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FEDERAL MARITIME COMMISSION

Washington, D.C.

June 30, 1979

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REPORT AND ORDER ADOPTING INITIAL DECISION

June 14, 1978

Docket No. 73-17 was instituted on April 13, 1973 to determine whether the so-called "50-mile container rules" proposed by Sea-Land Service, Inc. (Sea-Land) and Gulf Puerto Rico Lines, Inc. (GPRL) in the U.S. East and Gulf Coast/Puerto Rico trade were violative of sections 14 Fourth, 16 First, and 18(a) of the Shipping Act, 1916 and section 4 of the Intercoastal Shipping Act of 1933.

Thereafter, Respondent Sea-Land proposed revisions to its tariff rules which it claimed would cure the infirmities which led to the investigation and suspension. However, by Commission Order of August 10, 1973, these revisions were likewise placed under investigation. This investigation proceeded under the August 10 Order until September, 1974.

During the period between April, 1973, and September, 1974, Sea-Land and GPRL withdrew from the Puerto Rican trade and the Puerto Rico Maritime Shipping Authority (PRMSA) succeeded them as an ocean common carrier in that trade. On August 2, 1974, PRMSA filed its tariff which was to become effective on September 16, 1974, at or about which date PRMSA was to enter the U.S. East and Gulf Coast/Puerto Rico trade as an ocean common carrier. Certain portions of that tariff set forth identical provisions to those already under investigation. Therefore, by Order of September 13, 1974, the Commission placed PRMSA's proposed tariff rules under investigation; consolidated the new investigation (Docket No. 74-40) with the existent Docket No. 73-17; and ordered that the record already adduced in Docket No. 73-17 be used to the fullest extent possible to develop the issues in Docket No. 74-40.

Thereafter, on February 14, 1975, PRMSA filed amendments to its proposed tariff. By Order of March 14, 1975, the Commission ordered that these amendments be made a part of the ongoing investigation and that any future change, amendment, or reissuance be so incorporated. This Order puts in issue the rules of PRMSA as they stood at the time of hearing.

During the course of these proceedings, various participants either were named as parties or intervened. As the case came before us, the parties to the proceeding, in addition to PRMSA, were: Commonwealth of Puerto Rico (Commonwealth), Council of North Atlantic Shipping Associations (CONASA), International Association of NVOCC's (NVOCC's) National Customs Bureau and Forwarders Association of America, Inc. (National), New York Foreign Freight Forwarders & Brokers Association (NYFF), Consolidated Forwarders Intermodal Corp. (CONFICO), Puerto Rico Manufacturers Association, Truck Drivers Local Union Number 807 of the International Brotherhood of Teamsters, *et al.* (Teamsters Local 807), American Importers Association (AIA), Household Goods Freight Forwarders Association of America, Inc., and Commission Hearing Counsel.

After many months of hearings and the amassing of a voluminous record, Administrative Law Judge Charles E. Morgan issued his Initial Decision in which he found that the Commission had jurisdiction over the rules in issue and that such rules violated the sections of the Shipping Act as alleged.

Exceptions to the Initial Decision were filed by PRMSA and CONASA. Replies thereto were submitted by Hearing Counsel, by the NVOCC's, and by National, NYFF, and CONFICO.

Oral argument was heard and these proceedings came before us for decision. While our decision in these proceedings was pending, the validity of the collective bargaining rules which underlie the tariff rules was challenged before the NLRB. The collective bargaining provisions called Rules on Containers were found to be in violation of the National Labor Relations Act by the NLRB and the ILA and NYSA were ordered to cease their implementation and enforcement. That finding was upheld and the NLRB's order directed to be enforced by the Court of Appeals. The Supreme Court denied *certiorari*.[1]

As a result of the NLRB's decision, PRMSA filed a tariff note providing that its tariff rules on containers would not be enforced pending a determination of the validity of the underlying collective bargaining rules by the proper court of law.[2] In light of this tariff note provision and the holdings of the various courts, by Order issued August 10, 1977, we discontinued these cases on the ground that the allegedly unlawful rules on containers published by PRMSA had been "effectively withdrawn" by it.[3] Following issuance of our Order of Discontinuance, petitions for reconsideration were filed.[4] On the basis of these petitions, we granted reconsideration of the proceedings. Replies to the Petition for Reconsiderations were filed by Hearing Counsel and PRMSA.[5]

By Order on Reconsideration issued simultaneously with this Report and Order, we vacated our previous Order of Discontinuance and determined to issue

[1] The NLRB decision was served December 9, 1975. It was upheld by the Court of Appeals at 537 F.2d 706 (1976) and denial of *certiorari* was ordered by the Supreme Court at 429 U.S. 1040 (1977). The Supreme Court also denied rehearing by Order of February 28, 1977 (51 L.Ed.2d 589).

[2] For a more thorough discussion of this tariff note, see our Order on Reconsideration issued this date.

[3] These rules were, in fact, specifically cancelled by notice in PRMSA's tariff effective November 6, 1977.

[4] Petitioners were: 1. National Customs Brokers & Forwarders Association of America, Inc., New York Foreign Freight Forwarders & Brokers Association, Inc., and Consolidated Freight Forwarders Intermodal Corp. (filing a joint petition); 2. International Association of NVOCC's; and 3. Hearing Counsel.

[5] Pursuant to rules applicable to proceedings of this vintage, no replies to the petitions were permitted until the request for reconsideration was granted. See 46 C.F.R. Sections 502.261 and 502.262 as provided prior to May 19, 1976.

a decision on the merits of the proceeding. As a result, we have, once more, reviewed the record of these cases and herewith serve our Report.

DISCUSSION

Many of the exceptions are merely reargument of positions taken before the Presiding Officer. Therefore some will not be discussed here. However, we have devoted a great deal of time and care to a thorough analysis and review of each exception in light of the record. If certain exceptions are not specifically discussed it is because, in each instance, we are of the opinion that the argument advanced was adequately analyzed and properly disposed of by the Presiding Officer.

In its exceptions, PRMSA merely adopted much of the argument propounded in brief by CONASA. In large part, these issues were adequately and properly treated by the Presiding Officer. However, we are of the opinion that one issue so raised deserves further discussion here.

In support of its position that its tariff rules should not have been found to be unlawful as alleged, PRMSA cites the holding of the Commission in the *South Atlantic and Caribbean Line* (SACL) case (12 F.M.C. 237 (1969)). We wish, once and for all, to put to rest any attempt to apply the holding of that case to the rules at issue here. That case presented only two issues. The first was one of fact: did the refusal to handle certain cargo constitute a true embargo in the sense that the carrier was "physically incapable of handling the traffic"? The second issue was one of law: did the SACL "Embargo Notice" comply with the filing and notice requirement of section 2 of the Intercoastal Shipping Act? There was no allegation of any violation of sections 14, 16 or 18 of the Shipping Act or of section 4 of the Intercoastal Act in that case.

In the present case, PRMSA claims that pursuant to the holding in the SACL case, since the tariff rules at issue here were properly filed under section 2 of the Intercoastal Act, they cannot be found to be unlawful as alleged. This is a clear non sequitur. We may readily agree that PRMSA filed its tariff rules properly in accord with section 2 of the Intercoastal Act and in consonance with the SACL case. However, the provisions of those rules, notwithstanding proper filing, can obviously, simultaneously, be unjust, unreasonable, and unduly and unreasonably prejudicial and disadvantageous.

The exceptions of CONASA constitute, almost entirely, a reargument of its position before the Presiding Officer. We are of the opinion that the Presiding Officer also properly disposed of those issues again with qualifications.

CONASA has raised as an issue on exception, the alleged error of the Presiding Officer with respect to his findings of violations of sections 14 Fourth and 16 First. CONASA objects to what it characterizes as a "per se violation" concept. CONASA's allegation is two-pronged.

First, CONASA claims that the Presiding Officer erred in concluding that the ocean transportation service rendered by PRMSA is the same whether a given container is loaded or unloaded at the pier or at an offpier facility. CONASA maintains that such a view ignores essential terminal services performed by ILA longshore labor as part and parcel of the total transportation service rendered by PRMSA.

Second, CONASA challenges the conclusion of the Presiding Officer that the dissimilarity of treatment of shippers under the rules as shown in the record constituted a violation of sections 14 and 16 of the Act. It argues that to constitute a violation of the Act, such dissimilar treatment must be undue or unjust—*i.e.* unjustified by transportation factors. CONASA's position is, in essence, that the longshore services and the underlying collective bargaining agreement which regulates them are transportation factors which must be considered with regard to alleged violations of sections 14 and 16. Those services and the underlying agreement which created the disparate treatment of shippers, upon implementation by the tariff rules, constitute, in CONASA's view, a transportation factor which justifies the inequality which it creates. This is a novel, and, in our view, a circular proposition. CONASA would have us accept the proposition that the factors which created the uneven treatment also sufficiently justify such treatment. We find this argument ingenious but unconvincing.

We are of the opinion that the rules published in PRMSA's tariff were properly found by the Presiding Officer to create an anomalous condition where shippers who are similarly situated in all other transportation respects, are treated decidedly differently. Further, we agree with the Presiding Officer that the existence or not of a collective bargaining agreement which *affects* but is not *a part of* the transportation aspects of a shipper's relationship with his carrier, need not be given overwhelming priority or weight as a transportation factor by which to justify dissimilarity of treatment. We may agree that such an agreement is a factor to be considered. However, there are other factors. The mere existence of the collective bargaining agreement does not pre-empt those other factors or foreclose our consideration of them. For us to adopt the contentions of respondents would be tantamount to an acknowledgement by us that a common carrier by water or other person subject to our jurisdiction could escape our jurisdiction by the simple device of voluntarily (albeit with pressure from a union) entering into an agreement which obligates the common carrier to take actions which may be or are in clear violation of the Shipping Act. We do not view the impact of the National Labor Relations Act as permitting a common carrier to disregard entirely its statutory obligations when conducting and resolving labor/management negotiations.[6] We find that upon consideration of the transportation factors in the situation created by these rules, including the underlying ILA-CONASA agreement, the disparity of treatment under the rules is not adequately justified.

This is not an adoption of a "per se violation" concept. It is, rather, a simple acknowledgement by us that the record in this proceeding shows adoption and implementation of tariff rules which are unjust and unreasonable, and which are unduly and unreasonably prejudicial and disadvantageous because their effects are unjustified by transportation factors.

Additionally, on the theory that the rules at issue are lawful collective bargaining rules which are exempt from the strictures of the antitrust laws, and by extension, the requirements of the Shipping Act, Respondents have throughout this proceeding argued the Commission's lack of jurisdiction over such rules.

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[6] *Local 1976, United Brotherhood of Carpenters v. Labor Board*, 357 U.S. 93 (1958); *Galveston Truck Lines v. Ada Motor Lines, Inc.*, 73 M.C.C. 617 (1957).

In advancing this argument, Respondents rely heavily on the Supreme Court's decision in *Volkswagenwerk Aktiengesellschaft v. F.M.C.*, 390 U.S. 261, 19 L.Ed. 2d 1090, 88 S.Ct. 929 (1968) (Volkswagen). We find that case unpersuasive with respect to the question of this Commission's jurisdiction over the rules here at issue.[7]

In Volkswagen, the Court was confronted with a problem similar to that at issue here. In that case, the Pacific Maritime Association (PMA), an employer organization not unlike CONASA, had reached a "milestone agreement" with the International Longshoremen's and Warehousemen's Union (ILWU). By that agreement the ILWU agreed to the introduction of labor-saving devices and the elimination of restrictive work practices on the West Coast waterfront in return for PMA agreement to create a fund to mitigate the impact upon ILWU employees of the labor-saving technological innovations. The fund created—the so-called "Mech" fund—was to be raised and the method of its raising determined by the PMA alone.

The method used to raise this fund allegedly resulted in inequities borne by Volkswagenwerk Aktiengesellschaft, one shipper who supported the fund. It, therefore, refused to pay the assessments levied upon it with predictable loss of revenue to the fund.

Volkswagen obtained a stay of the court proceedings which followed in order to permit this Commission to exercise its jurisdiction and to determine certain issues. Those issues were:

1. whether the assessments against Volkswagen were claimed pursuant to an agreement required to be filed with the Commission pursuant to section 15 of the Shipping Act, which agreement had not been filed with or approved by the Commission;

2. whether the assessment subjected Volkswagen to undue or unreasonable prejudice or disadvantage in violation of section 16 of the Shipping Act; and

3. whether the assessment method constituted an unjust and unreasonable practice in violation of section 17 of the Shipping Act as to Volkswagen.

The Commission found against Volkswagen and dismissed the complaint. The Court of Appeals affirmed the Commission. However, thereafter the Supreme Court reversed the Court of Appeals.

A majority of the Court found that the assessment formula (as distinct from the agreement to set up the fund) was subject to the filing and approval requirements of section 15 of the Shipping Act. As such, the assessment agreement was to be filed with the Commission under that section. In the Commission's deliberations of this agreement, the Court concluded, the Commission would also have to take into consideration the alleged violations of sections 16 and 17. Therefore, the Court did not reach the merits of the sections 16 and 17 claims, and remanded the case to the Commission for further proceedings.

In a dissent, Mr. Justice Douglas urged that "to require the funding part of maritime collective bargaining agreements to receive prior approval from the

[7] We note in this regard the recent decision of the Supreme Court in *Federal Maritime Commission, v. Pacific Maritime Association*, 435 U.S. 40 (1978), with respect to requisite filing with and pre-implementation approval by the FMC of certain collective bargaining agreements which impose terms controlling or affecting competition upon employers who are not members of the multi-employer bargaining unit.

Maritime Commission . . . " was an unwise decision. He feared that such advance approval by the Commission would "partially paralyze" collective bargaining. Additionally, Douglas stated:

> I believe the Court has misconstrued section 15 of the Shipping Act, 1916; and I fear that its erroneous construction will cause serious disruption in the process of collective bargaining in the maritime industry. If the tariff extracted from [Volkswagen] is discriminatory or unreasonable, sections 16 and 17 of the Shipping Act provide a remedy.

Mr. Justice Harlan, in his separate concurring opinion, took issue with Douglas. Harlan stated:

> . . . he [Douglas] suggests that a proper accommodation between "labor" and "competition" interests can be reached by exempting both labor agreements and labor-related agreements from the filing requirements of section 15 but leaving them subject to the specific prohibitions of the antitrust laws and sections 16 and 17 of the Shipping Act.
>
> This suggested accommodation appears to me demonstrably wrong. In the first place, as the Court notes, the filing requirement of section 15 was drafted broadly, and the filing-and-approval process includes review of questions arising under sections 16 and 17, and specifically creates an exemption from antitrust attack.

As may be seen, the Harlan position, which is used repeatedly before us in an attempt to support the antitrust exemption and the exemption from the Shipping Act of the rules involved here simply does not support that contention. Harlan's position is addressed to agreements which should receive advance approval under section 15, and concurrent sections 16 and 17 scrutiny. We have no such agreement at issue here. What we have here is merely the unilateral implementation of a rule founded in a collective bargaining agreement.

One collateral matter addressed by the Presiding Officer needs to be disposed of although it may have been rendered moot by the passage of time. In his Initial Decision, the Presiding Officer found that, while the rules at issue violate the Shipping Act and the Intercoastal Shipping Act, any hastily effected order in the nature of a cease and desist order might precipitate interference with the ocean commerce involved which may be to the detriment of the public interest. As a result, the Presiding Officer determined that in the absence of review by us or exceptions, the effective date of any order requiring cancellation of PRMSA's offending tariff rules should be deferred for three months.

While we are amenable to deferring the effective date of the cease and desist order entered herein, we believe that the three months recommended by the Presiding Officer is unjustifiably long. We believe 30 days is sufficient time to allow Respondent to order its affairs and conform its tariffs, if necessary.

THEREFORE, IT IS ORDERED, That, except to the extent noted above, the Initial Decision issued in this proceeding is hereby adopted as our own and made a part hereof; and

FURTHER, IT IS ORDERED, That, within 30 days from the date of service of this Report and Order, Puerto Rico Maritime Shipping Authority shall cancel the tariffs found unlawful herein; and

FINALLY, IT IS ORDERED, That this proceeding be discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

No. 73–17

SEA-LAND SERVICE, INC. AND GULF PUERTO RICO LINES, INC.—PROPOSED RULES ON CONTAINERS

No. 74–40

PUERTO RICO MARITIME SHIPPING AUTHORITY—PROPOSED ILA RULES ON CONTAINERS

Adopted on June 14, 1978

Found (1) that the Federal Maritime Commission has jurisdiction over the tariff rules on containers of the Puerto Rico Maritime Shpping Authority (PRMSA), an ocean common carrier in the trade between ports on the East and Gulf Coasts of the United States, and ports in Puerto Rico; (2) that the present tariff rules on containers of PRMSA are unlawful under the Shipping Acts; and (3) that the pubic interest in its overall aspects necessitates that the effective date of an order requiring the cancellation of PRMSA's tariff rules on containers be deferred for three months, so that PRMSA in the meantime may determine and publish new tariff rules on containers, which are lawful under the Shipping Acts, and which are consistent with overall aspects of the public interest, including the preservation of a steady flow of ocean-borne commerce of the United States between the East and Gulf Coasts and Puerto Rico.

Mario F. Escudero and *Edward J. Sheppard* for respondent the Puerto Rico Maritime Shipping Authority and for intervener the Commonwealth of Puerto Rico.

Gerald A. Malia, Brian P. Murphy, and *Thomas D. Shea* for respondents Sea-Land Service, Inc., and Gulf Puerto Rico Lines, Inc.

C. P. Lambos, Francis A. Scanlan, Donato Caruso, and *Jacob Silverman* for intervener Council of North Atlantic Shipping Associations.

Raymond P. deMember and *H. Neil Garson* for intervener International Association of NVOCCs.

Gerald H. Ullman for intervenors and complainants National Custom Brokers and Forwarders Association of America, Inc., New York Foreign Freight Forwarders and Brokers Association, Inc., and Consolidated Forwarders Intermodal Corp.

Rafael Cebollero for intervener Puerto Rico Manufacturers Association.

J. Warren Mangan for intervener Truck Drivers Local Union Number 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Samuel Frankel for intervener and complainant American Importers Association.

Alan F. Wohlstetter and *Ernest H. Land* for intervener Household Goods Forwarders Association of America, Inc.

Donald J. Brunner, Charles L. Haslup, III, Marilynn J. Goldsmith, and *Martin F. McAlwee* as Hearing Counsel.

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

THE ISSUES AND THEIR SIGNIFICANCE

These *two consolidated proceedings are investigations* of the lawfulness *of certain tariff rules*[2] on containers in the Puerto Rican trade between ports on the East and Gulf Coasts of the Continental United States (mainland), on the one hand, and, on the other, ports in Puerto Rico. The present tariff rules are applicable at North Atlantic ports, Maine to Hampton Roads, inclusive, South Atlantic ports, Charleston, S.C., and Jacksonville, Fla., and at a Gulf port, New Orleans, La.

In the first of the two investigations herein, the tariff rules were those of the original two respondents, two ocean common carriers, Sea-Land Service, Inc. (Sea-Land), and Gulf-Puerto Rico Lines, Inc. (GPRL). As *now in issue, the tariff rules are those of* the present respondent, an ocean common carrier, *the Puerto Rico Maritime Shipping Authority* (PRMSA), which is an instrument of the government of the Commonwealth of Puerto Rico.

The second or present investigation began on September 13, 1974, although PRMSA did not begin operating as an ocean common carrier until October, 1974, when it took the place of the main former operators in the Puerto Rican trade, Sea-Land, GPRL, Seatrain Lines, Inc. (Seatrain), and Transamerican Trailer Transport, Inc. (TTT). PRMSA then adopted the tariff rules on containers formerly in the tariff of Sea-Land. PRMSA's present tariff rules on containers substantially are unchanged. PRMSA feels that much of the history of, and justification for, these tariff rules on containers preceded PRMSA's entry into the Puerto Rican trade (the trade).

Hearing in the second investigation was delayed for a time in order for PRMSA, and its new management, to get oriented to the many problems facing a new operator in the trade, and to permit PRMSA to examine its tariff rules on containers and possibly to revise them. No substantial revision resulted. Hearing was held in Washington, D.C., and was concluded on May 7, 1975. The final briefs of the parties were served on August 12, 1975.

The tariff rules in issue place certain restrictions on the movement of cargo in containers over mainland waterfront facilities, generally when such containerloads come to or from points within 50 miles of mainland ports. *In particular instances these tariff rules require some container cargoes to be "stripped,"* or unloaded, *from one container, and "stuffed" or "restuffed,"* or loaded or reloaded, *into another container* at the waterfront facilities (the piers). At the same time under the tariff rules certain *other containerloads may be handled* across the same mainland waterfront facilities *without the stripping and restuffing*. Yet, as to the ocean transportation service provided there is no difference between the containers which move freely and those which do not move freely.

[1] This decision will become the decision of the Commission in the absence of exceptions thereto or review thereof by the Commission. Rule 13(g), Rules of Practice and Procedure, 46 CFR 502.227.

[2] On brief one party insists that the issue herein involves "work preservation rules," rather than tariff rules. If these tariff rules were merely work preservation rules, affecting only employers of longshoremen and the longshoremen, but not affecting shippers, there would have been no need to place these rules in a tariff of an ocean common carrier subject to regulation under the Shipping Acts.

In other words, while PRMSA's ocean carrier service is the same, one container-load moves without restriction and another containerload is restricted.

This stripping and restuffing of some containerloads at the mainland water-front facility, before ocean carriage to Puerto Rico, ostensibly *is required by so-called "work preservation rules," but not by any recognized or legitimate transportation need.* The work preservation rules, which apply in this Puerto Rican trade and which also apply in many wor' ' rades, subject the ocean carriers to a penalty of $1,000 per container with regard to those containerloads of cargo which have not been stripped and restuffed in contravention of the work preservation rules.

The work preservation rules (see Exhibit 95 for example) and PRMSA's tariff rules on containers (see Exhibit 51) are alike in many respects. The work preservation rules and tariff rules differ in at least one important respect, in that only the tariff rules require the shipper or consignee to be liable to the ocean carrier for the penalty of $1,000 per container.

PRMSA, as was also the case with Sea-Land, feels that it cannot afford the work preservation rules' $1,000 penalty per container, and accordingly has chosen to pass the penalty (called "liquidated damages" in both the work preservation rules and in the tariff rules) on to its shippers in the form of its (PRMSA's) tariff rules on containers. The PRMSA tariff rules' $1,000 penalty applies to a shipper in instances where it is determined that the shipper "evaded" the stripping and stuffing requirement. A shipper, consignee, consolidator, forwarder, or deconsolidator may not evade the requirements of these tariff rules on containers by subterfuge, improper documentation, etc., but said shipper is not subject to the $1,000 penalty if he chooses to have the ocean carrier strip the container and restuff the cargo at the ocean carrier's waterfront facilities, where deep-sea longshore labor is used for this purpose.

The above stripping and restuffing constitute a substantial cost to the ocean carrier, and PRMSA considers that this cost compels it, in turn, to place charges therefor in its tariff. PRMSA's "transfer charge" for the stripping and restuffing is $150 for a 35-foot container and $175 for a 40-foot container, in connection with its freight-all-kinds (FAK) rate on containers. Needless to say, a shipper, who already has gone to the expense of stuffing a container at a point away from the waterfront facilities, is not happy to be faced with the additional PRMSA transfer charge for the stripping of that container and the restuffing of the contents by the ILA at the waterfront facilities, before the cargo is ocean-borne to Puerto Rico.

If the shipper, forwarder, or consolidator chooses not to be subjected to the $1,000 penalty by incurring the extra expense (transfer charge) for the second handling of the contents of his container before it is ocean-borne, said shipper also would be concerned with possible delays, losses, or damages related to the second handling. Of course, under ideal circumstances the shipper wants his cargo stuffed only once and he does not want to be subjected to any penalties for "evading" a second handling of his cargo.

The discussion above of the rules on containers in PRMSA's tariff largely relates to problems associated with container cargoes going from the mainland, or southbound, to Puerto Rico. Commerce to and from Puerto Rico mainly is southbound, but there is a substantial northbound movement to the mainland from Puerto Rico. On the northbound movement of containers there are similar restrictive requirements in the tariff rules on containers, including certain warehousing requirements which permit deconsolidation away from the piers without stripping and restuffing at the piers only if certain northbound cargoes are warehoused a minimum of 30 days. Many consignees and deconsolidators do not want their northbound cargoes stripped and restuffed at the piers, nor alternatively do they want to be subjected to the 30-day warehousing expense.

The tariff rules permit some container cargoes, such as "manufacturer's label" stuffed by the manufacturer, and in most instances[3] cargoes coming from or going to points more than 50 miles from a port, to cross mainland waterfront facilities without further stripping or stuffing.

The alleged unlawfulness comes about because the same tariff rules concurrently require the second stuffing or stripping of other container cargoes, such as cargoes coming from consolidators or going to deconsolidators located within 50 miles of a port. The second stuffing or stripping and other requirements of the container rules are alleged to be unjustly discriminatory and otherwise unlawful, among other reasons, because the tariff rules treat similar (from-a-transportation-viewpoint) shippers differently and because the tariff rules themselves allegedly are vague, uncertain, and unreasonable.

Besides the lawfulness of these tariff rules, another principal issue is the jurisdiction of the Federal Maritime Commission. Intervener, the Council of North Atlantic Shipping Associations (CONASA), contends that the attack by shippers on the tariff rules is in reality an attack on traditional work preservation rules or agreements known as the "Rules on Containers." These work preservation agreements are made between the International Longshoremen's Association AFL-CIO (ILA), on the one hand, and, on the other, certain shipping associations, such as for example, the agreement between the Atlantic Coast District of the ILA and CONASA.

In brief, three matters must be decided herein. (1) whether the Federal Maritime Commission (FMC or Commission) *has jurisdiction; (2)* if the FMC has jurisdiction, *whether the tariff rules on containers are* unjustly discriminatory, unduly prejudicial or otherwise *unlawful;* and *(3)* if the FMC has jurisdiction and if the tariff rules on containers are unlawful, *what kind of order should be issued,* including the timing of such order.

The significance of any order of the FMC herein cannot be minimized. It is alleged by CONASA that any order, prohibiting a single ocean carrier from including in its tariff the "Rules on Containers" in the Puerto Rican trade, would invite all ocean carriers in many world-wide trades to breach their contractual obligations to abide by these so-called work preservation agreements, and thereby upset practices and labor agreements of long duration. PRMSA fears an ILA shutdown if PRMSA is required not to follow the ILA's Rules on Containers. The various complainants and shipper interests herein fear dire consequences to United States trade and to themselves unless the Commission finds

[3] The "work preservation rules" have been interpreted, and in turn the tariff rules on containers have been interpreted, to require cargoes outside of a 50 mile radius to be stripped and restuffed if a consolidator, etc., were to move his consolidation point from within 50 miles to another point outside of a 50 mile radius of a port so as to "evade" the rules on containers.

the tariff rules on containers to be unlawful and promptly orders their cancellation. Hearing Counsel state that the issues are of monumental importance, and that unlike any other case now before the Commission, the issues involve a direct challenge to the viability of the Commission, and the regulatory mandates which it has insisted upon and enforced for many years.

It would seem that we must not only do justice to the various parties, particularly the shippers and consignees, but also we must consider the general public interest in fostering and maintaining a merchant marine consistent with maintaining the national defense and developing the foreign and domestic commerce of the United States through ocean shipping services which will provide steady flows of ocean commerce. In particular, we must assure a steady flow of ocean commerce to and from Puerto Rico.

THE ORDERS OF INVESTIGATION AND OTHER ORDERS

The *first proceeding, No. 73-17,* arose from the Commission's *order of investigation and suspension served April 13, 1973.* Therein Sea-Land and GPRL were named respondents, these respondents' proposed tariff rules on containers were suspended to and including August 13, 1973, and placed under investigation pursuant to section 22 of the Shipping Act, 1916 (1916 Act), and sections 3 and 4 of the Intercoastal Shipping Act, 1933 (1933 Act). It was ordered that determinations be made pursuant to sections 14 Fourth, 16 First, and 18(a) of the 1916 Act, and section 4 of the 1933 Act, as to whether there would be unfair or unjust discrimination against any shipper in the matter of cargo space accommodations, as to whether any particular person, locality, or description of traffic would be subjected to any undue or unreasonable prejudice or disadvantage, and as to whether the proposed tariff rules are just and reasonable.

By *first supplemental order* in No. 73-17 *served August 10, 1973,* the Commission placed under investigation certain revisions of Sea-Land's tariff rules on containers, and noted in this order that the proposed changes were protested by the Commonwealth of Puerto Rico (Commonwealth)[4] and by the International Association of NVOCCs (the NVOCCs).

On *August 28, 1973,* the Commission served its *order* in No. 73-17, *denying the motion to dismiss* filed June 11, 1973, by intervener CONASA. CONASA had urged that the FMC lacked jurisdiction over the subject matter of the proposed Rules on Containers and over the administration and interpretation of these rules, since CONASA claims that these are work preservation rules and part of the collective bargaining process, that these are matters covered by the National Labor Relations Act under the jurisdiction of the National Labor Relations Board (NLRB) and the courts, and that FMC jurisdiction would have a devastating effect on labor relations in the maritime industry, and impinge on labor peace, etc.

The Commission concluded that it was not persuaded to overrule the ruling issued on June 27, 1973, of the Administrative Law Judge, wherein he had denied the motion to dismiss, on the grounds generally that the proposed Rules

[4] The Commonwealth, as a protestant, was represented in the first investigation by the same counsel, who also represented PRMSA, as the respondent in the second investigation. Since PRMSA is an instrument of the Commonwealth, the Commonwealth has been in both investigations, but has changed from opposition to support of the tariff rules.

on Containers imposed terms which affected persons other than the collective bargaining parties and that the proposed rules apparently will have a substantial effect on the obligations of ocean common carriers to the shipping public. On brief, CONASA continues to assert that the FMC lacks jurisdiction.

By *order served September 26, 1973*, the Commission *denied the petition* of the NVOCCs filed on July 12, 1973, *for enforcement of the Commission's order of April 13, 1973*. Sea-Land had taken the position that no finding then could be made that Sea-Land was in violation of the Shipping Acts until after a full hearing. The Commission stated that no action to enforce suspension in connection with the first investigation herein could be maintained at the time (September 26, 1973) since such enforcement could only take the form of an extension of the suspension period, a form of relief which the courts and the Commission cannot grant.

The second proceeding, No. 74–40, arose from the Commission's *order of investigation and suspension served September 13, 1974*. Therein PRMSA was named respondent, the American Importers' Association, Dolphin Forwarding, Inc., the National Customs Brokers and Forwarding Association of America, Inc., the New York Foreign Freight Forwarders and Brokers Association, Inc., and Consolidated Forwarders Intermodal Corporation, Inc., were named complainants. (Some of these complainants had previously intervened in the first investigation herein.) The order of September 13, 1974, also provided that PRMSA's tariff rules on containers be suspended to and including January 15, 1975.

But, by a further *order issued September 23, 1974*, in Nos. 73–17 and 74–40, the Commission stated upon further consideration it became convinced that *suspension of these tariff rules on containers would not be in the public interest*, and it decided to allow the subject tariff matter of PRMSA to become effective while this investigation was conducted, and accordingly *the Commission vacated the said suspension.*[5] While the order of September 23, 1974, did not elucidate what specific matters of public interest were the basis of the order, presumably there was concern about the continuance of a steady flow of ocean commerce to and from Puerto Rico, a matter which apparently was one of the concerns of PRMSA when it adopted its tariff rules on containers. The investigation, but not the suspension, provided for in the order of September 13, 1974, remains in effect.

The Commission stated in its order of September 13, 1974, that generally PRMSA's tariff rules on containers provide that, at Atlantic Coast ports, consolidators including NVOCCs who operate facilities within 50 miles of a port will be furnished no containers where that would be contrary to these tariff rules, and that any containers which may come from them shall be stripped at the pier and the cargo placed (stuffed) into another container; also that at New Orleans, there is no prohibition against the furnishing of containers by the ocean carrier to

[5] The order of the Commission served September 13, 1974, provided thet there be a hearing before an Administrative Law Judge at a date and place determined by him, and that he submit an Initial Decision no later than November 15, 1974; but the Commission's further order served September 23, 1974, deleted the requirement thet an Initial Decision be rendered no later than November 15, 1974, and the presiding Administrative Law Judge was "urged to expedite these proceedings within the limits of his discretion and due process." These proceedings have been handled with expedition within the limits of due process in accordance with the general policy for all proceedings of similar magnitude and import.

consolidators, but that the stripping and restuffing provisions apply, and also that at all ports, these tariff rules would permit the carrier to pass along to the shipper fines or liquidated damages assessed against the carrier for violations of these tariff rules on containers, if the violation were caused by evasion, subterfuge, oversight, or other action by the shipper.

The Commission also stated in this order that certain notes to items 15940 and 18880 of PRMSA's tariff made PRMSA's Freight-All-Kinds (FAK) rates subject to its tariff rules on containers, and that Note 7 to item 15940 and note 6 to item 18880 provide that where the carrier is required by a collective bargaining agreement to strip and stuff, a shipper may bring his FAK cargo to the pier in his own trailer (container), where it will be placed into the carrier's container, or vice versa, for a fee, depending upon the size of the container, and that the shipper will then obtain the FAK rate. The Commission ordered an investigation of notes 6 and 7 of item 15940 and of notes 5 and 6 of item 18880.

The Commission ordered in No. 74–40 that determinations be made pursuant to sections 14 Fourth, 16 First and 18(a) of the 1916 Act, and section 4 of the 1933 Act as to whether there would be unfair or unjust discrimination against any class of shippers in the matter of space accommodations or other facilities, as to whether certain consolidators or certain consolidated cargo would be subjected to undue or unreasonable prejudice or disadvantage, and as to whether the subject tariff rules are unjust and unreasonable. The Commission's order consolidated No. 74–40 with No 73–17 and provided that the record already compiled in No. 73–17 be utilized to the maximum extent possible to develop the issues in No. 74–40.

By First Supplemental Order served March 14, 1975, in Nos. 73–17 and 74–40, the Commission stated that on February 14, 1975, PRMSA filed amendments to become effective March 16, 1975 (issue date of tariff February 11, 1975), setting forth new tariff rules on containers, which appeared to be based upon the collective bargaining agreements with the ILA for the period October 1, 1974, to September 30, 1977. The Commission noted that while the form of the rules is considerably different the substance of these tariff provisions appeared to be generally unchanged. The Commission ordered these PRMSA amendments to be made part of the investigation herein, as well as any other future change, amendment, or reissue of PRMSA's tariff rules on containers. This order brought into issue specifically certain tariff pages listed in its appendix, including tariff rule 440 covering CONASA ports, rule 442.5 covering the South Atlantic ports of Charleston and Jacksonville, and rule 445, covering the Gulf port of New Orleans.

THE PARTIES AND THEIR GENERAL POSITIONS ON THE ISSUES

The *Household Goods Forwarders Association of America, Inc.*, an intervener, expressed its concern as to whether non-military or commercial shipments of household goods would be exempt from the stripping and stuffing requirements of the tariff rules on containers. By order served January 16, 1974, the Commission rules that non-military, as well as military, shipments of household goods are not subject to the stripping and stuffing requirements, as stated on page 2 of the order served April 13, 1973. Accordingly, this intervener withdrew from active participation in the proceeding.

Sea-Land and GPRL. At the first prehearing conference, reference was made to the presumed fact that all ocean carriers serving the Port of New York in almost all cases abided by their collective bargaining agreements with the ILA. This reference was made in particular with regard to the so-called ILA "Rules on Containers," but it also was stated that so far as was known only Sea-Land and GPRL placed what these two ocean carriers deemed to be corresponding and appropriate rules on containers in their tariffs. Apparently, the ocean carriers in other trades in many or mostly all instances complied with their agreements with the ILA as to the ILA's "Rules on Containers," but did not elect to publish in their tariffs corresponding rules on containers. In time, Sea-Land and GPRL were succeeded in the trade herein to and from Puerto Rico by PRMSA, with the result that *Sea-Land* and *GPRL* cancelled their tariffs in this trade and *were dismissed as respondents* at the hearing on April 29, 1975.

Some of the principal features of the Puerto Rican trade herein were that, one, it was the first trade to use the container method of ocean transportation extensively, and, two, the consolidation of less-than-container loads into container loads was prominent in this trade. Because of these two features of this Puerto Rican trade apparently the ILA tended to focus a great deal of its attention regarding the enforcement of its "Rules on Containers" on this trade, rather than on other trades.

PRMSA, the remaining respondent, states that it is caught in a dilemma, that it is aware of the injustices which the strict application of the container rules has brought upon segments of the shipping industry, but that PRMSA must abide by the ILA container rules if it is to serve Puerto Rico from the East and Gulf Coast mainland ports, that PRMSA cannot absorb the $1,000 per violation penalties, much less expose iself to a possible ILA shut-down, and that under the circumstances it must be found that the tariff rules on containers of PRMSA are not unlawful under the Shipping Acts.

PRMSA's plaint reflects a prior comment made when PRMSA was not a party. At the first prehearing conference, counsel for CONASA had commented that Sea-Land was caught between Scylla and Charybdis. At that time Sea-Land's and GPRL's tariff rules on containers were under suspension, and counsel for CONASA asked whether these ocean carriers should obey the FMC[6] and fall into violations perhaps of their collective bargaining agreement, or should these ocean carriers obey their collective bargaining agreement and not pay attention to requirements of the FMC.

CONASA is the principal party supporting the tariff rules, and in fact CONASA, not PRMSA, assumed the main defense of these rules. But actually CONASA supports these rules not so much as tariff rules, but primarily as legitimate work preservation rules of ILA, or as agreements between the ILA and the various shipping associations, and subject not to the jurisdiction of the FMC, but to the jurisdiction of the National Labor Relations Board.

[6] That is, permit the relatively free movement of container cargoes across the mainland waterfront facilities without stripping and stuffing at the piers, because the restrictive tariff rules on containers then were under suspension by the FMC.

The ILA did not become a party.[7] Nevertheless, considerable evidence was offered and received as to the developments of the ILA's Rules on Containers, and the reasons for such rules, as background necessary to the development and interpretations of the tariff rules of Sea-Land and GPRL, and of PRMSA in issue herein. Under the circumstances, and in view of the substantial record made,[8] it is concluded that the existing record is ample to reach the conclusions and findings required by these investigations.

The *National Custom Brokers & Forwarders Association of America, Inc.* (National Association), the *New York Foreign Freight Forwarders & Brokers Association, Inc.* (New York Association), and *Consolidated Forwarders Intermodal Corp.* (Confico), all of whom have their principal offices in the City of New York, oppose the tariff rules on containers. These parties contend that PRMSA's rules operate to the detriment of United States exporters, are harmful to United States importers, are unduly restrictive to NVOCCs, consolidators, and ocean freight forwarders, and are harmful to ports, warehousemen, terminal operators and to United States flag carriers.

The non-vessel operating common carriers *(NVOCCs)* contend that previously, under rules and practices applicable to all shippers the NOVCCs were able to obtain containers (to be taken away from the piers) pursuant to the FAK tariff provisions of the ocean carriers in the Puerto Rican trade, that NVOCCs were able to load (stuff) containers at their own facilities, and deliver these containers to the ocean carriers at the port where these containers were loaded aboard vessels without stripping and restuffing. The NVOCCs also contend that they were able to receive loaded containers on return shipments without stripping and storage at the piers, which containers were unloaded (stripped) and distributed at the NVOCCs' own facilities. But, now the NVOCCs, under present PRMSA tariff rules on containers, allegedly economically in effect are embargoed from obtaining and using PRMSA's FAK tariff provision, with the result that several NVOCCs have been forced out of business. The NVOCCs contend that the ILA is using featherbedding practices to prevent the ocean carriers such as PRMSA from providing services to those persons, such as the consolidators and NVOCCs, which the ILA does not want the ocean carriers to serve.

