pool (*Ibid.*, p. 60); nor have an adverse effect on rates (*Ibid.*, p. 62).

The Department of Justice on the other hand argues that a pool is not the least anticompetitive way to eliminate malpractices, even assuming *arguendo* the existence of malpractices in the WINAC trade, or reduce overtonnaging (DOJ opening brief, p. 25). The DOJ suggests that "instead of taking measures designed to increase the rigidity of the conference rate structure—as the pool is intended to do—greater scope should be given for price flexibility. Through

such action it would be easier for prices to reach the market-clearing level,[9] and once that level is achieved, one can expect the demise of any malpractices which may exist." (*Ibid.*). The DOJ contends that approval of the pool would not provide important public benefits or further valid regulatory purposes (*Ibid.*, p. 27), nor assure shippers adequate service (*Ibid.*, p. 29).

Hearing Counsel takes the position that pool benefits outweigh anticompetitive effects in rehabilitating the WINAC trade (opening brief, p. 18). Hearing Counsel asserts that by eliminating the incentives for malpractices, reducing excessive loading calls in an overtonnaged trade and bringing about rate stability, the WINAC pool may produce benefits which outweigh the anticompetitive effects (*Ibid.*, p. 19). Further, says Hearing Counsel, the incentive to rebate for the purpose of obtaining or keeping cargo which another carrier could carry is eliminated when a carrier is assured a percentage of the trade (*Ibid.*). But in order to bring integrity to the WINAC trade, Hearing Counsel sees it as essential that the pool and the self-policing system work in concert and be dependent upon each other (*Ibid.*, p. 24).

Much argument is made that former Commission approval of a pool agreement in this WINAC trade was of great benefit in alleviating similarly claimed problems, referring to Docket No. 916—*Investigation of Practices, Operations, Actions and Agreements West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Trade*, 10 F.M.C. 95 (1966), which case is also cited for the presence of malpractices in this trade. Among the facts stated in that case is found, "From the very beginning of the WINAC Conference in 1934, the trade has been characterized by unrest. The source of this unrest stems from rebating and continuous *rumors of malpractices* (*Ibid.*, p. 96). . . . Traditionally, rebating and other concessions are widely employed. Italian law specifically sanctions such practices. (*Ibid.*) . . . Forwarders . . . are induced to seek reductions and concessions from carriers and have maintained such measures are necessary in order to stay in business. (*Ibid.*, p. 97) . . . *Rumors* circulated concerning 10 percent rebates and other concessions offered by the smaller lines (*Ibid.*, p. 99). . . . Widespread *rumors* regarding continued malpractices persuaded . . . resignations from WINAC." (*Ibid.*, p. 102) (Emphasis supplied).

Patently in approving the Pool in the previous attempt to aid the WINAC trade, direct hard evidence of serious problems of overtonnaging, unprofitability, rebating, and myriad malpractices similar to those problems claimed in the instant case was lacking and rumor prevailed. Approval of the Pool was in the best interest of the public. Possibly it also may be in the best interest of the public through this similarly proposed Pool Agreement to provide another chance to the WINAC trade to meet serious problems claimed so as to bring about the kind of utilization of the carriers in the trade that is most efficient, profitable and useful to shippers and carriers in the best public interest. To that end and for those reasons the pool agreement possibly should be approved after certain modifications hereinafter noted.

[9] In economics the market clearing level is defined as being the level of rates at which the quantity of service demanded was equal to the quantity of service supplied. At that rate, also, the rate would be equal to the marginal costs or incremental cost of providing service (March 21, 1978, TR 53).

With the modifications, the pool agreement would conform with section 15 of the Shipping Act, 1916, provisions of there having been filed with this Commission an agreement ". . . pooling or apportioning earnings, losses or traffic . . .", that ". . . after notice and hearing, and modification the agreement . . . would be found not to be (1) unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or (2) to operate to the detriment of the commerce of the United States or (3) to be contrary to the public interest or (4) to be in violation of this Act. . . ." (Numbers supplied.)

Sea-Land Service, Inc., argues (Opening Brief, p. 7) that not only will approval of the pool benefit U.S.-flag carriers in the trade, but it will also benefit shippers; that the planning and rationalization of service which will result from the pool will eliminate the incentive to rebate and to participate in malpractices (*Ibid.*, pp. 7, 8).

The proponents assert (Opening Brief, p. 50) that approval of the present Pool Agreement will be consonant with the public interest in that any competition which will be curtailed by the agreement is destructive and wasteful and in itself tends to work hardship on shippers through discriminatory rebates and the creation of rate instability. The proponents say (p. 55) there is no reasonable alternative to a pool for bringing capacity in line with cargo availability in the WINAC trade. Further (pp. 59, 60), that the Pool Agreement will have no adverse effect whatsoever on the shipping public; that service will remain more than adequate to meet the needs of the trade, and rates will be unaffected by the Pool. The proponents state that "The fact that not a single shipper or port has presented any evidence in opposition to approval of the Pool Agreement speaks for itself."

Hearing Counsel (Reply Brief, p. 18) submits that approval of the Pool is in the public interest because control by several lines of an extensive portion of our commerce may indeed be detrimental to this nation's commerce, especially when so many are owned or controlled by governments of other nations. And, Hearing Counsel urges, this is true whether the privately-owned carriers of our commerce, who are handicapped by the arrangement, are American or of any other flag. Therefore, approval of the WINAC pool would serve to increase the ability of United States carriers, as well as other privately-owned carriers, to compete in the trade with state-controlled carriers, whose presence represents a threat to the U.S. commerce.

The Department of Justice contends that the proponents have failed to show that the pool is consistent with the public interest.

Upon consideration of the above and the record herein, the Presiding Administrative Law Judge *finds* and *concludes*, having noted that positive proof on various aspects of the case as to malpractices including rebating was simply not available one way or the other, he is persuaded by the arguments of the proponents as to public interest and that based on inferences generally or, as here, on the Commission's special familiarity with the WINAC trade in the shipping industry, he may and does draw inferences on these points from the incomplete evidence that was available. *See Svenska, supra* (390 U.S. at p. 248). The inferences include the serious problems envisioned by the proponents

and those brought about in a similar setting as those claimed in the WINAC trade. It is reiterated that the instant Pool Agreement is not contrary to the public interest if modified as hereinafter provided. As modified, the Pool Agreement would be found to be in the public interest, in helping to solve the problems of the WINAC trade and thus should be approved. The modifications are deemed necessary because as Mr. Justice Black wrote in *Svenska*, "The conferences had abused their power in the past and might do so in the future unless they were subjected to some form of effective governmental supervision." Firstly, Hearing Counsel's recommended modification that the Pool Agreement No. 10286 be modified to contain language which obligates the WINAC Conference neutral body to police all aspects of the pool and which obligate the Pool members to be subject to the enforcement authority of the conferences, is deemed reasonable and is accepted.

Secondly, as part of effective governmental supervision, it is deemed that the Pool Agreement Article 4.3 (Exh. 1, p. 11), as well as any other pertinent areas, should be modified to include the Federal Maritime Commission among those to whom the items referred to in Article 4.3 of the Pool Agreement shall be made available, on demand, in order to permit verification of the accuracy of any later report or manifest.

Thirdly, as a part of effective governmental supervision, it is deemed that a copy of all records in connection with the Pool Agreement and its members be kept in the United States available for inspection by the Commission.

Fourthly, as part of effective governmental supervision that the existence of the agreement as provided in Article 14.1 (Exh. 1, p. 32) be modified to provide for only a two-year period with no automatic renewal.

Fifthly, the Pool Agreement explains any and all modifications brought about by the withdrawal of American President Lines from the Pool Agreement.

Wherefore, it is ordered,

(A) Pool Agreement No. 10286 shall be modified as follows:

(1) to contain language which obligates the WINAC conference neutral body to police all aspects of the Pool and which obligates the Pool members to be subject to the enforcement authority of the conference.

(2) to include the Federal Maritime Commission among those to whom the items referred to in Article 4.3 of the Pool Agreement shall be made available.

(3) to keep a copy of all records in connection with the Pool Agreement and its members in the United States available for inspection by this Commission.

(4) to provide that the existence of the Pool Agreement shall be for only a two year period with no automatic renewal.

(5) to explain any and all modifications brough about by the withdrawal of American President Lines from the Pool Agreement.

(B) Upon notice, satisfactory to this Commission, that the modification in

(A) above properly have been made, the Pool Agreement, as modified, will stand approved, and this proceeding discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

WASHINGTON, D.C.
August 31, 1978

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

SUBCHAPTER B—REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

[DOCKET 78-21; GENERAL ORDER 11, AMDT. 4]

PART 512—Financial Reports by Common Carriers By Water in the Domestic Offshore Trades

Subpart A—Vessel Operating Common Carriers Balance Sheet and Income Statements Reports

Average Value of Rate Base

January 29, 1979

ACTION: Final Rule

SUMMARY: The Federal Maritime Commission is revising its regulations which govern the financial reports by common carriers by water in the domestic offshore trades. This change will require common carriers by water in the domestic offshore trades to provide for the computation of the average value of rate base. The use of the average value instead of the beginning of the year rate base—which is currently used—will provide a more accurate calculation of rate of return on rate base.

EFFECTIVE DATE: Effective thirty (30) days after publication in the *Federal Register*. Applicable to proceedings instituted on and after that date.

SUPPLEMENTAL INFORMATION:

This proceeding was instituted by Notice of Proposed Rulemaking published in the *Federal Register* on *June 16, 1978* to amend section 512.7 of the Commission's General Order 11 (46 CFR Part 512). The purpose of this amendment is to provide for construction of a midyear or average value rate base. Such a rate base will better represent the actual extent of assets devoted to a trade throughout the year, as opposed to a rate base constructed at the beginning of the year, as currently required.

In its Notice the Commission recognized the fact that a rate base value for the beginning of the year indicates a value which is proper for only one point in time and not for the entire period. Because of accounting depreciation, the beginning of the year value of rate base will be steadily eroded throughout the period. Similarly, an end of the year rate base is only proper for that one point in time. A more appropriate value for rate base would be the average value.

Comments with respect to the proposed rules were received from (1) Matson Navigation Company (Matson), (2) Military Sealift Command, (MSC) and (3) Council of American-Flagship Operators (CASO).

Matson did not object to the proposed rule provided its application was to be prospective only and not used as a guide in determining the reasonableness and lawfulness of rate increases which were filed before the adoption of the rule. Matson requested that the report of the Commission promulgating the proposed rule specifically recite that the rule is not intended to be used in determining the reasonableness and lawfulness of rate increases filed prior to its adoption. The Commission accepts this to be a reasonable request.

MSC's comments addressed two issues. The first dealt with whether this rulemaking proceeding is intended to establish a substantive rule for application in rate cases as well as a reporting rule. The Commission intends for this rule to be applicable to both rate cases and annual reporting requirements.

MSC also took the position that an end of the year rate base is preferable to an average rate base. This position is based on the proposition that it is unfair to require ratepayers to support both depreciation, a current expense, and a return on rate base that includes any part of that depreciation.

As previously discussed, the Commission recognizes the fact that a rate base value at the beginning of the year indicates a value which is proper for only one point in time and not for the entire period. Similarly, an end of year rate base is proper only for that one point in time. The average rate base would correct for the overstated value created by using a beginning of the year rate base and the understated value of rate base which results from the use of end of the year values. The Commission feels the use of the average rate base more properly balances the interests of both the carriers and the ratepayers.

Comments submitted by CASO were opposed to the amendment based on historical acceptance of the present method. The Commission feels that historical acceptance of a particular method does not necessary preclude the evolvement of a better method. Further, as discussed previously, it is the opinion of the Commission that the use of average rate base will better balance the interests of the carriers and the ratepayers.

CASO also commented that in computing the working capital portion of the rate base, terminated voyage expenses are included without the benefit of averaging to reflect increases in operating expenses. It is the Commission's view that the working capital computation allows the maximum fair allowance for working capital in the rate base. Furthermore, the fact that terminated voyages occur throughout the accounting period tends to result in the averaging of expenses, much in the manner advocated by CASO.

Therefore, pursuant to the authority of sections 18, 21 and 43 of the Shipping Act, 1916 (46 U.S.C. 817, 820 and 841), sections 2, 4 and 7 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 844, 845(a) and 847) and section 4 of the Administrative Procedure Act (5 U.S.C. 553); section 512.7 of Title 46 CFR is amended to read as follows:

In section 512.7(b)(2) Reserve for Depreciation—Vessels (Schedule II)(i)), the second sentence is amended to read as follows: For vessels owned for the entire year the accumulated reserve for depreciation for the beginning and the

end of the year shall be reported and the arithmetic average thereof shall be allocated to The Service and to The Trade in the same proportion as is the cost of the vessel in Schedule I.

Subdivision (*ii*) is amended by adding a new sentence at the end reading as follows: The reserve for depreciation upon which the deduction is calculated shall be the average of the reserves for depreciation at the beginning of the year and at date of disposal.

A new subdivision (iii) is added as follows: (*iii*) For any vessels acquired during the period, an addition shall be made representing one-half of the reserve for depreciation on that vessel at the end of the year.

In section 512.7(b)(3)(i) the following three sentences will replace the first sentence: Actual investment, representing original cost to the carrier, or to any related company, in other fixed assets employed in The Service shall be reported as at the beginning of the year. Accumulated reserves for depreciation for these assets shall be reported as at both the beginning and the end of the year. The arithmetic average of the reserves shall also be shown and shall be the amount deducted from original cost in determining rate base.

The following sentence is to be added to the end of the existing section 512.7(b)(6): Where other assets are subject to depreciation, the amount of the reserve to be subtracted from the original cost in determining the component of rate base shall be the arithmetic average of the reserve for depreciation at the beginning and the end of the year.

The following sentence will be added between the existing second and third sentences of section 512.7(b)(7): In calculating depreciated costs, the reserve for depreciation to be deducted from the original cost shall be the arithmetic average of the reserve for depreciation at the beginning and the end of the year.

By the Commission

(S) FRANCIS C. HURNEY
Secretary

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

SUBCHAPTER B—REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

[DOCKET 78-5: GENERAL ORDER 11, AMDT. 5]

PART 512—Financial Reports By Common Carriers By Water in the Domestic Offshore Trades

Subpart A—Vessel Operating Common Carriers Balance Sheet and Income Statements Reports Capitalization of Interest During Construction

January 29, 1979

ACTION: Final Rule

SUMMARY: The Federal Maritime Commission is revising its regulations which govern the financial reports by common carriers by water in the domestic offshore trades. This change will require common carriers by water in the domestic offshore trades to capitalize interest incurred during a period of construction in determining the value of an asset to be included in rate base. The capitalization of interest incurred during construction will assign a more accurate cost to the asset and permit a carrier to earn a rate of return on rate base which is more conceptually correct.

EFFECTIVE DATE: This amendment shall be effective thirty (30) days after publication in the *Federal Register* and shall be applicable to assets the construction of which was completed after December 31, 1977.

SUPPLEMENTAL INFORMATION:

Pursuant to the authority of sections 18, 21 and 43 of the Shipping Act, 1916 (46 U.S.C. 817, 820 and 841), sections 2, 4 and 7 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 844, 845(a) and 847) and section 4 of the Administrative Procedure Act, (5 U.S.C. 553); the Federal Maritime Commission, hereinafter referred to as the Commission, is authorized and directed to make rules and regulations affecting Vessel Operating Common Carriers in the Domestic Offshore Commerce of the United States.

Part 512 of the Commission's regulations requires the filing of rate base and income account statements from vessel operating common carriers. These statements aid the Commission in the discharge of its duties by providing data used in evaluating the reasonableness of rates for the carriage of cargo and insure that the level of the rates which produce profits are commensurate with the carrier's cost of capital.

This proceeding was instituted by Notice of Proposed Rulemaking published in the *Federal Register* on March 24, 1978, to amend section 512.3 of the Commission's General Order 11 (46 CFR Part 512) by adding a new paragraph (j).

The purpose of this amendment is to require domestic offshore vessel operating common carriers to capitalize interest during a period of construction. The capitalization of such interest will result in the inclusion in rate base of a more accurate cost of assets employed and allow a carrier to recover this cost in future rate structures.

Comments were received from six interested parties, one of which merely endorsed the proposed rule. Two commentators advocated the use of interest rates other than the prime rate as proposed. One suggested the utilization of the weighted average of rates paid by the particular carrier on all of its outstanding long-term issues. The other proposed using actual rates for borrowings and the prime rate for equity funding.

In its reply, Hearing Counsel recited a number of reasons against adopting either of these proposals. Long-term debt averaging is not totally without merit, but not all financing comes from long-term debt. Loans repayable within one year may contribute to funding construction. Furthermore, since such a method would not take into account equity financing, the average could be skewed by rates on funds not used for construction. The use of actual rates is even less attractive. Funding may come from several sources, such as bank borrowings, general purpose bond issues and equity. Identification of a specific amount from a specific source with a special asset may prove impossible. Also, the classification of a borrowing from a related company as debt or equity may prove difficult.

In addition to the foregoing, carriers building identical assets may be charged different rates based on credit rating. Thus, the less efficient carrier in all likelihood would achieve a higher rate base than the more efficient one. The Commission believes that, lacking conclusive arguments in favor of an alternative, the ease of administration of the prime rate makes its adoption appropriate. It may be noted that one commentator specifically endorsed utilization of the prime rate for that reason.

Comments received also recommended broadening application of the rule, both as to cost and period covered. It was suggested that all costs which are capitalized under generally accepted accounting principles should be included within the scope of the rule. It is the Commission's understanding that certain of these costs are significant sums and result in a number of payments over a period of time which are readily identifiable. Others involve smaller amounts, may result in a single payment, and/or present difficulties in verification. Having given due consideration to this matter, the Commission finds that periodic payments to a firm under contract to perform such services as asset design, engineering studies and performance inspections may appropriately be taken into account in computing the cost of funds during construction. However, broadening the application of the rule to include the multitude of items which may be appropriately capitalized would result in administrative complexity without significant benefit to the carrier.

One commentator questioned the nature of the rule, raised several procedural questions and equated treatment under the proposed rule to income tax treatment. The proposed rule will affect the computation of rate base and will impact on all matters which involve rate base, including the evaluation of ratemaking by carriers. The rule is substantive and is intended to provide for a more accurate computation of the value of assets devoted to the domestic offshore trades. Also, the Commission believes that income tax treatment should not be an overriding consideration in regulatory ratemaking. It is the Commission's responsibility to develop a proper basis for the evaluation of the propriety of carrier rates, irrespective of how certain items are treated for tax purposes.

Several comments received were considered to have merit. It was suggested that the calculation of capitalized interest be shown only once and be incorporated by reference in subsequent reports. Recommendations were also made to include assets constructed by related companies, and to consider only those strikes which delay construction in computing the 12-month period. Hearing Counsel recommended substitution of the term carrier for company and making captilization mandatory. These comments have been taken into account in the composition of the final rule.

Therefore, section 512.3 of the Title 46 CFR is amended by adding a new paragraph, designated section 512.3(j), and reading as follows:

512.3(j) Interest During Construction—Interest shall be capitalized on all funds, including the carrier's own funds, actually employed in the design, engineering study, performance inspection, construction, reconstruction or reconditioning of a capital asset. Such asset shall be owned in a carrier's own name or in the name of any of its related companies. Should carrier capitalize such interest on assets of related companies, said companies shall produce any information related to the assets upon request of the Federal Maritime Commission, its employees or agents. Interest during contruction shall be eligible for capitalization when all of the following conditions and requirements are met:

(1) The construction period must be 12 months or greater. For the purpose of this part, the construction period begins when construction work commences on the asset and ends when the asset is ready for use by the carrier. Strike periods, during which construction is delayed for eight consecutive days or more, must be eliminated when determining whether or not the 12-month requirement is met.

(2) Payments must be made on a periodic basis during the period of design and construction.

(3) Interest shall be calculated starting with the first payment and on each payment thereafter. The rate employed shall be the average prime rate for the month in which the payment is made as set forth in the Federal Reserve Bulletin.

(4) A detailed description of the interest calculations made, including the name of the construction company employed and firm or firms performing design, engineering, and/or inspection services, shall be set forth on a separate schedule for each capital asset included in a rate base of the carrier, in the first year of such inclusion, for which interest capitalization has been employed. Such capitalized interest shall be included in rate base when the asset is included in rate base in accordance with section 512.7(b) and in the same allocable amounts as the asset. A schedule shall be provided with each rate base statement setting forth

the year in which an interest calculation statement was submitted for each asset which includes capitalized construction interest in the rate base. The following is a simplified example of the interest calculation:

ABC COMPANY, INC.
December 31, 1979

Description of Asset: *SS Steamship* Dates of Construction: 5/1/77–4/30/79

PAYMENT DATE	PAYEE	PAYMENTS	PRIME RATE	MONTHS FROM PAYMENT TO DELIVERY	INTEREST
10/31/76	J&J	$ 25,000	7.0%	30	$ 4,375
04/30/77	J&J	25,000	8.0	24	4,000
05/01/77		CONSTRUCTION COMMENCED			
10/31/77	XYZ	25,000,000	7 0	18	2,625,000
04/30/78	XYZ	25,000,000	7.5	12	1,875,000
10/31/78	XYZ	25,000,000	8.0	6	1,000,000
04/30/79	XYZ	25,000,000	7 0	0	—
		$100,050,000			$5,508,375

Design, engineering and inspection services performed by: Jones and Jones, P.C. (J&J)
Constructed by: XYZ Construction Co. (XYZ)

(5) The effects of the interest during construction provisions shall be calculated on work completed after December 31, 1977.

By the Commission

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 74-12

AGREEMENT NO. 9939-1
(MODIFICATION AND EXTENSION OF A POOLING, SAILING, AND EQUAL ACCESS TO GOVERNMENT CONTROLLED CARGO)

ORDER OF CONDITIONAL APPROVAL

January 30, 1979

This proceeding was initiated on April 1, 1974, to determine if Agreement No. 9939-1,[1] a pooling, sailing, and equal access agreement between Prudential Lines (PLI) and Compania Peruana de Vapores (CPV), should be approved, disapproved or modified pursuant to section 15, Shipping Act, 1916. Thereafter, the parties withdrew Agreement 9939-1 and filed Agreement Nos. 9939-2 and 9939-3. On November 3, 1976, the Commission conditionally approved Agreement Nos. 9939-2 and 9939-3 *pendente lite* and ordered Agreement 9939-2 to be set down for investigation and hearing.

Agreement No. 9939-2 is in effect a completely new agreement between the parties as it provides only for "equal access" and not pooling of revenues. Agreement No. 9939-3 is an interim arrangement providing for the suspension of the overcarriage penalty provisions of Agreement No. 9939 pending final action on Agreement No. 9939-2.

Subsequent to our interim approval of Agreement No. 9939-2, Westfal-Larsen Line (WL), the sole protestant, withdrew from the proceeding. This prompted PLI to move that this proceeding be discontinued and that Agreement Nos. 9939-2 and 9939-3 be "finally approved." On May 24, 1977, the Commission denied PLI's request.

PLI then petitioned for modification of our amended Order of Investigation (November 3, 1976 Order) and reconsideration of our May 24, 1977 Order denying PLI's motions to discontinue the proceeding.[2]

Thereafter, CPV, by letter of July 11, 1977, advised that it "will no longer participate in Docket No. 74-12 involving Agreement No. 9939-1" because:

(1) The proceeding has . . . been in a dead center position without reason.

(2) The only protesting parties have long since withdrawn.

(3) The discovering (sic) procedures initiated by [Hearing Counsel] presumed to question . . . the

[1] Agreement No. 9939, the basic agreement, was approved by the Commission through March 22, 1974, in Docket No. 71-71, *Agreement No. 9939—Pooling, Sailing, and Equal Access to Government Controlled Cargo Agreements*, 16 F M C 293 (1973). Agreement No. 9939-1 modified the basic agreement by, *inter alia*, extending the Agreement's term.

[2] Our action here effectively resolves the matters raised by PLI in its petition to modify and reconsider. Accordingly, except to the extent granted herein, PLI's petition is denied

shipping laws and policies of Peru, a sovereign nation. [S]uch discovery requests go far beyond any rational bounds involved in the proceeding.

In response to CPV's correspondence, Administrative Law Judge Seymour Glanzer (Presiding Officer), *sua sponte*, discontinued the proceeding. The Presiding Officer viewed CPV's withdrawal from the proceeding as a "request for dismissal of the application for approval, [of Agreement Nos. 9939–2 and 9939–3] under section 15, by one of the two parties to the submitted agreement." Although the Presiding Officer recognized that the question of Peruvian sovereignty is the "motivating factor for CPV's withdrawal,"[3] the Presiding Officer felt constrained, in view of CPV's lack of participation, to discontinue this proceeding.

PLI has appealed from the Presiding Officer's order of dismissal and urged approval of Agreement No. 9939–2.

DISCUSSION

A. *Agreement No. 9939–2*

As we have indicated, Agreement No. 9939–1 has been superseded by Agreement No. 9939–2, which is now before us on PLI's motions. In our consideration of these motions, we have determined to examine Agreement No. 9939–2 in light of our recent decision in Docket No. 74–5, *Agreement No. 10066—Cooperative Working Arrangement*, 21 F.M.C. ____ (1978), served November 17, 1978.

Agreement No. 9939–2, as interimly approved by our Order of November 3, 1976, provides that:

(1) CPV and PLI maintain regular maritime service between ports in Peru and ports on the West Coast of the United States and that these parties "declare their intention to cooperate, to the extent allowed by this Agreement, for the purpose of ensuring that commerce moving in the southbound trade is served regularly and efficiently"

(2) CPV and PLI will have free access to the cargo carried to Peru from United States West Coast ports and that the spirit of reciprocity must be maintained regarding participation by both lines

(3) The parties agree that if one of them "cannot accommodate a shipper's request for space, that party will advise the shipper that service may be available on the vessels of the other party and will further advise the shipper to contact the other party. The parties agree to exchange such information as to the schedules of each other's vessels and to the type of cargoes that may be accommodated."

(4) Cargoes will be carried in accordance with the tariff rules of the Latin American Pacific Coast Steamship Conference.

(5) CPV and PLI shall become associated companies insofar as the transportation of cargo in connection with paragraph 2 is concerned.

(6) The Agreement shall be submitted for approval in accordance with the legislative requirements of Peru and the United States.

(7) The Agreement shall be of indefinite duration.

The Agreement, as submitted, by providing for equal access, coordination of sailing, and cargo referral, is at the very least a combination in restraint of trade violative of section 1 of the Sherman Act. As such the Agreement is *prima facie*

[3] The Presiding Officer advised "that the question of Peruvian sovereignty is an additional factor motivating this order"

subject to disapproval under the public interest standard of section 15 unless justified.[4]

PLI has argued and the Commission has found when Agreement No. 9939-1 was originally approved in Docket No. 71-71, *supra*, that the impetus for the equal access agreement at issue here is the Peruvian cargo preference decrees. The other alternatives available to PLI would require, insofar as we are aware, retaliatory action, such as those permitted under section 19 of the Merchant Marine Act, 1920, with its possible resultant "inter-governmental conflict."[5]

When a commercial arrangement, such as Agreement No. 9939-2, provides a means to reconcile the conflict between the laws and policies of the United States and its trading partners, the Agreement clearly yields important public benefits through the avoidance of disruptive retaliatory action and the resultant "inter-governmental conflict." In addition, to the extent Agreement No. 9939-2 allows United States-flag carriers access to a significant portion of government controlled cargo that would otherwise not be available, thereby also improving common carrier service to shippers and consignees it provides additional important public benefits. Any reduction of United States-flag liner service in our trades would be detrimental to the commerce of the United States.

We realize, of course, that section 15 requires that the Commission consider the effects of an agreement on third-flag carriers—in this case a vessel flying the flag of other than the United States or Peru. Thus, we are required to "disapprove, cancel, or modify" any agreement that is found to be "unjustly discriminatory or unfair as between carriers." But before we may disapprove an arrangement that does not provide for participation by all carriers serving the trade as being discriminatory and unfair, we must first find that such discrimination or unfairness is *unjust*.

Although the Agreement does not provide for participation by third-flag lines, we cannot find, as a matter of law that the Agreement itself is unjustly discriminatory or unfair. The Agreement at issue was negotiated and executed by an United States-flag carrier in response to various legislative enactments of the Peruvian Government which restricted certain Peruvian imports to Peruvian-flag vessels or its associates. Because the Peruvian Government and CPV[6] desired to gain access to United States cargoes that are restricted to United States-flag vessels, PLI was able to negotiate Agreement 9939-2. Thus, this arrangement provides PLI access to Peruvian cargo that is restricted by Peruvian law to Peruvian-flag vessels or their associates. Therefore, it is not the Agreement itself which restricts third-flag participation in the carriage of Peruvian cargo but rather the underlying Peruvian decrees. Absent PLI's negotiation of this arrangement, PLI could well have sought retaliatory action from its government. This action in turn could well have resulted in inter-governmental conflict and the disruption of transportation service in the trade.

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[4] Docket No. 74-5, *Agreement No. 10066—Cooperative Working Arrangement*, 21 F.M.C. ___ (1978), served November 17 1978; *FMC v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968); *Mediterranean Pool Investigation*, 9 F.M.C. 264, 290-29 (1966).

[5] *Agreement No. 10066, supra.*

[6] As we found in Agreement No. 9939, *supra*, note 6, CPV and the Peruvian Government for all intents and purposes are one and the same.

In the United States/Peru trade, third-flag carriers do not find themselves in the same position as United States-flag carriers with regard to gaining access to restricted Peruvian cargoes.[7] For third-flag carriers cannot, insofar as this trade is concerned, offer the Peruvian Government and Peruvian-flag vessels reciprocal carrying rights to United States restricted cargoes. Accordingly, it is not our approval of this Agreement which burdens third-flag carriers but rather the status of third-flag carriers themselves and the Peruvian decrees which in effect restrict third-flag participation in Peruvian commerce. Although the status afforded third-flag carriers by the Peruvian Government may be inconsistent with United States policies, the Commission may not ignore the duly enacted law and philosophies of other sovereign nations merely because they may not be wholly consistent with our own.[8] Such inconsistencies are best resolved through commercial arrangements, such as Agreement No. 9939–2 in order to avoid retaliatory action, international conflict and the resultant disruption of United States waterborne commerce. Accordingly, we cannot find as a matter of law that Agreement 9939–2 is unjustly discriminatory or unfair.

B. *Modifications Required*

Our finding that Agreement No. 9939–2 is in the public interest because it confers important public benefits does not, however, conclude our inquiry. We must, in considering an antitrust exemption for the Agreement, make certain that the conduct legalized does not invade the prohibitions of the antitrust laws any more than is necessary to secure the purposes of the Shipping Act, 1916, and the legitimate objective of the Agreement itself. With this consideration in mind, and in light of our recent decision in Docket No. 74–5, *Agreement No. 10066, supra,* we find that certain provisions, *i.e.* Paragraph 1, the "cooperation" provision; and Paragraph 3, the cargo referral provision, exceed the legitimate objectives of the Agreement to the extent it has been justified. Accordingly, the deletion of these provisions is being made a condition to the approval of the Agreement. We are also requiring as a condition of approval that a provision be added to the Agreement which allows for the admission of other United States-flag carriers. As a further condition of approval, we shall require the parties to modify the term of the Agreement. A discussion of each of the required modifications follows.

1. *The "Cooperation" Provision*

Paragraph 1 provides that the parties shall "cooperate to the extent allowed by this Agreement for the purposes of insuring that commerce moving in the southbound trades from the Pacific Coast of the United States to Peru be served regularly and efficiently." While PLI advises that this language is intended only as a statement of the parties' "commitment to engage in the activities permitted elsewhere in the agreement," the parties have failed to justify the sweeping

[7] Although the present record does not reveal such agreements, the Commission has previously found that certain third-flag carriers in the U.S. trades have entered into agreements with some South American national flag lines which grant preferred treatment for these carriers in the trades between South America and their own countries. *Agreement Nos. 9847 and 9848 Revenue Pools, U.S. Brazil Trade,* 14 F.M.C. 149 at 156–157.

[8] In this regard, it must be remembered that of necessity the United States foreign commerce is also the foreign commerce of another sovereign nation.

language used in Paragraph 1. Paragraph 1 could be read to authorize coordination of sailing, space chartering or other anticompetitive activities under the guise of assuring that commerce moves in this trade. In short, the language of Paragraph 1 has not been adequately justified and is not sufficiently precise to permit interested parties to ascertain the scope of the Agreement without recourse to outside sources. As we have explained in the past, "it would be contrary to the public interest to approve an agreement whose coverage is so vague that the public [and the Commission] cannot ascertain the coverage by reading the agreement."[9] Accordingly, we shall require, as a condition of approval, that the parties delete Paragraph 1 of Agreement No. 9939-2.

2. *Cargo Referral*

We likewise find the Agreement's cargo referral provision to be vague and unjustified on the record.

Paragraph 3 of the Agreement provides that if one of the parties to the Agreement is unable to accommodate a shipper's request for space, that party will be advised to contact the other party as the requested service may be available on the other party's vessel. The authority contained in this paragraph would appear to bind a shipper to the services of *both* the parties to this Agreement, irrespective of shipper preference. The potential for unwarranted, unjustified anticompetitive activity presented by this provision is too great to merit our approval under section 15. As we stated in *Agreement No. 10066, supra*, "it would be anomalous to approve such an anticompetitive provision in an agreement, the approval of which has been sought on the basis of increased competition with respect to government controlled cargo."

In seeking approval of this Agreement, PLI has alleged that the Agreement is required to allow the parties to compete for government controlled cargo, particularly with respect to Peruvian controlled cargo that may otherwise not be available to PLI. Paragraph 3 of Agreement No. 9939-2 would appear to unjustifiably eliminate all vestiges of competition between the parties, as it requires in effect, that the parties exchange cargo offerings of controlled as well as noncontrolled cargo. In the absence of a showing that this provision is required by a serious transportation need, necessary to secure important public benefits, or in furtherance of a valid regulatory purpose, we find Paragraph 3 contrary to the public interest. Approval of Agreement No. 9939-2 is therefore conditioned upon the deletion of this provision.

3. *National-flag Participation*

As we have heretofore mentioned, Agreement No. 9939-2 provides only for access to government controlled cargo by PLI and CPV. The Agreement, as submitted, does not allow for participation by other United States-flag lines that may enter this trade. In *Agreement No. 10066, supra*, we found that the failure to provide for additional United States-flag participation in an equal access agreement could preclude a United States-flag carrier from entering the trade covered by the agreement, and that such a result, would be contrary to the public interest and detrimental to the commerce of the United States. Accordingly, we shall

[9] *Agreement No. 9448—North Atlantic/Outbound European Trade*, 10 F.M.C. 299, 307 (1967); *Agreement No. 10066, supra.*

require as a further condition of approval that the Agreement be modified to provide for participation by other United States-flag lines that may enter the trade covered by this Agreement.

4. *Term of the Agreement*

Although the Agreement as submitted provides for an indefinite term, we are requiring that it be limited to a three-year term. Not only have Proponents failed to justify an indefinite term, but by limiting the term of the Agreement, the Commission and the parties will, at the time any extension is sought, be in a position to reevaluate the need for the Agreement in view of the circumstances then existing in the United States/Peru trade. In view of the nature of the Agreement, the trade involved, and the potential for modification of the cargo preference decrees, we believe that a three-year term is reasonable. Therefore, this Agreement is approved on the condition that the Agreement be specifically limited to a term of three years from the date of this approval.

C. *Status of PLI*

On May 9, 1978, Delta Steamship Lines, Inc. (Delta) and PLI advised the Commission that Delta was acquiring PLI and would be assuming its Mexican, Caribbean, Central and South American operations. Delta further advised that it wished to assume all of PLI's rights and liabilities "under the respective section 15 agreements to which PLI is presently a party," including Agreement No. 9939. On May 23, 1978, we served notice, 43 Fed. Reg. 27074, of Delta's intent to assume the rights and liabilities of PLI under the respective section 15 agreements in the trades concerned and advised that Delta would be substituted for PLI as party to these agreements. No comments or protests to such notice were filed. Accordingly, as a further condition of approval, we shall require the Agreement to be modified by substituting Delta Steamship Lines, Inc. for PLI.

D. *Presiding Officer's Order of Dismissal*

The Presiding Officer, in his October 5, 1977 Order of Dismissal, found that CPV had, in effect, requested withdrawal of Agreement No. 9939-2 by its correspondence of July 11, 1977. CPV predicated its "refusal to participate" primarily on its objections to the scope of discovery initiated by Hearing Counsel. The Presiding Officer agreed holding that the question of Peruvian sovereignty "is an additional factor prompting this order of discontinuance."

If CPV had valid objections to the scope of discovery being pursued by Hearing Counsel in this proceeding, it should have followed the procedure provided in the Commission's Rules of Practice and Procedure. However, we note, as did the Presiding Officer, that CPV's July 11, 1977, letter was not "written by a lawyer".[10]

In any event, we believe that CPV's correspondence reflects a concern for the integrity of Peruvian sovereignty rather than a request to withdraw Agreement No. 9939. Accordingly, and because we believe that Agreement 9939-2 should now be approved, we are vacating the Presiding Officer's Order of Dismissal.

[10] As of July 11, 1977, CPV was not represented by counsel in this proceeding.

CONCLUSION

For reasons stated above, we find that Agreement No. 9939-2, if modified as provided herein, confers important benefits and is in furtherance of the regulatory purposes of the Shipping Act. Moreover, the extent of the anticompetitive activity being approved is not sufficient to outweigh these benefits and warrant the Agreement's disapproval. Further, we find that the Agreement, as conditionally approved, is not unjustly discriminatory or unfair, detrimental to the commerce of the United States, or otherwise in violation of the Shipping Act, 1916.

THEREFORE, IT IS ORDERED, That Agreement No. 9939-2 is approved pursuant to section 15 of the Shipping Act, 1916, on the condition that:

1. The preamble and Paragraphs 2, 4 and 5 be amended by deleting Prudential Lines and substituting therefor Delta Steamship Lines, Inc.

2. Paragraph 1, the "cooperation" provision and Paragraph 3, the cargo referral provision, be deleted.

3. A new Paragraph 1 be inserted as follows:

In the event, that an additional United States-flag line(s) enters the trade covered by this Agreement, it is mutually agreed by the signatories hereto that such additional line(s) shall upon application and notice to the Federal Maritime Commission become signatory(ies) and participate fully in this Agreement. In the event that any other party becomes signatory to this Agreement, participation shall be effective upon application and notice to the Federal Maritime Commission.

4. That Paragraph 7, the term provision, be deleted and replaced by a new paragraph reading as follows:

The term of this Agreement shall be three years from _____, the effective date of the Federal Maritime Commission's approval of this Agreement, provided, however, that either party may terminate the Agreement on sixty days' notice.

5. The Commission receive on or before March 26, 1979 a complete copy of Agreement No. 9939-2 modified in accordance with subparagraphs 1, 2, 3, and 4 signed by the parties.

IT IS FURTHER ORDERED, That the approval contained herein shall be effective on the date the above conditions are met.

IT IS FURTHER ORDERED, That the Presiding Officer's October 5, 1977, Order of Dismissal be vacated.

IT IS FURTHER ORDERED, That this proceeding be discontinued.

Commissioner Leslie Kanuk dissenting. I respectfully dissent from the action of the majority adopting the Order of Conditional Approval.

The issue properly before the Commission is whether the presiding officer was correct in discontinuing the proceeding. His action was taken after one of the two parties to Agreements 9939-2 and 9939-3 advised that it would "no longer participate" and was "withdrawing from this proceeding." The Administrative Law Judge, faced with this notification and lack of response to discovery requests and a motion to compel, determined that Compania Peruana de Vapores (CPV) had effectively requested dismissal of the application for approval. The record before us contains no indication that CPV disputes the Administrative Law Judge's perception of events. The remaining party to the Agreement filed an

appeal of the Administrative Law Judge's Order, and it is that appeal which is before the Commission.[11]

The Commission action reflected in the majority report goes far beyond the narrow question of the effect of CPV's withdrawal on the proceedings below. Instead, the Commission has ruled favorably on the approvability of the Agreement. In so doing the Commission has acted in a factual vacuum, and the result is no doubt defective. Were I inclined to agree with the majority's cursory treatment of the CPV withdrawal (Order at 13–14), I would urge a remand of the proceeding to the Administrative Law Judge for development of a factual record. None of the issues upon which the Commission directed the development of a record in its Order of Investigation have been addressed by the parties. We have before us virtually no evidence on the following questions:

1. What are the exact provision of the cargo preference laws of Peru at this time?

2. What effect have these cargo preference laws had on past and present carriers serving the U.S./Peru trades?

3. What has been the history of the competitive impact of Commission approval of predecessor agreement to Agreement 9939-2?

4. What are the present capacities of carriers serving the U.S./Peru trades in relation to the overall volume of the trade?[12]

These are all matters which the Commission ordered the parties to develop in the course of hearings. (See Order of Investigation, p. 9). These are among the many legal and factual questions which must be answered before I can vote on whether the Agreements should be approved. These issues are no more close to resolution than they were when the Commission refused to discontinue the proceeding at PLI's request in May 1977.

The practice of hastily catapulting ourselves into consideration of the merits of agreements filed for approval pursuant to section 15 of the Shipping Act, 1916, is one which serves no one well. However sound our policy judgments, however well motivated our actions, we quickly find our work undone when we dispense with the process of building a record. This state of affairs is easily avoided by insisting on at least a submission of affidavits of fact prior to consideration of the merits of an agreement. I am not prepared to vote for approval of an agreement backed only by procedural motions of counsel for one of the two signatories.

On the matter that is squarely before the Commission, I am inclined to support the Administrative Law Judge's interpretation of events. This support must, however, be carefully qualified. The notifiction by CPV of its withdrawal from the proceeding is ambiguously worded. The CPV letter of July 11, 1977, expresses irritation with discovery requests by Hearing Counsel as one of three reasons for "withdrawing from this proceeding" and the decision to "no longer participate." Counsel for PLI was granted time to obtain clarification from CPV

[11] I recognize that Prudential Lines, Inc. (PLI) included in its appeal a request for summary approval of the Agreement. I view such a request as the manifestation of aggressive, determined advocacy, rather than a seriously entertained conviction that the Commission could summarily approve this Agreement the docketed investigation of which had not gone beyond the prehearing stage.

[12] These issues are included either expressly or implicitly in the specific areas designated by the Commission's Order of Investigation and Hearing dated November 3, 1976. PLI has moved for modification of the Order of Investigation and that motion was pending before the agency at the time the Commission voted to approve the Agreement. See footnote, page 2, of the Order of Conditional Approval. That motion was considered by the majority to have been subsumed by its decision to approve the Agreement.

as to the intent of the notification and was unsuccessful. (See Administrative Law Judge's Order at 6). Even after the issuance of the Order of Dismissal, CPV has not informed the Commission that its notice of withdrawal was misinterpreted by the Administrative Law Judge. I would expect some utterance of protest from CPV had their notification of withdrawal been meant to convey anything other than an abandonment of the Agreement by CPV. For this reason, I support the conclusion of the Administrative Law Judge that CPV has walked away from this proceeding.

I qualify my support for the Administrative Law Judge's conclusion by observing that there is no requirement that all parties to an agreement submitted for section 15 approval actively participate in a proceeding. The obligation of going forward with justification of an agreement can, in some circumstances, be fulfilled by one party acting on behalf of others.

However, it is not unreasonable for the Commission to insist that it be clearly advised by the parties when this approach is being employed. Moreover, such a procedure must be permitted only under conditions which do not thwart the rights of protestants or Hearing Counsel to engage in effective discovery. Here there is reason to believe that CPV's withdrawal was viewed by that carrier as a means of avoiding inquiries from Hearing Counsel. In this instance we are presented with a somewhat ambiguous notification of withdrawal coupled with conduct by CPV which less ambiguously indicates that the carrier has little or no interest in the fate of the Agreement.

For these reasons, I dissent from the majority's decision to overrule the Administrative Law Judge's dismissal of the proceeding. Even if I supported the majority's analysis of the withdrawal of CPV, I submit that the proper action was to remand the proceeding to the Administrative Law Judge for development of an evidentiary record. The absence of any such record compels me to dissent from the majority's decision to approve Agreement 9939–2. Due to the absence of any meaningful factual evidence, and because of the procedural nature of my dissent, I will not address at this time the problems I have with the Order of Conditional Approval's analysis of the public interest issue. (See Order at 5–8). I do note, however, that the state of the record is not such that I am comfortable with the majority's assumption that the mere existence of Peruvian cargo reservation decrees will necessarily result in disruptive "inter-governmental conflict" absent approval of Agreement 9939–2.

Commissioner Karl E. Bakke, dissenting.

I agree totally with the views of Commissioner Kanuk that are separately expressed herewith, and join in her dissent on the stated ground.

In addition, two further aspects of the majority's position in this case are cause for grave concern and also militate strongly in favor of having proceeded with an evidentiary investigation, as previously ordered by the Commission, before acting on the proposed agreement.

The "Peace in Our Time" Rationale

The majority state (Order, p. 5) that—

> When a commercial agreement, such as [this], provides a means to reconcile the conflict between

the laws and policies of the United States and its trading partners, the Agreement clearly yields important public benefits through the avoidance of disruptive retaliatory action and the resultant "inter-governmental conflict." . . .

Beneath the veneer of the platitute in that observation lies the premise that the Commission is susceptible to intimidation, in the face of which judicial objectivity will give way to expediency. How my colleagues reconcile that premise with their oath of office is their concern. I am more concerned with the institutional implications. I certainly do not advocate picking regulatory fights; but an agency cannot regulate effectively or credibly by running away from them, either.

Let's not lose sight of the fact that whatever "inter-governmental conflict" might arise from lapse of the agreement in question would necessarily require affirmative action on the part of the government of Peru resulting in conditions unfavorable to the ocean foreign commerce of the United States. There is not one probative scintilla of record in this case to support the conclusion that this would happen;[1] to assume that it would is to assume that another sovereign government would act irresponsibily in disregard of *our* legitimate interest in the reciprocal trade. It is at least as tenable an hypothesis that the existence of § 19 of the 1920 Merchant Marine Act, and the Commission's demonstrated willingness to use it, would have a moderating influence on the prospect of Peruvian "retaliation" and lead all concerned to seek amicable alternatives to a ping-pong game of action and reaction. International comity is, after all, a two-way street.

On the other hand, if the rational regulatory decision to disapprove the agreement based on failure of proponents to carry their burden of proof under § 15, pursuant to the orderly procedures provided under U.S. law, should precipitate retaliation by the government of Peru rather than search for a workable *modus vivendi*, the Congress has provided the mechanism for redress in the form of § 19 and mandated its use. For the Commission to cede that jurisdictional option at the outset in a case such as this simply does not make sense on either policy or pragmatic grounds. It's not even good statesmanship.

The "Third Flag" Issue

The majority have, for all practical purposes, written off third-flag interests as a relevant consideration in evaluating "approvability" of pooling, sailing and equal access agreements implementing foreign government decrees, despite the mandate under § 15 to disapprove any agreement that is unjustly discriminatory or unfair between carriers in the U.S. ocean foreign commerce. They reach that result in this case by the bootstrap argument that since the agreement in question merely implements Peruvian law, and the role of third-flag carriers in the Peruvian trades is fixed by that law, the agreement itself cannot be *unjustly* discriminatory.

Of interest in this connection is the fact that Peruvian law has not excluded third-flag carriers from the liner trades here involved, as witness participation until recent years of Westfal-Larsen Line, a Norwegian-flag operator. Thus, the legitimate question does remain open whether the terms of accord between the

[1] It is significant to note that the majority do not even attempt to cite any evidence of record in this proceeding to support this finding, but merely refer to similar findings made in other cases on different evidence. This hardly meets the requirements of the Administrative Procedure Act that agency findings be based upon substantial evidence, or of the "Svenska" case that proponents of an anticompetitive agreement carry the burden of *proof* concerning *need* for the agreement.

parties to this agreement are, or may be implemented in a manner so as to be, unjustly discriminatory or unfair with respect to any other carrier in the same trades.

Peruvian Ministerial Resolution No. 0011-75/TC-AC dated April 28, 1975, which accorded approval of the Peruvian government to the agreement here under consideration by the Commission, contains an interesting commentary on state of mind of the original parties to this agreement concerning the purpose and effect of their contractual relationship. The Resolution in question[2] referred to the predecessor agreement entered into between CPV and PLI[3] in the following terms:

> The experience acquired during fulfillment of the said Agreement has led the contracting parties to consider that it would be preferable, from the standpoint of the said trade, to enter into an Agreement on Equal Access to the said Cargo in lieu of a Pool Agreement *whose object was the joint handling thereof by the parties hereto in order to eliminate the competition offered by a third flag [viz., Westfal-Larsen], which has lately been seen to decrease appreciably;* . . . [Emphasis added.]

So much for the majority's conclusion that any discrimination against third-flag carriers in these trades must necessarily be attributable to Peruvian law and not to competitive design of the parties to an agreement, such as this. The Peruvian government has unequivocally conceded the contrary.

True, Westfal-Larsen is now gone from the trades, for whatever reason, and approvability of *this* agreement must be judged in light of present and prospective competitive conditions in the trades. True also is the fact that there is a successor-in-interest to PLI as a contract party to this agreement. However, what's past may be prologue not only in Shakespearean drama. Given the foregoing suggestion of predatory purpose and effect of the predecessor agreement, a prudent regulator should, in my opinion, require the development of at least some evidence on the record before making the critical finding under § 15 that the present agreement would *not* be unjustly discriminatory or unfair as to other carriers.

CONCLUSION

At stake here is the Commission's orderly discharge of a judicial function. It may well be that a proper record would support approval of the agreement on the merits. Unfortunately, the majority have precluded the opportunity to find out.

(S) FRANCIS C. HURNEY
Secretary

[2] This document is contained in the official record of the instant proceeding.

[3] Approved by the Commission in Docket No. 71-71, 16 FMC 293 (1973).

FEDERAL MARITIME COMMISSION

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

[GENERAL ORDERS 13 AND 38; DOCKET NO. 78-30]

Part 531 and 536—Time Limit for Filing of Overcharge Claims

January 31, 1979

ACTION: Adoption of Proposed Rule in Part

SUMMARY: This rule amends the Commission's tariff filing provisions by: (1) requiring all ocean carriers to publish a notice in their tariffs advising shippers of their right to file with the Commission overcharge claims for reparations pursuant to section 22 of the Shipping Act, 1916 (46 U.S.C. 821) and (2) requiring all ocean carriers to respond to all overcharge claims within twenty days by notifying the shipper of the applicable provisions of the freight tariff and the Shipping Act. The purpose and need for such rule are to benefit the shipping public by adequately informing claimants of their rights under the Shipping Act and encouraging carriers to respond timely to overcharge claims.

DATES: Effective as to both new and existing tariffs March 1, 1979.

SUPPLEMENTARY INFORMATION:

This proceeding was instituted by Notice of Proposed Rulemaking published in the *Federal Register* on September 5, 1978, (43 F.R. 39399) to amend the Commission's tariff filing regulations by adding provisions which would: (a) prohibit ocean carriers from limiting the time for filing overcharge claims with carriers to less than two years from the date of payment of freight charges; (b) require ocean carrier tariffs to include a notice to notify shippers of their right to file overcharge claims for reparations with the Federal Maritime Commission pursuant to section 22 of the Shipping Act, 1916 (the Act), and; (c) require ocean carriers to acknowledge within ten days all overcharge claims filed by notifying the claimant of the governing and pertinent provisions of the applicable freight tariff.[1]

[1] The actual text of the published rule reads as follows:

(a) No tariff shall contain any provision which limits to less than two years from the date of payment of freight charges the time within which a shipper must submit a claim to a carrier in order to recover overcharges based on error in weight, measurement, or

The stated purpose of this proposal was to clarify the statute of limitations and limit the number of adjudicatory proceedings resulting from restrictive overcharge claim rules contained or found in many carriers' tariffs.

Comments to the proposed rules were received from 52 different parties.[2] Shippers or persons representing shipper interests favored the proposed rules in their entirety while ocean carriers and carrier conferences either opposed the rules in their entirety or accepted paragraph (b) while objecting to paragraphs (a) and (c).

POSITIONS OF THE PARTIES[3]

Shippers generally alleged that the proposed rules would benefit the shipping public by providing notice that the statute of limitations governing shipper overcharge claims is the two-year period specified in section 22 of the Shipping Act. This group of commentators also stated its belief that the proposed rules would reduce the number of formal and informal complaints filed with the Commission. It was suggested that current tariff rules force shippers to resort to administrative adjudication because the time period for filing overcharge claims under many carrier tariffs is limited to six months, and some carriers use such tariff provisions as a device whereby legitimate claims are ignored for six months and then refused on the basis that the claim is time barred.

Shippers also suggested numerous modifications in the proposed rules. The most frequent suggestion was to broaden the scope of the proposed rules to include all overcharge claims and not just those resulting from errors in measurement, weight and description.

All parties opposed to the proposed rules criticized their probable effects, alleged that the Commission was without jurisdiction to promulgate such requirements, and defended current carrier tariff practices as legal and practical.

The basic criticisms addressed to proposed paragraph (a) included the following allegations: (1) overcharge claims are a result of initial shipper misdescriptions and later attempted reclassifications; consequently a rule aimed at carriers' behavior is unfair; (2) a two-year period of claim consideration will only

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description. No tariff shall contain any provision which limits the carrier's ability or obligation to consider claims submitted which are within the two-year period.

(b) Every tariff shall contain a rule which clearly advises shippers/consignees of their rights to file claims for reparations within two years with the Federal Maritime Commission pursuant to Shipping Act section 22.

(c) Within 10 days of the receipt of such a claim, the carrier shall forward a written notice to the claimant advising of the governing and pertinent provisions of the applicable freight tariff.

[2] Parties filing comments were: Sea-Land Service, Inc., Crowley Maritime Corp., Kraft, Inc., Military Sealift Command, E. I. Du Pont de Nemours and Co., Shippers National Freight Claim Council, Caterpillar Tractor Co., PPG Industries, Inc., U.S. Department of Agriculture, Traffic Service Bureau, Inc., Warner-Lambert International, Ingersoll-Rand International, American Importers Association, Allied Chemical, Uniroyal, Eli Lilly and Co., Singer Company, National Retail Merchants Association, Frank J. Hathaway and John Strauss. Comments were also received from members of and lines of the following steamship conferences and rate agreements: Far East Conference, Pacific Westbound Conference, Latin America/Pacific Coast European Conference, Pacific Coast European Conference, Pacific Coast River Plate Brazil Conference, North Europe Conferences, Associated Latin American Freight Conferences, American West African Freight Conference, "8900" Lines and the Marseilles North Atlantic U.S.A. Freight Conference, Med-Gulf Conference, U.S. Atlantic and Gulf/Australia-New Zealand Conference, U.S. North Atlantic Spain Rate Agreement, U.S. South Atlantic/Spanish, Portuguese, Moroccan and Mediterranean Rate Agreement, North Atlantic Mediterranean Freight Conference, Atlantic and Gulf-Indonesia Conference, Atlantic and Gulf/Singapore, Malaya and Thailand Conference, Japan/Korea-Atlantic and Gulf Freight Conference, Philippines North America Conference, Trans-Pacific Freight Conference of Japan/Korea and Agreement Nos. 10107 and 10108.

[3] All comments, whether or not specifically described or discussed herein have nevertheless been carefully reviewed and considered by the Commission.

aggravate current problems; and, (3) the proposed rule would encourage such varied activities as unequal treatment of shippers, indirect rebating and ineffective self-policing.

Objections to proposed paragraphs (b) and (c) were of a more general nature. Both sections were considered burdensome to carriers and superfluous. Commentators pointed to the absence of support for allegations that carriers attempt to screen reparation rights under section 22 from shippers and that carriers respond slowly to claims. It was claimed that the tariff publishing requirements of sections 18(b)(1) and (2) and the availability of the booklet "Ocean Freight Rate Guidelines for Shippers" already give shippers adequate notice of tariff provisions and statutory rights with regard to overcharge claims.

Carrier interests also claimed that the Commission is without jurisdiction to promulgate the proposed rules absent a factual showing that existing carrier practices are in violation of the Shipping Act; further, they stated that no violation of section 14, Fourth was indicated, either in past Commission reparation decisions or in the evidence gathered in previous rulemaking proposals on this subject.

Commentators opposed to the rules claimed they were based on a misreading of the court's decision in *Kraft Foods v. Federal Maritime Commission*, 538 F.2d 445 (D.C. Cir. 1976). In their opinion, that decision merely struck down the Commission's finding that the carrier-custody rule prevented *Commission* consideration of claims filed after the goods had left the carriers' custody.

Finally, all parties opposed to the proposed rules defended existing carrier tariff practices on the basis that current limitations on claim rules require shippers to prove their claims while the carrier is in a position to independently verify the validity of the claim.

The carrier interests also suggested modifications to the proposed rules. Two particular suggestions are addressed below.

DISCUSSION

Several parties raised the issue of the Commission's jurisdiction to promulgate these rules. The argument advanced is that the Commission must find a violation of a substantive provision of the Act before it may promulgate the proposed rules. In support of this allegation, the parties quote from, and occasionally misconstrue, previous decisions in which the Commission refused to promulgate rules similar to those in the instant proceeding.[4]

However, rulemaking proceedings subsequent to these previous proceedings have firmly established that the Commission may promulgate rules absent a finding of a violation of the Act.[5] The broader interpretation of the Commission's powers has twice been upheld by the U.S. Court of Appeals.[6]

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[4] Docket No. 712, *Carrier-Imposed Time Limits on Presentation of Claims for Freight Adjustments*, 4 F.M.B. 29 (1952); Docket No. 65-5, *Proposed Rule Covering Time Limit on the Filing of Overcharge Claims*, 10 F.M.C. 1 (1966), 12 F.M.C. 298 (1969).

[5] *See* Docket No. 67-58, *Compensation and Freight Forwarder Certification*, 10 S.R.R. 201 (1968); Docket No. 73-66, *Austasia Container Express, Possible Violations of Section 18(b)(1) and General Order 13* (1977); Docket No. 73-55, *Uniform Rules and Regulations Governing Free Time on Import Containerized Cargo at the Port of New York*, (1978).

[6] *New York Foreign Freight Forwarders and Brokers Association, v. U.S.* 337 F.2d 289 (D.C. Cir. 1964) *cert. den.* 380 U.S. 910 (1964); *New York Foreign Freight Forwarders and Brokers Association v. Federal Maritime Commission*, 384 F.2d 979 (2nd Cir. 1967).

In a proceeding involving the Commission's rulemaking authority, *Pacific Coast European Conference v. FMC*, 376 F.2d 785 (D.C. Cir. 1967), the court, after noting that section 43 of the Act "clothe[s] the Commission with a broad authority . . . , going well beyond what it has possessed before," further explained that:

> . . . the Commission in rulemaking is not confined to the redress of demonstrated evils as distinct from the prevention of potential ones. 376 F.2d at 790.

Under current rulemaking standards, agency regulations must be reasonably adapted to the accomplishment of the Congressional objectives embodied in the agency's enabling statutes.[7] The objectives of the Shipping Act include the proscription of carrier practices which result in unfair treatment of shippers. Prior to proscribing such practices and prescribing alternative rules the Commission need only find that the operation of carrier rules either treats shippers unfairly or can reasonably be expected to treat shippers unfairly if left uncorrected.

Carrier commentators argued that neither section cited by the Commission in its Notice of Proposed Rulemaking, *i.e.*, section 14 Fourth and section 22, supports the promulgation of paragraph (a). Upon consideration of these comments, the Commission has decided not to adopt paragraph (a). The adoption of paragraphs (b)[8] and (c),[9] however, with the modifications described below, should significantly alleviate the problem addressed by this rulemaking and encourage the prompt handling of shippers' claims.

As noted by several shippers filing comments, the rules, as published, were limited to overcharge claims based on errors in weight, measurement or description. At the present time, carrier tariffs generally limit the time for filing such claims to the period during which the goods are in the custody of the carrier. All other overcharge claims are usually limited to a six-month filing period. It was suggested that the proposed rules by broadened to include all overcharge claims, and the Commission has concluded that the purpose for which these rules were proposed would be better served if they were so modified.

Several carriers filing comments suggested that the proposed ten day time period providing for carrier responses to filed claims was "unrealistic," given the complexity of carrier operations. Consequently, the rules were modified to extend the time period for carrier response to filed claims to 20 days.

Finally, carriers requested clarification as to the effects of proposed paragraph (c) on future litigation between a shipper and a carrier. It is our intention that the carrier be bound in future litigation by the tariff provision cited to the shipper pursuant to paragraph (c). To do otherwise would be inconsistent with the purpose of the proposed rules.

THEREFORE, IT IS ORDERED, That pursuant to section 4 of the Administrative Procedure Act (46 U.S.C. 553) and sections 14 Fourth, 22 and 43 of the Shipping Act, 1916 (46 U.S.C. 813, 821, 841(a)), Parts 531 and 536 of 46 C.F.R. are amended by adding new sections 531.5(b)(8)(xvi), 531.5(b)(9), 536.5(d)(20), and 536.5(e) as follows:

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[7] *See Pacific Coast European Conference, supra.*

[8] Promulgated as sections 536.5(d)(20)(i) and 531.5(b)(8)(xvi)(A) in Ordering Paragraph.

[9] Promulgated as sections 536.5(d)(20)(ii) and 531.5(b)(8)(xii)(B) in Ordering Paragraph.

531.5(b)(8)(xvi) *Overcharge Claims.* Tariffs shall contain a rule which states that shippers or consignees may file claims for the refund of freight overcharges resulting from errors in weight, measurement, cargo description or tariff application. This rule shall clearly indicate where and by what method such claims are to be filed and shall contain at minimum the following provisions:

(A) Claims seeking the refund of freight overcharges may be filed in the form of a complaint with the Federal Maritime Commission, Washington, D.C. 20573, pursuant to section 22, Shipping Act, 1916 (46 U.S.C. 821). Such claims must be filed within two years of the date the vessel sails or the date the disputed charges are paid, whichever is later.

(B) Claims for freight rate adjustments shall be acknowledged by the carrier within 20 days of receipt by written notice to the claimant of all governing tariff provisions and claimant's rights under the Shipping Act.

531.5(b)(9). Additional rules which affect the application of the tariff shall follow immediatley the rules specified above and shall be numbered consecutively, commencing with number 17.

536.5(d)(20) *Overcharge Claims.* Tariffs shall contain a rule which states that shippers or consignees may file claims for the refund of freight overcharges resulting from errors in weight, measurement, cargo description, or tariff application. This rule shall clearly indicate where and by what method such claims are to be filed and shall contain at minimum the following provisions:

(i) Claims seeking the refund of freight overcharges may be filed in the form of a complaint with the Federal Maritime Commission, Washington, D.C. 20573, pursuant to section 22, Shipping Act, 1916 (46 U.S.C. 821). Such claims must be filed within two years of the date the vessel sails or the date the disputed charges are paid, whichever is later.

(ii) Claims for freight rate adjustments will be acknowledged by the carrier within 20 days of receipt by written notice to the claimant of all governing tariff provisions and claimant's rights under the Shipping Act.

536.5(e). Additional rules which affect the application of the tariff shall follow immediately the rules specified above and shall be numbered consecutively, commencing with number 21.

IT IS FURTHER ORDERED, That sections 531.5(b)(8)(xvi) and 5(b)(9), and sections 536.5(d)(20) and 5(e) shall take effect on March 1, 1979. Ocean carrier tariffs which do not contain a rule in conformity with these sections on that date shall be subject to cancellation or rejection.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-38

IN RE: BALTIC SHIPPING COMPANY—RATES ON BUSES
IN THE U.S. GULF COAST/NORTH EUROPE TRADE

ORDER OF DISCONTINUANCE

February 5, 1979

On April 17, 1978, the Commission, pursuant to section 21 of the Shipping Act, 1916, issued to Baltic Shipping Company (Baltic) an Order to furnish certain specified information concerning the transportation, in February–March 1978, of approximately 25 buses from Bremerhaven, Germany, to Houston, Texas, aboard Baltic's vessel, MAGNITOGORSK. As a result of Baltic's failure to comply fully with this Order, the Commission issued a second Order, on October 12, 1978, requiring Baltic to show cause why it should not be found to be in violation of section 21 and in default of the Commission's April 17, 1978 Order. On January 8, 1979, Baltic submitted a supplemental response to the Commission's original Order. Baltic's reply to this Order is now adequate and complete.

THEREFORE, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

SUBCHAPTER A—GENERAL PROVISIONS

[DOCKET NO. 78-56]

PART 509—Actions to Adjust or Meet Conditions Unfavorable to Shipping in the United States Atlantic and Gulf/European Trades

February 7, 1979

ACTION: Final Rule

SUMMARY: The Federal Maritime Commission has adopted this Rule pursuant to section 19(1)(b) of the Merchant Marine Act of 1920 (46 U.S.C. §876(1)(b)) in order to adjust or meet conditions unfavorable to shipping in the foreign trade of the United States which may have arisen from possible illegal acts, rates and/or practices of the Baltic Shipping Company, a foreign-flag common carrier by water in the foreign commerce of the United States. This Rule would suspend, reject or cancel tariffs filed with the Commission by Baltic Shipping Company upon the Company's failure to provide certain information to establish that these possible acts, rates, and/or practices do not exist and do not constitute conditions unfavorable to the foreign trade of the United States.

EFFECTIVE DATE: March 9, 1979

SUPPLEMENTAL INFORMATION:

Pursuant to section 19(1)(b) of the Merchant Marine Act, 1920 (46 U.S.C. 876(1)(b)), as implemented by Part 506 of the Commission's Rules (46 C.F.R. Part 506), the Federal Maritime Commission is authorized and directed to make rules and regulations affecting shipping in the foreign trade of the United States in order to adjust or meet general or special conditions unfavorable to shipping in the foreign trade of the United States which arise out of, or result from, foreign laws, rules or regulations, or from competitive methods or practices employed by owners, operators, agents or masters of vessels of a foreign country.

The types of conditions which the Commission has found to be unfavorable to shipping in the foreign trade of the United States are set forth generally in 46 C.F.R. §506.3. Among these are conditions which preclude or tend to preclude a vessel in the foreign trade of the United States from competing in the trade on the same basis as any other vessel, those which are discriminatory or unfair as

between carriers, and those which are otherwise unfavorable to shipping in the foreign trade of the United States. (46 C.F.R. §§506.3(a), (c) and (d)).

A. *Background*

On April 17, 1978, the Commission issued an Order to the Baltic Shipping Company (Baltic), an ocean common carrier, to produce certain information pertaining to its rates and practices in the foreign commerce of the United States. This Order was issued pursuant to the Commission's authority under section 21 of the Shipping Act, 1916 (46 U.S.C. §820), to investigate the following suspected activities of Baltic: (1) massive misrating in the United States Gulf Coast/North Europe trades;[1] (2) entering into unfiled agreements with other ocean carriers pertaining to equipment sharing, in violation of section 15 of the Shipping Act, 1916 (46 U.S.C. §814);[2] and (3) improper implementation of its tariff provisions concerning space charters.[4] These activities were suspected on the basis of information received by the Commission from various sources, including a staff examination of documents relating to Baltic shipments from United States Gulf coast ports.

The section 21 Order originally called for Baltic's response to be completed no later than May 30, 1978. Pursuant to Baltic's request, an extension of time was granted by Commission Order dated May 26, 1978. This Order set forth an extended timetable for compliance, with Baltic's response to be complete by August 30, 1978. Despite this extension, and the passage of five months beyond the Commission's deadline, Baltic still has complied only partially with the Commission's April 17, 1978 Order. Baltic has provided piecemeal responses to various portions of the Order,[5] but it does not appear that full compliance is forthcoming.[6]

Although Baltic has now provided at least facial compliance with the other sections of the investigative Order, Baltic has submitted only a portion of the information sought under paragraph (A)(3)(e) of the Order.[7] This paragraph seeks the key to understanding the remainder of the raw data Baltic has submitted

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[1] Misrating of cargo, especially if it occurs intentionally and on a large scale, can be an effective form of illegal rebating to shippers, in violation of sections 14, 16 and 18 of the Shipping Act, 1916 (46 U.S.C §§812, 815 and 817). If some shippers, cargo, or ports are favored with lower rates through misrating, while other similarly situated shippers, cargo, or ports are not, undue preferences or advantages may result, in violation of section 16 of the Shipping Act, and unjust discriminations may result, in violation of section 17 of the Shipping Act (46 U.S.C. §816).

[2] To the extent that Baltic has entered into agreements or cooperative working arrangements with other carriers subject to section 15 of the Shipping Act, 1916 without first filing such agreements or arrangements for approval by the Commission, Baltic has violated section 15 of the Shipping Act.

[3] Noncompliance with tariff provisions is violative of section 18 of the Shipping Act, 1916 (46 U.S.C. §817), and can also result in undue preferences or advantages, in violation of section 16, and unjust discriminations between shippers, in violation of section 17 of the Shipping Act.

[4] Of the 179 rated bills of lading examined, 45 appeared to be misrated and as to 9 additional bills of lading, the tariff item number or other tariff authority for the rate charged could not be ascertained.

[5] Baltic's most recent submission was received on January 26, 1979 and contained a facially sufficient response to paragraphs (B)(1) through (B)(3), (C)(1), and (C)(2) of the investigative Order denying the existence of any documents or information responsive to those paragraphs beyond that already filed with the Commission.

[6] After considering Baltic's legal objections to full compliance with the Order and notifying Baltic on several occasions that its objections are without merit, the Commission, on January 17, 1979, served its final *Order and Notice of Default* finding Baltic to be in default of the Order. *See In Re: Baltic Shipping Company–Rates and Practices in the U.S. Gulf Coast/North Europe Trade*, (FMC Docket No. 78-36).

[7] On January 15, 1979, Baltic submitted a list stating the tariff authority it relied on with respect to 789 of the roughly 3,000 bills of lading or manifests it had previously filed. Baltic has not provided tariff authority for the charges reflected on the remaining group of over 2,200 bills of lading and manifests.

by calling for the tariff authority (described by tariff item number or otherwise) relied upon by Baltic in assessing the rates under investigation. Without the information sought by paragraph (A)(3)(e), the data provided by Baltic is virtually useless. The data provided discloses only that Baltic carried certain cargoes and assessed certain charges, but leaves open the question of what tariff authority, if any, Baltic relied upon in assessing the charges. The focus of the Commission's investigation is on whether Baltic has misrated its cargo, and this cannot be determined if the Commission has no idea what rate Baltic used.[8]

The Commission's investigation of Baltic's rates and practices is a broad one, covering a major portion of Baltic's activities in the foreign commerce of the United States.[9] These activities are on a large scale, and would cause significant harm to the public, shippers and the merchant marine of the United States if they involved widespread violations of the Shipping Act or other laws designed to protect those entities. Baltic's failure to provide the information sought by paragraph (A)(3)(e) of the Commission's Order of April 17, 1978, prevents the Commission from determining whether, or to what extent, the wide range of Baltic's activities under investigation is unlawful. Efforts to obtain a diplomatic resolution of this problem through the Department of State have been unavailing.[10] This situation gives rise to two major concerns on the part of the Commission: (1) That Baltic is withholding the information sought in paragraph (A)(3)(e) because this information would disclose that Baltic in fact has been engaged in widespread violations of the Shipping Act, 1916; and (2) That Baltic, by consistently refusing to provide information pertaining to many of its activities in the foreign commerce of the United States, is effectively placing itself beyond regulation by the Commission.

To alleviate these concerns, the Commission proposed this Rule, pursuant to section 19(1)(b) of the Merchant Marine Act, 1920 (46 U.S.C. §876(1)(b)), to require Baltic to provide the information sought in the Commission's section 21 Order, as well as similar information for a future twelve month period, so that the Commission can monitor Baltic's activities more carefully.[11] Comments were received from the Baltic Shipping Company, the United States Department of State, and United States Lines.

B. *Statutory Authority*

1. *Section 19, Merchant Marine Act, 1920*

(a) *Legislative History*

At the end of the First World War, Congress was forced to consider how to dispose of the large merchant fleet the United States had acquired during the War. As a result of its wartime experience, Congress was convinced of the value of

[8] Baltic has suggested that the Commission's staff, using the raw data already provided by Baltic, is in as good a position as Baltic to determine what tariff authority, if any, Baltic relied upon in rating its cargoes. Baltic argues that this task is properly that of the Commission. Baltic apparently overlooks the fact that the Commission is not interested in how its own staff might have assessed the cargo except in comparison to how Baltic *in fact* assessed it. Moreover, the basis for Baltic's rate assessments cannot be determined with certainty by the Commission's staff because: (1) Baltic's tariff structure often does not allow precise classification of commodities from their description on bills of lading or manifests; (2) rates assessed are sometimes hidden in unrelated special rate sections; and (3) rates assessed are sometimes included in mixed commodity groupings that do not consist of analogous commodities.

[9] *Cf. In Re: Baltic Shipping Company–Rates on Buses in the U.S. Gulf Coast/North Europe Trade*, (FMC Docket No. 78–38), which involved a Commission investigation of apparent misrating of a single commodity, buses.

[10] *See* note 31, *infra*.

[11] The proposed Rule was noticed at 43 *Fed.Reg.* 60966 (December 22, 1978) (FMC Docket No. 78–56).

maintaining an adequate merchant marine for defense purposes and to meet the needs of American shippers, but was concerned about the ability of this merchant marine to compete on equal terms with established foreign fleets, such as those of Great Britain. Congress, having plenary power to regulate, or exclude completely, foreign commerce, and to delegate such power where appropriate,[12] recognized that it lacked the flexibility to respond quickly and effectively to the actions of foreign countries in the commercial field which adversely affect the oceanborne commerce of the United States. Section 19 of the Merchant Marine Act, 1920, contains broad language indicative of Congress' intention to bestow the widest possible authority upon the Shipping Board (now the Federal Maritime Commission) in shipping matters.[13] As indicated in the Senate committee report accompanying the Act:[14]

> Far-reaching power is placed in the Shipping Board to make and control rules and regulations affecting shipping, and to meet foreign competition. We must do something of this kind, if we are to meet the practices and methods of other countries. Through their orders in council and other semilegislative acts of administrative bodies they interfere with and handicap our merchant marine in many different ways. This must be met in a similar way.

Section 19 of the Merchant Marine Act contains no restrictive language with regard to the measures that the Commission may take to meet adverse conditions created by foreign carriers or governments. Rather, that section contemplates that the Commission will take whatever action is necessary to meet or counterbalance conditions unfavorable to shipping in the foreign commerce of the United States.[15] Congress has taken no action since the passage of the Merchant Marine Act, 1920 inconsistent with the Commission's present application of that Act in its Rule.[16]

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[12] *See, e.g. United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), and the Export Control Act, 1949 as amended (50 U.S.C. App. §2021).

The Commission's exercise of delegated Congressional power over foreign commerce is carefully circumscribed by section 506.13 of the Commission's Rules (46 C.F.R. §506.13), which requires that the Commission postpone or discontinue any actions taken by it under section 19 of the Merchant Marine Act, "if the President informs the Commission that postponement, discontinuance, or suspension is required for reasons of foreign policy or national security."

[13] 46 U.S.C. §876 provides in pertinent part.

> "(1) The board is authorized and directed to aid of the accomplishment of the purposes of this Act
>
> (b) To make all rules and regulations affecting shipping in the foreign trade not in conflict with law, and order to adjust or meet general or special conditions unfavorable to shipping in the foreign trade, whether in any particular trade or upon any particular route or in commerce generally, and which arise out of or result from foreign laws, rules, or regulations or from competitive methods or practices employed by owners, operators, agents or masters of vessels of a foreign country."

[14] SENATE COMM. ON COMMERCE, PROMOTION AND MAINTENANCE OF THE AMERICAN MERCHANT MARINE [To accompany H.R. 10378], S. REP. NO. 573, 66th Cong., 2d Sess. 5. May 4, 1920 (Comm. Print 1920).

[15] Baltic argues that an implied limitation should be read into section 19 of the Merchant Marine Act as a result of the legislative history of section 20 of that Act (46 U.S.C. §812), which added section 14a to the Shipping Act, 1916 (46 U.S.C. §813). Baltic contends that section 19 does not authorize the suspension of tariffs because tariff suspension is tantamount to denying its vessels entry to United States ports, a step which may be taken only after notice and hearing pursuant to section 14a of the Shipping Act, 1916.

Baltic's argument is faulty. The hearing requirement was inserted in section 14a because of disputed issues of fact would necessarily be adjudicated in determining whether section 14 has been violated. (*See* 59 CONG. REC. 6859-6860 (1920) (Senate debate).) Part 509, by contrast, does not adjudicate any disputed factual issues, but merely requires the future submission of information to correct the present undisputed fact that there is a lack of information. Additionally, section 509.2(c) of this Rule provides Baltic an adequate opportunity to be heard prior to any tariff suspension.

[16] Baltic suggests that Congress' recent passage of the "Anti-Rebating Bill" (H.R. 9518) (vetoed by the President) is evidence to the contrary. H.R. 9518 would have specifically empowered the Commission to suspend *tariffs of foreign carriers that refuse to provide* information concerning illegal rebating. Baltic's assertion that this *specific* proposal negates any of the Commission's *general* authority under existing law represents an improbable and unconvincing form of statutory construction. Additionally in referring to pertinent parts of the legislative history of *H.R. 9518 (i.e. HOUSE COMM. ON MERCHANT MARINE AND FISHERIES.* REBATING PRACTICES IN THE UNITED STATES FOREIGN TRADE [To accompany H.R. 9518], H.R. REP. NO. 95-922,

(b) *Application of Section 19*

The Commission, to invoke section 19 of the Merchant Marine Act, must find that a condition unfavorable to shipping in the foreign trade exists, and that it exists as a result of a foreign rule, regulation, method or practice. Baltic contends that the Commission's Rule does not make these necessary findings. This is incorrect. The Commission *has found* that, if Baltic does not provide the information sought by the Rule, two conditions, each unfavorable to shipping in the foreign trade, *will exist*[17] as a consequence of this failure: (1) widespread and intentional misrating of cargo in the foreign commerce of the United States, in violation of sections 14, 16, 17 and 18 of the Shipping Act, 1916; and (2) the placement of Baltic's activities in the foreign commerce of the United States beyond effective regulation by the Commission. These findings are existing and unequivocal, and take effect upon Baltic's failure to comply with the Rule's information requirements. If Baltic supplies the information required, these findings will not apply.[18]

The Commission's finding of widespread Shipping Act violations is based upon Baltic's continued refusal to produce information necessary to effective regulation of Baltic's activities. Because Baltic has exclusive access to this information, the Commission is forced to choose between abandoning its investigation of Baltic's activties, or notifying Baltic that, in the absence of compliance from Baltic, it will presume that the possible Shipping Act violations under investigation exist. The Commission has chosen the latter option.

The Commission's finding that Baltic has placed itself beyond regulation is based upon Baltic's continued refusal to comply with a substantial portion of the Commission's Order requesting information as to its rates and practices in United States foreign commerce. Baltic's legal objections do not involve any consideration of foreign law,[19] and its arguments as to the laws of the United States do not raise colorable legal issues.[20] If Baltic is allowed to operate in U.S. foreign commerce without having to comply, as other foreign and domestic carriers must, with investigative Orders of the Commission, it will thereby gain an unfair competitive advantage by being able to engage in lucrative but unlawful activities with a reduced danger of detection. Other carriers will be tempted to counteract this situation by similarly refusing to comply with Commission Orders. The resulting likely disruption of the ocean trades constitutes a condition adverse to shipping in the foreign trade of the United States within the meaning of section 19 of the Merchant Marine Act, 1920.

95th Cong 2d Sess. 15 (1978), and SENATE COMM ON COMMERCE, SCIENCE AND TRANSPORTATION, REPORT [To accompany H.R 9518], S REP. No. 95-966, 95th Cong , 2d Sess 23 (1978)). Baltic overlooks the fact that the "Anti-Rebating Bill" was addressed to disclosure problems created by *foreign law* ("blocking statutes"), and the potential conflicts arising from simultaneous application of inconsistent laws of different sovereigns Baltic has repeatedly stated (most recently in its comments in opposition to the Commission's proposed section 19 Rule, at page 11), that there is *no issue* of foreign law involved in its failure to produce the information required by the Rule.

[17] This finding, effective upon Baltic's failure to provide the information required by the Rule, is made pursuant to section 506 12 of the Commission's Rules (46 C FR. §506 12), which states: "The Commission may, when there is a failure to produce any information ordered produced under §506 11, make appropriate findings of fact or deem such a failure to produce as an admission that conditions unfavorable to shipping in the foreign trade of the United States do exist "

[18] This is not to say that through providing this information, Baltic will be insulated from possible enforcement proceedings under the Shipping Act, 1916

[19] *See* note 16, *supra*

[20] *See* note 28, *infra*

2. *Authority Under the Shipping Act, 1916*

Among the statutory bases cited by the Commission for issuing Part 509 of its Rules is its rulemaking power under section 43 of the Shipping Act, 1916 (46 U.S.C. §841a). Baltic challenges this authority, and maintains that the Commission has no power under the Shipping Act to suspend tariffs or assess other "penalties" not specifically provided for in the Shipping Act.[21]

This Rule does not constitute a penalty for past conduct, and Baltic's arguments addressed to "penalties" are therefore inapposite. The Rule prescribes future conduct, in the form of production of necessary information by Baltic. Tariff suspension is invoked only as a last resort in the event of noncompliance by Baltic, to avoid complete frustration of the Commission's regulatory efforts and disruption of United States ocean trades.

Section 43 of the Shipping Act has been interpreted as giving the Commission added powers to enact rules regarding matters not specifically covered by substantive provisions of the Shipping Act.[22] Further, it appears that measures as stern as tariff suspension are allowable where information vital to effective Commission regulation is being withheld and no appropriate alternative exists.[23]

C. *Administrative Due Process*

1. *The Administrative Procedure Act*

This Rule has been promulgated in accordance with the rulemaking provisions of section 4 of the Administrative Procedure Act (APA), (5 U.S.C. § 553). The basis for the Rule's informational requirement is the Commission's need for certain information presently in the exclusive control of the Baltic Shipping Company which is essential to the effective regulation of Baltic. The basis for the Rule's tariff suspension provision is the Commission's conclusion that noncompliance with the informational requirement would give rise to adverse conditions in the foreign trade that can be avoided through no other means. It is thus apparent that the Rule does not rest in any manner upon contested issues of fact or upon undisclosed information in agency files.[24]

Most of Baltic's legal arguments concerning its rights under the APA derive from its claim that Part 509 "[which] judges Baltic's past conduct, determines Baltic's future rights and obligations, and imposes sanctions against Baltic, is an 'adjudication' under A.P.A."[25] Implicit in this claim is Baltic's apparent belief that a requirement that it produce before a regulatory agency pertinent informa-

[21] Baltic cites *Commonwealth of Pennsylvania v. Federal Maritime Commission*, 392 F. Supp. 795 (D.D.C. 1975) for the proposition that the Commission is without power to suspend tariffs of foreign carriers under any circumstances. In the *Pennsylvania* case, the court merely sustained the Commission's contention that it had no authority, under section 18(b) of the Shipping Act (46 U.S.C. 817), to suspend a foreign tariff pending a determination of its reasonableness. The court did not address tariff suspensions of the type provided by this Rule.

[22] *See, e.g., New York Foreign Freight Forwarders & Brokers Ass'n. v. Federal Maritime Commission*, 337 F.2d 289 (2d Cir. 1964), *cert. den.*, 380 U.S. 910, and *Alcoa Steamship Co. v. Federal Maritime Commission*, 348 F.2d 756, 761 (D.C. Cir. 1965)

[23] *See Calcutta East Coast of India & Pakistan/U.S.A. Conference v. Federal Maritime Commission*, 399 F.2d 994, 998 (D.C. Cir. 1968), and Note, "Rate Regulation in Ocean Shipping," 78 *Harv. L. Rev.* 635, 642-44 (1965).

[24] *Cf., Home Box Office, Inc. v. Federal Communications Commission*, 567 F.2d 9, 55 (D.C. Cir. 1977)

[25] From this claim, Baltic asserts that it is entitled to, and has been denied, its right to a hearing pursuant to 5 U.S.C. §554. Both assertions are incorrect. The adjudication provisions of 5 U.S.C. §554 do not apply to this proceeding. *See* note 26, *infra*. Additionally, in light of the fact that there are no contested factual issues in this proceeding, Baltic is afforded a sufficient opportunity to be heard by §509.2(c) of the Rule.

tion concerning its activities constitutes a penalty and implies an adjudication. The informational requirement of the Rule is reasonable, in furtherance of the Commission's regulatory functions, and is not an adjudication or penalty as a matter of law.[26] The application of the tariff suspension provision of the Rule would not require the deciding of any contested issue of fact. Baltic's position with regard to the applicability of the APA's adjudication requirements (5 U.S.C. §554) therefore is without merit. Baltic's objection that it has been denied an opportunity to be heard is met by section 509.2(c) of the Rule.

2. *Due Process of Law*

Baltic complains that the Rule, by suspending its tariffs upon nonproduction of information, deprives it of an opportunity to seek, in good faith, judicial review of the legality of the informational requirement. Citing *Ex Parte Young*[27] and its progeny, Baltic contends that it is entitled to immunity from the tariff suspension provision of the Rule until judicial review of the informational provision of the Rule is complete. Absent such immunity, Baltic contends that the Rule represents an unlawful deprivation of due process of law.

Baltic's contention is infirm for the following reason: Baltic's legal objections to the informational provision are obviously devoid of merit, and therefore do not present a colorable legal dispute for judicial resolution.[28] It is noted that:

". . . [t]here is no automatic right to interlocutory relief in the law. Even in the highly sensitive First Amendment area, . . . a 'persuasive demonstration' of likely success on the merits is a necessary predicate to obtaining a preliminary injunction. . . . Particularly where the public interest may be sacrificed by the grant of a preliminary injunction, courts of equity require a substantial showing by the moving party of the strength of its claim."[29]

Having weighed Baltic's asserted interest in a stay of this Rule against the regulatory and public interests in its adoption, the Commission has determined that a stay of this Rule is unwarranted.

Baltic's remaining due process objections concern its right to a full and fair hearing. These due process objections suffer the same infirmities as Baltic's APA objections. Because the APA fully protects Baltic's due process rights in proceedings before the Commission, Baltic's due process objections add nothing to its APA objections.

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[26] *See United States v. Morton Salt Co.*, 338 U.S. 632 (1950), and *In Re: FTC Line of Business Report Litigation*, _____ F.2d _____, D.C. Cir. No. 77-1728 (decided July 10, 1978) slip op. at 33-43. *See also, Guardian Federal Savings and Loan Assoc. v. Federal Savings and Loan Insurance Corporation*, _____ F.2d _____, D.C. Cir. No. 77-1550 (decided November 13, 1978) slip op. at 7-8.

[27] 209 U.S. 123 (1908).

[28] Baltic's legal objections and their merits are discussed more fully in the Commission Orders appearing in *In Re: Baltic Shipping Company-Rates and Practices in the U.S. Gulf Coast/North Europe Trade*, (FMC Docket No. 78-36). The reasoning of the Commission's Orders in those cases is adopted here.

[29] *Ford Motor Company v. Coleman*, 402 F. Supp. 475, 487 (D.D.C. 1975), *affirmed*, 425 U.S. 927. *See also, Virginia Petroleum Jobbers v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958), *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.* 559 F.2d 841 (D.C. Cir. 1977), *United States v. General Motors Corp.* 565 F.2d 754 (D.C. Cir. 1977), *St. Regis Paper Co. v. United States*, 368 U.S. 208 (1961), and *Genuine Parts Co. v. Federal Trade Commission*, 445 F.2d 1382, 1394 (5th Cir. 1971).

C. *COMMISSION ACTION*

Having given due consideration to the comments received from the Baltic Shipping Company, the State Department[30], and United States Lines,[31] the Commission has determined to adopt Part 509.

Certain minor changes were made to Part 509 as proposed, for the sake of clarity. Section 509.2(b) was made more specific with regard to the time for information submissions, and the requirement of section 509.2(b) for an *undertaking* to provide information was altered to a requirement that the information in fact be provided. Additionally, the words, "tariff authority" were added to Part 509.2(b) to avoid the impression that only tariff items to which numbers have been assigned are required. Reference to paragraphs (B)(1) through (B)(3), (C)(1), and (C)(2) of the Commission's section 21 Order was deleted from the Rule in light of Baltic's January 26, 1979, submission of additional information responsive to those paragraphs.

In view of the sensitive foreign policy considerations[32] involved in regulating the bilateral trades between the United States and Soviet Union (under whose flag the Baltic Steamship Company operates), the Commission added section 509.3(f), exempting tariffs applying to the direct movement of cargo between the United States and the Soviet Union from the tariff suspension provisions of the Rule.

In response to Baltic's recently expressed willingness to cooperate in fulfilling the Commission's investigative needs,[33] and in the hope that Baltic will avail itself of this further and final opportunity to do so, the tariff suspension date in the Rule was extended from thirty to forty-five days. This period, together with thirty day period between the publication of this Rule and its effectve date required by 5 U.S.C. §553 (d), will give Baltic a total of seventy-five days from the date this Rule is published in the *Federal Register* in which to avoid the suspension of its tariffs.

Therefore, pursuant to section 19(1)(b) of the Merchant Marine Act, 1920 (46) U.S.C. §876 (1)(b)) and section 43 of the Shipping Act, 1916 (46 U.S.C. §841a), the Commission hereby enacts Part 509, Title 46 CFR, as follows:

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[30] The Department of State filed a comment detailing the course of its efforts to obtain the information sought by the Commission through diplomatic channels While expressing no opinion as to the legality of the Commission's Rule, the State Department expressed concern that the tariff suspension imposed by the Rule upon Baltic's failure to provide information may be too strong a measure under the circumstances The State Department also expressed belief that Baltic's compliance with the Commission's informational requirements might be forthcoming if Baltic were given more time to comply In response to this belief, the Commission has extended the time provided within the Rule for compliance with the informational requirement. Tariff suspension is correctly described as a strong measure, and it is for this reason that the Commission has determined to use it only as a last resort, after giving Baltic every opportunity to comply with its informational requirements.

[31] In its comment, United States Lines, a U.S.-flag carrier, expressed agreement with the Commission's concern that Baltic, a foreign-flag carrier, would effectively place itself beyond regulation if it did not comply with the Commission's informational requirements, and that this would work to the unfair competitive disadvantage of U S.-flag lines. United States Lines takes the position that the proposed Rule is lawful in every respect.

[32] The bilateral trades between the United States and the Soviet Union are the subject of an agreement between the two countries, entitled "Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics Regarding Certain Maritime Matters". The Secretary of Commerce signed on behalf of the United States and the Minister of the Merchant Marine signed on behalf of the Soviet Union. The agreement originally entered into force November 22, 1972, has been amended on several occasions, and is published in 23, *United States Treaties and Other International Agreements* (Part 4), 3573–3687 (1972)

[33] This willingness is expressed at page 12 of Baltic's comments. In a letter to the Commission from counsel for Baltic dated December 22, 1978, a willingness to produce the remaining information sought under paragraph (A)(3)(e) of the Commission's Order of April 17, 1978 within sixty days is expressed

PART 509—ACTIONS TO ADJUST OR MEET CONDITIONS UNFAVORABLE TO SHIPPING IN THE UNITED STATES ATLANTIC AND GULF/EUROPEAN TRADES

Authority: Part 509 is issued under the authority of Commission General Order No. 33 (46 CFR Part 506), section 19(1)(b) of the Merchant Marine Act, 1920 (46 U.S.C. §876(1)(b)), section 4 of the Administrative Procedure Act (5 U.S.C. §553), section 43 of the Shipping Act, 1916 (46 U.S.C. §841a), and Reorganization Plan No. 7 of 1961 (75 Stat. 840).

Section 509.1 Conditions Unfavorable to Shipping in the Foreign Trade of the United States

The Federal Maritime Commission has determined that the Baltic Shipping Company, also doing business as Baltic-Atlantic Line, Balt-Gulf Line, and Baltic Middle East Line, (hereinafter referred to collectively as Baltic) will have created conditions unfavorable to shipping in the foreign trade of the United States by: (1) engaging in certain activities in the United States Atlantic and Gulf/European trades (hereinafter also meant to include the United States Atlantic and Gulf/Middle East trades) violative of section 14, 16, 17 and 18 of the Shipping Act, 1916;* and (2) placing itself beyond effective regulation by the Federal Maritime Commission, upon failure to provide information in accordance with section 509.2 of this Part.

Section 509.2—Production of Information

Pursuant to section 506.11 of this Chapter (46 CFR §506.11), the Commission has determined that receipt by the Commission of the following information is necessary in order for the Commission to determine whether either or both of the conditions described in section 509.1 of this Part exist in fact or may be developing:

(a) The information sought in paragraph (A)(3)(e) of the Commission's Order of April 17, 1978 (as modified by its Order of May 26, 1978) concerning Baltic's rates and practices in the U.S. Gulf/North Europe Trade;

(b) Duplicate bills of lading for all cargo carried by Baltic to and from United States Atlantic and Gulf ports for a twelve-month period commencing May 1, 1979. Such bills of lading shall indicate on their face, or on an attached sheet, the tariff and tariff item number or other specific tariff authority used to determine the rate assessed each item of cargo reflected on the bill of lading. Such bills of lading and tariff authority shall be filed quarterly, in accordance with the following schedule;

(i) For cargo delivered in May, June, and July, 1979, filing is due no later than September 15, 1979;

(ii) For cargo delivered in August, September, and October, 1979, filing is due no later than December 15, 1979;

(iii) For cargo delivered in November and December, 1979, and January, 1980, filing is due no later than March 15, 1980; and

* The suspected activities consist of the intentional and widespread misrating of cargo carried to and from United States Atlantic and Gulf ports in order to provide unlawful inducements or advantages to certain shippers or classes of cargo, in violation of sections 14, 16, 17 and 18 of the Shipping Act, 1916.

(iv) For cargo delivered in February, March, and April, 1980, filing is due no later than June 15, 1980; and

(c) Any other information or argument Baltic wishes to submit for the Commission's consideration to alter its determination that the conditions described in section 509.1 of this Part will exist, and will be unfavorable to shipping in the foreign trade of the United States.

Section 509.3–Rejection, Suspension, or Cancellation of Tariffs

(a) The Commission has determined that if it does not receive all of the information described in paragraph (a) of section 509.2 within 75 days after the publication of this Part in the *Federal Register,* then the conditions described in section 509.1 are found to exist and to be unfavorable to shipping in the foreign trade of the United States, pursuant to section 506.12 of the Commission's Rules (46 C.F.R. §506.12).

(b) The Commission has determined that, upon its failure to receive the information described in paragraph (b) of section 509.2 in accordance with the schedule set forth therein, the conditions described in section 509.1 are found to exist and to be unfavorable to shipping in the foreign trade of the United States pursuant to section 506.12 of the Commission's Rules.

(c) On the effective date of a finding contained in either paragraph (a) or paragraph (b) of this section 509.3 (*i.e.*, 76 days from the publication of this Part in the *Federal Register*, or upon failure to file information pursuant to paragraph (b) of section 509.2), the following tariffs and all amendments thereto are suspended in full, until such time as the information specified in sections 509.2(a) and (b) is provided:

I. Baltic Shipping Company
FMC Tariff Nos. 32 and 38.

II. Baltic Shipping Company dba Balt-Atlantic Line
FMC Tariff Nos. 3, 4, 5, 7, 13, 14, 16, 17, 22, 23, 33, 34, 39, 43, 44, 45, 46, 47, 49, 50 and 51.

III. Baltic Shipping dba Balt-Gulf Line
FMC Tariff Nos. 36, 37, 40 and 48.

IV. Baltic Shipping Company dba Baltic Middle East Line
FMC Tariff No. 31.

(d) All affected conference or rate agreement tariffs shall be amended to reflect the suspension of Baltic's participation upon the effective date of a finding contained in paragraphs (a) or (b) of this section 509.3. This section would suspend, as to all sailings commencing on or after the effective date of this section, all tariff rates, charges and rules as they apply to Baltic in the trades between the United States Atlantic and Gulf Coasts and Europe. Until such time as Baltic furnishes the information sought under section 509.2 of this Part, any tariffs subsequently submitted by or in behalf of Baltic in the trades between United States Atlantic and Gulf Coasts and Europe are within the scope of this Part and will be rejected or suspended upon filing.

(e) Operation by Baltic under suspended, cancelled, or rejected tariffs, or any other act or ommission by Baltic inconsistent with this Part, the Shipping Act,

1916, or any other law of the United States or political subdivision thereof, shall subject Baltic to all applicable rememdies and penalties provided by law.

(f) Notwithstanding provisions of this Rule to the contrary, tariff rates shall not be suspended which cover the direct movement of cargo to and from the Soviet Union.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 580

D.F. YOUNG, INC.

v.

COMPAGNIE NATIONALE ALGERIENNE DE NAVIGATION

ORDER ON REVIEW

February 8, 1979

The Commission determined to review the Initial Decision of Administrative Law Judge Charles E. Morgan in which he granted permission to Compagnie Nationale Algerienne de Navigation (CNAN) to waive collection of $1,318.96 in freight charges on five shipments of powerded milk in bags, carried from New Orleans, Louisiana, and Pensacola, Florida, to ports in Algeria, at various times between December 21, 1977, and January 24, 1978.

The applicable rate in effect at the time of shipment was $96.75 per long ton not subject to discounts (NSD), free out (F.O.)[1] It appears that sometime in November, 1977, CNAN negotiated with the shipper, the World Food Program, a rate of $96.00 per long ton NSD, F.O. However, due to a clerical or administrative error, CNAN failed to timely request the Gulf-Mediterranean Ports Conference (Conference), of which CNAN is a member and to whose tariff it is bound, to publish the negotiated rate. As a consequence, freight charges were assessed at the $96.75 rate. The Conference subsequently, on Febraury 2, 1978, published a new tariff showing the $96.00 rate. The requested waiver represents the difference between freight charges computed at the $96.75 rate and charges based on the $96.00 rate.

DISCUSSION

Section 18(b)(3) (46 U.S.C. 817(b)(3)) of the Shipping Act, 1916 (the Act), as amended by P.L. 90-298, provides in part:

That the Federal Maritime Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper *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 common carrier by water in foreign commerce or conference of such carriers has, prior to applying for authority to make refund, filed a

[1] Gulf-Mediterranean Ports Tariff No. 1 (FMC 16)

new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based. . . . (Emphasis added).

The legislative history of Public Law 90-298 clearly indicates that the purpose of that amendment was to allow a carrier to make a voluntary refund or to waive the collection of a portion of the freight charges where, as a result of a bona fide mistake,

the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.[2]

The Senate Report in setting forth the *Purposes of the Bill,* explains:

[Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.[3]

Thus, provided the statutory requirements are met, the Commission may at its discretion permit a carrier to refund or waive collection of a portion of the charges payable under the tariff in effect at the time of shipment.

The application here does not involve "an error due to inadvertence in failing to file a new tariff. . . .", because the Conference was not requested by CNAN to modify its tariff before the shipment at issue moved and thus could not form an intent to file the $96.00 rate negotiated by CNAN.

Section 18(b)(3), however, also provides a remedy in instances of errors of a clerical or administrative nature. Such errors in the tariffs may result from legitimate, bona fide mistakes of conferences or of carriers, be they independent or members of a conference.[4] The remedial provisions of section 18(b)(3) are intended to correct not only the errors of independent carriers or conferences but of individual members of such conferences as well.[5]

To hold that section 18(b)(3) allows a remedy for errors of independent carriers or conferences of carriers but not for erros of conference members is an unduly strict and unreasonable construction. P.L. 90-298 is a remedial statute enacted to relieve shippers from the economic consequences of a carrier's error in the filing of tariff rates. Too narrow a construction of the statute would defeat the legislative intent.[6] Where, as here, an error in the tariff of a clerical or administrative nature is caused by a conference member, and the conference recognizes that error by filing the requested rate modification, we will grant the relief requested. Ratification by the conference is indispensable. The member carrier may apply for a waiver or refund only if the conference agrees to publish a new tariff upon which the waiver or refund will be based before the application for relief is filed with the Commission.