The *American Importers Association* opposes the tariff rules on containers. The continued existence and operation of deconsolidators of container loads is of great importance to importers and especially to small firms. Distinctions in the tariff rules on containers as to whether or not an importer operates within 50 miles

[7] *In the first proceeding*, No. 73–17, Hearing Counsel procured numerous subpoenas, including a subpoena issued on June 4, 1973, directing the deposition of the president of the ILA. Said subpoena was served on the office manager of the ILA's office at 17 Battery Place, New York, N.Y. An attorney for the ILA indicated to Hearing Counsel that he had received personally the subpoena directed to the ILA's president, and was contemplating the filing of a motion to quash, but had not had an *opportunity to discuss it with the* ILA's president. The matter was dropped and no further action was taken by any party to secure the oral testimony of the President of the ILA, *but two affidavits*, dated April 19, 1974, and May 6, 1974, submitted by him in an NLRB proceeding, were received into the record of No. 73–17 as CONASA rebuttal exhibits, and in accordance with the agreement of all parties, there was no oral examination or cross-examination of the ILA's president on his affidavits. Nor was there oral examination or cross-examination in the present proceedings before the Administrative Law Judge of numerous other person who made *statements on both sides of the issues herein*. These statements also became exhibits in the present record. The agreement of all parties to waive cross-examination of numerous witnesses and to accept their written testimony as exhibits greatly shortened the time and expense of the hearing.

[8] The large record consists of 1311 pages of transcript, and 95 exhibits. Many exhibits are depositions, some consisting of hundreds of pages. Some exhibits are parts of the record in the proceeding, *Balicer v. International Longshoremen's Association and New York Shipping Association*, 364 F. Supp. 205 (D.N.J. 1973) (73 Civ. 1155) affirmed without opinion, 491 Fed. 2d 748 (3d Cir., 1974).

of a port, or imports goods in containers consolidated with cargo for other importers, or transfers title to merchandise within a 30-day warehousing period, etc., are unlawful in the view of these importers.

Truck Drivers Local Union No. 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 807, IBT) also opposes the tariff rules on containers in order to preserve teamster jobs. This teamster union contends that there are import-export warehouses which have been customarily manned by Teamsters, and that these warehouses regularly received containers from CONASA ports without restrictions prior to the so-called ILA-CONASA Dublin conference in February, 1973. The Teamsters contend that if the tariff rules on containers are permitted to exist the import-export warehouses in the geographic area of CONASA ports will have to go out of business and thereby deprive Teamsters of jobs.

Hearing Counsel insist that PRMSA's tariff rules on containers are unlawful and should be ordered stricken from the tariff, and furthermore that PRMSA should be prohibited from engaging in the unlawful practices ostensibly permitted by the provisions of these tariff rules on containers. Hearing Counsel state that the Shipping Act was not drafted by Congress in 1916 to possess the qualities of a chameleon and to change colors to suit the contractual or economic needs of private parties. Hearing Counsel state that the issues focus on the question of whether persons subject to the FMC's jurisdiction will pattern their business practices on the regulatory mandates of the Shipping Acts, or whether such practices will be forged solely in the collective bargaining arena.

THE WORK PRESERVATION RULES

CONASA is an unincorporated association. Since 1971, it has negotiated collective bargaining agreements with the ILA on a master contract basis concerning the North Atlantic or CONASA ports of Boston, Providence, New York, Baltimore and Hampton Roads. CONASA has acted on behalf of its six member associations, the Boston, the Rhode Island, the New York and the Hampton Roads Shipping Associations, the Philadelphia Marine Trade Association, and the Steamship Trade Association of Baltimore. The six shipping associations individually negotiate labor agreements with the ILA covering local conditions excepted from the master contract. The members of these six associations include ocean common carriers, stevedores, terminal operators and others functioning in waterfront related activities. Besides CONASA, there are multi-employer bargaining associations for the South Atlantic and Gulf Coasts. For the ports of Charleston, S.C., and Jacksonville, Fla., the South Atlantic Employers Negotiating Committee negotiates with the ILA. For the Port of New Orleans, La., the New Orleans Steamship Association negotiates with the ILA.

Of the three multi-employer bargaining associations, only CONASA intervened, and as a result the evidence largely relates to the situation at CONASA ports, and in particular to the situation at the Port of New York.[9]

[9] Problems concerning the ILA's work preservation rules are not confined to the Port of New York. Notice is taken that as recently as September 19, 1975, U.S. District Judge Robert R. Merhige, Jr., denied a temporary injunction against the ILA and the Hampton Roads Shipping Association (HRSA) sought by the NLRB to bar fines imposed by the ILA and HRSA Joint Grievance Committee on Containers on steamship lines whose containers were stripped in the port area by truckers. Fines totalling $10,000 were imposed in

The Rules on Containers are a compromise between the shipping industry (ocean common carriers, stevedores, terminal operators, et al.) and the ILA. The compromise enables the shipping industry to enjoy the benefits of innovation, particularly the handling of cargoes in containerloads over the piers, by the relatively free movement of an estimated 80 percent of the containers across the piers, while preserving to the longshoremen of the ILA some part of their traditional work jurisdiction.

As recently as the first three weeks of March 1975, out of the total average PRMSA weekly movement of 1,373 containers southbound in this trade, 1,140 containers, about 83 percent, crossed the piers without ILA rehandling of their contents.

Out of the other 233 containerloads per week, PRMSA consolidated 136 containers with LTL or LCL components at the piers; 26 containers of NVOCC cargoes were stripped and restuffed by PRMSA; and 71 containers of NVOCC cargoes were not subjected to this further stripping and stuffing by PRMSA because of court injunctions obtained by two NVOCCs. Of course, this figure of 1,373 total weekly containerloads, does not take into account some containerloads shifted from away from the Port of New York to a South Atlantic port and shipped on an ocean common carrier which did not use ILA labor at the piers.

In the Port of New York, for example, in the contract year ending September 30, 1959, before containerization became of any substantial significance, there were over 30,000 longshoremen who worked 44.7 million man hours per year. For the contract year ending September 30, 1973, there were only about 13,000 longshoremen who worked only 22.6 million man hours per year.

In the view of CONASA if the work preservation rules now were to be nullified, there would be an estimated further loss of 3,000 longshore positions in the Port of New York, which CONASA believes would threaten the present uneasy longshore labor peace. The 1974–1977 ILA-shipping industry labor contracts were reached without resort to strikes or work stoppages, an unusual event in the history of ILA labor contracts for the past 30 years. Both the longshoremen and the shipping industry are to be commended for reaching agreement without interruption to the steady flows of ocean commerce to and from the United States.

For many years before containerization, the longshoremen moved cargo over the piers piece by piece, and containerization posed a serious threat to ILA work opportunities. From time to time, as ILA labor contracts came up for renewal various compromises were reached between the ILA and the shipping industry. Generally in the bargaining sessions, before the agreements were reached, the ILA would insist on stuffing and stripping all containerloads at the piers, while the shipping industry would insist that no containerloads be stuffed and stripped at the piers. During the negotiations leading to the 1974–1977 labor agreement, these same goals of the ILA (stripping all) and of the shipping industry (stripping

1974 on United States Lines when certain truckers had stripped ten containers. When United States Lines was unable to recoup the fines from the truckers, it canceled its agreements with the trucking firms, and one result was that the Tidewater Motor Truck Association filed an unfair labor charge against the ILA and the HRSA. Judge Merhige cited the ILA's work preservation rule 1(a)(3) which *provides that ILA deepsea labor shall strip cargo from containers designated for a single consignee from which the cargo is discharged* (deconsolidated) by other than its own employees within the geographic area.

no containers) were again put forward, before the 1974–1977 "compromise" labor agreement was reached.

In the past the ILA and the shipping industry came to agreement on the ILA's Rules on Containers, which permitted many containers to move freely across the docks, and which restricted the free movement of other containers. There are certain containers which apparently always have moved freely across the docks without rehandling by the ILA, including household goods, mail, military effects, and coastwise and intercoastal containers (the latter two being considered marginal from a competitive standpoint with all-rail land movement).

The ILA apparently recognized that the container revolution was here to stay, by ceding that containers originating more than 50 miles from a port generally could move across the piers without rehandling by the ILA. In return for this and other concessions, the ILA obtained various benefits from the shipping industry such as better wages, vacation, health and retirement benefits, guaranteed annual income (GAI) and container royalties. These royalties were intended as partial compensation to the ILA for containers stuffed away from the piers by non ILA labor. Nevertheless, even with GAI and container royalties, the ILA wanted to hold on to as many jobs as reasonably possible for its members, and the ILA did not want only make-work jobs, such as sweeping piers.

Although the ILA insisted on holding on to the right to stuff and strip local containers coming from or going to points within its local area, or within 50 miles of the ports, even in this so-called "geographic area" the ILA gave up further cargoes. It excepted from its handling requirements containers loaded with cargo at a qualified shipper's facility with its own employees and so-called manufacturer's label containers loaded by a single manufacturer at its facilities with its own employees. However, where the shipper did not use its own employees to load the container, the ILA under its Rules on Containers insisted on its right to strip and stuff the containers at the piers.

From time to time officials and members of the ILA checked certain stuffing and stripping operations of consolidators and deconsolidators located within 50 miles of the Port of New York. ILA officials were very irate when they found in 1962, for example, that certain consolidation work was being performed away from the piers by non-union labor at 90 cents per hour, which was less than the minimum wage.

The main remaining containerloads which the ILA now insists on stuffing and stripping at the piers are containers coming to and from NVOCCs, consolidators, forwarders, deconsolidators, and other shippers and consignees who do not use their own employees to load and unload their containers, where the containers come to or go from points within 50 miles of a port. The ILA considers that these containerloads in reality consist of less-than-truckload (LTL) and less-than-containerload (LCL) cargoes, which the ILA insists must be consolidated and deconsolidated at the piers by longshoremen, thereby in the view of the ILA continuing the work jurisdiction of the ILA over these LTL and LCL cargoes.

The NVOCCs, consolidators and deconsolidators in response, contend that the ILA should not restrict their containers, and let other containerloads pass relatively freely over the docks.

The teamsters are in disagreement with the ILA as to the work jurisdictions of the members of the two unions. There is a disclaimer in the ILA's Rules on Containers, which states, "That these rules do not have any effect on work which historically was not performed at a waterfront facility by deepsea ILA labor." This disclaimer does not satisfy intervener, truck drivers' Local 807 IBT. This truck drivers' union fears that it will lose more jobs of its members, besides the estimated 2,500 jobs already lost in its view because of containerization.

Apparently, the ILA theoretically does not object to the stuffing and stripping by the Teamsters union of containers at locations within the 50-mile areas of port, such as at public warehouses or other points away from the piers. But, the practical problem between the ILA and the Teamsters arises because the ILA concomitantly insists on stuffing and stripping the same containers at the piers even when these containers also have been stuffed and stripped by the Teamsters away from the piers. Presumably, with regard to containers coming to and from areas outside of the 50-mile areas there is no problem, and the Teamsters or other non ILA labor could stuff and strip these containers outside of the 50-mile areas without any corresponding insistence by the ILA that it should also stuff the same containers at the piers.

Perhaps, this is the reason that Local 807 IBT intervened rather than the general IBT union. In one of his affidavits the president of the ILA, chides the president of Local 807 IBT, because the latter failed to supply any affidavit of the former or present general presidents of the Teamsters. The president of the ILA insists that there was an inter-union agreement or understanding that all work performed within the "compound" or waterfront ocean terminal, which covered the loading and stripping of containers on the piers and in the ocean terminals, and any and all work connected with the movement of cargo within such piers and terminals, was exclusively within the jurisdiction of the ILA.

The ILA's understanding of the inter-union agreement was that the jurisdiction of the Teamsters was to move the cargo to and from the compound. The ILA's view is that the Teamsters had no jurisdiction at the compound to consolidate or to deconsolidate containers. The president of the ILA states that his view was reaffirmed from time to time by the former and by the present general presidents of the Teamsters.

The president of Teamsters Local 807 insists that there was and is an inter-union agreement between the ILA and IBT that the unloading from trucks of all cargo for export is under the work jurisdiction of the Teamsters, and that the loading of import cargo on the trucks is divided betwen members of the IBT and of the ILA.

Some undisputed facts apparently are that the truck driver is the boss of, and is responsible for, any movement or placement of cargo within his truck. The truck driver and his helper are responsible for unloading the cargo from the truck to a point adjacent to the truck tailgate. If and when at times, the truck driver further moved export cargo and placed pieces of cargo in specific bins or cribs or places of rest for export, such placement was made under the work jurisdiction of the longshoremen, even though to save the time of, and for the convenience of, the truckman, he did some of the placement work on the pier. The placement on the docks had to be under the supervision of an ILA checker or clerk.

While the Teamsters in the past have handled certain boxes and cartons of small proportions on the piers, the ILA always has taken the view that boxes eight feet or larger containing consolidated loads are subject to rehandling by the ILA at the waterfront. The ILA apparently, because of the nature of the cargoes or for general convenience in clearing the piers, has loaded most of the import cargoes into trucks, but the actual loading into the trucks and placement of pieces inside the truck is the responsibility and is under the supervision of the truckman.

In summation of the inter-union contentions insofar as they relate to the stuffing and stripping of consolidated containers, the ILA generally insists on work jurisdiction at the piers, and the IBT generally insists on work jurisdiction away from the piers. If the result were that both the ILA and the IBT were to stuff and strip the same container there would be no inter-union problem. But, the problems arise because it is too expensive for the shippers and consignees to have their shipments consolidated or deconsolidated twice. Some of the above statements and findings of fact as to the work jurisdiction of the ILA and IBT may be both partially inaccurate and incomplete, but this matters not to the ultimate conclusions and findings herein.

Regardless of what is the complete and true situation and history as between the ILA and the IBT concerning labor jurisdiction to stuff and strip consolidated containers coming from or going to points within 50 miles of the ports, what we are faced with in these proceedings is that the ILA's Rules on Containers, in effect, have been adopted largely by PRMSA in its tariff rules on containers. And only PRMSA's tariff rules on containers are in issue herein.

The ILA's Rules on Containers were codified and placed into the October 1, 1968–September 30, 1971, collective bargaining agreement between the ILA and the New York Shipping Association (NYSA). But, it is the position of the ILA that these rules originated in the collective bargaining agreement effective October 1, 1959. Paragraph 8(c) of that agreement provided in connection with containers—Dravo[10] size or larger:

> Any work performed in connection with the loading and discharging of containers for employer members of the NYSA which is performed in the Port of Greater New York whether on piers or terminals controlled by them, or whether through direct contracting out, shall be performed by ILA labor at longshore rates.

The ILA always intended that its work preservation rules be strictly enforced, and from time to time the ILA was assured by the ocean carriers and stevedores that these rules were being enforced. However, enforcement of these work preservation rules was relatively lax in earlier years. As time went on enforcement increased in intensity. NYSA on February 28, 1962, issued the following statement to the ILA:

> Where an employer member of NYSA supplies a container which is the property of such member, to a consolidator for loading or discharging of cargo in the port of Greater New York, it will be stipulated that such container must be loaded or unloaded by ILA at longshore rates.

From time to time the ILA complained to NYSA that certain ocean common carriers were not honoring the labor agreement as to the loading of containers by the ILA. In 1969, after a 57-day strike on this issue, the ILA obtained the rule in the collective bargaining agreement which imposed liquidated damages (then

[10] Dravo is 8 feet by 8 feet by 8 feet.

$250, now the $1,000 penalty) on ocean common carriers violating the Rules on Containers, as shown on page 69 of attachment 9 of Exhibit 5.

In 1973, the ILA demanded and obtained the so-called "Dublin Rules," which were designed to make violations of the Rules on Containers more difficult. In the 1974 CONASA-ILA negotiations, the Rules on Containers were revised and the Dublin Rules were incorporated therein. Nevertheless, even after the 1974–1977 Rules on Containers went into effect, the investigators for the ILA found that hundreds of containers were moving in violation of the Rules on Containers, and the ILA protested that the ocean common carriers and stevedores were not living up to their bargain.

The present Rules on Containers in Rule 1(a)(1) provides that any container, whether owned, leased or used, by an ocean common carrier which contains a consolidated containerload, which comes from or goes to any point within the 50 mile radius of a port shall be stuffed or stripped by ILA deepsea labor, subject to exceptions provided in the Rules. One key word in Rule 1(a)(1) is "used," which means that this rule covers not only ocean-carrier owned or leased containers, but also any container used or transported by the ocean carrier. This is a tightening of certain earlier Rules on Containers, such as the October 1, 1968, Rules, which listed only owned or leased containers.

On April 28, 1975, the ILA unilaterally (as permitted in the labor agreement) revoked the present Rules on Containers and implemented even more restrictive provisions. Later, the ILA agreed to reinstate the Rules on Containers effective May 30, 1975, provided that a Council of Container Carriers actively participated in the implementation and administration of these Rules. Such a Council was formed.

The NYSA-ILA Contract Board is charged with the implementation and administration in the Port of New York of the CONASA-ILA collective bargaining agreement and of the local collective bargaining agreement between NYSA and ILA. This same Contract Board also acts as the NYSA-ILA Container Committee to enforce and administer the ILA's Rules on Containers. This committee has employed Mr. Michael Nicholas as its contract administration officer to interpret, administer, and police the enforcement of the Rules on Containers. His decisions are subject to hearing and review by the Contract Board, and when and if there is a deadlock on the Contract Board, the dispute goes to final and binding arbitration under the labor agreement's grievance and arbitration provisions.

Mr. Nicholas has rendered certain decisions interpreting the ILA's Rules on Containers. His decisions are communicated to the ocean carriers. Up to the time Mr. Nicholas testified, May 1, 1975, all ocean carriers had accepted his decisions without any dispute. No party had insisted upon any review of Mr. Nicholas' decisions by the NYSA-ILA Container Committee.

Inasmuch as various persons from time to time have disagreed as to their interpretation of the ILA's Rules on Containers and the ocean carriers have found it necessary to go to Mr. Nicholas for his interpretation, it follows that the ILA's Rules on Containers have not been entirely clear, and that to some extent they contain conflicting or ambiguous provisions. Since the ILA's Rules on Containers have been substantially copied in PRMSA's tariff rules on containers, it follows that the latter also are ambiguous and not clear on their face. Ambiguous tariffs are contrary to the requirements of the Shipping Acts, because tariffs must be definite and certain. There is a general principal of tariff construction or interpretation, that where a tariff is ambiguous it must be construed against the maker (the ocean common carrier in this instance) and in favor of the shipper.

When its tariff container rules are questioned an ocean carrier, such as PRMSA, would in certain instances feel bound to obtain the ILA-NYSA construction by Mr. Nicholas of the ILA's Rules on Containers. Of course, Mr. Nicholas properly avows that he is not a tariff (or traffic) man, and that his only duties relate to the ILA's labor Rules on Containers. However, the practical effect of his rulings relating to containers transported by PRMSA would be to guide PRMSA in its interpretation of its tariff rules on containers. The ultimate result could be the passing on by PRMSA of a $1,000 penalty suffered by this ocean carrier to a shipper, NVOCC, consolidator, forwarder, or deconsolidator. In practical effect, we would have Mr. Nicholas indirectly interpreting an ocean carrier's tariff, even though he is not a party to the transportation contract. Stated another way, we would have the ILA in part, through the contract administration officer of the NYSA-ILA Container Committee, influencing the interpretation of a tariff of an ocean common carrier.

CONASA turns this viewpoint around, and contends that the FMC under the guise of tariff regulation is urged by certain parties other than CONASA to improperly venture outside the sphere of its statutory jurisdiction into the area of labor relations and collective bargaining to outlaw the only conceivable work preservation clause in the shipping industry, and that just as the antitrust laws of the United States may not be utilized to outlaw valid union activity, so, too, must not the Shipping Acts which are economic regulatory statutes complementary to the antitrust laws.

CONASA further contends that the ILA's Rules on Containers must be reappraised continually to keep pace with rapidly changing work conditions, cargo movements and handling techniques. CONASA states that these Rules on Containers, like all other labor contract provisions are not rigid and static mechanisms and thus are not amenable to protracted administrative review.

The short answer of the NVOCC's, the consolidators, forwarders, importers and Hearing Counsel to the contentions of CONASA is that much of the evidence relied upon by CONASA, particularly the evidence as to labor problems and work preservation rules, is irrelevant to the issue of the tariff rules on containers of PRMSA, and that the work preservation rules of the ILA are not in issue. However, it would appear that the FMC must not only consider PRMSA's tariff rules in their effect on the consolidators, forwarders and importers, but also in their broader effect on the public interest of maintaining steady flows of ocean commerce to and from Puerto Rico. In that broader sense CONASA's evidence as to labor problems and the work preservation rules is relevant to the issues.

The work preservation rules of the ILA were part of a labor agreement between the ILA and the shipping industry including the ocean common carriers, stevedores and terminal operators. The consolidators, forwarders, importers and NVOCCs were not parties to the labor agreement.

Nevertheless, many of these non-parties were aware of the labor agreement *and its restrictive rules on containers. But these non-parties including* NVOCCs endeavored to continue operating by continuing to deal with the ocean carriers under the tariffs of these carriers. For a number of years, the NVOCCs managed to have their containers loaded away from the piers and then moved over the piers without further stripping or stuffing.

Consolidated Express, Inc. (CEI), an NVOCC, made illegal payments through its general manager from about 1961 or 1962 to about November 1972, to the pier superintendent and to the assistant pier superintendent, members of the ILA, employed by Sea-Land at the waterfront facilities of Sea-Land at Elizabethport, N.J., totalling $200 per month on a regular monthly basis. The payments were listed in CEI's books as travel and entertainment expenses.

A vice-president and part owner of CEI, took the view that these payments were not made to avoid the stuffing and stripping of CEI's containers by the ILA at Elizabethport, but that the payments were made to expedite both the paperwork at the piers and the placement of the containers aboard ship when, for example, the containers reached the waterfront close to 4:30 p.m. when the pier was about to close down, and the containership was near sailing time. This witness also pointed out that it would be an advantage to CEI to have CEI's containers stacked among the three layers of containers on top of the deck, rather than below deck, so that upon reaching Puerto Rico, CEI's containers would be among the first to be taken off the ship, and would reach the ultimate consignee earlier than the other containers stacked four deep below deck.

CONASA disputes the above views, and contends that these illegal payments were made to persons having no authority with respect to stowage aboard ship, and that the payments were made to avoid the stuffing and stripping requirement of the ILA's Rules. The true purpose of the payments does not matter to the ultimate conclusions herein, but the circumstances show the intent of the ILA to hold on to the consolidation work, and the intent of at least one NVOCC to do this consolidation itself and to have its containers move relatively freely across the piers, as were many other containers which moved without restriction.

An NVOCC may perform various special services for an exporter or importer, such as accepting prepaid, collect or C.O.D. shipments, and offering storage in transit and warehousing facilities. The NVOCC may route its containers to match sailings of ocean carriers so as to avoid delays waiting for a ship. The NVOCC assumes certain liabilities for losses of the cargo of the exporter or importer and in this respect, at least, acts as a common carrier, even though the NVOCC has no ocean-going ships.

While an NVOCC is a common carrier in the view of the small exporter or small importer, whose packages the NVOCC consolidates with other exporters' or importers' packages to make a containerload, on the other hand, in relation to the ocean common carrier, such as PRMSA, the NVOCC is a shipper or consignee. In the utilization of PRMSA's tariff, the NVOCC is a shipper or consignee and should be treated as other shippers and consignees are treated.

The NVOCC makes a profit by paying the containerload rate for freight-all-kinds of the ocean carrier, while the NVOCC charges his individual package rates to the exporters or importers who do not individually have the volume of packages sufficient to make a containerload. In the view of ILA officials, the estimated profit of an NVOCC is unduly high in relation to its relatively small capital investment in facilities and equipment. Apparently this NVOCC profit was, in the ILA's mind, another reason justifying the restrictive treatment of the NVOCCs and consolidators, in the ILA's Rules on Containers.

Some NVOCCs have experienced hard times, which they attribute at least in part to the ILA's work preservation rules and to Sea-Land's and PRMSA's tariff rules on containers.

Drake Marine, a division of Drake Motor Lines, Inc., commenced NVOCC operations on May 15, 1970, in the Puerto Rican trade, and provided service between the ports of New York, Charleston, Jacksonville and Miami on the one hand, and on the other San Juan, Puerto Rico. Drake Marine discontinued operations between New York and San Juan, and between Charleston and San Juan in March 1975.

Drake Marine was advised by PRMSA in January 1975, that all trailers (containers) tendered by it as a consolidator to PRMSA would be considered LTL or LCL shipments in accordance with the ILA's Rules on Containers, and accordingly Drake's trailers (containers) would have to be stripped at the piers. Drake was also advised that PRMSA would not furnish its containers to Drake. What this meant apparently was that PRMSA would not allow Drake or any other NVOCC to take a PRMSA container away from the piers. Nevertheless, Drake might bring a consolidated load in a non-PRMSA container to the piers, where under the tariff rules this containerload could be stripped and restuffed into a PRMSA container by ILA deepsea labor. In February 1975, Drake tendered eight trailers to PRMSA for delivery to Puerto Rico, and these containers were stripped and restuffed into thirteen PRMSA containers. Drake was assessed the transfer charge of $172 per 40-foot container.

Because of the above circumstances related to the Rules on Containers, and also because two other NVOCCs (Consolidated Express, Inc., and Twin Express, Inc.) were able to have their containers moved across the piers without stripping and restuffing, Drake discontinued its New York and Charleston/Puerto Rico operations. Consolidated Express and Twin Express continued to receive containers from PRMSA, and these two NVOCC's continued to have their containers moved across the piers without restriction because of a Court injunction obtained by them. The injunction did not apply to Drake and other NVOCCs, which had not joined in the Court proceeding with Consolidated Express and Twin Express.

Dolphin Forwarding, Inc., an NVOCC, has operated in the Puerto Rican trade since September 1964, mainly between New York and San Juan. It was advised by PRMSA in December 1974 that PRMSA could not provide[11] Dolphin with containers because of the ILA's contract restrictions and because of the PRMSA tariff rules on containers which were patterned on the ILA's restrictions. Dolphin

[11] Presumably PRMSA meant that it could not provide containers to Dolphin where that would be contrary to PRMSA's tariff rules on containers, and it was assumed by PRMSA that its tariff rules would be violated by furnishing containers to Dolphin. CONASA points out that the ILA's Rules on Containers do not deny containers to shippers, but "merely" require that ILA labor be used to stuff and strip local cargo into and out of the containers, and that the containers are available at the pier facility where the local cargo is to be loaded or discharged by ILA labor. CONASA seems to ignore the ILA's Rule 1(e) as well as PRMSA's tariff rule 1(e), both of which provide that no carrier shall supply its containers to any consolidator or de-consolidator. Apparently CONASA interprets this to mean only a requirement not to supply containers unless the ILA strips and stuffs the containers. But, there is no ambiguity if you read rule 1(e) as it stands clearly by itself.

in its judgment became obliged to divert all of its container cargoes from the Port of New York to the Port of Jacksonville.

Dolphin in February 1970, purchased Acme Fast Freight International, Inc. (AFFI), which began operations in the Puerto Rican trade in March 1960, under the name Acme Fast Freight of Puerto Rico. AFFI experienced a period in the spring of 1968 when its containerloads were stripped by the ILA. Dolphin was never exposed to the ILA's "Rule 1" until its publication in PRMSA's initial tariff, and being unable to qualify under "Rule 1," it protested the PRMSA tariff rules. Dolphin by diverting its containers to Jacksonville, has lost some customers, and its service is slower than before. Dolphin fears that its survival is in jeopardy.

San Juan Freight Forwarders, Inc. (SJF), an NVOCC, has been operating in the Puerto Rican trade since July 1972, during which year none of its trailers were stripped and restuffed at the piers. In late October 1973, TTT began to strip every container of SJF. After PRMSA took over TTT's operations in October 1974, SJF began to have problems getting containers from PRMSA.

PRMSA has two subsidiary groups, one group managing and operating the roll-on-roll-off ships formerly operated by TTT (the TTT group) and the other group, the conventional containerships of Sea-Land and Seatrain (the Sea-Land group). The two groups do not use the same waterfront facilities. The two managing and operating groups apparently at least for a time had different attitudes and reactions to the ILA's Rules on Containers. SJF continued after October 29, 1974, to receive containers from the TTT group, but could get no containers from the Sea-Land group. The containers furnished to SJF by the TTT group continued to be stripped at the piers.

By affidavit dated July 29, 1975, attached to Hearing Counsel's reply brief, the President of San Juan Freight Forwarders states that SJF has been forced to stop using the Port of New York temporarily because of PRMSA's tariff rules on containers. This affidavit hereby is accepted as an addendum to Exhibit 73 of record.

The record contains considerably more evidence as to the problems faced by the NVOCCs above and by other NVOCCs and by other shippers and consignees, but the general picture above is sufficient to show that not all NVOCCs and shippers were treated alike. Enforcement of the ILA's rules varied from time to time, it varied as between Staten Island piers (TTT group) and New Jersey piers (Sea-Land group), and PRMSA's tariff rules were interpreted differently as to the furnishing of containers as between the TTT group and Sea-Land group. And most importantly, the NVOCCs were treated differently from other shippers who owned and loaded their containers with their own labor at their own facilities.

THE TARIFF RULES ON CONTAINERS OF PRMSA

Under PRMSA's tariff rules on containers, one exporter may have 20 packages of a particular commodity, these packages amount to a containerload, the container is loaded by employees of the exporter at the exporter's own facility located within 50 miles of a port, and the exporter delivers this container to the pier, and this container will not be stripped and restuffed at the pier by ILA deepsea labor, because the tariff provides, rule 440, or 442.5, or 445, Rules on Containers, Rule 2A.(2), that "Containers loaded with cargo at a qualified shipper's facility with its own employees'' are excluded from the requirement of loading by ILA deepsea labor.

However, a second exporter with 20 packages of the same commodity who is not large enough, or for some reason does not have his own warehouse facility, and does not have his own employees to load the container, but instead delivers his 20 packages to a public warehouse within 50 miles of a port and has the 20 packages loaded by employees of the warehouse into the container, must have his container stripped and restuffed at the pier by ILA deepsea labor under PRMSA's tariff rule 440, or 442.5, or 445, Rules on Containers, Rule 1(a)(2).

Since it makes no sense for the second exporter above to incur the double handling of his goods and a stripping and stuffing charge at the pier as well, he must arrange for the trucking of his 20 individual packages to the pier where they will be loaded into a container by ILA deepsea labor.

Many exporters believe that when the packages are handled at the pier, they will be subject to pilferage, delay, and damage. These exporters believe that when cargo crosses a pier in a sealed container it is a lot less subject to pilferage and damage than when moved loose to be stuffed into a container at the pier. There is some dispute by CONASA that the danger of pilferage and damage at the pier is any different or any greater than the danger when the loose pieces are handled and stuffed into containers away from the piers.

Regardless of any conclusion as to the relative danger of pilferage and damage when the ocean transportation service of PRMSA is the same for two exporters who each ship 20 identical packages of the same commodity, to permit the first of these two exporters to have his container moved promptly and freely across the pier, and at the same time to require the second exporter to have his container delayed, stripped and restuffed or to require him to deliver his 20 packages loose to the pier, obviously restricts the freedom of choice of the second exporter and results in unfair and unjust discrimination against the second exporter.

A similar situation of undue preference and unjust discrimination may arise, where the first exporter's 20 packages are loaded at his own facility by his own employees and his container moves freely across the piers; whereas a second and a third exporter each has 10 packages, and in combination they amount to a similar 20-package containerload, but these 20 packages are consolidated by an NVOCC into one container, with the result that the second and third exporters may not have their consolidated container moved freely across the piers, again though PRMSA's ocean transportation service is the same for the container of the first exporter as it is for the container of the second and third exporters.

The impact of the 50-mile rule as it has been interpreted actually extends beyond 50 miles of a port, for example, in the case of a consolidated container shipped via the Port of New York originating within 50 miles north of the Port of Boston, but more than 50 miles from the Port of New York. On the other hand, an exporter consolidating at a public warehouse 150 miles due west of the Port of New York would not have his container stripped at the Port of New York because this warehouse is not within 50 miles of any CONASA port.

Under PRMSA's tariff rules on containers an import containerload discharged at a qualified consignee's facilities by its own employees is not required to be stripped and stuffed at the piers by ILA deepsea labor, Rule 2B(2). The qualified consignee is defined as the purchaser or one who otherwise has a proprietary financial interest (other than in the transportation or physical consolidation or deconsolidation) in the import cargo being delivered and who is named in the delivery order. But if such consignee does not own or operate his own warehouse facility and instead uses a public warehouse the consignee, Rule 2B(4)2., must pay the normal warehouse storage fees for a minimum of thirty days, and meet other requirements in order to be excluded from the requirement that his import containerload be stripped and stuffed at the piers by deepsea ILA labor.

As seen above, one importer of a containerload of shoes who unloads his container at his own facilities with his own employees may immediately distribute these shoes to retail outlets. However, another importer of a containerload of shoes who does not have his own warehouse facilities and employees, and who uses a public warehouse to unload the container must pay a warehouse storage fee for a minimum of 30 days, and furthermore, as the tariff rules provide, this second importer may not transfer title to the shoes within the 30 days of warehousing, Rule 2B(4)3. As seen, the tariff rules on containers of PRMSA restrict the freedom of some importers in moving merchandise and add substantially to their costs, while other importers are not so treated.

In PRMSA's tariff rules on containers there are provisions in Rule No. 440 (applicable at CONASA ports) and in Rule No. 422.5 (applicable at the South Atlantic Ports of Charleston and Jacksonville) which provide in rule 1(e) that no carrier or direct employer[12] shall supply its containers to any consolidator or deconsolidator, and further that all rule 1 containers be stuffed or stripped at a waterfront facility. Rule 445 (applicable at the Port of New Orleans) contains a different rule 1(e), which does not mention carriers, but does refer to "employer" and is otherwise the same as the rule 1(e) in Rules 440 and 442.5 above. Obviously, when an ocean carrier supplies equipment (containers) to one shipper but not to a second similar shipper, this action and the tariff rule providing for such action are unjustly discriminatory and unlawful.

Under the tariff rules of Sea-Land and GPRL in effect in prior years before these two carriers placed into their tariffs the rules now substantially adopted by PRMSA as its tariff rules on containers, and when Sea-Land and GPRL in their operations in the Puerto Rican trade had no restrictive rules on containers, at those times the shippers, including the NVOCCs, consolidators and forwarders, were free, at least insofar as these ocean carriers' tariffs provided, to obtain containers from these ocean carriers, the shippers were free and able to load containers at any facilities away from the piers, the shippers could deliver containers to the ocean carriers at their waterfront facilities, and these containers could be placed aboard the containerships without any stripping and restuffing, at the piers. At present as seen, the shipping acts are being violated by the unequal treatment of shippers. Regardless of whether the treatment of shippers is unequal, the tariff rules may also be unjust and unreasonable insofar as they may require the uneconomic second handling (stripping and restuffing) of containers at the piers when there is no ocean transportation need for such second handling.

[12] The tariff says "employee," probably a typographical error. The *ILA's Rules on Containers (Exhibit No. 95)* also contain in their Rule 1(e) the words, direct employee, so it appears that PRMSA copied the ILA's Rules and typographical error. Direct employer in the usual sense of the collective bargaining agreement, means employer of ILA longshoremen.

Certainly the rehandling or stripping and restuffing of a container does not add anything of value to the ocean service provided to the shipper.

DISCUSSION AND CONCLUSIONS

Section 14 Fourth of the 1916 Act provides in part that no common carrier by water in the Puerto Rican trade shall make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of cargo space accommodations or other facilities.

PRMSA will not supply PRMSA containers to certain consolidators and deconsolidators, whereas PRMSA will supply its containers to other shippers and consignees in the same geographic area. PRMSA's rules on containers unfairly treat and unjustly discriminate against certain consolidators and deconsolidators inasmuch as PRMSA does not provide them the same facilities (containers) as PRMSA provides other shippers and consignees, in violation of section 14 Fourth.

PRMSA's rules on containers are in violation of section 14 Fourth insofar as these rules permit certain containerloads to move freely over facilities of PRMSA, that is, over the piers, while PRMSA's rules also require other similar containerloads to be stripped and restuffed at the piers by ILA deepsea labor. The unlawful discrimination results from the unequal availability of the piers for movement of containerloads to and from ships.

Clearly, PRMSA's tariff rules on containers unfairly treat and unjustly discriminate against certain shippers and consignees in the matter of cargo space accommodations and other facilities, including the use of the piers and the use of containers for consolidated shipments.

Section 16 First of the 1916 Act provides in part that it is unlawful for any common carrier by water to make or give any undue or unreasonable preference or advantage to any person, or to subject any particular person to any undue or unreasonable prejudice or disadvantage in any respect.

PRMSA's rules on containers are in violation of section 16, First, in that they unduly prefer certain shippers and consignees, such as for example, those who have certain facilities and whose employees stuff and strip containers, while these rules subject other shippers and consignees to undue and unreasonable prejudice and disadvantage, such as for example, those shippers and consignees who do not have their own facilities or do not have their own employees to stuff and strip containers. PRMSA's rules require certain shippers to suffer transfer or rehandling charges at the piers for their containers to their undue prejudice, while other shippers escape such transfer charges to their undue preference, in violation of section 16, First.

Section 18(a) of the 1916 Act and section 4 of the 1933 Act, in part, together provide that the common carriers by water in the Puerto Rican trade must provide just and reasonable rates, regulations and practices relating to various matters, including the receiving, handling, transporting, storing or delivering of property; and that if the FMC finds these rates, regulations and practices to be unreasonable, it may prescribe just and reasonable rates, regulations and practices.

PRMSA's rules permit shippers to be held liable for fines or penalties of $1,000 per container, which penalties have no relationship to the cost of transportation or of handling of the container from an ocean transportation viewpoint. These PRMSA tariff rules in part are ambiguous and uncertain in that they are not clear on their face, and are subject to various interpretations. PRMSA's rules are unreasonable insofar as certain shippers must undergo the added transfer charges, for example, of $172 per 40-foot container, in order to avail themselves of PRMSA's FAK rate on containerloads, when there is no transportation necessity to transfer the contents of a container from one container to another container. PRMSA's rules are unreasonable in a number of other ways, including that they deny containers to some shippers while providing containers to other shippers, and that the rules require certain consignees to warehouse their imports under certain restrictions while not so requiring other consignees to so warehouse their imports. For the reasons stated in this paragraph PRMSA's tariff rules on containers are unjust and unreasonable in violation of section 18(a) of the 1916 Act and of section 4 of the 1933 Act.

There are certain fundamental truths pertinent to these proceedings. One is that all shippers should be treated substantially equally, provided of course that they seek and receive the same ocean transportation service from the same ocean common carrier. If we were considering only the tariff rules on containers of an ocean carrier, without knowing what caused these rules to be put in the tariff, clearly we would find that tariff rules, such as PRMSA's rules on containers, are unlawful. In an ordinary proceeding there would be no need to go any further, that is, there would be no need to go beyond an examination of the tariff rules on containers. But the present proceedings have potential ramifications which go beyond the ordinary problems of the legality of a tariff rate or rule, and we must consider these ramifications in issuing our order herein.

Another fundamental truth is that the FMC has jurisdiction over tariffs (rules, rates, etc.) of ocean common carriers in the United States mainland/Puerto Rico trade. Keeping the above two fundamentals in mind, the FMC clearly has jurisdiction over the lawfulness of PRMSA's tariff rules in the Puerto Rican trade. Secondly, if the tariff rules provide for grossly unequal treatment of similarly situated shippers the rules are clearly unlawful under the Shipping Acts. Furthermore, if one shipper receives preferred treatment, and another shipper is subjected to unfair, unjust and grossly discriminatory treatment, such treatment is clearly unlawful when for the same ocean transportation service, despite any reason leading to the discriminatory treatment.