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[2] House Report No. 920, November 14, 1967 [To accompany H.R. 9473, 90th Congress, 1st Sess. (1967)].

[3] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund on Certain Freight Charges* under *Purpose of the Bill.* 90th Cong., 2d Sess. (1968).

[4] The statute in referring to "common carrier by water in foreign commerce" makes no distinction between independent carriers or conference carriers.

[5] Assuming that an independent carrier or a conference files a $57 rather than an intended $75 rate, or a member of the conference in requesting the conference to file the same rate makes the same error, there is no rational reason why a shipper utilizing the conference member should not be entitled to the same remedy as the shipper utilizing the independent carrier or the conference.

[6] House Report No. 920, note 2, *supra, Oakland Motor Car Co. v. Great Lakes Transit Corporation,* 1 U.S.S.B.B. 308, 311 (1934). *Hermann Ludwig, Inc. v. Waterman Steamship Corporation,* 17 S.R.R. 1532 (1978).

The holding in *Munoz y Cabrero v. Sea-Land Service, Inc.*, 17 S.R.R. 1191 (1977) does not call for a different conclusion. In that case, the tariff upon which the waiver was to be based showed a rate never considered or agreed before by the parties. The Commission held that a rate sought to be applied retroactively must be a prior intended rate and not a rate agreed upon after the shipment. In this instance, the $96.00 rate was negotiated before the shipments. Because of CNAN's error the conference members were not given opportunity to vote the proposed rate change. However, upon learning of CNAN's error, the Conference promptly agreed to the $96.00 negotiated rate and filed the tariff modification before CNAN applied for a waiver.[7]

We find therefore that there was an error of a clerical or administrative nature in the tariff.

Section 18(b)(3) also provides that:

> . . . the carrier or conference agrees that if permission is granted by the Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Federal Maritime Commission may require, which give notice of the rate on which such refund or waiver would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application. . . .

The Conference which alone can publish the required notice in the tariff has not concurred in the application.[8] Therefore, CNAN will be granted permission to waive collection of $1,318.76 of the freight charges provided the Conference publishes within thirty (30) days from the service of this order the following notice in the appropriate pages of its tariff:

> Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket No. 580, that effective December 17, 1977, and continuing through February 2, 1978, inclusive, the rate for powdered skim milk in bags from United States Gulf of Mexico ports, including Brownsville, Texas, but not including Key West, Florida, to Algerian ports, for relief purposes, is $96.00 per ton of 2,240 pounds, not subject to discount and free out, and subject to all applicable rules, regulations, terms and conditions of this tariff, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during this period of time.

Should the Conference decline to publish the notice in its tariff, permission to waive a portion of the freight charges will be denied.

It is so ordered.

Commissioner Karl E. Bakke Dissents.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[7] The last of the bills of lading was dated January 24, 1978, and the new tariff was published on February 2, 1978.

[8] Amended Rule 502.92(a) of the Commission's Rules of Practice and Procedure requires a conference to join in applications for refunds or waivers filed by its members. The amendment, however, post dated the application here.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 571(F)

JOSEPH P. SULLIVAN & COMPANY

v.

SEA-LAND SERVICE, INC.

NOTICE

February 14, 1979

Notice is given that no exceptions have been filed to the January 5, 1979 initial decision in this proceeding and that time within which the Commission could determine to review that decision has expired. No such determination has been made and accordingly, review will not be undertaken.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 571(F)

JOSEPH P. SULLIVAN & COMPANY

v.

SEA-LAND SERVICE, INC.

Finalized on February 14, 1979

Reparation of $3,327.21 awarded.

John F. Manning, export coordinator of Joseph P. Sullivan & Company for Complainant-Shipper.
Frank A. Fleischer, Registered Practitioner, Manager, Foreign Commerce of Sea-Land Service, Inc., for the Respondent-Carrier.

INITIAL DECISION[1] OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

This proceeding seeks reparation for overcharge by the carrier for the transportation of 13[2] container loads of apples from Boston to the United Kingdom between January 20, 1977 and March 14, 1977.

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 318, Rules of Practice and Procedure, 46 CFR 502.318).

[2]

B/L Number and Date	Cartons	Overcharge
704-232	611 full ctns	
1/20/77	228 half ctns	330.60
704-280	550 full ctns	
1/26/77	350 half ctns	507.50
704-310	609 full ctns	
1/27/77	233 half ctns	168.20
704-311	578 full ctns	
1/27/77	294 half ctns	213.15
704-313	603 full ctns	
1/27/77	244 half ctns	176.90
704-339	611 full ctns	
1/31/77	228 half ctns	165.30
704-372	519 full ctns	
2/3/77	412 half ctns	298.70
704-407	578 full ctns	
2/7/77	294 half ctns	213.15
704-411	488 full ctns	
2/17/77	474 half ctns	343.65
704-477	569 full ctns	
2/15/77	312 half ctns	226.20
704-486	615 full ctns	
2/15/77	200 half ctns	130.50
704-754	475 full ctns	
3/14/77	500 half ctns	347.73
704-756	573 full ctns	
3/14/77	304 half ctns	205.63
		3,327.21 Total

Beginning with and including a March 14, 1977, letter from the International Apple Institute to the North Atlantic/United Kingdom Freight Conference relative to the Institute's request that two half boxes of apples be considered a package whether bundled together or not, there are 14 letters anent the problem. The said letters include one dated May 25, 1977, to the Conference from the Commission's Bureau of Compliance expressing agreement ". . . that half cartons not bundled together should take a half-carton rate."

The Conference in response to the above May 25, 1977, letter stated, in part:

. . . of the thirteen container loads in question, two are covered by bills of lading dated March 14, 1977. On these two the merchant appears to be entitled to adjustment as per C of the Appendix[3] and should so submit to the carrier(s) involved.

The remaining eleven container loads may best be dealt with by singling out one of them as being typical of the other ten:

1. Blading 704486 dated February 15, 1977, covers a house-to-house container said to contain 615 full cartons (under 2'2" each) and 200 half cartons (under 1'2" each); the half cartons *not* bundled two together.

2. As we understand it, Mr. Burrows (Executive V.P. International Apple Institute) contends that the rating should have been $2.90 each for the 615 full cartons and $1.45 each for the 200 half cartons.

3. The member lines disagree because (a) the tariff at the time contained no service I any-quantity rate on full cartons and (b) the tariff at the time contained no provisions which would allow the carrier(s) to waive the "minimum 725 packages per container" as a requirement for the $2.90 each incentive rate.

4. Further, they hold the view that nowhere did the tariff provide that two half cartons *not* bundled two together may be considered a single package.

5. It is the view of the carriers that the rating for blading 704486 should have been $2.90 each for 725 packages and $1.45 each for 90 of the half cartons. Any adjustments in freight charges on the eleven container loads in question using any other rationale would in their view be contrary to the provisions of the tariff.

The Commission's Bureau of Compliance in an August 29, 1977 reply to the above-mentioned July 13, 1977 letter stated, *inter alia;*

. . . let us take the example which you used of Bill of Lading No. 704486, dated February 15, 1977, of 615 full cartons of apples and 200 half cartons not bundled two together. The commodity description in effect at the time stated the following: "Apples: Temperature Controlled—In Wooden Boxes *or* Fibreboard Cartons *or* in Cartons Bundled Two Together." We need go no further than this to demonstrate that half cartons need not be bundled two together to receive a half carton rate. The last phrase of the sentence states "*or* in cartons bundled two together," not that they *must* be bundled together. If it is the intention of the member carriers to require that half cartons of Wooden Boxes, Fibreboard Cartons, and Cartons be bundled two together, then this must be specifically stated in the tariff. The commodity description as it stands now is quite ambiguous and must be changed to reflect the wishes of the member carriers.

The above gives background information to which follows further background:

[3] Appendix
C) Item 051.4001
lbs. per container.
Apples, Packed Temperature Controlled–Minimum 30,240
(Thru June 30, 1977)
Rate Established Eff. 3/14/77–$155.75 W Service I.

FURTHER BACKGROUND

The complaint in this proceeding, received in the Commission on or about August 25, 1978, sought treatment under Subpart S—Informal Procedure for Adjudication of Small Claims, 46 CFR 502.301. The complaint was served September 5, 1978, by Settlement Officer Putnam. Respondent-Carrier Sea-Land Service, Inc., would not consent[4] to the informal procedure. Pursuant to Section 502.311, the Secretary of the Commission in a memorandum dated October 23, 1978, referred the matter to the Office of Administrative Law Judges for adjudication under the provisions of Subpart T.

Sea-Land, in its September 28, 1978, letter, also asked for an extension of time to permit an audit of the freight bills so it could then respond whether it consents to the claim being informally adjudicated. By letter dated October 4, 1978, Settlement Officer Putnam granted the extension to October 20, 1978.

Sea-Land, in its October 16, 1978, letter took the position:

. . . that informal docket 571(I) should be dismissed because no decision can be rendered for the following reasons:

1. During the period the alleged violations took place, Sea-Land was a member of agreement 7100—North Atlantic/United Kingdom Freight Conference (NAUKFC).

2. The NAUKFC agreement 7100 Article VIII stipulates:

All freights and other charges for or in connection with the transportation of cargo shall be quoted, charged and collected by the Members strictly in accordance with the Conference Tariff. No part thereof shall be, directly or indirectly, refunded or remitted in any manner or by any device.

3. Sea-Land billed the freight charges in conformity with the NAUKFC tariff and Agreement 7100.

4. Sea-Land did not violate Section 18(b)(3) of the Shipping Act by charging more than the rates on file with the Commission.

5. Sea-Land did not violate any provision of the Shipping Act.

6. Complainant has no cause of action against Sea-Land individually, as Sea-Land did not individually publish the rate provision in dispute.

On October 30, 1978, the Presiding Administrative Law Judge received a letter dated October 27, 1978, from Sea-Land Service, Inc., reiterating its October 16, 1978, letter referred to above. (Letter did not indicate copy was sent to complainant. Commission Rules require all parties to be supplied with copies of all matters filed in a proceeding.) The Presiding Administrative Law Judge treated that response of Sea-Land Service, Inc., as a motion, and denied the motion, without prejudice, in an Order served October 31, 1978. Sea-Land Service, Inc., was referred to Rule 73 (46 CFR 502.73) as to what a motion should contain.

To permit consideration of this proceeding, the parties were asked to provide the answers the Formal Procedure for Adjudication of Small Claims (46 CFR 502.311, *et seq.*) indicate.

Under date of November 15, 1978, the respondent, Sea-Land Service, Inc., served (received November 20, 1978) a motion seeking reconsideration of the October 31, 1978, denial of motion to dismiss complaint. The respondent simply

[4] In letters dated September 28, 1978, and October 16, 1978, respectively, to the Settlement Officer, Sea-Land Service, Inc., advised that it ". . . *does not consent* to informal docket 571(I) being informally adjudicated in accordance with the Federal Maritime Commission Rule 301-304."

reiterated that which it had previously filed and ignored the suggestion in the October 31, 1978, Order to consult Rule 73 (46 CFR 502.73) as to what a motion should contain. There was no support for the original motion or the motion for reconsideration by statutes, Rules, or cases, but complaint was made that the October 31, 1978, Order denying the motion to dismiss recited no grounds and that the Judge made errors of fact which led to erroneous legal conclusions. There was no citation as to what those errors are. The respondent failed to observe Rule 73 (46 CFR 502.73) that all motions shall state clearly and concisely the purpose of and the relief sought by the motion, the statutory or principal authority relied upon, and the facts claimed to constitute the grounds requiring the relief requested. To get to the merits of the proceeding, the Presiding Administrative Law Judge suggested in the Order served December 7, 1978, denying reconsideration, there should be the answer and memoranda, as is provided in Subpart T, as pointed out in the Order served October 31, 1978, that the parties, if possible, should agree as to what is or is not in dispute. For example, even in the motion for reconsideration, it is stated:

> . . . Sea-Land has determined that the following freight bills were rated incorrectly and provided Sea-Land receives authorization . . . . permitting Sea-Land to waive the "six-month" rule contained in Rule 9 of the North/Atlantic United Kingdom Freight Conference Tariff . . . . Sea-Land will, upon receipt of a properly documented overcharge claim, refund all monies overcharged: 704–232, 704–280, 704–754, 704–756.

The Presiding Administrative Law Judge pointed out that the Conference Rules do not supersede or preclude the two-year statute of limitations provided for in section 22 of the Shipping Act, 1916, as the time within which actions must be brought.

DISCUSSION

The respondent-carrier in this proceeding, by its answer served December 13, 1978 (received December 18, 1978), substantially admits the material allegations of the complaint. The respondent-carrier admits that the wording in the North Atlantic/United Kingdom Freight Conference Tariff FMC–3 Item No. 0514004–479—Apples—Fresh—in Wooden boxes, or fibreboard cartons, *or* in cartons bundled two together, did not justify the carrier charging the full rate $2.90 on the number of half cartons that were shipped in each container. Further, the respondent-carrier submits there are no controverted issues of fact or law in this proceeding.

In regard to the allegation in paragraph III of the complaint as to alteration of bills of lading, the answer stipulates that the averred alteration of the bills of lading were simply Supplemental Bills of Lading issued, Sea-Land believed at the time, in order to correct the original bills. Sea-Land notes that the claim alleges no violation of the Shipping Act, 1916, or of the Intercoastal Shipping Act, 1933, and that Sea-Land, by its admissions, does not admit to any violation of either Act.

Upon consideration of all the aforesaid, the Presiding Administrative Law Judge *finds* and *concludes*, in addition to the findings and conclusions hereinbefore stated:

The complaint in this proceeding was filed within two years after the causes of action accrued as provided in section 22 of the Shipping Act, 1916, and so has been filed timely. Documents covering the transportation of the 13 containers of apples involved from Boston to the United Kingdom support what was shipped. The letters submitted and filed support the ambiguity of the tariff, which coupled with the respondent-carrier's admission, warrants the granting of the relief sought.

The claimant did not total up the amount of overpayment. The Presiding Administrative Law Judge, using the figures submitted, finds the overcharges total $3,327.21.

Upon consideration of the above, the Presiding Administrative Law Judge finds and concludes that there was an ambiguity in the tariff involved which should be and is construed against the carrier who is a member of the Conference whose tariff is involved. The admissions of the carrier and the supporting evidence entitle the complainant to an award against the carrier, as reparation, in the amount of $3,327.21.

Wherefore, it is ordered,

(A), The complainant be and hereby is awarded reparation in the amount of $3,327.21 against the respondent-carrier.

(B) This proceeding be and hereby is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

WASHINGTON, D.C.
January 5, 1979

TITLE 46–SHIPPING

Chapter IV—Federal Maritime Commission

SUBCHAPTER A—GENERAL PROVISIONS

[GENERAL ORDER NO. 16, AMDT. 28; DOCKET NO. 78–47]

PART 502—Rules of Practice and Procedure

ACTION: Final Rules

SUMMARY: Part 502 of the Federal Maritime Commission's Rules has been revised to enable the Commission to comply with the requirements of Public Law 95–475, an amendment to the Intercoastal Shipping Act, 1933. This new statute is intended in part to expedite the Commission's decision-making process in its regulation of the domestic offshore trades. P.L. 95–475 imposes a definitive procedural schedule upon Commission consideration of matters arising under the 1933 Act. The new Rules effectuate the legislative intent by establishing detailed guidelines for participants in proceedings under the Act to permit prompt adjudication by the Commission.

EFFECTIVE DATE: February 14, 1979

SUPPLEMENTAL INFORMATION:

This proceeding was initiated by a Notice of Proposed Rulemaking published in the *Federal Register* on November 24, 1978 (43 F.R. 54960–62). The Federal Maritime Commission proposed to revise its Rules of Practice and Procedure in order to enable it to comply with the requirements of P.L. 95–475, 92 Stat. 1494 (1978), which amends the Intercoastal Shipping Act, 1933 (46 U.S.C. 843 et seq.). In its Notice, the Commission indicated that in order to effectuate the legislative intent to expedite the Commission's decision-making process, strict procedural guidelines for participants in the proceedings under the Act were required. These Final Rules establish such guidelines.

Comments were received from six parties.[1] They addressed a variety of issues raised by the Proposed Rules. All comments received were carefully reviewed and considered. The various objections raised and the revisions made in the Proposed Rules are discussed below.

1. *Section 502.67(a).* Crowley, Matson, and Sea-Land expressed concern as to the confidentiality of the underlying workpapers filed concurrently with a general rate increase or decrease. The Commission agrees that the confidentiality of particular financial data submitted by a carrier must be protected. Allowing

[1] Comments were submitted by: Crowley Maritime Corporation (Crowley); Matson Navigation Company (Matson); The Military Sealift Command (M.S.C.); Puerto Rico Maritime Shipping Authority (P.R.M.S.A.); Sea-Land Service, Inc. (Sea-Land); and Totem Ocean Trailer Express, Inc. (T.O.T.E.).

a carrier's competitors to have unlimited access to this information could cause undue harm to the submitting carrier without significantly advancing any regulatory purpose. Therefore, the Commission has incorporated into the Final Rules a number of specific controls on the distribution of the material file pursuant to the Rules. Unless authorized by an order of the Commission or a Presiding Administrative Law Judge, the contents of the underlying workpapers are not to be disclosed. However, in order to provide the public with the information necessary to evaluate general rate increases or decreases, copies of this information must be readily accessible prior to the institution of formal investigations. Therefore, carriers will be required to promptly furnish their underlying workpapers to those persons who have requested their release and submitted a certificate indicating that the data is sought in connection with protests related to and proceedings resulting from the carrier's general rate increase or decrease. This method of distribution will limit release of the data to those persons having an interest in the rate action and will enable the carrier to be informed as to those people who have had access to its workpapers.

A copy of the testimony and exhibits filed at the Federal Maritime Commission by the carrier must also be made available at every port in the relevant trade at the offices of the carrier or its agent. The Commission agrees with Matson that the inclusion of the phrase "or its agent" clarifies the nature of the requirement. However, the Commission cannot endorse Sea-Land's suggestion that the availability of the direct testimony and exhibits should be restricted to the offices of the Commission. The public's need for information must be weighed against any burden imposed upon the carrier. Making the testimony and exhibits available only at Commission offices would unduly weight the scale against those seeking access to that material.

The Commission believes there is merit in Sea-Land's suggestion that copies of testimony, exhibits, and underlying workpapers should be served only on the attorney general of each *noncontiguous* State, Commonwealth, Possession, or Territory having ports in the relevant trade served by the carrier. Service on officials of contiguous States would be unwarranted and unnecessarily burdensome to the submitting carrier. Under the Final Rules, carriers will be required to certify that all of the designated material has been served simultaneously on the appropriate attorney general. The concern here is that in the absence of such a requirement, timely service will not be made upon officials in the more outlying regions.

Another comment which the Commission has incorporated into the Final Rules is Matson's proposal that the word "workpapers" be substituted for the words "underlying data". "Underlying data" is too broad and too vague, and the use of this term might impose upon a carrier the burden of providing a quantity of material unnecessary to an analysis of a rate action.

Both Crowley and T.O.T.E. urged that the requirement that a carrier submit its entire direct case concurrently with the filing of a general rate increase or decrease, irrespective of whether the filing is subsequently protested, imposes an undue and unnecessary burden on the carrier. The Commission cannot agree with this assessment of the Rule. In order to evaluate the justness and reasonableness of the rate and to expedite Commission decision-making, it is imperative that

carriers make the designated material available at the time of their initial filing. The Commission firmly believes that this requirement is necessary to meet the procedural schedule imposed by Congress.

Further, in response to an inquiry by Sea-Land, the filing of certain past and projected financial data as presently required by General Order 11 would not constitute a *prima facie* direct case under section 502.67. As is true in current rate actions, a far more comprehensive submission would be required.

M.S.C. urged that the testimony and exhibits filed by the carrier should be executed under oath. The Commission agrees that this suggestion has merit. M.S.C. also proposed that carriers be required to serve their entire direct case on major ratepayers who have requested such service prior to the filing of the rate increase or decrease. The Commission believes that such a requirement would impose a substantial and unnecessary burden upon carriers. The material is readily available to the ratepayer at the offices of the carrier or its agent at every port in the trade served by the carrier. Requiring ratepayers to inspect this material at these locations clearly will not substantially disadvantage their participation in any proceedings under the Act.

The substance of Sea-Land's proposal that a provision be included in the Rules which would set forth the Commission's authority to reject tariffs and establish an early deadline for the exercise of that authority has been incorporated in the Final Rules.

2. *Section 502.67(b).* Sea-Land recommended the inclusion of a provision mandating that protests which address only the effect of general rate increases on specific commodities should not be entertained. The Commission concurs. If individual commodity considerations were to be superimposed on general rate cases, it is doubtful that proceedings could be completed expeditiously.

3. *Section 502.67(c).* The Commission has not adopted Sea-land's proposal that the provision mandating that replies to protests shall be filed no later than fifteen days prior to the effective date of the proposed changes. Section 502.74 (Rule 74) provides adequate guidelines for the timely filing of replies to protests, while allowing a degree of flexibility absent in the Sea-Land proposal.

4. *Section 502.67(d).* Both Matson and M.S.C. have urged the Commission to include a provision in the Final Rules concerning the filing requirements for other than general revenue changes in tariffs made pursuant to section 3 of the Intercoastal Shipping Act, 1933. M.S.C. argued that the requirement for concurrent filing by the carrier of its entire direct case should be expanded to encompass all tariff changes. Matson has contended that the direct cases of all parties, including the carrier, should be filed twenty days after a proceeding is instituted which involves less than a general rate increase. We believe there is a distinction which must be recognized in evaluating these comments. A general rate increase or decrease is far more likely to evoke a protest than are other kinds of tariff changes. The greater likelihood that a general rate action will be protested justifies the imposition of a stringent filing requirement on the carrier submitting such a change. Therefore, the Commission endorses Matson's proposal that the carrier, Hearing Counsel, and all protestants be required to simultaneously serve testimony, exhibits, and workpapers on all parties and lodge copies of testimony and exhibits with the Administrative Law Judge no later than twenty days after

the effective date of other than general revenue tariff changes should the proposed change be made subject to a docketed proceeding. The modified filing requirement approved by the Commission ensures that proceedings involving other tariff changes will proceed expeditiously, but avoids imposing an additional burden on the carrier. If the Commission were to adopt M.S.C.'s recommendation, carriers would be compelled to compile substantial amounts of evidence, which based upon past experience, they may not be called upon to use in a formal proceeding.

Matson's suggestion that the phrase "general increase in rates or general decrease in rates" should be substituted for the word "matter" has also been incorporated with stylistic modification into the Final Rules. The phrase offered by Matson serves to clarify the intent of the section that Hearing Counsel's and protestants' responsibility to serve testimony, exhibits, and underlying data in response to carrier filings arises only in general rate cases.

Sea-Land also urged the adoption of a requirement that would limit the time during which the Commission would be authorized to issue orders of investigation not involving suspensions to the seven-day period prior to the effective date of the proposed changes. The suggestion has merit and will be considered as an amendment to the Commission's internal procedures. As such, its inclusion in the Commission's Rules of Practice and Procedure would be inappropriate.

The Commission has not incorporated a proposal by M.S.C. that would have guaranteed Hearing Counsel and all protestants fourteen days to prepare their direct cases. The Commission acknowledges M.S.C.'s concern that the guidelines incorporated in the Final Rules might impose severe time constraints on Hearing Counsel and protestants, but believes that the adoption of the internal Commission procedure discussed above obviates the problem.

5. *Section 502.67(e).* The Commission has incorporated into the Final Rules the concept of Matson's suggestion that the Administrative Law Judge be allowed to dispense with a prehearing conference if, in his discretion, he determines that a conference would not expedite the proceedings at hand. The inclusion of Matson's proposal injects an additional degree of flexibility into the Rules.

Matson also recommended that the phrase "Such other matters as may aid in the disposition of the proceeding" be added to the list of subjects to be considered at the prehearing conference. Again, to allow for increased flexibility under the Final Rules, the Commission has adopted this suggestion.

6. *Section 502.67(f).* PRMSA expressed concern that the carrier may be required to prepare a prehearing statement prior to receipt of the direct case of Hearing Counsel and protestants. While acknowledging that this possibility exists, the Commission is reluctant to interfere with the Administrative Law Judge's discretionary authority to set the date of the prehearing conference. The Commission believes that the detailed protests mandated by the Rules would provide carriers with the information necessary to prepare a prehearing statement in the event that the direct case of Hearing Counsel or protestants had not been received.

7. *Section 502.67(g).* P.R.M.S.A. also expressed concern that the Rules do not indicate whether oral argument will be held prior to a Commission decision

in an action under the Rules. The Commission believes that section 502.241 adequately addresses this issue and renders additional guidelines in the Final Rules unnecessary.

P.R.M.S.A. urged that the procedural regulations mandated by Public Law 95-475 should not be adopted prior to the issuance of the substantive guidlines required by the amendment to section 3 of the Intercoastal Shipping Act. The Commission agrees with P.R.M.S.A. that it would be advisable to await the adoption of the substantive guidelines. Unfortunately, it is imperative that the procedural rules be issued immediately in order to coincide as closely as possible with the effective date of the Act. We anticipate that the procedural rules will evolve, based on our experience in processing general rate changes under these procedures.

Therefore, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553), section 21, 27 and 43 of the Shipping Act, 1916 (46 U.S.C. 820, 826, 841(a)), and section 3 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 845), Part 502 of Title 46, Code of Federal Regulations, is amended as set forth hereinafter.

Section 502.67 is revised as follows:

Sec. 502.67—*Proceedings under section 3(a) of the Intercoastal Shipping Act, 1933*

(a)(1)(i) The term "general rate increase" means any change in rates, fare, or charges which will (A) result in an increase in not less than 50 per centum of the total rate, fare, or charge items in the tariffs per trade of any common carrier by water in intercoastal commerce; and (B) directly result in an increase in gross revenues of such carrier for the particular trade of not less than 3 per centum.

(ii) The term "general rate decrease" means any change in rates, fares, or charges which will (A) result in a decrease in not less than 50 per centum of the total rate, fare, or charge items in the tariffs per trade of any common carrier by water in the intercoastal commerce; and (B) directly result in a decrease in gross revenue of such carrier for the particular trade of not less than 3 per centum.

(2) No general rate increase or decrease shall take effect before the close of the sixtieth day after the day it is posted and filed with the Commission. The carrier shall file, under oath, concurrently with any general rate increase or decrease testimony and exhibits of such composition, scope and format that they will serve as the carrier's entire direct case in the event the matter is set for preparation of the testimony and exhibits. The carrier shall also certify that copies of testimony, exhibits and underlying workpapers have been served simultaneously on the attorney general of every non-contiguous State, Commonwealth, Possession or Territory having ports in the relevant trade that are served by the carrier. The contents of underlying workpapers served on attorneys general pursuant to this paragraph are to be considered confidential and are not to be disclosed to members of the public except to the extent specifically authorized by an order of the Commission or a Presiding Administrative Law Judge. A copy of the testimony and exhibits shall be made available at every port in the trade at the offices of the carrier or its agent during usual business hours for inspection

and copying by any person. In addition, the underlying workpapers shall be made available promptly by the carrier to all persons requesting them for inspection and copying upon the submission of the following certification, under oath, to the carrier:

CERTIFICATION

I, _____
(Name and Title if Applicable)

of _____, having been duly sworn
(Full Name of Company or Entity)

certify that the underlying workpapers requested from _____,
(Name of Carrier)

will be used solely in connection with protests related to and proceedings resulting from _____general rate increase or
(Name of Carrier)

decrease scheduled to become effective _____ and
(Date)

that their contents will not be disclosed to any person who has not signed, under oath, a certification in the form prescribed, which has been filed with the carrier, unless public disclosure is specifically authorized by an order of the Commission or a Presiding Administrative Law Judge.

_____
Signature

_____
Date

Signed and Sworn before me this _____ Day of _____

_____
Notary Public

My Commission expires _____

(3) Failure by the carrier to meet the service and filing requirements of paragraph (a)(2) may result in rejection of the tariff matter. Such rejection will take place within three work days after the defect is discovered.

(b) (1) Protests against a proposed general rate increase or decrease made pursuant to section 3 of the Intercoastal Shipping Act, 1933, may be made by letter and shall be filed with the Director, Bureau of Ocean Commerce Regulation and the carrier no later than thirty (30) days prior to the proposed effective date of the proposed changes. In the event the due date for protests falls on Saturday, Sunday or national legal holiday, protests must be filed with the Director, Bureau of Ocean Commerce Regulation and the carrier no later than the last business day preceding the weekend or holiday. Persons filing protests pursuant to this section shall be made parties to any docketed proceeding involving the matter protested, provided that the issues raised in the protest are pertinent to the issues set forth in the order of investigation. Protests shall include:

(i) Identification of the tariff in question;

(ii) Grounds for opposition to the change;

(iii) Identification of any specific areas of the carrier's testimony, exhibits, or underlying data that are in dispute and a statement of position on each area in dispute;
(iv) Specific reasons why a hearing is necessary to resolve the issues in dispute;
(v) Any requests for additional carrier data;
(vi) Identification of any witnesses that protestant would produce at a hearing, a summary of their testimony and identification of documents that protestant would offer in evidence; and
(vii) A subscription and verification.

(2) Protests against other proposed changes in tariffs made pursuant to section 3 of the Intercoastal Shipping Act, 1933, shall be filed no later than twenty (20) days prior to the proposed effective date of the change. The provisions of paragraph (b)(1) relating to the form, place and manner of filing protests against a proposed general rate increase or decrease shall be applicable to protests against other proposed tariff changes.

(c) Replies to protests shall conform to the requirements of §502.74 (Rule 74).

(d) (1) In the event a general rate increase or decrease is made subject to a docketed proceeding, Hearing Counsel and all protestants shall serve, under oath, testimony and exhibits constituting their direct case, together with underlying workpapers on all parties and lodge copies of testimony and exhibits with the Administrative Law Judge no later than seven (7) days after the tariff matter takes effect or, in the case of suspended matter, seven (7) days after the matter would have otherwise gone into effect.

(2) If other proposed tariff changes made pursuant to section 3 of the Intercoastal Shipping Act, 1933 are made subject to a docketed proceeding, the carrier, Hearing Counsel and all protestants will simultaneously serve testimony and exhibits constituting their direct case, together with underlying workpapers on all parties and lodge copies of testimony and exhibits with the Administrative Law Judge no later than twenty (20) days after the tariff matter takes effect, or in the case of suspended matter, twenty (20) days after the matter would have otherwise gone into effect.

(e) (1) Subsequent to the exchange of testimony, exhibits, underlying data and prehearing statements by all parties, the Administrative Law Judge shall at his discretion, direct all parties to attend a prehearing conference to consider:
(i) Simplication of issues;
(ii) Identification of issues which can be resolved readily on the basis of documents, admissions of fact, or stipulations;
(iii) Identification of any issues which require evidentiary hearing;
(iv) Limitation of witnesses and areas of cross-examination should an evidentiary hearing be necessary;
(v) Requests for subpoenas; and
(vi) Other matters which may aid in the disposition of the hearing.

(2) After considering the procedural recommendations of the parties, the Administrative Law Judge shall limit the issues to the extent possible and establish a procedure for their resolution.

(3) The Administrative Law Judge shall, whenever feasible, rule orally upon the record on matters presented before him.

(f) (1) It shall be the duty of every party to file a prehearing statement on date specified by the Administrative Law Judge, but in any event no later than the date of the prehearing conference.

(2) A prehearing statement shall state the name of the party or parties on whose behalf it is presented and briefly set forth:

(i) Identification of issues which can be resolved readily on the basis of documents, admissions of fact, or stipulations;

(ii) Identification of any issues which require evidentiary hearing, together with the reasons why these issues cannot be resolved readily on the basis of documents, admissions of fact, stipulations or an alternative procedure;

(iii) Requests for cross-examination of the direct written testimony of specified witnesses, the subjects of such cross-examination and the reason why alternatives to cross-examination are not feasible;

(iv) Requests for additional, specified witnesses and documents, together with the reasons why the record would be deficient in the absence of this evidence; and

(v) Procedural suggestions that would aid in the timely disposition of the proceeding.

(g) The provisions of this section are designed to enable the Administrative Law Judge to complete a hearing within sixty (60) days after the proposed effective date of the tariff changes and submit an initial decision to the Commission within one hundred twenty (120) days pursuant to section 3(b) of the Intercoastal Shipping Act, 1933. The Administrative Law Judge may employ any other provision of the Commission's Rules of Practice and Procedure, not inconsistent with this section in order to meet this objective. Exceptions to the decision of the Administrative Law Judge, filed pursuant to section 502.227 (Rule 227) shall be served no later than fifteen (15) days after date of service of the initial decision. Replies thereto shall be served no later than ten (10) days after date of service of exceptions.

(h) Intervention by persons other than protestants ordinarily shall not be granted. In the event intervention of such persons is granted, the Administrative Law Judge or the Commission may attach such conditions or limitations as are deemed necessary to effectuate the purpose of this section.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 556

PAN AMERICAN INDUSTRIES, INC.

v.

SEA-LAND SERVICE, INC.

Transportation under a through bill of lading from Toronto, Canada, to San Juan, Puerto Rico, via Elizabeth, New Jersey, found to be in the domestic offshore commerce of the United States. Application for permission to waive collection of undercharges on a shipment of malt in bags denied.

REPORT

February 14, 1979

BY THE COMMISSION: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice Chairman;* Karl E. Bakke and James V. Day *Commissioners*)

Sea-Land Service, Inc. (Sea-Land) applied for permission to waive collection of a portion of the freight charges on a shipment of malt in bags from Toronto, Canada, via Elizabeth, New Jersey, to San Juan, Puerto Rico. The application was filed under section 92(b) of the Commission's Rules of Practice and Procedure (46 C.F.R. 92(b)) which governs the filing of applications for refunds or waivers by carriers engaged in the domestic offshore trade.[1]

Administrative Law Judge Charles E. Morgan denied the application on the ground that the shipment moved in foreign commerce and the application, received at the Commission more than 180 days after the date of shipment,[2] was untimely filed.[3] The Commission determined to review the Initial Decision. The tariff applicable to the shipments is Sea-Land's Tariff No. 243, FMC-F No. 30, filed in the Domestic Tariff Branch.

[1] Under section 92(b) the *application* is treated like a complaint and may be filed within two years after the cause of action accrued *rather* than the 180 days provided in section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817) for *shipments in foreign* commerce.

[2] The application was received at the Commission on December 13, 1977; the bill of lading was *dated* June 17, 1976—the shipment was delivered between June 28 and July 1, 1976.

[3] Section 18(b)(3) of the Shipping Act, 1916 (46 *U.S.C.* 817(b)(3)) requires that applications of common carriers by water in foreign commerce *for permission* to refund or waive collection of a portion of the freight charges from a shipper, be filed *within 180* days of the date of shipment.

DISCUSSION

The shipment which forms the basis of the waiver application moved by motor carrier from Toronto to Elizabeth, New Jersey and thence by water to San Juan, under Sea-Land's through bill of lading.[4] The tariff sets forth the joint through rate and the ocean portion thereof. Sea-Land first filed the tariff under section 18(b)(1) of the Shipping Act, 1916 (the 1916 Act), but the filing was rejected by the Commission's Bureau of Compliance on the ground that the transportation involved was in the domestic offshore and not in the foreign commerce of the United States. The Bureau took the position that when read in light of the definition "common carrier by water in foreign commerce" in section 1 of the 1916 Act, the provision "transportation to and from United States ports and foreign ports" in section 18(b)(1) must be read to mean transportation by water.[5] Because in this instance the only movement by water was between the ports of Elizabeth and San Juan, it was determined that the transportation subject to the Commission's jurisdiction was in the domestic offshore trade regulated under the Intercoastal Shipping Act, 1933 (the 1933 Act). This determination, which was affirmed by the Commission on June 4, 1975, governs the matter before us here. Accordingly, we find that the shipment at issue here moved in the domestic and not in the foreign commerce as the Presiding Officer held. Therefore, the application, which was filed within the two-year time limit set forth in section 22 of the 1916 Act, must be decided on its merits on the basis of the provisions of the 1933 Act.

The material facts as stated in the Initial Decision are as follows. Sea-Land seeks authority to waive $1,778.22 of the total applicable freight charges of $16,843.70, on a shipment of ten containers of malt, in bags, from Toronto, Canada, to San Juan, Puerto Rico. The shipment moved to San Juan under Sea-Land's through bill of lading dated June 17, 1976. Total freight charges collected from the shipper-complainant, Pan American Industries, Inc. were $15,065.48. The difference between this amount and the charges of $16,843.70 computed at the rate in effect at the time of shipment, is $1,778.22, the amount sought to be waived.

Sea-Land alleges that on April 12, 1976, its Caribbean pricing division requested the Menlo Park Tariff Publication, Corporate Traffic Division of Sea-Land to publish a rate for malt in bags of 289 cents per 100 pounds "to meet the competition of PRMSA."[6] Pan American Industries, Inc., the shipper, was informed that the rate would be effective on June 1, 1976. Upon discovering that the request for the filing had not been received by the traffic division of Sea-Land, a new publication request was made which included an increase in the trucking rate of about 10 percent and resulted in the publication of a rate from To-

[4] The port of loading is designated as "Toronto via Elizabeth."

[5] Section 1 reads in part:

> The term "common carrier by water in foreign commerce" means a common carrier . . . engaged in the transportation by water of passengers or property between the United States . . . and a foreign country . . . . 46 U.S.C. 801.

Section 18(b)(1) requires every common carrier by water in foreign commerce to file with the Commission tariffs showing all the rates and charges of such carriers . . . for transportation to and from United States ports and foreign ports between all points on its own route and on any through route which has been established. 46 U.S.C. 817(b)(1).

[6] The reference, apparently, is to Puerto Rico Maritime Shipping Authority.

ronto to San Juan of 299 cents per 100 pounds. The rate became effective on July 8, 1976. Complainant, who had advised the consignee that the 289 cents rate would be effective on the date of shipment, paid freight charges computed on the basis of the 299 cents rate.

Section 18(a) of the 1916 Act requires common carriers by water in interstate commerce to file with the Commission just and reasonable rates and charges. Under section 4 of the 1933 Act the Commission, upon finding that a rate is unjust or unreasonable, may determine and prescribe a just and reasonable maximum or minimum rate. Neither section 18(a) of the 1916 Act nor the 1933 Act provides for the issuance of waivers or refunds based solely on errors in the tariff or on a failure to publish an intended rate. Therefore, the permission to waive collection of a portion of the freight charges may not be granted unless the rate duly published and in effect at the time of shipment is found to be unreasonable. *Application—The East Asiatic Co., Inc.*, 9 F.M.C. 169, 172 (1965); *Davies, Turner and Co. v. Atlantic Lines, Ltd.* 13 F.M.C. 270 (1970); *Real Fresh, Inc. v. Matson Navigation Company*, 16 S.R.R. 1174 (1976).

Sea-Land's "admission" standing alone is not sufficient to support a finding that the applicable rate was unreasonable. Neither would a desire to meet competition[7] justify the retroactive application of a new rate unless the rate on file with the Commission is found to be unlawful. Sea-Land has not alleged or shown that the 335 cents rate in effect at the time of the shipment was unjust or unreasonable. In the absence of evidence to that effect, permission to waive collection of $1,778.22 of the freight charges must be denied.

It is so ordered.

Commissioner Kanuk concurring;

I concur in the majority's conclusion denying permission to waive collection of freight charges.

In so doing, I do not reach the question of whether movements on a through bill of lading between a foreign point and a domestic port are domestic movements when the water portion of the movement is solely domestic.

(S) FRANCIS C. HURNEY
Secretary

[7] The application does not mention the rate charged by PRMSA.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74-53

AGREEMENT NO. 17-34—APPLICATION OF THE FAR EAST CONFERENCE FOR INTERMODAL AUTHORITY

Proposed conference intermodal agreement found not justified and disapproved pursuant to Shipping Act, section 15.

Elkan Turk, Jr. for the Far East Conference.
Paul M. Donovan and *Samuel H. Moerman* for the Port Authority of New York and New Jersey.
George F. Mohr and *Martin A. Heckscher* for the Delaware River Port Authority.
J. Robert Bray and *A.W. Jacocks* for the Virginia Port Authority.
Neal M. Mayer for Seatrain Lines, Inc.
Edward D. Ransom and *Donovan D. Day, Jr.*, for the Pacific Westbound Conference.
Michael Crutcher, Jonathan Blank and *James D. Dwyer* for the Port of Seattle.
Greg B. Perry for the New Orleans Traffic and Transportation Bureau.
J.A. Illes and *Roland Ronshausen* for Outboard Marine Corporation.
C.D. Miller, John C. Cunningham, and *Donald J. Brunner,* for the Bureau of Hearing Counsel.

REPORT AND ORDER ADOPTING INITIAL DECISION

February 23, 1979

BY THE COMMISSION: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice Chairman;* James V. Day and Leslie Kanuk, *Commissioners*)*

The Commission initiated this proceeding to determine whether Agreement No. 17-34 (Agreement) among the member lines of the Far East Conference (FEC) should be approved, modified or disapproved pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C 814).[1]

The Agreement would extend the geographic scope of FEC's ratemaking authority by extending the FEC's existing port-to-port service to include all U.S. inland points and ports via Atlantic and Gulf ports to all points or ports in Japan, Okinawa, Korea, Taiwan, Siberia, Manchuria, China, Hong Kong, the Philippines, Vietnam, Cambodia, and Laos.[2] The FEC would thereby be able to

* Commissioner Karl E. Bakke dissents. He would approve Agreement No. 17-34 for a period of six months.

[1] Agreement No. 17-34 was filed for approval on February 14, 1973. A protest to the agreement was filed by Seatrain Lines, Inc. An Order of Investigation and Hearing was issued on December 10, 1974. Following the Hearing Order, the Delaware River Port Authority, New Orleans Traffic and Transportation Bureau, Outboard Marine Corporation, Pacific Westbound Conference, Port Authority of New York and New Jersey, Port of Seattle, and the Virginia Port Authority were granted leave to intervene.

[2] The signatories to the proposed agreement were: American Export Lines, Inc.; American President Lines, Ltd.; Barber Lines, A/S; Blue Sea Line-Joint Service; Japan Line, Ltd.; Kawasaki Kisen Kaisha, Ltd.; Lykes Bros. Steamship Company, Inc.; Maritime Company of the Philippines, Inc.; Mitsui-O.S.K. Lines, Ltd.; A.P. Moller-Maersk Line; Nippon Yusen Kaisha; Sea-Land Service, Inc; States Marine Lines; Thai Mercantile Marine Limited; United Philippine Lines, Inc.; United States Lines, Inc.; Waterman Steamship Corporation; Yamashita Shinnihon Steamship Co., Ltd.; and Zim Israel Navigation Co., Ltd.

establish port-to-port, port-to-point, or point-to-port rates for these trade routes.

Administrative Law Judge William Beasley Harris (Presiding Officer) issued an Initial Decision on February 20, 1976, disapproving the Agreement on the ground that the FEC had failed to meet its burden to adduce evidence justifying the need for the Agreement under Commission standards articulated and approved in *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien, et al.*, 390 U.S. 238 (1968).

The FEC, the Pacific Westbound Conference, the Delaware River Port Authority, and the Port Authority of New York and New Jersey (Proponents) filed Exceptions to the Initial Decision. Replies to Exceptions were submitted by Seatrain Lines, Inc., Outboard Marine Corporation, and the Commission's Bureau of Hearing Counsel (Protestants).

Position of the Parties

Proponents allege that the Presiding Officer erred in the following respects:

1. A strict *Svenska* standard was incorrectly applied to an agreement which would merely extend port-to-port conference rate making authority to include intermodal transportation. Proponents argue that the Commission has previously announced that certain factors favoring approval of such agreements will substantially reduce the quantum of proof necessary to justify such agreements. These factors are that: (1) intermodal amendments are merely extensions of existing conference rate making power; (2) such agreements are generally acceptable; (3) intermodalism is to be encouraged; and (4) the conference system is the most effective means of developing intermodalism;[3]
2. Under any standard, the Proponents of the Agreement have sustained the burden of justifying its approval;
3. Certain proposed findings of fact supported by uncontroverted evidence in the record were not ruled upon.

In reply, the Protestants contend that:

1. There were facts supporting approval of the Agreement in *Pacific Westbound* that are not present in the instant case;[4]
2. Each proposed section 15 agreement that is violative of the antitrust laws must withstand scrutiny on its own merits under the principles enunciated in the *Svenska* decision, *supra;*
3. The FEC has failed to establish a need for the Agreement; and
4. The Presiding Officer is not required to make a separate ruling on each proposed finding. The decision is sufficient if it sets forth the Presiding Officer's findings and the underlying reasons therefor.

Since the date the Agreement was filed, the FEC's membership has declined. Its current member lines are: Barber Blue Sea Line; Galleon Shipping Corporation; Japan Line, Ltd.; "K" Line; Maritime Company of the Philippines; Mitsui O.S.K. Lines; Moller-Maersk Line; Nippon Yusen Kaisha; United States Lines; Waterman Steamship Corporation and Yamashita-Shinnihon Steamship Co., Ltd.

[3] As authority for the proposition, Proponents cite *Agreement No. 57-96, Pacific Westbound Conference Extension of Authority for Intermodal Services*, 19 FMC 289, 16 S.R.R. 159 (1975).

[4] Protestants also argued that *Pacific Westbound* should not be relied upon as authority for any proposition because the Commission decision in that case had been stayed pending appeal. Because the appeal in that case has been withdrawn and the Commission has vacated its stay, that argument is now moot.

DISCUSSION

I. *Standards for Approval*

We find the Presiding Officer's ultimate conclusion to be correct and shall adopt the Initial Decision except as modified by the following discussion.

The Proponents failed to adduce sufficient evidence of probative value that would justify approval of Agreement No. 17-34, but were, for the most part, content to argue that approval was mandated by Commission policy as reflected in *Pacific Westbound*.[5] Contrary to Proponents' assertion, they have failed to sustain their burden of justification "under any [recognized] standard."

In *Pacific Westbound*, we held that the *Svenska* standard is applicable to intermodal rate making agreements,[6] stating:

> Here, applying the standards of section 15 as interpreted in *Svenska*, we find on this record that the approval of Agreement No. 57-96 is 'required by a serious transportation need,' and will serve 'to secure important public benefits'. 16 S.R.R. at 171.

Such an analysis does not represent at "policy" of automatically approving intermodal service agreements by ocean carriers. In fact, *Pacific Westbound* is express authority for the proposition that there is no "presumptive validity" to intermodal agreements.[7]

Were the Proponents to introduce evidence demonstrating that the conditions existing in the Atlantic-Gulf Far East trade are the same or substantially similar to those that existed in the Pacific Coast Far East trade at the time of the *Pacific Westbound* decision, then a different result might follow. The record in the instant proceeding is devoid of any evidence of trade conditions or a probability of trade conditions that would serve to outweigh the Agreement's anticompetitive features.

A comparison of the findings in *Pacific Westbound* and the instant case will illustrate the point:

In *Pacific Westbound*, the Commission found that the stable development of intermodalism in that particular trade could be most effectively accomplished through the conference system.[8] Seizing on this finding, the FEC, in the instant proceeding, contends that approval of the Agreement will likewise foster quicker and more stable development of intermodalism. The primary support in the record for this assertion is the testimony of Mr. Raymond Frias, Vice President of Barber Steamship Lines, and Mr. Douglas W. Binns, the Traffic Manager of the Port Authority of New York and New Jersey.

Mr. Frias testified that his company had not introduced intermodal service because of a fear of precipitating excessive competition. Upon cross examina-

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[5] While we herein affirm our decision in *Pacific Westbound*, we do not find that it mandates approval of the instant agreement.

[6] The Presiding Officer incorrectly found that the Commission had not applied *Svenska* in the *Pacific Westbound* case when he stated that the instant case "is not governed by Docket No. 72-46 (the *Pacific Westbound* decision), and therefore should be held to the standards of *Svenska*." I.D. at 12.

[7] The Commission therein stated:

> Without confusing statistics with the law, as PWC appears to have done here, we would point out that the Commission has in fact to date approved numerous agreements granting conferences intermodal ratemaking authority. While this falls far short of clothing such agreements with a "presumptive validity" it does indicate that *the Commission has generally found them to be in the public interest*. [Emphasis added]. At 16 S.R.R. 171-172.

[8] This was characterized by the Commission as the "single most important public benefit that Agreement No. 57-96 can be expected to provide . . . ." 16 S.R.R. at 172.

tion, Mr. Frias admitted that the reason Barber Lines has not become involved in minibridge or interior point intermodalism is that there has been insufficient shipper demand for such service and Barber Lines believes that it can effectively carry cargo using all water rates without having to pay any division to the railroads.[9] Mr. Frias also testified, on cross-examination, that of the more than fourteen minibridge tariffs westbound in the Far East trade, the bulk of those tariffs are identical, there being a few initiators whose tariffs have been copied by other carriers. According to Mr. Frias, because of the tendency of individual carriers to follow the lead of the innovator, the multiplicity of minibridge rates has not resulted in rate wars in any trade.

Mr. Binns testified that "individual carriers have been reluctant to make the necessary investments in time, effort and money to fully develop intermodalism." Upon cross examination, he could not identify any carrier that has been expressly unwilling to make such an investment nor did he explain why carriers are reluctant to make these investments.

Statistical evidence in this record indicates that of the thirty-two intermodal amendments to conference agreements approved by the Commission, only six have even filed intermodal tariffs. Of those six, five conferences did not file tariffs until after individual members had instituted intermodal service. Overall, this evidence shows that conferences generally have not acted quickly to develop intermodal services after approval of their intermodal amendments, and the majority of those which did implement intermodal service did so only after an individual member pioneered in the field. The record here, therefore, tends to run counter to previous Commission findings regarding the expected public benefit of promoting intermodal development under conference rate authority.

A further distinction between *Pacific Westbound* and the instant proceeding is that at the time of the *Pacific Westbound* decision, the PWC had an interior point rate system in the form of overland common point rates (overland rates).[10] The PWC's overland rates tariff quotes all water rates from Pacific ports to the Far East for cargo originating east of the Rocky Mountains.[11] The Commission has consistently viewed these rates as a logical and efficient use of available overland and water transportation facilities for cargo moving to the Far East from interior points in the United States.[12] The FEC does not have, nor has there been shown any shipper demand for, any type of interior point system from Atlantic or Gulf ports to the Far East.