In other plainer words, unlawful tariff rule discrimination is unlawful tariff rule discrimination, regardless of the fact that it may have been caused by a work preservation rule, and it matters not at all whether the work preservation rule is lawful in and of itself. It is elemental and basic to United States transportation law, that shippers all be treated equally, whether large or small, or whether they differ in their plants, warehouse facilities or in other respects, provided only that they are buying identical transportation services.

One other fact should be remembered. We are not here dealing with section-15 agreements between two or more persons subject to the Shipping Acts. We are dealing merely with tariff rules on containers of an ocean common carrier. A tariff provision is not an agreement; rather it is a unilateral statement of the author of the tariff. Basically a tariff sets the price and terms at which a common carrier offers its services. Therefore any citations of cases dealing directly or peripherally with section-15 agreements are really not directly in point, although they may be of some background interest.

The Commission previously has ruled on a matter which had substantially similar, if not the same, legal implications as the matter now at issue. The factual background in the previous case was that on February 19, 1969, the ILA and the employers of longshoremen at the Port of Miami entered into a deepsea longshore agreement, which contained a Clause 19, in which clause there was a series of rules designed to protect and preserve the work jurisdiction of longshoremen of the ILA at deepsea piers and terminals.

Clause 19 in part required that certain containers containing consolidated loads, destined to or coming from any person including a consolidator or deconsolidator who is not the beneficial owner of the cargo, which containers come from or are destined to any point within a 50-mile radius from the center of the port, shall be stuffed and stripped by ILA labor at longshore rates at a waterfront facility. Also, Clause 19 provided where such a container had not been stuffed and stripped by the ILA that the ocean carrier should pay liquidated damages of $250 per container to the ILA if for any reason the container was no longer at the waterfront facility where it should have been stuffed or stripped.

Based upon the above labor agreement, South Atlantic and Caribbean Line, Inc. (SACL), an ocean common carrier then operating in and out of Miami in the Puerto Rican trade, published an embargo notice which stated that it would not book or accept certain consolidated containerloads at Miami unless certain conditions were met. One proviso was that the shipper agree to indemnify SACL in the amount of $250 per container in the event that the ILA invoked the liquidated damages provision of Clause 19. While this $250 penalty proviso later was deleted by SACL, its embargo notice stood in effect as an absolute refusal to carry "clause 19 cargo." The legal question then became whether the embargo notice imposed a true embargo, because financial loss on the carriage does not normally constitute sufficient justification for the institution of an embargo. The usual justification for an embargo is congestion or physical disability, and there was no physical disability of SACL to carry the consolidated containerloads.

SACL did not want to perform the additional terminal or transfer service of stripping and restuffing the consolidated containerloads, inasmuch as that was not something offered by SACL to the shipping public as an aid to the efficient transportation of goods. If anything, from SACL's point of view the stripping and restuffing was a penalty for handling NVOCCs' or consolidators' trailers. In this situation at Miami, SACL itself did not employ the ILA labor and was not a party to the labor agreement, but SACL's stevedore at Miami presumably was a party to the labor agreement.

Under the above circumstances, in *South Atlantic and Caribbean Line, Inc.*, 12 F.M.C. 237, at page 241 (1969), the Commission stated:

We are not here concerned with the ultimate validity of clause 19. Such a determination is beyond our jurisdiction and is within the province of the National Labor Relations Board. But whatever its validity, we cannot permit the mere execution of a collective bargaining agreement to override the clear requirements of a statute we are charged to administer. Statutes controlling the activities of common carriers and the obligations of those carriers are not subordinate to the requirements of labor contracts. *Galveston Truck Line Corp. v. Ada Motor Lines, Inc.*, 73 M.C.C. 617, at page 627 (1957).

The Commission further went on to say at pages 241 and 242:

We are not without sympathy for the position in which SACL finds itself, but it is of course not an excuse for the imposition of an unlawful embargo.

* * *

Our decision here does not reach either the validity of the collective bargaining agreement and clause 19 or the questions of what actions by SACL would be proper should the ILA insist on invoking clause 19.

* * *

Although the Commission cannot deal with the new labor contract which is the immediate source of this condition, we can deal with those persons affected by it and within our jurisdiction. In that posture we do not intend to permit disruptions of our waterborne foreign or domestic offshore commerce.

* * *

Now we would accept any appropriate tariff filing on short notice, the result of which would be to make the carrier whole in the event clause 19 is invoked and which would enable the cargo to move.

The above words of the Commission in 1969, with very slight adjustments, might well be restated and be appropriate for the present investigations. What the Commission apparently hoped for in the 1969 SACL matter, was a mutually beneficial result, which not only would not interfere with the collective bargaining labor agreement, but which also would enable the consolidated containerloads of the NVOCCs to move freely in compliance with the Shipping Acts, and which would not place any undue burden on the ocean carrier. Of course, there were some differences between the SACL matter and the present investigations. In 1969 in the SACL matter, there was a carrier's embargo of certain NVOCC or consolidated containerloads. Notice is taken that SACL canceled its tariff in 1970, and presumably went out of business in that year. At present we now are concerned with, among other matters, what amounts to an embargo of the furnishing by PRMSA of PRMSA's containers to the NVOCCs and to the consolidators.

In 1969, the Commission stated that statutes controlling the activities of ocean common carriers and the obligations of these carriers are not subordinate to the requirements of labor contracts. The same is true in 1975. In 1969, the Commission said that an ocean common carrier has a duty and obligation to accept and carry all cargo tendered to it in accordance with the terms and conditions of its published and filed tariffs, *South Atlantic and Caribbean Line, supra,* at page 239. The same is true in 1975, and that duty includes the furnishing of the ocean carrier's containers and facilities equally to similarly situated shippers. In 1969, the Commission said that although it could not deal with the new labor contract, it could deal with those persons affected by it and within the Commission's jurisdiction. The same is true in 1975. In 1969, the Commission said that it did not intend to permit disruptions of our waterborne foreign or domestic offshore commerce. Obviously, this is true in 1975.

In *Volkswagenwerk v. F.M.C.*, 390 U.S. 261 (1968), the Supreme Court found that a certain agreement among members of the Pacific Maritime Association to impose certain assessments upon member ocean common carriers, stevedores, and terminal operators and their customers was subject to the jurisdiction of the FMC under section 15 of the 1916 Act. Therein it was stated, at page 278, that we are not concerned here with the agreement creating the

Association or with the collective bargaining agreement between the Association and the ILWU (International Longshoremen's and Warehousemen's Union). CONASA in its opening brief states that in this *Volkswagenwerk* case the Supreme Court reaffirmed that there is a labor exemption from antitrust statutes for labor agreements which would otherwise be subject to such antitrust regulation. What the Supreme Court actually said was that those agreements, reflecting the national labor policy of free collective bargaining by representatives of the parties' own unfettered choice, fall in an area of concern to the National Labor Relations Board, but the Supreme Court went on to say that the assessment arrangement or agreement in issue affected only relationships among Association members and their customers. Thus, there was no labor agreement in issue in the *Volkswagenwerk* case.

More importantly, nowhere in *Volkswagenwerk v. F.M.C., supra,* is there any issue of the lawfulness of a tariff rule. Whatever significance that case has to the present investigation possibly may be found in the concurring statement of Justice Harlan. He was concerned about the exact extent of the labor exemption from statutes regulating competition. He pointed out that no collective bargaining agreement was before the Court and that it would be inappropriate to suggest the affirmative extent of the labor exemption or immunity. He went on to say, at page 287, that:

the assessment agreement before us is not immune or exempt, for it raises 'shipping' problems logically distinct from the industry's labor problems; at the same time Commission review itself must be circumscribed by the existence of labor problems that it is not equipped to resolve.

In the present proceeding, PRMSA's tariff rules on containers raise shipping problems logically distinct from the labor problems which may be raised by the ILA's Rules on Containers. Anytime two shippers seeking the same ocean transportation service are treated differently by an ocean carrier, to the extent that one shipper is unduly and unreasonably preferred and the other shipper is unduly and unreasonably prejudiced, there is a shipping problem. The FMC must exercise its jurisdiction over shipping problems.

There is no evidence in this record that any ocean carriers other than Sea-Land, GPRL, and PRMSA placed in their tariffs, rules on containers patterned after the ILA's Rules on Containers. To the extent that these carriers did so, it appears that they did as a matter of individual choice. The vice-president, traffic, of a management subsidiary of PRMSA recommended that PRMSA file its tariff rules on containers, among other reasons, so that PRMSA could recover the \$1,000 penalty (liquidated damages) per container from the shipper and to provide that PRMSA could not supply trailers (containers) to NVOCCs. As noted heretofore, the ILA's rules do not require that the ocean carrier pass on the \$1,000 penalty to the shipper. Before PRMSA took over the operations of Sea-Land, Seatrain and TTT, these three ocean carriers had pursued different courses with respect to tariff rules on containers. Sea-Land filed such rules, Seatrain did not file, and TTT filed rules but its filing was rejected by the FMC. From these facts it is concluded that there was no concerted agreement between the carriers in the Puerto Rican trade, or between the many ocean carriers operating in both the foreign and domestic trades out of New York, to publish similar tariff rules on containers. The ILA and the shipping associations insofar as their collective *bargaining agreement contained* the ILA's Rules on Containers apparently considered these to be strictly a labor matter and not a shipping matter or problem subject to the filing of a section-15 agreement.

Notwithstanding that the present case involves tariff rules and shipping problems and does not involve any section-15 agreement between two or more persons subject to the 1916 Act, some consideration may be appropriate concerning the so-called "labor exemption" from antitrust laws. *In United Stevedoring Corp. v. Boston Shipping Association,* 16 F.M.C. 7, the Commission found that a certain agreement among and between members of the Boston Shipping Association as to the allocation of labor gangs among stevedores was entitled to the labor exemption and therefore not required to be filed and approved under section 15 of the Shipping Act, 1916.

The Commission stated in *United Stevedoring Corp., supra,* at pages 11, 12, 13, 14, and 15:

> The 'labor exemption' originated in the area of accommodation of the labor laws and the antitrust laws. * * * Thus, the analogy to a 'labor exemption' from the shipping laws is obvious. We are in agreement with the view that such a labor exemption should exist. However, the problem is one of line drawing, i.e., just how far should the labor exemption extend and at what point should the shipping laws be activated.
>
> * * *
>
> The Supreme Court attempted to balance the interests of both policies so that only 'legitimate' collective bargaining objectives would be without the scope of the antitrust laws.
>
> * * *
>
> Hence, from these cases have evolved the various criteria for determining the labor exemption from the antitrust laws and which we herewith adopt for purposes of assisting us in determining the labor exemption from the shipping laws with this caveat. These criteria are by no means meant to be exclusive nor are they determinative in each and every case. Just as in the accommodation of the labor laws and the antitrust laws the courts have resolved each case on an ad hoc basis, so too will we.
>
> * * *
>
> Upon thorough review of the views presented on this issue, we conclude that no valid regulatory purpose would be served in requiring organic agreements of pure collective bargaining units to be filed and approved pursuant to section 15. However, to the extent that any organic agreements provide for purposes other than collective bargaining, no labor exemption from section 15 would apply to those portions of the organic agreements, and filing and approval of those provisions would be required.
>
> Thus the line is drawn at the point where purely labor matters cease and shipping matters begin.
>
> * * *
>
> The mere fact, therefore, that a certain agreement is part of a collective bargaining agreement does not automatically immunize that agreement from the antitrust laws.
>
> * * *
>
> In the same manner in which offensive collective bargaining agreements in general are challenged under the antitrust laws, collective bargaining agreements in the shipping industry can be challenged under the shipping laws, with due regard for the labor policy considerations discussed above.

In the present investigations, it is herein found that the tariff rules on containers of PRMSA are a shipping matter subject to shipping laws, and separate from any labor matter and the labor laws. However, if one were to conclude that PRMSA's rules on containers are partly a shipping matter and partly a labor matter, one still must conclude that the shipping part is of such importance that it is not immunized from the shipping laws.

The United States Court of Appeals for the Second Circuit, in *New York Shipping Association, Inc. v. Federal Maritime Commission,* 495 F. 2d, 1215 (2d Cir. 1974), denied the petitions to review filed by NYSA and the ILA, and found that a certain assessment agreement was subject to the filing and approval requirements of section 15 of the 1916 Act. The Court of Appeals made references to *Volkswagenwerk v. FMC, supra,* among others, and referred to Justice Harlan's concurrence wherein he warned against assuming that a maritime agreement must always fall neatly into either the Labor Board or Maritime Commission domain. The Court of Appeals stated that like the *Volkswagenwerk* case, its case also raised shipping problems logically distinct from the industry's labor problems. The Court of Appeals went on to say that in determining whether the agreement should be approved, disapproved or modified, the Commission must thus continue to weigh the Shipping Act and labor interests raised by different portions of the agreement and should move with caution in areas of greater collective bargaining concern.

In none of the cases referred to by the parties in their briefs do I find any holding that where there is a shipping problem the Federal Maritime Commission should ignore that problem. I must conclude that the FMC has jurisdiction over the shipping problem here in issue, and it must take steps to remedy that problem. Of course, the FMC should proceed cautiously in issuing its findings and order herein.

Attention is invited to Exhibit No. 88, the supplemental testimony of the President of CONASA, and to his oral testimony on May 7, 1975. His testimony should be given the most careful consideration. The recent CONASA-ILA negotiations, leading to the current 1974–1977 labor contract, commenced again with the demand of the ILA that all containers be stuffed and stripped on the piers by the ILA. CONASA's counter position at the outset of these negotiations was that all containers should be permitted to move without any restriction by the ILA. The ILA immediately rejected CONASA's proposal stating in that event a strike by the ILA would be assured. CONASA represented that the desire of the shipping industry was to permit shippers as much flexibility as possible without causing an assured strike.

Many median or compromise proposals were discussed and analyzed. For example, the New York Foreign Freight Forwarders and Brokers Association suggested that consolidators be permitted to operate, utilizing ILA deepsea labor within the waterfront terminal areas, but away from the actual pier operations of ship loading and unloading. The ILA rejected this proposal upon receiving legal advice that this proposed approach would constitute an affirmative extension of the ILA's work jurisdiction subject to attack before the NLRB. Many other proposals were discussed at great length and rejected. Finally the ILA and the shipping industry settled on the ILA's Rules on Containers which had been in effect for some time.

The wages issues and the fringe benefit issues consumed only a few hours during the continuous negotiations from June 11 to June 21, 1974. The issue which required the continuous time and efforts of the negotiators on almost a 100 percent basis was the containerization issue. In the view of CONASA's president any disturbance of the ILA's Rules on Containers would result in a resurgence of labor unrest on the entire Atlantic and Gulf Coasts to the detriment of the longshoremen, ocean carriers, stevedores and the general public as well. There is no reason to doubt the testimony of CONASA's president.

PRMSA, as seen, fears an ILA shutdown if it is required not to follow the ILA's Rules on Containers. Nevertheless, the Commission must act in the overall public interest.

The Commission must make findings with respect to the 1916 and 1933 Acts. Also, it should recognize that any order it may issue should be carefully drawn so as not to precipitate any actions which may interfere with the steady flow of ocean commerce in the Puerto Rican trade. PRMSA should be given a reasonable period of time to adjust its tariff rules on containers so that they do not violate the Shipping Acts, and also so that PRMSA may continue to operate. Undeniably such an adjustment of PRMSA's tariff rules will be most difficult, but PRMSA is closest to the problem and should not be fettered by any rigid preconceived notions as to the best solution. Within the PRMSA management are persons with many years experience in the shipping business, and of course, PRMSA should be free to consult with other experienced tariff and traffic experts. The overall aspects of the public interest necessitate that the effective date of an order requiring the cancellation of PRMSA's tariff rules on containers be deferred for three months, or such other reasonable period as may be appropriate as the circumstances may develop.

Ultimate Findings

It is found that the Federal Maritime Commission has jurisdiction over the tariff rules on containers of PRMSA in the Puerto Rican trade, and that these tariff rules are unlawful in violation of sections 14 Fourth, 16 First and 18(a) of the 1916 Act, and of section 4 of the 1933 Act.

It is ordered, subject to review by the Commission on appeal or upon its own motion, that the tariff rules on containers of PRMSA be canceled, and that PRMSA publish and file revised tariff rules on containers and other tariff provisions as may be necessary which will treat all similarly situated shippers and consignees, including consolidators and deconsolidators, fairly and equally. It is further ordered that the effective date of this order, requiring PRMSA to cancel its tariff rules on containers and to publish and file new tariff rules on containers and other tariff provisions, be deferred for a period of three months from the date of this initial decision if no exceptions are filed thereto and there is no Commission review thereof. In the event that there is review by the Commission of this decision, it is suggested that the Commission, if it adopts the findings herein, give PRMSA a reasonable time to cancel its tariff rules on containers and to publish and file new tariff rules on containers and other tariff provisions which will be lawful under the 1916 and 1933 Acts and which at the same time will enable a steady flow of ocean commerce in the Puerto Rican trade and which will be consistent with the overall aspects of the public interest.

(S) Charles E. Morgan
Administrative Law Judge

Washington, D.C.
October 9, 1975

FEDERAL MARITIME COMMISSION

DOCKET NO. 72-48

PACIFIC MARITIME ASSOCIATION—COOPERATIVE WORKING ARRANGEMENTS; POSSIBLE VIOLATIONS OF SECTIONS 15, 16 AND 17, SHIPPING ACT, 1916

NOTICE OF DETERMINATION NOT TO REVIEW

June 22, 1978

Notice is hereby given that the Commission on June 20, 1978 determined not to review the Administrative Law Judge's order of discontinuance in this proceeding served May 26, 1978.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 72–48

PACIFIC MARITIME ASSOCIATION—COOPERATIVE WORKING ARRANGEMENTS; POSSIBLE VIOLATIONS OF SECTION 15, 16 AND 17, SHIPPING ACT, 1916

ORDER DISMISSING APPLICATION AND DISCONTINUING PROCEEDING

Finalized on June 22, 1978

On March 23, 1978, one of the respondents, Pacific Maritime Association (PMA), served a document, entitled Notice of Cancellation and Withdrawal of Agreement, on its own behalf and on behalf of the other respondent, International Longshoremen's and Warehousemen's Union (ILWU). In that document, which was filed with the Commission on March 27, 1978, PMA advised "that the Nonmember Participation Agreement . . . has been cancelled and withdrawn." Concomitantly, PMA expressed the belief that "We assume an appropriate Order will enter terminating the proceeding.

I ordered that the document be treated as a motion to dismiss the application and to discontinue the proceeding and fixed the time for filing replies to the motion. In addition, I ordered that any reply address the question whether the replicant intends to prove that the Nonmember Participation Agreement was implemented without Commission approval.

Only Hearing Counsel, of all the other parties in the proceeding, replied. Among other things, Hearing Counsel stated that it had consulted with some of the parties opposing approval of the Nonmember Participation Agreement and that neither Hearing Counsel nor anyone Hearing Counsel consulted with,[1] "have any information tending to indicate that the Nonmember Participation Agreement . . . was implemented without approval by the Commission under Section 15 of the Shipping Act." Hearing Counsel did not oppose discontinuance of the proceeding.

Hearing Counsel's statement confirms representations iterated throughout the proceeding by PMA to the effect that the Nonmember Participation Agreement had not been and would not be implemented until either (a) it was determined that

[1] Hearing Counsel spoke to counsel for the Port of Seattle, the Petitioner Ports (Anacortes, Bellingham, Everett, Grays Harbor, Olympia, Port Angeles, Portland and Tacoma), CONASA (North Atlantic Shipping Association) and the New York Shipping Association, which was, but no longer is, a member of CONASA. An intervenor, Wolfsburger Transport-Gesellschaft m.b.H. (Wobtrans), received an extension of time to reply to the motion, but filed no reply. However, Wobtrans' counsel advised me, by telephone, that the motion would not be opposed.

the Commission did not have jurisdiction over the Agreement, or (b) the Commission approved the Agreement.

It is now beyond cavil that the Commission has jurisdiction over the Nonmember Participation Agreement. The Commission reached that conclusion in its decision on severed jurisdictional issues, holding that the Nonmember Participation Agreement was subject to its jurisdiction under section 15 of the Shipping Act, 1916, 46 U.S.C. 814, and holding, also, that the Agreement was not "labor exempt." *Pacific Maritime Association–Cooperative Working Arrangement; Possible Violations of Sections 15, 16 and 17, Shipping Act, 1916*, 18 F.M.C. 196 (1975).[2] Judicial review of that decision has now been completed. In *Federal Maritime Commission v. Pacific Maritime Association*, 435 U.S. 40 (March 1, 1978), the Supreme Court upheld the Commission's jurisdiction over collective bargaining agreements of the type here involved.[3]

One of the issues specified to be determined in this proceeding, see n. 2, *supra*, was whether the Nonmember Participation Agreement should be approved, disapproved or modified pursuant to section 15 of the Shipping Act, 1916. Other issues in connection with the Nonmember Participation Agreement were whether its implementation would result in violation of other sections of the Shipping Act, 1916. However, in the light of the cancellation of the Nonmember Participation Agreement and the fact that it was never implemented, it would appear that no useful regulatory purpose would be served by continuing the investigation.

In reaching the conclusion that the investigation should be discontinued, I am not unmindful of the fact that the several Orders instituting and defining the scope of the investigation also placed the 1972 amendments to the Master Collective Bargaining Agreement under investigation.[4] Hearing Counsel has noted this additional aspect of the investigation in its reply to the motion, indicating that discontinuance should not be construed as approval of the Master Collective Bargaining Agreement.

However, in a supplemental, joint filing with PMA, Hearing Counsel modified the position it had taken earlier. Hearing Counsel now believes that, under the express language of the Commission's decision on jurisdictional issues in this proceeding, the underlying Master Collective Bargaining Agreement, absent the Nonmember Participation Agreement, was not intended to come under section 15 investigation for purposes of approval, disapproval or modification. Hearing

[2] The Commission's Order implementing its decision directed that the investigation proceed to determine specified remaining issues. 18 F.M.C. at 212–213. By order of March 4, 1975, I stayed the proceeding pending judicial review.

[3] In affirming the Commission, the Supreme Court reversed an earlier reversal of the Commission by the Court of Appeals. See *Pacific Maritime Association v. Federal Maritime Commission*, 542 F. 2d 395 (D.C. Cir. 1976). By Order of April 5, 1978, the Court of Appeals recalled its judgment and opinion from the Commission.

[4] (1) Order of Investigation, served September 6, 1972; (2) First Supplemental Order Severing Jurisdictional Issues, served October 19, 1972; (3) Order of January 27, 1975, *supra*, 18 F.M.C. at 212–213. The third, and last, Order, of course, superseded the previous orders. Insofar as the Master Collective Bargaining Agreement was concerned, the Third Order sought a determination whether its implementation, in conjunction with the Nonmember Participation Agreement, would result in any practices which would subject any person, locality or description of traffic to undue or unreasonable prejudice or disadvantage in violation of section 16 of the Shipping Act, 1916, 46 U.S.C. 815, or would result in any practice which would be unjust or unreasonable in violation of section 17 of the Shipping Act, 1916, 46 U.S.C. 816. In addition, it was to be determined whether any labor policy considerations would operate to exempt the Agreements or practices resulting therefrom from any provision of sections 16 or 17.

Counsel and PMA find support for this proposition in the following discussion by the Commission, 18 F.M.C. at 209:

> Further, we disagree with Respondents that our jurisdiction over the Revised Agreement will preclude the remaining sections of the master collective bargaining agreement from being implemented. *At issue here is only the Revised Agreement which we consider severable from other provisions of the master collective bargaining agreement, i.e.,* the amount of fringe benefits to be paid the union. The obligation of PMA to pay those benefits remains unimpaired. *Consequently, the Commission's assertion of jurisdiction will have no effect upon PMA's obligations under the labor contracts.* (Emphasis added.) (18 F.M.C. at 209.)

I agree with PMA and Hearing Counsel that the Master Collective Bargaining Agreement was intended to be a subject of the instant investigation only because of the presence of the Nonmember Participation Agreement, entered into by the same parties, and the interrelationship of the two agreements. Now that the Nonmember Participation Agreement has been withdrawn, there appears to be no need for concern that the Master Collective Bargaining Agreement might be violative of sections 16 or 17. With regard to the "labor exempt" issue specified in the Third Order, it appears that the Commission has now indicated a preference to treat this matter by way of rulemaking rather than as an adjudicatory matter in this proceeding. See *Advance Notice of Proposed Rulemaking, Exemption of Certain Collective Bargaining Agreements.* 43 F.R. 17845.

Accordingly, it is ordered that the application for approval of the Nonmember Participation Agreement be dismissed and the investigation be discontinued.

(S) SEYMOUR GLANZER
Administrative Law Judge

May 26, 1978

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-41

HOUSTON GULF CRANE, INC., ET AL.

v.

PORT OF HOUSTON AUTHORITY OF HARRIS COUNTY, TEXAS

NOTICE OF DETERMINATION NOT TO REVIEW

July 12, 1978

Notice is hereby given that the Commission on July 10, 1978 determined not to review the Administrative Law Judge's order of dismissal in this proceeding served June 15, 1978.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

June 15, 1978

No. 77–41

HOUSTON GULF CRANE, INC., ET AL.

v.

PORT OF HOUSTON AUTHORITY OF HARRIS COUNTY, TEXAS

COMPLAINT DISMISSED

Finalized on July 12, 1978

This proceeding commenced with the filing of a complaint on August 9, 1977, by a corporation and individual owners of the corporation owning and renting cranes operating at the Port of Houston. Complainants alleged that respondent Port of Houston Authority of Harris County, Texas, had violated sections 16, 17, and 18 of the Shipping Act, 1916 (the Act), by engaging in practices by which respondent's cranes were given preference in the hiring of cranes by stevedores at the Port. Complainants also alleged that they had suffered financial injury as a result of these practices and asked for "monetary reparations, damages, penalties, costs, interest and reasonable attorney's fees," totalling one million dollars. Respondent filed general denials of the material allegations and more specifically denied that complainants were entitled to any monetary damages.

By letter dated June 9, 1978, Mr. Joe E. Turner, attorney at law, who had been conferring with complainants, advised that they had decided to withdraw from the case because "they do not feel that the potential recovery is great enough to justify the expense and inconvenience of litigation . . . " For the reasons explained below, this letter is being treated as a motion to withdraw or dismiss the complaint and is granted.

As indicated, complainants have decided that the cost of pursuing this litigation would not be justified by any potential recovery. In addition to the fact that certain elements of damages which complainants in this case were seeking, e.g., "penalties," "costs," "reasonable attorney's fees," do not appear to be compensable items of reparation under section 22 of the Act,[1] the two-year

[1] The entire matter of reparation awards is discretionary with the Commission and the mere showing of a violation may not be enough to justify an award of reparation under section 22 of the Act. See, e.g., *Federal Maritime Commission v. Consolo*, 383 U.S. 607, 621 (1966), and cases cited in my Initial Decision, pp. 47–49. Items of reparation should be shown to be compensable under applicable law. Such things as punitive damages, attorney's fees, and costs are not considered compensable absent statutory authority. See, e.g., *Fleishmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717–720 (1967) (attorney's fees); *Fitzgerald v. Civil Service Commission*, 407 F. Supp. 380 (D.D.C. 1975) (attorney's fees); *Ace Machinery Company v. Hapag-Lloyd*, 16 Shipping Regulation Reports (Pike & Fischer) 1258, 1261; *Id.*, 16 SRR 1531, 1534 (1976) (attorney's fees, punitive damages, lost management time).

period of limitation prescribed in section 22 of the Act would appear to have a substantial effect in reducing any potential monetary recovery in view of the fact that the complaint was filed on August 9, 1977, and complainants discontinued business at Houston on November 1, 1975.[2]

The decision of complainants that further prosecution of their complaint would be uneconomical and inconvenient should be respected. No doctrine of law of which I am aware requires a complainant to litigate against his will and economic interests. Furthermore, in view of the Commission's decision in the *Perry* case, cited below, should the complainants ever wish to resume business at the Port of Houston, they will not suffer any disadvantage because of the previous practices which the Commission found lawful and ordered terminated and which the Port has discontinued. Accordingly, the complaint is dismissed.[3]

(S) NORMAN D. KLINE
Administrative Law Judge

June 15, 1978

[2] Reparation would be awardable, if at all, only during the period August 9, 1975, through August 9, 1977, 46 U.S.C. 821. Since complainants terminated their business at Houston on November 1, 1975, there would be less than three months' time in which damages could be computed (August 9, 1975 through November 1, 1975).

[3] The present complaint is one of four similar complaints filed by crane operators at the Port of Houston, all alleging that they suffered financial injury because of alleged violations of the Shipping Act on the pert of the respondent Port. The first of these complaints was that in Docket No. 75–51, *Perry's Crane Service, Inc. v. Port of Houston Authority*, on September 28, 1976. I issued an Initial Decision finding violations of sections 16 First and 17 of the Act and ordered respondent to terminate certain preferential practices in hiring of cranes. I found insufficient proof of monetary damages and recommended that the case be remanded on the issue of reparation (damages) to give complainant a second chance to establish his measure of damages and further encouraged settlement under Commission rule 252, 46 CFR 502.252. On February 25, 1977, the Commission affirmed my findings and recommendations with certain modifications. See Partial Adoption of Initial Decision. Three similar complaints were filed subsequent to my Initial Decision seeking reparation, namely, Docket No. 76–57, *H & H Cranes, Inc. v. Port of Houston Authority*, No. 77–41 (the present case), and No. 77–42, *P & M Cranes, Inc. v. Port of Houston Authority*. Virtually no progress toward settlement or trial was made in any of there cases following the Commission decision in February, 1977, despite my rulings and instructions, apparently because of the inability of complainants' original counsel to proceed expeditiously. New counsel has, however, replaced counsel for complainants in Nos. 75–51, 76–57, and 77–42, and hopefully these cases can now move along to conclusion with minimal delay.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-45

HAWAII MEAT COMPANY, LIMITED

v.

MATSON NAVIGATION COMPANY

ORDER OF ADOPTION OF INITIAL DECISION

July 25, 1978

This proceeding comes before the Commission on exception to the Initial Decision of Administrative Law Judge Stanley M. Levy in which he determined that Matson Navigation Company's (Matson) increase in rates for the carriage of cattle feed did not subject Hawaii Meat Company, Limited (Hawaii), to any undue or unreasonable prejudice or disadvantage; that the increases were just and reasonable; and that Matson did not intend to drive out or injure a competitive carrier by decreasing and subsequently increasing its rates.

Hawaii now contends that the Initial Decision fails to indicate that Matson had the burden of proving that the changes from its prior rates were just and reasonable. The instant dispute is a complaint proceeding brought under section 22 of the Shipping Act, 1916, and not a Commission instituted investigation. Although the rate under investigation is a new rate, section 502.155 of the Commission's Rules places the burden of proof upon a section 22 Complainant. *Department of Defense v. Matson Navigation Company,* 17 S.R.R. 671, 675 (1977). Moreover, upon a careful consideration of the record, we find that the evidence fully supports the findings and conclusions as set forth in the Initial Decision without regard to which party had the burden of proof. In view of such evidence the issue of which party has the burden of proof becomes irrelevant. *Rates of Pacific Northwest Elevators Association,* 11 F.M.C. 369, 378 (1968).

Other exceptions raised by Hawaii have been carefully reviewed and found to constitute contentions already argued before the Presiding Officer and properly disposed of by him.

Accordingly, the Initial Decision issued in this proceeding is hereby adopted and made a part hereof.

It is so ordered.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 77–45

HAWAII MEAT COMPANY, LIMITED

v.

MATSON NAVIGATION COMPANY

Adopted July 25, 1978

Complaint seeking reparation for alleged violations of sections 16, 18 and 19 of the Shipping Act, 1916, dismissed.

Increases in rates for carriage of animal feed did not subject shipper to any undue or unreasonable prejudice or disadvantage.

The increase in rates for animal feed were just and reasonable.

The increase in rates for animal feed were not intended to drive out or injure a competitive carrier.

Arthur B. Reinwald for complainant, Hawaii Meat Company, Limited.
David F. Anderson and *Peter B. Wilson* for respondent, Matson Navigation Company.

INITIAL DECISION[1] OF STANLEY M. LEVY, ADMINISTRATIVE LAW JUDGE

On August 8, 1978, Hawaii Meat Company, Limited (Hawaii Meat), filed the complaint in this proceeding seeking reparations in the amount of $54,500 for 1976 and an undetermined amount for 1977. The action for reparation based upon rate increases effective April 7, 1976, is Matson tariff no. 14–D. Hawaii Meat alleges that the increase in rates for carriage for animal feed by 15% is unlawful, unjust and unreasonable, in light of the fact that the overall rate increase was 5.4% and the rates for carriage of a competing product, chilled meat, were not increased at all.

Matson filed two subsequent rate increases by supplements to tariff no. 14–E, being 3.5% effective August 2, 1976, and 2% effective July 31, 1977. To the extent these increases were based upon the 15% increase in tariff no. 14–D, Hawaii Meat seeks reparation.

The complaint was served on Matson on August 22, 1977, and on August 28, 1977, it was noticed in the *Federal Register*. On September 6, 1977, Matson served its Answer to Complaint denying all liability. Pursuant to notice of the Presiding Administrative Law Judge, served November 4, 1977, oral hearing was held January 16, 1978, in Honolulu, Hawaii. Twenty-one exhibits were admitted in evidence as well as certain portions of the record in Docket No. 75–57 incorporated by reference.

[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).

FINDINGS OF FACT

(1) In 1965, switching from grass feeding, Hawaii Meat opened its feed lot. Basically the new operation withdrew from marketing fully grown grass-fed beef; and it introduced the delivery of small yearling calves to the feed lot, to be fattened on imported grains, thus producing beef to grade U.S. Choice, in competition with what was being imported from the mainland U.S. (Ex. 1)

(2) The wholesale price for Hawaiian produced meat has been and continues to be that prevailing in the West Coast market plus the cost of transportation to Hawaii. (Ex. 1, p. 2)

(3) Most of the meat produced in Hawaii is pen fed. Approximately two tons of imported animal feed are required to raise a beef calf to butcher block weight and maturity. (Ex. 1)

(4) In 1965, when feed lot operations started, Matson delivered feed at $136 less than fully allocated cost per container. (Ex. 11)

(5) Approximately 75 percent of the animal feed consumed in Hawaii is imported; some carried by Matson, some by barge-operators. (Ex. 2; Ex. 5, p. 12)

(6) In 1976, Matson carried 22,957 tons of feed; barges 14,297 tons. (Ex. 2, p. 1)

(7) In the first ten months of 1977, Matson carried 11,915 tons; barges 16,212 tons. (Ex. 2, p. 1)

(8) In 1976, Matson carried 46 percent of Hawaii Meat's feed requirements; in the first ten months of 1977, 29.6 percent. (Ex. 2, p. 1)

(9) Some of Hawaii's ranchers operated at losses 1975-1977. The higher animal feed shipping rates since 1976 contribute to such losses. (Ex. 1, pp. 35)

(10) In October 1975, Matson filed with the Commission revisions of several of its tariffs, embodied in tariff no. 14-D, resulting in rate increases on 356 commodity items for which Matson published rates in the U. S. Pacific Coast/ Hawaii trade. The increases vary from commodity to commodity, with an overall increase of Matson's gross revenues by approximately 5.4%. Some items were increased by up to 15% and some items were not increased at all. (See, Order of Suspension and Investigation, December 3, 1975, Docket No. 75-57; Ex. 1, pp. 3, 5, 7; Ex. 5, p. 12; Ex. 7, p. 6)

(11) Most of the revisions were to become effective December 8, 1975, and the remainder on January 2, 1976. By the Order of Investigation and Suspension, filed in Docket No. 75-57 on December 3, 1975, the effective dates were suspended until April 8 and May 2, 1976. (See, Order of Suspension, etc., *Ibid.*)

(12) Matson's new tariff no. 14-D increased the rates for carrying animal feed (item 1030) by 15%. Although many reefer cargo rates were increased, tariff no. 14-D did not increase chilled meat reefer cargo (items 2015, 2075, 2077 and 2080). (Docket No. 75-57; Ex. 1, pp. 3, 5, 7; Ex. 5, p. 12)

(13) Animal feed produces the lowest minimum containerload revenue in Matson's tariff no. 14-D, even after the increase by 15 percent. (Docket No. 75-57; Ex. 1, p. 2)

(14) Matson filed a supplement to tariff no. 14-G, increasing all rates by 3.5 percent, effective August 2, 1976. Those rates became effective without suspension.

Matson filed another supplement to tariff no. 14-E, increasing all rates 2 percent, effective July 31, 1977. Those rates became effective without suspension. (Ex. 7, p. 6)

(15) As a consequence of the subsequent increases in 1976 and 1977 revenue per container from the carriage of refrigerated cargoes increased from $1,039 during the first 7 months of 1977, to $1,210 for the three-month period ending November 30, 1977. For refrigerated meat items, comparable figures were $1,078 and $1,217. (Ex. 7, p. 7)

(16) Matson reduced the rates for shipping animal feed from $516 per 20 ton container ($25.80 per ton) in March 1964, to $398 per container ($19.90 per ton). Those rates remained unaltered until March 1971. It increased the rates to $500 per container in April 1972, but again reduced the rates to $400 per container in August 1972, because of what its competitors, United States Lines and Seatrain, were charging. Its rates did not rise to above $500 per container until 1975, after its major competitor Seatrain ceased operations in the trade. (Exs. 9, 11, 19 (Req. 8), 20 (Int. 8, 9); Tr. 33, 34, 42, 43)

(17) When Matson filed the tariff changes in 1975 it was aware that the airline industry had emerged as a real competitor to Matson in the carriage of among other commodities, meat items. Matson had been unable to determine the volume of fresh meat products that were being carried by the airlines because it had no definitive source for the data but found some evidence of air carriage from shipper interviews. Because of the inherent susceptibility of meat products to the air transportation mode which combined with Matson's tonnage decline during the middle months of 1975 and the narrowing margin between ocean and air rates for meat products led Matson to conclude that increasing amounts of meat products were moving by air.

(18) In 1975, Matson's carriage under meat items was down approximately 30 percent versus similar periods in 1974. Matson's meat product rates had increased since 1967 while air rates had been reduced by approximately 60 percent during the same eight year period. A number of meat shippers indicated to Matson's Sales Department that they were shipping by air to some extent, particularly those shippers whose meat shipments originated inland. (Ex. 20, pp. 2-3 (Interrog. 3))

(19) Airline competition on reefers westbound in 1975 amounted to the equivalent of approximately 550 containers a year as against approximately 13,845 reefer containers carried by Matson. (Docket No. 75-57, Tr. 426-427)

(20) With one exception, early in 1964, animal feed has never been carried at fully allocated cost. (Tr. 45; Ex. 11)

(21) For the period 1964 through April 1976, the approximate ratio of Matson's revenues for animal feed to fully allocated costs averaged approximately 80 percent. (Tr. 43-45; Ex. 11)

(22) In April 1976, the ratio of revenues to fully allocated cost increased to approximately 87 percent. (Tr. 43-45; Ex. 11)

(23) If instead of the 15 percent increase, a 5.4 percent increase had been imposed, the ratio of revenue to fully allocated cost would have been about 80 percent—the ratio for the 1964-1976 period. (Tr. 44)

(24) The rate increases since April 1976, have increased the ratio of revenues to cost to 86 percent. (Tr. 60–61; Exs. 11, 17)

(25) From 1969 to 1976, the price of feed per 100 pounds increased in Hawaii from $4.43 to $8.95 and the ocean freight rate as a percentage of price decreased from 22.5 percent to 17.1 percent. (Ex. 7, p. 4)

(26) With one exception, early in 1964, Matson's animal feed rates have been less than fully allocated costs of shipping containers. From 1965–1975, the charges for feed containers averaged about 77.7% of fully allocated costs. (Ex. 11, Tr. 44–45)

(27) Matson calculates that for 1976, the fully allocated cost of a container of animal feed was $752 (Exs. 16, 17; Tr. 60–62). It also calculated that revenues for that period were an average of $654 per container. (Exs. 16, 17; Tr. 61) It thus claims a negative difference of about $98 per container (Ex. 16). After the 15 percent rate increase the revenue per container was about 87% of fully allocated cost.