We reject the FEC's formalistic contention that the PWC's overland rates are without logical comparability to interior point intermodalism because they are merely "port-to-port" rates. To differentiate overland rates and interior point intermodal rates on the basis that the first moves on separate bills of lading and the latter moves on through bills of lading ignores the overriding similarity of the

[9] In *Pacific Westbound* there was no direct evidence regarding shipper demand for intermodal services.

[10] The PWC has offered overland rates from Pacific ports to the Far East since 1923.

[11] Since 1975, the PWN has had dual rate overland authority. See *Pacific Westbound Conference—Application to Extend Its Exclusive Patronage (Dual Rate) Contract System to Include Its OCP Territory*, 18 F.M.C. 308 (1975).

[12] In *Investigation of Overland/OCP Rates and Absorptions*, 12 F.M.C. 184, 225 (1969), the Commission said:

> Ever since the transcontinental railroads were built, the Pacific Coast has offered the shortest route in time and miles between this territory [central United States] and the Orient.

competitive purpose and effect of the types of rates.[13] In the case of the Pacific Westbound Conference trade, both overland and interior point intermodal systems are intended to address the shipping needs of a particular class of shippers, *i.e.*, Midwestern shippers, and each is designed to attract inland cargo away from more geographically proximate ports of exit by furnishing an alternative, and more direct, transportation route.

In *Pacific Westbound*, the Commission found that a transportation need existed to move cargo originating in interior U.S. points and moving westward to a Far East destination. That finding having been made, all that remained to be decided in that case was whether the PWC proposal would fulfill that needed transportation service. Here, the record does not establish the threshold need for an interior point intermodal service. The alleged availability of an unmeasured quantity of an undefined nature of cargo at points in excess of 200 miles from the Port of New York is not a *need* for transportation services exceeding those presently available in the trade, much less a serious need, particularly in light of the admittedly nonexistent demand for those services.

In *Pacific Westbound*, evidence of overtonnaging in the trade served by the PWC presented a probability that malpractices and rate instability would arise in the Pacific Coast trade. In the instant proceeding there is no evidence of overtonnaging.

There is no evidence of record that trade conditions have significantly affected the FEC's ability to compete. The existence of competition, in and of itself, will not justify the approval of the proposed agreement. Granted that the FEC's all water service to the Far East from Atlantic and Gulf ports must compete with minibridge service to the Far East offered by independent carriers and the PWC,[14] the fact is that this competition has not been shown to be disruptive or otherwise detrimental to the commerce of the United States.

In conclusion, the FEC has failed to show even the possibility that any of the conditions existing in the Pacific Westbound trade at the time of the *Pacific Westbound* decision will ensue in the Far East trade if Agreement No. 17-34 is not approved. As we stated in *Agreement 8765—Order to Show Cause*, 9 F.M.C. 333, 335-336 (1966):

> Both initial and continued approval of any agreement under section 15 are dependent upon a determination that the agreement approved is not contrary to the public interest. . . . Thus, one prerequisite for approval of an agreement is the actual existence or immediate probability of transportation circumstances in the trade covered by the agreement which warrant approval.[15]

II. *Presiding Officer's Failure to Rule on Each Proposed Finding of Fact.*

Neither the Presiding Officer nor the Commission is required to specifically

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[13] As Commissioner Hearn correctly observed in his opinion in *Investigation of Overland/OCP Rates and Absorptions*, Id. at 226:

> [T]he development of the Overland/OCP system was also the genesis of the intermodalism which underpins many modern transportation services.

[14] Because all the members of the FEC are also members of the PWC, we have reservations regarding the existence of any real competition between these conferences in any event.

[15] Nor did we depart from that standard in the *Pacific Westbound* case. There we stated:

> In short, the conditions and circumstances which have historically led to instability and resulting malpractices in a trade are present here. There is testimony in this record offered by several witnesses that the trade served by PWC . is overtonnaged and it is generally acknowledged that overtonnaging invariably gives rise to rate instability and malpractices as the carriers in the trade compete for the available cargo. And when one considers the number of individual minibridge carriers that are competing for the available cargo, *the potential to instability becomes very real indeed.* [emphasis added.] 16 S.R.R. 172-173.

rule on each proposed finding of fact. It is sufficient if the Presiding Officer or the Commission states the reasons for its decision, and find facts supported by substantial evidence in the record which support those reasons. *Mediterranean Pools Investigation*, 9 F.M.C. 264, 267 (1966), citing *N.L.R.B. v. Sharpless Chemicals, Inc.*, 209, F.2d 645 (6th Cir. 1954).

III. *Discussion Agreement Alternative.*

A serious concern voiced by the opponents of approval of the Agreement is that it defies meaningful analysis because the FEC has failed to present even a skeletal rate structure for its proposed intermodal service. The FEC responded that it does not know what its rate structure will be because its members cannot discuss the subject without section 15 approval. Because the FEC has not done any preliminary work in these areas, the best estimate it can give as to when an intermodal tariff can be filed is a "minimum" of six months. The testimony of Mr. Frias reveals that negotiations with "almost any and every one of the railroads that serve the United States Seaboard Ports and Gulf Ports . . . ." would be required in order to institute an interior intermodal service. To date, that has not been done. Mr. Flynn, the Chairman of the FEC, testified that the Conference had not even attempted to define the meaning of "port areas" or "points" as used in Agreement No. 17-34. Mr. Flynn also testified that he believes the FEC should enter into a joint agreement with the PWC before filing a tariff under the Agreement.[16]

Clearly there are preliminary matters that the FEC must resolve before it can implement any intermodal amendment.[17] Because the FEC has expressed a fear that it may violate section 15 if it discusses these matters prior to the Commission's approval, it may wish to file for our consideration a discussion agreement sufficient in scope to allow it to discuss a proposed intermodal amendment.

THEREFORE, IT IS ORDERED, That the Initial Decision served February 20, 1976, as modified above, is adopted and Agreement No. 17-34 is disapproved; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

[16] Agreement No. 8200-5, which would expand the all water interconference rate fixing authority between the FEC and PWC to include overland/OCP and intermodal rate fixing to the Far East, has been filed with the Commission.

[17] It should also be noted that Agreement No. 17-34 is unlimited in geographic scope within the United States. By its very terms, minibridge rates from Pacific Coast ports are authorized. While it makes economic sense for cargo to move overland from New Orleans to San Francisco, thence via ocean transportstion to Yokohama, it does not appear to make economic sense to move cargo from San Francisco overland to New Orleans, thence via ocean transportation through the Panama Canal to Yokohama under ordinary circumstances. The Proponents of an agreement authorizing such a movement, or like movement, must carry the burden of justifying its need.

FEDERAL MARITIME COMMISSION

No. 74-53

AGREEMENT NO. 17-34—APPLICATION OF THE FAR EAST CONFERENCE FOR INTERMODAL AUTHORITY

Adopted February 23, 1979

The FEC has failed to meet its burden of coming forward with evidence to show that the restraint is necessitated by a serious transportation need, necessary to secure important public benefits as directed by the *Svenska* case.

The facts and opinion in Docket No. 72-46 (*Agreement No. 57-96, Pacific Westbound Conference Extension of Authority for Intermodal Services*), are distinctive from the instant case. This application should be held to the standards of *Svenska*, not *Agreement No. 57-96*.

The FEC not having proved Agreement No. 17-34 serves a need to warrant § 15 approval, it does not become necessary to determine whether Agreement No. 17-34 is unjustly discriminatory, or unfair as between carriers, shippers, exporters, importers, or ports between exporters from the United States and their foreign competitors, detrimental to the commerce of the United States contrary to the public interest, or is in violation of the Shipping Act, 1916, because the basic foundation on which to build to warrant approval of the agreement is missing.

The development of intermodalism does not necessitate the approval of Agreement No. 17-34.

Agreement No. 17-34 is disapproved. These proceedings are discontinued.

For Petitioner, Seatrain Lines, Inc., *Neal M. Mayer.*

For Respondents, the Far East Conference and its Member Lines,[1] *Elkan Turk, Jr.*

For Intervenor, Delaware River Port Authority, *Martin A. Heckscher.*

For Intervenor, New Orleans Traffic and Transportation Bureau, *Greg B. Perry.*

For Intervenor, Outboard Marine Corporation, *J.A. Illes* and *Ronald Ronshausen.*

For Intervenor, Pacific Westbound Conference, *Edward D. Ransom.*

For Intervenor, Port Authority of New York and New Jersey, *Samuel H. Moerman* and *Paul M. Donovan.*

For Intervenor, Port of Seattle, *Michael Crutcher, Jonathan Blank* and *James D. Dwyer*, legal officer of the Port of Seattle.

For Intervenor, Virginia Port Authority, *J. Robert Bray* and *Arthur W. Jacocks*, Director of Traffic.

For Hearing Counsel, *C. Douglass Miller* and *Donald J. Brunner*, Director of Bureau of Hearing Counsel.

[1] Member Lines listed in the Order of Investigation and Hearing served December 10, 1974, total fifteen (15), namely American Export Lines, Inc., American President Lines, Ltd., Barber Blue Sea Line, Japan Lines, Ltd., Kawasaki Kisen Kaisha, Ltd., Lykes Bros Steamship Co., Inc., Maritime Company of the Philippines, Inc., Mitsui OSK Lines, Ltd., A P. Moller-Maersk Line, Nippon Yusen Kaisha, Sea Land Service, Inc., United States Lines, Inc., Waterman Steamship Corporation, Yamashita-Shinnihon Steamship Co., Ltd. and Zim Israel Navigation Co., Ltd. Since then however, the FEC has added Far Eastern Shipping Company, bringing the total to sixteen (16) members

The FEC has sixteen (16) members, of whom twelve are also members of PWC, and one additional is an associate member of PWC Coming at it the other way around, PWC has nineteen members, of whom twelve are also members of FEC One associate member of PWC is also a member of FEC (Extracted from letter from counsel for FEC dated September 15, 1975 (received September 18, 1975) to which was attached a copy of 2nd Revised Page 1 and Original Page 2 of FEC Tariff No. 26, FMC No. 8, said pages effective August 20, 1975, and March 1, 1975, respectively; and a copy of PWC Local Tariff No. 4, FMC No. 12, 2nd Revised page 4, effective January 15, 1975) See Tr. 310

INITIAL DECISION OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE[2]

PROCEDURAL BACKGROUND

The Commission served its Order of Investigation and Hearing in this matter December 10, 1974, (published in the Federal Register December 13, 1974, (FR Docket 74-29082)). The Commission ordered, *inter alia*, that pursuant to Sections 15 and 22 of the Shipping Act, 1916, it be determined whether Agreement No. 17-34 is unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, detrimental to the commerce of the United States, contrary to the public interest, or is in violation of the Shipping Act, 1916, and, therefore, whether it should be approved, disapproved or modified.

By notice served December 20, 1974, the presiding Administrative Law Judge, pursuant to Rule 6(d) of the Commission's Rules of Practice and Procedure, 46 CFR 502.94, called a prehearing conference for January 28, 1975. That prehearing conference, by notice served January 14, 1975, was postponed until further notice. The FEC, on January 10, 1975, had filed a petition for Reconsideration of the Commission's December 10, 1974, order of Investigation and Hearing. On February 13, 1975, the Commission denied FEC's petition for Reconsideration. A prehearing conference called for April 1, 1975, by notice served February 14, 1975, was held as scheduled and the official transcript thereof consists of 71 pages.

PETITIONS FOR INTERVENTION

DATED FILED	BY WHOM	ACTION TAKEN	DATE
1/06/75	Port of Seattle (Seattle)	granted	1/27/75
1/07/75	Outboard Marine Corporation (OMC)	granted	1/27/75
1/16/75	Port Authority of New York and New Jersey (PA of NY, NJ)	granted	2/4/75
3/26/75	Delaware River Port Authority (DRPA)	granted	4/1/75
3/28/75	Pacific Westbound Conference (PWC)	granted	4/1/75
3/31/75	Virginia Port Authority (VPA)	granted	4/1/75
7/09/75	New Orleans Traffic & Transportation Bureau (NO. T&T)	granted	8/13/75

Hearings herein were held September 9 and 10, 1975, in Washington, D.C. A total of five witnesses were presented, i.e., two by the respondent and one each by intervenor PWC, intervenor PA of NY & NJ and intervenor DRPA. The official stenographic transcript of the hearings consists of two volumes, totalling 311 pages. Exhibits received in evidence are numbered 1, 2, 3, 4, 5A, 5B, 7, 8, 8A, 8B, and 8C. Exhibit No. 5 for identification was not offered in evidence (Tr. 308). Exhibit No. 6 for identification was withdrawn.

It is from the official stenographic transcript of the hearings, exhibits and all papers and requests filed in the proceeding, the presiding Administrative Law Judge finds the facts hereinafter designated.

[2] This decision will become the decision of the Commission in the absence of exceptions thereto or review thereof by the Commission (Rule 13(g) of the Commission's Rules of Practice and Procedure, 46 CFR 502.227).

Opening Briefs in support of the application were filed between October 31, 1975, and November 4, 1975, by the PA of NY & NJ, FEC, PWC and the DRPA. Reply briefs opposed to the application were filed between December 2, 1975, and December 4, 1975, by Seatrain Lines, Inc. (Seatrain), Hearing Counsel and OMC. Closing briefs were filed by Intervenor PA of NY & NJ and the Respondent FEC on December 24, 1975, and January 2, 1976, respectively.

FACTS

Between January 1969 and October 1974, 34 Conferences (including FEC) have filed 37 conference agreements or amendatory agreements providing authority for the conference to establish port-to-point, point-to-port, and/or point-to-point intermodal rates (Ex. No. 5(B)). Of the 37 agreements filed, Investigation and Hearing Docket Numbers were assigned only to 12 of them; of the 12, 9 together were assigned Docket No. 69-33 (Atlantic & Gulf/West Coast of South America Conference Agreement No. *2744-30,* Docket No. 69-33, 13 FMC 121 (1969)). Two were pending § 15 approval; PWC in Docket No. 72-46, and FEC in this Docket No. 74-53. One, Docket No. 72-47, was discontinued by order served October 1, 1974 (Ibid.).

The years in which the above 37 agreements were filed for Commission approval, and the years Commission approval was granted are as follows:

Year Filed	Quantity Filed	Year Approved	Quantity Approved
1969	10	1969	1
1970	1	1970	9
1971	5	1971	1
1972	13	1972	9
1973	5	1973	12
1974	3	1974	3
1975	0	1975	0
	37		35
		Pending	2
		Total	37

Individual carriers intermodal tariff on file prior to initial approval of agreement totalled 5, 19 were without a prior tariff on file (Exh. 5A).

Agreement No. 17-34 (a copy of which, offered for the convenience of all, was received in evidence as Exhibit No. 1) entered into January 19, 1973, was filed with the Commission on January 24, 1973, for approval. On September 3, 1973, the Commission served notice that pursuant to Section 15 of the Shipping Act, 1916, the Commission "intends to approve Agreement No. 17-34, conditioning such approval upon:

1. Limitation of the agreement to a period of 18 months.
2. The requirement that any conference uniform bill of lading shall be filed with the Commission for review 30 days prior to the effective date of implementation.
3. The furnishing to the Commission of quarterly reports setting forth:

a. a description of the intermodal services offered by the Conference as of the close of the reporting period.

b. a description of actions taken during the reporting period to implement or further develop such intermodal services; and

c. the volume of cargo carried in each of the following categories:

i. intermodal cargo moving under a through bill of lading.

ii. intermodal cargo not moving under a through bill of lading; and

iii. all other cargo carried by the conference members.

4. The requirement of notification to the Commission at least six months prior to such termination date, together with a full report setting forth the extent to which the intermodal authority granted under the agreement has been implemented and the positive transportation needs and public benefits which have resulted from operation under the agreement.

Agreement No. 17-34 would amend the preamble to FMC Agreement No. 17 to read:

"That the parties hereby associate themselves together in a Far East Conference to promote commerce originating within U.S.A. continental limits moving directly, by transshipment, or intermodally from or via Atlantic and Gulf ports of the United States of America and via inland carriers of any mode as initial carriers, and from any U.S. inland point *including points at U.S. Pacific Coast ports*, (emphasis supplied) with loading aboard ocean vessels at Atlantic and Gulf ports of the United States to Japan, Okinawa, Korea, Taiwan (Formosa), Siberia, Manchuria, China, Hong Kong, Republic of the Philippines and the territory formerly known as Indochina, namely, Vietnam, Cambodia and Laos, for the common good of shippers and carriers, by providing just and economical cooperation between the steamship lines operating in said trades and between said steamship lines and inland carriers in one or more of the aforesaid geographical areas."

Currently, there is no interior point, intermodal tariff in effect via Atlantic or Gulf Ports to destination countries served by the Conference (Tr. 33). The FEC tariff presently on file with this Commission is for all water port-to-port rates of the conference members. (Tr. 15)

It would take a minimum of six (6) months to publish effectively, a meaningful tariff under the hoped for authority (Tr. 71); for the type of service the FEC is seeking it would require a series of serious discussions among the members as to the manner in which they would implement such authority if granted. (Tr. 34)

The member lines of FEC, as an alternative, could establish, individually, the same method of pricing that the FEC is endeavoring to secure collectively within the conference structure. (Tr. 35) However, none of the member lines of FEC have filed interior intermodal tariffs. (Tr. 61)

Many of the member lines of FEC operate fully containerized ships and breakbulk ships. A number of the members of FEC provide minibridge service. Agreement No. 17-34 does not cover what is commonly known as minibridge traffic via the West Coast. (Tr. 54) The minibridge introduction of rate systems has not caused any rate dispute between PWC and FEC (Tr. 297); did not *per se* create a rate war in any trade. (Tr. 127) While the FEC has lost cargo to the independent minibridge operator by virtue of the introduction of these minibridge services, and by indirection has lost cargo to the conference members of the PWC because some of the independent minibridge carriers are also members of

PWC (Tr. 298), and there is non-conference all water competition in the Far East trade. (Tr. 108) The FEC all water trade is reasonably stable. (Tr. 129) There are over fourteen (14) minibridge tariffs westbound in the Far East trade. (Tr. 110)

Barber Steamship Lines, through its rules and interior offices has received information which it has passed on to the conference, that there is a growing pressure for interior intermodal—people realizing its easier to do business, to satisfy the need of penetrating and exporting to a particular market by being able to lay cargo down in an interior point and have one bill of lading, the banking of documents through their facilities, etc. (Tr. 137)

ISSUES

Whether the FEC has met its burden of coming forward with evidence to show that the restraint is necessitated by a serious transportation need, necessary to secure important public benefits, or in furtherance of a valid regulatory purpose of the Shipping Act, which need, benefit, or purpose is greater than the restraints invasion of the antitrust principles.

Whether Agreement No. 17-34 is unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports between exporters from the United States and their foreign competitors, detrimental to the commerce of the United States, contrary to the public interest, or is in violation of the Shipping Act, 1916, and therefore whether Agreement 17-34 should be approved, disapproved or modified.

Whether, as Hearing Counsel has posed it, the development of intermodalism necessitates the approval of this agreement.

HOLDINGS

The FEC has not met its burden of showing a serious or compelling transportation need, necessary to secure important public benefits, in conformity with the Svenska case, which is found controlling in this instance, rather than the *Agreement No. 57-96* case, Docket No. 72-46.

The FEC not having proved Agreement No. 17-34 serves a need to warrant §15 approval, it does not become necessary to determine whether Agreement No. 17-34 is unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports between exporters from the United States and their foreign competitors, detrimental to the commerce of the United States, contrary to the public interest or in violation of the Shipping Act, 1916, because the basic foundation on which to build to warrant approval of the agreement is missing.

The development of intermodalism does not necessitate the approval of Agreement No. 17-34.

DISCUSSION

The FEC asserts the record in this proceeding demonstrates that Agreement No. 17-34 more than satisfies the public benefit and serious transportation need standards of Docket No. 72-46 (*Agreement No. 57-96*, Pacific Westbound Conference Extension of Authority for Intermodal Services. Initial Decision

served July 18, 1973, holding, Agreement 57-96 should not be approved; Commission Report (Decision) served July 8, 1975, granting approval of Agreement 57-96 pursuant to Section 15 of the Shipping Act, 1916, subject to certain conditions and limitations; Commission order served September 8, 1975, suspending July 8, 1975, order until further order of the Commission).

Thus, FEC and proponents of approval of Agreement No. 17-34, namely, PWC, PA of NY & NJ and DRPA would dispose of the issue as to what is the compelling transportation need for Agreement No. 17-34 and the resulting public benefits. On the other hand, the opponents to approval of Agreement No. 17-34, Seatrain, Hearing Counsel and OMC, tackle the application on that issue, in another manner.

Seatrain says it opposes approval of Agreement 17-34 because the record demonstrates there is no transportation need for the agreement as required under the teachings of the Supreme Court in *FMC v. Svenska Amerika Linien,* 390 U.S. 238 (1968) and as reiterated by the court in its May 14, 1973 decision in *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726 (1973).

Hearing Counsel contends that under Svenska, Agreement No. 17-34 may be approved only if FEC has brought forth such facts as would demonstrate the agreement is "required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act. This *Svenska* test, says Hearing Counsel, is not met by the agreement.

It is Hearing Counsel's position that there has not been advanced sufficient proof of the necessity for this agreement to achieve the benefits claimed by FEC and the other proponents. Therefore, Hearing Counsel also says the Agreement does not meet the *Svenska* test, arguing that since by its anti-competitive nature the Agreement is presumed to be contrary to the public interest, it should be disapproved. And, Hearing Counsel states its opposition to approval of Agreement 17-34 holds even if the Commission applies the lesser standard of proof found in Docket No. 72-46, *Agreement 57-96.*

OMC says the FEC and its supporters have failed to show any serious transportation need which the approval of Agreement No. 17-34 is likely to meet.

The features of Docket No. 72-46, present in the instant case, according to FEC, are namely: (1) eliminating the multiplicity of tariffs which shippers would have to consult if individual carriers, rather than the conference, inaugurated intermodal service; (2) the providing of a forward looking service in accordance with the admonition in the case of *Disposition of Container Marine Lines Through Intermodal Containers* (Docket No. 68-8, 11 F.M.C. 476 (1968)), Freight Tariffs No. 1 and 2, FMC Nos. 10 and 11; and (3) the probability that, in the absence of Conference intermodal authority, rate instability would ensure.

OMC submits that proponents' reliance on FMC Docket No. 72-46 is wholly misplaced in that the decision there is completely distinguishable from the instant case. According to OMC, in Docket No. 72-46, PWC sought by Agreement 57-96 to add intermodal authority to its pre-existing power to quote rates on cargo from interior points of the United States, commonly referred to as Overland Common Points territory (OCP). No identical, or even similar, pre-

existing power to make interim point rates is held by the FEC, nor has a need for such authority been shown. The FEC points out that OMC incorrectly referred to OCP for overland rates, and disagreed with OMC and Seatrain that Docket No. 72-46 is distinguishable.

FEC quoted from p. 16 of the Commission's July 8, 1975, decision in Docket No. 72-46, "Agreement No. 57-96 involves after all only an extension of the Conference's existing and approved ratemaking powers . . . . Since the amendment before us represented but an extension of the Conference's established ratemaking authority under its organic agreement and because intermodalism, as it relates to the through movement of cargoes and the shipper benefits that may be derived therefrom, is generally desirable, we believe that the proof need be demonstrated to support the approval of Agreement No. 57-96 is considerably less stringent than that the Presiding Officer would require." FEC stated, all that is needed to make this statement applicable to the present case is to substitute "17-34" for "57-96."

The applicant FEC and supporters, apparently, did not deem Svenska applicable in any way because none save the FEC even mentioned Svenska. The FEC only mentioned the case of Svenska (p. 2, FEC opening brief; p. 3-FEC closing brief) in reciting Commission action in this Docket on its Notice of Intention to Approve Application and in Docket No. 72-46 respectively.

The presiding Administrative Law Judge agrees with the opponents to approval of Agreement No. 17-34, and therefore finds and concludes for those reasons and others indicated, that the FEC has failed to meet its burden of coming forward with evidence to show that the restraint is necessitated by a serious transportation need, necessary to secure important public benefits, as directed by the *Svenska* case.

The Presiding Administrative Law Judge cannot agree with the FEC position. An analysis of the facts in Docket No. 72-46, as reflected in the Commission's July 8, 1975, opinion thereon, supports OMC's position that the facts in Docket No. 72-46 are completely distinguishable from the instant case. For example, FEC publishes a tariff naming local rates only, i.e., port-to-port rates. (Opinion, Mimeo p. 2) From its inception, PWC has published both local and overland rates in its tariff. The local tariff of PWC covers all cargo by PWC members in the PWC trade not covered by overland rates (Ibid. p. 3). And, Agreement 57-96 would permit PWC to broaden its geographic scope to include inland points in the United States and inland points in various Asian Nations (Ibid. p. 6). There is overtonnaging in the PWC trade, no overtonnaging was shown here. We agree with the Commission that *all* conference rate making agreements are subject to the approval standards of Section 15 of the Shipping Act, 1916 (Ibid. p. 14) and that all agreements contemplated by Section 15, must be considered individually, on their own merits, based on all the available confirmation and facts of record (Ibid. p. 18).

The Presiding Administrative Law Judge consequently, finds and concludes this application is not governed by Docket No. 72-46, and therefore should be held to the standards of Svenska.

The FEC asserts an important carrier member of the Conference testified that a principal motivating factor for agreeing to Agreement No. 17-34 was the desire

to render a forwarding looking service for which there has been some shipper interest expressed. The FEC says it is carrying out the admonition contained in the Container Marine Lines case, that "The Conference, as the dominant commercial units in this trade . . . should be at the forefront in stimulating and encouraging improvements in transportation." Hearing Counsel is in full agreement with proponent's contention that the Commission has historically favored and urged the development of intermodalism and has opined that intermodalism would be best developed under the auspices of the conference system rather than by individual lines. The question is whether the development of intermodalism necessitates the approval of this agreement. The answer to that question says Hearing Counsel is No. And, says Hearing Counsel, approval of the agreement would paradoxically contravene the policy of the Commission as expressed in Disposition of Container Marine Lines.

FEC argues that if the Conference is deprived of authority to establish interior point intermodal rates and such rates are established on an individual basis by those carriers, a multiplicity of tariffs will ensue.

To FEC's argument on multiplicity of tariffs, Hearing Counsel responds that careful analysis reveals the contention rests upon a triple hypothesis, three interdependent conditions which are necessary before such a potential multiplicity of tariffs could actually come about and could actually cause shipper inconvenience: (1) More than one individual carrier would have to establish interior intermodal tariffs; (2) Those tariffs, once established, would have to differ substantially from one another in terms of rates and rules; and (3) It would have to be actual shipper practice to consult all existing tariffs before choosing a carrier. Hearing Counsel argues, since the elements are interdependent, if the result of the analysis is negative as to any one of them, the entire hypothesis must fall.

As to the matter of potential rate instability, FEC asserts the Commission dealt with similar contentions in the Agreement No. 57–96 case, and refused to accept arguments which would lead it to refuse to authorize locking the barn door until after the herd had been long gone. According to FEC, the record in the present case amply justifies the anticipation that, without Conference authority over intermodal rates, there will be instability by reason of the efforts of successive carriers to obtain cargo for intermodal services by rate reduction, alternate routings, etc.; and the likelihood that all-water route carriers will attempt to maintain their cargo carryings in the face of loss of cargo to intermodal services by rate actions which can only result in harm to all the carriers and in deterioration of service for all of the merchants. (FEC Opening Brief p. 16)

Hearing Counsel says the agreement is not necessary to avoid hypothetical rate instability, that again, close examination reveals three interdependent conditions are necessary before potential rate instability could actually come about in the trade: (1) More than one individual carrier would have to publish interior intermodal tariffs; (2) These tariffs, once established, would have to differ substantially from one another in terms of rates; and (3) There would have to be a significant level of cargo moving in the trade via interior intermodalism in order that the quality of competition between the individual carriers would be sufficiently intense so as to raise the possibility of rate instability. Hearing Counsel

asserts the market area from which FEC's interim intermodal service would draw its cargo has a history of rate instability in its minibridge and all-water service, and there is no factual evidence in the record to support the proposition that interim intermodalism has special potential for rate instability.

Citing the hypothetical nature of the arguments of the proponents of the agreement, Hearing Counsel argues, since no carrier is offering interior intermodal service through Atlantic and Gulf Coast Ports at this time, the Agreement can only provide rate stability and shipper convenience if the transportation circumstances predicted by the proponents actually come to pass. However, Hearing Counsel says it is not asking the Commission to abandon the proposition that an agreement can be justified under section 15 on the basis of a showing that the agreement is meant to meet a potential transportation need or to avoid potential rate stability, thus, is not expecting the Commission to await the actual advent of instability, malpractices, and the institution of a hodge-podge of differing interior intermodal tariffs before it can act. However, Hearing Counsel thinks the Commission was correct in stating, ". . . One prerequisite for approval of an agreement is the *actual existence* or *immediate probability* of transportation circumstances in the trade covered by the agreement which warrant approval." (Emphasis supplied by Hearing Counsel.) *Agreement 8765 Order to Show Cause,* Docket No. 65-42, 9 F.M.C. 333, 335-336) (1966). Hearing Counsel asserts that FEC did not and could not provide facts that more than one carrier was offering or other carriers were about to offer interior intermodal service with substantially different tariff rates and rules, and hence was forced to attempt to justify this agreement with a case consisting of predictions, conjecture and promises about the form and manner of the development of interior intermodal service, and that the arguing by FEC of purely hypothetical rate instability and shipper inconvenience justifies approval of the agreement, does not conform to the standards of *Agreement 8765.* Hearing Counsel says potential for regulatory purposes, to form the basis of a regulatory order approving an anticompetitive agreement seeking to remedy or prevent such potential, should be a potential that is reasonably imminent or so likely to occur as to be deemed to exist.

The FEC contends that the language in the Commission's September 12, 1973, published "Notice of Intention to Approve Application" of the FEC for Agreement No. 17-34, means that as of that time the Commission was satisfied, on the basis of the information then before it, that Agreement No. 17-34 would invade the antitrust policy of the United States no more than was necessary to accomplish the public benefits countenanced by the Shipping Act which would flow from the approval of the agreement—all subject to enumerated conditions in the notice. Further, the approval of the agreement was to be forthcoming unless any party should come forward with a statement of facts material to the issues as to which it desired to produce evidence."

The FEC contends there has been no rebuttal evidence whatsoever and accordingly, on technical procedural grounds, an order of approval should be made forthwith.

In its February 13, 1975, order Denying FEC's petition for reconsideration of the Order of Investigation and Hearing in this matter, the Commission, respond-

ing to similar contentions by FEC as to the effect of its published intention to approve agreement No. 17-34 said, *inter alia*, ". . . the conference has the burden of coming forward with evidence to show that the restraint is *necessitated* by a serious transportation need, *necessary* to secure important public benefits, or in furtherance of a valid regulatory purpose of the Shipping Act, which need, benefit or purpose must be greater than the restraint's invasion of the antitrust principles. . . . Suffice it to say that such prior statements or expression by the Commission do not mandate our approval of an agreement without an adjudicatory hearing where there are material factual matters in dispute." (Order of Feb. 13, 1975, p. 4)

In the adjudicatory hearings herein, the FEC presented two witnesses (1) its Chairman, and (2) the assistant Vice President, Barber Steamship Lines, agents for Barber Lines A.S., who are the managers of Barber Blue Sea which is a trination consortium made up of a Norwegian Company, a Swedish Company and a British Company.

The Chairman of the FEC gave no testimony as to the transportation need for Agreement No. 17-34. He did testify that it is contemplated that the conference on approval of Agreement No. 17-34 would continue to publish all water port-to-port rates and when they get a tariff then develop interim point intermodal through rates too. (Tr. 52) The witness was of the opinion if Agreement 17-34 is approved there would be an orderly progression of the institution of a new type of placing and movement of cargoes for merchants in areas and points beyond the seaboard, which is not available today. (Tr. 302)

The steamship representative witness did testify information had come to him of growing pressure for interior intermodal service. He admitted on cross-examination that minibridge was a concept of an individual carrier, as was containerization.

The Intervenor PWC, in support of FEC, presented as a witness the Chairman of the PWC (whose Written Testimony is Exhibit No. 7), who expressed his philosophy that the conferences ought to be given the authority to control intermodalism, because there would not be rate competition but just competition within the members of the conference. (Tr. 180)

Intervenor PA of NY & NJ presented its Traffic Manager in support of FEC's application, who opined that if in the tariff for intermodalism the rates are equalized among the ports as they are with minibridge, then New York is going to have a better competitive position in the North Atlantic and would benefit from intermodalism (Tr. 228), but not if New York were placed in rate disadvantage. (Tr. 230)

The Intervenor DRPA presented its Manager of Regulatory Matters as a witness, who felt if the FEC is to remain competitive for cargo originating at or destined to inland U.S. points, it is essential that the FEC have the same authority as PWC in Docket No. 72-46.

DRPA submits that Agreement No. 17-34 should be approved because it is in the general public interest and is necessary to prevent unjust or unfair discrimination between the Port of Philadelphia and U.S. West Coast ports.

The PA of NY & NJ supports approval of the application of the FEC, as does DRPA, PWC and of course, FEC.

It is not necessary to reiterate further the contentions of the proponents and opponents of Agreement No. 17-34. FEC argues that the only opponents of approval, Seatrain and OMC (FEC Opening Brief, p. 14) (to which should be added, Hearing Counsel) produced no evidence whatsoever. Nevertheless, the burden is upon the proponent, and that burden as indicated, has not been met. FEC's reliance on the Docket 72-46, *Agreement 57-96* case, as being on all fours with this case, and a lesser burden of proof, for approval is regarded as not well taken.

Under "Facts" the statement, including points at U.S. Pacific Coast ports, was underscored to focus attention thereon because that appears to be rather inclusive and extensive point within which FEC would operate. Perhaps in a subsequent application, or in this one, should the Commission overturn this decision, further scrutiny should be made of that provision.

FINDINGS AND CONCLUSIONS

Upon consideration of all the aforesaid, the Presiding Administrative Law Judge *finds* and *concludes*, in addition to the findings and conclusions hereinbefore stated:

Agreement No. 17-34 should not be approved.

Wherefore, it is *ordered*, subject to review by the Commission on appeal, or upon its own motion, as provided in the Commission's Rules of Practice and Procedure, that,

(A) Agreement No. 17-34 be and hereby is disapproved.

(B) This proceeding be and hereby is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

WASHINGTON, D.C.
February 20, 1976

FEDERAL MARITIME COMMISSION

DOCKET NO. 73-24

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

NOTICE

February 26, 1979

Notice is given that no appeal of the January 19, 1979 order of discontinuance in this proceeding has been filed and the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, review will not be undertaken.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

January 19, 1979

No. 73-24

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

APPROVAL OF AGREEMENT
AND DISCONTINUANCE OF PROCEEDING

Finalized on February 26, 1979

The subject Agreement No. T-2635-2 is an agreement between the members of the Pacific Maritime Association (PMA). These members are employers of longshore labor. The agreement contains a formula by which PMA members are assessed to cover certain benefits of the longshoremen. The purpose of the present proceeding, as stated in the order served December 29, 1977, reopening the proceeding, is to ascertain whether the agreement is unjustly discriminatory, unfair, unreasonable, etc., as to the assessment on automobiles, and whether the agreement should be approved, modified or disapproved.

PMA seeks final approval of the assessment formula for funding the International Longshormen's and Warehousemen's Union (ILWS)/PMA pay guarantee plan. Wolfsburger Transport-Gesellschaft, m.b.h. (Wobtrans) has been the only party objecting to approval of the agreement in the six years it has been in operation. Wobtrans on December 19, 1978, mindful of the expense, time and effort required to continue the proceeding consented to the discontinuance of the proceeding, withdrew its protest to Agreement No. T-2635-2, and consented to making the interim approval of Agreement No. T-2635-2 final.

This proceeding has had a long and, in terms of litigation costs, expensive history. Attorneys' fees, costs of printing briefs and appellate record and other costs have to date well exceeded six figures to PMA and to Wobtrans.

The ancestry of this case is the litigation concerning the assessments for the PMA/ILWU Mechanization and Modernization Fund in the early 1960's which reached the Supreme Court in Volkswagenwerk v. FMC, 390 U.S. 261 (1968).

The present docket had its origin in the 1972 collective bargaining agreement between PMA and the ILWU, which began the Pay Guarantee Plan (PGP), and in the initial assessment formula to collect funds for PGP. That assessment formula, dated April 20, 1972, was designated FMC Agreement No. T-2635 and was approved by the Commission on May 15, 1972, as an interim agreement. Agreement No. T-2635-1 extended the interim agreement until a final

agreement was approved. No. T-2635-1 was approved by the Commission on January 4, 1973.

The assessment formula was submitted by PMA members for investigation and recommendation of a "final" formula to Mr. Kagel, a nationally known labor arbitrator and conciliator. Kagel recommended adoption of the interim formula. It was adopted by PMA members on December 13, 1972, and was designated T-2635-2.

Wobtrans, a carrier of Volkswagens, protested. The Commission entered its order of investigation in No. 73-24 on May 4, 1973, and by another order gave its interim approval of T-2635-2.

On February 6, 1974, Administrative Law Judge Bryant in his initial decision approved Agreement T-2635-2. Said initial decision was adopted by the Commission on August 14, 1974. It was appealed to the Court of Appeals for the District of Columbia by Wobtrans. The Commission requested remand. The matter was remanded to the Commission and it issued its report on remand on June 24, 1975. On August 25, 1977, the Court of Appeals issued its decision and order, which order was amended by the Court on October 5, 1977.

The Court then again remanded the matter "to develop a reasonable and understandable comparison between the benefits accruing to other cargoes, including breakbulk, and those realized by automobiles."

The Commission's order reopening the proceeding was served on December 29, 1977, and the matter was assigned to Administrative Law Judge Morgan on January 3, 1978.

Two prehearing conferences were held by Administrative Law Judge Morgan in which the opposing parties (PMA and Wobtrans) were encouraged to cooperate in their discovery efforts to develop data concerning whether the assessment charges imposed on automobiles and other cargoes were fairly and reasonably proportioned in relation to the benefits received by these cargoes. Also, bearing in mind the long history and expense of the proceeding, and the earnest and sincere efforts of the able counsel for PMA and Wobtrans to avoid any further expensive and unnecessary litigation, the parties were given additional time for discovery and for possible resolution or settlement of some of the issues.

The comparison sought by the United States Court of Appeals for the District of Columbia in its remand of August and October 1977 has been provided through the efforts of PMA. Attached to PMA's petition for discontinuance of this proceeding and for approval of Agreement T-2635-2 is a statement in support of its petition. On page 19 thereof there is shown for breakbulk, automobiles and container cargoes, productivity at the beginning of the pay guarantee plan in 1972, productivity in 1977, and percentage gains in productivity.

This comparative table tends to show that assessing containers at 7/10ths of breakbulk proved to be reasonable, and that automobiles' benefits exceed their burdens, and that automobiles are not disadvantaged in relation to either breakbulk or containers.

Any tonnage assessment formula for the future necessarily is an estimate or guess. But for the past, experience has shown that the Kagel formula adopted by PMA and given interim approval by the Commission has worked out in a fashion

which reasonably compares benefits to burdens in the manner which the Court of Appeals has suggested.

As seen, Wobtrans, as the only protestant, has withdrawn its protest, and consents to discontinuance of the proceeding and final approval of Agreement T-2635-2, Hearing Counsel, the only other party, in their reply to PMA's petition, state that the data developed by PMA makes the comparison sought by the Court of Appeals, that the data shows no unlawful discrimination as between automobiles and other cargoes, that to continue this proceeding would be prohibitively expensive not only to the private litigants, but to the U.S. Government as well, and that there is no public interest or regulatory purpose to be served by the continuation of this proceeding.

Accordingly, it is concluded and found that good cause has been shown to grant the petition of PMA, and hereby it is granted. Agreement No. T-2635-2 is approved, and the proceeding in No. 73-24 is discontinued.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-58

CONDITIONAL APPROVAL OF AGREEMENT NO. 5600-36

ORDER OF DISCONTINUANCE

February 27, 1979

Agreement No. 5600-36 would have amended the existing organic agreement of the Philippines North America Conference and its member lines (PNAC) by establishing a neutral body self-policing system. By Order dated April 26, 1978, the Commission approved Agreement No. 5600-36 on condition that: (1) PNAC agree to keep on file with the Commission a current copy of its contract with the neutral body plus a statement of the neutral body's qualifications; and (2) the agreement be modified to provide that nothing in it shall prohibit the release of confidential information by the neutral body to the Commission pursuant to an order or subpoena.

On May 30, 1978, PNAC filed a Petition for Reconsideration of the Commission's conditional approval. By Order dated September 28, 1978, the Commission denied PNAC's Petition for Reconsideration, affirmed its April 26, 1978 Order, and notified PNAC that Agreement No. 5600-36 would be disapproved unless PNAC either met the conditions of the April 26, 1978 Order, conformed its Agreement to Part 528 of the Commission's Rules, or requested a hearing within 60 days. On November 27, 1978, PNAC requested a hearing. A hearing, in the form of a proceeding requiring PNAC to show cause why its Agreement No. 5600-36 should not be disapproved, was directed by Order of December 29, 1978. PNAC was to file its opening response to the Commission's Show Cause Order no later than January 23, 1979. On January 23, 1979, PNAC notified the Commission that it had withdrawn Agreement No. 5600-36. On the basis of this action, PNAC filed a motion to discontinue this proceeding. Because Agreement No. 5600-36 no longer exists, no useful purpose would be served by continuing the proceeding.

THEREFORE, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-36

IN RE: BALTIC SHIPPING COMPANY—RATES AND PRACTICES IN THE U.S. GULF COAST/NORTH EUROPE TRADE

ORDER ON RECONSIDERATION

February 27, 1979

1. *Proceeding to Date*

On January 17, 1979, the Commission served the Baltic Shipping Company (Baltic) with a final Order and Notice of Default (January Order) finding Baltic to be in violation of section 21 of the Shipping Act, 1916 (46 U.S.C. 820). This finding was based upon Baltic's continuous failure, since June 30, 1978, to comply with paragraphs (A)(3)(e), (B)(1) through (B)(3), (C)(1), and (C)(2) of the Commission's section 21 investigative Order of April 17, 1978 (April Order) as modified by its Order of May 26, 1978.

On January 26, 1979, Baltic filed a Petition for Reconsideration (Petition) of the Commission's January Order together with a "Verified Supplemental Response" (Response)[1] to the April Order. The Response constitutes a facially adequate reply to paragraphs (B)(1) through (B)(3), (C)(1) and (C)(2) of the Commission's April Order. Therefore, as to those paragraphs, Baltic is no longer in default of the April Order.

The Response did not address paragraph (A)(3)(e) of the April Order, and Baltic's reply to that paragraph remains substantially incomplete.[2] This paragraph seeks the key to understanding the remainder of the raw data Baltic has submitted by calling for the tariff authority relied upon by Baltic in assessing the rates and charge under investigation. Without the information sought by paragraph (A)(3)(e), the other data provided by Baltic is virtually useless. The data provided discloses only that Baltic carried certain cargoes and assessed certain charges, but leaves open the question of what tariff authority, if any, Baltic relied upon in assessing the charges. The focus of the investigation commenced by the April Order is on whether Baltic has misrated its cargo, and this cannot be determined if the Commission has no idea what tariff authority Baltic used.

[1] The Response consisted of a statement verified under oath by a principal of Baltic, Oleg A. Savin, its Vice President.

[2] On January 15, 1979, Baltic submitted a list stating the tariff authority it relied on with respect to 789 of the roughly 3,000 bills of lading or manifests for which tariff authority is sought. To date, Baltic has not provided tariff authority for the charges reflected in the remaining group of over 2,200 bills of lading and manifests as required by paragraph (A)(3)(e).

II. *Baltic's Petition*

A. *Burden of Proof*

In its Petition, Baltic argues that the Commission's staff, using the raw data already provided by Baltic, is in as good a position as Baltic to determine what tariff authority, if any, Baltic relied upon in rating its cargoes. Baltic argues that this task is properly that of the Commission.[3] Baltic apparently overlooks the fact that the Commission is not interested in how its own staff might have assessed the cargo except in comparison to how Baltic *in fact* assessed it. Moreover, the basis for Baltic's rate assessments cannot be determined with certainty by the Commission's staff because: (1) Baltic's tariff structure often does not allow precise classification of commodities from their description on bills of lading or manifests; (2) rates assessed are sometimes hidden in unrelated special rate sections; and (3) rates assessed are sometimes included in mixed commodity groupings that do not consist of analogous commodities. For the foregoing reasons, the Commission finds Baltic's argument to be without merit.

B. *Possibility of Compliance*

Baltic complains that, as to paragraph (A)(3)(e), it cannot comply with the April Order's requirement that all responses be submitted under oath. Baltic states that any "reconstruction" of the tariff authority it relied upon in assessing the rates in question "necessarily depends upon speculation, [and] Baltic could never verify as a matter of fact or as a matter of personal knowledge of an individual affiant, that any tariff item numbers submitted were the ones which were applied."[4] Paragraph (A)(3)(e) requires only that Baltic, utilizing the resources and procedures it employed in assessing the rates and charges in question, determine, to the best of its knowledge, recollection and belief, what tariff authority was relied upon in arriving at the rates charged. If no tariff authority can be found, Baltic may so state. The requirement that Baltic's response to paragraph (A)(3)(e) be verified under oath is not an unreasonable one under these circumstances.[5]

Baltic indicates that because tariff items are not numbered in its westbound tariffs, it cannot comply with paragraph (A)(3)(e), but "could provide the tariff

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[3] In support of this argument, Baltic cites *Porter v. Central Chevrolet, Inc.*, 7 F.R.D. 86 (N.D. Ohio, 1946), *Porter v. Montaldo's* 71 F. Supp. 372 (S.D. Ohio, 1956), *Krantz v. United States*, 56 F.R.D. 555 (W.D. Va., 1972) and *Technitrol v. Digital Equipment Corp.*, 62 F.R.D. 91 (N.D. Ill., 1973). These cases involve standards for interrogatories and other forms of discovery in court proceedings under Rules 33 and 34 of the Federal Rules of Civil Procedure. The cases stand for the general proposition that it is unreasonably burdensome, in discovery proceedings, to require a party to sift through the information it discloses and express detailed legal or factual conclusions concerning the meaning of that information. Baltic suggests that these cases are apposite because paragraph (A)(3)(e) of the April Order is an "interrogatory-type" request.

The April Order (of which paragraph (A)(3)(e) is a critical part) was lawfully issued pursuant to the Commission's broad investigatory powers under section 21 of the Shipping Act, 1916, and is not subject to the narrow evidentiary constraints suggested by Baltic. See *Kerr Steamship Co. v. United States*, 284 F.2d 61 (2d Cir. 1960), *appeal dismissed as moot* 369 U.S. 462 (1962), *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), *Federal Trade Commission v. Texaco, Inc.*, 555 F.2d 862 (D.C. Cir. 1977), *cert. den.*, 431 U.S. 974, and *In Re: FTC Line of Business Report Litigation*, ___ F.2d. ___ , ___ , D.C. Cir. No. 77-1728 (decided July 10, 1978) slip op. at 33-40.

Baltic's Petition also "repeats and reasserts" (without elaborating further) its argument that the Commission cannot legally require it to produce any information not contained in its existing business records. The Commission again rejects this argument, for the reasons stated in its Order to Show Cause of October 5, 1978.

[4] Petition, at 3.

[5] The Commission is disturbed by Baltic's assertion that determining from its published tariffs how it arrived at its rates and charges is, for it, a matter of "speculation." The assessment of cargo rates and charges by a common carrier should be uniform and in accordance with its effective tariffs, and should not be a matter of "speculation" for the carrier, shippers, or this Commission.

under which authority the shipment was rated or carried."[6] In the absence of a tariff item number Baltic could comply with paragraph (A)(3)(e) by providing the FMC tariff number and tariff page number for the westbound commodities moved. Baltic's explanation of its inability to provide responses as to westbound shipments therefore is unconvincing and is rejected.

C. *Right of Appeal*

Finally, Baltic asserts that the Commission cannot hold it in default of the April Order while it is challenging the legal validity of that Order.[7] Baltic seems to suggest that the Commission cannot find Baltic in default until Baltic has obtained final judicial review of the Commission's April Order. This argument is somewhat puzzling, for without a final Commission finding of default, it is unclear how Baltic could obtain judicial review.[8] The Commission's finding of default is based upon Baltic's repeated refusal to comply with the Commission's April Order, and the Commission sees no reason to withdraw that finding.

III. *Conclusion*

Baltic ceased being in noncompliance with paragraphs (B)(1) through (B)(3), (C)(1) and (C)(2) of the Commission's April Order on January 26, 1979, by submitting its supplemental Response. Baltic has not cured its default of paragraph (A)(3)(e) of the April Order. This is a significant default, and Baltic has presented no persuasive matter of law or fact to alter the Commission's determination that Baltic is in default of the April Order.

THEREFORE, IT IS ORDERED, That the Petition for Reconsideration of the Baltic Shipping Company is denied, and the Commission's Order and Notice of Default is affirmed; and

IT IS FURTHER ORDERED, That Baltic Shipping Company is hereby notified that its default of paragraphs (B)(1) through (B)(3), (C)(1), and (C)(2) of the Commission's Order of April 17, 1978, ceased on January 26, 1979, but that its substantial default of that Order continues to run from June 30, 1978, by reason of its continuing failure to comply with paragraph (A)(3)(e) thereof.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[6] Petition, at 4. This would not constitute compliance with paragraph (A)(3)(e), which calls for tariff item number *and* tariff authority. "Tariff authority" means the authority contained in a *specific tariff commodity item*, not just the number of a tariff containing a multitude of commodity items.

[7] The authority cited by Baltic for this proposition is *United States v. Pacific Coast European Conference*, 451 F.2d 172 (9th Cir 1971). This case is apposite only to the running of penalties, not to making findings of default.