(28) In 1972, Matson reduced its rates from $25 to $20 per ton to meet competition. (Exs. 9, 11; Tr. 30–34) Its rates in early 1973 were 62% of the $32.24 being charged in 1977. Its fully allocated cost of $516 in 1973 was 69% of the $752 in 1977. If the $20 per ton had been increased the same percentages that the costs had increased, then the rates at the beginning of 1977 would have been $28.99 per ton. (Ex. 12; Tr. 20–23) A 5.4% rate increase in April 1975 and a 3.5% increase in August 1976 from the $26.56 rate in effect at the beginning of 1975 would have produced virtually the same figure ($28.98). (Ex. 11 and calculate)

(29) Even if the rates for animal feed are 80% or less of fully allocated cost, Matson's revenue will exceed direct incremental cost by several hundred dollars. The direct costs for each container of animal feed are $150. Indirect costs are $466. Overhead and return are $137. (Tr. 60–62) Revenues of $650 per container were approximately $102 less than fully allocated costs in 1976. (Ex. 21).

(30) Matson's cost of carrying a container of feed to Hawaii in 1976 was $752.18 and its revenues were $653.55. (Ex. 16)

(31) The fully allocated costs for refrigerated containers are calculated at $964 per container plus $68 for allocation from unrecovered cost pool. (Ex. 18) Direct costs of carrying a container of chilled meat are $212 compared to $150 for animal feed. Overhead and indirect costs total $752. (Ex. 21)

(32) Matson's cost of carrying a container of chilled meat to Hawaii in 1976 was $968.21 excluding the allocation from the unrecovered cost pool and its revenues were $1,033.04. (Ex. 16)

(33) A container of feed has a value of about $3,580, a container of chilled meat about $25,000. (Tr. 4)

(34) While costs of carriage for feed is less, Matson under its tariff loses money on each container whereas chilled meat costing more to carry nevertheless generates a profit per container under Matson's tariff. (Ex. 16)

(35) For the five year period 1972–1976, Matson carried the following tons of chilled meat:

1972	23,152	
1973	33,756	
1974	44,665	
1975	43,801	
1976	46,134	(Exhibit 14)

(36) During the same period, the number of tons of animal feed carried by Matson were:

1972	40,719	
1973	56,888	
1974	90,051	
1975	107,256	
1976	107,800	
1977	95,792	(Ex. 7, p. 5; Ex. 19 (Req. 1); Ex. 20 (Int. 5))

Following the 1976 rate increases, the tonnage of feed dropped over 11%. (Ex. 7, p. 5)

(37) If Matson had merely raised the animal feed rates by 5.4%, Hawaii Meat would have paid $71,238 less for the animal feed than it did under the 15% increase, for the period April 2, 1976, through October 31, 1977.

RATE MAKING FACTORS

What constitutes a just and reasonable rate is determined by a number of interdependent factors, among which are value of service, necessity, cost of service, capacity, volume and competition.[2] In this case complainant stresses the value of the commodity as controlling. Its witnesses set forth that Hawaii meat competes with chilled beef imported from the West Coast. The wholesale price of Hawaii meat is based upon the West Coast price plus the cost of transportation. They claim that during the years 1975 through 1977 most Hawaii ranchers received less for their beef than the cost of raising and feeding. The 15% rate increase for animal feed was especially hard. Since the price for importing chilled meat was not increased, Hawaii's ranchers were not able to increase prices on account of higher transportation costs for animal feed. These costs merely added to the losses.

Respondent stresses the cost of service in contending that the increase in the rate of animal feed is not unreasonable since it still remains the lowest rated item in the tariff and even with the increase it fails to produce revenue equal to fully allocated costs.[3]

For the period 1964 through April 1976, the approximate ratio of Matson's revenues for animal feed to fully allocated costs averaged approximately 80 percent. In April 1976, the ratio of revenues to fully allocated cost increased to approximately 87 percent.[4] If instead of the 15 percent increase, a 5.4 percent increase had been imposed the ratio of revenue to fully allocated cost would have been about 80 percent—the ratio for the 1964–1976 period.[5]

[2] *Chicago Board of Trade v. United States*, 223 F. 2d 348, 351 (D.C. Cir. 1955).

[3] Docket No. 75–57, Exhibit 1, p 2.

[4] Tr. 43–45; Exhibit 11.

[5] Tr. 44.

The rate increases since April 1976 have increased the ratio of revenues to cost to 86 percent.[6]

With one exception, early in 1964, animal feed has never been carried at fully allocated cost.[7]

In 1965 the meat industry in Hawaii made the capital investment in converting primarily from range feeding to pen feeding. Matson's rate for feed in effect from May 1962 through March 1965 was $25.80 per ton.[8]

Hawaii Meat contends that in 1965 when it started feed lot operations Matson delivered feed at a loss of $136 less than fully allocated cost per container. Since it could take more than $1.63 today to equal the value of a dollar in 1965 to maintain the same economic dollar relationship today Matson receipts per container would have to be $222 less than fully allocated costs. Since Matson established a loss of only $98.63 in 1976 Hawaii Meat says it is obviously overcharging for delivery of animal feed.[9]

Whatever the accuracy of Hawaii Meat's analysis of the decline in value of the dollar there is no validity to the proposition that having taken a loss that such loss is the bench mark which thereafter controls; that failure of the carrier to maintain such loss is prejudicial to the shipper equal to the degree that the loss to the carrier is diminished, either in actual or devalued dollars.

From August 1972 until May 1973 the rate on animal feed was $20.00 per ton. In May 1973, it was increased to $22.50 per ton and the current rate is $32.24 per 2,000 pounds.

The rate prior to May 1973 thus was 62 percent of the current rate. Fully allocated costs prior to May 1973 were $516.57, 69 percent of current cost of $752.18[12] If rates had increased proportionate to the slower rate of increase in costs the current rate would be only $28.986 instead of $32.24.[13] In other words rates have gone up disproportionately higher than costs have gone up.[14]

For a period of almost ten years during the 1960's Matson took no general rate increase.[15] The relationship that existed then between different commodity rates is at the heart of the dispute here. As Matson in the early 1970's began increasing rates based on a percentage of the previous rate the dollar differential between the higher and lower rated items began to widen.[16] Matson then determined to narrow the gap to a point closer to the early dollar differentials by raising rates for lower rated items a greater percentage than for higher rated items.[17]

Hawaii Meat believes the historic percentage differential between higher and

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[6] Revenue $653; fully allocated cost $752. See Tr. 60–61, Exhibits 11, 17.

[7] Tr. 45; Exhibit 11.

[8] Exhibit 9. The $25.80 rate per ton was not exceeded until April 1975, approximately 13 years after its publication.

[9] Hawaii Meat opening brief, pp. 26–27; reply brief, p. 3.

[10] Tr. 20–21; Exhibit 9.

[11] Tr. 23, Exhibit 12.

[12] *Ibid.*

[13] *Ibid.*

[14] Tr. 24.

[15] Docket No. 75-57, Tr. 83–84.

[16] *Ibid.*, Tr. 91.

[17] Fifteen percent versus an average increase of 5.4 percent. See Docket No. 75-57, Exhibit 1, p. 2.

lower rated items ought to be retained rather than the dollar differential. Out of these opposing rate making concepts this proceeding has been born.

It is generally true that Matson's cost of carrying containers is approximately the same, regardless of the commodity carried. If increases are assessed on a percentage basis the higher rated items assume a greater burden. Since 1970 this has generally happened.[18] Lower rated items may be carried below fully allocated costs. By raising such rates at a higher percentage it is an attempt to reach fully allocated costs for such items.[19]

Hawaii Meat contends that in raising the animal feed rate in 1976 in an effort to maintain and restore the dollar difference between animal feed container rates and the rates for higher priced containers Matson did not consider the decreasing value of the dollar difference and therefore Matson did not maintain comparable economic relationships.

Hawaii Meat says that in the inflationary 1970's, maintenance of a previous nominal dollar relationship is an insufficient basis upon which a disproportionate rate increase can be found to be just and reasonable.

In 1971, with a rate of $398 per 20 ton container, Matson's fully allocated cost was $500. The difference was $102. Prior to the 1975 rate increase the difference between feed rate of $531 in revenues to an allocated cost of $697 was $166. In 1976, after tariff no. 14-D became effective, the rate per 20 ton container was $610, which was $87 less than the fully allocated cost of $697.[20]

The cost of living in 1971 is taken to be 118.9; in 1976—162.8 [based on 100 in 1969].[21] On such basis the ratio of cost of living 1971-1976 is 1.369. The difference between revenue and cost in 1975 was $166. The ratio of such difference to the difference in 1971 of $102 is 1.627; the ratio of the difference between revenues and cost in 1976 of $87 after the increase compared to the $102 difference in 1971 was .853; the difference between revenue and cost if the rate had been increased only the average 5.4 percent would have been $137; as compared to the 1971 loss of $102 this ratio is 1.343.[22]

Thus, Hawaii Meat argues that tracking the cost of living rate of 1.369 an increase in rates of 5.4 percent would have most closely kept revenues at approximately the same disparate ratio below cost as existed in 1971. To narrow the spread in 1976 by increasing the rate on animal feed by 15 percent it claims narrowed the difference to a disproportionately greater amount than the cost of living index warranted.

The weakness in Hawaii Meat's analysis is that by the same rationale it is apparent that rates in 1971 were too low compared to the cost of living index—that is, the negative spread of 1.627 between revenues and costs was greater than the cost of living index then warranted.

[18] Docket No. 75-57, Tr. 238; Exhibit 1, p. 2. For example: if one started out with an original proposition of commodity "A" at $100; and commodity "B" at $200; and then were to double the rates for all the commodities, you would have $200 and $400; whereas before there was a gap of $100; between "A" and "B," there is now a gap of $200 between "A" and "B," and that Matson decided that if such were to occur a gap of $100 was more appropriate than the $200 gap, so they would raise the one commodity more to maintain a gap, not of $200, but of $100.

[19] Docket No. 75-57, Tr. 239.

[20] Exhibit 13.

[21] Exhibit 13.

[22] *Ibid.*

A further weakness is that there is no basis for assuming that cost of living ratios are the bench mark for determining whether rates—in 1971, 1975 or now—are just and reasonable. To do so would be to perpetuate possible error—too high or too low.

Although Hawaii Meat's economic analysis focuses on holding the rate increase to a comparable increase in the cost of living yet the increase of the feed rate has not increased as much as the price of feed and the rate of carriage for feed as a percentage of the price of feed has in fact decreased over the years.[23] During the period 1969 through 1976, there was an approximate doubling of the price of feed per 100 pounds[24] in Hawaii, and during that time Matson's rate as a percentage of price decreased from 22.5 percent to 17.1 percent.[25] Thus the shipping burden as a percentage of value of the commodity declined approximately 24 percent. Even with the imposition of the 15 percent increase, Matson's rate as a percentage of price is below that which existed in 1973. The tragic economic plight of Hawaii's ranchers is attributable not to the increase in the cost of feed transportation but primarily to the increase in the cost of the feed itself.

Hawaii Meat contends that the increase in animal feed rates without a corresponding increase in chilled meat rates performs a disservice to Hawaii agriculture; it jeopardizes the highly capitalized pen feeding operations.

Hawaii Meat's witness Mr. Bennett testified that "We firmly believe that there is a service responsibility [by Matson] to bring in basic products at rates which allow [H]awaiian agriculture to compete with mainland counterparts."[26]

Assuming there is such a "responsibility" on the part of Matson, to the extent that Matson carries feed at a loss[27] it subsidizes and meets its responsibility to Hawaiian agriculture. To the extent that the Hawaii meat industry had the benefit of the low rate for those years prior to the increase, so Matson and other shippers had the detriment.

In 1972 approximately 30,000 tons of locally produced meat was marketed in Hawaii. In that year Matson carried approximately 23,000 tons of meat and 41,000 tons of feed. By 1975 Matson carried approximately 44,000 tons of meat and had increased its feed carriage to approximately 107,000 tons. Despite this increase in feed carriage locally produced meat had declined to approximately 25,000 tons.[28] The increased carriage of feed had apparently not stemmed the decline by 1975 of the Hawaiian meat industry *vis-a-vis* mainland meat. In 1976 Matson carried approximately 46,000 tons of meat which competed with approximately 30,000 tons of Hawaiian meat. The local industry was doing a bit better, approximating its 1972 production. In that year, after the increase in the rate for feed, Matson's carriage of feed declined about 11 percent.[29]

Mr. Bennett testified that "We [i.e., Hawaii Meat] are just beginning to develop barge shipments for our feed requirements. We expect that in the future

[23] Exhibit 7, pp. 3–4.

[24] 1969—$4.43; 1976—$8.95.

[25] Exhibit 7, p. 4.

[26] Exhibit 1, p. 6.

[27] $495,023.97 in 1976. Exhibit 16.

[28] Exhibit 14. In these years feed lot beef has accounted for between approximately 60 and 66 percent of local production.

[29] Tr. 37; Exhibit 14.

Matson will lose a substantial part of its feed carriage to barge operations."[30]

Mr. Nishiyama, testifying on behalf of Hawaii Meat, stated [31] that in 1976 Hawaii Meat received 22,957 tons of feed shipped by Matson, 14,297 tons hauled by barge and 12,402 tons produced in Hawaii. Thus approximately 46 percent of Hawaii Meat's feed requirements were carried by Matson in 1976.[32] In the first ten months of 1977, Matson carried 11,915 tons, 16,212 tons imported by barge and 12,036 tons purchased locally. Thus, approximately 29.6 percent of Hawaii Meat's requirements were carried by Matson in that period.[33]

Mr. Nishiyama, in corroboration of Mr. Bennett's testimony regarding the future of feed carriage by barge operations further stated that "we expect that it [i.e., the barge carrier] will be importing for our account a greater portion of our total commodities purchased."[34]

The Commission in *Reduced Rates–Atlantic Coast Ports to Puerto Rico*, 9 F.M.C. 147 (1965), recognized that some commodities must, because of the public interest, bear more than their full share of allocated costs in order that other commodities might bear less. That some high-valued commodities should share some of the costs of the movement of basic commodities and that such rate practices are necessary for the overall growth and health of certain economies is good policy. [In that case, Puerto Rico]. Thus the necessity of raising some rate to facilitate the carriage of commodities essential to the welfare of the community is unquestionably in the public interest. In this proceeding, however, there is no present danger of loss of the carriage of any basic commodity since the movement of the item involved is being facilitated by barge movements. Whatever the impact Matson may have on Hawaii Meat's cost of production it can be seen that Hawaii Meat is not primarily dependent on Matson. To equate the rate increase with economic survival is not established by dependency on Matson—or lack thereof—of the magnitude reflected by Mr. Nishiyama's testimony. The evidence is to the effect that barges are moving on ever increasing volume and percentage of the commodity. Barge movements combined with locally available feed reduce any necessity of requiring other commodities or respondent to subsidize to a greater degree the carriage for them of animal feed than is presently being provided.

If Hawaiian raised beef must meet the price competition posed by chilled beef shipped from the mainland it may not survive as an industry. The cost of animal feed shipped from the mainland may be an insurmountable barrier. But transportation charges are only a fraction of the cost of feed[35] and to the extent that transportation charges are deemed by Hawaii Meat to be an insufficient subsidy that is more than can be said of the cost of feed itself.[36] Matson should not be required single handedly to sustain the industry. If public policy requires

[30] Exhibit 1, pp. 6–7.

[31] Exhibit 2, p. 1.

[32] *Ibid.*

[33] *Ibid.*

[34] Exhibit 2, p. 1.

[35] Exhibit 7, p. 4.

[36] There is no evidence and no reason to believe that the animal feed producers have ever sold feed at less than the cost of production.

survival of Hawaiian produced beef, then public means should be explored as a possibility thereof.

Profitability of a shipper's business is not the determinent of the justness and reasonableness of a rate.

This Commission has consistently refused to permit the "profitability" of a shipper's business to determine the reasonableness of a carrier's rates. The reason given for this rule is that ocean rates are but a single factor affecting "profitability" which is also affected by a narrowing market, increased cost of production, over production, and many other considerations. *Reduced Rates on Flour from Pacific Coast Ports to Hawaii,* 10 F.M.C. 145, 152.[37]

The simple irreducible fact in this proceeding is that despite the rate increases for animal feed Matson still carries animal feed at a loss. There is no basis, therefore, for finding that a rate increase which is insufficient to recover fully allocated costs is unlawful, unjust and unreasonable as alleged. Hawaii Meat as a shipper has been subsidized by other shippers. It now contends that it has a right to be subsidized and that it is unlawful, unjust and unreasonable to reduce that subsidy. I cannot find that by any interpretation of the Shipping Act, 1916, or the Intercoastal Shipping Act, 1933, that other shippers are required to subsidize Hawaii Meat or that Matson is required to carry for Hawaii Meat at a loss.

Profits or rates of return may be found to be excessive and therefore unlawful, unjust or unreasonable. However, this concept of public utility regulation does not extend so far as to find an action by a carrier to reduce loss results in an unlawful, unjust or unreasonable act as to be in violation of sections 16, 18, and 19 of the Shipping Act, 1916.

The complainant seeks a ruling that if the value of the service is so low that at compensatory rates the industry cannot compete with mainland beef it must be allowed a lower rate. The argument would have greater validity if the survival and competition would redound to the benefit of the Hawaiian consumer. The marketing history of Hawaii Meat, as established by the testimony of Mr. Bennett, that the "wholesale price of such meat [i.e., feed lot produced in Hawaii] has been and continues to be that prevailing in the west coast market [for "block-ready beef] plus the cost of transportation to Hawaii"[38] indicates that the Hawaiian consumer will not necessarily be benefitted by any reduction in the rate for animal feed. The Hawaiian consumer pays the price prevailing on the west coast for "block-ready" beef plus cost of transportation. If rates for feed are reduced the Hawaiian consumer will still pay the same since Hawaii Meat's contention is that reduced feed rates will enable it to remain in business and thus be able to continue to market its product.

The shipper is seeking, as a matter of law, to have the Shipping Act, 1916, require that a carrier must subsidize the competitive position of the shipper. I can find no basis for finding that the Shipping Act is to be so construed.[39] If public policy is to establish tariff import protection to Hawaiian producers against United States mainland producers, and if constitutional, it must be done by

[37] *See also Eastbound Intercoastal Lumber*, 1 U.S.S.M.C. 608, 620 (1936); *Increased Rates Alaska Steamship Company*, 3 F.M.B. 632 638 (1951); *Interstate Commerce Commission v. Diffenbaugh*, 222 U.S. 42, 46 (1911).

[38] Exhibit 1, p. 2; also p. 4, "since the Hawaii wholesale price is tied to the Los Angeles price plus transportation, the ranchers are not able to increase the wholesale price to compensate for increased shipping costs; they have to swallow them."

[39] "Ocean rates are but a single factor affecting "profitability" which is also affected by . . . increased cost of production, and many other considerations." *Reduced Rates on Flour-Pacific Coast Ports to Hawaii,* 10 F.M.C. 145, 152 (1966).

legislation clearly establishing such public policy. It is not yet embodied in the Shipping Act, 1916.

The concept of just and reasonable rates does not permit on this record a finding that, in order to preclude losses to a shipper, a rate which is at a level below fully distributed costs of the carrier is prejudicial and discriminatory and unlawful.

In any event, the lowest rated commodity in a tariff, carried at a loss, cannot be and is not found to be so unjust and unreasonable a rate as to be unlawful and support a claim for reparation.

Complainant has alleged violations of sections 16, 18 and 19 of the Shipping Act, 1916.

Section 16 provides in pertinent part:

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly: First. To make or give any undue or unreasonable preference or advantage or any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 18 provides in pertinent part:

That every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charters, classifications, and tariffs.

Section 19 provides:

That whenever a common carrier by water in interstate commerce reduces its rates on the carriage of any species of freight to or from competitive points below a fair and remunerative basis with the intent of driving out or otherwise injuring a competitive carrier by water, it shall not increase such rates unless after hearing the board finds that such increase rests upon changed conditions other than the elimination of said competition.

SECTION 19

Section 19 makes it unlawful to reduce rates below a fair and remunerative basis with the intent of driving out or otherwise injuring a competitive carrier by water.

The evidence in this case establishes that in 1972, Matson reduced the filed rate for animal feed from $25.00 to $20.00 per weight ton.[40] The evidence is that in 1972, Matson and its two competitors in the trade at that time, United States Lines, Inc., and Seatrain Lines, California ("Seatrain"), had rate levels for different size containers proportionate to the cubic capacity of those containers.[41] Effective August 18, 1972, Seatrain reduced its rates. Effective September 9, 1972, Matson reduced its rates to the same rate that Seatrain had chosen.

Matson's witness, Mr. Kane, testified that the decrease was necessary in order to meet a competitor's rates. Matson did not wish to go below the Seatrain rate, but rather, Matson wanted to be on an equal competitive basis with Seatrain.[42] Mr. Kane testified that he was not aware that Matson's volume of feed carried increased substantially after the rate reduction.

Hawaii Meat presented no evidence to support its allegation of section 19 violation that the August 1972 rate reduction was intended to drive a competitor

[40] Exhibit 9.

[41] Tr. 31–33; Docket No. 75–57, Tr. 121.

[42] Tr. 32–34.

out of business. The only evidence in this proceeding relating to that reduction shows that Matson did no more than meet a competitor's rate.

The Commission in the case of *Matson Navigation Company-Van Measurements/Heavy Cargo Rules,* 7 F.M.C. 239 (1962), held that an allegation of a section 19 violation failed where the record established only that one competitor met another's rate.

In that case Matson changed its tariff rule to conform to a change previously made by its competitor. Even if this charge caused rates to be reduced below a fair and remunerative basis the Commission held that section 19 was not violated where the purpose of the reduction is to meet competition. Subsequently, the competitor ceased operation and Matson thereafter restored its original tariff rule. This is no violation of section 19.

The facts in this proceeding, insofar as they relate to alleged violations of section 19, conform to those in the *Van Measurements/Heavy Cargo Rules* case. In conformity with the Commission's ruling therein, it is found and concluded that Matson in the instant case has not violated section 19 of the Shipping Act, 1916.

SECTION 16

In this case Hawaii Meat contends Matson violated section 16 in that Matson increased the animal feed rate by 15 percent in April 1976, and did not increase the chilled meat rate.

Section 16[43] proclaims, in essence, that it shall be unlawful to give any undue preference to any traffic or to subject any traffic to undue or unreasonable prejudice or disadvantage.

To warrant the finding of undue preference and prejudice, the evidence should disclose (1) that a difference in the level of the rates exists in favor of the preferred rate, (2) that the difference in rates is not justified by transportation conditions, (3) that there is a carrier which is the common source of the rate prejudice and which participates in the prejudiced and preferred traffic, and (4) that the prejudiced parties suffer actual or potential injury.[44]

The first element in a prejudice or preference case is showing that the preferred shipper has a lower rate on a competitive commodity. In this case the complaint must fail because there is not a rate differential existing in favor of the commodity alleged to be preferred, i.e., chilled beef. Rather, the rate differential exists in favor of the commodity alleged to be prejudiced, i.e., animal feed which has the lowest minimum container load charge in respondent's tariff.

Another element to be considered is whether the difference in rates is justified by transportation conditions.

Presumptively, it can be argued that any time a tariff item is changed it gives a

[43] Section 16 provides in pertinent part:

> That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly; First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

[44] *Fresh Meats from Illinois, Indiana, Kentucky, Ohio and Missouri to Points in Florida,* 318 I.C.C. 5 (1962), and in *Classification of Corrugated Boxes,* 1970 Fed. Carr. Cases 36389 (1970).

preference or advantage to or prejudices or disadvantages every other item in the tariff not similarly changed. But any presumption that such act is unlawful remains valid only if no reasonable basis exists for the tariff change. In this proceeding the evidence establishes valid reasons for imposing different percentage increases on commodities. There is at the very least a rebuttable presumption that a rate which even after an increase continues to recover less than the carrier's cost and which produces the lowest minimum containerload revenue in the carrier's tariff does not unduly or unreasonably prejudice or disadvantage such commodity as against other commodities which produce revenues in excess of cost, subsidize less than cost carriage, and contribute to fair return.

In 1976, Matson carried 5019 containers of feed at a loss of $98.63 per container,[45] or a total loss of $495,023.97. If the feed rate had not been increased by 15 percent in April 1976, losses presumably would have been much greater. Even after the 15 percent increase, the minimum containerload charge for the carriage of feed was $85.00 below Matson's cost.

Hawaii Meat has complained of undue prejudice because Matson held down the rate on chilled beef at the same time that it increased the rate on animal feed 15 percent.

Matson contends that when it filed the tariff changes it was convinced that the airline industry had emerged as a real competitor to Matson in the carriage of among other commodities, meat items. Matson had been unable to determine the volume of fresh meat products that were being carried by the airlines because it had no reliable source for the data. Matson was aware that its meat product rates had increased since 1967 while air rates had been reduced by approximately 60 percent during the same eight year period. A number of meat shippers indicated to Matson's Sales Department that they were shipping by air to some extent, particularly those shippers whose meat shipments originated inland.[46] While Matson admits it carries substantially more westbound reefer cargo than is carried by air, approximately 13,845 containers annually versus an estimated approximately 550 equivalent containers, nevertheless, it believed it could not ignore the competition posed by air carriers for reefer cargo.[47] Supporting this view was the fact that in 1975, Matson's carriage of chilled beef declined slightly from the previous year, after having nearly doubled in three years.[48]

Subsequent to the October 1975 filing, as the air freight situation stabilized, Matson filed across-the-board increases which became effective in August 1976 and July 1977. Additionally on July 31, 1977, changes in the chilled meat items were made which require the shipper to achieve a weight of 30,000 pounds in each container to obtain the lowest possible per pound rate. For the three-month period ending November 30, 1977, Matson's revenue from the carriage of chilled meats increased from $1,078 to $1,217 per container, or 12.9 percent, while feed rates were increased by 2 percent.[49]

Costs of carrying feed are approximately $200 less than costs for carriage of

[45] Exhibit 16.

[46] Exhibit 20, pp. 2–3.

[47] Docket No. 75–57, Tr. 426–427.

[48] Exhibit 19, p. 3.

[49] Exhibit 7, pp. 6–7.

chilled meats. The issue is whether Matson is unduly prejudicing feed cargoes by raising rates 15 percent while holding down the rate for chilled meat cargoes, the alleged competitive cargo.

While costs of carriage for feed is less, Matson under its tariff loses money on each container[50] whereas chilled meat costing more to carry nevertheless generates a profit per container[51] under Matson's tariff. In essence, complainant would have Matson make up its losses by increasing rates on chilled beef to the benefit of Hawaiian ranchers and to the detriment of Hawaiian consumers. In the alternative, complainant would have Matson maintain the historical rate spread by holding down on feed; this to the detriment of Matson and to the benefit of Hawaiian ranchers. Under either approach other parties would suffer economic detriment in order that Hawaiian ranchers could benefit.

The final element in consideration of undue preference or prejudice is injury. There must be a showing of the character of the competition, i.e., of the preferred commodity, and of the effect of the rate relation of such competiton.[52] In this case the problem is magnified since the rate on the competitive product is not only higher but also it is not subsidized by other shippers. In other words, shippers of chilled beef are subsidizing the complaining competitive product.[53] This is an anomaly in considering who is being prejudiced or disadvantaged by the rate offered the competitive product. In any event, while there is testimony that some Hawaiian ranchers have suffered operating losses this is not necessarily conclusive that the injury has been created by the increase in the cost of transportation. During the period 1969 through 1976, there was an approximate doubling in the price of feed per 100 pounds in Hawaii, and during that time while Matson's rate on feed increased[54] yet its rate as a percentage of price decreased approximately 24 percent.[55] The economic problem besetting importers of feed is primarily that of the basic cost of the commodity rather than the transportation element.

In 1965, switching from grass feeding, Hawaii Meat opened its feed lot. Mr. Bennett, president of Hawaii Meat, testified[56] that basically the new operation withdrew from marketing fully grown grass-fed beef, in competition with lower priced imports; and it introduced the delivery of small yearling calves to the feed lot, to be fattened on imported grains, thus producing beef to grade U.S. Choice, in competition with what was being imported from the mainland U.S. Approximately two tons of imported animal feed are required to raise a beef calf to butcher block weight and maturity. The wholesale price for such meat has been and continues to be that prevailing in the West Coast market plus the cost of transportation to Hawaii. However, since the Hawaii wholesale price is tied to the Los Angeles price plus transportation, the ranchers are not able to increase

[50] In 1976, $98.63 per container: revenue $653.55; cost $752.18. Exhibit 16.

[51] In 1976, $68.83 per container before allocation of unrecovered costs: revenue $1,033.04; cost $968.21. Exhibit 16.

[52] *Johnson Picket Co. v. Dollar Steamship Lines, Inc.*, 1 U.S.S.B.B. 585, 587 (1936).

[53] Tr. 59–60.

[54] Exhibit 9.

[55] In 1969, the average price of feed per 100 pounds was $4.43; in 1976, $8.95 per 100 pounds. In 1969, the freight rate was $.995 per hundred pounds; 22.5% of price; in 1976, the freight rate was $1.527 per hundred pounds; 17.1% of price. Exhibit 7, pp. 3–4.

[56] Exhibit 1.

the wholesale price to compensate for increased shipping costs; they have to swallow them. Mr. Bennett also testified that because of the high cost of importing grain feed grains to Hawaii, the "freight rate differential" was necessary for survival of Hawaii's beef; other meat and egg producers. "Economic justification of the livestock industry in this State becomes very questionable with costs of importing foodstuffs rising faster than the costs of importing competitive meat products."[57]

Most important, and critical to this proceeding, he testified that "the costs of feed have been increasing to the point where in 1975 through 1977, most Hawaii ranchers received less for their beef than the cost of raising and feeding them."[58]

The importance of this economic fact is that transportation costs in 1976, even after the 15 percent rate increase, accounted for only approximately 14.6 percent of the landed cost of the feed.[59] The substantial increases in the base cost of feed plus other costs involved in raising and feeding cattle are overwhelmingly the reason that "in 1975 through 1977, most Hawaii ranchers received less for their beef than the cost of raising and feeding them" rather than the increase in transportation costs. Inflation is that insidious villain which lays us all low.

It is uncontroverted that Hawaiian agriculture faces many problems[60] and since "local production costs run appreciably higher than out of State (most often the case), freight costs offer only limited benefit for the local producer in offsetting higher production costs."[61] "Commodities in diversified agriculture have had a marked loss of market share in recent years due to adverse cost disadvantages which outweigh corresponding advantages of freshness, quality and location [i.e., shipping costs of mainland food products]."[62]

The magnitude of these problems far exceeds any which may be caused by Matson's rate increase on animal feed for Mr. Bennett testified that "Assuming that barging costs rose to the level sought by Matson, *and this appears to be the case considering the increases in the delivered costs of feed . . .*"[63] (Emphasis added.)

The economic evidence of cost of production in Hawaii as against cost of production on the mainland is sadly deficient in this proceeding. Presumably mainland producers have feed costs and, in addition, shipping costs to Hawaii. One may wonder, then, why the wholesale price in Hawaii is predicated on the mainland wholesale price plus costs of shipping rather than on the cost of Hawaiian produced beef. If Hawaiian produced beef is less expensive than mainland produced beef plus transportation costs the price should redound to the benefit of Hawaiian consumers rather than have the price pegged to the higher mainland beef costs, including transportation. If mainland beef, including feed costs, plus transportation costs can be sold at a price less than Hawaiian produced beef, including transportation feed costs, but absent other transportation cost,

[57] Exhibit 1, p. 5.

[58] *Ibid.*, p. 3.

[59] Feed per 100 pounds—$8.95; transportation per 100 pounds—$1.527; total cost—$10.48 per 100 pounds. Exhibit 7, p. 4.

[60] Exhibits 4 and 5.

[61] Exhibit 4, p. 4.

[62] *Ibid.*, p. 5.

[63] Exhibit 1, p. 4.

then the Hawaiian consumer benefits from the availability of mainland beef. If prices of both are kept artificially high by both local and mainland producers, because of the islands isolation, then the Hawaiian consumer is the innocent victim.

There has been no contention in this proceeding that there is a shortage of beef in the markets in Hawaii. The consumers' need for subsistence items is being met by mainland beef at a cost which the Hawaiian producers say is less than the cost of locally produced beef. In the absence of a showing that island food requirements are not being met or absent a showing that a rate reduction in feed would result in lower cost to the consumer it cannot be established on this record that a carrier should subsidize the island industry and be required to carry at a rate lower than a rate which despite the increase complained of is still the lowest rated item in respondent's tariff and is still less than respondent's fully allocated cost.

Based on the record herein and for all of the foregoing reasons it is found and concluded that the increase in the rate of animal feed at a time when the rate on chilled beef was not increased did not give any unlawful or undue preference to any traffic nor subject any traffic to undue or unreasonable prejudice or disadvantage in violation of section 16 First of the Shipping Act, 1916.

SECTION 18

Section 18 provides in pertinent part:

> That every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs.

In order to find a violation of section 18(a) by Matson, it must be established that the rate charged is not just and reasonable. Before Hawaii Meat may recover reparations there must be a demonstration that the feed is unjustly or unreasonably high as to be unlawful.

A lawful rate in the domestic off-shore commerce generally falls within a maximum and a minimum range of rates. The minimum may reflect bare out-of-pocket costs, whereas the maximum may reflect administrative costs, overhead and other costs, as well as a reasonable profit.

The standard for unreasonableness is set forth by the Commission in *Matson Navigation Company Pallets and Containers Pacific Coast/Hawaii Trade*, 7 F.M.C. 771, 772 (1964), in which the Commission said that it can only disapprove a rate if it finds that the rate exceeds a just and reasonable figure. In *Thatcher Glass Manufacturing Co. v. Sea-Land Service, Inc.*, 8 F.M.C. 645, 647 (1965), the Commission held that when the rate is insufficient to cover the cost of transportation it cannot be demonstrated that the rate is unjustly or unreasonably too high.

The movement through Matson's system of a container of feed does not differ from the movement of another commodity moving in the same service in another dry container.[64] Feed produces the lowest minimum containerload charge in Matson's tariff and did not at the pre-increase level even come close to recovering Matson's fully allocated costs. Even after the 15 percent increase,

[64] Exhibit 6, p. 2.

feed is still the lowest minimum containerload charge in Matson's tariff.[65]

Margaret S. Fletcher, a Matson Financial Analyst, testified that in 1976, it cost Matson $752.18 to move a container of feed for which it earned revenues of $653.55.[66] Although the data was not available for a comparable study for 1977, Mrs. Fletcher said that there would be no major difference in the cost of moving containers between 1976 and 1977.[67] She also testified that in 1976 Matson's per container revenues were $1,033.04 from the carriage of chilled meats as opposed to $653.55 from the carriage of feed.[68]

Hawaii Meat suggests that when in 1972 Matson reduced its rate on animal feed from $25 to $20 its revenue was $400 per container and 72 percent of allocated cost; that not even Matson has argued that such 72 percent of allocated cost was not a just and reasonable rate. Therefore Hawaii Meat argues that "If that was a just and reasonable rate, the question remains whether the dramatic, disproportionate increase in 1976 to 88% of fully allocated cost was just and reasonable."[69]

The evidence in this case is that the rate reduction was made to meet a competitor rate.[70] The reduced rate exceeded incremental costs—the irreducible minimum. As such it was not an illegal rate. *Reduced Rates on Flour-Pacific Coast Ports to Hawaii,* 10 F.M.C. 145, 149 (1966).

Even with the 15 percent increase of animal feed Matson suffered a loss of $98.63 per container in 1976 for every container of animal feed carried. Such loss is incompatible with a finding that the rate is unreasonably high.

Hawaii Meat argues that despite the loss of $98.63 per container in 1976, the rate increases in August 1976 and July 1977 should provide "virtually equal revenues with fully allocated costs."[71]

The record does not contain any evidence of 1977 revenues, costs or tons per container which Hawaii Meat extrapolates for 1977. The assumptions of tonnage per container at 20 tons per container[72] in 1976 and 23 tons in 1977[73] are inapposite. If 23 tons in 1977 would reduce loss so as to result in "virtually equal revenues" then in 1976 23 tons would be carried and 23 tons resulted in $98.63 loss. Twenty-three tons in 1977 even at the higher rates would not make up $98.63 difference. In any event, even accepting Hawaii's assumption that losses are now negligible, it is an ancient saying that loss per item is not made up by volume. Raising to near cost cannot be equated to an unjust and unreasonable rate which is prejudicial and discriminatory as against a higher rate for a competitive product, particularly when the higher rate on the competitive product returns a profit above fully allocated rates.

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[65] Docket No. 75-57, Exhibit 1, p. 2.

[66] Exhibit 16.

[67] Exhibit 15, p. 4.

[68] Exhibit 16.

[69] Hawaii Meat reply brief, p. 10.

[70] Docket No. 75-57, Tr. 121-122.

[71] Hawaii Meat reply brief, p. 6; see also opening brief, pp. 20-21.

[72] Hawaii Meat opening brief, p. 20.

[73] Hawaii Meat opening brief, pp. 20-21.

Inasmuch as the feed rate paid is the lowest in Matson's tariff no. 14–E and revenues earned by Matson from the carriage of feed are less than costs of that carriage it cannot be found on this record that the feed rate is unlawful as being unjustly or unreasonably high in violation of section 18 of the Shipping Act, 1916.

CONCLUSIONS

On the basis of all of the aforementioned findings of fact and for all of the reasons hereinbefore set forth it is determined and concluded that the increases in rates for the carriage of animal feed did not subject complainant to any undue or unreasonable prejudice or disadvantage; the increase in rates for animal feed were just and reasonable; and the increase in rates for animal feed were not intended to drive out or injure a competitive carrier.

Ordered:

Complaint seeking reparation for alleged violations of sections 16, 18 and 19 of the Shipping Act, 1916, dismissed.

(S) STANLEY M. LEVY
Administrative Law Judge

WASHINGTON, D.C.
May 10, 1978

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-83

COM-CO PAPER STOCK CORPORATION

v.

PACIFIC COAST-AUSTRALASIAN TARIFF BUREAU, ET AL.

NOTICE OF DETERMINATION NOT TO REVIEW

July 27, 1978

Notice is hereby given that the Commission on July 27, 1978, determined not to review the order of dismissal of the Administrative Law Judge in this proceeding served June 29, 1978.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

June 29, 1978

No. 71–83

Com-Co Paper Stock Corporation

v.

Pacific Coast-Australasian Tariff Bureau, et al.

APPROVAL OF SETTLEMENT: JOINT MOTION FOR DISMISSAL WITH PREJUDICE GRANTED

Finalized July 27, 1978

By joint motion, the complainant, Consolidated Fibres, Inc.,[1] and the respondents, Pacific Coast-Australasian Tariff Bureau and its member lines,[2] seek dismissal of the complaint, with prejudice, upon approval of a negotiated compromise settlement. The terms of settlement appear in the Compromise Settlement and Mutual Release, annexed hereto. Hearing Counsel, an intervenor, supports the joint motion.

In my judgment, the settlement agreement, with one modification, should be approved and motion should be granted.

Background

Prior to instituting this proceeding in October 1971, the complainant, herein, had initiated a similar complaint proceeding against the respondent, herein, in May, 1967. The first proceeding was assigned Docket No. 67–31. Essentially, the complaint in No. 67–31 alleged that the complainant, a wastepaper exporter, was injured because the conference's rate structure unjustly and unlawfully discriminated against wastepaper by virtue of more favorable rates on woodpulp, a commodity with which wastepaper competes in the marketplace. When the respondents agreed to amend their 1967 tariff in a manner deemed satisfactory to complainant, the complainant moved to dismiss the proceeding. Acting on that motion, the Commission discontinued No. 67–31 in September, 1967.