[8] *See* 5 U.S.C. 704.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-14

AGREEMENT NO. 10116-1—EXTENSION OF POOLING AGREEMENT IN U.S. PACIFIC COAST/JAPAN TRADES

AGREEMENT NO. 10116-3

REPORT AND ORDER ADOPTING INITIAL DECISION AND CONDITIONALLY APPROVING EXTENSION AGREEMENT

March 6, 1979

BY THE COMMISSION: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice Chairman;* Karl E. Bakke,* James V. Day, and Leslie Kanuk,* *Commissioners*)

This proceeding was commenced March 5, 1976, to investigate the approvability of Agreement No. 1016-1 (Agreement) under section 15 of the Shipping Act, 1916 (46 U.S.C. 814)[1]. The Agreement would extend for three years an existing pooling arrangement between Japan Line, Ltd.; Kawasaki Kisen Kaisha, Ltd.; Mitsui O.S.K. Lines, Ltd.; Nippon Yusen Kaisha; Showa Lines, Ltd.; and Yamashita-Shinnihon Steamship Co., Ltd., in the U.S. Pacific Coast/Japan import and export trades.[1] All six parties (Proponents) are Japanese flag containership operators providing common carrier service in the foreign commerce of the United States. Under the Agreement, Proponents pool the revenues earned by their port-to-port and overland common point operations. Intermodal and transshipment cargoes are not included in the pool.[2] Costs are also shared, except that each of the proponent lines is responsible for its own marketing expenses and issues its own bill of lading.

By Supplemental Order served March 7, 1977, the Commission rejected certain allegations raised by the Marine Cooks and Stewards Union, but referred further questions of an evidentiary nature to an Administrative Law Judge. Upon completion of hearings, Administrative Law Judge Norman D. Kline (Presiding Officer) issued an Initial Decision finding adequate justification for the anticompetitive aspects of the Agreement and recommending its approval.

* Commissioner Bakke and Kanuk concur in the result only. Their separate opinions are attached.

[1] This pooling arrangement has been in effect since March 7, 1975. Agreement No. 10116 was effective between March 7, 1975 and March 6, 1976. *Pendente lite* approval was given to the subject Agreement (10116-1) from March 7, 1976 through December 31, 1978. Agreement No. 10116-2 was approved as an interim measure until March 31, 1979. The Proponents recently filed Agreement No. 10116-3 which seeks approval until March 31, 1982.

[2] Mail and bulk liquid cargoes are also excluded.

The Commission's Bureau of Hearing Counsel (Hearing Counsel) opposed approval and filed exceptions to the Initial Decision. Proponents also excepted to certain findings and conclusions of the Presiding Officer. A "Reply to Exceptions" was submitted by both Proponents and Hearing Counsel.

POSITION OF THE PARTIES

Both parties would have the Commission interpret the evidence differently than did the Presiding Officer. Hearing Counsel contends that the ultimate conclusion reached by the Initial Decision is erroneous because the public benefits found therein are either unsubstantiated by the record or result from related cross chartering agreements already approved by the Commission.[3]

Proponents endorse the Presiding Officer's findings that public benefits exist, but contend that the record requires an additional finding that Agreement No. 10116 has been and will continue to be effective in reducing malpractices in the U.S. Pacific Coast/Japan trades. Proponents further except to the discussion on pages 69–85 of the Initial Decision wherein the Presiding Officer concluded that the burden of going forward with the evidence was upon Proponents whether or not the Agreement is *per se* violative of the antitrust laws.

DISCUSSION

Upon review of the record, the Commission has concluded that the Presiding Officer's findings are substantially correct and the Initial Decision's treatment of the facts and applicable law adequately disposes of the contentions raised by both sets of exceptions. The Commission is of the view, however, that portions of the Initial Decision, and especially pages 69–85, discuss matters which range unnecessarily beyond the question of whether Agreement No. 10116 should be approved for a further term. Accordingly, the Initial Decision will be adopted, but only to the extent it is consistent with and directly supports the following summary of its salient features.

I. The purpose of Agreement No. 10116–1 is to reduce competition between the six proponent lines by dividing revenues and expenses. Such an agreement is anticompetitive, regardless of whether it is *per se* violative of the antitrust laws.[4] It was necessary, therefore, for the Proponents to produce evidence measuring the practical effects of their proposal upon competition and to demonstrate that any anticompetitive impact would be outweighed by positive public interest factors.

II. Proponents met their burden of justifying Agreement No. 10116–1. Other liner operators in the U.S. Pacific Coast/Japan trades will not be measurably injured by the reduction of competition between Proponents. The record shows that the Agreement will not be employed in a predatory fashion.[5] It will instead

[3] Agreement Nos. 9835–3, 9718–5 and 9731–7.

[4] The Commission has long recognized pooling agreements as being anticompetitive on their face, *Mediterranean Pools Investigation*, 9 F.M.C. 264, 290–291 (1966); *Inter-America Freight Conference*, 14 F.M.C. 58, 72 (1970). *See also, Citizens Publishing Co. v. United States*, 394 U.S. 131 (1969), regarding the *per se* nature of pooling arrangements.

[5] Proponents' potential market shares are controlled by the capacity limitations of their FMC-approved space chartering arrangements, their pricing policies are governed by the Pacific Westbound Conference (FMC Agreement No. 57), and they face competition from over 20 other liner operators.

make a meaningful contribution towards needed stability in the trade. Moreover, Agreement No. 10116 provides for separate marketing by the Proponents, a practice which will preserve the trade name and good will of each participating line and thereby facilitate whatever independent activities as may subsequently become feasible for one or more of the proponents.

III. An extension of Agreement No. 10116 will serve a valid regulatory purpose by helping eliminate excess tonnage in an overtonnaged trade, reducing Proponents' incentives to rebate, and encouraging an overall environment of fair competition among all carriers in the trade. The Agreement will also create public benefits by permitting cost savings and efficiencies in the use of capital equipment in an industry where fixed costs constitute the majority of a carrier's business expenses and the need to cover these high fixed costs is the major cause of malpractices. Moreover, by facilitating high levels of efficiency and minimizing risks, the Agreement will encourage Proponents to provide high levels of service to the shipping public (*e.g.*, the attractiveness of vessel calls at ports with smaller cargo offerings will be enhanced).

Although extension of Agreement No. 10116–1 is warranted under Shipping Act section 15, Agreement No. 10116–1 has expired and Proponents are operating under Agreement No. 10116–2 on an interim basis until April 1, 1979. Extension of the pooling arrangement beyond March 31, 1979, can only be accomplished by taking action on Agreement No. 10116–3 which proposes a three-year term commencing April 1, 1979. Public notice of Agreement No. 10116–3's pendency was given on January 22, 1979, 44 *Fed. Reg.* 4540, and no protests or comments were received.

Because the benefits of the instant pooling arrangement depend largely upon the existence of space chartering agreements which expire on August 22, 1979 (No. 9835–3) and August 22, 1980 (Nos. 9718–5 and 9731–7), respectively, efficient regulatory oversight of Proponents' activities requires that any extension of Agreement No. 10116 be coordinated with the space chartering agreements as was suggested by the Presiding Officer. This can be accomplished by approving Agreement No. 10116–3 until August 22, 1980.

THEREFORE, IT IS ORDERED, That the Exceptions of the Bureau of Hearing Counsel are denied; and

IT IS FURTHER ORDERED, That the Exceptions of Proponents are denied; and

IT IS FURTHER ORDERED, That the Initial Decision served November 21, 1978 is adopted to the extent indicated above; and

IT IS FURTHER ORDERED, That Agreement No. 10116–3 is approved upon the condition that: (1) the Proponents modify Article 14 thereof to provide for an expiration date of August 22, 1980; and (2) the Commission actually receive a complete copy of Agreement No. 10116–3 as so modified, signed by all parties thereto, on or before March 31, 1979.

(S) FRANCIS C. HURNEY
Secretary

Commissioner Karl E. Bakke, concurring.

I agree with the majority that extension of the subject agreement is warranted on the basis of the record before the Commission.

However, I part company with the majority to the extent of their election not to adopt that portion of the initial decision dealing with current interplay between § 15 of the Shipping Act and national competition policy because it deals with "matters which range unnecessarily beyond the question of whether Agreement No. 10116 should be approved for a further term." (Report, p. 4.)

In my view, at least the substance of Judge Kline's sound, well-reasoned discussion of that important policy question should have been adopted. Not only is that discussion germane to the argumentative issue of the quantum of justification required for § 15 "approvability" of this agreement that was raised by proponents in their reply brief (pp. 78–83), but it explicates what I believe to be precisely the position that the Commission should take on the subject under existing legislation and case law.[1] Indeed, several recent Commission decisions have clearly signaled movement in that direction, and I think it unfortunate that the majority have failed to take advantage of this splendid opportunity to "bite the bullet" through the medium of Judge Kline's articulate and careful legal craftsmanship.

Commissioner Leslie Kanuk, concurring. I concur in the result, but do so by urging adoption of the full text of the Initial Decision.

The majority correctly observes that the Initial Decision contains discussion of matters not strictly necessary to gauging the approvability of the Agreement. If the Presiding Officer's thorough treatment of this Agreement has resulted in discussion of matters not absolutely essential to the disposition of the main issues, his willingness to expound upon these matters can only be viewed as an aid to the Commission's deliberations. Dicta are not presumptively objectionable, particularly where they reflect thoughtful consideration of issues of concern to the Commission and the public.

If the Commission has specific problems with the Initial Decision, it should identify those problems and deal with them. The three paragraphs of summary do not do justice to the quality of the Initial Decision and may create confusion as to the meaning of the Commission's adoption. I fear that my colleagues and successors face no end of briefing on the extent of the Commission's carving away of this thoughtful work by Judge Kline. I am further concerned that by specifically referencing pages 69–85, the majority will create the mistaken impression that we find merit in the Proponent's exceptions.

I strongly endorse the majority's reaffirmation of the long-established requirement that Proponents must justify anticompetitive agreements (Paragraph 1, p. 4). However, I am somewhat skeptical that the Agreement will "create public benefits by permitting cost savings and efficiencies" to be realized by Proponents. This is a pool within a space charter within a conference. Since the conference (consisting of some 26 carriers) sets the rates, I consider it most

[1] I wish to stress the qualifying adjective "existing." In my opinion, general domestic antitrust philosophy is antithetical to the specific international commercial realities involved in § 15 agreements and the 96th Congress willing, should be expressly excluded from the "approvability" standards to be applied by the Commission. However, until that is done, the Commission is stuck with the law as it is, not as it should be.

unlikely that any efficiencies achieved by the six carriers in the pool will manifest themselves as cost benefits accruing to the public.

I also question whether this approval will serve to encourage Proponents to change their port call patterns in favor of smaller ports, and do not see this approval as a means of "reducing Proponents" incentives to rebate." The most effective deterrent to rebating is a strict enforcement program vigorously administered by the Commission.

With these observations and qualifications, I endorse the Initial Decision and concur in the majority's approval of the Agreement.

FEDERAL MARITIME COMMISSION

No. 76-14

AGREEMENT NO. 10116-1—EXTENSION OF POOLING AGREEMENT IN THE EASTBOUND AND WESTBOUND TRADES BETWEEN JAPANESE PORTS AND PORTS IN CALIFORNIA, OREGON AND WASHINGTON

Adopted March 6, 1979

Six Japanese carriers are requesting continued approval of an agreement by which they essentially share equally in revenue they earn on carrying certain cargo in the Japan/U.S. Pacific Coast trade. The carriers argue that this pooling agreement has helped to curb malpractices and provides additional cost-savings and other benefits with no harm resulting to other carriers. The carriers believe that the Japanese trade is and will continue to be overtonnaged, thus causing malpractices, so that continued approval of their agreement is necessary primarily for that reason. Hearing Counsel disagree, seeing no public benefits or need for the agreement. It is my opinion that the agreement does provide certain benefits and therefore deserves continued approval and that the preponderance of the evidence shows the following facts:

(1) The continued addition of container capacity to the Japan and Far East trades will not be matched by cargo growth; therefore, overtonnaging will continue as a problem;

(2) The main reason for malpractices in the Far East trades has been overtonnaging coupled with the peculiar pressures on containerized carriers to maintain high load factors, although nonconference competition certainly contributes to the problem;

(3) The pooling agreement appears to have had only minor effects at best on reducing malpractices, since malpractices continued for well over a year and one-half after the agreement had been approved by the Commission in March 1975; other factors were far more important in reducing malpractices, such as the admonition of the Japanese Government, increase in cargo volume after 1975, increased action by the U.S. Government, this Commission, and the conferences' self-policing body, commitment by carriers' owners to clean up the trade, etc.;

(4) Notwithstanding the above facts, the pooling agreement deserves continued approval because it produces benefits mainly with regard to cost-savings and assists intimately-related Japanese space chartering agreements which this Commission has found to be beneficial to the commerce of the United States; so long as the space chartering agreements continue to benefit the commerce of the United States, the auxiliary pooling agreement deserves approval;

(5) Pooling agreements do, in theory, help curb malpractices, but particular facts in a trade may work to frustrate the theory, as may have happened here;

(6) There is no evidence of any real harm to other carriers as a result of the pooling agreement among six carriers out of over 26 carriers operating in all, nor should the benefits of the agreement be thrown away because all 26 or more carriers are not parties to the agreement, nor is there persuasive evidence that the Japanese carriers have failed to support efforts to strengthen the conferences' self-policing system, which has been considerably improved and has become more effective.

Proponents of any agreement submitted for approval under section 15 of the Shipping Act, 1916, must show entitlement to approval by showing need or benefit or valid regulatory purpose because virtually all section 15 agreements are contrary to the national policy favoring free

competition. The primary standards for determining approvability are, however, Shipping Act, not Sherman Act standards, and neither Hearing Counsel nor the Commission have to prove a violation of the Sherman Act before an agreement can be disapproved. The Commission has responsibilities different from those of the Department of Justice or the Federal Trade Commission. The subject agreement does restrain competition to some extent but, as mentioned, produces offsetting benefits and no real harm to other carriers.

Charles F. Warren, George A. Quadrino, and *John E. Ormond, Jr.,* for proponents.
John Robert Ewers and *Paul J. Kaller,* for Bureau of Hearing Counsel.

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

I. History of this Proceeding

A. *First Commission Approval*

This proceeding is an investigation ordered by the Commission to determine the approvability of a pooling agreement among six Japanese carriers (proponents). The agreement, designated as Agreement No. 10116, was originally filed with the Commission on January 31, 1974. The six Japanese carriers (Japan Line, Ltd., Kawasaki Kisen Kaisha, Ltd. (KKK), Mitsui O.S.K. Lines, Ltd. (Mitsui), Nippon Yusen Kaisha (NYK), Showa Lines, Ltd. (Showa), and Yamashita-Shinnihon Steamship Co., Ltd. (YS)) sought to have their agreement approved for a term of three years, commencing from the date of the Commission's approval. The agreement, very simply, called for the six carriers to pool the revenue earned by the carriage of certain cargo eastbound and westbound between ports in Japan and ports on the Pacific West Coast of the United States, including inland moving cargo known as "overland common point" cargo.

The filing of Agreement No. 10116, in its original form, resulted in a protest filed by Sea-Land Service, Inc., an American carrier, which urged the Commission to give the agreement limited approval of one year so that the effects of the agreement could be monitored. The Commission however, did not grant such approval but instead set the matter down for full investigation and commenced a formal proceeding for that purpose, namely, Docket No. 74-47, *Agreement No. 10116—Pooling Agreement in the Eastbound and Westbound Trades Between Japanese Ports and Ports in California, Oregon and Washington,* October 22, 1974. This proceeding was aborted, however. Proponents petitioned the Commission to reconsider the order of investigation and no one replied to the petition. Thereupon, the Commission approved Agreement No. 10116 for a term of one year, through March 6, 1976, so that its effects could be monitored. See Docket No. 74-47—Order Vacating the Investigation and Hearing and Discontinuing the Proceeding, March 19, 1975.

B. *The First Extension of Approval*

On January 20, 1976, proponents filed Agreement No. 10116-1, amending Agreement No. 10116, to provide that the agreement continue in effect up to and including December 21, 1978. This agreement was protested by a trade union consisting of employees of American carriers operating on the West Coast

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

known as the Marine Cooks and Stewards Union (the Union). The Union urged disapproval of the agreement on the grounds that it was unjustly discriminatory and unfair as between carriers and contrary to the public interest. The Union furthermore argued that approval of the agreement would continue a serious anticompetitive "measure" because the revenue sharing features would allegedly permit the strongest Japanese carriers to sustain the weakest, eliminate competition among themselves, and concentrate their forces on non-Japanese carriers serving the subject trade for the purpose of enlarging the pool of revenues which they would share. The Union also argued that the agreement was unfair because non-Japanese carriers were not included in it.

Proponents replied to the Union's arguments by contending that the Union was making undocumented and unascertainable allegations, that there was no basis in fact to conclude that the approval of the agreement would increase proponents' ability to concentrate their competitive efforts against non-Japanese carriers, that there was no requirement in law that all carriers in a trade must be allowed to participate in pooling agreements, that no American or third-flag carrier had protested continued approval of the agreement, and that there was no automatic illegality attached to a pooling agreement because a weaker carrier could conceivably be sustained by a stronger one under such an agreement.

The Commission found the Union's arguments to be general in nature and devoid of factual support or to be otherwise refuted by evidence submitted by the proponents. The Commission also acknowledged that the agreement "was apparently directed by the Japanese Government in order to discourage malpractices which have been reported to be prevalent in these trades." Order of Investigation, March 5, 1976, p. 4. The Commission furthermore noted "with particular interest" the absence of protest by any carrier. *Id.*, p. 4. However, the Commission expressed concern over possible anticompetitive implications. Therefore, the Commission extended the period of approval of the pooling agreement for another year, until March 6, 1977, and set the matter of approval for the remaining period of time desired by proponents, i.e., until December 31, 1978, for formal investigation. The Commission directed proponents to furnish additional factual evidence to show that the agreement "is justified by a serious transportation need, secures important public benefits, or is in the furtherance of a valid regulatory purpose." *Id.*, p. 5.[3] Hearing Counsel and the Union were also provided an opportunity to submit relevant information in reply.

C. *The Second Extension of Approval and the Present Phase of the Proceeding*

In its Supplemental Order (SO), served March 7, 1977, the Commission granted a second extension of approval of the agreement beyond March 6, 1977, "pending the final order of the Commission in the proceeding instituted herein." Supplemental Order, p. 10. Proponents therefore are operating under the agreement and will continue to do so at least until December 31, 1978, which is the date they had requested when filing Agreement No. 10116-1, which amended the original agreement to extend its life until that date and possibly beyond that

[3] In repeating the instruction to proponent to submit additional information, the Commission later stated that proponents "submit . . . such memoranda of law, affidavits of fact and such other material as would demonstrate the need for approval of Agreement No. 10116-1 under the standards of section 15, Shipping Act, 1916." *Id.*, p. 6.

date.[3] In addition, however, the Commission, in effect, found that the Union's protests were without merit, i.e., that the agreement was not unjustly discriminatory or unfair or otherwise harmful in the manner argued by the Union or that the Union had actually been injured by the agreement. However, because the evidentiary record did not fully illuminate all of the possible ramifications of the agreement, the Commission decided to refer the matter to the Office of Administrative Law Judges for a full investigation in order to satisfy the Commission that its decision "will most fully serve the public interest." SO, p. 7. As discussed below, the Commission specified its areas of concern and instructed the parties to develop particular evidentiary matters during this phase of the proceeding.

D. *Dispostion of the Earlier Issues Raised by the Union*

The Union's contentions regarding alleged discrimination, competitive harm, and unfairness have been summarized above. The Commission found against the Union in every regard in these matters on the basis of the evidence submitted by the parties in affidavits, the evidentiary record in Docket No. 75-30, *Agreements Nos. 9728-3 and 9731-5,* November 1, 1976, in which the Commission approved related space chartering agreements among these Japanese carriers, and matters officially noticed by the Commission, SO, p. 3. Briefly, the Commission disposed of the Union's contentions as follows.

The Union had contended that continued approval of Agreement No. 10116-1 was unjustly discriminatory and unfair as between carriers because it permitted proponents to perpetuate a "monopoly" of the U.S. Pacific-Japan trade achieved by means of proponents' other agreements, namely, terminal and space chartering agreements in the subject trades. However, the Commission found that the Union had failed to prove that any of the three space chartering agreements gave proponents a monopoly. See *Agreements Nos. 9713-3 and 9731-5,* Docket No. 75-30, 16 SRR 1553, November 1, 1976; *Agreement No. 9835-2,* Order of Approval, November 1, 1976. There being no further evidence offered by the Union on the subject of monopoly or unfairness, the Commission therefore found that the Union had failed to prove Agreement No. 10116-1 to be unjustly discriminatory or unfair as between carriers. SO, p. 4.

The Commission found against the Union's claim that the pooling agreement permitted stronger carriers to sustain weaker carriers in the subject trade by showing that the Japanese carrier which had carried the least amount of cargo actually contributed the most money to the pool and that the carrier which had received the greatest amount of money from the pool in the first year of its operation (March 7, 1975 through March 6, 1976) had nevertheless grossed in excess of $33,000,000. SO, p. 5.

The Commission found against the Union's claims that the agreement was having the effect of promoting a disproportionate share of the market for proponents so that by January 1976, proponents' market share was 65.5 percent, higher than at any time during the preceding 22 months. The Commission found,

[3] In its Supplemental Order, served March 7, 1977, the Commission appears to have extended approval of Agreement No. 10116-1 "pending the final order of the Commission in the proceeding instituted herein. . . ." SO, p. 10. It is unclear whether the Commission intended to grant approval beyond December 31, 1978, in the event that the proceeding could not be finished by that date. Proponents, not taking any chances, have filed Agreement No. 10116-2, seeking an extension three years' beyond December 31, 1978. That matter is before the staff for consideration.

however, that the percentage of each year's carryings in each month of 1974 and 1975 was not significantly different from the cargo carrying patterns of other conference carriers. Furthermore, the Commission found that by February of 1976 proponents' share had already dropped to 60.4 percent and that the data before the Commission would not support an inference that proponents had increased their share of the inbound conference's cargo for all of 1976. SO, p. 7.

E. *The Issues Remaining in This Phase of the Proceeding*

Although the Commission has largely disposed of the issues regarding monopoly, market shares, discrimination and unfairness among carriers, stronger carriers sustaining weaker, etc., there remain other issues which were raised by the parties during the earlier phase of the proceeding and which were set down for further investigation in the Commission's Supplemental Order. The main issues which the Commission indicated that it wished to explore further were those relating to the possible existence of overtonnaging and its effects, if any, on the commission of malpractices (rebating) and secondly, assuming that overtonnaging exists and that it leads to malpractices, whether the agreement can be justified on the ground that it helps to reduce the incidence of malpractices. The Commission's Supplemental Order also added another area of inquiry, namely the question whether the conferences' self-policing system has been effective in combatting malpractices and if not, why not. SO, p. 9.

F. *The Earlier Arguments of the Parties*

During the earlier phase of this proceeding when it was before the Commission on affidavits, memoranda of law, etc., proponents had argued that continued approval of the agreement was necessary because of serious overtonnaging and consequent pressure on the proponents to commit malpractices. Proponents did not claim that the agreement was the only means to combat malpractices but stated that it was "only one of several measures necessary for the achievement of improved trade stability." (Respondents' Memorandum in Support of Continued Approval of Agreement No. 10116, as amended, May 27, 1976, pp. 2, 3). Proponents acknowledged that other measures would be of "vital importance," mentioning their space chartering agreements, strengthening of self-policing, seeking admissions of other carriers into conference membership, and continuance of discussions with other carriers seeking new ways to improve the trade posture. *Id.*, p. 3.

The Union, in the earlier phase of the proceeding, had refuted proponents' contentions by arguing that the agreement might in theory at best only help eliminate malpractices among proponents themselves since they are the only parties to the agreement. However, the Union pointed out that the record at that time did not even establish that any proponents had been committing malpractices and that proponents had not given the Commission evidence on this question. (Petitioner's Memorandum of Law, September 27, 1976, p. 23.) The Union consequently argued that proponents had not shown any need for the agreement and, as mentioned, argued that substantial harm would result from approval of the agreement.

Hearing Counsel, during this earlier phase of the proceeding, had stated that

"malpractices in the trade apparently exist" and that a "pooling agreement such as this would seem to alleviate such malpractices at least between the members of the pool, and the Japanese Ministry of Transport apparently believes this agreement is the best way to alleviate such malpractices." (Hearing Counsel's Memorandum, September 27, 1976, p. 7.) Hearing Counsel also acknowledged that "in theory pooling agreements remove the incentive for member lines to take cargo from each other through the use of rebating and other malpractices. . . ." *Id.*, p. 7. However, in fairness to Hearing Counsel, I must add that they were operating under a limited evidentiary record which was later more fully developed, that they did contend that the record did not show whether the agreement had been effective in reducing malpractices and that they specifically called attention to the need for evidence showing what had happened in the trade regarding incidence of malpractices after the agreement was approved so as to be able to determine whether the agreement had any effect on reducing malpractices. *Id.*, pp. 7, 8. Finally, Hearing Counsel commented on the role of the Japanese Government in the formation of the agreement by stating that if the "directive" of that Government "to form this pool" will be effective in curtailing malpractices, then the Commission could legitimately consider the public interest in giving regard to the policy of another nation with which this country does business. *Id.*, p. 9. Hearing Counsel did, however, argue that the agreement divided markets and would be a per se violation of the antitrust laws, therefore requiring offsetting evidence of need, benefit, etc., to be furnished by the proponents. *Id.*, p. 7.

II. Resolution of the Major Factual Issues Remaining in this Proceeding

After the issuance of the Commission's Supplemental Order, served March 7, 1977, the Union ceased being an active participant in this proceeding. Therefore, the only remaining party now actively opposing continued approval of this agreement is Hearing Counsel. Having the benefit of a more fully developed record,[4] Hearing Counsel have continued to press for disapproval of the agreement, essentially on the grounds that the record does not show that there is presently overtonnaging in the Japanese trade or that the agreement has been effective in reducing malpractices, or even that overtonnaging is the primary cause of rebating. Furthermore, Hearing Counsel argue that there are either no benefits resulting from the agreement or that the so-called benefits are only private, i.e., that they assist only the parties to the agreement, not the public. Essentially, then, Hearing Counsel argue that there is no need for the agreement, no public benefit, and that no valid regulatory purpose would be served by its approval. They conclude that the agreement is merely the instrument of Japanese Government policy to promote the best interests of the Japanese merchant marine. Proponents, of course, vigorously dispute each of these contentions. Since the ultimate decision in this case must largely hinge on a resolution of these

[4] Hearing Counsel and the parties developed the record by use of the Commission's discovery procedure (46 CFR 502.201 *et seq.*) in which 10 depositions were taken and admitted into evidence, by interrogatories and requests for information, and by a trial-type hearing which consumed six days, concluding on February 10, 1978. After the hearing was concluded, additional evidentiary materials were admitted into evidence by agreement of the parties and with my approval.

factual disputes, it is best to proceed immediately to discuss them and despite the wide disparity separating the parties, seek to elicit as far as humanly possible, what the true facts and correct conclusions are.

A. *There Is and Will Continue To Be Overtonnaging in the Japanese Trades in the 1977–1978 Period*

Hearing Counsel contend that the relevant Japan trade is not nor will it be overtonnaged. They contend that proponents never compared vessel capacity allocated to the Japanese trade (as opposed to the entire Far East trade area) with cargo growth in the same Japan trade. Nor was there a similar comparison between total Far East trades' capacity with total Far East cargo growth. Furthermore, proponents' utilization rates (i.e., the proportion of cargo that occupied capacity) improved from 54.8 percent and 50.3 percent for the full year 1975 in the inbound California and Pacific Northwest trades respectively to utilization of 86.9 percent and 88.9 percent respectively for the first nine months of 1977. (Ex. 2, App. 4). In 1977, furthermore, the Japanese lines experienced utilization factors in excess of 90 percent during February, July, and September in the inbound California trade and in the Pacific Northwest these carriers exceed 90 percent utilization in five of the nine months of record for that year, reaching 96.6 percent in July. (Ex. 18).

Hearing Counsel criticize proponents' expert witness, Mr. Douglas Tucker[5] who projected overtonnaging on the basis of total trans-Pacific vessel capacity measured against dollar growth in the Japan trade as a measure of expected cargo growth. (Ex. 6, p. 7 and Appendices). Again Hearing Counsel comment that Mr. Tucker compared total Far East vessel capacity with Japan cargo growth only but additionally they criticize Mr. Tucker contending that he estimated cargo growth on the basis of estimated dollar growth. They also criticize Mr. Tucker's analysis on the grounds that he ignored growth in other Far East trades besides the Japanese such as Korea, Hong Kong, and Taiwan inbound to the Pacific Coast which trades, from 1971 to 1976, grew at 28.1 percent, 21.8 percent, and 22.2 percent annually in long tons respectively. (Ex. 6, Table 4). Therefore, Hearing Counsel conclude that much of the additional vessel tonnage that has been added to the Far East trade area was in direct response to growth of cargo demand in the non-Japanese trades. Finally, while not seriously disputing witness Tucker's estimated growth in vessel capacity for the entire Far East from January 1, 1977, to December 31, 1978, which was 64 percent, Hearing Counsel argue that "while a forecast of increased tonnage of this magnitude might be cause for alarm . . . ," such is not the case here because Trade Route 29 (i.e., the entire Far East trade area) "is not only the largest trade route for liner cargo but is also the fastest growing. In tonnage terms, liner imports on TR–29 grew by 39.69 percent during 1976. (Ex. 19, Table 2). This rapid growth in liner cargo moving

[5] Mr Douglas C Tucker is President of D C Tucker and Company, a Washington, D.C based economic research firm. He is also Managing Director of TRG/Washington Group, Inc., which offers management counseling services to industry and government. He has been an economic or management consultant since 1967 and before that time, a transportation facilities planner with the Port of New York Authority His principal work throughout the last 14 years has been as a transportation economist with particular specialization in the maritime and intermodal transportation fields. He has testified before this Commission as well as before the Interstate Commerce Commission and the Postal Rate Commission (Ex 6, pp 1, 2). He also holds a master's degree from New York University in industrial management and economics

on Tr-29 continued in 1977, albeit at a less torrid pace than in 1976, with TR-29 liner imports registering a 24.61 percent rate of growth." (Answering Brief of H.C., pp. 39, 40). The latter figure is derived from liner cargo data prepared by the Maritime Administration, of which figure Hearing Counsel request that I take official notice.[6] Hearing Counsel conclude that all of the added capacity which privately-owned carriers are willing to place in the Far East trades demonstrates, in effect, their belief that the cargo demand will be there and that there will be no serious overtonnaging.

Proponents rebut the above contentions of Hearing Counsel in detail. Although there is merit to many of Hearing Counsel's criticisms of Mr. Tucker's analysis, I find that his analysis, as corroborated by other evidence, contains sufficient merit to lead me to the conclusion that there is a continuing danger of overtonnaging in the relevant Japanese trade. It must be remembered that both Hearing Counsel's and proponents' expert witnesses were offering predictions and that any prediction is, of course, only an estimate. The problem is to determine whether the prediction is based upon reasonable data, reasonable methodology, logic, and therefore has probative value. As in most cases of this type, furthermore, precision is impossible.

Before discussing the merits of Hearing Counsel's analysis and proponents' predictions as to overtonnaging, perhaps it would be well to bear in mind a basic underlying fact, that is, that under prevailing law, any carrier can enter any U.S. foreign trade at will. Any list of carriers and their vessel capacities is thus not frozen or engraved in stone for all time but is subject to constant changes up or down. For example, the record in this case shows that there were supposed to be something like 26 carriers offering service in the Far East trades at the end of 1978. See Table below. But even after this list was compiled, more carriers were expected to enter the Far East trades. For example, the following carriers announced plans to enter the trans-Pacific trades in addition to the 26 estimated at the end of 1978. Malaysia International Shipping Corporation, with 4-1500 TEU vessels; Neptune Orient Line, with 4-1700 TEU vessels; Korea Shipping Corporation, with 1-4 1700 TEU vessels, China Merchant Steam with 6-1500 TEU vessels, and Taiwan Navigation, with 2-1100 TEU vessels. Total increased capacity from these carriers alone is expected to be around 200,000 TEUs annually. (Ex. 2, pp. 15-16; Tr. 628). On top of that, still another new carrier, Ro-Lo Pacific Line, has advertised in the *Pacific Shipper* that it is offering service to Korea and Japan and Seatrain has also advertised the addition of an eighth vessel.[7] Whether proponents' expert witness should have estimated

[6] Proponents have objected to my taking official notice of various data used by Hearing Counsel which were compiled by the Maritime Administration. However, both sides seem to utilize data compiled by MARAD or by other governmental organizations whenever they see fit. See, e.g., Mr. Tucker's use of data compiled by the Department of Commerce, the International Monetary Fund, and the Survey of Current Business. (Ex. 6, Appendix Tables). This being the case, and since I do not find against proponents when I officially notice the MARAD data, I see no harm done in taking official notice. I recognize, of course, as do both parties, that MARAD data has limitations (e.g., liner definitions used may not be the same as those used by this Commission). This Commission has also commented on these limitations on MARAD data. The Commission, however, also commented that if official notice is taken, it should be done in time for other parties to comment or rebut. 16 SRR at p. 1569. Comments on the MARAD data have been made by proponents already and can be made in exceptions to my Initial Decision, if proponents wish to do so, although my finding is in their favor. I might add that under the new liberal Federal Rules of Evidence, Rule 703, 28 U.S.C.A., data such as MARAD data, which are customarily used by experts in the field, may be admitted into evidence even if they suffer from hearsay and other limitations.

[7] One may argue, I suppose, that mere advertisement does not mean that the carrier is actually providing a service. Of course, the Ro-Lo Pacific Line advertisement, which I officially notice, and which is attached as Appendix 2 to Proponents' Opening Brief, only states that the service will be "starting May 23" in 1978. Perhaps it has since terminated or perhaps the owners of the line reconsidered and never commenced the service. I only take official notice of the fact that still another new carrier has advertised a service. Although

only Japanese trade capacity rather than total Far East capacity, therefore, we should remember that there is no shortage of carriers offering service in the trans-Pacific trades and that they come and go as they please. This climate alone can hardly be found to be conducive to tranquility, unless the carriers operating in these trades are firmly convinced that cargo volume will continue to increase indefinitely at equivalent high levels to meet the added capacity. Although there is considerable cargo growth in the Far East and Japanese trades, I agree with proponents that the rate of growth is not equivalent to match increased vessel capacity or sufficient to convince any reasonable observer that the Japanese trades will not experience some degree of overtonnaging difficulties.

B. *Vessel Capacity Will Outrace Cargo Growth in the Japan and Far East Trades in the 1977–1978 Period*

A basic fact which was not seriously disputed by Hearing Counsel or their expert witness was that total container capacity was expected to increase by 64 percent during the two year period from January 1, 1977, through December 31, 1978. The actual growth was expected to be from approximately 725,000 TEUs to nearly 1,200,000. The following table shows each carrier and its expected capacity by December 31, 1978, expressed in TEUs (20-foot equivalent container units):

ANNUAL CAPACITIES OF MAJOR TRANS-PACIFIC CARRIERS, IN TEUs, DECEMBER 31, 1978

Carrier	Capacity (TEU's)
American President Line	142,104
Barber Blue Sea	4,200
CSC Line	19,199
East Asiatic	9,960
Evergreen	40,800
FESCO	58,812
Hapag-Lloyd	72,000
Japan Six (Agreement 9835)	101,088
Japan Four (Agreement 9718)	83,640
Japan Two (Agreement 9731)	47,196
Knutsen	7,200
Maersk Line	66,640
Neptune Orient Line	34,580
OOCL/KSC	75,281
OOCL	8,592
PFEL	51,480
Phoenix	16,204
Sea-Land	124,800
Seatrain	78,350
Seaway Express	16,536
States	30,324
U.S. Lines	62,400
Zim Israel	40,038
TOTAL	1,191,424

I believe it likely that the service actually commenced, I cannot find that as a fact. The main point, however, is that any carrier cannot only advertise but start up a new service in the Far East trades any time it wishes and similarly withdraw from the trades if it cannot compete profitably. The Seatrain advertisement appearing in the *Pacific Shipper* is shown on Appendix A to Proponents' Reply Brief.

As noted, this table is subject to further change because of the expected addition of around 200,000 more TEUs offered by five more carriers and the table does not include whatever TEUs might have been offered by the carrier known as Ro-Lo Pacific Line, which advertised in the *Pacific Shipper* nor apparently does it show the effects of the new Seatrain ship which was also advertised. On the other hand, as Hearing Counsel note, the bankruptcy of PFEL would result in the deletion of 51,480 TEUs shown in the table, so that the final figure should be adjusted to be 1,139,444, or only a 57 percent projected increase. But if we add in the 200,000 TEUs for the new carriers, this would result in 1,339,444 TEUs, again not counting Ro-Lo Pacific Line or Seatrain's new ship. This last figure would result in a projected TEU capacity growth during 1977–1978 in the amount of 85 percent. Since both witnesses Ellsworth and Tucker essentially concurred in the original 64 percent figure at the close of the hearings, let us stick with that number for purposes of analysis and because of the fact that no precise prediction is possible in any event.

Even utilizing Hearing Counsel's argument that we should compare total Far East capacity with Far East cargo growth, or similarly, Japanese trade vessel capacity with Japanese cargo growth to arrive at a meaningful conclusion, capacity growth in the neighborhood of 64 percent would require cargo growth during the same period (1977–1978) at an equivalent level. Otherwise the utilization or load factors which were at the 86–88 percent level at the beginning of 1977 could not be maintained. Both expert witnesses agreed to this. (Ex. 6, pp. 13–14, Tucker; Tr. 641, Ellsworth). But where does the record show such an enormous expansion of cargo in the Far East trades? On the contrary, evidence which Hearing Counsel themselves introduced showed that from 1971–1976 average annual cargo increase was only 6.6 percent for Trade Route 29. (Ex. 19, Table 2). How could there be such an enormous growth after 1976 during the 1977–1978 period so far above the average of 6.6 percent? Hearing Counsel attempt to explain.

Hearing Counsel contend that the total Far East trade area experienced cargo growth in the order of 74 percent, thus explaining why so many carriers added vessels, namely, to meet the demand. The problem with this contention is that the 64 percent vessel capacity increase covered the period 1977–78 but the 74 percent figure, even if reliable, covered an earlier period, namely 1975–1977, and is derived from extra-record MARAD data which, as both expert witnesses explained, have shortcomings. (See also above discussion on this point.) Just as Hearing Counsel contended that proponents should have compared Far East capacity with Far East cargo, etc., Hearing Counsel should have compared cargo growth for the period 1977–1978 with vessel capacity for the same period. The trouble with using the earlier period, aside from the fact that it does not match the same time period relating to container capacity growth is that, as proponents show, the year 1975 from which the growth was measured, was a miserable, depressed year because of worldwide recession, and indeed, MARAD liner figures show cargo levels in that year to be at the lowest level during the period 1971–1976. Even Hearing Counsel's witness Ellsworth conceded that point. (Ex. 19, Table 2). When one begins at such a low level, any upward surge will appear to be large. Thus the 39 percent growth in cargo from

1975 to 1976 probably indicates recovery from the recession and is not typical of the average annual growth in the Far East trades which, as noted, was only 6.6 percent for the 1971–1976 period. This facts appears to be reasonable inference since, as Hearing Counsel themselves stated, the rate of cargo growth from 1976–1977 dropped to 24.61 percent,[8] from the 39 percent figure.

But if we turn our attention to the contention that Far East cargo grew by 74 percent during the earlier period, 1975–1977, we find on closer analysis that the figure is somewhat doubtful and of limited reliability. In 1975, MARAD data used by witness Ellsworth show TR–29 cargo in long tons to be 2,557,513. (Ex. 19, Table 2). In 1977, MARAD data, which Hearing Counsel wish to have officially noticed, show 4,486,632 tons, an increase of 74.65 percent by my reckoning. I have already noted that the year 1975 was unique because of the worldwide recession and that the rate of increase in cargo was already beginning to decline substantially after 1976. A further problem with the figure showing a surge of cargo volume on TR–29 for the year 1977 is the fact that there occurred a longshoremen's strike which closed East Coast ports during the last four months of 1977 with the result, as the record shows, that West Coast traffic levels were artificially inflated.[9] Even with such inflated figures, however, cargo had already begun a substantial decline in rate of growth for the year 1977 over 1976 (24.61 percent) as compared to the rate of growth for the year 1976 over 1975 (39 percent). One wonders what the decline would have been in 1977 without the East and Gulf Coast strike which propped up the 1977 figure.

As a further matter concerning the doubtful validity of Hearing Counsel's 74 percent cargo projection applied to the year 1977–78 I might add that other testimony in the record fails to come anywhere near such an estimate.[10] Witness Tucker had estimated 12 percent. Witness Yamada, proponents' chief carrier witness, predicted a 3–5 percent growth. United States Lines anticipated a one percent annual growth rate through 1980. APL thought there might be a slight decline in early 1978. Sea-Land anticipated overtonnaging by 1978, and witness Ellsworth, sponsored by Hearing Counsel, apparently did no study of Far East

[8] For 1976, MARAD data show 3,600,648 tons. (Ex. 19, p. 2). In 1977, MARAD data show 4,486,632 tons. The rate of growth from 1976 to 1977 works out to be 24.61 percent.

[9] Proponents carefully demonstrated this fact from evidence of record, primarily from Exhibits 18, R–2, R–3, and Tr. 684–686. This evidence shows that there were substantial increases in OCP, mini-landbridge (MLB) carrying for September 1977 compared to earlier non-strike periods. These types of cargo (OCP and MLB) move to inland U.S. destinations and indeed, in the MLB cases, the Commission is aware that East Coast ports compete for MLB cargoes. See *Investigation of Overland/OCP Rates and Absorptions*, 12 F.M.C. 184, 197 (1969), affirmed under the name *Port of New York Authority v. F.M.C.*, 429 F. 2d 663 (5 Cir. 1970), and Docket No. 73–38, *CONASA v. AML, Ltd.*, 18 SRR 774 (1978). Quite obviously, closing of the East Coast ports caused shippers to utilize carriers calling at West Coast ports who offered MLB and OCP services. To cite a few figures, while Pacific Coast local cargo increased only by 5.4 percent in September 1977, over the monthly average for January–August, OCP and MLB cargo increased 28.3 and 34.4 percent, respectively, over the same time. (Ex. R–2). Proponents' utilization figures also increased from 80.9 percent in August 1977 to 93.5 percent in September. Proponents have made a further computation in Appendix B to their Reply Brief, showing that had OCP and MLB cargoes not increased in September but remained equal to the average local Pacific Coast cargo prior to September (5.4 percent), proponents' utilization would not have been 93.5 percent but only 83.6 percent.

[10] In a rough attempt to devise some other means of projecting Far East cargo growth for the period 1977–78 to match the 64 percent capacity growth figure, I used Hearing Counsel's recommended figures for tonnages derived from MARAD data for the years 1976 and 1977, which showed a growth of 24.61 percent (from 3,800,648 in 1976 to 4,486,632 tons in 1977) and assumed that the same rate of growth would prevail into 1978, although it is questionable whether such a high rate of growth would occur because of the increased cargo base in 1977 and the decline in rate of growth from 39 to 24.61 percent. Nevertheless, if we assume that cargo would grow in 1978 to 5,590,792 tons, which is 24.61 percent more than the 1977 figure, this projected 1978 figure is only 55 percent over the 1976 figure of 3,600,648. That figure falls far short of the 74 percent figure which Hearing Counsel estimates for 1977–1978 as cargo growth for the Far East trades.

cargo trends and professed "no idea" as to the level of future cargo increases. (Tr. 641; 670).

As a final test to determine whether the increase in container capacity during 1977–1978 resulted in overtonnaging, Hearing Counsel submit various arguments showing utilization (i.e., load factors) of various carriers to be quite high during 1977. Therefore, argue Hearing Counsel, despite the increase in capacity, which had increased by 125,000 TEUs by October 1977 over the total capacity at the end of 1976, evidence of record shows that carriers in 1977 were quite able to maintain high load factors, i.e., that cargo was rising to match the increase in capacity. Once again, however, the argument does not stand up very well under analysis, as proponents show.

Hearing Counsel contend that an increase of 125,000 TEUs by October 1977, which was actually a 17 percent increase, should be annualized so as to become 20.7 percent. Hearing Counsel then contend that the record shows that this increase, whether 17 percent or 20.7 percent annualized, caused no adverse effects on carrier utilization for various carriers. For the non-Japanese carriers some of these utilization factors for 1977 were as high as 113 percent eastbound. Others showed 90 percent, 85–95 percent, 90 percent or more since 1976, 90–95 percent, etc. (H.C.'s Answering Brief, proposed finding of fact PFF 3). The Japanese lines had increased utilization from the miserable year 1975 when they had suffered with utilization factors of 54.8 percent to California and 50.3 percent to the Pacific Northwest to factors of 86.9 and 88.9 percent respectively for the first nine months of 1977. (Ex. 2, App. 4). In five of the first nine months of 1977, furthermore, these carriers had exceeded 90 percent, reaching 96.6 percent in July. (Ex. 18). How then, asks Hearing Counsel, can it be said that the increase in TEU capacity in 1977 could not be matched by increase in cargo volume, i.e., how can one say that the trade was in the process of becoming overtonnaged? (H.C. Answering Brief, p. 37).

Proponents quibble over the annualized figure of 20.7 percent, calling it a theoretical exercise and perhaps it is. However, the more important figures are those relating to utilization. What is wrong with them and with Hearing Counsel's arguments?

One of the problems with the utilization figures of the various non-Japanese carriers, as proponents point out, is that the evidence on which Hearing Counsel relies, with some exceptions, consists of data covering only the first four months of 1977. (Tr. 576). In fact they were derived from depositions, all of which were concluded before the end of June 1977. Even Hearing Counsel's expert witness Ellsworth, when asked whether he was aware of utilizations of these carriers after April 1977, answered that he had no idea and had not seen figures on utilization rates for these carriers, meaning, from the context of the question, after April 1977. (Tr. 477). How then can one say that the 17 percent capacity increase through October 1977 was well absorbed by carriers when we do not know what happened to their utilization factors after April 1977?

Aside from one other carrier whose utilization figures were provided through June, 1977,[11] the only later utilization figures in the record are those of the

[11] This was the carrier whose eastbound utilization factor was 113 percent. But after June, this carrier increased its fleet substantially and, according to witness Ellsworth, likely saw its utilization decline.

Japanese carriers for the period January-September 1977. These figures were rather high, as Hearing Counsel argued. Proponents admit that they average 87.5 percent for the eastbound California and Pacific Northwest trades combined. (Proponents' reply brief, p. 4). But they had also slipped to 80.9 percent in August 1977, their lowest level since January. In September, they sharply increased to 93.5 percent. (Ex. R–5). But as I have discussed earlier, this later increase in September was most probably attributable to the longshoremen's strike which closed East and Gulf Coast ports.[12]

Furthermore, making a comparison of non-Japanese carrier's utilization based only on the first four months of 1977 as compared to increase in container capacity extending over 10 months in 1977 does not enable me to find that these carriers were able to maintain high utilization for the full 10-months' period. As for the Japanese carriers, despite previous high utilizations shown by Hearing Counsel, they had dropped in August to 80.9 percent before the effects of the strike could be felt. Proponents have further calculated that by removing the effects of the strike and calculating the September increase in OCP and MLB cargo at rates of growth equivalent to local Pacific cargo, which had essentially been the history in 1976, utilization would have been only 83.6 percent in September 1977. Perhaps it is important at this time to emphasize that both proponents' and Hearing Counsel's expert witnesses emphasized that containerized carriers must maintain load factors in the neighborhood of 85 percent to break even. (Tr. 73: Ex. 6, p. 4; Tr. 564–65).

Finally, we must consider that Hearing Counsel was only contending that the increased capacity which had occurred by the end of October 1977 had caused no bad effects because utilization had remained high for carriers (although, as seen, this conclusion is not sustainable). For the remaining 14 months from the end of October 1977 to December 31, 1978, both expert witnesses acknowledged that a further 40 percent increase in container capacity to 1,191,424 would probably occur. As proponents correctly point out, how can one logically conclude that because a 17 percent increase was matched by cargo growth for the first 10 months of 1977 (again assuming that Hearing Counsel was correct) then it follows that an additional 40 percent increase in container capacity would be matched by a corresponding growth in cargo during that remaining period?

C. *Proponents' Estimates Regarding Capacity and Overtonnaging Are Not Perfect but Have Probative Value and, Together with Other Evidence, Point to Overtonnaging in 1978*

Having shown that Hearing Counsel's vrious contentions regarding overtonnaging and the continued danger of overtonnaging are replete with deficiencies and do not enable me to rely upon them to make any reasonable conclusion in their favor, I now turn to proponents' predictions, which also have deficiencies.

[12] In addition to my previous discussion of this subject, I add the following remarks. First, Hearing Counsel's witness Ellsworth conceded or acknowledged that even though the strike closed East and Gulf ports at the end of September, there is a lag time of perhaps 20 days between the time the Japanese shipper loads cargo in Japan and the time of discharge in the U.S. port Therefore, the Japanese shipper, aware that a strike might occur on October 1, 1977, would have to consider the wisdom of booking cargo on a ship bound for an East or Gulf Coast port, leaving Japan in September, when the cargo might not be discharged on arrival at the port. (Tr 685) It is reasonable to infer that the Japanese shipper would transfer the booking to a ship discharging on a West Coast port under a mini-landbridge (MLB) tariff, thus inflating load factors of carriers operating between Japan and the Pacific Coast ports As noted above, evidence shows that MLB and OCP traffic did increase drastically in September, thereby confirming my conclusion

Proponents' expert witness, Mr. Tucker, as noted, estimated total container capacity growth for the Far East trades but as compared to only Japanese cargoes. Hearing Counsel have a right to criticize this method. Ideally, we should compare Far East container capacity with Far East cargo growth or Japanese capacity with Japanese cargo growth. Hearing Counsel contend that they were able to determine Japanese-only container capacity. But things are not that simple.