Although the basic tariff rates for wastepaper and woodpulp remained in parity from 1967 to 1971, presumably in accordance with the 1967 settlement agreement, another tariff provision, called a "penalty provision," was added to

[1] After the complaint was filed, Com-Co Paper Stock Corporation changed its corporate name to Consolidated Fibres, Inc.

[2] Pacific Coast-Australasian Tariff Bureau is a conference of common carriers by water with authority to establish ocean freight rates pursuant to approved Agreement No. 50, as amended.

the tariff. In the instant proceeding it is alleged that the penalty provision applied solely against wastepaper, thereby bringing about the same type of discrimination in favor of woodpulp vis-a-vis wastepaper which existed before the 1967 settlement. As amended and supplemented, the complaint alleges injury, by way of loss of sales, in a sum substantially in excess of $150,000, because respondents' rates and charges on wastepaper are unlawful and in violation of sections 14, 15, 16 First, 17 and 18(b)(5) of the Shipping Act, 1916, 46 U.S.C. 812, 814, 815, 816 and 817(b)(5).

From the time that issue was joined this proceeding was vigorously contested by the parties. Among other things, both parties engaged in profuse prehearing discovery and inspection activity, and lengthy, complex motions for summary judgment and for consolidation[3] with Docket No. 72–35, *Pacific Westbound Conference–Wastepaper and Woodpulp from United States West Coast to Far East,* were filed. No. 72–35 is a related matter, and, as its title indicates, involves a similar wastepaper-woodpulp rate controversy in a different trade.

The Commission investigation in No. 72–35 concerned hundreds of thousands more tons of wastepaper movements, annually, than the movements in this proceeding and it went to evidentiary hearing before this proceeding was ripe for oral hearing. Consolidated Fibres, Inc., was an intervenor in No. 72–35, as was the trade association to which it belonged.[4] Because of the more advanced status of No. 72–35, the complainant moved to hold these proceedings in abeyance pending the initial decision in No. 72–35. The motion was granted on July 9, 1974. After service of the initial decision in No. 72–35 on August 15, 1977, this proceeding was reactivated and was set for oral hearing on April 18, 1978. The scheduled oral hearing was canceled when the parties advised that they had reached a settlement and would file an appropriate motion for approval of the terms of their agreement.

DISCUSSION

The key features of the bargain struck are: (1) respondents promise to take and maintain certain tariff actions, whereby, at least through December 31, 1979, parity of wastepaper and woodpulp will be guaranteed; (2) in return, complainant commits to refrain from initiating any new proceeding for alleged discrimination through 1979, and thereafter as well, if the conference's promise is kept by maintaining in the tariff the parity principles enunciated in the agreement; (3) in addition, without admitting any violation of the Shipping Act, 1916, the respondents agree to pay Consolidated Fibres, Inc., the sum of $20,000 as a compromise settlement of the alleged damage.

The substantive difference between the instant settlement agreement and the one which resulted in the discontinuance of No. 67–31 is the $20,000 compromise of damage provision. It is an important difference because the agreement expressly negates any admission of violation of law and, if the compromise

[3] The motion for summary judgment was denied by Judge Charles E. Morgan who then presided over this proceeding. Former Chief Judge Clarence W. Robinson denied the motion for consolidation.

[4] National Association of Recycling Industries, Inc., and its member, Consolidated Fibres, Inc., were among the chief litigants in Docket No. 72–35. See, *Pacific Westbound Conference–Wastepaper and Woodpulp from United States West Coast to Far East.* Initial Decision, served August 15, 1977 (pending on exceptions), at pp. 3, 5.

provision is approved, there will be no finding of violation of law by the Commission. The issue thus raised is whether the Commission may authorize settlement of a proceeding on the basis of a compromised reparation payment, absent an admission or finding of violation of law. The parties to the proceeding, complainant, respondents and Hearing Counsel, submit that in the circumstances of this proceeding these factors present no obstacle to approval of the terms of settlement. I agree.

There are two aspects to the stated issue. First, it must be determined whether the Commission considers itself empowered to approve the kind of settlement proposed. Second, if the power exists, it must be ascertained whether the terms of settlement are meritorious.

In regard to the first part of the issue, it is recognized that the Commission has adopted the principle that before it will approve settlement agreements in reparation cases in which the payment of money is one of the terms or conditions, there must be a showing of a violation of law. However, this principle has been limited to cases arising under section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817(b)(3), which "directs common carriers to collect the rates and charges specified in their tariffs and forbids rebates, remissions or refunds of lawful charges." *Consolidated International Corp. v. Concordia Line,* 18 F.M.C. 180, 183 (1975). In that case the statement of limitation was made in the following way, 18 F.M.C. at 183:

> It follows that an agreement to settle a proceeding, brought under Section 22 of the Shipping Act, alleging a violation of Section 18(b)(3), can be approved only upon an affirmative finding that such violation occurred.

On the other hand, in proceedings seeking reparation for alleged unjust discrimination in violation of section 17 of the Shipping Act, the Commission has excercised its power to authorize money settlements without admission or finding of violation. See *All Chilean Fruit Corp. v. Grace Line, Inc.*, Docket No. 66–64, and *Arthur Schwartz v. Grace Line, Inc.*, Docket No. 66–69 (the *All Chilean* cases). The order approving the settlement in the *All Chilean* cases was issued by an Examiner and did not require subsequent Commission action.[5] The Commission has since ratified the settlement in that case. See *Levatino & Sons v. Prudential-Grace Lines, Inc.*, 18 F.M.C. 82, 85, 100–103, 112–114 (1974).[6] In the light of this precedent establishing that the Commission is empowered to authorize money settlements in reparation proceedings alleging discrimination absent a determination of violation, it is now appropriate to inquire whether the settlement is meritorious.

The movants assert that the amount agreed to is based upon a reasonable

[5] Rule 227(c) of the Commission's Rules of Practice, 46 CFR 502.227(c) was not in effect at the time of the issuance of the order in the *All Chilean* cases. Rule 227 (c) provides the procedure for review of orders of dismissal issued by an Administrative Law Judge.

[6] It does not seem necessary in this order to write an exhaustive treatise explaining why the Commission views its authority to approve settlements differently in section 18(b)(3) cases than in section 17 cases. It is sufficient to recognize that the dominant issues in section 18(b)(3) cases are different from those in section 17 cases. In the former the lawfulness of the tariff rate is conceded and the question is whether, under the rule of rigid observance of the tariff, the proper tariff rate has been applied. In the latter, the question is whether the tariff rate that has been applied is lawful. Moreover, in section 18(b)(3) cases, determination of a violation fixes the reparation for the injury and permits no room for compromise of the amount of damage. In section 17 cases the measure of damages where a violation has been found is governed by "remoter considerations." See, generally, *Southern Pacific Company v. Darnell-Taenzer Lumber Company*, 245 U.S. 531 (1918); *Pennsylvania Railroad Company v. International Coal Mining Company*, 230 U.S. 184 (1913); *Davis v. Portland Seed Co.*, 264 U.S. 403 (1924).

estimate of the cost of litigating the proceeding and an evaluation of the potential reparation. Insofar as the cost of litigation is concerned, it is reasonable to speculate that it would take about the same length of time to litigate this case as it took for Docket No. 72-35. Given the 18 days of trial, nearly 3,000 transcript pages, 110 exhibits, the lengthy briefs and exceptions in No. 72-35, the parties' estimate of expense seems to be on the conservative side. With regard to liability and reparation, respondents state that they continue to believe they would prevail on the merits but they must be cognizant of the possibility of an adverse determination against the conference similar to a recent determination made "against another conference, in a somewhat parallel case."[7] The movants also submit that no undue prejudice or preference or unjust discrimination can arise by payment of the $20,000 inasmuch as there is no other wastepaper shipper operating in the trade served by the respondents.

I am satisfied that the terms and conditions of the settlement agreement are the result of arms length negotiations between the complainant and respondents; that the agreement to maintain parity between wastepaper and woodpulp rates will not result in violation of the Shipping Act; that the agreement of the complainant to take and the respondents to give $20,000 by way of compromise is based upon realistic estimates of expense of litigation and likelihood of success; that the amount of compromise is subordinate to the complainant's real objective of obtaining present and future rate parity between wastepaper and woodpulp; that the determination to settle reflects sound managerial judgments on both sides; that the compromise amount will not result in rebates or other violations of the Shipping Act; and that the settlement agreement as a whole warrants approval as an appropriate compromise of differences in the special circumstances of this case. "The law, of course, encourages settlement and every presumption is indulged in which favors their fairness, correctness and validity generally." *Merck Sharp & Dohme v. Atlantic Lines,* 17 F.M.C. 244, 247 (1973).

In only one respect will I require modification of the settlement terms. Paragraph No. 9 of the Compromise Settlement and Mutual Release should be changed to read "To the extent not governed by the Shipping Act, 1916, this Mutual Release shall be governed by the law of the State of California."[8]

Therefore, it is ordered that the terms and conditions of the attached Compromise Settlement and Mutual Release, as modified, are approved.

It is further ordered that the complaint be dismissed, with prejudice, and the proceeding be discontinued.

(S) SEYMOUR GLANZER
Administrative Law Judge

June 29, 1978

[7] Respondents refer to the initial decision in Docket No. 72-35.

[8] By telephone, I was informed by counsel for the respondents that this modification is acceptable.

APPENDIX

COMPROMISE SETTLEMENT AND MUTUAL RELEASE

IT IS HEREBY AGREED, by and between the undersigned, CONSOLIDATED FIBRES, INC. (hereinafter "Consolidated"), complainant in F.M.C. Docket No. 71-83, and the PACIFIC COAST AUSTRALASIAN TARIFF BUREAU and its member lines (hereinafter "the Conference"), respondents in the same Docket, that the said Docket shall be terminated by mutual agreement, on the following terms, conditions and commitments:

1. Rates on wastepaper in minimum quantities of 150 long tons from one shipper and one port of loading to any one or all of the ports of Sydney, Melbourne, Adelaide and/or Brisbane, Australia, on one vessel, shall be "open" at least through September 30, 1978.

2. Rates after "closing" of open-rate status, pursuant to paragraph 1, and/or before that for quantities less than the minimum tonnage specifications contained in paragraph 1:

(a) To be tariff rates (i.e., "off-contract").

(b) Wastepaper and virgin wood pulp to be in parity as to both base rates and incremental "step" increases for increased cubic measure; minimum quantity discounts and reductions applicable to such rate structure also to be parity, to be guaranteed through December 31, 1979.

(c) In the case of rates for 40-foot containers, wastepaper will be maintained (at the least) in parity with wood pulp consistent with maximum load limits permitted by highway or other regulations, also guaranteed through December 31, 1979.

3. The foregoing terms and conditions apply on rates to Australia only.

4. The respondents, in the aggregate, shall pay a total sum in compromise settlement of Consolidated's allegations of damage (but expressly without admission of liability therefor) of $20,000.

5. Consolidated and/or any successor in interest shall be barred from initiating any new claim against the Conference, for alleged discrimination against wastepaper vis-a-vis virgin wood pulp, at any time prior to January 1, 1980, or thereafter, so long as the parity principles outlined in paragraphs 1 through 3, above, are maintained.

6. Both parties hereto expressly waive the benefit of § 1542 of the Civil Code of the State of California, which provides:

> "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor, at the time of executing the release, which, if known by him, must have materially affected his settlement with the debtor;"

and agree as a further consideration and inducement for this Mutual Release that it shall apply to all unknown and unanticipated losses or damages, and all losses or damages which may arise in the future, arising out of actions or inactions up until the date of this Mutual Release, which may hereafter be claimed by either party, as well as to those presently known by either party.

7. It is understood and agreed that this Mutual Release is in full accord and

satisfaction of doubtful and disputed claims, and that the execution of this release is not an admission of liability by any party hereto.

8. It is further understood and agreed that Consolidated's release of the Conference and its member lines hereunder extends not only to present member lines but also to former member lines within the scope and time-frame of the Complaint in Docket No. 71-83.

9. This Mutual Release shall be governed by the law of the State of California.

10. This Mutual Release constitutes the entire agreement between the parties and is executed by the parties with and upon the advice of independent counsel.

IN WITNESS WHEREOF, the undersigned have executed these presents this 17th day of April, 1978.

CONSOLIDATED FIBRES INC.

By

PACIFIC COAST AUSTRALASIAN TARIFF BUREAU

By

A.H. Eber, Secretary

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

SUBCHAPTER B—REGULATIONS AFFECTING MARITIME CARRIERS AND REGULATED ACTIVITIES

DOCKET NO. 78-9; GENERAL ORDER NO. 40

Part 542—Financial Responsibility for Water Pollution

August 4, 1978

ACTION: Adoption of Final Rules

SUMMARY: Part 542 of the Commission's Rules has been revised to conform to the requirements of the 1977 Clean Water Act amendments to the Federal Water Pollution Control Act (33 U.S.C. 1321). Part 542 establishes procedures whereby vessel operators may demonstrate the financial ability to meet their liability to the United States for the costs of removing oil and other polluting substances discharged into any waters over which the United States has jurisdiction.

Financial responsibility requirements are now $125 per gross ton or $125,000 (whichever is greater) for "inland oil barges;" $150 per gross ton for "vessels not carrying oil or hazardous substances as cargo;" and $150 per gross ton or $250,000 (whichever is greater) for "vessels which do carry oil or hazardous substances as cargo."

Applications for Certificates of Financial Responsibility (Water Pollution) must be made to the Commission on Form FMC-321 and accompanied by application and certification fees, as applicable. Certificates are issued for a term of three years. Unless a current Certificate is carried aboard a vessel, the vessel may be denied use of the navigable waters of the United States or of any port or place located thereon.

EFFECTIVE DATE: August 11, 1978

SUPPLEMENTARY INFORMATION:

On April 20, 1978, (43 *Fed. Reg.* 16772), the Commission proposed the issuance of regulations to implement the Clean Water Act of 1977.[1] The proposal would replace both the Commission's current provisions for oil pollution responsibility (General Order 27, 46 C.F.R. Part 542) and the adopted, but not implemented, provisions for oil *and* hazardous substance pollution responsibility (General Order 31, 46 C.F.R. Part 542)[2] with an updated and revised Part

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[1] P.L. 95-217, 91 Stat. 1566. The Clean Water Act (CWA) amends the Federal Water Pollution Control Act (FWPCA), 33 U.S.C 1321. The latter statute, as amended through 1977, is hereinafter referred to as the "Act".

542. Relatively brief comments were received from 23 persons, who took issue with some 25 aspects of the proposed regulations.[3]

The majority of the objections related to procedural or administrative matters such as the length of the certification period or the requirement of keeping original documents on board unmanned vessels.[4] Need for greater coordination between FMC and Coast Guard certification programs was the most frequently expressed comment. Time restraints preclude the consideration of any specific "joint certification" program in this instance, but it also appears that basic differences in the two agencies' regulatory functions make such joint certification impractical, if not actually impossible.

The various objections raised and the revisions made in the proposed regulations are discussed below. In some instances, related matters are combined as a single discussion item.

(1) The proposed regulations require persons engaged in "building, repairing, scrapping or selling vessels" to obtain Certificates on the basis that they are vessel "operators" during the time they control a vessel's activities in their yards. Several shipbuilding concerns oppose this requirement as duplicative, unduly expensive and beyond the purpose of the Act without recognizing that the requirement has been in effect for shipyards since 1971.[5] Only the addition of the clarifying word "repairers" is new, yet Todd Shipyards complains of the potentially high insurance expense for repairers which might temporarily be handling a large number of very large vessels.

The proposed regulations pertaining to the certification of "builders, repairers, scrappers, or sellers" will be adopted. Shipyards which are in fact responsible for the operation of vessels under their control are liable for pollution damage under the Act, and each of the shipyards complaining of an "unwarranted extension" of the Commission's requirements hold existing FMC Certificates. Moreover, the proposed regulations would not require duplicate certification of a given vessel or place an unreasonable financial burden on repairers. First of all, shipyards are permitted to obtain a Master Certificate based upon the largest vessel the yard will handle. Secondly, the shipyard and the "nonshipyard"

[2] General Order 31 was adopted in October, 1973 in anticipation of the Environmental Protection Agency's promulgation of regulations identifying the "hazardous substances" encompassed by the Act. General Order 31 was not to take effect until the EPA regulations were effective. The EPA published its rules on March 13, 1978 (43 *Fed. Reg.* 10474) to take effect with respect to vessels on September 11, 1978. On June 8, 1978, however, the United States District Court for the Western District of Louisiana, issued a preliminary injunction against certain of the EPA regulations. *Manufacturing Chemists Association v. Douglas M. Costle*, Civil Action No. 78-0578. Hearings on a permanent injunction were conducted on July 24, 1978. The Commission will issue such further Order concerning the hazardous substances provisions of Part 542 as may be appropriate following release of the Court's decision.

[3] Those submitting comments were: American Commercial Barge Line Company; Union Carbide Corporation; Chevron Shipping Company; Norfolk Shipbuilding & Drydock Corp; American Waterways Operators, Inc.; Exxon Company, U.S.A.; Todd Shipyards Corporation; Dow Chemical U.S.A.; International Committee of Passenger Lines (ICPL); Water Quality Insurance Syndicate (WQIS); International Group of Shipowners' Protection and Indemnity Association (International Group); Jacksonville Shipyards, Inc.; Stauffer Chemical Company; Council of American-Flag Ship Operators (CASO); Zapata Corporation; Bethlehem Steel Corporation; Ingram Materials, Inc.; Chotin Transportation, Inc.; Old Man River Towing, Incorporated; Mr. Donald McGulgan of Omaha, Nebraska, and Bath Iron Works Corporation. Mr. McGulgan limited his remarks to endorsing the general purpose of the Clean Water Act and the proposed regulations. Bath Iron Works stated only that the existing regulations are adequate and the proposed rules unnecessary. The late filed comments of Ingram Corporation and the United States Coast Guard (Coast Guard) were also considered by the Commission.

[4] The International Group also voiced a preference for the uniformity which could be obtained if the United States were to abandon its separate oil spill program and adhere to the International Convention on Civil Liability for Oil Pollution Damage—a matter entirely beyond the scope of the instant proceeding.

[5] See existing section 542.6(d), 36 *Fed. Reg.* 5704 which refers to "builders, scrappers, and sellers."

vessel operator are free to contract for the responsibility of maintaining a Certificate while the vessel is in the yard. The proposed regulations are not intended to require a nonshipyard operator to return its Certificate to the Commission when a vessel is temporarily turned over to a shipyard.[6] To clarify this intention, section 542.9 will be modified by adding a new paragraph (f) referring to temporary custodial arrangements.

(2) Proposed Forms FMC-322 through 326 state that the liability coverage provided by the underwriter:

shall not be reduced or modified by any agreements or warranties made between an [operator] and the [underwriter] that any such vessel is or is not an "inland oil barge", will or will not carry oil or certain hazardous substances, or will or will not operate in certain waters.

WQIS argues that this language improperly attempts to eliminate defenses available to the insurer under section 311(p)(3) of the Act. The International Group states only that this provision should not be construed to prejudice any other "defenses to which the association or member concerned, or either or them, might have under the Act or the certificate of insurance."

The CWA establishes different levels of liability for vessel owners and operators based upon whether the vessel in question is an "inland oil barge," a "vessel carrying oil or hazardous substances as cargo," or, a "vessel not carrying oil or hazardous substances as cargo." However, the liability category applicable to a given vessel can only be determined *at the time pollutants are discharged.*[7] For this reason, the financial responsibility coverage required by Forms FMC-322 through 326 is based on *vessel status at the time of the incident.* The language disputed by WQIS was added to the various FMC Forms to assure that the vessel's *actual status* would govern the underwriter's payment by preventing the underwriter from contractually conditioning coverage upon prior representations by the vessel operator as to a vessel's status. This was necessary to close the potential loophole created by section 311(p) of the Act which allows an underwriter to raise "defenses which would have been available to it if an action had been brought against it by the vessel operator."

By inserting the "actual status" clause in the FMC Forms, the Commission is acting within its statutory authority to prescribe the "evidence of financial responsibility" which meets the standards of the Act. The "actual status" clause does not preclude the underwriter from raising defenses traditionally reserved to it by law. It merely precludes vessel certification in situations where financial responsibility coverage may be denied in whole or in part because of changes in the vessel's liability status. Because the proposed language was perceived by WQIS as an attempt to prohibit insurance companies from exercising "warranty" defenses of a type not contractually created by the Insurer and not plainly inconsistent with the purpose of the CWA amendments, modifications have been made in the final version of the Forms to more plainly reflect the limited purpose of the "actual status" clause.

[6] The proposed rules were silent on this point, but *existing* section 542.6(c) expressly dealt with such situations.

[7] Before liability limits can be established, one must know whether a vessel is actually carrying oil or hazardous substances as cargo, or whether an oil tank barge, certificated by the Coast Guard to operate only in "the inland waters of the United States," is actually operating in such waters.

(3) Section 542.2(k). Only four parties mentioned the problem presented by the CWA's new definition of "inland oil barge" despite the Commission's express request for comments on this subject. The Act requires that such barges be "certificated to operate only in the inland waters of the United States." No such route certification program is presently in effect, but the Coast Guard stated that it will "in the future," issue inland waters inspection certificates to persons specially requesting them. The only suggestion concerning the proper response of the Commission during the interim period was Chotin Transportation's unclear request that "the regulation" not become effective until Coast Guard certification is available.

The "inland oil barge" definition creates an exception from the Act's $150 per gross ton liability ceiling. If the definition were omitted, operators of such barges would have to demonstrate the higher level of financial responsibility required of other vessels. The Commission has determined to construe the "inland oil barge" exception narrowly in the interest of providing maximum protection by requiring Coast Guard certification in all instances where the lower "inland oil barge" liability is claimed.

Modifications have been made in the final rule to reflect this strict construction, and also to reflect the conclusion expressed in the April 20th Notice of Proposed Rulemaking that barges otherwise qualifying as "inland oil barges" should be deemed as such regardless of whether they are actually carrying oil as cargo at the time they cause a spill. Congress does not appear to have intended that empty oil barges be subject to greater liability limits than are loaded oil barges.

Finally, WQIS observed that the use of the words "which is" in the proposed definition of "inland oil barge" tended to defeat the intended meaning that empty inland barges be assessed no greater liability than loaded inland barges. These words have been deleted from the final rule.

(4) WQIS objects to the definition of "cargo" in proposed section 542.2(d) as overly broad and desires that it be limited in one or both of the following respects: 1) that oil be transported under a bill of lading, charter party, or other freight agreement; and 2) that some minimum quantity of oil be prescribed before "cargo" status is reached. The International Group believes that the Act was intended to refer only to cargo carried in bulk. Neither commentator cites authority for its limited interpretation of the Act, an interpretation particularly inappropriate in the case of hazardous substances which may vary widely in toxicity and transportation characteristics. The policy most consistent with the general purpose of the Act is to define cargo broadly. It is not anomalous within the purpose of the Act that a vessel carrying a single drum of oil or hazardous substance *as cargo* be subject to greater liability than a vessel carrying no oil or hazardous substance as cargo. Editorial changes have been made in the final rule for the sake of clarity, but the basic scope of section 542.2(d) has not been altered. "Cargo" is not dependent upon the nature of the shipping documents. In fact, shipping documents may be absent altogether in some circumstances.[8] Oil

[8] The reference to such documents in the final rule is not meant to exclude materials carried pursuant to oral understandings or other less formal arrangements.

carried only as *operating fuel* for an equipment carrying barge *(e.g.,* a crane barge) would not fall within the definition finally adopted herein when carried on board the equipment barge in question in quantities ordinarily required to power onboard equipment.

(5) Objections were raised to the various provisions which preclude vessel owners (who are not also vessel operators) from applying for Certificates. Dow Chemical claimed this restriction unnecessarily impinges upon the freedom of vessel owners and operators to contract for the responsibility of obtaining FMC certification and was inconsistent with proposed sections 542.9(a) and 542.13(e) which require that both owners and operators be identified on FMC certificates. Ingram Materials, Inc., states that the common business practice of "spot" or "trip" chartering inland barges on short notice would be unduly hampered if owners could not apply for certificates because a new operator would be unable to complete a new FMC application as quickly as an owner could amend an existing application.

Once again, the proposed regulation reflects existing Commission policy and practice and does not impose new requirements or limitations. Present Part 542 does not permit applications by owners which are not responsible for vessel operations. *See*, 35 *Fed. Reg.* 5216 (1970). The name of a registered owner has been and continues to be required on application forms (Forms FMC-224 and 321) only as a further means of vessel identification useful in enforcement situations.

There is no indication that the practice of limiting applications to "operators" has significantly impeded the business of spot chartering and Ingram Materials does not allege that it has—only that it somehow will. Dow Chemical's concern that the proposed regulations will limit its freedom to contract also appears unwarranted. Existing section 542.6(c) contemplates just such contractual shiftings of pollution responsibilities, and permits a previously certificated owner/operator to maintain its FMC Certificate so long as it continues to be responsible for the vessel's potential liabilities under the Act. In Item 1, *supra*, the Commission provided for the addition of a provision closely modeled after existing section 542.6(c) to the final rules as a new section 542.9(f). Those portions of proposed sections 542.9(a) and 542.13(e) which require vessel owners to be listed on FMC Certificates in addition to vessel operators have been deleted for the time being, however, because the Commission's data processing system is not yet fully capable of printing certificates containing ownership data.

(6), (7) and (8). On Board Documentation. One of the more frequently objected to proposals was section 542.10 ("Operator's Responsibility for Identification") which requires vessels operated by persons other than their owners to carry copies of a demise charter-party or other contract which demonstrates that the person named on the FMC Certificate is the current and actual vessel operator. The proposed regulations also delete former section 542.6(a) which allowed vessels to mark an FMC Certificate number on the bow in lieu of carrying an on board copy of the Certificate whenever it would be "physically impossible" to do so. Proposed section 542.9(b) requires vessels to carry their *original* FMC Certificates, except that unmanned barges and vessels covered by Master Certificates need only carry a copy of the Certificate. Keeping Certificates on board is allegedly an administrative burden for vessel operating personnel, and American Waterway Operators state that many barges would require the construction of a weatherproof document container if the Commission did not allow some alternative to onboard documentation.[9] The extent or cost of these administrative burdens and vessel alterations was not discussed, however, and they are presumed to be minimal, especially in light of the Coast Guard's statement that unmanned barges with Coast Guard Certificates of Inspection are outfitted with a "tube" or "mailbox" for carrying such documents. Few vessels appear to have made use of the bow marking option in the past. Accordingly, no change has been made in the final regulations insofar as the on board carriage of FMC Certificates is concerned.

The "charter-party" requirement was opposed by barge operators because such documents are often bulky, contain confidential information which could be viewed by competitiors, are often oral, are difficult to maintain intact on working vessels (especially unmanned barges) and because the Commission has established no clear need for the requirement.

The purpose of maintaining charter-party documents on board vessels is to assist the U.S. Customs Service and the Coast Guard in their enforcement efforts and to minimize occasions for detaining vessels pending proper identification of their operators. It is doubtful, however, that the availability of charter party agreements for cross-reference purposes will appreciably increase the ability of the Coast Guard and Customs Service agents to critically examine the FMC Certificates of unmanned barges which operate primarily on inland waters. The final regulations contain several other measures directed towards improved enforcement efforts: providing Certificate expiration dates; requiring Certificates on board all vessels; and increasing the carriage of original Certificates, all of which should reduce the opportunity for the circulation of revoked or altered Certificates. Acordingly, final section 542.10 has been modified to exempt unmanned barges from its provisions, and to require the carriage of *any document*—including a letter—which identifies the operator rather than the more formal "demise charter-party or other contract" now specified.

(9) and (10) Certificate Term and Certificate Fee. Several parties objected to the two year expiration date on FMC Certificates proposed by section 542.9(a) and to the flat $20.00 certificate fee provided by proposed section 542.13(e). Existing section 542.9(e) already imposes certification fees on a sliding scale of between $2 and $25, but there is no expiration date on existing Certificates so that the fees need only be paid once in most instances. The proposed requirements were complained of as make work and unduly expensive ($10 per vessel per year). It was contended that the better allocation of resources would be for the Commission to enforce penalties directly against operators which refuse to surrender cancelled certificates, rather than require the entire industry to be recertified. If a fixed expiration date were nonetheless needed for enforcement purposes, it was urged that the Commission lengthen the term to a less costly five or ten years.

[9] Some barge operators actually opposed the placement of numbers on the outside of dry cargo barge hulls because they are easily obliterated by wear and tear. A system wherein the operator would have the option of placing the numbers on the hull or within the rake compartment near the Coast Guard's net tonnage numbers was preferred.

There is a sound enforcement basis for issuing Certificates for a fixed term. Periodic termination of all Certificates will reduce opportunities for the misuse of revoked or altered Certificates to a much greater extent than the initiation of criminal sanctions against those operators which refuse to surrender cancelled Certificates. Levying fines under section 311(p)(4) requires coordination with other agencies, is time consuming, relatively expensive, and effective only against known violators present in the United States. The Commission's objective is to assure the highest practical correlation between operators holding FMC Certificates and operators liable under section 311 of the Act. See proposed section 542.9(e). However, the Commission has determined to ameliorate the cost of recertification by lengthening the certification period from two to three years.[10]

(11) Date When Insurance Coverage Terminates. Only WQIS objects to the proviso clause in proposed Insurance Form FMC-322 which establishes a flexible insurance termination date for vessels carrying oil or hazardous substances in bulk loaded prior to the ordinary termination date (the 30th day after notice to the Commission).[11] WQIS states that these provisions unduly complicate its underwriting decisions and request that a definite termination date be devised.

There are two elements of uncertainty in the proposed clause. The first is whether a vessel actually has on board bulk cargo which was loaded prior to the ordinary termination date (the 30th day after notice) and the second is the unloading date. The former "uncertainty" is necessitated by the purposes of the Act—to indemnify the public against the cost of removing spilled pollutants. This protection would be considerably weakened if the coverage ended before existing cargos were reasonably likely to be discharged. The second "uncertainty" should not cause any significant underwriting difficulties. Insurers will presumably charge premiums based upon the maximum 60 day period and then allow refunds when furnished with evidence of the actual discharge date by the Insured.

Accordingly, no modification has been made in the proposed termination of liability clause.

(12) Notice Provided in Certain Instances of Certificate Revocation or Denial. CASO suggested that the Commission clarify section 542.12(b) to indicate that those types of Certificate denial or revocation mentioned in the last sentences of that section are subject to the appropriate notice provisions of subsections 542.12(c) and (d). The availability of such notice is already discernible from a fair reading of the proposed regulation and section 542.12(b) has been adopted with only one clarifying modification not directly related to CASO's comment.

(13) Removal of Certificates from Vessel. CASO also suggested that proposed section 542.9(b) be amended to expressly state that governmental officials may not remove FMC Certificates from vessels. No information was provided to

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[10] In any event, the present Act is likely to be superceded by "Super Fund" legislation before CWA certificates expire. Four bills have been introduced in the 95th Congress proposing to consolidate existing federal water pollution legislation into a comprehensive system of pollution liability and compensation. H.R. 6803, S.1187, S.2083 and S.2900.

[11] Forms FMC-322 through 326 provide for the continuation of coverage for a fixed period of 30 days, and then, after the 30th day, continuation in the cases of previously loaded vessels only until the cargo is unloaded or until the 60th day after notice.

indicate that this practice constitutes a particular problem and no change has been made in section 542.9(b) in this regard. *Although no one other than the vessel operator is authorized to remove currently valid FMC Certificates from vessels,* it should be noted that this fact does not preclude U.S. Customs officials from requiring vessel operators to present their Certificates at on shore U.S. Customs facilities.

(14) Certificate Renewal Exemption for Passenger Vessels. ICPL requests that the 75 or so passenger vessels subject to the Act be granted a waiver of proposed section 542.9(a)'s requirement that vessel operators file a Certificate renewal request every two years. ICPL claims the Certificate renewal process is an unfair burden upon passenger vessels because they already submit semiannual change in ownership or operation statements to the Commission under its Safety of Life at Sea Act regulations (46 C.F.R. Part 540). No such exemption has been created. ICPL's complaint centers upon the shortness of the proposed renewal period and the $20.00 certification fee, and should be partially satisfied by the modification of section 542.9(a) extending the certification period to three years. (Item 9–10, *supra*). Moreover, the Certificate renewal procedure (section 542.7) is quite simple and does not involve filing a new Form FMC-321. The materials ICPL members now submit to the Commission's Passenger Vessel Certification Office pertain to another regulatory program with different definitions of "vessel operator" and different financial responsibility requirements. Except in the case of self-insurers, there is very little common information on a vessel's Part 540 and Part 542 reports.

(15) Create a Master Certificate for Fleet Operators. Two barge fleet operators stated that the Commission should permit them to obtain a Master FMC Certificate covering all the vessels of a single operator, thereby eliminating the need for them to obtain Certificates for individual barges. The financial security for such a Master Certificate would be based upon the largest vessel in the fleet.

The Commission presently recognizes that financial responsibility may be based upon the largest vessel under the control of a single operator and that "cumulative" or per vessel coverage is not required.[12] A vessel operator presently files only a single application form (FMC-224) which lists all its vessels, and only one application fee must be paid. The only advantage to a Master Certificate approach would be a saving in certificate fees and perhaps simpler procedures for handling original Certificates. Copies of the Master Certificate would still be required on each vessel. From the Commission's viewpoint, the suggested procedure would expedite the issuance of Certificates, but would also make enforcement of the Act and overall program administration more difficult. Accordingly, no revisions were made in the proposed rules in this regard.

(16) and (17). Requests for Further Explanation. WQIS requested that the Commission expand upon the language of proposed section 542.8(d) pertaining to "direct action" against insurers. WQIS wants the Commission to specify who might be considered a "claimant" for purposes of a direct suit against an insurer. Section 311(p)(3) of the Act provides for the filing of claims directly against the

[12] Although some insurance companies insist upon separate premiums for each vessel insured, vessel operators need not obtain insurance. They may also establish financial responsibility through surety, self insurance and guaranty arrangements.

insurer and does not appear to limit the class of potential claimants. The purpose of the proposed regulations is to require insurers to submit to *all* direct claims to which they may be subject under the Act and not to define the nature and extent of such claims. Accordingly, no change has been made in proposed section 542.8(d).

Exxon requested that the Commission provide more information in proposed section 542.8(b)(5) concerning "other methods" of insurance which might be acceptable to the Commission. The purpose of subparagraph (b)(5) is merely to indicate that the Commission is willing to consider requests from vessel operators for approval of methods of demonstrating financial responsibility which significantly differ from the four previously described methods. No specific alternate procedures are presently contemplated, and no change has been made in proposed section 542.8(b)(5).

(18-20) Self-Insurance and Guaranty Standards. Three modifications to section 542.8(b) were made in response to the comments of the Zapata Corporation and Exxon. The original proposal has been modified to provide that: requests for waiver of working capital requirements will be considered in limited circumstances where the applicant's financial stability is otherwise firmly established; an appropriate officer of an applicant (as well as a Certified Public Accountant) may certify the amount of assets located in the United States when nonconsolidated financial statements are submitted; and guaranty arrangements involving joint guarantors will be permitted.

(21-23) Miscellaneous Provisions Adopted for Purposes of Clarification or Program Efficiency.

(21) Proposed section 542.12(a)(3) was modified to expressly provide for the revocation or denial of Certificates for violations of Part 542 regulations and not for the violation of *any* Commission Rule.

(22) The new CWA Certificates will contain language similar to that found in proposed section 542.9(c) to the effect that any erasures or alterations will automatically void the Certificate.

(23) Proposed section 542.7 was modified to permit applicants to request the issuance of a renewal Certificate up to 90 days prior to the expiration date of the existing Certificate, rather than the 60 days originally specified.

(24) Use of Existing Certificates on an Interim Basis. If a vessel operator does not comply with revised Part 542 by October 1, 1978, Certificates issued to that operator under prior Part 542 regulations will be automatically invalidated on that date (without prior notice). In response to a suggestion of the International Group, however, the Commission shall permit a valid existing Certificate to be used as evidence of compliance with the new CWA regulations until such time as a new Certificate is issued. This procedure will be permitted only in cases where vessel operators have made *timely and complete application (including evidence of financial responsibility and fees) for CWA Certification*. It is anticipated that some 26,000 vessels will require new CWA Certificates, and the suggested procedure should facilitate the Commission's task of preparing and mailing these documents. It should be noted, however, that no Interim Certificate will remain valid if the underlying evidence of financial responsibility is terminated.

(25) Amendment of Existing Forms FMC-225. The International Group also

suggested that burdensome paperwork could be eliminated if insurers were allowed to convert their present insurance Form FMC-225 to the new CWA Form FMC-322 by means of a simple endorsement or rider, rather than preparing new forms. This approach was successfully employed in implementing the Commission's Trans-Alaska Pipeline Authorization Act regulations (46 C.F.R. Part 543) and should also be of assistance to both insurers and the Commission in the instant circumstances. Accordingly, insurers may convert existing insurance Form FMC-225 to insurance Form FMC-322 merely by issuing a uniform endorsement; provided, however, that such endorsement is first found acceptable in all respects by the Commission's Bureau of Certification and Licensing.

Finally, the Commission has made editorial changes throughout the regulations intended solely to improve their readability.

Because of the large number of applications which must be processed by the Commission prior to October 1, 1978, the date the CWA requires vessels to be certified, the Commission finds that good cause exists for making the revised Part 542 regulations effective upon less than the 30 day notice ordinarily applicable under 5 U.S.C. 553(d).

THEREFORE, IT IS ORDERED, That, effective upon publication in the *Federal Register*, Subchapter B of Chapter IV of Title 46 of the Code of Federal Regulations is amended by the deletion of existing Part 542 in its entirety (both General Order 27 and General Order 31) and the addition of a revised Part 542, as set forth below; and

IT IS FURTHER ORDERED, That existing General Order 27 Certificates shall be sufficient evidence of compliance with revised Part 542 in cases where vessel operators have complied with the revised regulations by submitting a complete application Form FMC-321, appropriate fees, *and* demonstrating acceptable financial responsibility prior to October 1, 1978. Such grandfathered or Interim Certificates shall remain valid until a new Certificate is issued pursuant to revised Part 542, unless earlier invalidated; and

IT IS FURTHER ORDERED, That in lieu of submitting a new Form FMC-322, Insurers may submit an endorsement to existing insurance Form FMC-225 stating that the vessel operator(s) in question has insurance coverage meeting the standards of the Clean Water Act of 1977 and revised Part 542; Provided, however, that any such endorsement be specifically approved by the Commission's Bureau of Certification and Licensing prior to submission.

By Order of the Commission.

(S) FRANCIS C. HURNEY
Secretary

PART 542—FINANCIAL RESPONSIBLITY FOR WATER POLLUTION

AUTHORITY: This revised Part 542 is issued under section 311(p) of the Federal Water Pollution Control Act (33 U.S.C. 1321(p), 86 Stat. 862), as amended by the Clean Water Act of 1977 (P.L. 95–217, 91 Stat. 1566), and section 3 of Executive Order 11735 (38 Fed. Reg. 21243, 1973).

§542.1 Scope

(a) These regulations implement paragraph (1) of subsection 311(p) of the Federal Water Pollution Control Act, as amended by the Clean Water Act of 1977 (Public Law 95–217), and apply to all vessels using any port or place in the United States or the navigable waters of the United States except (1) vessels which are 300 gross tons or less, (2) non-self-propelled barges which do not carry oil or hazardous substances as cargo or fuel, and (3) public vessels.

(b) The regulations in this Part set forth the procedures whereby vessel operators can demonstrate that they are financially able to meet their liability to the United States resulting from the discharge of oil or hazardous substances (1) into or upon the navigable waters of the United States, adjoining shorelines or waters of the contiguous zone, or (2) in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976).

(c) Upon the satisfactory demonstration of financial responsibility, the Commission shall issue Certificates of Financial Responsibility (Water Pollution) which are to be carried aboard the vessels covered by such Certificates. The carriage of a valid Certificate indicates compliance with these regulations.

§542.2 DEFINITIONS

For purposes of this Part, the following terms shall have the indicated meanings:

(a) "Act" means the Federal Water Pollution Control Act, as amended.

(b) "Applicant" means any vessel "operator," as defined in paragraph (q) of this section, who has applied for a Certificate or for the renewal of a Certificate.

(c) "Application" means Application for Certificate of Financial Responsibility (Water Pollution), Form FMC-321.

(d) "Cargo" means goods or materials on board a vessel for purposes of transportation, in any quantity, whether in bulk or by lot, and regardless of whether transported under proprietary or nonproprietary shipping documents. Oil carried solely as operating fuel for equipment carrying barges, while on board such barges, is not within this definition.

(e) "Certificant" means any operator, as defined in paragraph (q) of this section, who has been issued a Certificate.

(f) "Certificate" means a Certificate of Financial Responsibility (Water Pollution) issued by the Federal Maritime Commission pursuant to these regulations.

(g) "Commission" means the Federal Maritime Commission.

(h) "Financial responsibility" means proof of financial ability to reimburse the United States under the requirements of section 311(p)(1) of the Act.

(i) "Fuel" means any oil or hazardous substance used or capable of being used to produce heat or power by burning.

(j) "Hazardous substances" means any substance or substances designated as such by the Administrator of the Environmental Protection Agency pursuant to section 311(b) of the Federal Water Pollution Control Act. Generally, hazardous substances are those elements and compounds, other than oil, which, when discharged, may present an imminent and substantial danger to the public health or welfare including, but not limited to, fish, shellfish, wildlife, shorelines and beaches.

(k) "Inland oil barge" means a non-self-propelled vessel over 300 gross tons capable of carrying oil in bulk as cargo and which is certificated by the U.S. Coast Guard to operate only in the inland waters of the United States, while operating in such waters. Regardless of the actual routes traveled by a barge, it shall not be deemed an "inland oil barge" until and unless it possesses Coast Guard certificaton to that effect.

(l) "Inland waters of the United States" means those waters of the United States lying inside the baseline from which the territorial sea is measured and those waters outside such baseline which are a part of the Gulf Intracoastal Waterway.

(m) "Insurer" means one or more acceptable insurance companies, corporations or associations of underwriters, shipowners' protection and indemnity associations, or other persons acceptable to the Commission.

(n) "Master Certificate" means a Certificate issued to builders, repairers, scrappers and sellers of vessels pursuant to section 542.11 of these regulations.

(o) *"Navigable waters of the United States" means the waters of the United* States, including the territorial sea.

(p) "Oil" means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse and oil mixed with wastes other than dredged spoil.

(q) "Operator" or "Vessel operator" means any person, including, but not limited to, an owner, a demise charterer or other contractor who conducts or who is responsible for the operation of a vessel. Persons who are responsible for vessels in the capacity of a builder, repairer, scrapper, or seller are included in this definition of operator.

(r) "Owner" or "Vessel owner" means any person holding legal or equitable title to a vessel. In a case where a Certificate of Registry or equivalent document has been issued, the owner shall be deemed to be the person or persons whose name or names appear thereon as owner;*provided, however,* that where a Certificate of Registry has been issued in the name of the President or Secretary of an incorporated company pursuant to 46 U.S.C. 15, such incorporated company will be deemed to be the owner.

(s) "Person" includes, but is not limited to, an individual, a government, a firm, a corporation, an association, a partnership, a joint-stock company, a business trust, or an unincorporated organization.

(t) "Public vessel" means a vessel, not engaged in commerce, the operator of which is the Government of the United States or a State or political subdivision thereof, or the government of a foreign nation.

(u) "Remove," "removing,"or "removal" means (1) the removal of oil or hazardous substances from the water and shorelines; (2) the taking of such other actions as may be necessary to minimize or mitigate damage to the public health or welfare (including, but not limited to, fish, shellfish, wildlife and public or private property, shorelines and beaches), resulting from a discharge or substantial threat of a discharge of oil or a hazardous substance; and (3) the restoration or replacement of natural resources damaged or destroyed as the result of a discharge of oil or a hazardous substance in violation of subsection 311(b) of the Act.

(v) "Underwriter" means an insurer, a surety company, a guarantor, or any other person, other than the operator, which undertakes to pay the liability of the operator.

(w) "United States" means any place under the jurisdiction of the United States, including, but not limited to, the States, the District of Columbia, the Commonwealth of Puerto Rico, the Canal Zone, Guam, American Samoa, the United States Virgin Islands and the Trust Territory of the Pacific Islands.

(x) "Vessel" means every description of watercraft or other artificial contrivance which is used, or capable of being used, as a means of transportation on water, and which is over 300 gross tons. Drilling rigs are included within this definition, except when at a drilling site *and* in a drilling mode. Public vessels are not included in this definition.

§542.3 General

(a) Paragraph (1) of subsection 311(p) of the Act requires vessel operators whose vessels are subject to that paragraph (i.e., vessels subject to these regulations) to establish evidence of financial responsibility to meet removal cost liability to which such operators could be subjected under section 311 of the Act. Upon satisfactorily establishing such evidence, Certificates are issued to the vessel operator in accordance with these regulations.

(b) After September 30, 1978, no vessel subject to these regulations shall use any port or place in, or the navigable waters of, the United States, unless that vessel has a Certificate covering that vessel and its operator.

(c) The gross tons of a vessel subject to these regulations shall be presumed to be the tonnage indicated in the vessel's Certificate of Registry or, in the absence thereof, other marine documents acceptable to the Commission. If a vessel has more than one gross tonnage, the higher tonnage shall apply unless the vessel's operator states in writing that the vessel never operates in any United States waters under such higher tonnage.

§542.4 Where to Apply and Obtain Forms

(a) Any operator who wishes to be issued a Certificate (including a Master Certificate) shall file or cause to be filed with the Commission an application Form FMC-321, fees and evidence of financial responsibility at the following address:

Office of Water Pollution Responsibility
Federal Maritime Commission
Washington, D.C. 20573

(b) Regulations concerning application Forms FMC-321 are set forth in the remaining paragraphs of this section 542.4 and in sections 542.5 and 542.6. Regulations concerning fees are set forth in section 542.13, and regulations concerning evidence of financial responsibility are set forth in section 542.8. Regulations concerning Master Certificates (i.e., special Certificates applicable only in connection with vessels held solely for building, repair, scrapping, or sale) are set forth in section 542.11.

(c) Application Forms FMC-321 may be obtained from the Commission's Washington, D.C. address set forth in paragraph (a) of this section and from the Commission offices at New York, New York; New Orleans, Louisiana; San Francisco, California; Chicago, Illinois; Savannah, Georgia; San Pedro, California and Hato Rey, Puerto Rico. All requests for assistance, including telephone inquiries, in completing applications should be directed to the Commission's Office of Water Pollution Responsibility in Washington, D.C.

§542.5 Time to Apply

A completed application, fees and evidence of financial responsibility shall be filed before September 30, 1978. After that date, filings shall be made at least 21 days prior to the date the Certificate is required. Applications will be processed in the order in which they are filed.

§542.6 Applications, General Instructions

(a) All applications and supporting documents shall be in English. All monetary terms shall be in United States currency.

(b) *Only vessel operators, as defined in paragraph (q) of section 542.2, may apply for a Certificate.*

(c) The spaces on the application Form FMC-321 shall be filled in only with the information requested or the phrase "Not applicable." Applicants for a Master Certificate should refer to Section 542.11.

(d) The application shall be signed by an authorized official of the applicant, whose title shall be shown in the space provided on the application. A written statement proving authority to sign shall also be required where the signer is not disclosed as an individual (sole proprietor) applicant, a partner in a partnership applicant, or a director or other officer of a corporate applicant.

(e) If, prior to the issuance of a Certificate, the applicant becomes aware of a change in any of the facts contained in the application or supporting documentation, the applicant shall, in writing, within five (5) days of becoming aware of the change, notify the Commission of the change.

§542.7 Renewal of Certificates

After Certificates are issued, certificants shall apply to the Commission for the issuance of renewal Certificates. Such applications shall be made in writing at least 21 days, but not earlier than 90 days, prior to the expiration dates of the existing Certificates. Each application shall be accompanied by appropriate recertification fees, shall identify any item of information on the original application Form FMC-321 which has changed since the original application was filed, and shall set forth the correct information in full.

§542.8 Financial Responsibility, How Established

(a) *General*—In addition to filing an application Form FMC-321, each applicant shall demonstrate that it is able to pay the amount necessary to meet its removal cost liability under section 311 of the Act by establishing evidence of financial responsibility in accordance with these regulations. The amount of evidence of financial responsibility required by the regulations in this Part 542 is separate from and in addition to the amount, if any, required of the applicant pursuant to Part 543 (Oil Pollution Cleanup—Alaska Pipeline) of this Title.

(b) *Methods*—An applicant shall establish evidence of financial responsibility by any one of, or by an acceptable combination of, the following methods:

- Insurance;
- Surety Bond;
- Qualification as a Self-Insurer;
- Guaranty;
- Other Methods.

(1) *Insurance*—Insurance may be established by filing with the Commission an Insurance Form FMC-322 (Master Insurance Form FMC-323 when applying for a Master Certificate) executed by an insurer which is acceptable to the Commission for purposes of these regulations;

(2) *Surety Bond*—An applicant may file with the Commission a Surety Bond Form FMC-324, executed by the applicant and by a surety company which is acceptable to the Commission for purposes of these regulations. To be

acceptable, surety companies must, at a minimum, be certified by the United States Department of the Treasury with respect to the issuance of Federal bonds in the penal sum of the bonds to be issued under these regulations;

(3) *Self-Insurance*—A person may qualify as a self-insurer by maintaining, in the United States, working capital and net worth, each in the amount of $150 per gross ton of the largest vessel to be self-insured or $250,000, whichever is greater. For the purposes of this subparagraph, "working capital" is defined as the amount of current assets located in the United States, less *all* current liabilities; and "net worth" is defined as the amount of all assets located in the United States, less *all* liabilities. The amounts required by this subparagraph are in addition to the amounts of working capital and net worth, if any, required by Part 543 of this Title (Oil Pollution Cleanup—Alaska Pipeline). Maintenance of the required working capital and net worth shall be demonstrated by submitting with the initial application the items specified in subdivision (i) of this subparagraph for the applicant's last fiscal year preceding the date of application. Thereafter, for each of the applicant's fiscal years in which the certificant is holding a Certificate, the applicant/certificant shall submit the items specified in subdivision (i) and (ii) of this subparagraph and shall be subject to the provisions of subdivisions (iii), (iv), (v) and (vi) of this subparagraph:

(i) *Initial and Annual Submissions*—An applicant/certificant shall submit an annual, current nonconsolidated statement of income and surplus, certified by an independent Certified Public Accountant. Those financial statements shall be accompanied by an additional statement from the applicant/certificant's Treasurer (or equivalent official), certifying to both the amount of current assets and the amount of total assets included in the accompanying balance sheet, which are located in the United States and acceptable for purposes of this Part, *e.g.*, not pledged for purposes of Part 543. If the balance sheet and statement of income and surplus cannot be submitted in nonconsolidated form, consolidated statements may be submitted if accompanied by an additional statement prepared by the involved Certified Public Accountant, certifying to the amount by which (A) the applicant's/certificant's total assets, located in the United States and acceptable for purposes of this Part, exceed its total liabilities, and (B) the applicant's/certificant's current assets, located in the United States and acceptable for purposes of this Part, exceed its current liabilities. Such additional statement by the Certified Public Accountant must specifically name the applicant/certificant, must indicate that the amounts so certified relate only to the applicant/certificant, apart from any other entity, and must identify the consolidated financial statement to which it applies;

(ii) *Semi-Annual Submissions*—When the applicant's/certificant's self-insurance covers a vessel which carries oil or hazardous substances in bulk as cargo and its demonstrated net worth is not at least ten times the required amount, an affidavit shall be filed by the applicant's/certificant's corporate Treasurer (or the equivalent official in cases where the applicant/certificant is not a corporation) covering the first six months of the applicant's/certificant's fiscal year. Such affidavits shall state that neither the working capital nor the net worth have, during the first six months, fallen below the required amounts;

(iii) *Additional Submissions*—Additional financial information shall be submitted upon request of the Commission. All applicants/certificants who choose self-insurance shall notify the Commission within five days of the date such persons know, or have reason to believe, that the amounts of working capital or net worth have fallen below the amounts required by this subparagraph;

(iv) *Time for Submissions*—All required annual financial statements shall be received by the Commission within three calendar months after the close of the applicant's/certificant's fiscal year, and all six-month affidavits within one calendar month after close of the applicable six-month period. Upon written request, the Commission may grant a reasonable extension of the time limits for filing financial statements/affidavits, provided that the request sets forth good and sufficient reason to justify the requested extension and is received 15 days before the statements/affidavits are due. The Commission will not consider a request for an extension of more than 45 days;

(v) *Failure to Submit*—Failure to timely file any statement, data, or affidavit required by this subparagraph (3) shall cause the revocation of the Certificate;

(vi) *Waivers of Submissions*—For good cause shown in writing by the applicant/certificant, the Commission may waive the working capital requirement in cases where the applicant/certificant is an economically regulated public utility, a municipal or higher-level governmental entity, or an entity which operates solely as a charitable, non-profitmaking organization. The Commission will consider good cause to have been shown when the applicant/certificant demonstrates in writing that the grant of such waiver would benefit at least a local public interest without resulting in undue risk to the environment *and* without resulting in undue risk that the applicant's/certificant's removal cost liability could not be met. In addition, for good cause shown in writing by the applicant/certificant, the Commission may waive the working capital requirement in any case where it can be demonstrated that working capital is not a significant factor in the applicant's/certificant's financial condition. An applicant's/certificant's net worth in relation to the amount of its exposure under the Act, as well as a history of stable operations will be major elements in such demonstration;

(4) *Guaranty*—An applicant/certificant may file with the Commission a Guaranty Form FMC-325 (Master Guaranty Form FMC-326 when applying for a Master Certificate) executed by a guarantor acceptable to the Commission for purposes of these regulations. A guarantor shall be subject to and must fully comply with all of the self-insurance provisions of subparagraph (3) of this paragraph (b). In addition, the amounts of working capital and net worth required to be demonstrated by an acceptable guarantor shall be no less than the aggregate amounts underwritten as a guarantor and self-insurer pursuant to these regulations and the regulations of Part 543 of this Title;

(5) *Other Methods*—An applicant may choose any other method specially justified and acceptable to the Commission, provided that such other method is not a mere modification of any of the foregoing methods;

(c) *Forms—General*—The Commission's Application Form FMC-321, Insurance Form FMC-322, Master Insurance Form FMC-323, Surety Bond Form FMC-324, Guaranty Form FMC-325, and Master Guaranty Form

FMC-326, as appended to this Part, are hereby incorporated into this Part. If more than one insurer, guarantor, or surety joins in executing an insurance, guaranty, or surety bond form, such action shall constitute joint and several liability on the part of such joint underwriters. Each form submitted to the Commission pursuant to these regulations shall set forth in full the correct name of the applicant or certificant on whose behalf such form is submitted.

(d) *Direct Action*—Forms FMC-322 through FMC-326 and any other undertaking accepted pursuant to the provisions of these regulations, shall permit the commencement of an action in court for removal cost claims arising under the provisions of section 311 of the Act by the claimant (including a claimant by right of subrogation) directly against the underwriter. Such forms and other undertakings shall also provide that in the event such action is brought directly against the underwriter, such underwriter shall be entitled to invoke only those rights and defenses permitted by paragraph (3) of subsection 311(p) of the Act, as specified by the Commission.

(e) *Public Access to Data*—Financial data filed by applicants, certificants, and underwriters shall be public information to the extent required by the Freedom of Information Act and permitted by the Privacy Act.

§542.9 INDIVIDUAL CERTIFICATES

(a) An individual Certificate for each vessel listed on completed applications shall be issued by the Commission when acceptable evidence of financial responsibility has been provided and appropriate fees have been paid, except where Master Certificates are issued pursuant to section 542.11 of these regulations. Such Certificates will be issued only to vessel operators, as defined in paragraph (q) of section 542.2. Each Certificate shall be effective for not more than three years from the date of issue.

(b) The original Certificate shall be carried on the vessel named on the Certificate. However, a legible copy (certified as accurate by a notary public or other person authorized to take oaths) may be carried in lieu of the original Certificate if the vessel is an unmanned barge and does not have a facility which the vessel operator believes would offer suitable protection for the original Certificate. If a copy is carried aboard such barge, the original shall be retained at a location in the United States and shall be kept readily accessible for inspection by U.S. Government officials.

(c) Erasures or other alterations on a Certificate or copy is prohibited (even if made by government authorities) and automatically voids such Certificate or copy.

(d) If at any time after a Certificate has been issued a certificant becomes aware of a change in any of the facts contained in the application or supporting documentation, the vessel operator shall notify the Commission in writing within five (5) days of becoming aware of the change.

(e) If for any reason, including a vessel's demise or transfer to a new operator, a certificant ceases to be the vessel's operator, as defined in paragraph (q) of section 542.2, the certificant shall, within ten (10) days, complete the reverse side of that vessel's original Certificate and return it to the Commission. Such Certificate and any copy thereof is automatically void (whether or not *returned to the Commission), and its use is prohibited.* Where such voided Certificate cannot be returned because it has been lost or destroyed, the certificant shall, as soon as possible, submit the following written information to the Commission:

(1) The number of the Certificate and the name of vessel;

(2) The date and reason why the certificant ceased to be the operator of the vessel;

(3) The location of the vessel on the date the certificant ceased to be the operator, and

(4) The name and mailing address of the person to whom the vessel was sold or transferred.

(f) In the event of the temporary transfer of a vessel certificated pursuant to this Part, where the certificant transferring such vessel continues to be responsible for liabilities to which such vessel could be subjected under section 311 of the Act, and continues to maintain on file adequate evidence of financial responsibility with respect to such vessel, the existing Certificate will remain in effect and the new operator shall not be required to obtain an additional Certificate.

§542.10 Operator's Responsibility for Identification

Except in the case of unmanned barges, operators who are not also the owners of certificated vessels shall carry on board such vessels the original or legible copy of the demise charter-party or any other written document which demonstrates that such operators are, in fact, the operators designated on the Certificates. Such documents shall be presented for examination to U.S. Government officials upon request.

§542.11 Master Certificates

(a) A contractor or other person who is responsible for vessels in the capacity of a builder, repairer, scrapper, or seller may choose to apply for a Master Certificate in lieu of applying for an individual Certificate for each vessel. A Master Certificate is designed to cover all of such applicant's vessels, provided each of such vessels is held by the applicant *solely* for purposes of construction, repair, scrapping, or sale. A vessel which is being operated commercially in any business venture, including the business of building, repairing, scrapping, or selling other vessels (e.g., a slop barge used by a shipyard), is not eligible to be covered by a Master Certificate. Any vessel which requires a Certificate but which is not eligible for coverage by a Master Certificate shall be covered by a separate Certificate applied for in accordance with the provisions of section 542.9.

(b) Application for a Master Certificate shall be made by filing Form FMC-321, appropriate fees, and evidence of financial responsibility. Acceptable evidence of financial responsibility may be established by any of the methods set forth in paragraph (b) of section 542.8, except Insurance Form FMC-322 and Guaranty Form FMC-325. Application Form FMC-321 shall be completed in full, except for Item 5. In lieu of completing that item, the applicant shall make the following statement in Item 5, and shall indicate the gross tonnage of the largest vessel to be covered by the Master Certificate: "This is an application for a Master Certificate. The largest vessel to be covered by this application is __________ gross tons." The gross tonnage indicated by the applicant in such statement may not exceed the applicant's dollar amount of financial responsibility divided by $150.

(c) Each Master Certificate shall indicate thereon (1) the name of the operator (the applicant builder, repairer, scrapper, or seller), (2) the dates of issuance and termination, encompassing a period of not more than three years, and (3) the gross tonnage of the largest vessel eligible for coverage by that Master Certificate. The gross tonnage indicated on a particular Master Certificate shall be determined by the amount of financial responsibility established by the applicant pursuant to the optional methods set forth in paragraph (b) of section 542.8 (a master insurance form, a surety bond, self-insurance, or a master guaranty form). Master Certificates will not name the vessels covered by such Certificates.

(d) Once a Master Certificate is issued, new vessels (none of which exceed the tonnage indicated on the Master Certificate, all of which are eligible for coverage by a Master Certificate, and all of which are held solely for the purpose of construction, repair, scrapping or sale) shall be automatically covered by that Master Certificate. However, before acquiring a vessel (by any means, including conversion of an existing vessel) of a larger gross tonnage than the tonnage indicated on the existing Master Certificate, the certificant shall submit (1) evidence of increased financial responsibility to cover the larger vessel, (2) a new certification fee, and (3) either a new application form or a letter amending the existing application form to reflect the new gross tonnage which is to be indicated on a new Master Certificate.

e) A person to whom a Master Certificate has been issued shall submit to the Commission, every six months beginning with the month in which the Master Certificate is issued, a report indicating the name, previous name, or other identifying information and gross tonnage of each vessel covered by the Master Certificate during the six-month reporting period.

f) A copy of the Master Certificate shall be carried aboard each vessel covered by the Master Certificate. The original Certificate shall be retained at a United States location and be kept readily accessible for inspection by U.S. Government officials.

g) Upon revocation or other invalidation of the Master Certificate, the original Certificate shall be returned within ten (10) days to the Commission and all copies shall be destroyed by the person in whose name the Certificate was issued. The use of an invalid Master Certificate or any copy thereof is prohibited.

§542.12 Certificates, Denial or Revocation

(a) A Certificate shall be denied or revoked for any of the following reasons:

(1) Making any willfully false statement to the Commission in connection with an application for an initial Certificate or a request for a renewal Certificate;

(2) Failure of an applicant or certificant to establish or maintain acceptable evidence of financial responsibility as required by these regulations;

(3) Failure to comply with or respond to lawful inquiries, regulations, or orders of the Commission pertaining to activities subject to this Part;

(4) Failure to timely file the statements or affidavits required by subdivisions (i), ii), or (iii) of subparagraph (3) of paragraph (b) of section 542.8 of these regulations; or

(5) Cancellation or termination of any insurance form, surety bond, guaranty or other undertaking issued pursuant to these regulations, unless acceptable substitute evidence of financial responsibility has been submitted.

(b) Denial or revocation of a Certificate shall be immediate and without prior notice where the applicant or certificant (1) is no longer the responsible operator of the vessel in question, (2) fails to furnish acceptable evidence of financial responsibility in support of an application, or (3) permits the cancellation or termination of the insurance form, surety bond, guaranty or other undertaking upon which the continued validity of the Certificate was based. In any other case, prior to the denial or revocation of a Certificate, the Commission shall advise the applicant or certificant, in writing, of its intention to deny or revoke the Certificate, and shall state the reason therefor.

(c) If the reason for an intended revocation is failure to file the required financial statements or affidavits, the revocation shall be effective ten (10) days after the date of the notice of intention to revoke, unless the certificant shall, prior to revocation, demonstrate that the required statements were timely filed.

(d) If the intended denial or revocation is based upon one of the reasons in subparagraphs 542.12(a)(1) or (3), the applicant or certificant may request, in writing, a hearing to show that the applicant or certificant is in compliance with the provisions of these regulations, and, if such request is received within 30 days after the date of the notification of intention to deny or revoke, such hearings shall be granted by the Commission. Hearings pursuant to these regulations shall be conducted in accordance with the Commission's Rules of Practice and Procedure (46 CFR Part 502).

§542.13 Fees

(a) This section establishes the application fee which shall be imposed by the Commission for processing Application Form FMC-321 and also establishes the certification fee which shall be imposed for the issuance of Certificates.

(b) No Certificate shall be issued unless the application and/or certification fees set forth in paragraphs (d) and (e) of this section have been paid.

(c) Fees shall be paid by check, draft or postal money order in United States currency and be made payable to the Federal Maritime Commission.

(d) Each applicant who submits Application Form FMC-321 for the first time and who does not hold a *valid* Certificate of Financial Responsibility (Oil Pollution) pursuant to previous Part 542 of this Title (i.e., General Order 27), shall pay an initial, nonrefundable application fee of $100. Only one application fee shall be necessary where an applicant submits both an application for individual Certificates and an application for a Master Certificate. Applications for additional Certificates, or to amend or renew existing Certificates, shall not require new application fees. However, once an Application Form FMC-321 is withdrawn or denied for any reason, and the same applicant, holding no valid

Certificates, wishes to reapply for a Certificate (covering the same or new vessel), a new application form and application fee of $100 shall be required.

(e) In addition to a $100 application fee, applicants shall pay a $20 fee for each Certificate issued, whether an individual Certificate or Master Certificate. Applicants shall submit such certification fee for each vessel listed in, or later added to, an application for individual Certificates. The $20 certification fee is required to renew or to reissue a Certificate for any reason, including, but not limited to, a name change or a lost Certificate.

(f) Certification fees shall be refunded, upon receipt of a written request, if the application is withdrawn or denied prior to issuance of the Certificates. Overpayments in the application fees and/or the certification fees will be refunded on request only if the refund is $10 or more. However, any overpayments not refunded will be credited, for a period of two years from the date of receipt of the monies by the Commission, for the applicant's possible future use in connection with these regulations.

§542.14 ENFORCEMENT

(a) Any operator of a vessel subject to subsection 311(p) of the Act who fails to comply with the provisions of subsection 311(p) of these regulations shall be subject to a fine of not more than $10,000 for each such failure to comply.

(b) The Secretary of the Treasury may refuse to grant the clearance required by section 4197 of the Revised Statutes of the United States, as amended (46 U.S.C. 91), to any vessel subject to subsection 311(p) of the Act which does not have a Certificate issued pursuant to these regulations.

(c) The Secretary of the Department in which the Coast Guard is operating many deny entry to any port or place in the United States or the navigable waters of the United States and detain at the port or place in the United States from which it is about to depart for any other port or place in the United States any vessel subject to subsection 311(p) of the Act, which, upon request, does not produce a Certificate issued pursuant to these regulations.

§542.15 SERVICE OF PROCESS

(a) When executing the forms required by these regulations, each applicant and underwriter shall designate thereon a person in the United States as its agent for service of process for the purposes of section 311 of the Act and of these regulations. Each designation shall be acknowledged in writing by the designee unless that party has already furnished the Commission with a "master" concurrence showing that it has agreed in advance to act as the United States agent for service of process for the applicant or underwriter in question.

(b) When the designated agent cannot be served because of death, disability, or unavailability, the Secretary of the Federal Maritime Commission will be deemed to be the agent for service of process. When serving the Secretary of the Federal Maritime Commission, the server shall also send to the applicant, certificant, or underwriter, a copy of each document served upon the Secretary, and shall attest to that mailing at the time service is made. Copies will be sent by registered mail, postage prepaid.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–38

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, ET AL.

v.

AMERICAN MAIL LINES, LTD., ET AL.

REPORT AND ORDER ADOPTING INITIAL DECISION

August 8, 1978

BY THE COMMISSION: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice-Chairman;* Karl E. Bakke,[1] James V. Day, and Leslie Kanuk, *Commissioners*)

This proceeding was initiated by the filing of a complaint on July 9, 1973, in which the Council of North Atlantic Shipping Associations (CONASA), the International Longshoremen's Association, AFL/CIO (ILA), the Delaware River Port Authority (DRPA) and the Massachusetts Port Authority (Massport), charged fifteen common carriers by water (Respondents)[2] with violations of sections 15,[3] 16 First, 17 and 18(b)(5) of the Shipping Act, 1916. Complainants challenged the legality of the transportation system known as Far East minilandbridge or minibridge. Numerous parties intervened on behalf of both Complainants and Respondents.[3]

The Far East minibridge system is representative of most minibridge services. Rail and water carriers jointly undertake to provide through transportation under a tariff filed with both the Federal Maritime Commission and the Interstate Commerce Commission (ICC). The shipper pays a single rate and the goods move under a single bill of lading. The water and rail carriers divide the "joint rate" pursuant to a previously agreed upon formula.[4]

[1] Concurring in final result.

[2] Respondents are: American Mail Line, Ltd.; American President Lines, Ltd. (APL); Japan Line, Ltd. (Japan Line); Kawasaki Kisen Kaisha Line, Ltd. (K Line); Mitsui-O.S.K. Lines, Ltd.; Nippon Yusen Kaisha Line, Ltd.; Orient-Overseas Line, Inc.; Pacific Far East Line; Phoenix Container Liners, Ltd. (Phoenix Line); Sea-Land Service, Inc. (Sea-Land); Seatrain Line, Inc. (Seatrain); Showa Shipping Co., Ltd. (Showa); United States Lines, Inc. (USL); Yamashita-Shinnihon Line; and Zim Israel Navigation Co., Ltd.

[3] The section 15 allegation was dismissed by an order served April 8, 1975.

[3] Appendix A to the Initial Decision lists all intervenors.

[4] The Presiding Officer provides an example of a minibridge movement from Kobe, Japan, to New York: . . . [T]he agreed to division takes the form of a water rate and a flat rail rate per container, the rail carriage being from rail ramp at the West Coast port to rail ramp at New York. The Kobe shipper takes delivery of the water carrier's container, packs it, and delivers it to the water carrier's container yard. The water carrier collects the total freight from the shipper, moves the cargo to the West Coast port (*e.g.*, Long Beach), pays the Long Beach terminal and wharfage charges, transfers the cargo from the ship to the rail ramp, and pays the railroad the agreed rate for transcontinental transport. The consignee receives the container at the New York railhead. Outbound the operation is reversed. The shipper, of course, has the free choice between an all-water service or a minibridge service. (I.D., at 5).

Chief Administrative Law Judge John E. Cograve (Presiding Officer) issued an Initial Decision on July 1, 1977, holding that Respondent's Far East minibridge service was not violative of Shipping Act sections 16 First, 17 or 18(b)(5). Complainants and Intervenors filed Exceptions to the Initial Decision.[5] Oral argument was conducted before the Commission on June 13, 1978.

Position of the Parties

The Exceptions raise numerous allegations of error which can be categorized as follows:

1. Minibridge violates sections 16 First and 17 of the Act and section 8 of the Merchant Marine Act of 1920, in that:

 a. minibridge carriers absorb shippers' costs;

 b. minibridge diverts substantial amounts of naturally tributary cargo from Atlantic and Gulf ports.

 c. minibridge inflicts serious harm on Complainants;

 d. minibridge causes undue prejudice and unjust discrimination against shippers and against ports;

2. Minibridge rates are so unreasonably low they violate section 18(b)(5) of the Act;

3. Respondents must justify the use of minibridge;

4. Minibridge traffic should move at premium rates or a floor should be imposed on minibridge rates;

5. The Commission lacks jurisdiction to accept minibridge tariffs;

6. The Presiding Officer failed to establish guidelines for future cargo diversion cases;

7. The Initial Decision inadequately describes Far East minibridge service;

8. The Presiding Officer improperly characterized the testimony of certain witnesses;

9. Complainants were denied full discovery.

Discussion

Upon review of the entire record in this proceeding, it has been concluded that the findings and conclusions set forth in the Initial Decision are correct in all substantial respects. Exceptions (1) through (4) consist entirely of matters argued in briefs before the Presiding Officer. All have been adequately treated in the Initial Decision and require no further response by the Commission. Accordingly, the Initial Decision shall be adopted as our own except as it may be modified or clarified by the following discussion of matters raised by Complainants' remaining exceptions.

CONASA asserts that the Commission lacks statutory authority to accept

[5] Separate Exceptions were filed by: (a) CONASA, ILA, and DRPA; (b) Port of Seattle; (c) Massport; (d) State of Texas, Board of Trustees of Galveston Wharves; Galveston Cotton Exchange and Board of Trade, Port of Beaumont Navigation District of Jefferson County, Port of Houston Authority of Harris County, Texas Ports Association, and Houston Port Bureau, Inc. (Texas); (e) Board of Commissioners of the Port of New Orleans and New Orleans Traffic and Transportation Bureau (New Orleans); and (f) the Commonwealth of Pennsylvania (Pennsylvania).

Replies to Exceptions were filed by: (a) Japan Line; (b) APL; (c) Sea-Land; (d) the intervening railroads; (e) K Line; (f) Bureau of Hearing Counsel (Hearing Counsel); (g) United States Department of Transportation (DOT); and (h) USL; Phoenix; Seatrain; and Showa (jointly).

minibridge tariffs for filing. CONASA claims that prior to 1970, the Commission maintained that it lacked authority to accept joint rates for filing and sought intermodal legislation from Congress. It further states that the Commission's adoption of regulatons in 1970 governing the filing of joint through intermodal rates,[6] cannot compensate for the absence of statutory authority to accept minibridge tariffs.

The Commission's authority to accept rail/water tariffs for filing and regulatory jurisdiction over the water portion of such joint through rates pursuant to section 18(b) of the Shipping Act, 1916, 48 U.S.C. 817(b)(1), has been confirmed by recent judicial decisions. In *Commonwealth of Pennsylvania v. I.C.C.*, 561 F.2d 278 (D.C.C. 1977) the court held that the ICC was authorized to accept joint intermodal tariffs—which are filed at both the ICC and this Commission and which specify the land/water rate divisions—and to confine its jurisdiction to the land portion of the through transportation.[7] This result was plainly premised upon the FMC exercising jurisdiction over the water portion of the joint rate just as the ICC regulates the land portion.[8]

Early in the instant proceeding, APL petitioned the Commission to institute rulemaking on the subject of minibridge as a substitute for adjudication of Complainants' claims. In denying this petition, the Commission designated this proceeding as a lead case for the establishment of "general principles" concerning minibridge.[9] Three parties now allege that the Presiding Officer failed to establish the guidelines contemplated by our December, 1973 Order.[10] When examined in context, however, the Initial Decision, contains a statement of the principles governing the diversion of containerized cargo and port equalization sufficient to delineate the general limits within which minibridge carriers will be allowed to compete for intermodal cargoes.

The record in this proceeding and the varied allegations of the complaint necessarily limit the context within which specific guidelines can be established. The Presiding Officer soundly determined that it was "not practical or feasible to draw future guidelines for measuring the lawfulness of diversion, if by guidelines is meant the drafting of precise rules of conduct under which a particular practice could be judged valid or invalid by the simple process of matching a particular practice against the language of a rule." (I.D., at 69). The Commission, however, views the Initial Decision as establishing the following general principles:

1. Certain cargo may be naturally tributary to a port, but any "naturally

[6] "Filing of Through Rates and Through Routes," Amendment 4 to General Order 13, 46 C.F.R. 536.16, 35 Fed. Reg. 6394 (1970).

[7] The ICC had previously maintained that it lacked authority to accept joint through tariffs in foreign commerce and had also sought intermodal legislation.

[8] Other recent decisions have assumed the existence of FMC jurisdiction to accept joint tariffs for filing. *State of Texas v. Seatrain International, S.A.*, 518 F.2d 175 (5th Cir. 1975) and *Commonwealth of Pennsylvania v. Federal Maritime Commission*, 392 F.Supp. 795 (D.D.C. 1975).

[9] Order served December 5, 1973, 14 S.R.R. 236. However, in its "Clarification of Denial of Petition for Rule Making" served April 5, 1974, 14 S.R.R. 630, 633, the Commission further stated that "[i]t was not our intention to conduct a rule making proceeding sub nomine adjudication, or to resolve *all* of the manifold absorption and minibridge questions in one proceeding."

[10] Seattle's contention that the Initial Decision "fails to enunciate general principles under which minibridge is to be conducted" merely voices dissatisfaction with the Initial Decision's failure to adopt the particular principles espoused by Seattle. We find no support in the record for Seattle's request that minibridge rates be set in relation to Overland Common Point (OCP) rates.

tributary zone'' surrounding a port is constantly changing.[11] In a particular case, this zone is determined by consideration of: (a) the flow of traffic through the port prior to the conduct in question, including points of cargo origin or destination; (b) relevant inland transportation rates; (c) natural or geographical transportation patterns and efficiencies, and (d) shipper needs and cargo characteristics.

2. A carrier or port may not *unreasonably* divert cargo which is naturally tributary to another port. When diversion of naturally tributary cargo occurs, the reasonableness of the practice must be determined. The reasonableness of the particular practice is determined by consideration of: (a) the quantity and quality of cargo being diverted (is there substantial injury?), (b) the cost to the carrier of providing direct service to the port; (c) any operational difficulties or other transportation factors that bear upon the carrier's ability to provide direct service (*e.g.*, lack of cargo volume, inadequate facilities); (d) the competitive conditions existing in the trade; and (e) the fairness of the diversionary method or methods employed (*e.g.*, absorption, solicitation).

These guidelines shall be considered in all future proceedings wherein violations of section 16 First and 17 of the Act are alleged based upon the diversion of cargo from a port.

Seattle and Pennsylvania except to the Presiding Officer's description of minibridge. Pennsylvania asserts that certain details about minibridge were omitted. Whereas, Seattle contends that the description is misleading because many import containers are actually ''dropped off'' at interior points rather than delivered to the destination ''port'' specified in Respondent's tariffs. The record simply does not support any finding of a ''drop off'' of containers.[12] Moreover, we find that the Presiding Officer's description of minibridge does accurately describe all elements of the service relevant to Shipping Act regulation.

Texas and Pennsylvania except to statements of the Presiding Officer characterizing the testimony of their respective governors as being primarily for ''psychological effect.'' (I.D., at 33). When it is considered that the broad assertions made by the governors were unsupported by facts it would appear that the Presiding Officer correctly described the nature of the testimony. Even if these observations were without a reasonable foundation, however, they were plainly harmless in that they had no perceptible effect upon the Presiding Officer's handling or disposition of the case.

Complainants assert that a ruling on discovery denied them access to carrier cost data concerning minibridge.[13] Complainants submitted an extensive discovery request on October 5, 1973. At a second prehearing conference on October 24, 1973 a group representing Complainants, Respondents, and Intervenors was designated to draft a standard discovery form relating to Complainants' original discovery requests. A procedural schedule was agreed to by all parties at a third prehearing conference on February 7, 1974. Further discovery was at that time

[11] A port's locally tributary zone will not only vary over time, but with the nature of the commodity shipped. The tributary zone for cotton may differ from that for apples or for computer parts.

[12] If carriers are indeed ''dropping off'' containers at points not specified in their tariffs such action would violate both the Interstate Commerce Act and the Shipping Act and subject them to possible civil penalties.

[13] The ''Ruling on Additional Interrogatories'' denying further discovery was issued on September 12, 1974.

clearly limited to: (1) matters which could not have been reasonably foreseen; and (2) "follow-up" on responses to the original discovery requests. On the date designated for follow-up discovery, June 10, 1974, Complainants served numerous additional interrogatories. The Presiding Officer concluded that this new request sought information which could have been foreseen at the time of the original request and did not constitute follow up discovery. We perceive no error in this ruling and recognize that our adjudicatory proceedings must be characterized by such firm but fair actions by administrative law judges, if a timely and useful record is to be produced.[14]

The Commission's Office of Environmental Analysis has identified the energy and environmental consequences of a final resolution of this proceeding in a Final Environmental Impact Statement (FEIS) served June 26, 1978.[15] We have thoroughly reviewed the FEIS and have fully considered it in our determination of this matter.

The FEIS discusses the environmental effects of the three possible alternative resolutions of this proceeding—(1) declaring the minibridge service lawful; (2) declaring it unlawful; or (3) declaring it lawful with certain provisions. It concludes that the environmentally preferable alternative is to declare minibridge lawful. Such a decision will promote energy efficiency, conserve fossil fuels and benefit the shipping public. We note that in declaring minibridge lawful, certain adverse environmental impacts are unavoidable. For instance, air pollution may increase in certain United States land areas. These adverse impacts are minimal, however, and do not warrant deviation from the regulatory action otherwise mandated by Shipping Act sections 16, 17 and 18(b).