The major problem is that it is extremely difficult to allocate what portion of total container capacity should be allocated to the Japanese trade for future estimate. Witness Ellsworth, Hearing Counsel's expert,[13] admitted not only the extreme difficulty of the problem of future allocation, but when asked "is there any valid way, any dependable method, to determine what the estimated growth in TEU's devoted to the Japan trade, is going to be?" answered: "I don't know of any, if there is one." (Tr. 667). Further on, witness Ellsworth explained why the problem is so difficult. It relates to the fact that carriers other than the Japanese, which are restricted to Japanese ports, call at other Far East ports, e.g., Hong Kong, Taiwan, Philippines, and would adjust their space allocations when arriving at Japanese ports if they had picked up less cargo at the earlier ports of call and were trying to fill space at the last Japanese ports before sailing across the Pacific. (Tr. 662, 663). Similarly, I suppose, it is possible that if more cargo developed at the earlier ports, less might be "allocated" to the Japanese ports. Perhaps current or historical experience could have been used to determine roughly what the Japanese portion of container capacity is. Hearing Counsel state that they obtained such information. However, we are attempting to predict future space allocations for Japan, which is another matter. Absent anything better, perhaps past experience could have been utilized but it is understandable that proponents did not make such an attempt. This is so not merely because of extreme difficulty and possible unreliability but for other reasons as well.[14]

Therefore, we are left with a projection of 64 percent in total Far East capacity (which might really be much higher, in the neighborhood of 85 percent) as noted earlier and a projeeted growth of Japanese eastbound cargo volume at a rate of 12 percent in 1977, before resuming a normal 8–9 percent rate in 1978 and beyond, according to witness Tucker. Actual evidence from the inbound conference showed an 11.6 percent rate of increase for January-August 1977 above 1976 levels, thus somewhat corroborating Mr. Tucker's predictions. (Ex. R–1). Other evidence submitted by Mr. Tucker shows the Japan trade expected to increase by 21.5 percent in cargo volume during the 1977–78 period, i.e., during the same

[13] The witness's full name is Robert A. Ellsworth, who is Chief of the Commission's Office of Economic Analysis, Bureau of Industry Economics. He holds B.S. and Ph.D. degrees in economics from the University of Utah, receiving the latter degree in 1974. During the academic year 1973–74 Mr. Ellsworth served on the faculty of the Department of Economics at the university. From April to October 1974, he was also employed by the Bureau of Economic and Business Research at the University of Utah, which compiles data on the economic activity of the State of Utah and acts as a consultant agency for the State Division of Planning. Mr. Ellsworth has testified in previous Commission proceedings and has prepared various reports dealing with various facets of the ocean transportation industry. (Ex. 19, pp. 1, 2).

[14] In *Agreement No. 9955-1* (the "Star Shipping" case), 18 F.M.C. 426 (1975), the inbound conference attempted at the last day of hearings to introduce current capacity allocations. I excluded them for several reasons but primarily because of the remote hearsay nature of the allocations and consequently their unreliability in making reasonably precise estimates. 18 F.M.C. at p. 430. The Commission upheld my ruling. Nevertheless, had the effort been made in this case, not on the last day of the hearings, when there was no opportunity to cross-examine, I might have admitted such evidence, at least if nothing better were available. But proponents' counsel could hardly be expected to read my mind in this case after their experience in the "Star" case.

period of time that total Far East container capacity is expected to increase by 64 percent or more. The Japan trade, it should be added, is and is expected to remain the dominant Far East trade, enjoying a consistent 60 percent share or better in tonnages and something like 64 percent in value in the eastbound trade. In 1976, for example, Japan represented more than 60 percent of the total Far East market, accounting for nearly 5 million out of the 8 million long tons carried. Hong Kong, the second leading market, accounted for only 988,000 tons. In dollar values, Japan occupied 64 percent of the total market. Hearing Counsel contend that the Japan trade is in relative decline compared to total Far East trades, citing facts that from the years 1971 to 1976, imports from Korea, Hong Kong, and Taiwan destined for Pacific Coast ports grew at 28.1, 21.8 and 22.2 percent annually in long tons respectively. (Ex. 19, Table 4). Thus, argue Hearing Counsel, much of the added container capacity on TR-29 is in direct response to cargo growth in those non-Japanese trades. Here, Hearing Counsel have scored some points.

Evidence of record (Ex. 19, p. 8, and attached tables) does indicate that for the period 1971-1976, Japan's share of U.S. liner imports to Pacific Coast ports compared to total Japan/Korea, Taiwan, and Hong Kong has declined from 82 percent in 1971 to 64.4 percent in 1976. The larger rate of growth of the non-Japanese trades, however, is explained by Hearing Counsel's own expert witness Ellsworth who stated: "To some extent the larger growth rate in the non-Japanese trades is a function of the comparative smallness of the trade volumes vis-a-vis the U.S./Japan trade." (Ex. 19, p. 8).[15] Mr. Ellsworth therefore states that "the magnitude of the liner trade between the U.S. and Korea, Taiwan and Hong Kong . . . should not be underestimated." *Id.* He does not flatly state that this non-Japanese trade growth accounts for much of the increased container capacity in TR-29, as does Hearing Counsel, but only that "[c]learly these other Far Eastern countries are playing an increasing role in the fleet serving the U.S. West Coast/Far East eastbound trade and any discussion of the growth in the fleet serving the U.S. West Coast/Far East trade must take this fact into consideration." *Id.* He criticizes proponents' witness Tucker for comparing Far East capacity with Japanese cargo growth. However, he adds: "How much of the prospective growth in tonnage is due to expansion in the trade between the U.S. and these other countries is extremely difficult to calculate. . . ." *Id.* Also, I might add, in the table on which Mr. Ellsworth relies to show the decline in the Japanese trade share during the period 1971-1976, it appears that during the period 1973-1976, the decline was only from 68.3 to 64.4 percent. (Ex. 19, Table 6). Again, a measure starting from an abnormal figure such as 82.1 percent in 1971 can be somewhat deceptive.

So where are we in this battle of the experts? Certainly, the non-Japanese trades cannot be discounted but can we attribute a 64 percent or perhaps as much as an 85 percent growth in container capacity primarily to these non-Japanese trades? Just to confuse the reader a little more, I might add that Table 7 of Mr. Ellsworth's exhibit 19 shows that in terms of dollar values, the Japanese share

[15] This, of course, is the same principle I was trying to make when discussing Hearing Counsel's use of 1975 as a base year to measure rate of growth of the Far Eas trades, namely, that when one starts with small volume and there is an increase, the rate of increase will appear to be large

has not done badly at all, at least 1973 to 1976 when it declined only from 68.2 percent to 65.8 percent. (The percentage figure for 1971, that strange year in these tables, was 79.4 percent). Is not value of goods shipped of interest to carriers since, as we know, rates, and consequently revenues, are usually correlated to values of commodities? On the basis of all of these facts, I cannot conclude that the large increase in container capacity, in the order of 64 percent, 85 percent, or whatever, is primarily the result of growth in the non-Japanese trades. I can only conclude that these non-Japanese trades have played some role in container capacity expansion to a degree no one can determine or, as Hearing Counsel's own witness admitted, how much of this increase in container capacity is due to these other trades is "very difficult to determine" and no one has done it on this record.[16]

Therefore, we are left with a 64 percent or much greater container capacity increase in the Far East trades (maybe even 85 percent) during 1977–78 as compared to an estimated 21.5 percent growth in tonnages in the Japanese trade,[17] or, as earlier noted, as compared to total Far East tonnage growth figure nowhere near 64 percent. Furthermore, despite high utilization factors enjoyed by the Japanese and other carriers during parts of 1977, which were at the 86–88 percent level at the beginning of 1977, both expert witnesses agreed that these high factors could not be maintained by the end of 1978 without a 64 percent increase in cargo volume during the 1977–1978 period. (Ex. 6, pp. 13–14; Tr. 641). Perhaps this entire overtonnaging discussion can therefore be summed up merely by saying that since there is no showing of anything like a 64 percent increase in cargo volume for either the Japanese or Far East trades, the high utilization factors will decline and since they only have to decline slightly to 85 percent or below before the carriers fail to break even, a figure on which both expert witnesses could agree, the weight of all of this analysis definitely points to the danger of overtonnaging and consequent pressures on carriers by the end of 1978, and probably much earlier.

D. *Overtonnaging Is the Primary Cause of Malpractices (Rebating) Although Non-Conference Competition Is a Significant Contributing Factor*

As I mentioned above, Hearing Counsel not only do not agree that the Japanese trades are or will become overtonnaged but they contend that overtonnaging has not been the primary cause of rebating, Rather, they say that the presence of non-conference competition is the real reason. But Hearing Counsel also state that overtonnaging in a trade provides a climate in which malpractices and rebates may flourish. I certainly do not disagree with this latter statement.

[16] As proponents remark, another reason why it is unrealistic to conclude that the reason for the 64 percent capacity increase was the *growth of non-Japanese trades is the fact* that these other trades would have to increase at a somewhat phenomenal rate of over 125 percent if overall Far East cargo growth were to match the 64 percent growth in container capacity This calculation is based on the fact that the Japanese trade occupies roughly 60 percent of the Far East market and is expected to expand by only 21 5 percent during 1977–78. *Proponents do not furnish their method of deriving* the 125 percent figure Actually, I derive 128 percent under the following formula: 40% times X + 60% times .215 = 64%; X = 128%

[17] Hearing Counsel also dispute witness Tucker's predictions as to the 21.5 percent growth in cargo volume in the Japanese trade on the grounds that it was based on dollar growth which may not be related to *containerized traffic increases. However, witness* Tucker explained that he determined a trade growth index by considering a number of factors such as historic trade patterns during the period 1965–1976 and study of current trends in the Japan and U S. economies (Tr. 348–349, 354) He did study dollar statistics which he explained to be complete and accurate for the Japan-U.S. trade but *stated that his forecast has been based on the "macro-economics of* trade between the two countries . . ." (Tr. 351–352). The forecast was in terms of physical trade, not increase in dollar amounts. (Tr. 354).

But if overtonnaging provides such a climate, it must follow that overtonnaging, to some extent, promotes malpractices. Furthermore, the record in this case and numerous other cases demonstrate that it is virtually axiomatic that overtonnaging produces pressures on carriers to engage in malpractices in an effort to seek to reach a reasonable level of utilization of space in their ships. One does not need to read treatises on economics to realize that if a seller or producer has an excess of goods or services which are not being purchased and a continuing need to meet costs which run regardless of sales, such as rent, overhead, etc., the seller or producer will seek some way to push his goods or services onto the buyer. If there are many competitors in the market and comparatively few buyers, the pressures to sell are obviously more intense. But enough of obvious principles. What other evidence is there that overtonnaging promotes malpractices?

In this record there is the testimony of Mr. Donald G. Aldridge, Executive Vice President of U.S. Lines, an official having considerable experience in liner operations. He was asked by Hearing Counsel as to what are the primary reasons that lines rebate in the subject trades? He mentioned several possible cures for the problem, such as closed conferences, independent action, stronger dual rate contracts, pooling. But he concluded by stating:

> But, in our view, none of the cures reach the cause of rebating. The cause of rebating is overtonnage, and the proportion relationship between the amount of tonnage available and the amount of cargo available. And American trades are open. They are a dumping ground for the rest of the world. (Ex. 16, p. 73).

This view is confirmed by numerous decisions of the Commission and by the views recently expressed by the House Merchant Marine and Fisheries Committee. In Mediterranean Pools Investigation, 9 F.M.C. 264, 270 (1966), the Commission stated:

> Since World War II rebates and special concessions have, in the opinion of witnesses, been perpetuated by the seriously overtonnaged state of the WINAC trade. With every line seriously short of sufficient cargo to fill the available space, the pressures toward rebates and other concessions were formidable.

In *Agreement No. 10,000*, 14 SRR 267, 287 (1973), involving a pooling agreement in the North Atlantic trades, which was ultimately withdrawn, the presiding judge had remarked:

> As noted earlier, one of the reasons given by the pool members as justification for their agreemnt is that it will eliminate malpractices which cause rate instability. . . . The true cause of this turmoil was overtonnaging—each carrier doing its utmost to fill its ships.

Recently the House Merchant Marine and Fisheries Committee reported out the so-called "anti-rebating" bill (H.R. 9518) and stated:

> With excessive overtonnaging in our trades, many carriers have been offering secret kickbacks, commonly called rebates, to attract more cargo for their ships. H.R. Report No. 922, 95th Cong. 2nd Sess. (1978), p. 3.

Elsewhere in this Report, the Committee commented on "FMC testimony" regarding the problems stemming from present shipping regulatory laws which permit free entry in our liner trades. The Committee concluded:

> The result is that our liner trades tend to be overtonnaged even in good times and, absent an effective mechanism to stabilize the liner cargo/tonnage ratio, a climate conducive to rebating often prevails in the ocean trades of the United States. *Ibid.*, p. 10.

An obvious measure of overtonnaging is utilization or load factors experienced by carriers. Utilization of 90 or 100 percent indicates that there is sufficient cargo volume in a trade to match capacity whereas, when utilization plummets to the 50 percent range, as it did in the terrible year 1975 in the Far East trades, there is an obvious serious overtonnaging problem. Low utilization figures by themselves might indicate overtonnaging but not the extent of the pressures on carriers to engage in malpractices unless we know what level of utilization a carrier has to maintain before the carrier experiences financial difficulties. This record enlightens us on this point.

Both economic witnesses Tucker and Ellsworth generally agreed that fully containerized carriers on the dominant leg of a trade (in this case eastbound from Japan to the U.S. West Coast) must maintain utilization in the neighborhood of 85 percent as a break-even point. Hearing Counsel's witness Ellsworth conceded this point and stated that it is usually cited in literature on the subject. (Tr. 564–565). Witness Tucker found 85 percent to be marginal and any level below that to represent a "financial danger sign" to carriers. (Ex. 6, p. 4). Below 80 percent, according to Mr. Tucker, "clearly reflects existing, chronic overtonnaging." (Ex. 6, p. 4). There is thus a constant pressure on containerized carriers to maintain rather high load factors. Furthermore, as both witnesses recognized, the vast majority of ocean carriers' costs (85 percent) are fixed or constant, i.e., they continue to run regardless of whether the ships operate. This fact intensifies pressure on carriers to operate their ships as full as possible and seek new sources of business. This fact might also explain why carriers in the Far East trades, other than the Japanese, who are restricted to Japanese ports, have gone into other Far East markets especially on the westbound leg of the Far East trades, where the record shows chronically low utilization factors (one carrier, 33–39 percent from the Pacific Northwest and 50–60 percent from California from period July 1, 1976–June 30, 1977; 60–75 percent for three other carriers westbound, as examples).

On the eastbound dominant leg, utilization figures are much more favorable, at least into part of 1977, as I have discussed earlier, exceeding the 85 percent level for non-Japanese carriers, albeit the evidence was confined to the first four months of the year before the bulk of the container capacity increase took effect. The Japanese carriers' utilization had declined to 80.9 percent in August 1977 for the combined eastbound trade. As found previously, there is no way in which I can find that cargo growth in the Far East trades would match the 64 percent or higher container capacity growth for the period 1977–78. The prospect of carriers' maintaining utilization factors at 85 percent or above for the year 1978 in the eastbound leg is therefore subject to legitimate doubt.[18]

Finally, Hearing Counsel contend that it is non-conference competition that is the main reason for malpractices. I cannot agree. As seen above, it is almost universally conceded that overtonnaging is the prime culprit that fosters mal-

[18] Witness Tucker had estimated that eastbound load factors for all trans-Pacific carriers would decline to approximately 71.9 percent by the end of 1978, assuming a 47 percent increase in container capacity during 1977–78 and growth in cargo of only 21.5 percent (Ex. 6, p. 13). On brief, proponents state that the load factors would decline to 65 percent assuming a 64 percent increase in eastbound Far East capacity and assuming that the load factor was 87 percent at the beginning of 1977. Load factors may well decline but these precise conclusions are not sufficiently reliable since they are based upon a 21.5 percent growth in the Japanese trade only, rather than the total Far East trade area.

practices together with the peculiar economics of containerized carriers which have to maintain load factors of 85 percent. Certainly non-conference competition adds more tonnage and helps depress utilization factors. But, as the record shows, malpractices were at their worst in 1975, the recession year, when non-conference competition was at its lowest point. Malpractices declined in 1976 and in 1977, yet in 1977 there were five major non-conference carriers, all fully containerized (Seatrain, Evergreen, PFEL, FESCO, and Seaway Express) which were not present in 1975, were conference members, or were much smaller operators in 1975. Some carrier witnesses testifying in depositions acknowledged that nonconference carriers contribute to the problem of malpractices and cause problems. (See H.C. Answering Brief, pp. 6–9). However, the weight of the evidence tends to support proponents' contention that overtonnaging, not non-conference competition was the primary reason for malpractices. Even Hearing Counsel's witness has authored a statement which seems to corroborate proponents' contentions. (Confidential Ex. R–11).[19] Moreover, even Hearing Counsel concede that "an overtonnaged trade provides a climate in which malpractices and rebates may flourish." (H.C. Answering Brief, p. 40).

I conclude, therefore, from a preponderance of the evidence and from the conclusions of the authorities cited that overtonnaging coupled with the peculiar economic pressures on containerized carriers to maintain high load factors are the primary reasons for malpractices, and that non-conference competition is only a contributing factor, albeit a significant one.

III. This Pooling Agreement has not shown Itself to Have Been Greatly Effective in Reducing Malpractices. Other Factors Have Been Far More Effective.

Given the strong probability of an aggravation of the overtonnaging problem some time prior to the end of 1978 and the fact that overtonnaging is the primary cause of malpractices, does it follow that pooling agreements and more specifically, Agreement No. 10116, will be an effective deterrent to malpractice? Hearing Counsel cite at least seven factors that they believe were the true reasons why rebating declined after 1975, none of which factors related to the subject pooling agreement. Hearing Counsel also state that even if the subject pooling agreement assisted the Japanese carriers to reduce malpractices, this would not help the whole trade unless there were a trade-wide pool of all carriers or unless the primary reason for malpractices happened to be Japanese malpracticing. Hearing Counsel contend that carrier witnesses furthermore failed to corroborate proponents' claim that their agreement was effective in reducing malpractices.

Proponents contend, on the contrary, that there is evidence in this record showing that their agreement has been effective in reducing malpractices. They

[19] Further refutation of Hearing Counsel's argument is shown by the facts that malpractices have been a more serious problem in the westbound trades than eastbound, yet two of the largest non-conference carriers eastbound are or were conference members westbound (Seatrain and PFEL). In the westbound trades, the evidence shows lower utilization factors, i.e., more serious overtonnaging. This would further indicate that overtonnaging, not non-conference competition, is the primary reason for malpractices

do not contend that their agreement was the sole reason for the decline in rebating, acknowledging other factors, but emphasize that the very reason for a pooling agreement is to make rebating uneconomical and therefore, to discourage it. They also acknowledge that rebating occured after the Commission approved Agreement No. 10116 in March 1975, but explain that it nevertheless declined and that rebating could not be turned off overnight, especially when the first year's result of the pool were not known so that a member line of the pool did not know whether it would be liable as an overcarrier or entitled to added revenue as an undercarrier.

Reading the evidence as a whole, I believe that a fair conclusion is that the Japanese and Far East trades, which admittedly became cleaner after 1975, did so for a number of reasons and that the subject pooling agreement, while in theory, discouraging rebating, had at best only minimal effects. There were, as Hearing Counsel contend, many factors which occured after 1975 which point to the conclusion that these factors rather than the pooling agreement were the real causes for reduction or elimination of malpractices. Furthermore, although pooling agreements in theory are supposed to discourage malpractices, the facts surrounding a particular pooling agreement are more important when determining whether the pooling agreement will really work, theory or no theory.

First, there were events which occurred after 1975 which any reasonable observer must conclude to have had strong effects in reducing malpractices. Hearing Counsel list seven factors. (H.C. Answering Brief, p. 31). Among these factors are the following: increase in cargo volume, increase in action by the U.S. Government against carriers found to be rebating, a direct admonition or order of the Japanese Government to stop rebating issued on November 16, 1976, improved self-policing by the neutral-body system serving the conferences, commitment by the owners of the carriers to clean up the trades, the development of mini-landbridge services, and the lowering of certain rates by the Pacific Westbound Conference (PWC). As Hearing Counsel point out, these factors do not appear to relate to the pooling agreement. Furthermore, ask Hearing Counsel, if the agreement was really so effective, as proponents maintain, why was it necessary for the Japanese Government to direct Japanese carriers to clean things up as late as November 16, 1976, i.e., over a year and one-half after the pooling agreement had been approved by the Commission?

I have studied the arguments of proponents who attempt to explain these facts and to persuade me that the pooling agreement was effective in reducing malpractices. However, here the preponderance of the evidence points to the conclusion that proponents' pooling agreement did not in fact have a great deal to do with the improvement in the rebating situation in the trades. Consider these facts more closely and remember that although in theory, pooling agreements are supposed to discourage malpractices, much depends upon the facts of a particular pool or trade.

It is stipulated that the year 1975 was the worst in the Far East trades in terms of rebating and that rebating declined in 1976 and still further in 1977. Yet 1975 was the worst year in terms of cargo volume since, as noted, that year was marked by a worldwide recession. Recovery began in 1976 and continued hereafter. But at the same time rebating also declined. It must be more than mere

coincidence that with the increase of cargo volume, there came a decrease in rebating. As more cargo became available, the need to rebate to attract cargo obviously subsided. Even proponents took pains to show that small volume of cargo in relation to large container capacity causes malpractices, as I have discussed above. Furthermore, additional testimony of record confirms that an important reason for reduced malpractices is the availability of cargo. (Ex, 16, p. 37; Ex. 23, pp. 55–56; Ex. 1, pp. 61–62).

Another important factor which helped clean up these trades is the activity of the Commission and other U.S. Government agencies in eliminating rebating and the improvement in conferences' self-policing. Even proponents do not deny the effects of these activities, stating that "[t]he investigations by various United States government agencies (e.g., FMC, Securities & Exchange Commission, Department of Justice), no doubt, had a greater impact on U.S. flag carriers than on other. . . . There is also testimony that conference self-policing impacts more strongly on U.S. and Japanese carriers than on third flag carriers whose records may be physicially less available." (Proponents' Reply Brief, pp. 58–59). Proponents were trying to assert that this increased activity by government and conference agencies was not uniformly effective. However, testimony of various carrier witnesses on deposition acknowledged the importance of this factor. One witness attested to the fact that reduction of malpractices began in 1976 "coincidental with the application of pretty heavy fines against conference members who had been found in violation." (Ex. 8, p. 52). Other witnesses vouched for the increased effectiveness of Freight Conference Services, Inc. (FCS), the conferences' self-policing body. Since the Commission's Supplemental Order directed specific inquiry into the activities and effectiveness of FCS, Hearing Counsel developed facts on this subject in greater detail than they might otherwise have done. The evidence regarding FCS shows that it has been effective and is causing a reduction of malpractices in the Far East trades. (Ex. 7, pp. 46, 38–39). This evidence describes how more effective FCS has become with increased experience and how highly regarded it is, although it shows that FCS has perhaps been less effective against actual rebating than against non-rebating malpractices[20] and that U.S. and Japanese carriers are more vulnerable to FCS than conference third-flag lines because of the accessibility of corporate offices in the two countries. Nevertheless FCS has access to relevant documents, conducts thorough investigations, and employs an efficient, conscientious staff of investigators. Both conferences, eastbound and westbound, have invested heavily in FCS in the hope of stabilizing the Far East trades.

Other testimony by carrier witnesses point to still other factors as having beneficial effects on the rebating problem, namely, the commitment by owners of carriers of all flags to clean up the trades prompted by increased governmental and FCS activity, increase in cargo volume attracted by new mini-landbridge services, and certain rate reductions by PWC in the westbound trades.

[20] These other malpractices, described as "operational malpractices" consist of such things as absorption of drayage, handling, or container freight station charges, short-cubing, short weight, predating bills of lading, waiving detention charges or demurrage charges. These malpractices apparently are more prevalent than rebating. (Ex. 13, p. 55, 94, 96), (H.C. Answering Brief, p. 13). The opinion that FCS might be less effective against rebating than against operational malpractices was expressed by Mr. Gota Yamada, proponents' main carrier witness, Director of Mitsui-O.S.K. Lines, Ltd., a forthright and personable gentleman and witness. (Ex. 1, p. 21).

All of the above testimony was given by officials of carriers operating in the subject trades. Proponents do not seen to deny that these factors helped to reduce malpractices but insist that such facts do not mean that the pooling agreement was not also effective in achieving the same objective. However, one significant fact does undermine proponents' argument regarding the effectiveness of their agreement. That is, if the pooling agreement was so effective, why did the Japanese Ministry of Transport (MOT) issue instructions on November 16, 1976, to the Japanese lines to discontinue malpractices? (Tr. 22–23, 25: Ex. 1, pp. 45–47). And if the agreement had been so effective, why is there testimony that after these instructions were issued by the Japanese Government, the Japanese lines began to reduce intentional malpractices? (Tr. 25–26, 91, 101; Ex. 12; Ex. 1, p. 47). Also why were strict instructions to employees and agents of the six Japanese carriers to comply with applicable laws, conference agreements, and tariffs not given until after the Government directive to stop rebating? (Tr. 139–140; Ex. 1, p. 159).

Proponents counter these facts by stating that the carrier witnesses who were deposed did not definitely relate the decline in rebating to the instructions of the Japanese MOT. Proponents are generally correct since the deponents acknowledged the issuance of the MOT directive but did not deny that other factors were at work and did not assert that the decline in malpractices was traceable to the MOT directive, except for one deponent who admitted he had no definite proof. Indeed, another carrier's deponent believed that the pooling agreement should be having an effect upon Japanese malpractices. (Ex. 16, p. 89.)

Mr. Yamada, chief witness for the Japanese carriers, a forthright gentleman, acknowledged the existence of the MOT warning but testified that the pooling agreement was "a much more important factor." (Ex. 1, p. 46). He also testified that malpractices had stopped largely because of the pooling agreement. (Ex. 1, p. 46; Tr. 25). He also acknowledged that malpractices did not stop immediately after the Commission first approved the pool on March 7, 1975, but stated that some reductions in malpractices began to occur three to six months following approval of the agreement. Not until the latter part of 1976 did Mr. Yamada believe that malpractices had been substantially reduced (August-September through December, Tr. 101). Since 1977, Mr. Yamada believes that Japanese malpractices have been virtually nonexistent. (Ex. 1, pp. 67, 68). However, he candidly asserted that "nothing can be stated absolutely." (Ex. 2, p. 20).

Proponents' explanation as to why it took so long for the pool to cause reduction in Japanese malpractices would have seemed plausible but for a certain inconsistency. Thus, he stated that the pool did not have effect for some time after approval to any substantial degree because the parties to the agreement did not have their first-year report and make their cash settlement until some time after September 16, 1976. (Tr. 92). He testified that monthly reports were issued but that they did not allow a party to know what its "potential" was, i.e., no line could tell for sure whether it would be an overcarrier or an undercarrier at the end of the accounting period. (Under the theory of pools, an overcarrier surrenders all of the revenue derived from carriage above its share less certain costs. Therefore, in theory, no carrier wants to become an overcarrier and thereby retain no revenue above costs.) But then, proponents argue inconsistently that

"there was some reduction in malpractices three to six months following the pool's implementation in 1975, *as the monthly reports were in*" (Tr. 100), a condition the State Line deponent also confirmed. (Ex. 8, p. 62). So what is it? Did the pool help reduce incentives to rebate and actually reduce rebating during the three to six months following approval because the monthly reports were in, or was there no real incentive to discontinue rebating until the final report was circulated and the cash settlement took place on September 16, 1976, when Mr. Yamada testified that the carriers "now . . . know how big the out-of-pocket means." (Tr. 93). It is this kind of inconsistency that undermines proponents' contention that the agreement really began to have much of an effect on reducing rebates shortly after its approval. Furthermore, even Mr. Yamada candidly acknowledged that during the latter part of 1976 when rebating had been "substantially decreased," there was also an increase in cargo and this was part of the reason for the improvement in the rebating situation. (Tr. 102).

Hearing Counsel rely heavily on confidential exhibit (Ex. 24) relating to rebates to one important shipper in support of their contention that rebating actually increased during the year and one-half after the pool's approval. Proponents rebut this contention by showing that the exhibit relates to one shipper and refers to shipments occurring considerably earlier in time than September 1976 and that one cannot tell from the exhibit whether rebates were paid on cargo moving to the West Coast under the pooling agreement either in part or in whole. Proponents also explain that old habits die hard and could not be readily cut off. Nevertheless, rebating did apparently occur with regard to the one shipper involved during much of 1976, terminating by September 1976. Furthermore, some shipments did occur in 1976 and as late as July 1976 in two instances. Old attitudes or not, it is disconcerting to find that shipments on which rebates were paid occurred at all more than one year after the agreement had been approved by the Commission.

It is not necessary nor indeed would it be sound to conclude that rebating had been increasing up to September 1976 on the basis of experience with only one shipper, prominent though that shipper might be. However, it is not necessary to rely on exhibit 24 since even Mr. Yamada acknowledged that rebating had continued into the year 1976. If one considers all of the other factors which so many witnesses cited as having beneficial effects other than the pooling agreement and the need of the Japanese MOT to issue its warning as late as November 1976, one cannot really conclude with any degree of confidence that the pooling agreement played much of a role in reducing malpractices. Rather, as I discuss below, the main reason for the pooling agreement is more probably the fact that it works closely with the Japanese space chartering agreements, helping to make them more effective. There is also the possibility that since the space chartering agreements depend upon the continued presence of all six Japanese carriers to maintain frequency of service, a pooling agreement which can help an undercarrier by infusing it with pool revenues helps ensure the continued effectiveness of the space chartering agreements. As I also discuss below, furthermore, instead of struggling to prove that the pooling agreement was the main factor or a major factor in cleaning up these trades, in the face of so many facts showing so many other reasons for the decline in rebating, proponents should have concentrated on

showing how the pooling agreement works intimately with the three space chartering agreements which the Commission has emphatically found to be beneficial to the trades and in the public interest. It is this last factor that finally persuades me that the pooling agreement, which does not really harm any other carrier, should be approved.[21]

IV. Why Pooling Agreements May Not Work Well in Practice to Reduce Rebating, Although in Theory They Are Supposed to.

Proponents assert the standard theoretical framework which all proponents of pooling agreements believe to show irrefutably that such agreements discourage rebating. The theory is that with a guaranteed proportion of revenue, why should any carrier wish to incur the extra cost of rebating? Furthermore, since all revenue received by any member of a pool must be shared with the others, i.e., since each member retains only a small share of the revenue, why should he pay a rebate, and if the carrier turns out to be an overcarrier, he surrenders all the revenue to the other members, thus incurring costs of rebating without any compensating revenue. (Ex. 2, pp. 23, 23).

Proponents illustrate this theory by a hypothetical situation. Thus, if, in a six-carrier pool, such as Agreement No. 10116, a carrier keeps only one-sixth of each $100 revenue on cargo subject to the agreement, i.e., $16.67, why would the carrier pay out, say, a 10 percent rebate? The answer should be obvious. Under this set of facts the carrier retains $16.67 and pays out only $10. In fact, the carrier could even rebate up to around 15 percent, i.e., pay out $15 and still come out ahead. Remember also that the pooling agreement allows each carrier to keep other revenue for certain direct costs, called "allowances." Thus, at best, all the pooling agreement would do would be to keep the size of the rebates down, in this instance to something under 16 percent or so. It would not necessarily stop the rebate. It is critical to bear in mind that in the economics of ratemaking for containerized carriers, 85 percent of their costs are fixed and indirect, such as overhead, depreciation, etc. This means that if the carrier can get some revenue over and above direct costs such as stevedoring, it may still be economical to get that revenue so as to make some contribution toward indirect costs. So long as the revenue does not fall below direct costs, the carrier does not really lose any money for each ton of cargo it carries. Therefore, a pool member may feel it worthwhile to retain only $16.67 per $100 plus the pool "allowances" for costs which the agreement lets him keep, and still pay out $15

[21] I believe that the above discussion illustrates amply that the record shows many reasons for the decline in rebating other than the pooling agreement. Hearing Counsel add several other arguments in this regard. They contend that the Korean trade cleared up without any pooling agreement and that eight carrier deponents did not attribute decline in rebating to the pooling agreement in question. There is suggestive testimony that malpractices have declined in other Far East trades such as Korea, although perhaps not as fast as they have declined in the Japanese trades. (Ex. 13, pp. 99–100; 102). However, certain malpractices continue in the Korea trade as well as in Hong Kong and Taiwan, known as "tea money," which is money paid to lower clerks in the shippers' organization. (Ex. 1, p. 33). Furthermore, there is testimony that the Korea trade westbound is essentially military as well as being "absolutely clean." (Ex. 16, p. 72).

As to the eight carrier deponent witnesses, it is not quite accurate to state that none of them saw any real relationship between the pooling agreement and the decline in rebating. Although they mainly recognized a number of factors at work in reducing rebating, some of them did acknowledge that a pooling agreement should or possibly did have some beneficial effect in helping to reduce rebating. (See, e.g., Ex. 8, p. 72; Ex. 15, p. 57; Ex. 13, pp. 117–118; Ex. 9, p. 87; Ex. 16, p. 89). This testimony is mainly opinion-based and not expressly related to hard facts but in some instances it was the opinion of the witnesses that the pooling agreement had beneficial effects by itself. (See Ex. 15, p. 57; Ex. 13, pp. 117–118).

in a rebate. All of the above discussion is not mere daydreaming. This Commission and authorities on the economics of transportation have long recognized the fact that for some shipments, any revenue over direct, variable costs is worth having and it is further recognized that carriers may set rates lawfully anywhere between direct, variable costs and fully distributed costs plus profit. *See, e.g., Investigation of Increased Rates on Sugar/Puerto Rico Trade,* 7 F.M.C. 404, 411–412 (1962); *Matson Navigation Company–Reduced Rates on Flour,* 10 F.M.C. 145, 148–149, 153 (1966); *Gulf Westbound Intercoastal Sova Bean Oil Meal Rates,* 1 U.S.S.B.B. 554, 560 (1936); *Investigation of Ocean Rate Structures,* 12 F.M.C. 34, 37 (1968), cited above. For a fuller discussion of the principle that it may pay a carrier to carry a commodity at a rate which barely exceeds direct costs of handling since such a rate will contribute to fixed costs, see Locklin, *Economics of Transportation,* (6th Ed. 1966), Chapters 8 and 9.

But, argue proponents, if the pool member becomes an overcarrier, i.e., if he exceeds his one-sixth share at the end of the accounting period, does he not surrender all revenue to the other members and, if so what revenue can he keep to meet direct costs, which must be met or else the carrier suffers a net loss every time it carriers a ton of such cargo.? First, remember that even if all of the revenue must be surrendered to the other five carriers because the first carrier exceeded its one-sixth share of pooled revenue, the first carrier, under Article 4 of the agreement, is allowed to keep a certain portion of the revenue which will cover at least the cost of terminal and handling plus surcharges and even "such other special allowances as may be decided." (Ex. 2, pp. 10–12; Proponents' Opening Brief, p. 4). By not keeping any other revenue to compensate for a rebate of $10 or $15 per $100 of revenue, of course, this overcarrier will have suffered the cost of the rebate without compensation, unless there are "special allowances as may be decided." (There is, however, no evidence that the "special allowance" provision has been used in any improper way.) However, the overcarrier does not know how much of an overcarrier he is until the final accounting and cash settlement. Meanwhile, during the preceding year, if there has been enough revenue and the carrier has been keeping close to his predetermined one-sixth share, he may have netted out enough revenue to cover rebates plus keeping the other "allowances" so that the final accounting might not offset the earlier net returns over direct costs. Of course, if the carrier is an undercarrier, and not subject to the penalty clause of the agreement for failure to maintain 85 percent of its pool share, this carrier will not lose all of its revenue to the other members, on which revenue, rebates had been paid.

All of the above does not mean to say that there is absolutely no incentive to restrict or eliminate rebating under a pooling agreement. It merely means that the disincentive factor may sometimes be exaggerated and that the facts of the trade, number of pool members, and other considerations may well interfere with the theory that pooling agreements cause elimination of rebating.[23]

[23] There has been no probing of the proponents' witnesses to confirm my analysis. Proponents' expert witness merely gives a hypothetical situation in which he claims that it would not be sensible to pay out five-sixths of revenue for the sake of paying a 10 per cent rebate. Of course, if there were 10 pool members and each carrier retained only one-tenth of the revenue, one could then argue that any rebate over $10 per $100 of revenue would be discouraged. Since there has, to my knowledge, never been a policing or monitoring of pooling agreements by the Commission to see if the facts confirm that it has not been economical to rebate in view of cost settlements and contributions actually made, no one has shown that carriers have continued to rebate under pooling agreement

Lest the reader believe that the above analysis is merely theoretical and the reader asks for some concrete evidence that it may indeed pay for a carrier member of the pooling agreement to continue rebating under certain circumstances despite the supposed disincentives to rebate built into the pooling agreement, Mr. Yamada, a forthright and candid witness for the six Japanese carriers, acknowledged that under some circumstances sizeable rebates could continue to be paid by a carrier member despite the pool when it appeared that a large volume of cargo was obtained and that the carrier was an undercarrier. (See Tr. 102–105, cited in H.C.'s Answering Brief, pp. 19–20).

V. Certain Benefits Will Flow From Continued Approval of this Pooling Agreement.

Although proponents concentrate heavily on their claim that the main benefit of the pooling agreement has been to reduce malpractices, a claim which I have seriously questioned and found not to have been proved, there are a number of other benefits which proponents contend to have stemmed from the agreement. For example, they contend that the following benefits have resulted: cost savings, better utilization of vessel capacity, reduction in number of carrier solicitors, increased number of vessel calls at Portland, Oregon, and Nagoya, Japan, greater implementation of certain provisions of the Commission-approved space chartering agreements relating to container interchange and subchartering, reduction of pressures to raise rates, expansion of the range of commodities carried, and maintenance of slower vessel speeds with consequent fuel savings. (Proponents' Opening Brief, pp. 55–60). Hearing Counsel refute proponents by arguing that these benefits, if that is what they are, are only "private" to the pool members alone, are not the result of the agreement, or that some of them, namely, the greater use of the interchange and subchartering agreements, actually work to the detriment of non-Japanese carriers. I find that there is some merit to proponents' contentions regarding these additional benefits, although they vary in quality and in evidentiary support. There are sufficient benefits, moreover, especially in relation to the furtherance of the three Commission-approved space chartering agreements, to persuade me that the pooling agreement merits continued approval and furthermore, that because of the interrelationship between the pooling agreement and the space-chartering agreements, approval should be correlated with approval of those agreements as well, that is, that the Commission should eventually consider all of these agreements as one and determine whether the benefits flowing from all of them outweigh any detriment.

There can be little doubt as to the close interrelationship between the pooling agreement and three space charter agreements approved by the Commission in Docket No. 75-30, *Agreement Nos. 9718-3 and 9731-5*, 16 SRR 1553 (1976), and by separate order (Agreement No. 9835), November 1, 1976.

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because rebating has in fact still paid off. This record, however, shows that rebating did continue after approval of the agreement and that other factors were effective in eliminating rebating, as I have discussed. Finally, I fully recognize that no carrier can operate profitably if it merely nets out some revenue above direct costs, under my analysis above, on all of its shipment. There must be some commodities on which the net revenue returns a profit above all costs, direct and indirect. But this statement applies whether there is a pool or not and even where there is no rebating some commodities cannot pay all costs plus return a profit.

The Commission itself has several times recognized the connection between the space chartering and pooling agreements. In its Supplemental Order in this proceeding, the Commission directed the parties to consider "the quantitative and qualitative effect of Agreement No. 10116, either alone or in connection with . . . Agreement Nos. 9718, 9731, and 9835, upon overtonnaging and malpractices. . . ." SO, p. 9.

Similarly, in Docket No. 75-30, the Commission stated in its Modified Order of Investigation, October 16, 1975, at pp. 3-4:

[P]roper consideration of Agreements 9718 and 9731 may not be accomplished if those two Agreements are viewed in a vacuum. If there is evidence which shows . . . the interrelationship between Agreements 9718 and 9731 and other agreements in those trades, or which shows the effect of any such interrelationship, that evidence is relevant to the issues presented in this investigation. This is so because the anticompetitive effect, if any, of Agreements 9718 and 9731 might well be substantially different if those two Agreements were the only agreements in the U.S. West Coast/Japan trades to which the Respondent Carriers were party than if the Respondent Carriers are party to other agreements in those trades which interlock with the Agreements under investigation.

Evidence shows that the space chartering and pooling agreements are indeed "interlocked." All of the six Japanese carriers who are members of the pooling agreement are members of one or more of the space chartering agreements. All of the cargo subject to the pooling agreements also moves under the three space chartering agreements. All of the space chartering and pooling agreements have the impetus, direction, and backing of the Japanese Ministry of Transport and represent the Japanese Government's long-range plans for its merchant marine which assume that the space chartering and pooling agreements together will help restrain excessive competition and eliminate malpractices.[23] Indeed, as the Director General of the Japanese MOT advised on November 7, 1977:

My Ministry still believes that the pooling arrangement *in combination with the space chartering arrangement* is instrumental in avoiding excessive competition and in eliminating malpractice, although it is not the total solution to the problem. (Ex. 2, App. 3). (Emphasis added.)

As if the foregoing facts were not enough to illustrate conclusively that the space chartering and present pooling agreements are inextricably interrelated, Article 5 of the present pooling agreement, No. 10116, indicates that the very shares which each party will enjoy are based upon the vessel contributions made under the three space charter agreements.[24]

Whatever benefits have been shown to have resulted from approval of the three space chartering agreements and the Commission has emphatically found in Docket No. 75-30 and by separate order, that important benefits do flow from those agreements, any auxiliary agreement such as the present pooling agree-

[23] A detailed description of the three space chartering agreements is contained in Docket No. 75-30, *Agreements Nos. 9718-3 and 9731-5*, 16 SRR 1087 (Initial Decision, which, as to these facts, was not modified by the Commission's final decision). The Commission has included the record in No. 75-30 in this proceeding, as mentioned earlier.

Briefly, the record in that case, as discussed in the Initial Decision, shows that the Japanese MOT supervised efforts of the six Japanese carriers to convert to containerships in the trade between Japan and the Pacific Coast of North America. Plans were made to construct containerships, allocate them among the six carriers, and arrange for reciprocal sharing of cargo space on the vessels, sharing of containers, and terminals. The first two space sharing agreements were dated May 9 and June 6, 1968, and related to the California trade. A third agreement effective since 1971, related to the Pacific Northwest trade. The first two agreements have been in effect ever since 1968. In 1973, the Japanese MOT directed the formulation of the present pooling agreement. (Ex. 2, p. 5, App. 2).

[24] Therefore, the pool parties share revenue in the Northwest and Pacific Southwest trades as one-sixth for each carrier, except in the Pacific Southwest trade, the shares of NYK and Showa are apportioned as one-fifth and two-fifteenths respectively. NYK and Showa are the only parties to Agreement No. 9731 in the Pacific Southwest whereas the other four Japanese carriers are members of the other two space chartering agreements (9718 and 9835).

ment will assist the basic space chartering agreements and thus help the Japanese carriers to provide more frequent service, to improve utilization, and to keep down the overtonnaging problem as the Commission found and the record shows in Docket No. 75-30. Thus, any auxiliary agreement bound to the basic space chartering agreements, as the pooling agreement is, deserves continued approval. The Commission can hardly find so much merit in the space chartering agreements and little or no harm resulting from them as it did in No. 75-30 and then find the auxiliary pooling agreement, which is designed, to some extent, to improve the workings of the space chartering agreements, to be detrimental to commerce and contrary to the public interest. Of course, if the space chartering agreements, when next submitted for continued approval, are no longer found to be providing benefits, the intimately related pooling agreements may have to be considered in a new light.

In approving two of the space chartering agreements (Nos. 9718 and 9731), the Commission specifically found that the agreements permitted proponents to offer a service which they deemed competitively necessary but without increasing the number of ships in the trade. The Commission also found that the space chartering agreements helped to keep a high number of carriers in the trade. These facts were deemed to be benefits by the Commission. In this regard the Commission stated:

These agreements permit Respondents to offer the level of service which they consider competitively necessary, a determination not unreasonable on this record, with substantially less capacity than would be required for each Respondent to individually offer that level of service. The agreements, therefore, tend to ameliorate the overtonnaging problem in the transpacific trades and tend to keep a high number of common carriers in those trades. Both of those results are beneficial to the public, and outweigh the anticompetitive effects of these agreements, demonstrated on this record, sufficiently to justify the continued implementation of these agreements until August 22, 1977, the date upon which Agreement Nos. 9718 and 9731 will terminate in accordance with the amendments now before the Commission for approval. Docket No. 75-30, cited above, 16 SRR at 1567.[25]

The Commission had similar remarks to make when approving the third space chartering agreement (No. 9835) in the Pacific Northwest, as follows:

[Q]uite obviously [the agreement] affords transportation benefits, including, among others, the regularity of service and the efficient utilization of high cost equipment, which far outweigh any relevant antitrust considerations which could be marshalled against its approval under section 15. *Agreement No. 9835*, 14 F.M.C. 203, 207 (1971). Cf. *City of Portland, Oregon v. Federal Maritime Commission*, 433 F. 2d 502, 502 (D.C. Cir. 1970), which had commented on the beneficial services provided under Agreement No. 9835.

The record in Docket No. 75-30 supports the Commission's findings regarding improved efficiencies, better service, and reduction of pressures to overtonnage which resulted from the space chartering agreements. See discussion in the Initial Decision, 16 SRR at pp. 1113-1115.

The above benefits, it should be noted, were precisely those that the framers of section 15 of the Act had in mind. As the legislative history to that Act shows in the so-called Alexander Report,[26] frequent, regular service, elimination of wasteful competition, and even the protecton of weaker lines so that they might

[25] As noted earlier, these agreements and Agreement 9835 have continued in effect to the present time. They are due to expire in August 1979 and August 1980, unless the Commission grants extensions.

[26] House Committee on Merchant Marine and Fisheries, Report on Steamship Agreements . . . . H. Doc. No. 805, 63rd Cong. 2d Sess. (1914).

continue serving a trade, were considered benefits which the Commission should consider when determining whether to approve agreements. Alexander Report, pp. 295–303. Of more recent interest are similar recommendations of the Antitrust Subcommittee of the House Committee on the Judiciary, Report No. 1419, 87th Cong. 2d Sess., March 12, 1962, the so-called "Celler Report." After a thorough study of the ocean shipping industry, the Celler Report found advantages (plus some disadvantages) to pooling agreements. Among the advantages were greater efficiencies and better service. The Report stated:

> There are undoubtedly economic reasons which compel steamship lines to enter into one or more of the types of pooling agreements outlined above. Elimination of overlapping and duplicating transport facilities, the benefit derived from offering more frequent sailings, and distribution of the risks of the trade are but a few of the advantages accruing to participants in pooling arrangements. Celler Report, p. 71.

The Celler Report also cited an earlier decision of this Commission's predecessor agency which commented on advantages flowing from pooling agreements such as "increased frequency of service at principal ports, adequate coverage at lesser ports . . . increased earnings by the carriers from maximum utilization of vessel space, better balanced cargoes. . . ." *Lykes-Harrison Pooling Agreement*, 4 F.M.B. 515, 520 (1954).

Of course, the Celler Report was not talking about the present pooling agreement and had also been discussing different types of pooling agreements, such as those which are reactions against restrictive foreign cargo preference decrees and are designed to combat discrimination. Also the Report mentioned disadvantages that could also result, such as attempts to monopolize, discouragement of vigorous solicitation of cargo or of furnishing additional services to shippers. Celler Report, pp. 171–172; pp. 157 *et seq.* However, neither the record in Docket No. 75–30 as the Commission found, nor the record in this case shows the present pooling agreement as designed to seek a monopoly or to restrict cargo to any nation's carriers, or to result in curtailment of the frequent services offered under the space chartering agreements, although the agreement is supposed to restrain competition among its members. There is no persuasive evidence that the present pooling agreement nor the space chartering agreements were designed to harm any outside party, as the Commission found in Docket No. 75–30 and in the Supplemental Order in this proceeding. Although Hearing Counsel oppose approval of the present pooling agreement, which, as I have found, is auxiliary to the space chartering agreements, Hearing Counsel wholeheartedly endorsed complete approval of the two space chartering agreements in Docket No. 75–30. Hearing Counsel contended that continued approval of those agreements would result in substantial benefits to the trade and noted that "only a small union, with an extremely narrow concern, saw fit to protest the continued approval. . . ." (H.C. Brief in No. 75–30, p. 17). Hearing Counsel also noted that American carriers such as APL, Sea-Land and United States Lines could not detect a negative impact from the agreements and that the agreements produced benefits such as providing modern, efficient, coordinated containership service without burdening an overtonnaged trade. See discussion in Docket No. 75–30, Initial Decision, 16 SRR at p. 1107. Of course, at that time Hearing Counsel were working with a record which they believed to show dangers from overton-

naging which they no longer perceive. However, the space chartering agreements were the major agreements which enabled the Japanese carriers to improve service, introduce new containerized ships, and gradually gather a greater share of cargo in the subject trade at least in the first few years after approval. Yet Hearing Counsel found benefits of the agreements clear, urging total approval. The present pooling agreement, an auxiliary spinoff from those agreements, is not presently protested by any other carrier, by a shipper, or by anyone other than Hearing Counsel. Yet, in the last analysis, all that is happening is that six Japanese lines wish to share revenue among themselves, when there are over 20 other carriers in the trades and more probably coming in, and when there is no showing that the pooling agreements are causing a trend toward monopoly or rise in the Japanese carriers' share of the total relevant market, which the Commission in Docket No. 75-30 defined to include both conference and non-conference carriers. 16 SRR at p. 1559. But now I return to the benefits, which Hearing Counsel dispute.

As noted, Hearing Counsel contend that the benefits offered by proponents, if their pooling agreements continues to be approved, are only "private," are not caused by the agreement, or are even harmful to other carriers. Proponents contend, with some merit, that Hearing Counsel are wrong.