THEREFORE, IT IS ORDERED, That the Exceptions of CONASA, ILA, and DRPA; Port of Seattle; Massport; State of Texas, Board of Trustees of Galveston Wharves; Galveston Cotton Exchange and Board of Trade, Port of Beaumont Navigation District of Jefferson County, Port of Houston Authority of Harris County, Texas Ports Association, and Houston Port Bureau, Inc. (Texas); Board of Commissioners of the Port of New Orleans and New Orleans Traffic and Transportation Bureau (New Orleans); and the Commonwealth of Pennsylvania (Pennsylvania) are denied and the Initial Decision issued in this proceeding is adopted; and

IT IS FURTHER ORDERED, That the Final Environmental Impact Statement served June 26, 1978, is adopted, and;

IT IS FURTHER ORDERED, That the complaint of the Council of North Atlantic Shipping Associations, the International Longshoremen's Association AFL-CIO, the Delaware River Port Authority, and the Massachusetts Port Authority is denied and this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

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[14] Complainants could have attempted to obtain carrier cost data at the hearing by employing the subpoena power available under section 502.131 of the Commission's Rules. 46 C.F.R. 502.131. They chose not to do so.

[15] The energy assessment is required by section 382(b) of the Energy Policy and Conservation Act of 1975, 42 U.S.C. 6362; the environmental assessment by the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*

FEDERAL MARITIME COMMISSION

No. 73–38

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, ET AL.

v.

AMERICAN MAIL LINES, LTD., ET AL.

Adopted August 8, 1978

Respondents' Far East minibridge service found not to violate sections 16 First, 17 or 18(b)(5) of the Shipping Act, 1916.

Analysis of precedent shown to require reevaluation of past criteria for intermodal or minibridge service in the light of present advances in transportation, particularly containerization and the developments fostered by it.

Francis A. Scanlan, Sean O'Callaghan, and *C. Peter Lambos* for complainant Council of North Atlantic Shipping Associations.

Thomas W. Gleason, Jr., for complainant the International Longshoremen's Association.

Francis A. Scanlan, George F. Mohr, and *Victor Wright* for complainant Delaware River Port Authority.

Joseph F. Kelly, Jr., for complainant Massachusetts Port Authority.

Warner W. Gardner, R. James Woolsey, and *Robert T. Basseches* for respondents American Mail Line, Ltd., and American President Lines, Ltd.

George F. Galland, Robert L. McGeorge, John C. O'Shea, and *Amy Klein* for respondent Japan Lines, Ltd.

John P. Meade, David C. Nolan, Forrest Booth, and *Frank A. Devine* for respondent Kawasaki Kisen Kaisha, Ltd.

Edward J. Sheppard, IV, and *Edward Schmeltzer* for respondents Mitsui O.S.K. Lines, Ltd., Nippon Yusen Kaisha Line, Ltd., and Yamashita-Shinnihon Line.

Seymour H. Kligler for respondent Orient Overseas Line, Inc.

Lee A. Monroe and *Roy G. Bowman* for respondent Pacific Far East Line.

Neal M. Mayer and *Paul D. Coleman* for respondents Phoenix Container Liners, Ltd., Seatrain Lines, Inc., and Showa Line, Ltd.

Edward M. Shea, John A. Douglas and *Peter Hearn* for respondent SeaLand Service, Inc.

Russell T. Weil, James B. Moore, and *Mary Lou Montgomery* for respondent United States Lines, Inc.

Edwin Longcope for respondent Zim Israel Navigation Co., Ltd.

Dudley J. Clapp, Jr., Milton J. Stickles, Jr., E. Duncan Hamner, Jr., and *John DeGurse* for intervenor Military Sealift Command on behalf of the Department of Defense.

G. B. Perry and *C. C. Guidry* for intervenor Board of Commissioners of the Port of New Orleans.

Louis A. Schwartz, Laurence F. Daspit, and *G. B. Perry* for intervenor New Orleans Traffic and Transportation Bureau.

John P. Meade and *Carl Parker, Jr.,* for intervenor the Board of Trustees of the Galveston Wharves.

G. B. Perry for intervenor Gulf Ports Association, Inc.

Samuel Frankel for intervenor American Importers Association, Inc.

David C. Redford, F. William Colburn and *G. E. Strange* for intervenors Port of Houston Authority, Houston Port Bureau, Inc., and Texas Ports Association.
G. K. Winn for intervenor Board of Commissioners of the Port of Lake Charles.
T. M. Hogg for intervenor Greater Baton Rouge Port Commission.
Gerald B. Grinstein, Michael B. Crutcher, Emanuel Rouvelas, James D. Dwyer, and *Jonathan Blank* for intervenor Port of Seattle.
Eldered N. Bell, Jr., and *Gary Koecheler* for intervenor Maryland Port Administration.
Peter R. Schaff for intervenor Brazos River Harbor Navigation District of Brazoria County, Texas (Port of Freeport).
Wayne C. Page for intervenor Nueces County Navigation District No. 1, Port of Corpus Christi.
John P. Meade for intervenor the Galveston Cotton Exchange and Board of Trade.
Doyle G. Owens for intervenor Port of Beaumont Navigation District of Jefferson County, Texas.
J. Kerwin Rooney and *Robert Crandall* for intervenor City of Oakland.
Marion S. Moore, Jr., for intervenor South Carolina State Ports Authority.
Charles W. Burkett and *William P. Higgins* for intervenors Southern Pacific Transportation Company and Union Pacific Railroad.
Leonard Putnam and *Leslie E. Still, Jr.,* for intervenor City of Long Beach.
Frederick G. Pfrommer and *Leland E. Butler* for intervenor The Atchison, Topeka and Santa Fe Railway Co.
Israel Packel and *Gordon P. MacDougall* for intervenor Commonwealth of Pennsylvania.
Robert Szwajkos, John J. Paylor, Jervis Langdon, Jr., and *George P. Baker* for intervenor Trustees of the Property of Penn Central Transportation Company.
Richard Lalanne for intervenor Trustees of the Property of Lehigh Valley Railroad Company.
J. P. Clark, Thomas F. Patton, and *Ralph S. Taylor, Jr.,* for intervenor Trustees of the Property of Erie Lackawanna Railway Co.
John J. Paylor for intervenors the Baltimore and Ohio Railroad Company, the Chesapeake & Ohio Railway Company, and Western Maryland Railway Company.
Richard W. Kienle for intervenor Norfolk and Western Railway Company.
Robert S. Davis for intervenors the Missouri Pacific Railroad Company and the Texas and Pacific Railway Company.
J. Thomas Tidd, James C. Schultz, Stuart G. Meister, John Hart Ely, and *Barry Chasnoff* for intervenor Department of Transportation.
Charles M. Butler, III, for intervenors John Tower, Member from Texas, United States Senate, and Bill Archer, Member from the Seventh District of Texas, United States House of Representatives.
C. D. Haig, Jr. and *Charles H. Lombard* for intervenor Alabama State Docks Department.
Thomas J. White, Norman E. Sutherland, Lloyd Robinson, and *Milton A. Mowat* for intervenor the Port of Portland, Oregon.
John L. Hill, Larry F. York, Rex H. White, Jr., and *David Hughes* for intervenors State of Texas and the Port of Beaumont Navigation District of Jefferson County, Texas.
Jack L. Well, Burt Pines, and *Frank Wagner* for intervenor City of Los Angeles.
Robert K. Jorgensen for intervenor the International Association of Great Lakes Ports.
Arthur W. Jacocks for intervenor Virginia Port Authority.
S. H. Moerman, Douglas W. Binns, and *P. M. Donovan* for intervenor the Port Authority of New York and New Jersey.
Donald J. Brunner, John Robert Ewers, and *C. Douglass Miller* as Hearing Counsel, intervenors.

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

A maritime association, a labor union, and two port authorities have challenged the legality of a transportation system which has come to be known as Far East mini-landbridge or just minibridge. The Council of North Atlantic Shipping

[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).

Associations (CONASA), the International Longshoremen's Association, AFL-CIO (ILA), the Delaware River Port Authority (DRPA), and the Massachusetts Port Authority (Massport), charge fifteen common carriers by water[2] with violations of "the following sections of the Shipping Act, 1916 (46 U.S.C. 815-817) for the reasons expressed:

(1) Section 16—by subjecting localities and descriptions of traffic to undue or unreasonable prejudice or disadvantage, and granting other localities undue preference or advantage.

(2) Section 17—by demanding, charging or collecting rates or charges which are unjustly discriminatory between shippers or ports, through absorption, port equalization or other unlawful devices.

(3) Section 18(b)(5)—by charging rates so unreasonably low as to be detrimental to the commerce of the United States."[3]

This case has assumed a significance which goes beyond the interests of the complainants. The Commission while denying a petition for the institution of a "rulemaking" proceeding to dispose of all the so-called "cargo diversion issues," designated this proceeding as the lead case for the establishment of general "minibridge" principles. (See Order of the Commission dated December 5, 1973.) For obvious reasons a number of petitions to intervene were filed and granted.[4]

The Minibridge System

The first minibridge tariff filed with the Commission was that of Seatrain, from the United Kingdom and Europe to the West Coast, effective January 14, 1972.[5] This was soon followed by Seatrain's Far East minibridge tariff which became effective on January 24, 1972.[6]

All the Far East minibridge services are conducted under joint through service tariffs filed with both this Commission, which has jurisdiction over the water transportation, and the Interstate Commerce Commission, which has jurisdiction over the rail transportation.

The physical characteristics of the Far East to U.S. Atlantic minibridge service are typical of most if not all minibridge services. The minibridge tariff calls for a single bill of lading and a single rate. Under the tariff the steamship line and the rail carrier have agreed upon the division of the "joint rate." Using as an example a movement from Kobe, Japan, to New York, the agreed to

[2] The named respondents are American Mail Lines (AML), American President Lines, Ltd. (APL), Japan Lines, Ltd., Kawasaki Kisen Kaisha Line, LTd. (K Line), Mitsui-O.S.K. Lines Ltd., Nippon Yusen Kaisha Line, Ltd. (NYK), Orient-Overseas Line, Inc. (OOL), Pacific Far East Line (PFEL), Phoenix Container Liners, Ltd., Sea-Land Service, Inc., Seatrain Line Inc., Showa Shipping Co., Ltd., United States Lines., Inc., Yamashita-Shinnihon Line, and Zim Israel Navigation Co., Ltd.

[3] Originally, complainants alleged that the respondents were operating the Far East minibridge system pursuant to unfiled and unapproved agreements in violation of section 15 of the Shipping Act, 1916. The section 15 allegation was dismissed by an order served April 8, 1975.

[4] For a listing of the intervenors see Appendix A.

[5] There is in addition to the so-called mini-landbridge or minibridge service a "landbridge" service between Europe and the Far East. As distinguished from minibridge, landbridge cargo originates say in Europe, moves by water to a U.S. Atlantic Coast port, across the U.S. by rail to a West Coast port and then by water to a Far East port.

[6] The Commission has by now approved under section 15 of the Shipping Act some 27 agreements or amendments to agreements granting "intermodal" authority for joint rail/water through service. For convenience, and to save space the names of the conferences have been omitted and only the FMC agreement numbers given: No. 9982-3, No. 2846-24, No. 5850-25, No. 8210-24, No. 93-9, No. 7100-16, No. 50-27, No. 14-33, No. 150, No. 3103-8, No. 2744, No. 5660, Nos. 6190 and 6780, No. 6400, No. 7590, No. 7670, No. 7770, No. 7890, No. 8090, No. 8660, No. 8770, No. 9214, No. 9360 A and B, No. 9548, No. 9615, and No. 9988.

*division takes the form of water rate and a flat rail rate per container, the rail car-*riage being from rail ramp at the West Coast port to rail ramp at New York.[7] The Kobe shipper takes delivery of the water carrier's container, packs it, and delivers it to the water carrier's container yard. The water carrier collects the total freight from the shipper, moves the cargo to the West Coast port (e.g. Long Beach), pays the Long Beach terminal and wharfage charges, transfers the cargo from the ship to the rail ramp, and pays the railroad the agreed rate for transcontinental transport. The consignee receives the container at the New York railhead. Outbound the operation is reversed. The shipper, of course, has the free choice between an all-water service or a minibridge service. Often, as in the case of APL and the Japanese line, both services are offered by the same line.[8]

DISCUSSION OF THE "EVIDENCE"

The record in this proceeding consists of 2,651 pages of transcript and 100 exhibits.

The complainants[9] have quite naturally attempted to carry the main burden of demonstrating the impact of the Far East minibridge. Intervenors in support of complainants by and large adopt all findings of fact proposed by CONASA insofar as they are relevant to their respective positions.

For reasons which should soon become apparent, I consider it necessary to discuss the "evidence" presented at the hearing before making specific findings of fact.

One example of complainants' approach to the evidence is the following *finding of fact* proposed on brief: "The Governor of Pennsylvania testified that he found the minibridge to be unjustly discriminatory and unduly prejudicial against the Port of Philadelphia." Now, strictly speaking, that proposed finding could be adopted. The Governor did indeed testify and in his testimony he "concluded (found) that minibridge was unjustly discriminatory and unduly prejudicial against Philadelphia." But to adopt such a finding would not advance complainants' case. It would merely show that there was testimony by the Governor. The Governor's "finding" was not supported by hard evidence and no matter how eloquently expressed, remains nothing more than his considered opinion or assertion. Unfortunately a dismayingly large portion of complainants' proposed findings fall into one or the other of these categories—Opinion or assertion. *See e.g.* the testimony of the Governor of Texas. (Ex. 39).

A. General Impact of Far East Minibridge

CONASA offers the testimony of Mr. Richard J. Barber[10] an economist and lawyer who undertook to conduct a study of the impact of the Far East minibridge

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[7] The flat rail rate decreases as more than 20, 40 or 60 containers are offered.

[8] Rather hyperbolically, one of the complainants states as a proposed finding of fact that "The only justification urged for such flagrant violation of the law (minibridge operations) is a desire to provide shippers a choice." This statement is then footnoted: "It is absurd for carriers such as Seatrain, Showa, Phoenix, PFEL and OOL which do not provide all-water service to any CONASA port to masquerade as providing a 'choice'." The "choice" of course is between all-water and minibridge regardless of whether both services happen to be offered by the same carrier.

[9] CONASA, the ILA and DRPA filed a joint brief. Massport filed a separate brief. For convenience and unless specified, or the context requires otherwise, "CONASA" when used applies to all complainants including Massport, and any reference to complainants or respondents includes those intervenors taking positions in support of them.

[10] Mr. Barber's testimony was also adopted by the Port of Beaumont, the Port of Houston Authority, the Houston Port Bureau, Inc., and the Texas Port Association.

service on ten selected North Atlantic and Gulf ports.[11] Additional witnesses appeared on behalf of the ports of Philadelphia, New York/New Jersey, Boston, New Orleans, Beaumont, Houston, Galveston, Lake Charles and Baltimore. But before using the specific conclusions of Mr. Barber, CONASA urges as a general proposition that the nation's ports, in order to meet the "widely anticipated continued growth in world trade," will have to develop new container and other cargo handling facilities.[12] These new facilities will have three characterisitics: (1) They are very long-lived and fixed in place, and their costs cannot be modified to reflect diminution or changes in container traffic volume; (2) they are very expensive and paying for them entails large scale, long-term borrowings, often through revenue or general obligation bonds; and (3) they must be intensively used if the fixed investments are to be amortized. CONASA follows this proposition with the prediction that it will be difficult to obtain the "tremendous additional investment" to construct these new facilities. This difficulty it seems stems from the uncertainty of a port's prospects when minibridge threatens to "drain" cargo and revenue from the port. CONASA then moves to what this cargo drain means to a port.

The value of a ton of containerized cargo "drained" from a port is "conservatively" estimated by the American Association of Port Authorities as $25.00. This assertedly represents the income that arises directly from loading and unloading the cargo and other port charges.[13] To this CONASA would apply the so-called multiplier effect.[14] This effect attempts to measure "the additional revenue generated by the flow of direct revenue payments through the local economy" when a ton of containerized cargo moves through the port. It is measured "cautiously" at 2.5 or approximately $60 a short ton or "not at all unreasonably" at a multiplier of "three"—which comes to $75.00 a ton. "Thus," to CONASA, "the value of a ton of cargo, including both direct and indirect income to a port is approximately $75.00 ($25.00 × 3)," which when applied to the "estimated 708,825 tons of container cargo *diverted* by minibridge from the ten ports studied," comes to a revenue loss for the 18-month period mid-1972 through 1973 of some $53 million.[15] CONASA would then apply these "figures" to individual ports. Using numbers of containers supplied by the respondents themselves CONASA says that respondents *diverted* containers over the 18-month period July 1972—December 1973 on the following scale:

Boston	6,392
New York	21,454
Philadelphia	3,291
Baltimore	3,236
Hampton Roads	2,180
	36,553 Estimated Loss

[11] The ports studied were Boston, New York/New Jersey, Philadelphia, Baltimore, Hampton Roads, New Orleans, Lake Charles, Beaumont, Galveston and Houston.

[12] This prediction of growth in exports and imports is based on a table which does not deal with particular ports or even geographical areas in the U.S.

[13] The $25.00 a ton figure takes in account "inflation" and is less than the figure (not in the record) for handling a ton of breakbulk cargo.

[14] By the multiplier effect is meant "the cumulative revenue generated as the first wave of direct port related revenue flows, in ripple like fashion, through the local economy in which the port is participant."

[15] If the 2.5 multiplier effect had been used, the "loss" would have been $43 million.

However there is a fatal flaw in the figures upon which complainants' "estimated loss" is based. This flaw is pointed out by DOT which states on brief, "The testimony[16] does not show, however, how much Far East cargo was *diverted* by Minibridge." (Emphasis mine.) What the record does show is the *level* of minibridge operations. The assumption inherent in complainants' assertions of diversion is that *all* traffic consolidated and shipped from the railhead at each of the ten ports is traffic which would have moved through that port were it not for the minibridge system or at the very least originated in territory which is naturally tributary to that port. Of course it does not show the inland point of origin of the particular container loaded at the port city railhead. That this assumption is incorrect is clear from the record.

Complainants' main witness, Barber, admitted that he did not know the exact origin or destination of the cargo moving by minibridge; rather he counted as "diverted" all minibridge cargo which was handled at a rail terminal at or near one of the ten ports. By the witness's own admission the cargo he counted as "diverted" could have come from more than 200 miles away from any of the ten ports. An example of the fallacy in this approach is demonstrated by the fact that some 26 percent of Phoenix Lines' minibridge containers originated in or were bound for states different from the one in which the railhead was located. Thus, even if such cargo had moved all-water to the Far East, it would not necessarily have moved through one of the ten ports. It might just as well have passed through one of the many other ports on the East and Gulf coasts with container facilities. Indeed, Baltimore, one of the ten ports who testified, offered testimony that the port was already so congested that no more Far East traffic could be handled if it became available.

In addition there is testimony by shippers that some or all of their cargo would not have moved at all and therefore would not have moved through the ten ports. For example, W. J. Jackson of E.I. Dupont DeNemours and Company and Frederick Drager of Gould, Inc., testified that their overseas sales would decrease were it not for minibridge. Some shippers indicated that if minibridge were not available, they would not be able to do any business in the Far East.[17]

Of course, this method used by complainants to measure minibridge cargo "diversion" has a direct bearing on the reliability of the computations of losses to the ports in both containers and revenues. The unwarranted assumption that all minibridge containers would have moved all-water through one of the ten ports causes the asserted number of containers, and therefore cargo tons, allegedly lost to minibridge to be imprecise, unreliable and at the very best overstated by a degree impossible to measure on this record.

Respondents on the other hand urge that it is misleading to measure the impact of minibridge on the ten ports only in terms of Far East containers which tends to distort and exaggerate that impact. For example, if minibridge is viewed in the light of the ports total operations, it accounted for only 4.6 percent of the ten ports' total container movements and 1.5 percent of the total cargo movements. A comparison of total minibridge traffic to the overall increase in Far East

[16] As used by DOT "testimony" includes exhibits.

[17] *See e.g.* statements of M. Lowenstein and Sons and North American Hide Exporters Inc., reflected in Table III of Exhibit 95.

container traffic at the ten ports for the relevant time period reveals that minibridge traffic was equal to only 35 percent of the total growth in Far East container traffic during this period. Thus, minibridge has not had the overwhelming impact on the method of shipment to the Far East that complainants assert and such impact as minibridge has had is more than offset by the growth in Far East shipments generally, including those not moving via minibridge.

Complainants' assertions of losses from Far East minibridge do not take into account any gains from other minibridge operations. For example, Seatrain moved more than 27,000 containers between July 1973 and December 1976 through one or more of the ten ports under a minibridge system linking the West Coast of the U.S. with Europe (the so-called Euro-Cal minibridge).[18] Baltimore also states that it handles a substantial number of Euro-Cal minibridge containers and is working on plans to encourage an increase in this traffic. Finally, there is evidence that losses suffered by port cities because of minibridge may be recouped in other ways. There is the already mentioned Euro-Cal minibridge;[19] and, additionally, losses incurred when a container is not loaded on a ship are to some extent made up since the container must be loaded aboard the train at the port cities railhead. This benefits other labor and presumably carries with it its own ripple effect, but a positive rather than a negative one.

The "evidence" alleged to suport the impact of the Far East Minibridge on the individual ports studied will be taken up next.

1. New York

CONASA launches a two-pronged attack on the mainibridge operations as they affect New York: (1) Its impact on labor at the Port, and (2) its impact on Port revenues. To take labor first.

CONASA asserts, "It is undisputed that, at least partly due to Far East minibridge, the ILA has only half the members in the port of New York that it had only a few years ago." Thus, in 1966, the ILA active membership eligible for Guaranteed Annual Income (GAI) was 21,471 but in 1974 had fallen to 11,746. The total manhours in New York in 1966 approximated 43 million while in 1974 manhours were down to about 24 million.[20] These are the only figures offered by CONASA to demonstrate the "decimation" of labor at New York. The remaining proposed findings deal with the "good-faith" bargaining by the ILA, the cost of the GAI program and other fringe benefits for ILA members and general argument that minibridge erodes work opportunities and is an "outright

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[18] A situation which directly reverses the impact of the Far East minibridge service.

[19] Complainants point to a decline in Euro-Cal minibridge traffic (1973—2943 containers, 1974—2281 containers). This is for Seatrain only however. CONASA also contrasts the Euro-Cal and Far East minibridges. A Euro-Cal container merely involves loading or unloading the container on the ship while Far East deprives CONASA ports of other work opportunities such as stuffing and stripping, terminal operations, etc. Here we have not only the basic assumption that the minibridge cargo would move all-water through a CONASA port, but also that outbound cargo would require consolidation and stuffing into the container and that inbound cargo would require stripping from the containers at the port city terminal area. Since by their own admission, complainants do not know the ultimate origin or destination of the cargo, there is no way on the basis of this record to measure in any way the losses allegedly incurred.

[20] CONASA also asserts that Boston estimated the total loss in wages, pension and coastwise assessment benefits in 1973 was $315,230 and $605,777 in 1974. This is best dealt with when tha Port of Boston is discussed. No other figures are offered by CONASA for other ports.

evasion of the container royalty fund in all CONASA-ILA *ports.*"[21]

The first thing to be noted is the period chosen by CONASA to illustrate the dire straits of ILA labor at New York. Of the eight years covered, five were prior to the advent of minibridge, but included the period of the so-called container revolution, and only three were after the beginning of the minibridge system. Breaking down the figures by periods, from 1966 to 1971 the last year prior to minibridge, the membership went from 21,471 to 14,942, a drop of 6,529. For the same period manhours went from 43,695,544 to 30,849,623, a reduction of 12,845,921. For the period covered by minibridge 1972–74, membership in 1972 was 12,984 while in 1974 it was 11,746, a drop of 1,238. Manhours for 1972 wee 22,627,084 while in 1974 manhours were 24,771,211. Thus, when the general conclusion drawn by CONASA that the ILA had only "half" the members in 1974 that it had in 1966 at the Port of New York and that manhours "plummeted" from "approximately 43 million" to "about 24 million" only "eight short years later," may be arithmetically within the bounds of accuracy, it completely distorts the impact of minibridge operations on the labor situation at New York. By far the greatest drop in ILA membership took place prior to the advent of minibridge, and during the minibridge period the manhours actually increased from the low point reached in the first year of minibridge operations. Finally, the assertion that minibridge "decimates port labor and affects labor stability at all Atlantic and Gulf ports" borders on the absurd when you consider the fact that under even the most liberal estimates the "loss" of cargo to minibridge operations at all ten ports amounts to only 1.5 percent of the total cargo moved through those ports.

As already noted CONASA asserts that 21,454 containers have been "diverted" from the Port of New York by the Far East minibridge system. The testimony of Mr. James J. Dickman is offered by CONASA in an effort to show the precise impact of the Far East minibridge.[22] According to Dickman Far East minibridge "diverted" an "approximate average of 500 containers a week in 1974." Also " . . . according to reports received from industry sources" Dickman concluded that "most of this cargo is cargo that would have moved through the Port of New York." In 1974, therefore, it was estimated that "as a result of the staggering diversion" of 570 containers a week the economic loss to New York "was on the order of $20 million." Dickman breaks the loss down as follows:

$ 4,600,000	-	direct payroll loss
4,000,000	-	loss of fringe benefits
2,200,000	-	loss of overhead and supervision revenue
3,000,000	-	loss of dockage and wharfage charges
2,000,000	-	loss of insurance, taxes, waterfront commission
3,000,000	-	loss of miscellaneous items such as cargo watching fees, maintenance, truckloading equipment
1,100,000		loss of potential profit
$20,000,000	-	Estimated Direct Loss in 1974 to Port of New York

[21] The container royalty fund is the result of a contractual program designed to "compensate" the ILA where its members do not stuff or strip certain containers at the pier. As already noted this of course assumes that minibridge containers would not only move all-water through New York but that they would require stuffing or stripping. Again the record provides no basis for measuring how many, if any, containers would have met this condition.

[22] Mr. Dickman is President of both CONASA and the New York Shipping Association. The figures offered by Dickman were his own and not those of the Port of New York Authority which did not appear in the case.

Dickman next applies the "multiplier effect" figures that the total loss to the economy of New York for 1974 was $60 million. A great deal of difficulty is immediately encountered in accepting Dickman's estimates of the injury to the Port of New York caused by minibridge operations.

In the first place Dickman presented no documentary evidence in support of his assertions of losses to the Port of New York.[23] On cross-examination Dickman was unable to call upon any specific documentary evidence to support the figures used by him to estimate the losses in revenue to the Port of New York. Rather he pointed only to "people" he represented in the minibridge trade, "industry sources," unproduced records of "meetings," and his general "experience"—hardly a proper foundation upon which to base a finding of a $60 million loss.

2. PHILADELPHIA

Philadelphia "as a conservative estimate" figures it lost "31,000 tons of cargo" in 1973 and as a result the port and the "local economy" lost "in the neighborhood" of 1.5 million dollars in combined direct and indirect income. The total investment in general cargo facilities at the port is "upwards of $165 million." Some $47 million was invested in container facilities in 1973. The port urges that the new investment is based upon anticipated continued growth and that the anticipated growth "is made uncertain by the continuing drain of cargo caused by minibridge, with the result that future investments are cut back or abandoned altogether." Thus a planned third container terminal "may not become a reality because of minibridge."

In contrast to the gloomy picture painted above the record shows: Philadelphia containership services are concentrated in trades other than the Far East, and Philadelphia has no specific figures to back its assertion of increased cargo diversion from minibridge. Philadelphia's own estimates show that from the fourth quarter of 1972 to the fourth quarter of 1973 there was an increase of only one minibridge container. The basis for Philadelphia's belief that cargo drain by minibridge is on the rise came from the port's staff which made no attempt to quantify with any degree of accuracy the number of containers allegedly diverted or to be diverted.

In 1973 Philadelphia reached a record total of more than 79,000,000 tons of bulk and general cargo. General cargo to the Far East in 1973 increased 20.8 percent over 1972. Container cargo went from 546,760 tons in 1972 to 1,050,000 tons in 1973. Using the Port's own estimate of an average of 13 minibridge containers a week, minibridge cargo represents .039 percent of bulk and general cargo, .048 percent of general cargo, and 2.9 percent of container cargo. Finally, in a statement before the Pennsylvania Senate's Special Sub-Committee on Port Development on April 25, 1974 (which was after the complaint in this case), the Delaware River Port Authority said that the Packer Avenue and Tioga container terminals were nearing their capacity and that container cargo had increased to 1,050,000 tons in 1973, almost double the volume of 1972. The statement was directed to the funding required for planned expansion. No mention was made of minibridge and its alleged adverse effects.

[23] The only exhibit cited to support Dickman's testimony was Exhibit 7.

3. *MASSPORT (BOSTON)*

The Massachusetts Port Authority is charged with the responsibility of promoting and protecting the maritime commerce at the Port of Boston. As of June 30, 1974, the value of Massport's capital investment in maritime facilities was approximately $38,600,000. In addition, Massport owes the Commonwealth of Massachusetts an additional $17,650,000 for the port properties which it acquired from the Commonwealth in 1959. Total Massport investment in its maritime facilities as of June 30, 1974, was therefore $56,250,000.

The Far East general cargo tonnage figures compiled by the Bureau of Census for Boston for the years 1968 through 1973 and Massport's own estimate of 1974 tonnage show the historic steady level of Far East traffic until 1972 (the decreased tonnage in 1969 is largely attributable to a prolonged ILA strike in that year).

Far East tonnage at Boston was increasing prior to the full-fledged introduction of minibridge in 1973.

Commencing in 1973, the Far East tonnage moving through the Port of Boston decreased.

During the last two quarters of 1972 and in 1973, "substantial numbers" of containers carrying Far East cargo were moved into and out of Boston by minibridge. The increase in minibridge movements by respondents at the Port of Boston is "illustrated" by the following figures extracted from respondents' answer to complainants' interrogatories as set forth in exhibit 7, table C:

	Total TEUs[24] Both Directions
3rd Q 1972	830
4th Q 1972	1,906
1st Q 1973	2,014
2nd Q 1973	2,311
3rd Q 1973	2,327
4th Q 1973	2,218
Total	11,606

Massport asserts that the growth of minibridge at the Port of Boston increased dramatically between 1973 and 1974, and projecting the continuing erosion of Far East waterborne cargo in 1974, Massport contends that approximately 8,000 additional TEUs were lost to minibridge in 1974.

To Massport the decrease in Far East tonnage at the Port of Boston in 1973 was principally attributable to the introduction of minibridge movements between the Far East and New England. Moreover Massport asserts that New England shippers located near Boston who formerly shipped to the Far East by water through the Port of Boston simply switched their method of shipping to minibridge.

And finally Massport contends that there is no evidence to support a claim that the Port of Boston is getting any significant reverse minibridge cargo bound for Europe.

[24] TEUs refers to twenty-foot equivalent units or containers.

The foregoing represents Massport's view of the record in this case of the impact of Far East minibridge on the Port of Boston. There are however a number of qualifying factors in the record which Massport has not taken into account.

In trying to show the decline in Far East cargo for 1974, Massport used the total Asia figures with no breakout to show how much "Far East" cargo was lost.[25]

Massport experienced 140 percent growth from 1972 to 1973 in container cargo volume. The amount of containerized tonnage went up 135,450 tons between 1972 and 1973. Any drop in 1974 volume is explained by Massport's internal memo which stated that Massport "simply does not have the space to sustain this growth through 1974." Other reports indicated:

> We [Massport] are very definitely outrunning our available space and growth may force Massport into more and more costly operations, rather than achieving expected economy scales.

Total Far East tonnage at Boston increased from 8,666 tons for the last half of 1972 to 26,667 tons for the last half of 1973 or an increase of approximately 20 percent.

Sea-Land's minibridge containers at Boston were 8,870 for 1973, which at an average 8.5 tons (as used by Massport's witness, Mr. Soules) represent .27 percent of total cargo moving through Boston in 1973 and 12.7 percent of containerized cargo. Additionally, Massport's general cargo tonnage decreased from 1972 to 1973 and is estimated to have decreased from 1973 to 1974 while total container cargo has increased. Massport, without any quantification, assumed that every ton of general cargo lost was diverted to minibridge in 1974. The statistician who prepared Massport's evidence admitted on cross-examination that the lower tonnages were not necessarily container cargo and consequently probably were not caused by minibridge. Additionally the witness admitted that the estimated 1974 total container cargo was understated.

Finally, Massport's own study (the Maguire study) shows that additional container handling facilities within the port will be required to handle the increased growth projected to 1990. The study concluded this even though minibridge had been in operation for over two years. One of the things considered by Massport in addition to its study was the Maritime Administration study which predicted surplus port facilities on both the Atlantic and West Coasts. Aware of these factors, Massport intends to expand its container facilities.

4 NEW ORLEANS

The Port of New Orleans is located on the Mississippi River and two man-made channels—the Industrial Canal and Mississippi River Gulf Outlet.

Navigation from the Gulf to New Orleans involves a distance of 124 miles on the River, with steaming time of 7–8 hours conditioned to water levels; the Outlet distance is 66 miles requiring 5 hours.

As presented in the 78th Annual Report of the Board of Commissioners of the Port of New Orleans, investment in fixed assets (land, wharves, sheds, etc.) had reached the amount of $163,639,077 in fiscal year 1974.

[25] Additionally the figures used to support Boston's loss were based on total figures for all general cargo and they indicate clearly that the greater part of the loss was other than container cargo

General cargo berths total 97 in number, and represent a total frontage of approximately 60,000 lineal feet and 14½ million square feet of covered and open area. These facilities are the primary source of Port income. In 1974 the upsurge in international commerce developed exceptional earnings of $13,070,646, exceeding the prior fiscal year by approximately $3 million.

General cargo berths also handle container traffic.

At present two full container berths are in operation. Their construction costs were in excess of $12 milllion. One of the berths is leased to Sea-Land on an annual rental basis. In the aggregate, the Board has expended over $15 million for the development of container facilities. Constructions in progress and future planning indicate an additional expenditure of approximately $45 million on container facilities will be required to meet the needs of the Port of New Orleans by the year 2000.

In terms of 20′ equivalents, the Port of New Orleans handled 76,638 containers in the fiscal year 1972–1973 (ending June 30), while for the fiscal year 1973–1974, comparable volume was 104,000 containers. (Both loaded and empty containers appear in these totals.) Basing upon an estimation of 11 net tons per inbound container and 13 tons outbound, containerized cargo tons in 1972–1973 aggregated 490,356; tons in 1973–1974 were 793,717.

In relation to total general cargo handled through the Port in 1973 and 1974, 10 percent was containerized.

During the last two quarters of 1972, and the full year 1973, New Orleans asserts that 5,790 container units moved in minibridge service between New Orleans and the Far East. Here again the figures merely show the number of containers loaded or unloaded at the railhead.

The volume of general cargo moving through Port of New Orleans breaks down into three major areas of trade—Europe, Latin America and Asia. General cargo movements with Asia, and more particularly Japan, represents 20 percent of the total. This makes Japan the largest single customer of the Port.

This fact was given strong consideration in planning of capital facility—programs designed to the accommodation of containerized cargoes.

In the years 1972–1974, in units and cargo volumes, increases were experienced, including the Far East. The really substantial increase in containerized cargo, however, was in the European trade.

Containers in the Continent-United Kingdom trade were 31 percent of the total in 1972, 41 percent in 1973, and 50 percent in 1974 (seven months). In comparison, the Far East ratio was 22–23 percent in the years 1972–1973, and 15 percent in 1974.

Studies and projections indicate that the Port's container capability at present can accommodate an additional 25,000 containers per year through existing facilities. Development of additional acreage as programmed for one of the container facilities would increase capacity by 24,000 TEUs at that facility alone. But the assurance of further investment would depend on obtaining additional cargo. All of the containers now moving between the Port and Far East are transported via conventional vessels berthed at river facilities, and there is no full container vessel service from or to the Far East which would utilize facilities constructed to that purpose.

As a sure average, using New Orleans as the last port of call and Japan the first port of call, voyage time to the Far East is 20–22 days, via the Panama Canal.[26] Even so steamship services from New Orleans to the Far East reduced in the 1973–1974 period; Japanese carriers for example went from 13 to 9 lines. There was, however, a sufficiency in sailings to accommodate all cargo offerings, in fact, volumes of cargo offered in the last half of 1973 and first half of 1974 resulted in an increase in frequency of sailings.

As a consequence, progression of Berth 4 has been put on a delayed basis. If the need is not there with under-utilization of Berth 5, alternate uses may be developed. About $150 thousand has been spent on design.

The Port's agent in Japan advised the Director for Trade Development that the new facility should not go forward because of diversions of Japanese cargoes to minibridge.

As before there are flaws which seriously distort the picture painted by New Orleans of the impact of the Far East minibridge.

The record shows: Total cargo increased 49.8 percent from 5,056,000 short tons in 1972 to 7,576,000 short tons in 1973. General cargo increased from 1,499,000 short tons in 1972 to 1,649,000 short tons in 1973. Total containerized tonnage increased 43.7 percent from 516,000 tons in 1972 to 742,000 tons in 1973. The number of container units increased from 30,394 in 1971 to 64,020 in 1973. Far East container tonnage increased from 179,000 tons in 1972 (approximately 3 percent of total tonnage) to 256,000 tons in 1973 (again approximately 3 percent of total general cargo tonnage). The number of Far East containers increased from approximately 10,000 in 1972 to 15,000 in 1973. For the fiscal year ended June 30, 1974, New Orleans had revenue of $2,476,300 as opposed to $1,403,194 for fiscal 1973.

Converting forty-foot units and the "other" units (on the same basis) to TEUs, and multiplying by the average of 11 tons per container claimed by New Orleans, minibridge container cargo in 1973 was approximately 1.2 percent of total general cargo, and 5 percent of total Far East general cargo. Far East containerized cargo represents 3.4 percent of the Port's total general cargo.

The Port of New Orleans has a total investment of $163,639,077 of which approximately $15,000,000 is for container facilities and less than $500,000 is attributable to the Far East trade. This represents approximately .3 percent of the total investment and 3 percent of container facilities' investment.

Port of New Orleans does not know the origin or destination of minibridge cargo. It does know, in the absence of minibridge, whether cargo in containers would go overland to other ports rather than through New Orleans. In fact, not all minibridge cargo went previously all-water from the Port of New Orleans.

The Port of New Orleans maintains offices in New York, Chicago and St. Louis to serve the area surrounding these cities and solicit business therefrom. Fifty-two percent of New Orleans cargo is believed by the Port to be "up for grabs" among Atlantic and Gulf Coast ports.

The principal item of import from Japan through the Port of New Orleans is steel. Steel is not a containerized commodity.

[26] Obviously, this is not always the case.