Most of the benefits listed by proponents relate to cost-savings and greater efficiencies of one type or another. Thus, witness Yamada, proponents' chief spokesman, testified that the pooling agreement had acted as a disincentive against resuming faster vessel speeds, thereby maximizing fuel savings. (Ex. 2, p. 23). He also testified that the number of solicitors employed by each of the pool members had not increased since 1972 although volume of cargo has increased by more than fifty percent since 1975. Thus, costs per cargo would decline. Hearing Counsel's expert witness Ellsworth did not dispute proponents' contention that efficiencies and cost savings occured. Indeed, he conceded that "[T]he cost savings that might arise from this revenue pool are not to be ignored." (Ex. 19, p. 3).[27] Witness Yamada further testified that the pooling agreement had had the effect of increasing the number of vessel calls at Portland, Oregon, and Nagoya, Japan, by the carrier members of the pooling agreement. Proponents state that since all parties share in revenue generated at all ports, carriers having little cargo at Portland no longer oppose calls at Portland by any pooling member. Another claimed benefit is the holding down of vessel speed which saves fuel. This is claimed to be a result of the pooling agreement which is supposed to encourage cost hold-downs. Another claimed benefit is the expansion of each carrier's efforts to solicit lower-rated commodities. The theory is that while the space chartering agreements alone would not encourage a Japanese carrier to seek out lower-rated cargoes, the pooling agreement would remove any carrier's reluctance to carry such low-rated items since it would share revenue from the other members of the pool. (Note that this appears to be a similar

[27] Of course, Mr. Ellsworth did not thereafter support the agreement despite admitting that cost savings could not be ignored. He went on to testify that whatever benefits might result from cost savings would be offset or diluted by the fact that only the Japanese members of the pooling agreement derived such benefits, that it would give them a competitive advantage over other carriers, and that ultimate benefits to shippers would be minimal. (Ex. 19, p. 3). I have discussed these contentions in the text of my decision and find them to be unpersuasive.

conclusion to that made by the Alexander Report, namely, that pooling agreements tend to help maintain service by weaker carriers). (Alexander Report, pp. 300–301). The Union, in the earlier phase of the proceeding had argued that the pool would enable stronger lines to "prop up" weaker ones. The Commission had found no facts to support such a conclusion on the basis of the earlier pool reports and proponents have resisted the conclusion. Nevertheless, why should any carrier be less reluctant to seek out lower-rated cargoes unless it knew that it would be getting revenue from the other members of the pool if it were an undercarrier?[28] All of these costs savings are supposed to help Japanese carriers keep rates down in conference meetings since these carriers are so efficiently operated.

The above factors are certainly benefits. Greater efficiency in utilization of equipment has long been recognized to be a benefit. The Alexander Report recognized that anticompetitive agreements could reduce wasteful competition, "thus reducing the aggregate cost of service of all the lines." Alexander Report, p. 302. Furthermore, the Celler Report and the case cited on p. 171 of that Report[29] also demonstrate the belief that efficiencies and elimination of wasteful duplication are certainly benefits. Finally, the Commission has often recognized that the financial soundness of carriers serving the commerce of the United States is a necessary consideration since carriers are the "instrumentalities" of that commerce. *See, e.g., Regulations Governing Level of Military Rates,* 13 SRR 411, 412 (1972); *Seas Shipping Co. v. American South African Line, Inc.,* 1 U.S.S.B.B. 568, 583 (1936); *Secretary of Agriculture v. N. Atlantic Continental Freight Conference,* 4 F.M.C. 706, 739 (1955); *Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trade,* 11 F.M.C. 168, 174 (1967).

Hearing Counsel's attacks on these benefits do not make them disappear. Thus, in arguing that cost savings and greater efficiencies are really only "private" benefits to the Japanese carriers, this overlooks the above findings and conclusions expressed in so many decisions, including that in Docket No. 75–30, that such benefits are also public benefits. As noted, furthermore, even Hearing Counsel's own expert witness testified that the pool's cost savings could not be disregarded. Hearing Counsel's claim that other carriers held their sales force in status quo although not entering into any pooling agreement is only partially accurate. Other carriers (USL, States, PFEL, and FESCO) appear to have increased their sales staffs. (See Ex. 16, p. 6; Ex. 8, p. 29, Ex. 9, p. 29; Ex. 23, pp. 17–18; Ex. 15, p. 21). The additional calls at Portland and Nagoya may have resulted from increased cargo at those ports, not because of the pool, as Hearing Counsel argue. However, witness Yamada could not say that cargo

[28] The Alexander Report believed that pooling agreements helped keep weaker lines in a trade. The Commission had agreed with proponents earlier in this proceeding that the pooling agreement was not designed to "prop up" weaker Japanese lines since evidence of record did not sustain the idea that any Japanese line would be likely to leave an important Japanese trade or that any line had financial difficulties. Nevertheless, proponents' present argument that the pooling agreement encourages service at Portland and Nagoya and encourages members of the pool to solicit lower rated cargoes, while not signifying that any carrier is being "propped up," does signify that the Alexander Committee's basic idea was valid, namely, that a sharing of pooling revenues might well induce a particular line to offer a service or as a logical extension of this idea, to carry low-rated cargoes. For example, as the Union had pointed out earlier in this proceeding, during this first year of the pool period ending January 31, 1976, Japan Line, an undercarrier which had made the poorest showing under the pool, received pool revenues amounting to $105,656 per voyage. (Petitioner's Memorandum of Law, September 27, 1976, p. 14). Of course, this does not mean that Japan Line would have withdrawn from the trades involved, and the pooling agreement provides penalties and limitations on sharing of revenues to ensure that each carrier will maintain a viable service. (Opening Case of Respondents, May 27, 1976, pp. 12–14).

[29] *Lykes-Harrison Pooling Agreement,* 4 F.M.B. 415, 420 (1954).

increased at Portland anyway regardless of the pool or because the Japanese ships were operating under the space charter agreements. (Tr. 126–127). The encouragement to solicit and carry low-rated cargo because of the pooling agreement is unrefuted and accords with the theory of pools.

What is problematic about all of the above benefits is not that they exist, more or less, but whether they were brought about by the space chartering agreements rather than the auxiliary pooling agreement under investigation in this case. The same proponents of the space chartering agreements argued and showed that cost savings, greater efficiencies and utilizations, improved service, downward pressure on conference rates and the like, would result from the space chartering agreements. They might well also flow from the pooling agreements, since these agreements are spinoffs of the main space chartering agreements, all of which agreements were more or less directed by the Japanese Government. However, one of the above benefits, namely, the tendency to solicit lower-rated cargoes, appears to be related more to the pooling agreement rather than the space chartering agreements. Nevertheless, since even Hearing Counsel's witness acknowledged that the pooling agreement's cost savings features could not be ignored, some portion of the above benefits seem attributable to the pooling agreement. Perhaps the most important single benefit which can be said to result from the pooling agreement and not from the space chartering agreements, however, relates to the fact that the pooling agreement works to make the subchartering and container interchange provisions of the space chartering agreements more effective. Since the Commission and Hearing Counsel have overwhelmingly approved the space charter agreements because of their many benefits, it would appear that anything that would help those agreements to work more effectively should be encouraged.

Testimony of Mr. Yamada, which was not refuted, shows that without the pooling agreement, the six carriers who are parties to the space chartering agreements so resembled each other by using space on the same ships and offering the same frequency of service that pressure to engage in excessive competitive practices resulted as each carrier attempted to distinguish itself to shippers. (Ex. 2, pp. 13, 14). This factor intensified the situation in which Japanese carriers were their own most direct and serious competitors. (Ex. 2, p. 14; Tr. 27–29; Ex. 1, p. 106). This highly competitive situation interfered with the workings of the space chartering agreements, under which any member could subcharter needed space on another member's vessel if cargo became available to the first member. But the second member would not charter the space out. The second member's space might even go unutilized. With the pooling agreement in effect, the second member would have an incentive to charter the space needed to the first member because the second member would ultimately share in the revenue.[30] Thus, as proponents stated, "the pool makes possible more efficient operations under the space chartering agreements in that it permits optimal employment of capital investment," (Proponents' Opening Brief, p. 57). Hearing Counsel's answer to this statement is that it was an afterthought

[30] The same beneficial effects as to the container borrowing provisions of the space chartering agreements should be felt. However, Mr. Yamada testified that he could not report free interchange of containers had occurred because so many of the containers go into other trades. (Tr. 118).

"made up" by Mr. Yamada after his earlier deposition. There was no contrary testimony which would undermine the logic of Mr. Yamada's testimony and the record shows that Mr. Yamada had testified at the deposition as to the intensity of competition among the Japanese carriers under the space chartering agreements. (See Ex. 1, pp. 72–73). Hearing Counsel also argue that this particular negative aspect of the space chartering agreements was not brought up by proponents in Docket No. 75–30 and they should either be precluded from raising it now or else such negative features should be considered by the Commission when next considering whether to continue approval of the space chartering agreements. (H.C. Answering Brief, p. 32). A fact is a fact no matter when it appears.[31] However, as I remarked earlier, Hearing Counsel's contention that this particular fact regarding the tendency of the space charter agreements to encourage malpractices should be considered when those agreements next come up for continued approval confirms my conclusion that the space chartering and pooling agreements should not be considered apart from each other since they obviously are inter-dependent. Also, I note that the Commission, when approving the space chartering agreements in Docket No. 75–30, knew full well that "the competition among Respondents, although diminished, is still real." *Agreement Nos. 9718–3 and 9731–5*, cited above, 16 SRR at p. 1566. The Commission found further that the space chartering members were not only engaging in strong competition among themselves despite the agreements but even resisted allotting to any of the other members any additional space on vessels and were also resisting use of each other's containers. 16 SRR at p. 1567. These findings by the Commission in Docket No. 75–30 corroborate Mr. Yamada's testimony that intense competition among the Japanese carriers continued despite the space chartering agreements and that the provisions of those agreements relating to subchartering of additional vessel space (and interchange of containers, see 16 SRR at p. 1567) were not working because of such competition. All of these facts were known some time ago during the proceedings in Docket No. 75–30 and could not have been "made up" now. Furthermore, since, as I have discussed above, various authorities (Alexander and Celler Reports, etc.) and evidence in this record have shown that pooling agreements encourage greater service by certain carriers who might not otherwise believe it to be economical to offer such service, it is entirely logical to find that this pooling agreement, as Mr. Yamada testified, encourages each Japanese carrier, when necessary, to charter additional vessel space to another Japanese carrier, an activity which the space chartering agreement was supposed to permit.

In Docket No. 75–30, the Commission therefore realized that there were some negative competitive features relating to the space chartering agreements which were nevertheless approved because of their benefits. Therefore, it makes no sense to disapprove the pooling agreement which will offset these negative features and help the space chartering agreements work more effectively.

[31] As noted below, furthermore, the Commission was aware of such negative competitive aspects of the space chartering agreements when approving the agreements in Docket No. 75–30.

VI. THERE IS NO EVIDENCE OF REAL DETRIMENT TO OTHER CARRIERS,

Hearing Counsel contend that the auxiliary feature of the pooling agreement that would improve the workings of the space chartering agreements would cause harm to non-Japanese carriers operating in the subject trades. Hearing Counsel contend that the six lines would be fused into a single service enjoying over 50 percent of conference cargo, using joint solicitation. Furthermore, if a potential overcarrier under the pooling agreement feels free to relinquish cargo to another pool member and can reduce its sales efforts, Hearing Counsel argue that this "permits the potential unutilized sales staff to be devoted to other trades to the disadvantage of carriers in those trades." (H.C. Answering Brief, p. 44). I find almost all of these contentions of Hearing Counsel to be reruns of arguments made not even by Hearing Counsel but instead by the protestant to the space chartering agreement in Docket No. 75-30 (the Union) and to have been thoroughly rejected by the Commission in that case. Furthermore, as noted, Hearing Counsel, rather than calling the Commission's attention to allegedly harmful effects from growth of the six carriers' share of conference cargo or from "multiple solicitation," urged the Commission to approve those agreements in Docket No. 75-30 without reservation of any kind. Why then do Hearing Counsel now raise rejected arguments from the past at this late date, especially when there is no new evidence which would tend to support the idea that the Japanese carriers would employ joint solicitation efforts or would gobble up conference cargoes out of proportion to the carriers' size? As to the argument that a potential overcarrier might reduce its solicitation efforts in the subject trade and turn such efforts over to another trade, why does it follow that carriers in those other trades will be at a "disadvantage"? Is it unlawful for any carrier to intensify its solicitation efforts in any trade and can the Commission make such a finding when Hearing Counsel do not even specify who are the carriers or what are the other trades where this alleged disadvantage would occur?

Virtually all of these arguments were carefully considered by the Commission in Docket No. 75-30 and found to be without merit. Thus, the Commission found that there was competition among the members of the space chartering agreements. Indeed, the very space chartering agreements forbid "multiple solicitation." Article 3 of the space chartering agreements clearly specifies:

> The parties shall solicit and book such containerized cargoes for their own separate accounts, and there shall be no joint solicitation and/or booking between or among them

The Commission also expressly found that:

> . . . solicitation by each Respondent is only for the account of the Respondent performing the solicitation; for example, Mitsui is only seeking to fill that quarter of the JAPAN ACE which Mitsui has chartered. *Agreement Nos. 9718-3 & 9731-5*, 16 SRR at p. 1562

The Commission therefore refused to characterize this situation as "multiple solicitation." Furthermore, the evidence shows that each party to the space chartering agreements maintains its own solicitation force, office, and agents, books its own cargo, and issues its own bills of lading. All that will happen with continued approval of the present pooling agreement is that a second party may be encouraged to subcharter additional space on its vessel to a first party, which

space the first party needs but the second does not. But each party still solicits on its own, issues its own bills of lading, maintains separate offices and agents, etc.

The idea that the six Japanese carriers will be operating as a dangerous block which will gobble up increasing shares of cargo from non-Japanese lines was considered and rejected in Docket No. 75–30. If this event were to occur, it would more likely have occurred as a result of the space chartering agreements, which enabled the six carriers to offer the most frequent service of all carriers in the trades and not because they have tacked on an auxiliary agreement to share whatever revenue may be derived under the space chartering agreements.

In Docket No. 75–30, the Commission found that the six carriers in the aggregate had only increased their share of inbound *conference* cargo from 56.7 percent in 1968 to just 59.3 percent in 1974. 16 SRR at p. 1564. The Commission stated that all the Japanese carriers had done under the space chartering agreements was to have "brought themselves back to the approximate position in the conferenece which they enjoyed in 1968, prior to the addition of the new fully containerized vessels. That position in the trade alone does not render these agreements unfair." 16 SRR at p. 1565. Remember, too, that the figures related only to the inbound conference share of the total market, whereas the Commission emphatically stated that the relevant market to be considered must include non-conference carriers as well, thus further reducing the Japanese carriers' share. 16 SRR at p. 1559.

In Docket No. 75–30, the Commission could find no support for the allegation made by the Union similar to that now made by Hearing Counsel in this case, that American flag carriers will suffer harm presumably because shares of conference cargoes had declined because of the Japanese space chartering agreements, or will, because of the pooling agreement. Indeed, the Commission had found that one American line, Sea-Land Service, Inc., had acquired the greatest single share of the inbound conference market. 16 SRR at p. 1566. Other American lines which had experienced declining shares were shown primarily to have brought these problems upon themselves because of improvident management decisions, not because of the Japanese space chartering agreements and also declined because of the increase in the share carried by Sea-Land. 16 SRR at pp. 1565, 1568.

The Commission took pains to explain that in the space chartering case it was a mistake to characterize the proceeding "as a conflict between U.S. flag carriers and Japanese flag carriers." 16 SRR at p. 1566. In both that case and in this one no American carrier or any other non-Japanese carrier intervened and remained in opposition to the agreement.[32]

If the pooling agreement were enabling proponents to usurp a disproportionate share of the market, certainly statistics should bear that out since the pooling

[32] Hearing Counsel seem to imply that the lack of expressed opposition by American carrier witnesses to the pooling agreement was motivated by reluctance to antagonize the Japanese Government. We have been through this sort of argument in Docket No. 75–30 in which there was little or no testimony by non-Japanese carriers against the space chartering agreements. Hearing Counsel believe that the Japanese Government has taken action which has affected American flag lines referring especially to Sea-Land and PFEL. Neither of these two carriers' witnesses opposed the pooling agreement in their depositions. Furthermore, Sea-Land's witness testified that certain restrictions imposed by the Japanese Government on container sizes applied "equally to all carriers," even to the Japanese "K" Line. (Ex. 13, pp. 121, 122, Ex. 13, p. 80). PFEL might have had some apprehensions but it testified in Docket No. 75–30 (see Tr. 578 in that case record) and yet since 1976, PFEL states that its ships had been running full. (Ex. 23, p. 13) As for other carrier witnesses, APL testified that APL "had nothing against revenue sharing" (Ex. 14, p. 81) and States' witness could not identify any specific impact that Japanese revenue sharing had made upon States (Ex. 8, p. 75).

agreement was first approved in 1975. However, there is evidence to the contrary showing that proponents' share, at least of the inbound conference market, has declined to somewhere around 50 percent while American and third-flag carriers' shares have increased. Indeed, even Hearing Counsel cited evidence of record to indicate that "[f]rom 1974 to 1977, the Japanese lines' [inbound] conference trade share has decreased from 59% to 54%." (H.C. Answering Brief, p. 23, PFF 14 K; Ex. 2, Appendix 7). Hearing Counsel add that "[t]his has been due to improved service, rebating and added capacity by competitors" and that Japanese capacity is fixed by the space chartering agreements. (*Id.*, p. 23). Hearing Counsel attributes the Japanese decline mainly to increase in non-conference competition.

Even later data based on inbound conference statistics show a continued decline in the Japanese share of conference carrying, declining to just over 51 percent for the period January-September 1977. (Confidential Ex. R-10). The evidence also shows corresponding increases in American and third-flag carryings from 1974 down through July-September 1977. In the inbound conference, the Japanese declined from 58.8 percent in 1974 to 51.1 percent in that last quarter cited. (See Table II in Proponents' Opening Brief, June 29, 1978, p. 24, derived from conference statistics.) If one accepts the opinion that the inbound conference carries about 70 percent of the trade (Ex. 2, p. 19), this means that the Japanese carriers account for about 35.7 percent of the total relevant Japanese market, as defined by the Commission in Docket No. 75-30. This continued decline and resulting smaller share has happened since the record was closed in Docket No. 75-30, when the Commission found no "monopoly" or harm caused by the Japanese lines. Such facts hardly persuade me that the Japanese carriers are now endangering other carriers in the trade or are causing them harm.

I find no new evidence, therefore, which would lead me to disagree with the Commission's conclusions in Docket No. 75-30 when the Commission rejected allegations that the Japanese lines' agreements were concentrated against U.S. or any other flag carriers and that the agreements were discriminatory or unfair among carriers.[33] In these respects the Commission concluded:

> There is no evidence that Respondents concentrated their competitive activities upon U.S. Flag carriers 16 SRR p. 1566.
>
> * * *
>
> . . Petitioner has not proven, on this record, that Respondents' agreements have been unjustly discriminatory or unfair as between carriers . . . 16 SRR at p. 1568.

[33] Hearing Counsel also argue that the Japanese lines enjoy great power to cause detriment against other carriers because they usually vote as a bloc at conference meetings and even when one pool carrier relinquishes cargo because it is a potential overcarrier, it knows that 60-70 percent of the time the cargo will be carried by another Japanese carrier member of the pool. The fact that these carriers often vote as a bloc does not prove that harm has resulted to the conference or any member. There is no evidence, as there was in the "Travel Agents" case *Unvestigation of Passenger Travel Agents*, 10 F.M.C. 27 (1966), affirmed under the name *F.M.C. v. Svenska Amerika Linien*, 390 U.S. 238 (1968)), which clearly showed that voting by members of conferences under the conferences' unanimous voting rule had in fact caused the carriers competitive harm. Furthermore, unlike the *Johnson Scanstar* case *In Re. Agreement No. 9973-3*, Docket No. 77-5, August 15, 1978), the record in this case shows no joint service but rather separate offices, separate bills of lading, separate solicitation, separate agents etc.

The fact that Japanese shippers might prefer another Japanese carrier member of the pooling agreement if a member gave up cargo is not the fault of the pooling agreement. It is the shipper's decision. (Ex. 1, pp. 102-104). American consignees similarly may prefer American carriers when shipping F.O.B. inbound. (Tr. 33-35).

VII. Miscellaneous Contentions That Only a Trade-Wide Pool Is the Answer, That the Commission Should Not Approve the Pool Merely Because of Japanese Government Policy; or That Proponents Have Not Cooperated With the Conferences' Neutral Body, Have No Real Merit.

As a windup to the miscellaneous arguments which Hearing Counsel have employed in an effort to persuade me that the pooling agreement provides no benefits and does not deserve continued approval, Hearing Counsel offer the following arguments: (1) if we assume that the trade becomes overtonnaged, the present pooling agreement, limited to only 6 carriers out of 26 plus countless other carriers, will not effectively curb malpractices, but must include all carriers especially non-conference carriers who, according to Hearing Counsel, are the real cause of malpractices; (2) the Commission should not continue its approval of the pooling agreement merely because it is the product of Japanese Government policy as there will be no governmental confrontation and the Commission has exclusive responsibility to administer section 15; (3) the six Japanese lines have not cooperated with the conferences' neutral body in its self-policing efforts. Each of these arguments, on close analysis, fails to stand up.

As to a trade-wide pool, even Hearing Counsel's witness Ellsworth testified that he had no knowledge of such a pool that the Commission had ever approved. Further, consider the difficulties in organizing and allotting shares to 26 plus innumerable other carriers which keep coming and leaving the Far East trades. Countless pools approved by the Commission have not included every carrier in pools.[34] Finally, in Docket No. 77–43, *Agreement No. 10286* (Initial Decision, August 31, 1978), Hearing Counsel take an opposite position in the inbound Italian (WINAC) trade. In that case Hearing Counsel are urging approval of a pooling agreement which is limited to only certain carriers in the trade and even omits six conference members from the pool besides omitting non-conference lines. That pool not only has non-conference competition but other competition caused by a drain of cargo to North Europe ports away from Italian ports. Yet Hearing Counsel urge approval of that pooling agreement, as proponents in this case point out, by arguing that the pool, in combination with self policing, should prove to be a "a hybrid method for eliminating malpractices and restoring integrity to the WINAC trade." (H.C. Opening Brief in Docket No. 77–43, pp. 17–18, May 5, 1978; Proponents' Reply Brief in this case, p. 49). Perhaps Hearing Counsel believe there is not much non-conference competition in the WINAC trade and that there are other distinguishing facts in the WINAC trade, but certainly this opposite position does not enhance Hearing Counsel's contention that only a trade-wide pool including all carriers is the solution to the rebating problem in these trades. In any event, even if the testimony in this record which seems to lend support to the idea, and there is such testimony (see H.C Answering Brief, pp. 24–25), I have already found that the chief benefits from the subject pooling agreement relate to its effects in assisting the space chartering agreements while also providing cost savings, although only having

[34] *See, e.g., West Coast Line, Inc. v. Grace Line, Inc.*, 3 F.M.B. 586, 596 (1951).

minor effects at best in curbing malpractices among the Japanese lines themselves. These benefits ought not to be thrown away merely because some observers believe that a trade-wide pool consisting of 26 plus countless other carriers should be sought instead.

Hearing Counsel argue next that the Commission should not approve the pooling agreement merely because the Japanese Government wants approval as part of Japanese national policy. Hearing Counsel urge the Commission not to "defer its decision" to the Government of Japan. (H.C. Answering Brief, pp. 44–45).

This argument assumes that the pooling agreement cannot stand on its own feet, i.e., that it has no merit and furnishes no benefits. I have already found to the contrary. Furthermore, the Commission has not shown that it is about to abdicate its responsibilities to a foreign government. In Docket No. 75–30, for example, the Commission noted the receipt of aid memoires transmitted by the Government of Japan through our State Department. The Commission disposed of them quickly by depositing them in the docket file and refused to consider them as part of the record for decision, as provided by Rule 170, 46 CFR 502.170. See *Agreements Nos. 9718–3 and 9731–5*, 16 SRR at pp 1570–1571.

In the past the Commission has believed that if governmental confrontation was likely, it would be in the public interest to avoid such confrontation. See *Agreement No. 9932–Agreement 9939*, 16 F.M.C. 293, 306 (1973). Even Hearing Counsel had supported the pool in that case which involved a Peruvian "equal-access" pooling agreement. In a later case involving an Argentinian equal-access pooling agreement, *Agreement No. 10056*, 17 SRR 1323, 1327 (1977), the Commission departed from the belief expressed in the Peruvian case but only to the extent of requiring proponents of agreements to "establish a clear likelihood" that governmental confrontation might occur. The Argentine case is presently under reconsideration so that present Commission policy has not been clarified. However, both the Peruvian and Argentine agreements involved restrictive foreign cargo preference decrees, unlike the present case. Furthermore, proponents have shown benefits to have resulted from the subject agreements and need not rely upon arguments that approval would avoid governmental confrontation. In any event, present Commission policy is in a state of flux but whatever emerges from the Commission's reconsideration of the Argentine case, it is not unreasonable to suppose that, absent showing of any harm and with a showing of benefits, an agreement mandated or desired by a friendly foreign government may be entitled to consideration as being in the public interest in promoting a friendly inter-governmental climate.[35]

The last argument of Hearing Counsel that proponents have not cooperated with the conferences' self-policing neutral body does not seem particularly valid or fair. Hearing Counsel base this argument on a tabulation of how many

[35] Although not stated in a Commission decision, Chairman Daschbach, in a prepared speech to the Georgia Foreign Trade Conference in Savannah, Georgia, November 1, 1978, supported the idea of "accommodation to the legitimate desires of our trading partners to protect their own national interest, promote their own national-flag fleets, and serve the interests of their shipping public." Prepared text, p 6. This speech seems to indicate a return to the ideas expressed in the Peruvian case However, the Commission has not yet issued its decision on reconsideration in the Argentine case. The Chairman also seemed to support the idea of rationalization, including closed conferences which would be followed by pooling agreements, bilateral or multilateral, "or various combinations and permutations of the above." Prepared text, p 4

complaints have been filed by other carriers with the neutral body, i.e., they measure the seriousness of a carrier's cooperation with the neutral body by the number of formal complaints filed. This analysis does not prove too much in my opinion. Though one carrier testified that it filed as many as 40–50 complaints per year and another, 10 or 15, since the end of 1976, other carriers filed two or no complaints at all. But the Japanese carriers have increased their filing of complaints to a yearly average of two per line by 1976. (Ex. 5).

What is more significant, if we assume this whole argument has any relevance to the merits of the pooling agreement, is that the neutral body (FCS), as I noted earlier, has been considerably strengthened. In the westbound conference, furthermore, according to proponents, this would require unanimous voting. Therefore, the six Japanese lines, who are members of the conference, must have given their support and thus "co-operated" in helping to strengthen the conference's self-policing system. (See Proponents' Opening Case, May 27, 1976, pp. 6–7). It is somewhat ironic for Hearing Counsel to accuse the six Japanese carriers of not cooperating in strengthening self-policing efforts when Hearing Counsel earlier argued how powerful the six lines were in voting as a "bloc" in conference meetings. If so powerful, couldn't they have defeated efforts to strengthen the conference's self-policing neutral body if they had really not wished to cooperate?[36]

VII. Proponents of any Anticompetitive Agreement Submitted Under Section 15 of the Act Must Show Entitlement to Approval by Showing Need or Benefit, or Valid Regulatory Purpose. The Antitrust Policy of Free and Open Competition Must be Considered but the Primary Standards are Those of the Shipping Act, Not the Sherman Act and the Family of Antitrust Laws

It has become customary for parties in section 15 proceeding to recite the famous *Svenska* case and others which cite that case and cease bothering further as to whether *Svenska* states the complete law on the subject. In this case, for example, Hearing Counsel argue that the proponents have not satisfied the *Svenska* test and therefore recommend disapproval. Proponents on the other hand, believe that the Commission must always make a finding in violation of the standards of section 15 of the Act before it can disapprove an agreement. However, they further argue that the burden of going forward with justification for their agreement shifts to proponents only after some type violation of the antitrust laws appears, in which event Hearing Counsel or the Commission could

[36] Mention should be made of Hearing Counsel's request for sanctions because proponents did not answer certain interrogatories regarding rebating so that a determination could be made whether rebating actually declined during the operation of Agreement No. 10116. (H C. Answering Brief, p. 42). As a sanction, Hearing Counsel request a finding that I reject proponents' opinion testimony that rebating declined during the operation of the agreement and find that it increased by Japanese lines until terminated by order of the Japanese MOT in November 1976. Proponents argue that Hearing Counsel have contended that the record already contains probative evidence showing that the agreement did not cause reductions in rebating, that Hearing Counsel have stipulated that rebating declined after 1975, and that in Docket No 77–43, Hearing Counsel acknowledged that it is unrealistic to expect carriers to confess to rebating in Commission proceedings. To a large extent this matter is academic since I have already agreed with Hearing Counsel and found no evidence that the agreement had much effect on reducing rebating and I have recognized that a major reason, if not the main one, for termination of rebating, was the order of the Japanese MOT. There is no need to rely on sanctions, therefore, although had there been a close question, adverse inferences might have been employed against the proponents.

find that the agreement violates the public interest standard added to section 15 in 1961. Proponents claim that their agreement does not even "facially" violate the antitrust laws but even if it did, that they have shown offsetting benefits. (Proponents' Reply Brief, p. 78 *et seq.*). I believe that some clarification of the complete standard to be applied under section 15 is necessary, although I believe that proponents have shown benefits and purposes which offset any possible harm that may result from the limited restraints on competition inherent in the pooling agreement. I believe this clarification to be necessary because of proponents' argument that they need offer no justification at all until Hearing Counsel or the Commission make out a finding of violation of the antitrust laws either because the agreement is *per se* violative of antitrust laws or is an unreasonable restraint of trade in violation of antitrust laws. In my opinion, any anticompetitive agreement (and virtually all section 15 agreements are anticompetitive) requires a showing of entitlement to the exemption from antitrust laws which approval by the Commission confers to the exemption from the national policy of free and open competition. The degree of proof may vary depending upon how much harm may actually result from the restraints on competition but to argue that proponents need do nothing until protestants of agreements can show violations of antitrust laws, in my opinion, goes too far. (In fairness to proponents, however, they went forward with proof of benefits even though they believe that Hearing Counsel had made out no case of violation of antitrust laws or other harm.)

The case which has dominated and driven out all other thinking in this area is *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien, (Svenska)*, 290 U.S. 238 (1968). In that case the Court stated the oft-quoted words:

> The Commission has formulated a rule that conference restraints which interfere with the policies of antitrust laws will be approved only if the conferences can "bring forth such facts as would demonstrate that the . . . rule was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act." See 10 F.M.C. at 45.

Notice that in the above quote there is no mention of a requirement that the Commission must first find a violation of the Sherman Act or any other antitrust law, only, at best, that the burden would shift to proponents of agreements if their restraints "interfere with the policies of antitrust laws. . . ." Yet later on the Court confused matters to some extent by remarking:

> . . . but once an antitrust violation is established, this alone will normally constitute substantial evidence that the agreement is "contrary to the public interest," unless other evidence in the record fairly detracts from the weight of this factor. 390 U.S. at pp. 245, 246.

Does this mean that the Commission or Hearing Counsel or protestants must first put on a full-blown case to show unreasonable restraint of trade sufficient to support a finding of violation of the Sherman Act or other antitrust law before proponents need do anything? This might be no easy matter when we depart from the obvious *per se* category of violations of the Sherman Act, such as rate fixing, group boycotts, market divisions, or tying arrangements.[37] Other restraints of

[37] *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (price fixing), *U.S. v. Topco Associates*, 405 U.S. 596 (1972) (market divisions), *Paramount Famous Lasky Corp. v. U.S.*, 282 U.S. 30 (1930) (group boycotts), *United States v. General Motors*, 384 U.S. 127

trade must be shown to be unreasonable and undue and such cases involve considerations of relevant markets, shares of the market, structure of the market, and other complicated matters. Then if Hearing Counsel succeed in showing that proponents have unreasonably restrained trade, or have acquired "monopoly" power under the many interpretations of that term in antitrust law, what then? If proponents do nothing so that the Federal Maritime Commission, a shipping regulatory agency, makes a finding of violation of section 1 or 2 of the Sherman Act and consequently finds that the agreement is contrary to the public interest in violation of section 15, do the proponents challenge the antitrust findings in the courts? This seems to make this Commission an antitrust court or the Federal Trade Commission and turn Hearing Counsel into the antitrust division of the Department of Justice. Furthermore, if Hearing Counsel cannot make out a case showing violation of the Sherman Act, does this mean that the Commission must then approve the agreement, even if no benefits have been shown at all? Is this what the Court in *Svenska* intended. I think not and neither did the Commission. *See Travel Agents,* 10 F.M.C. at pp. 34, 35.

It is first critical to understand that the so-called standard was not created by the Supreme Court but by this Commission. The Court after all, only approved the test which the Commission had formulated in Commission decisions, such as the very case on appeal, *Investigation of Passenger Travel Agents,* 10 F.M.C. 264 (1966), cited by the Court, and even earlier in *Mediterranean Pools Investigation,* 9 F.M.C. 264 (1966), which the Commission had cited in its *Travel Agents* decision. In turn, the genesis of the doctrine of showing some purpose because agreements were anticompetitive occured in another famous case *Isbrandtsen Co. Inc. v. United States,* 211 F. 2d 51, 57 (D.C. Cir. 1954). All that this *Isbrandtsen* case had said was, in another often-quoted statement:

> The condition upon which such authority [i.e., section 15 approval] is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure the conduct thus legalized does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purpose of the regulatory statute.

Although this Commission has followed this *Isbrandtsen* rationale in several section 15 cases, unfortunately, after the *Svenska* decision, there has been an undue concentration on the antitrust violation question rather than on merely the "prohibitions of the antitrust laws." Cf., e.g. *Canadian-American Working Arrangement, (CAWA/CADA),* 16 SRR 733 (1976). These cases, such as *CAWA/CADA* however, were usually dealing with *per se* violations of antitrust laws, i.e., price fixing or market divisions, so that there was no difficulty in shifting the burden of showing need, benefit, purpose, etc., to proponents. Again, there is little problem in requiring proponents to show justification when it must be balanced against a *per se* violation of the Sherman Act, which is clearly contrary to the public interest standard under section 15. The problem is what happens when an agreement is submitted which is not *per se* violative of the

(1966) (group boycotts); *International Salt Co v. United States,* 332 U.S. 392 (1947) (tying arrangements) A so-called "per se" violation of the Sherman act are those types of agreements "which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal. . . " *Northern Pacific Ry. v United States,* 356 U.S. 1, 5 (1958) These types of agreements are considered so bad and harmful to competition that no justification is permitted and it does not matter what benefits are claimed to result. *U.S. v. Socony-Vacuum Oil Co.,* cited above; *U.S v. Trenton Potteries,* 273 U.S. 392 (1927).

Sherman Act but may be shown to be an unreasonable restraint of trade in violation of that Act after an involved and complex antitrust trial-type hearing. Or what happens if the agreement is *per se* violative of the Sherman Act, such as price-fixing, but the impact on a trade is microscopic, for example, if two carriers out of 20 in a trade decide to fix prices but they only carry 2 percent of the entire trade between them? Do we throw the book at them and order them to carry a heavy burden of proof showing serious need, important public benefits, etc.? In other words, what is the Commission, an antitrust agency or a shipping agency? Does the Commission carry out the purposes of the Sherman Act or the Shipping Act?

Considering the background of the *Svenska* case (which incidentally involved tying rules and other things which were either *per se* violations of the Sherman Act or virtually so) and certain language elsewhere in that decision, I do not believe the Court intended this Commission to emulate the Department of Justice by forcing the Commission to prove violations of the Sherman Act. Despite the Court's language in *Svenska* that "once an antitrust violation is established," proponents of agreements would have to put in evidence to detract from the weight of this factor, elsewhere the Court spoke not about violations of the antitrust laws but about the "policies of the antitrust laws." For example, on p. 243 of its decision, the Court stated, as I quoted above, that the Commission had formulated a rule regarding conference restraints "which interfere with the *policies* of antitrust laws." (Emphasis added.) Also on page 243, the Court described the issue arising out of "respondents' challenge to the Commission's reliance on *antitrust policy* as a basis of disapproving these rules." (Emphasis added.) The Court also reversed the Court of Appeals which had specifically held that "[w]e do not read the statute as authorizing disapproval of an agreement on the ground that it runs counter to *antitrust principles*. . . ." 390 U.S. at p. 244. (Emphasis added.) Furthermore, the Court approved the Commission's test under section 15 as the type of "accommodation between antitrust and regulatory objectives approved by this Court in those cases. Indeed we have stressed that such an accommodation does not authorize the agency in question to ignore the antitrust laws. E.g., *McLean Trucking Co. v. United States*, 321 U.S. 67, 79–80 (1944)." 390 U.S. at p. 245 n. 4.

I detect in the above words of the Court something other than a requirement of findings of violations of the Sherman Act. I detect approval of the Court in this Commission's giving due consideration to the policies and purposes of the antitrust laws and in accommodating them with the purposes of the Shipping Act. This, of course, is the original balancing test enunciated by the court in the *Isbrandtsen* case, cited above. By citing *McLean Trucking*, furthermore, the Court emphasizes that a transportation regulatory agency is not the tribunal which is supposed to make findings of violations of the Sherman Act or any other antitrust law and indeed, is not really competent to do so.

In *McLean Trucking Co. v. United States*, cited above, the Supreme Court ultimately upheld a decision of the Interstate Commerce Commission which had approved a consolidation of seven large motor carriers under section 5 of the Interstate Commerce Act, 49 U.S.C. 5. This law bears some resemblance to section 15 of the Shipping Act. It authorizes the I.C.C. to approve a consolida-

tion if it finds that it will be consistent with the public interest and exempts parties operating under approval of the I.C.C. from the antitrust laws. The Commission is also supposed to consider such things as the effect of a consolidation or merger on adequate transportation service to the public (see 321 U.S. at pp. 74–77), and if a railroad is involved, to find that the merger will not unduly restrain competition. *Id.*

What the Court emphasized in *McLean*, however, is that the I.C.C. must apply the standards of the Interstate Commerce Act (ICA) ultimately, that it is not really expected to nor is it competent to make definitive finds of violations of antitrust laws, but that it should consider the policies of the antitrust laws, i.e., protection of competition, when determining if there are overriding benefits under the policies of the ICA which justify approval of the consolidation. In other words, the I.C.C. balances the purposes of the ICA against the purposes of the antitrust laws and accommodates the two purposes, but in so doing the I.C.C. remains a transportation agency and does not become the Department of Justice, an antitrust court, or the Federal Trade Commission.

To illustrate that the Court did indeed establish the preceding guidelines for a transportation agency like the I.C.C., consider the following quotations from the Court's opinion in *McLean Trucking:*

To secure the continuous, close and informed supervision which enforcement of legislative mandates frequently requires, Congress has vested expert administrative bodies such as the Interstate Commerce Commission with broad discretion and has charged them with the duty to execute stated and specific statutory policies. *That delegation does not necessarily include either the duty or the authority to execute numerous other laws. Thus, here, the Commission has no power to enforce the Sherman Act as such. It cannot decide definitively whether the transaction comtemplated constitutes a restraint of trade or an attempt to monopolize which is forbidden by that Act. The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems. That legislation constitutes the immediate frame of reference within which the Commission operates; and the policies expressed in it must be the basic determinants of its action.* 321 U.S. at pp. 79, 80. (Emphasis added.)

Elsewhere the Court stated:

. . . [T]he Commission is not to measure proposals for all-rail or all-motor consolidations by the standards of the anti-trust laws. Congress authorized such consolidations because it recognized that in some circumstances they were appropriate for effectuation of the national transportation policy. . . . And in authorizing those consolidations it did not import the general policies of the anti-trust laws as a measure of their permissibility. It in terms relieved participants in appropriate mergers from the requirements of those laws. Section 5(11). In doing so, it presumably took into account the fact that the business affected is subject to strict regulation and supervision. . . . Against this background no other inference is possible but that, *as a factor in determining the propriety of motor-carrier consolidation the preservation of competition among carriers, although still a value, is significant chiefly as it aids in the attainment of the objective of the national transportation policy. Therefore, the Commission is not bound, as appellants urge, to accede to the policies of the anti-trust laws so completely.* . . . 321 U.S. at pp. 85–86. (Emphasis added.)

The Court stated the same doctrine as did the court in the *Isbrandtsen* case regarding the fact that the Commission cannot ignore the policies of the antitrust laws but must engage in a balancing exercise weighing the purposes of the transportation statute as against the purposes of the antitrust laws. Thus, the Court stated:

Congress, however neither has made the anti-trust laws wholly inapplicable to the transportation industry nor has authorized the Commission in passing on a proposed merger to ignore their policy. . . . The preservation of independent and competing motor carriers unquestionably has

bearing on the achievement of these ends [i.e., promotion of economical transportation services and encourage reasonable charges, etc.] Hence, the fact that the carriers participating in a properly authorized consolidation may obtain immunity from prosecution under the anti-trust laws in no sense relieves the Commission of its duty . . . to consider the effect of the merger on competitors and on the general competitive situation in the industry in the light of the objectives of the national transportation policy. In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc. to determine whether the consolidation will assist in effectuating the over-all transportation policy. 321 U.S. pp. 86–87.

Earlier the Court had indicated that the cases of this type involve an accommodation stating that such a case "poses a problem of accommodation of the Transportation Act and the anti-trust legislation. . . ." 321 U.S. at p. 79.

Significantly, not only did the Court cite *McLean Trucking* in its *Svenska* decision, as noted, but the Court in *Svenska* recognized that this Commission had made findings striking down the obnoxious conference rules on Shipping Act, not Sherman Act grounds, although the Commission had not ignored the policies of that antitrust law. In this regard the Court stated:

Under these circumstances the Commission concluded that the [unanimity] rule was detrimental to commerce by fostering a decline in travel by sea, and contrary to the public interest in the maintenance of a sound and independent merchant marine. The Commission also found the rules contrary to the public interest in that it invaded *the principles of the Antitrust laws* more than was necessary to further any valid regulatory purpose. 390 U.S. at p. 247. (Emphasis added.)

* * *

These circumstances taken together provide substantial support for all three of the Commission's findings—that the [tying] rule is detrimental to the commerce of the United States by injuring passengers, agents, and nonconference lines, that the rule is unjustly disriminatory as between conference and nonconference carriers, and that the rule is contrary to the public interest by unnecessarily invading the *policies of the antitrust laws*. 390 U.S. at p. 252. (Emphasis added.)

Note very carefully that even with regard to the tying rule which is probably a *per se* violation of the Sherman Act, the Court did not require the Commission to strike it down by finding that it violated the Sherman Act. The Court, most significantly, endorsed the test in the *Isbrandtsen* case, cited above, namely, "unnecessarily invading the *policies* of the antitrust laws." (Emphasis added.)

More recently, in *F.M.C. v. Pacific Maritime Association,* 15 SRR 353 (1978), the Supreme Court held approvability of section 15 agreements determinable under Shipping Act standards by the Commission, not by courts. Thus, the Court stated that "it is apparent that the Congress assigned to the Commission, not to the courts, the task of initially determining [approvability] under the general statutory guidelines" and that "the regulation of competition in the shipping industry is to be an administrative function." 15 SR at pp. 362–363.

Note further that I am not saying that the Commission is free to disregard the purposes and policies of the antitrust laws. None of the cases cited above says that. Indeed, in *Mediterranean Pools Investigation,* cited above, where the Commission first formulated the balancig test, as well as in the *Travel Agents* case, affirmed by the Court, the Commission had balanced benefits against invasions of the purposes and policies of the antitrust laws. The decision of the Commission in *Mediterranean Pools* deserves re-reading. The Commission established the balancing test by citing the *Isbrandtsen* case, cited above, and then stating:

Thus, the questin of approval under section 15 requires (1) consideration of the public interest in the preservation of the competitive philosophy embodied in the antitrust laws insofar as consistent with the regulatory purpose of the Shipping Act and (2) a consideration of the circumstances and conditions existing in the particular trade involved which the anticompetitive agreement seeks to remedy or prevent. The weighing of these two factors determines whether the agreement is to be approved. 9 F.M.C. at p. 290.

The Commission discused the need to obtain information "as to the probable future impact of the particular agreement upon our commerce. . . ." 9 F.M.C. at p. 290. It then instructed the agreement members to come forard with the information because they were seeking exemption from the antitrust laws. *Id.* The Commission, earlier in its deciion, had gone to great pains to explain that section 15 "represents a departure from our national policy—the promotion of competition and the fostering of market rivalry, as a means of ensuring economic freedom." 9 F.M.C. at p. 288. The Commission found this policy as well as the policy against "undue limitations on competitive conditions" to be embodied in the antitrust laws. 9 F.M.C. at p. 289. The Commission emphasized the "public interest in the promotion of free and open competition" which Congress recognized when enacting section 15. *Id.* the Commission concluded:

We think it now beyond dispute that the "public interest" within the meaning of secton 15 includes the national policy embodied in the antitrust laws. *Id.*

Since the Commission felt that the pooling agreements in that case intruded upon the national policy favoring free and open competition, it found those agreements to be "prima facie" contrary to the public interest, thereby requiring justification. 9 F.M.C. at p. 290. Then the Commission stated that:

[p]resumptively all anticompetitive combinations run counter to the public interest in free and open competition and it is incombent upon those who seek exemption of anticompetitive combinations under section 15 to demonstrate that the combination seeks to eliminate or remedy conditions which preclude or hinder the ahievement of the regulatory purposes of the Shipping Act. 9 F.M.C. at p. 290.

Interestingly, to illustrate further than the Commission had no intention to become an antitrust tribunal which must make findings of violations of the Sherman Act, the Commission cited two decisions of the Civil Aeronautics Board arising under section 412 of the Federal Aviation Act, which was modeled after section 15. In those two cases the C.A.B. had required proponents of anticompetitive agreements to show need, or benefit, or valid regulatory purpose, not because the C.A.B. had first found a violation of the Sherman Act but because the Agreements were "plainly repugnant to established antitrust principles" or that they "inhibit competition to any significant extent." 9 F.M.C. at p. 291, citing *Local Cartage Agreement Case,* 15 C.A.B. 850, 852 (1952) and *Six Carrier Mutual Aid Pact,* 29 C.A.B. 168 at 175 (actually found at p. 174).

In several decisions since *Svenska* involving pooling agreements the Commission has engaged in a balancing test, weighing benefits of the agreements against the invasions of the antitrust tribunal. For example, in *Agreement Nos. 9847 and 9848,* 14 F.M.C. 149 (1970), a case which involved a more common type of pooling agreement, i.e., a pooling agreement tacked on to a more basic "equal access" agreement by which both the national-flag Brazilian and American lines would be given preferential rights to certain Government-controlled cargoes, obviously a really restrictive-type agreement in its totality, the Commission

interpreted the *Svenska* decision to mean a weighing of need, benefit, or purpose as against invasion of the policies of the antitrust laws, not as a requirement that the Commission actually find a violation of any antitrust law. Thus, the Commission stated:

Again, in 1968, *in FMC v. Svenska Amerika Linien,* 390 U.S. 238 (1968), we required that those proponents seeking to impose *restraints which interfere with the policies of the antitrust laws* must demonstrate that the restraints are required by a serious transportation need, necessary to secure important public benefits or to be in furtherance of some valid regulatory purposes. We now affirm those standards and base our approval herein on findings consonant with those prior decisions. 14 F.M.C. at pp. 155–156. (Emphasis added.) In accord: *Travel Agents* case, 10 F.M.C. at 34, 35.

In *Inter-American Freight Conference,* 14 F.M.C. 58 (1970), a case involving the pooling, not of revenue but of cargoes stemming from Brazilian decrees favoring the Brazilian merchant marine, the parties ultimately withdrew from the agreement, rendering the case moot. However, the Commission issued guidelines, again emphasizing the same interpretation of the *Svenska* decision, i.e., weighing need, benefit, or purpose against invasions of the "prohibitions of the antitrust laws" or the "policies of the antitrust laws." 14 F.M.C. at p. 61. However, since, in that case, it appeared that the percentages of carriages were dictated by the Brazilian government, i.e., that carriers were coerced into joining the agreement, the Commission denounced such a practice, stating that "[t]here is simply no room under section 15 for the approval of a pooling agreement which embodies discriminatory or unfair quotas dictated by governmental law, regulation, decrees, ukase, or fiat." 14 F.M.C. at p. 72. In that case the Commission illustrated that there were standards under section 15 other than the public interest seeing that the policies of the antitrust laws were not invaded more than necessary to serve the purposes of the regulatory statute, for example, standards like unjust discrimination, and unfairness among carriers.[38] (It bears reminding that in this Japanese case, there is no Japanese government decree, ukase, or fiat, which requires that any line, Japanese or otherwise, obtain any fixed percentage of the entire trade to the exclusion of any other line. At best, the six lines must compete for whatever share of revenue they can earn and simply apportion that share among themselves essentially equally).

In *Agreement No. 9835,* 14 F.M.C. 203 (1971), the Commission approved the Pacific Northwest space chartering agreement among the six Japanese lines, stating, as did *Svenska,* that if the Commission were to disapprove an agreement, it must find "substantial" evidence that the agreement violated one of the standards set forth in section 15 of the Shipping act, 14 F.M.C. at p. 207.[39] However, the Commission also applied the balancing test first enunciated in the

[38] In that case, furthermore, the Commission stated that "bilateralism" is a policy to be formulated by agencies of the government other than the Commission, which is a "quasi-judicial" tribunal administering the standards of the Shipping Act 14 F M C at p. 73 As discussed above, this area of policy and accommodation to the desires of a friendly foreign government is presently in a state of flux, awaiting reconsideration in the Argentine equal access and pooling case, Docket No. 73-72

[39] I agree with proponents that if the Commission disapproves an agreement, it must do so on the basis of evidence showing that the agreement violates one of the standards set forth in section 15 See *Svenska*, cited above 390 U.S. at p. 245. I also agree that if the agreement has minimal anticompetitive effects or minimal intrusions on the policies of the antitrust laws, the depth and scope of proof required to justify approval might be relatively light My disagreement with proponents is with their contention that there is no requirement that they go forward with evidence to justify approval unless protestants or Hearing Counsel first make out a case of violation of the antitrust laws, or show a "facial" violation as proponents would call it. When attempting to restrain competition, proponents automatically run counter to our national philosophy and, accordingly, they should show evidence of need, benefit, or regulatory purpose at the very outset of the proceeding If Hearing Counsel or protestants have nothing more to show than a mere restraint of competition to support their contentions for disapproval, then proponents may then have shown on balance that the need, benefit, etc., outweighs any possible harm, detriment, or invasion of the national policy favoring free and open competition.