5. GALVESTON AND BEAUMONT[27]

A rather glaring example of the rather generalized approach taken by the opponents of the Far East minibridge system appears in a section of the joint brief headed "Combined Evidentiary Summary and Argument."[28] A perhaps over-long quote from this section will demonstrate what is meant:

> The interest of Texas in this proceeding is best illustrated by Witness Carl Parker, Jr. of Galveston's Exhibit No. 37 which is a synopsis of information derived from Respondent Carriers concerning the volume of containers moving by mini-bridge service between the Gulf and Atlantic ports. This Exhibit demonstrates that during the year 1973, of all westbound export mini-bridge traffic handled, 59.51% originated at the Gulf ports. The Port of Houston alone originated 41.5%, and Texas ports accounted for over 46% of the admitted total. There is ample reason to believe, in view of other admitted evidence, that the total amount of cargo moving in this service is even higher. To document the diversion of cotton, the principal commodity indigenous to the Port of Galveston, attention is called to witness Louis C. Oliver and Exhibit 36. Mr. Oliver is the General Manager and Secretary of the Galveston Cotton Exchange and Board of Trade, and is responsible for the keeping of all statistical and financial records of the Exchange. He furnished a 26 year history of cotton receipts and exports to and from the City of Galveston. His testimony revealed the loss of 728,619 bales of cotton from the Cotton Exchange records during the 1973/1974 cotton season which could only have been moved from Galveston in containers. His testimony emphasized the yearly increase in this mysterious disappearance which began in 1971, a year which coincides with the advent of the mini-bridge service. This evidence is further verified by a reconciliation Mr. Oliver made of his statistical records (Page 3, Exhibit 36) which excluded 20,000 bales lost to a fire, and 75,000 moving in trucks to various Southeastern points. With the obvious loss of cotton inferentially going to mini-bridge, thereby bringing about a corresponding change in the pattern of shipping practices, cotton will no longer come to the City of Galveston. As Oliver points out on page 3 of his written statement: "This will reduce the need for our services and impair our revenues which are based on 1/8th of a cent per bale placed in the warehouse, and 9 cents for cotton available for certification. This will adversely affect all other maritime related industries that have depended upon our services for over one hundred years."[29]

Galveston goes on to propose as findings of fact:[30]

Galveston is the Nation's "number one cotton facility." The Port has surpassed all of the United States ports in cotton export tonnage for over fifty years.

If cotton should be lost to Galveston, the City would experience closing of the cotton warehouses employing 1,769 individuals, adverse impact on 1,860 longshoremen, stevedores and freight handlers and 450 Port employees.

Twenty-five percent of the ship calls at the Galveston Wharves are cotton ships.

During the year 1973, 1,096 ocean vessels called at the Port of Galveston. In 1974, the total was 905 vessel sailings.

The Port of Galveston's Far East sailings averged 25 calls per month during

[27] The State of Texas, the Board of Trustees of the Galveston Wharves, the Galveston Cotton Exchange and Board of Trade and the Port of Beaumont Navigation District of Jefferson County filed a joint brief.

[28] Which section strangely enough precedes the section titled "Proposed Findings of Fact." Even stranger is the fact that in the Galveston's proposed findings these figures are not alluded to or proposed as facts to be found.

[29] The first thing to be noted is Texas' interest is best illustrated by an exhibit which synopsises information from respondent carriers on the volume moving by minibridge between the Atlantic and Gulf ports. From this information it is asserted that "59.51 percent originated at the Gulf ports." In reality it means only that the cargo was loaded or delivered at Gulf port railheads. It does not show that the cargo would have moved *through* a Gulf port. Moreover the "mysterious disappearance" of some quarter of a million bales of cotton is only "inferentially going to minibridge." If the disappearance is "mysterious" how then attribute it to the overt minibridge operations?

[30] Quotation marks have been omitted and some small paraphrasing and reorganization has been indulged in.

the first half of 1973 which dropped to an average of 6 calls a month during the last quarter of 1974.

Beaumont simply states that, "The all-water sailings from the Port of Beaumont to the Far East in 1973 have decreased by more than 75 percent from the prior year."

Thus it would appear from the above that minibridge is rather a drastic effect upon Galveston and Beaumont. However, the record also clearly shows that despite the mysterious disappearance of the 1/4 million bales, cotton exports increased from 1969 through 1973.

The record further demonstrates that total tonnage at Galveston increased from 719,667 tons in 1972 to 1,054,313 tons in 1973. Outbound total Far East general cargo for 1972 was 277,694 tons, which increased to 525,033 tons for 1973. Total containers handled during 1972 were 9,204 TEUs of which 30 were to the Far East. Cotton exports increased to all Far East destinations from 1,413,539 bales in 1972/73 to 1,499,264 bales in 1973/74. Exports to the Far East increased 61 percent from 932,649 bales in 1969 to 1,499,264 bales in 1974. Total exports to China, Japan and Korea increased from 849,254 bales during the 1971/72 season to 1,720,148 for the 1973/74 season.

Utilizing 80 bales per forty-foot container at an average of 530 pounds per bale, minibridge tonnage in 1973 was 13,175.8 tons or 1.2 percent of total tonnage at Galveston for 1973, and only 2.5 percent of *outbound* Far East general cargo for 1973. Assuming there was some inbound Far East general cargo, the 2.5 percent would decrease.

Galveston, like the other ports in this proceeding, improved its container facilities after the advent of minibridge tariffs. The Galveston container facilities first became operational in 1972 while the minibridge tariffs had been filed a year earlier.

Congestion on the wharves in 1973 and 1974 may have forced some shippers to use minibridge rather than all-water service from Galveston. Indeed, port officials warned that there could be chaos on the wharves in the spring of 1974.

As for the Port of Beaumont, it admits that the respondents have not taken away any container business which the port enjoyed. In fact, Beaumont has no facility dedicated exclusively to container operation. Approximately 200 short tons of container cargo, either import or export Far East cargo, moved through Beaumont during 1971, 1972, and 1973 which is only an infinitesimal percentage of its 1974 general cargo of 628,134 tons.

6. HOUSTON

The book value of facilities of the Port of Houston Authority, excluding its investments at its Bayport Divison, as of November 30, 1974, is $75,131,798.00, which includes fixed assets such as land, buildings, railroads, and machinery and equipment. The total investment in all facilities, including $22,693,926.00 at Bayport, is $125,967,610.00.

The Port of Houston Authority has invested substantially in container facilities since Sea-Land's first container voyage to Houston in 1956. Prior to April 1973, expenditures for container facilities of the Port of Houston amounted to approximately $12,000,000.00. In 1967, General Obligation Bonds were issued in the *amount of $16,000,000.00 and it was thought that this issue would provide* ample funds for facilities to handle container traffic for the following twenty (20) years. However, in approximately 1969, an unexpected surge of container activity in Houston began and the Port Authority felt that further expansion of Port facilities to handle containers was called for. In April 1973, a $40,000,000.00 General Obligation Bond Issue was submitted to and accepted by the voters of Harris County. The bulk of the $40,000,000 will be used for new container facilities. The Port of Houston Authority is also developing a division at Bayport of which approximately two hundred fifty (250) acres out of a total of seven hundred (700) acres owned by the Port Authority are designated for container facilities. There are also extensive investments at the Port of Houston in container facilities by steamship lines.

It is urged that the result of the minibridge activities have been decreased sailings between Japan and the Port of Houston and decreased container cargo tonnage at the Port of Houston.

Containers transported via minibridge between the Port City of Houston, Texas, and the Far East during the third quarter, 1972, to the fourth quarter, 1973, totalled 11,341.[31] The "loss" of those containers adversely affected the Port of Houston Authority and the economy of Houston and Harris County. To Houston the result of this "diversion" was decreased sailings between Houston and the Far East; and some instances of warehouses being moved from Houston to interior points, and the loss of cargo which could reasonably have been expected to move through the Port of Houston if not for the Far East minibridge.

However, as respondents point out, the record also reveals that total cargo at Houston increased from 10,228,592 tons in 1971 to 12,860,897 tons in 1973 or an increase of 25.7 percent. Container cargo increased from 565,666 tons in 1971 to 1,399,824 tons in 1973 or an increase of 147.5 percent. Foreign trade container general cargo increased from 316,040 tons in 1972 to 802,592 in 1973. Foreign trade general cargo increased from 4,921,387 in 1972 to 5,770,050 in 1973.

Using Houston's calculations of 13 tons average weight per container for 16,289 TEUs carried in minibridge service during 1973, it is seen that minibridge cargo represented approximately 1.6 percent of total cargo at Houston for 1973 and 3.6 percent of foreign trade general cargo.

Respondents somewhat gleefully point out that Houston advertises that "a Minibridge between Houston and California can save time and money for shipments going to Europe." The prospective customer is then urged to let C. A. Rousser, Western Sales Manager for the Port of Houston, "tell you the facts about MiniBridge."

Additionally shippers have complained as to the shortage of containers for Far East movement and congestion in the Port of Houston. Delays in shipments through the Port have run as much as five weeks longer than when the cargo was expected to be moved. Shippers have further complained of the prohibitive pier handling charges on their commodities at the Port of Houston.

[31] Once more there were containers loaded or unloaded at the railhead in and near Houston; and once more the specific origins or destinations of particular containers is unknown.

Finally, the assertion that most if not all the minibridge cargo would have moved through the Port of Houston is supported only by an assumption that shippers with facilities in and around Houston would have sent their cargo through the Port but for the Far East minibridge.

7. Lake Charles

From the third quarter of 1972 to the fourth quarter of 1973 eight containers were "transported via minibridge at the Port City of Lake Charles." The record further shows that Lake Charles increased its total tonnage in 1972, 1973 and 1974. Lake Charles has no container experience as it moved no containers in either import or export trades with the Far East in 1972, 1973, and 1974, and in fact, the port does not even have container cranes.

8. Baltimore

From third quarter 1972 to fourth quarter 1974, 3,238 containers moved by minibridge, both eastbound and westbound, at the Port City of Baltimore.[32]

The direct testimony of Mr. Eldered Bell, Director of Transportation for the Maryland Port Authority, reveals that even if the carrier's figures are used the "diverted" cargo is less than 1 percent of Baltimore's total container cargo. Thus Baltimore "cannot rightfully claim substantial harm by the practice of minibridge. . . ." Baltimore does not support the complainants' position in this case.

9. Hampton Roads

Hampton Roads "lost" 2,180 boxes eastbound and westbound to minibridge. Again the period used is third quarter 1972 to fourth quarter 1973. These figures are of course subject to the same caveat as the others used in Exhibit 1. While the Virginia Port Authority was granted leave to intervene, it did not intervene in support of complainants and filed no brief in the case.

"Absorptions" by Minibridge Carriers

Complainants assert that since in minibridge the railroads perform only railramp to railramp service, the ocean carriers must necessarily "absorb" the costs between railramp and ocean terminal on the West Coast. Complainants would contrast this with the all-water shipper from the Atlantic or Gulf and the "local" West Coast shipper to the Far East.[33]

They further note that minibridge carriers also "absorb" the costs of "loading and unloading of containers to or from inland railcar or truck, gate charges, wharfage charges and other cargo handling." Then complainants state "Except as noted these charges in either all water service or in the local West Coast service are for the account of the shipper." No explanation is given for the phrase "Except as noted" and no figures are offered as to what charges may be included within the meaning of that phrase.

[32] Baltimore's figures are for the year 1973 1,007 boxes westbound and 1,192 boxes eastbound—a total of 2,199 Again it must be remembered that the figures in Exhibit 1 show only those containers *moving* via minibridge and do not necessarily show that the cargo would have moved through the particular port.

[33] Respondents concede that they pay drayage charges between the terminal and dockside.

Additionally, complainants allege that "other charges absorbed by minibridge carriers include the cost of repositioning of containers as a result of the imbalance between inbound and outbound minibridge movements."

Finally complainants assert that because minibridge rates had to be priced at "parity" with the all-water rates, minibridge carriers had to settle for a division of revenue less than they would receive in their all-water service.[34] From this it follows, in the eyes of complainants, that the minibridge operator "receives significantly less revenue" than he would for the all-water service and he even gets less than he would from carrying OCP cargo.[35]

From the foregoing complainants offer the following proposed "finding":

> Unlike the rates in parallel services, either all-water or local West Coast, the joint rates in minibridge are not, even partially based on carrier costs. The minibridge rates merely track all-water rates . . . Since minibridge generates less revenue to the carrier than the parallel services, the result must be a partial absorption of costs by the ocean carrier, especially where, as in minibridge, there are additional costs not present in the parallel services—wharfage, terminal costs, cargo handling costs, drayage and repositioning costs. Where minibridge costs are set *below* all-water ocean rates the absorption of costs is even greater.

Complainants' assertions concerning "absorptions" among other things attempt to show that minibridge operations as conducted by respondents are not economically viable.

Much of the respondents' answer to the charges of absorption deals not with the idea that they pay some of the costs involved in inland operations but rather argument over the legal meaning of the word "absorption"; or they offer proposed findings that result in much the same thing. Thus Sea-Land offers as a finding of fact:

> . . . None of the railroad's costs or charges are borne by the water carrier from the time the [minibridge] container enters the . . . system at the rail terminal and there is no evidence of *absorption* of any inland costs that *must* be borne by the shipper/consignee in getting the container to or from the rail terminal and its origin or destination. (Emphasis mine.)[36]

Seatrain, on the other hand, chooses to avoid the "problem" of absorptions by offering as proposed findings the following sequence of events:

> . . . A shipper having chosen to utilize the service, contacts Seatrain, obtains a booking permit and arranges for the pickup of an empty container. After the container is . . . stuffed by the shipper, a drayman delivers the container, at the shipper's expense, to the rail terminal for movement in the joint rail/water service. . . . *The container is then transported on regularly scheduled trains and vessels.* (Emphasis mine.)

However, Seatrain offers an alternative proposition for measuring economic viability of minibridge operations.[37] Seatrain would compare "revenues per nautical mile from the East Coast to the Far East via direct or indirect water carriage, from the West Coast to the Far East via direct water carriage, and carriage by minibridge from East Coast rail terminals to the Far East. . . ."

[34] The term "division of revenue" arises from the fact minibridge shippers pay the ocean carrier a "joint through rate" out of which the ocean carrier pays a "division" to the railroad.

[35] Complainants offer two examples both of which deal only in the disparity of rates between (1) minibridge, (2) Local West Coast, (3) OCP, and (4) all-water from Atlantic and Gulf ports to the Far East.

[36] Of course the question of what charges *must* be borne by the shipper is one of law.

[37] At the heart of complainants' charges of the lack of revenue received by minibridge operators is that they are taking losses merely to divert cargo from Gulf and Atlantic ports and then eliminate calls at those ports.

Using this theory Seatrain demonstrates that minibridge yields greater revenues per nautical mile than the Atlantic Coast all-water service and that the yield is not far below the yield of the West Coast local service.[38]

Another respondent K Line asserts that the averge revenue of a minibridge container is higher than the revenue from an all-water container moving from Atlantic or Gulf ports.

Other "evidence" purportedly dealing with noncompensatory rates, naturally tributary territory and rate discrimination between shippers is best dealt with in the context of the specific violations of law to which such evidence is assertedly relevant.

Before concluding this discussion of the record, a few observations seem in order.

I have already made theat the record in this proceeding consists of 2,651 pages of transcript and 100 exhibits. It is dismaying to discover that so much of the material was introduced for its psychological effect.[39] It is equally discouraging to find that in the name of advocacy parties resort to hyperbole and evasion. Hyperbole in casting the other parties' actions in a distorted light and evasion in ignoring the most salient points of the opposition. Such an approach gains nothing for either side.

FINDINGS OF FACT[40]

Complainants anticipate a continued growth in world trade which should necessitate the development of new container and other cargo handling facilities. Any new facilities actually developed will have three characteristics: (1) they are long-lived and fixed in place and the costs cannot be modified to offset reduction in container traffic; (2) they are expensive and the financing entails long-term borrowing, often through revenue or general obligation bonds; and (3) they must be intensively used if fixed investments are to be amortized.

To the extent that minibridge can be expected to drain substantial amounts of cargo from a port, difficulty could arise in the financing of container facilities at the port. However, the difficulty is at this time only speculative.

Complainants employed the firm of Richard J. Barber Associates, Inc., to conduct a study of ten selected ports on the Atlantic and Gulf coasts. The study was to show the "impact" of the Far East minibridge systems on the ports of Boston, New York/New Jersey, Philadelphia, Baltimore, Hampton Roads, New Orleans, Lake Charles, Beaumont, Galveston, and Houston.

The American Association of Port Authorities concludes that the average value to a port of containerized cargo is conservatively estimated at $25.00. This figure supposedly takes into account "inflation" and is said to represent the income that arises directly from loading and unloading the cargo and other port charges. The $25.00 a ton in direct revenue is less than the direct revenue

[38] Complainants attack this position because "expenses of all-water carriers are not apportioned on a per mile basis."

[39] For instance the testimonies of the Governors of Texas and Pennsylvania—the testimony becomes psychological when not followed up by facts and figures which support the broad assertions made by them—in this case no reliable facts and figures were forthcoming. Had they really been in the possession of complainants, quite obviously they would have been produced.

[40] No one disputes the physical operation of the Far East minibridge. For a description (and a reminder) of the way it operates see pages 4 and 5.

received from a ton of breakbulk cargo—the figure for breakbulk is not in the record. However, a figure of $35.00 is given for "general cargo."

In determining additional revenue to a port from a ton of containerized cargo complainants would employ a "multiplier" effect of 3 times the value of a ton of cargo, i.e. $25 × 3 = $75.00 a ton of containerized cargo.[41] The "multiplier" is used to calculate revenue lost because of the "ripple" effect produced by the loss of a ton of cargo. It is explained as follows:

> . . . Cargo means revenue to a port and the loss of cargo through diversion sets in motion a chain of reverberations just as a stone tossed into a pond sets off a pattern of rippling effects. Some of these are readily apparent (in wage earnings to port facility operators, income to public authorities, benefits to firms and workers serving a port, etc.); others less apparent though nonetheless real (those who benefit through secondary waves of expenditures, as when employees spend their earnings).

Obviously these are highly theoretical averages, do not provide actual figures for one specific ton of cargo, and will vary at each port.[42]

Using figures supplied by respondents, complainants show that 54,525 containers "were moved via minibridge" from the ten "port cities." Since the data supplied by respondents did not show the weight of each container, complainants used figures from the Maritime Administration's "Preliminary Containerized Cargo Statistics on Selected Trade Routes" and came up with an average of 13 short tons per container which results in some 708,825 tons of cargo which were moved from port cities via minibridge. At $75 a ton this would have resulted in losses in the region of $53 million dollars,[43] if all the cargo was actually "diverted" from the studied ports.

However, these figures do not show losses from cargo *diverted* from the ten ports by the Far East minibridge operators. They do show the number of containers which were handled at a railhead in or near one of the ten port cities studied. The record does not establish that any or all of the cargo moved via minibridge would have gone through a complainant port. For example, some shippers testified that were minibridge not available they would not be able to do business in the Far East. Congestion at some ports would have rendered it extremely difficult to use the all-water service and some of the cargo could have just as readily moved through two or more ports.

Taking the ten ports as a whole minibridge accounted for 4.6 percent of all container movements and only 1.6 of the total cargo moved through those ports. Using the relevant time period minibridge traffic was equal to only 35 percent of the total *growth* in Far East container traffic. Thus, the real impact of minibridge which is impossible to quantify accurately on this record is more than offset by the total growth in Far East movements. Additionally, using complainants' ten port example, the asserted losses from minibridge are offset (again to extent impossible to quantify) by the Euro-Cal minibridge operations.[44] As for losses

[41] Both the $25.00 figure and the multiplier of 3 come from a mixed bag of secondary sources which include a number of studies by personnel at various universities, a letter from the Director of the American Association of Port Authorities, an annual report from one port, and a "Grant Economy model" from yet another port.

[42] Indeed the multiplier effect ranges from a low 2.5 at Baltimore to a high of 3.05 at Corpus Christi. The inclusion of Corpus Christi is somewhat puzzling. It was not one of the ten ports selected for the basic study and there appears to be no other data for Corpus Christi.

[43] See page 8 for individual losses asserted for CONASA ports.

[44] For example Seatrain moved more than 27,000 containers between July 1973 and December 1976 through one or more of the ten ports studied. Baltimore is working on plans to increase its Euro-Cal tonnage.

due to the "ripple effect" they are to some extent made up for by other revenues generated in the port city by minibridge, i.e. the containers must be handled and loaded or unloaded at the railhead.

The record purporting to show the impact of minibridge at the individual ports suffers from the same deficiencies mentioned above.

NEW YORK

In 1966 the ILA had an active membership at the Port of New York of 21,471—by active members, complainants mean those eligible for Guaranteed Annual Income. The total manhours approximated 43 million in 1966. In 1974 total membership was down to 11,746 and manhours were about 24 million. This decline in membership and manhours was overwhelmingly the result of the introduction of containerization and not due to the advent of minibridge. By far the greatest drop in membership took place prior to the advent of minibridge and during the minibridge period the manhours actually increased from the low point reached in the first year of minibridge operations.

Some 21,454 containers were loaded or unloaded for minibridge at the railhead at the Port of New York for the period from July 1972 through December 1973. From this and other sources complainants projected a loss of 570 containers a week for the year 1974. It is asserted that 570 "diverted" containers cost the port $20 million. This assertion is unsupported by any documentary evidence and is based upon unsupported and unreliable sources.

The Port of New York has lost some containers to minibridge operators which containers would have moved through the Port of New York but for those operators. There is, however, no way on the basis of this record to tell how many containers were lost or even to make a reasonably accurate estimate.

PHILADELPHIA

The record shows that 3,291 containers were moved from or to the railhead at Philadelphia via minibridge. Using complainants' conversion methodology some 31,000 tons of cargo moved by minibridge. The record does not show the origin or final destination of this cargo; nor does it show that but for the minibridge system the cargo would have moved through the Port of Philadelphia.

The record does not establish that the construction of a third container facility "may not become a reality because of minibridge." From the fourth quarter of 1972 to the fourth quarter of 1973 there was an increase of only one minibridge container.

Minibridge cargo represents only .039 percent of bulk and general cargo, .048 percent of general cargo, and 2.9 percent of container cargo. Philadelphia at the close of this record was proceeding with plans for expansion of container facilities without regard or reference to the allegedly adverse impact of minibridge operations.

BOSTON

Using TEUs[45] and their own conception of the trade involved, Boston shows that 11,606 containers moved via minibridge from the railhead at Boston. Citing the increase in minibridge from 1972 to 1973, Boston projected an additional 8,000 TEUs "lost" for 1974. However, Boston did not have the facilities to handle the total growth in containerized cargo for 1974.

Total Far East tonnage for Boston increased from 8,666 tons for the last half of 1972 to 26,667 tons for the last half of 1973—an increase of some 200 percent. Taking Sea-Land as an example minibridge represented .27 percent of total cargo moving through Boston in 1973 and 12.7 percent of containerized cargo.

Boston has lost some cargo to minibridge. The record does not establish how much nor does it afford a basis for any reasonably accurate estimate.

NEW ORLEANS

In the fiscal year 1972-1973 New Orleans handled 76,638 containers (TEUs) while in fiscal 1973-1974 the port handled 104,000 (the figures include empties). Using an average of 13 tons outbound and 11 tons inbound the tonnage amounted to 490,356 in 1972-73 and 793,717 in 1973-74. Of the total general cargo handled, containerized cargo represented 10 percent.

For the period in question 5,790 "container units" moved via minibridge between New Orleans and the Far East. However, total cargo at New Orleans increased 49.8 percent from 5,056,000 short tons in 1972 to 7,576,000 in 1973. General cargo increased from 1,499,000 short tons in 1972 to 1,649,000 in 1973. Total containerized tonnage increased 43.7 percent from 516,000 tons in 1973. Far East container tonnage increased from 179,000 tons in 1972 (about .03 percent of total tonnage) to 256,000 tons in 1973 (again about .03 percent of total). For the fiscal year ending June 30, 1974, New Orleans had revenue of $2,476,300 opposed to $1,403,194 for the previous fiscal year.

Minibridge cargo for 1973 was about 1.2 percent of total general cargo and about 5 percent of total Far East cargo. Far East containerized cargo represents about 3.4 percent of the ports total general cargo. The principal import from Japan is steel which is not a containerized cargo.

New Orleans has lost some cargo to minibridge; however, since New Orleans itself admits that the origin and destination of the "5,790 containers" is not known, it has no way of knowing whether any container would have moved through the port had it not been for minibridge; and this record provides no basis for making such a determination.

GALVESTON AND BEAUMONT

Galveston, using a synopsis of information provided by respondents, demonstrates that 51 percent of all Far East minibridge movements originated at Gulf ports, that Texas ports accounted for 46 percent of the total movement, and that Houston alone accounted for 41.5 percent.

During the 1973/74 cotton season 728,619 bales of cotton "mysteriously"

[45] See footnote 24.

disappeared from the records of the Galveston Cotton Exchange. It is asserted but not established that the missing bales could only have moved by container and the inference is drawn that they moved by *minibridge* container to the Far East.

Historically 50 percent of all cotton exports from Galveston have been destined to Japan. In the last quarter of 1974 the percentage was 24.4. However, total cotton exports to all Far East destinations went from 1,413,539 bales in 1972/73 to 1,499,264 bales in 1973/74.

Utilizing 80 bales per forty-foot container at an average of 530 pounds per bale, minibridge in 1973 was 13,175.8 tons or 1.2 percent of total tonnage at Galveston and only 2.5 percent of total outbound Far East general cargo for 1973.

That Galveston has lost some cotton to minibridge is highly probable. Just how much is impossible to determine from this record. Other factors such as congestion undoubtedly played a part in some of the individual decisions to use minibridge.

Beaumont admits that minibridge has not taken away any container business which the port would otherwise have enjoyed. Beaumont has no facility exclusively dedicated to the handling of container operations. Some 200 short tons of Far East container cargo moved through Beaumont during 1971–1973 which is only an infinitesimal percentage of its 1974 general cargo of 628,134 tons.

Houston

During the period from the third quarter 1972 through the fourth quarter 1973 11,341 minibridge containers moved between the port city of Houston and the Far East. There is no hard evidence to show that but for minibridge those containers would have moved through the Port of Houston.

Total cargo at Houston increased from 10,228,592 tons in 1971 to 12,860,897 in 1973—an increased of 25.7 percent. Container cargo increased from 565,666 tons in 1971 to 1,399,824 tons in 1973. Foreign trade container cargo increased from 316,040 tons in 1972 to 802,592 tons in 1973. Foreign trade general cargo increased from 4,921,387 in 1972 to 5,770,050 in 1973.

Using Houston's calculations of 13 tons average weight per container for 16,289 TEUs carried in minibridge service in 1973, minibridge cargo represented some 1.6 percent of total cargo at Houston for 1973 and 3.6 percent of foreign trade of general cargo.

Houston actively solicits Euro-Cal minibridge cargo.

Other factors such as shortage of containers and congestion may have contributed to some degree to the individual decision to ship minibridge.

It appears that Houston has lost some cargo to minibridge but once again it is impossible from this record to quantify that loss.

Lake Charles

From the third quarter 1972 through the fourth quarter 1973, eight containers moved by minibridge at the Port City of Lake Charles. The port has had no container experience and has moved no containers in either the export or import trades. Lake Charles does not have a container crane.

BALTIMORE

The Port of Baltimore does not support complainants' position. The 3,238 containers[46] moved by minibridge to or from the railhead at Baltimore represent less than one percent of Baltimore's total container cargo; thus Baltimore "cannot rightfully claim substantial harm by the practice of minibridge. . . ."

HAMPTON ROADS

From the third quarter 1972 through the fourth quarter 1973 2,180 containers moved to or from the railhead at Hampton Roads. Although offered the opportunity, Hampton Roads did not intervene in support of complainants and filed no brief in the case. The record affords no basis for determining the actual impact of minibridge on the port.

Generally, it can be seen from the foregoing that while some cargo has been lost by the various ports, the record does not allow any quantification of the actual losses and thus renders virtually impossible any reasonable estimation of the harm if any inflicted on the ports by minibridge.

Overall, the ports studied have realized increases in the total cargo handled in foreign trade and most ports are going ahead with plans for the expansion of container facilities despite the dire predictions and gloomy pictures painted about the expected depredations of minibridge.

Findings as to facts relevant to noncompensatory rates, naturally tributary territory and rate discrimination between shippers will be made when those allegations of violations are discussed below.

DISCUSSION AND CONCLUSIONS

As already noted, by an order dated December 5, 1973, the Commission assigned this case an importance which went beyond the simple resolution of a purely private dispute between complainants and respondents. That order denied a petition of American Mail Line which sought the institution of a general rulemaking proceeding to solve the problems said to inhere in intermodalism. In denying the petition, the Commission clearly recognized that developments in transportation had sharpened the historical conflict between ports, which desire the maximum amount of carrier calls obtainable, and the carriers, which continually sought to reduce the number of port calls. As the Commission recognized, the rapid growth of containerization:

> . . . increased the inland mobility of export and import cargo; cargo can and does move from or to any part of the continental United States through ports on any coast. At the same time, a rigorous restriction of port calls with supplemental road or rail distribution from or to the terminal ports has become an economic necessity for the containership operator. Additional port calls both magnify voyage expense and require increased terminal investment or expense. (Order of December 5, 1973.)

Thus, containerization, intermodalism generally, and, in this case, minibridge in particular have pitted the economic interests of the complaining ports against the economic interests of the respondent containership lines.

With denial of the petition for rulemaking, primarily on the ground that each intermodal situation would present different factual circumstances, the Commis-

[46] These are complainants' figures.

sion designated two cases then pending—this case and Docket 73–35, *Intermodal Service of Containers & Barges at Philadelphia,* as vehicles for the establishment of "general principles." Thus it would seem that something more than a simple resolution of the controversy here, say on the basis of burden of proof, is called for in this decision. However, the "general principles" can only be considered on the basis of the record here and in the context of the specific allegations of the complaint.

The complaint in this case charges respondents with violations of sections 16 First, 17 and 18(b)(5).[47] The minibridge service is said to violate sections 16 and 17 because it (1)". . . unlawfully diverts locally tributary cargo from [complainant] ports"; and (2) this " . . . diversion is accomplished by unlawful absorption of shipper and inland costs, and creates discrimination."

Complainants also urge that minibridge is contrary to the policies of section 8 of the Merchant Marine Act 1920 (46 U.S.C. 867), which they allege "embodies the policy and intent of Congress to protect and promote ports." Because of its pivotal importance here, section 8 is set forth below in its entirety:

> It shall be the duty of the Secretary of Commerce, in cooperation with the Secretary of the Army, with the object of promoting, encouraging, and developing ports and transportation facilities in connection with water commerce over which it has jurisdiction, to investigate territorial regions and zones tributary to such ports, taking into consideration the economies of transportation by rail, water, and highway and the natural direction of the flow of commerce; to investigate the causes of the congestion of commerce at ports and the remedies applicable thereto; to investigate the subject of water terminals, including the necessary docks, warehouses, apparatus, equipment, and appliances in connection therewith, with a view of devising and suggesting the types most appropriate for different locations and for the most expeditious and economical transfer or interchange of passengers or property between carrier by water and carriers by rail; to advise with communities regarding the appropriate location and plan of construction of wharves, piers, and water terminals; to investigate the practicability and advantages of harbor, river, and port improvements in connection with foreign and coastwise trade; and to investigate any other matter that may tend to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally pass through such ports: *Provided,* That if after such investigation the Secretary of Commerce shall be of the opinion that rates, charges, rules, or regulations of common carriers by rail subject to the jurisdiction of the Interstate Commerce Commission are detrimental to the declared object of this section, or that new rates, charges, rules or regulations, new or additional port terminal facilities, or affirmative action on the part of such common carriers by rail is necessary to promote the objects of this section, the board may submit its findings to the Interstate Commerce Commission for such action as such commission may consider proper under existing law.

The section, of course, addresses itself to the Secretaries of Commerce and the Army, and even then only imposes the duty to investigate and to report any recommendations to the Interstate Commerce Commission. Section 8 does not proscribe any particular activity by carriers, be they water or rail, and it represents only a statement of Congressional policy to be given weight by the Commission when adminstering the statutes entrusted to it by Congress. *Intermodal Service to Portland,* 17 F.M.C. 106 (1973); *Port of New York Authority v. F.M.C.,* 429 F.2d 663 (5th Cir., 1970). Section 8 has indeed been given such

[47] Section 16 First makes it "unlawful for any common carrier by water . . . either alone or in conjunction with any other person, directly or indirectly: . . . to make or give any undue or unreasonable preference or advantage to any particular person, locality or description of traffic in any respect whatsoever, or to subject any particular person locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . . (46 U.S.C. § 815)

Section 17 provides: That no common carrier by water in foreign commerce shall demand, charge or collect any rate, fare or charge which is unjustly prejudicial to exporters of the United States as compared with their foreign competitors. (46 U.S.C. § 816)

Section 18(b)(5) will be dealt with later in this report.

"weight" in the past when the Commission dealt with discrimination or prejudice toward a port; (*Associated Latin American Freight Conferences*, 15 F.M.C. 151 (1972) at 155–156). However complainants may not be too far from the mark when they argue that:

. . . the cases cited make clear that a violation of Section 8 will sustain a finding that a rate or practice is unduly prejudicial under section 16 or unjustly discriminatory under section 17 of the Shipping Act. *City of Portland v. PWC*, 4 F.M.B. 665 (1955), at 674.

Complainants go on to say:

As the Commission has repeatedly held, these laws [§§16 & 17] are violated whenever an ocean carrier, by some unlawful technique, whether it be absorption of inland transportation costs, or port equalization, or by any discriminatory device, diverts traffic from a port to which the area of origin or destination of the cargo is naturally tributary. The only circumstance under which such diversion may be justified is where there is a lack of adequate service to the shipper at the port or ports from which traffic is diverted. *Intermodal Service to Portland, Oregon, supra; Sea-Land Service, Inc. v. S. Atlantic and Caribbean Line* 9 F.M.C. 338, 344 (1966); *see also City of Mobile v. Baltimore Insular Line*, 2 U.S.M.C. 474 (1941); *Beaumont Port Commission v. Seatrain Lines, Inc.*, 2 U.S.M.C. 500 (1941), and 2 U.S.M.C. 699 (1943); *City of Portland v. Pacific Westbound Conference*, 4 F.M.B. 665 (1955), and 5 F.M.B. 118 (1956); *Proportional Commodity Rates on Cigarettes and Tobacco*, 6 F.M.B. 48 (1960); *Stockton Port District v. Pacific Westbound Conference*, 9 F.M.C. 12 (1965).[48]

As readily seen complainants (1) identify minibridge as but another form of "port equalization"; (2) equate port equalization with other "unlawful" means of diverting cargo; and (3) argue that the only justification against "diversion" is an inadequacy of service at the port from which the cargo is diverted. There would appear to be some confusion here on the part of complainants.

Port equalization is not of itself an unlawful device; it is not unlawful in principle. *Beaumont Port Commission v. Seatrain Lines Inc.*, 2 U.S.M.C. 500, 504 (1941). It has been defined as:

. . . The allowance or absorption by the ocean carrier of such amount as will make the shipper's cost of overland transportation identical or substantially so, from his inland point of origin to two or more ports. Its purpose is to enable the ocean carrier to compete for cargo without calling at the port closest to or enjoying the lowest inland transportation costs from, the point where cargo originates. *Sea-Land Services, Inc. v. S. Atlantic & Caribbean Line Inc.*, 9 F.M.C. 338 at 344 (1966).)[49]

Port equalization, although most often described as a practice, is in one way as much a result reached through the use of other practices as it is a practice itself. Port equalization can be accomplished by the use of allowances, absorptions, differentials, proportional rates or "transshipment."[50] (*SACL* case, *supra*, at 345.) All of the cases cited by complainant above are cases which deal with one or another of the forms of port equalization.

Once equalization is practiced and cargo is diverted from territory naturally tributary to a port, it is said that the only defense against a charge of unlawfulness

[48] It is at times quite difficult to disentangle the legal reasoning from the hyperbole and emotional polemics of at least one complainant's "argument" on the issues. As an example, in one brief we find that "Seatrain and its imitators" have "mounted a single-minded assault on the cargo markets of CONASA port areas." But what appears to make this single-minded assault, reprehensible is that it was "Impelled by the search for profits . . . "; moreover the actions of Seatrain have apparently imperiled the "livelihood" of "hundreds of thousands of people." To complainants the respondents make "arrogant claims" and generally disport themselves in a manner that is at least unbecoming and at worst malevolent. Such emotional appeals do not in any way advance decision on the merits and only redound to the detriment of those practicing them.

[49] This will be referred to as the *SACL* case hereinafter.

[50] "Transshipment" as used in connection with port equalization means "the movement of cargo, usually by land carrier, in the water carrier's name and at its expense, from a dock or terminal at the port where it is originally delivered by the shipper to the water carrier, to the dock or terminal at another port where it is loaded aboard the vessel" (*SACL* at 345).

is inadequacy of service at that port. Adequacy of service is a "general" rather than a "particularized" concept and has been recognized as a "troublesome one" because:

> In a very real sense, it is the ocean carriers themselves who, because of a desire to serve a port indirectly, can theoretically make service "inadequate" merely by refusing to serve that port directly, and then unlawfully divert cargo from that port by an indirect service. *Intermodal Service to Portland, Oregon,* 17 F.M.C. 106 at 131 (1973).

In the *Portland* case the troublesome aspect of the adequacy test was remedied through section 15 (not at issue here) under which the Commission directed that only members of the Conference serving Portland direct by alternate sailings could equalize against Portland. (17 F.M.C. at 131.)

Thus if the law is as complainants see it, and leaving aside any attempt to capture the elusive concept of "naturally tributary" the entire verbiage of section 8 has been reduced to the twofold proposition of (1) "diversion" of cargo from a port by a practice such as allowance or absorption and (2) "inadequacy of service" as the only defense to such diversion.[51] Before attempting to state the current law on equalization and to apply it here,[52] some review of the development of that law is necessary. To be kept in mind throughout this review is the fact that the sections of the Shipping Act alleged to have been violated are sections 16 First and 17 and that it is undue preference or prejudice to ports and unjust discrimination against ports, not diversion of cargo, which those sections proscribe.

The first case in which the question of "discrimination" against a port was considered was *Alaska Rate Investigation,* 1 U.S.S.B. 1 (1919). There it was asserted that the rates on farm products and coal which were higher from Anchorage to Juneau than from Puget Sound ports to Juneau subjected Anchorage to "undue discriminations." In reaching its determination, the Board concluded that (1) as to some of the commodities at least, Juneau was the logical market for the products and that shippers at Anchorage competed there with shippers from Puget Sound ports; (2) that but for the rate differential much larger quantities would move through Anchorage; and (3) the carriers could show no circumstances which would warrant the differentials. The Board then concluded, among other things that "The maintenance of rates on farm products from Puget Sound ports to Juneau, Alaska, lower than rates contemporaneously maintained on like traffic from Anchorage to Juneau [was] unduly preferential to Puget Sound ports and unduly prejudicial to Anchorage; and the resulting *undue discrimination* must be removed."[53] (Emphasis added.)

In *Port Differential Investigation,* 1 U.S.S.B. 61 (1925), a tripartite conference agreement divided ports on the North Atlantic, South Atlantic and Gulf

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[51] When section 8 directs the Secretaries of Commerce and the Army with the object of promoting, encouraging and developing ports to investigate "territorial regions and zones tributary to such ports," the investigation is to take into consideration "the economies of transportation by rail, water and highway and the natural direction of the flow of commerce" — "adequacy" of service is of course not mentioned.

[52] Some respondents argue that minibridge operations do not result in port equalization. This will be dealt with later.

[53] This report, written in apparently less demanding times, failed to cite a single statutory provision which had been violated. However, it is obvious that at least three were involved i.e., sections 18(a), 16 First and 17. It will of course be observed that the precise discrimination asserted is between shippers, but the Port of Anchorage could just as readily make the charge. It will remain to be seen whether there is any sound basis for a different law for discrimination or prejudice against shippers as distinguished from ports. Finally, the use of the term "undue discrimination" is an early indication of the confusion which arose in the application of sections 16 and 17.

coasts into three groups and rates were fixed on a principle of differentials which favored ports in the North Atlantic. Ports in the South Atlantic and Gulf alleged that the differentials were unduly prejudicial and unjustly discriminatory in violation of sections 16 and 17.

The Board noted that the port groupings and differentials had been in effect for some time and that the circumstances surrounding the adoption of the differentials did not reveal any clearly defined rule or reason for their amount or measure. The carriers' principal defense for the differentials was that their purpose was to "offset the addditional cost of operation from the South Atlantic and Gulf ports over the North Atlantic ports on the basis of the then existing level of rates." The Board said:

> If that were the