Isbrandtsen case, by finding "transportation benefits . . . which far outweigh any relevant antitrust considerations which could be marshaled against its approval under section 15. . . ." *Id.* (Citations of the *Travel Agents* case and *Svenska* decision omitted.)

More recently, the Commission has followed the above interpretations of the *Svenska* decision approving the six lines' space chartering agreements in Docket No. 75–30, cited above. In its decision approving the six lines' space chartering agreements, the Commission stated:

> By the means of Agreement Nos. 9718 and 9731 Respondents have reduced the level of competition among themselves. As such, the agreements run counter to the policies enunciated in the United States antitrust laws, in favor of free and open competition in the marketplace. It is necessary, therefore, to examine what benefits, if any, these agreements confer upon the public, for the Commission will not approve an agreement if it invades the policies of the antitrust laws more than is necessary to serve the regulatory purposes of the Shipping Act. *Agreements Nos. 9718–3 and 9731–5*, cited above, 16 SRR at p. 1566.

This last statement is a pure reiteration of the original balancing test enunciated in the *Isbrandtsen* case, cited above, which in turn was the genesis of the Commission's test in the *Mediterranean Pools* and the *Travel Agents* cases, as ultimately endorsed by the Supreme Court in *Svenska*.[40]

In its recent decision in the so-called "Euro-Pacific" case, *United States, Lines, Inc. v. Federal Maritime Commission* (D.C. Cir. July 28, 1978), a case involving an agreement to operate a joint service, including agreement to "fix rates, share profits and losses, rationalize services, and employ common agents," *Id.*, at pp. 4, 5, the Court remanded the proceeding to the Commission with instructions to "consider the antitrust implications. . . ." *Id.*, p. 46. Throughout its opinion the Court emphasized the duty of the Commission to consider antitrust "implications" or "aspects." The court cited its own earlier *Isbrandtsen* decision as well as other decisions of the Supreme court in which that Court had recognized the duty of the Commission to study antitrust implications. The Court concluded:

> Under the Shipping Act, then, the FMC has the responsibility to consider carefully the antitrust aspects of all agreements submitted for approval. *Id.*, at p. 15.

But the Court did not say that the burden of going forward with evidence showing need, benefit, or purpose shifted to proponents of agreements only when the Commission has first found a violation of the antitrust laws or that an agreement "facially" violates the antitrust laws, as proponents would argue. The Court felt that the Commission had not explained why the public interest supports approval notwithstanding antitrust implications. *Id.*, p. 20. However, the Court went on to say that before finding an agreement to be in the public in-

[40] Another reason for clarification of the *Svenska* test may be the Commission's proposed rulemaking proceeding, Docket No. 76–63, *Filing of Agreements by Common Carriers and Other Persons*, 41 Fed. Reg. 51622, November 23, 1976. The Commission is proposing to require proponents of most types of agreements to submit evidence of need, benefit, or purpose. For other types of agreements, such evidence is necessary only if the agreement "appears to be violative of the antitrust laws." The Commission did not explain how it would determine the status of any agreement under the antitrust laws. No final rules have issued and the Commission may clarify simply by requiring submission of evidence for all agreements because they all run counter to our national philosophy favoring free competition, as the cases I discuss show. Furthermore, section 15 does not distinguish between agreements which are *per se* violative of antitrust law or otherwise violative. See *Volkswagenwerk v. F.M.C.*, 390 U.S.S261, 274–277 (1968); *F.M.C. v. Seatrain Lines*, 411 U.S. 726, 739 (1973), *Agreement No. T–4*, 8 F.M.C. 521, 531 (1965). Of course, if there is relatively little impact on competition, the burden of justification may be lighter than otherwise. See *Agreement No. 8760–5*, 17 F.M.C. 61, 62 (1973); Agreement No. 57–96, 16 SRR 159, 170 (1975).

terest, the Commission must make some positive findings showing benefits of the agreement which outweigh the harm that results from any form of anticompetitive arrangement, not merely arrangements which are *per se* violative of the antitrust laws. In this regard the Court stated:

The responsibility delegated to the Commission by Congress is not simply to guard against per se violations of the antitrust laws; it is to protect the public interest which may be adversely affected by all forms of anticompetitive arrangements. *Id.*, p. 20.

Finally, the Court came back to the fact that after the antitrust implications are considered, the Commission must ultimately base its decision on Shipping Act standards, stating:

In this case the FMC simply failed to address itself in any way to one of the factors specified by Congress in the Shipping Act. . . . *Id.*, p. 20.

The proceeding discussion of the Euro-Pacific decision summarizes my entire discussion in this section of my decision, i.e.: (1) that proponents of any anticompetitive agreements submitted for approval under section 15 of the Act must show entitlement to approval by showing need, benefit, purpose, or other jusitification and must do so at the outset of the proceeding whether the agreement is *per se* or "facially" violative of the antitrust laws; (2) that the Commission will balance the need benefit, etc., against the invasion of our national policy favoring free and open competition; and (3) that the ultimate standard for approval will be a Shipping Act, not a Sherman Act, standard.[41]

IX. In the Last Analysis the Subject Pooling Agreement Produces Benefits Mainly Related to the Already Approved Space Chartering Agreements Without Any Showing of Harm, Detriment to Commerce or Injury to Other Carriers

This record shows that, after balancing the benefits flowing from approval of the pooling agreement against its effects on commerce, shippers, or outside carriers, or the policies favoring free and unrestrained competition, the benefits outweigh any possible harm and the agreement deserves continued approval.

The effect of continued approval of the agreement is to allow six Japanese carriers to share among themselves whatever revenue they are able to earn in the total market, which is a minority share, perhaps in the area of 35.7 percent. Such

[41] Adopting the principle that any anticompetitive agreement requires proponents to go forward with proof of need, benefits, etc., regardless of the status of the agreement under the Sherman Act avoids the *difficult problem of determining* exactly what the agreements would be considered under the Sherman Act or other antitrust law. For example, the pure pooling agreement in this case *may or may not be per se* violative of the Sherman Act. No case cited to me by any party or any case that I have seen cited by the Department of Justice in other cases seems to answer this question. The various cases cited invarably involve more than pooling agreements, for example, they usually include price fixing, exclusive rights to territories, etc. It is not even clear that pooling agreements alone constitute market divisions, which are *per se* violative of the Sherman Act. *In the only shipping* case involving pure pooling of revenue arising under the Sherman Act, the lower court had found the agreement on balance not to be an unreasonable restraint of trade, thus not violative of the Sherman Act, either *per se* or otherwise. However, the Supreme Court dismissed the case as moot on appeal. See *United States v. Hamburg-American S.S. Line*, 216 Fed. 971 (S.D.N.Y. 1914), vacated as moot, 239 U.S. 466 (1916). Although market divisions are considered *per se* violative of the Sherman Act (*U.S. v. Topco Associates*, 405 U.S. 596 (1972)), the various market division cases also involve *territorial restrictions or customer* allocations (*e.g., U.S. v. Consolidated Laundries Corp.*, 291 F. 2d 563 (2 Cir. 1961)). Also, some authorities believe pooling agreements are not necessarily market divisions. See Locklin, *Economics of Transportation* (5th Ed. 1960), pp. 292, 293 n. 11. See also Celler Report, p. 158. It is not necessary to write a treatise on this question. My only point is that the Commission should avoid the Sherman Act thicket and need not attempt *to puzzle out whether pooling* agreements are or are not *per se* violative of the Sherman Act, in this case, especially, where there are no exclusive territorial restrictions or divisions of customers, *but merely a sharing of some* revenues earned in the total market. As discussed in note 40, above, furthermore, section 15 does not distinguish agreements under antitrust criteria.

revenue sharing improves certain features of the lines' space chartering agreements by encouraging the lines to charter out additional space and containers to any other carrier operating under the space chartering agreements, which have already been found to be beneficial to commerce by the Commission. The pooling agreement, together with the space chartering agreements, also assists the carrier parties to reduce costs and better utilize space on their vessels. Because of its revenue-sharing features, furthermore, the agreement encourages any carrier to solicit lower-rated cargoes at ports the carrier might otherwise find unattractive economically. This feature of pooling agreements, namely, encouragement of additional service which might otherwise disappear because of relative economic weakness of carriers, was specifically recognized as a potential benefit of pooling agreements by the legislators responsible for section 15 of the Shipping Act, as shown in the Alexander Report and confirmed by the later Celler Report (p. 171). Other benefits of pooling agreements, such as restraints on excessive competition and malpractices have been recognized by the Commission in previous cases, although to the extent these benefits as to malpractices have appeared here, they seem to have been minimal at best since malpractices continued long after approval of the agreement and terminated because of several other critical events unrelated to the agreements. The agreement, however, did place some curb on competition among the Japanese carriers, which competition had interfered with the effectiveness of the space chartering agreements.

The space chartering agreements, which have been exhaustively studied and found to be beneficial by the Commission, are the basic agreements which are assisted by the pooling agreement. At least so long as the space chartering agreements continue to provide first-rate service, help curb overtonnaging, and contribute to better utilization of vessels, as they have been found to do, the pooling agreement, which makes these space chartering agreements even more efficient, deserves continued approval. Furthermore, since the space chartering and pooling agreements are all directed by the Japanese Government as part of its policy to help improve the performance of its carriers and since these agreements are inextricably interrelated, disapproval of the pooling agreement while the space chartering agreements continue in operation, would be illogical. Ultimately the periods of approval for all these agreements should probably be coordinated so that all of them can be considered as the unified whole they appear intended to be.

For ready reference a brief narrative description of the various articles of the pooling agreement is shown in the appendix.

(S) NORMAN D. KLINE
Administrative Law Judge

WASHINGTON, D.C.
November 15, 1978

APPENDIX

Under Article 1 of the Agreement, the pooling of revenues is restricted to cargo of the parties moving in the trades between ports in Japan and ports in California, Oregon and Wasington, including cargo originating or terminating in OCP territory. Under Article 2, minilandbridge, transshipment, mail and bulk liquid cargo are excluded from pool cargo. Pool cargo is defined as cargo loaded or discharged to or from the parties' containership vessels operating in the trades. The parties may elect to include as pool cargo, cargo moving on their semi-container or conventional vessels. Under Article 3, revenues derived from pool cargo are defined as the basic ocean freight and the applicable currency and bunker surcharges, less the allowances as permited under Article 4. Under Article 4, compensation equal to ten (10) percent of the freight, including surcharges and compensation covering the cost of terminal and handling charges, also such other special allowances as may be decided, are authorized as deductible allowances. Under Article 5, the pool share of each party is divided equally into one-sixths for each the Pacific Northwest and the Pacific Southwest trades, except in the Pacific Southwest trade, the share of NYK and Shawa are apportioned as one-fifth and two-fifteenth interests, respectively. Under Article 6, the pool period on a calendar year basis is fixed except for the initial year, and under Article 7 pool revenues are to be apportioned and settled among the parties at the close of each pool period, but limited to fifteen percent of each party's pool share if its contribution is less than its pool share. Should there be a surplus, it shall be apportioned among those parties whose contributions range from 85 to 115 percent of their respective pool shares. And, under Article 8, a penalty shall be assessed in the case of a party whose contribution does not attain eighty-five percent of its pool share, but not to exceed fifteen percent of the share. The amount assessed shall be apportioned among the parties whose contributions range from eighty-five to one hundred and fifteen percent. Other provisions deal with the quantum for voting (Article 9); attendance at meetings (Article 10); arbitration in case of dispute (Article 11); reporting (Article 12); withdrawal (Article 13); and duration (Article 14). Since the Agreement's approval, there has been no occasion to include other cargo (Article 2), agree upon other special allowances (Article 4) or resort to arbitration (Article 11). (Ex. 2, pp. 10–12).

FEDERAL MARITIME COMMISSION

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

SUBCHAPTER A—GENERAL PROVISIONS

PART 502—Rules of Practice and Procedure

[DOCKET NO. 78-50; GENERAL ORDER 16, AMDT. 29]

PETITIONS FOR DECLARATORY ORDER

March 7, 1979

ACTION: Final Rule

SUMMARY: The Commission's rule governing issuance of declaratory orders is revised to define the limits of applicability of the rule and to adopt procedures governing notice, participation of persons not named in the petition, referral to a formal docket, availability of discovery and evidentiary hearing, and timing and limits of submissions in declaratory order proceedings. The changes are necessary because of problems encountered in the above specified areas due to lack of guidance in the current rule. The amendments will serve to provide uniform guidelines and eliminate current confusion in processing of petitions for declaratory orders.

DATES: March 13, 1979.

SUPPLEMENTARY INFORMATION:

The Commission by notice published December 5, 1978, (43 F.R. 56921) proposed to amend Rule 68 of the Commission's Rules of Practice (46 CFR 502.68) which provides for issuance of declaratory orders. The proposal indicated that experience has shown that the current rule is deficient due to its failure to outline procedures governing processing of petitions for declaratory orders and its failure to define limits of matters for which it is appropriate to invoke the declaratory order procedures. Specific areas of confusion under the current rule include whether to notice the filing of the petition, whether and to what extent participation by persons not named in the petition (including Hearing Counsel) will be permitted, when referral to a formal docket is appropriate, to what extent discovery and evidentiary procedures should be available, and whether the parties' submissions on the merits must accompany the petition and reply.

The proposed rule was designed to remedy these deficiencies. No comments were directed to the substance of the proposed rule. Accordingly, we have decided to adopt the rule as proposed with minor language changes.

The legislative history of the Administrative Procedure Act indicates that Congress recognized that a necessary condition of the ready use of a declaratory order is that it be employed only in situations where the critical facts can be explicitly stated, without the possibility that subsequent events will alter them.[1] In its order denying a petition for declaratory order in Docket 76-60, served August 9, 1978, the Commission also recognized that declaratory orders are not suited to dispose of contested factual issues. Accordingly, it will usually not be necessary to resort to discovery procedures or evidentiary hearing in declaratory order proceedings. For this reason we are adopting a filing schedule limited to petitions and replies with such filings to be accompanied by the party's complete legal and actual presentation as to its desired disposition of the merits of the petition. Relief from this schedule would be available only if the party could clearly substantiate its need for discovery or evidentiary hearing.

Under this amendment all petitions meeting the requirements of the rules will be referred to a formal docket and notice of filing thereof will be published in the *Federal Register*. The notice will indicate to what extent replies are permitted. In the case of petitions which are not of general public interest, but which involve matters limited to specifically named parties, replies by persons other than those named in the petition will be permitted only upon grant of intervention by the Commission under Rule 72 (46 CFR 502.72). Participation by the Commission's Bureau of Hearing Counsel will be governed by the same standards as other persons.

In an effort to clarify the circumstances under which petitions for declaratory order are not appropriate, our new rule recites the recognized limited purpose of declaratory orders viz. to allow persons to act without peril upon their own view.[2] The rule further distinguishes between declaratory orders and coercive orders and refers to the appropriate sections of the rules under which the latter are to be sought. Finally, the rule makes it clear that declaratory orders are to be limited to matters involving conduct or activity regulated by the Commission under statutes administered by the Commission.

Pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553) and section 43 of the Shipping Act, 1916 (46 U.S.C. 841(a)), section 502.68 of Title 46 CFR is revised to read as follows:

§502.68 Declaratory orders.

(a) The Commission may, in its sound discretion, issue a declaratory order to terminate a controversy or to remove uncertainty. Petitions for the issuance thereof shall state clearly and concisely the controversy or uncertainty, shall name the persons and cite the statutory authority involved, shall include a complete statement of the facts and grounds prompting the petition, together with full disclosure of petitioner's interest, shall be served upon all parties named therein, and shall conform to the requirements of Subpart H of this part.

[1] Attorney General's Manual on the Administrative Procedure Act, U.S. Department of Justice, 1947, p. 60.

[2] Attorney General's Manual cited above, p. 59.

(b) Petitions under this section shall be limited to matters involving conduct or activity regulated by the Commission under statutes administered by the Commission. The procedures of this section shall be invoked solely for the purpose of obtaining declaratory rulings which will allow persons to act without peril upon their own view. Controversies involving an allegation of violation by another person of statutes administered by the Commission, for which coercive rulings such as payment of reparation or cease and desist orders are sought, are not proper subjects of petitions under this section. Such matters must be adjudicated either by filing of a complaint under section 22 of the Shipping Act, 1916 and section 502.62 of this part, or by filing of a petition for investigation under section 502.69 of this part.

(c) Petitions under this section shall be accompanied by the complete factual and legal presentation of petitioner as to the desired resolution of the controversy or uncertainty, or a detailed explanation why such can only be developed through discovery or evidentiary hearing.

(d) Replies to the petition shall contain the complete factual and legal presentation of the replying party as to the desired resolution, or a detailed explanation why such can only be developed through discovery or evidentiary hearing. Replies shall conform to the requirements of section 502.74 of this part.

(e) No additional submissions will be permitted unless ordered or requested by the Commission or the presiding officer. If discovery or evidentiary hearing on the petition is deemed necessary by the parties, such must be requested in the petition or replies. Requests shall state in detail the facts to be developed, their relevance to the issues, and why discovery or hearing procedures are necessary to develop such facts.

(f) A notice of filing of any petition which meets the requirements of this section shall be published in the *Federal Register*. The notice will indicate the time for filing of replies to the petition. If the controversy or uncertainty is one of general public interest, and not limited to specifically named persons, opportunity for reply will be given to all interested persons including the Commission's Bureau of Hearing Counsel. In the case of petitions involving a matter limited to specifically named persons, participation by persons not named therein will be permitted only upon grant of intervention by the Commission pursuant to section 502.72 of this part. Petitions to intervene shall be submitted on or before the reply date and shall be accompanied by intervener's complete reply including its factual and legal presentation in the matter.

(g) Petitions for declaratory order which conform to the requirements of this section will be referred to a formal docket. Referral to a formal docket is not to be construed as the exercise by the Commission of its discretion to issue an order on the merits of the petition.

By the Commision.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-10

JOY MANUFACTURING COMPANY

v.

LYKES BROS. STEAMSHIP LINES

ORDER ON RECONSIDERATION

March 8, 1979

By petition filed January 11, 1979, the Complainant, Joy Manufacturing Company, requested reconsideration of the Commission's Order of December 15, 1978, partially adopting the Initial Decision and remanding the proceeding to the Presiding Officer for a determination of the applicable freight charges.

The Complainant's petition fails to raise any allegations of fact or law not already fully considered. There being no error found in our decision on the existing record and nothing new to add that would affect our decision, reconsideration is unwarranted.*

The Petition is therefore denied. The Commission's decision served December 15, 1979, is affirmed.

IT IS SO ORDERED.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

* See Rule 261 of the Commission's Rules of Practice and Procedure.

FEDERAL MARITIME COMMISSION

DOCKET NO. 72-35

PACIFIC WESTBOUND CONFERENCE—INVESTIGATION OF RATES, RULES AND PRACTICES PERTAINING TO THE MOVEMENT OF WASTEPAPER AND WOODPULP FROM UNITED STATES WEST COAST PORTS TO PORTS IN JAPAN, THE PHILIPPINES, TAIWAN, KOREA, SOUTH VIETNAM AND THAILAND

Pacific Westbound Conference's rates on wastepaper found lawful under sections 15 and 18 (b) (5) of the Shipping Act, 1916.

Edward D. Ransom, Thomas E. Kimball and *Robert B. Yoshitomi* for Pacific Westbound Conference.

Edward L. Merrigan for National Association of Recycling Industries, Inc., Consolidated Fibers, Inc., and Paper Fibers, Inc.

Timothy L. Harker and *William A. White* for United States Environmental Protection Agency.

Robert W. Skiruin for Crown Zellerbach Corporation.

Richard A. Miller and *Dean Stern* for Southwest Forest Industries.

Warner W. Gardner and *Kent L. Jones* for American President Lines, Ltd.

Edward M. Shea for Sea-Land Service, Inc.

John Robert Ewers, Paul J. Kaller, Alan J. Jacobson, and *Donald J. Brunner* for Bureau of Hearing Counsel.

REPORT

March 9. 1979

BY THE COMMISSION: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice Chairman;* Karl E. Bakke, James V. Day and Leslie L. Kanuk, *Commissioners*)

This proceeding was initiated on July 20, 1972, by Order of Investigation and Hearing to determine whether provisions in the Pacific Westbound Conference (PWC) tariff and/or actions of its member lines, relating to the carriage of woodpulp and wastepaper from United States West Coast ports to ports in Japan violated sections 15, 16 First, 17, and 18(b)(5) of the Shipping Act, 1916 (46 U.S.C. 814, 815, 816, and 817).[1] PWC and its member lines were named as respondents. Several parties intervened,[2] including the National Association of

[1] The Order of Investigation was subsequently amended, expanding the scope of the investigation to destination ports in the Philippines, Taiwan, Korea, South Vietnam, and Thailand. Unless otherwise specified, this entire range of ports will be referred to as the "Far East."

[2] Intervenors included: Fibreboard Corporation, United States Environmental Protection Agency (EPA), Southwest Forest Industries, Inc., Crown Zellerbach Corporation, National Association of Secondary Material Industries, Inc. (later changed to NARI), Consolidated Fibers, Inc., M. Sassoon Co., Inc., and Paper Fibers Inc. EPA and M. Sassoon Co., Inc. withdrew as parties.

Recycling Industries, Inc. (NARI), the party which carried the burden of proof for this particular proceeding.[3]

Administrative Law Judge Seymour Glanzer (Presiding Officer) issued an Initial Decision on August 15, 1977, in which he found PWC's ratemaking practices concerning woodpulp and wastepaper in violation of section 15 and in contravention of section 18(b)(5). As a result, he directed that PWC's Agreement No. 57 be modified by eliminating the conference's rate fixing authority over wastepaper, thereby declaring wastepaper rates open. Exceptions to the Initial Decision were filed by NARI, PWC, the Commission's Bureau of Hearing Counsel (Hearing Counsel), and American President Lines, Ltd. (APL) and Sea-Land Service, Inc. (Sea-Land). NARI and PWC filed replies to exceptions. Oral argument was heard on September 14, 1978.

Though environmental evidence was received during the hearings, the Presiding Officer issued his Initial Decision based solely on the economic record.[4] The Commission's Office of Environmental Analysis (OEA) considered the environmental ramifications of this proceeding and prepared a draft environmental impact statement (DEIS)[5] pursuant to the National Environmental Policy Act of 1969 (NEPA). (42 U.S.C. 4321 *et seq.*). Several parties filed comments to OEA's completed DEIS.[6] A Final Environmental Impact Statement (FEIS), incorporating and responding to comments in the DEIS, was served on November 29, 1978.[7]

BACKGROUND

Woodpulp, a commodity used in the manufacture of paper and paper products, is produced from primary materials—mainly residues from the manufacture of other forest products. Wastepaper, a secondary material obtained through recycling, can also be used as a raw material in the manufacture of paper and paper products, though not necessarily in the same manufacturing process as woodpulp.[8] Only specific grades of wastepaper can be used to make specific grades of pulp. Both in the United States and in the Far East, woodpulp has consistently remained the more highly valued commodity.

Since 1967, PWC rates on woodpulp have been "open" thus allowing individual members of PWC to set their own rates for woodpulp. Since 1970, the PWC rate for wastepaper has been incorporated into one line item. The PWC contract rate for wastepaper during the period covered by the record in this proceeding was higher than representative open rates for woodpulp.[9] Though PWC originally carried more woodpulp than wastepaper, it now carries a greater

[3] Hearings were conducted which resulted in almost 3,000 pages of testimony and the introduction of 109 exhibits.

[4] See Commission order dated October 28, 1978.

[5] An earlier prepared DEIS was thus considered a "threshold assessment survey."

[6] Comments were received from Hearing Counsel, PWC, NARI, EPA, Garden State Paper Co., Inc., U.S. Department of Energy, U.S. Department of Commerce, U.S. Maritime Administration, and U.S. Department of Interior.
PWC filed a motion to strike the DEIS on a variety of grounds. This motion was denied by Commission order on September 8, 1978.

[7] PWC filed a "Renewed Motion to Strike" the FEIS. For reasons which follow this motion will be denied.

[8] Approximately 1.25 tons of wastepaper are needed to produce one ton of cellulose fiber (TR. 2532).

[9] The disparity of rates between wastepaper and woodpulp has decreased markedly since the close of the record. Woodpulp rates have increased significantly so that presently the rate difference between the two commodities is negligible to Korean ports and has been considerably narrowed to Japanese ports. Wastepaper, the highest volume commodity moving to Japan and Korea via PWC carriers, has a rate well below the average freight rate of the 113 highest tonnage/volume commodities moving to the Far East.

volume of wastepaper. Moreover, its wastepaper volume has continued to increase steadily, and at times dramatically.

PWC members carry virtually all of the wastepaper shipped to the Far East from West Coast ports.[10] However, PWC's share of the export woodpulp in this trade has been decreasing, due primarily to the strong competition it receives from non-conference carriers (liners, tramps, and specialized breakbulk vessels).

The Presiding Officer found that PWC's rates on wastepaper violated section 18(b)(5), by: (1) measuring the rate for wastepaper against that of a similar commodity—woodpulp; (2) concluding that wastepaper rates did not conform to the normal ratemaking factors of cost, value of service, or other transportation conditions; and (3) concluding that wastepaper dealers were harmed by PWC's wastepaper rates, *i.e.*, export wastepaper movement was inhibited and dealers thereby lost profits. The Presiding Officer also found that PWC's ratemaking practices violated section 15 because: (1) PWC misused its conference agreement to contravene the regulatory purposes of section 18(b)(5) in fixing its rates so unreasonably high; and (2) PWC's ratemaking practices were "unjustly unfair" as between wastepaper and woodpulp shippers, exporters and importers. He declined to rule on any possible violations of sections 16 First and 17, however, deciding that to do so would serve no useful regulatory purpose.

Position of the Parties

NARI supports the Presiding Officer's ultimate conclusions, but offers two exceptions concerning the form of relief. First, NARI believes the Commission should actually prescribe what is "reasonable and fair" for future wastepaper rates. Secondly, in determining what is reasonable and fair, NARI suggests that the Commission consider PWC members' rates on "competing woodchips."

Hearing Counsel excepts to the Presiding Officer's finding of Shipping Act violations. With respect to section 18(b)(5) Hearing Counsel specifically excepts to the findings that:

(1) PWC's wastepaper rates have adversely affected the volume of wastepaper movement;

(2) PWC's wastepaper rates have caused a reduction of profit to wastepaper dealers;

(3) The effect Commission incentives for expanded wastepaper exports will have on domestic wastepaper users need not be considered by the Commission.

As to section 15, Hearing Counsel excepts to the finding that:

(4) By fixing wastepaper rates so unreasonably high as to be a detriment to commerce, PWC misused its conference agreement and operated beyond the scope of the Commission's grant of partial immunity from the antitrust laws.

Hearing Counsel does not argue that PWC rates on wastepaper are or are not "unreasonably high" for purposes of section 18(b)(5) but rather contends that NARI has failed to establish that these rates are "detrimental to the commerce of the United States."

Like Hearing Counsel, PWC argues that the Initial Decision errs in finding that wastepaper dealers are harmed by PWC's rates on wastepaper. Additionally, PWC contends that the Presiding Officer erred in finding that:

[10] In 1971 PWC carried 92 3% of the exports to Japan, and in 1972, 95 2%. Its percentage of the tonnage to Korea for those same years was even higher.

1. Non-conference competition from carriers of woodpulp is not a legitimate ratemaking factor justifying the open rates on woodpulp, and

2. PWC's wastepaper rates were unreasonably high.

In support of its second exception, PWC further submits that: (a) wastepaper and woodpulp carried by PWC do not compete with each other; (b) PWC woodpulp rates were not shown to be profitable; and (c) any difference in rates between the two commodities is justified by a number of transportation factors. Finally, PWC argues that its rate actions have neither "violated" section 15 nor caused a loss of antitrust immunity.

APL/Sea-Land adopt PWC's exceptions concerning the reasonableness of wastepaper rates for purposes of section 18(b)(5). They then proceed to argue that, even if these wastepaper rates are condemned by section 18(b)(5), section 15 was not thereby "violated" and PWC was not operating outside the grant of immunity from the antitrust laws.

DISCUSSION

Regulatory Issues

After thoroughly reviewing the exceptions and replies, together with the entire record, we are compelled to reverse the Initial Decision and find PWC's rates and practices concerning wastepaper lawful under all applicable sections of the Shipping Act.[11] We do so for the reasons set forth below.

The Order of Investigation which initiated this proceeding raised possible violations of sections 15, 16 First, 17 and 18(b)(5). The Presiding Officer decided that no useful regulatory purpose would be served by determining the sections 16 First and 17 issues in light of his finding violations of sections 15 and 18(b)(5) (Initial Decision at 99). Our disposition of this proceeding, however, requires a brief consideration of these two sections.

Section 16 First proscribes rates which result in "undue or unreasonable preference or prejudice."[12] Section 17 prohibits "unjustly discriminatory rates between shippers."[13] In *North Atlantic Mediterranean Freight Conference—Rates on Household Goods*, 11 F.M.C. 202, 213 (1967), the Commission distinguished these two sections:

> To constitute unjust discrimination [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. In such a case, it is immaterial that the shippers are not in competition with each other. Where the service is different—*e.g.*, different commodities—or the transportation is between different localities, it is a case of undue or unreasonable preference or prejudice [section 16] unless the many relevant considerations render the different rates reasonable. Ordinarily, the shippers must be competitors.

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[11] Any specific exception or reply not expressly addressed has nonetheless been fully considered by the Commission.

[12] Section 16 states, in pertinent part,

> that it shall be unlawful for any common carrier by water
>
> First To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any regard whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever

[13] Section 17 states, in pertinent part

> that no common carrier by water in foreign commerce shall . . . charge . . . any rate . . . which is unjustly discriminatory between shippers or ports .

Section 17 is clearly inapplicable to this case. Wastepaper and woodpulp are not "like commodities" nor are they transported "over the same line between the same points." The majority of wastepaper carried by PWC to the Far East originates in and is shipped from California ports. Woodpulp is manufactured almost exclusively in the Pacific Northwest and consequently is shipped from ports in that area (Initial Decision at 55).

Three elements must be present before a carrier's rates will violate section 16 First: (1) there must be a competitive relationship between the commodities; (2) the complaining party must be actually disadvantaged and the other party unduly favored; and (3) the difference in rates must be undue, or unreasonable, *i.e.*, not justified by other factors.[14] *Household Goods*, 11 F.M.C. at 209; *Nickey Brothers, Inc. v. Associated Steamship Lines (Manila Conference)*, 5 F.M.B. 467, 476–77 (1958). We need only consider the first of these elements to find that no violation of section 16 First is presented.

NARI has failed to establish that the particular grades of wastepaper moving to the Far East are competitive with the particular grades of woodpulp which move in the same trade. While it is no doubt true that both commodities compete in certain end uses—*i.e.*, that both can be used as a raw material for the manufacture of paper or paperboard—specific grades of wastepaper can only be used to produce specific grades of pulp of a like kind and quality. The table below indicates specific grades of woodpulp exported to Japan in 1972 and 1974.[15]

TABLE I

Commodity	Imports (in tons) 1972[16]	1974[17]
Dissolving pulp	206,880	216,784
Bleached sulphate and sulphite pulp	151,251	269,386
Unbleached sulphate and sulphite pulp	16,388	4,136
Groundwood pulp	37	7
TOTAL	374,556	497,268[18]

Japan's wastepaper imports for the same years were 69,413 tons and 184,214 tons respectively.[19]

Dissolving pulp, which accounted for 55.2% of Japan's total pulp imports in 1972 and 43.6% in 1974, is used in the manufacture of non-paper products (*e.g.*, rayon). No type of wastepaper can be substituted for it. The next highest volume woodpulp grade, bleached sulphate and sulphite pulp, could only be compatible with tab cards as a raw material. Tab cards, however, constitute only about 10

[14] Among the factors mentioned by the Commission in *Household Goods* which would work to make a preference or prejudice reasonable or due are: carrier competition, the convenience of the public, the fair interest of the carrier, the relative quantities of the traffic moved, the relative cost of the service and profit to the carrier, and the situation and circumstances of the respective customers. *Household Goods*, 11 F.M.C. at 210.

[15] Japan is the only Far East country for which detailed statistics were introduced. It is, however, the largest Far East importer of woodpulp and wastepaper and is, therefore, representative for purposes of analysis.

[16] 1972 data from entire United States. Ex 92, p. 177.

[17] 1974 data from West Coast only. Attachment to Response of NARI dated March 18, 1976.

[18] An additional 6,955 tons of "semi-bleached sulphate" were imported in 1974, but no comparable figure exists for 1972

[19] Exhibit 22 and Attachment 3 to Reply of Hearing Counsel dated March 1, 1976.

percent of the wastepaper movement to the Far East.[20] Unbleached sulphate and sulphite grades of pulp make up a minor percentage of woodpulp exports to Japan (less than 1 percent in 1974). These are the only grades with which 50% of the wastepaper exports could compete (new corrugated cuttings, old corrugated, bag waste and grocery bags). Virtually no groundwood pulp is exported to Japan. However, this is the grade of pulp with which old newsprint, one-third of the wastepaper exports, could compete.

These figures indicate that for 1972 more than 83% of Japan's wastepaper imports from the United States could not compete with more than 95% of its woodpulp exports. For 1974 more than 99% of the woodpulp could not compete with 90% of the wastepaper moving in the trade. Moreover, even the theoretical compatibility between tab cards and bleached sulphate and sulphite pulps was not established as fact on this record.

Section 18(b)(5) contains two elements: (1) is the rate unreasonably high or low; and (2) has the unreasonableness of the rate caused detriment to commerce?[21] *Investigation of Ocean Rate Structures*, 12 F.M.C. 34, 55 (1968). An unreasonable rate is one which does not conform to the ratemaking factors of cost, value of service or other transportation conditions. *Investigation of Ocean Rates*, 12 F.M.C. at 56. Because the PWC rates at issue, even if unreasonable, have not been shown to result in detriment to commerce, it is not necessary to discuss the reasonableness of PWC's wastepaper rates.[22] Our decision turns on the "detriment to commerce" standard of section 18(b)(5).

The Commission has had occasion to discuss detriment to commerce in several cases. A rate which handicaps tonnage from moving or which impairs the movement of goods has been found detrimental to commerce. *Iron and Steel Rates, Export-Import*, 9 F.M.C. 180, 191–192 (1965); *Outboard Rates Affecting Export High Pressure Boilers*, 9 F.M.C. 441, 458 (1965). In *Rates, Hong Kong-United States Trade*, 11 F.M.C. 168, 174 (1968), the Commission held that a complaining carrier makes out a *prima facie* case of detriment to commerce if it demonstrates an adverse economic impact upon itself.

Ultimately, the Commission decided not to restrict the meaning of detriment to commerce to rates which prevent a commodity from moving.[23] Accordingly, detriment was characterized as "something harmful" and was not limited to

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[20] Based upon testimony of NARI's witness, Richard P Stovroff, the percentage of wastepaper exports from the West Coast breaks down as follows:

Old newsprint	33.3%
New Double-lined Kraft corrugated cuttings	16.7%
Old corrugated	13.3%
Bag Waste	10.0%
Grocery bags	10.0%
Tab cards	10.0%
Other	6.7%

[21] Section 18(b)(5) states:

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

[22] The Presiding Officer found as a fact that PWC wastepaper rates were "exorbitant and outrageously high" (Initial Decision at 25). He further concluded that these rates were "unreasonable": (1) by comparing the rate for wastepaper against that of a "similar commodity" woodpulp, and (2) by determining that PWC's wastepaper rates were not justified by the normal ratemaking factors of cost, value of service or other transportation conditions (Initial Decision at 72 and 74).

[23] Of course, any rate which prevents cargo from moving is detrimental to commerce.

"lost sales" or other rigid formulas. In so doing, the Commission purposefully expanded the interpretation of detriment to include cases of more intangible impacts such as the watering down of profits or the preclusion of a merchant from entering a market. *Investigation of Ocean Rates*, 12 F.M.C. at 61. The Commission further noted the economic truism that "all things being equal, more cargo will move at lower rates," but emphasized that, that fact standing alone, does not legally constitute detriment to commerce. *Investigation of Ocean Rates*, 12 F.M.C. at 62.

The Presiding Officer found that wastepaper dealers were harmed by PWC's rate on wastepaper because wastepaper movement was inhibited and dealers thereby suffered a loss of profit (Initial Decision at 84). He based his finding primarily on the testimony of the president of Consolidated Fibers who had visited manufacturers of paper and paperboard in Japan, Taiwan and the Philippines and who testified that those manufacturers would use increasing quantities of United States wastepaper if its delivered price were lower (Initial Decision at 60). We find such conclusory, hearsay statements, without more, to have little probative value. As our predecessor stated:

> It may be that [complainants'] conclusions are based on specific facts bearing upon the question of discrimination and prejudice, but . . . [we] cannot accept such conclusions without an examination of the underlying facts upon which they are based, which facts are not of record in this proceeding. *Philadelphia Ocean Traffic Bureau v. Export Steamship Corp.*, 1 U.S.S.B. 538, 541 (1936). *See also, Port of Houston Authority v. Lykes Bros.*, 16 S.R.R. 1069, 1077 (1976).

The record fails to establish that wastepaper dealers were actually harmed by PWC's wastepaper rates.[24] Other than the general proposition that more goods would move at a lower rate (if indeed true in this particular case), nothing of record supports any finding that dealer profits were "watered down." NARI objected to the development of any evidence which would reveal wastepaper dealer profitability and the Presiding Officer curtailed PWC's efforts in this direction.[25] Nor was any evidence offered indicating loss of sales of wastepaper because of the freight rate.[26] Furthermore, no wastepaper dealers testified that wastepaper freight rates precluded them from entering the wastepaper export market.

Clearly, PWC's wastepaper rates did not prevent wastepaper from moving to the Far East.

TABLE II

PWC Wastepaper Exports 1971–1976 (short tons)[27]

	Japan	Korea	All Destinations
1971	62,638	17,199	97,513
1972	70,449	26,817	111,446

[24] The Presiding Officer was also influenced by letters received by PWC from wastepaper receivers in the Far East claiming that they would have to shift to woodpulp unless PWC reduced its freight rates for wastepaper. These letters in no way change our position. They were written prior to the initiation of the proceeding, when conditions in the Far East were considerably different, and are themselves rather self-serving statements. Moreover, none of these requests was supported by any hard data which could be verified by PWC (Ex. 86, p. 286). No shift to woodpulp is apparent.

[25] Then Chief Judge C. W. Robinson (Tr 211–221).

[26] This case is unlike that of *Nickey Brothers, supra*, in which distributors of mahogany products presented evidence that sales of these products declined because of the rate differential favoring bundled mahogany lumber over mahogany logs.

[27] Sources: Exhibit 71, Attachment A, March 3, 1976 Exhibit, Attachment C; Attachment E to Hearing Counsel's Exceptions. The 1976 figures are not part of the record. We are taking official notice of them pursuant to Rule 226(a) of the Commission's Rules of Prac-

1973	145,554	98,530	264,153
1974	190,793	100,887	327,303
1975	128,096	124,804	283,207
1976	132,179	132,329	285,950

As this table indicates, wastepaper exports to Japan and Korea increased steadily and dramatically from 1971 through 1976 (with a slight decrease in 1975 coinciding with a worldwide recession). This occurred despite PWC freight rates which NARI contends are outrageously high.[28] These export trends completely belie any argument that PWC wastepaper rates are inhibiting the export of wastepaper. Far East demand for wastepaper continues to grow regardless of the freight rate on this commodity.[29] Based upon this record, we are unable to find any harm to wastepaper dealers which amounts to "detriment to commerce" under section 18(b)(5).

The Presiding Officer found PWC's ratemaking practices violative of section 15 in two separate ways.[30] First, because the Presiding Officer reasoned that PWC fixed wastepaper rates so unreasonably high as to be a "detriment to commerce" in contravention of section 18(b)(5), its conference agreement operated to the "detriment of the commerce of the United States" and contrary to the public interest.[31] Secondly, he found PWC's ratemaking practice "unjustly unfair as between wastepaper and woodpulp shippers, exporters and importers" (Initial Decision at 96). The first finding neccssarily rests upon his prior finding that PWC's wastepaper rates were so unreasonably high as to be detrimental to commerce—*i.e.*, that these rates in some way harmed wastepaper shippers. As discussed above, however, such a finding cannot be made on this record. Nor can any finding be made of "unfairness" between wastepaper and woodpulp shippers, or exporters and importers, solely on rather dated requests from shippers and receivers of wastepaper that PWC lower its rates.[32] Again, there is no

tice and Procedure. 46 C.F.R. 502.226(a). A similar trend is reflected in exports of wastepaper from the entire United States. *See*, United States Department of Commerce, *Pulp, Paper and Board*, 41 (Spring 1978), a publication of which we are also taking official notice. In fact, the export volume of wastepaper in 1977 was an all time record, surpassing the previous high of 1974.

[28] The 1974 increases in wastepaper carryings occurred even though PWC raised the freight charge for wastepaper twice during this period. Ex. 71, Attachments B and C.

[29] Richard P. Stovroff, President of Consolidated Fibers, Inc., testified on July 25, 1973 that if "reasonable, equitable" freight rates were established for wastepaper shipments to the Far East, within a 12-month period wastepaper shipments aboard PWC vessels would increase 100 per cent, within 36 months they would increase to approximately 300,000 tons per year, and by 1977–78 they would reach 500,000 tons per year (Tr. at 44). This prediction was substantially met without any reduction in PWC's challenged rates. 1973 exports were 237 per cent of 1972's and by 1974 exports had reached the 300,000 ton level. Moreover, for 1977 combined wastepaper exports to Japan, Korea, Taiwan, and the Philippines reached 617,000 tons. United States Department of Commerce, *Pulp, Paper, and Board*, 41 (Spring 1978).

[30] Section 15 states in pertinent part:

> The Commission shall . . . disapprove, cancel or modify any agreement . . . that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

[31] He then stated that, "[i]n employing its agreement so injuriously, PWC operated beyond the scope of the Commission's grant of partial immunity from the antitrust laws" (Initial Decision at 96). We cannot agree with this analysis. PWC was operating under an approved conference agreement (Agreement No. 57) which gave it authority to set rates and charges for the carriage of goods. Even assuming PWC's rates on wastepaper were so unreasonably high as to be detrimental to commerce, thereby contravening section 18(b)(5), the proper remedy would be to disapprove those rates. Only after continued adherence to the disapproved rate could PWC be considered in violation of section 18(b) (5) and penalties imposed. *Federal Maritime Commission v. Caragher*, 364 F.2d 709, 717–18 (2d Cir. 1966); *Valley Evaporting Co. v. Grace Line, Inc.*, 14 F.M.C. 16, 26–27 (1970). PWC could not have "operated beyond the scope of the Commission's grant of partial immunity from the antitrust laws" or have "violated" section 15 simply because it published and charged an unreasonably high rate. This does not mean that the Commission is powerless to affect the level of a rate which it finds unreasonably high. Under its general supervisory authority over section 15 agreements the Commission could conditionally modify a conference's section 15 agreement to ensure that the condemned rate is set at a reasonable level.

[32] See footnote 24, *supra*.

evidence of record from which to conclude that the PWC rate structure on woodpulp and wastepaper in any way inhibited the export of wastepaper thereby operating to the detriment of the shippers or receivers.

Environmental Issues

The National Environmental Policy Act of 1969 reflects a national concern for the quality of the human environment. It sets forth a number of environmental goals[33] and also directs that, to the fullest extent possible, the public laws of the United States be interpreted and administered in accordance with its policies. 42 U.S.C. 4332(1). To accomplish these goals and implement these policies, Congress has established certain procedural requirements with which all Federal agencies must comply. 42 U.S.C. 4332(2). The most significant of these procedures is the preparation of an environmental impact statement for every Federal action "significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(c). By requiring an impact statement Congress intended that Federal agencies consider environmental issues at the same time they consider other matters within their mandates, in a balancing process.[34] *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*, 449 F.2d 1109, 1112–1113 (D.C. Cir. 1971).

The potential environmental effects of the Commission's final decision have permeated this proceeding from its inception. During the hearings, evidence was introduced relating to both the environmental and economic issues. After the close of hearings, however, the Commission instructed the Presiding Officer to issue his Initial Decision solely on the economic record before him without considering the environmental evidence.[35] The OEA subsequently prepared a DEIS in which it concluded that the final decision in this proceeding was a major Federal action which had the potential for yielding several important environmental benefits. The OEA's FEIS reiterated this conclusion, but noted that it was based upon certain assumptions which must be determined by the Commission in its final resolution of this proceeding.[36] We find certain of these assumptions

[33] Among these goals is that of "enchanc[ing] the quality of renewable resources and approach[ing] the maximum attainable recycling of depletable resources." 42 U.S.C. 4331(b)96).

[34] Though NEPA's policies and goals are supplementary to our existing authorizations, 42 U.S.C. 4335, and in no way repeal the statutes which we regulate, NEPA's applicability to proceedings under the Shipping Act has never been clearly resolved. One court has concluded that NEPA does not expand the Commission's power to reject tariffs, pursuant to section 18(b), on non-statutory, environmental grounds. *Commonwealth of Pennsylvania v. Federal Maritime Commission*, 392 F. Supp. 795, 802 (D.D.C. 1975). It would appear that the Commission's power to disapprove a rate pursuant to section 18(b)(5) might similarly not be expanded by NEPA. We conclude that NEPA applies to our adjudicatory proceedings, if at all, under the "public interest" provision of section 15. We will, accordingly, consider the environmental effects of this action under this section.

[35] Commission order of October 28, 1975. The Commission had served a "Notice of Intent to Make an Environmental Assessment" on September 26, 1975, in which it noted that the final resolution of the issues *may* constitute a major Federal action significantly affecting the quality of the human environment.

[36] The FEIS concludes that the environmentally preferable alternative in this proceeding is to declare PWC's ratemaking practices "unlawful" and order its member lines to file and observe fair wastepaper rates (FEIS at 28). If the Commission follows this course of action, the following environmental benefits are predicted for the United States: (1) lower solid waste management costs; (2) less fuel consumed; (3) less landfill used; (4) less process water used; (5) and (6) less air and water pollutants produced. These impacts are based upon a hypothetical increase in exports of wastepaper to Japan and upon the following assumptions:

1. lower wastepaper rates will generate greater demand;

2. demand will require increased exports of approximately 20,000 tons of wastepaper per year;

3. wastepaper is an adequate substitute in papermaking for woodpulp in Japan and competitive in that market with woodpulp and woodchips; and

4. increased exports of wastepaper will replace a like amount of woodpulp from being produced in the United States for shipment to Japan (FEIS at 5).

unsupported by the primary economic record. Consequently, the environmental conclusions of the FEIS, which are premised on these assumptions, are of no value to us in our final decision.

Our earlier discussion indicates that the record is devoid of evidence that wastepaper is an adequate substitute for woodpulp in papermaking and competitive with it in Japan.[37] Moreover, only a small fraction of the wastepaper exported to Japan via PWC carriers could conceivably be substituted for a like grade of woodpulp moving in the same trade and there is no evidence that even such limited substitution could or would take place.

Because of the limited nature of the substitutability of wastepaper for woodpulp it is inconceivable that increased exports of all wastepaper grades would replace a like amount of woodpulp from being produced in the United States. Moreover, if wastepaper and woodpulp were directly competing with one another in Japan then an increase in the exports of one should be matched by a corresponding decrease in exports of the other. Such is not the case.[38]

TABLE III

PWC Wastepaper and Woodpulp Carriage to Japan
1967–1976 (short tons)[39]

	Wastepaper	Woodpulp
1967	34,718	137,210
1968	27,580	91,936
1969	43,421	105,638
1970	61,942	101,588
1971	62,638	49,334
1972	70,449	79,207
1973	145,554	132,382
1974	190,793	142,524
1975	128,096	63,720
1976	132,179	89,413

This table indicates that from 1967 to 1976 woodpulp and wastepaper exports on PWC carriers moved in conjunction—when one rose, so did the other and when one declined, the other followed.[40]

Finally, the assumption that lower freight rates for wastepaper will result in increased demand for and exports of this commodity was not established. Wastepaper exports to Japan and other Far East countries have increased steadily even in light of the allegedly high rate on wastepaper. Hard evidence that Japanese receivers would increase their demand if rates were lowered was simply not presented by NARI or any other party.[41] Japanese demand for

[37] The FEIS also assumes that wastepaper is competitive with woodchips in Japan. Woodchips are beyond the scope of this proceeding. Though large volumes of woodchips are exported to Japan, they do so on specialized, non-common carriers under long term contracts and are not subject to our jurisdiction. Woodchip exports are thus immaterial.

[38] NARI's own witness conceded that additional exports of wastepaper would "not necessarily result in a decrease in the exports of woodpulp" (Tr. 231).

[39] Source: Exhibit 71, Attachment A; Appendix A to PWC Exceptions.
Total United States exports of wastepaper and woodpulp for this period reflect the same trend. United States Department of Commerce, *Pulp, Paper, and Board*, 41 (Spring 1978).

[40] That these two commodities do not move reciprocally is most noticeable for 1970 through 1971. Woodpulp decreased from 101,558 tons to 49,334 tons, yet wastepaper increased only marginally.

[41] There are large numbers of exclusive agents for foreign paper mills operating in the United States (Tr. 1384). None was called as a witness to support this assumption.

wastepaper will most likely remain at high levels in the future, regardless of the freight rate component of its landed price.

THEREFORE, IT IS ORDERED, That the Exceptions of Pacific Westbound Conference, Bureau of Hearing Counsel, American President Lines, Ltd. and Sea-Land Service, Inc. are granted to the extent indicated above; and

IT IS FURTHER ORDERED, That the Initial Decision served August 15, 1977, is reversed and its order vacated; and

IT IS FURTHER ORDERED, That Pacific Westbound Conference's "Renewed Motion to Strike" is denied, and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary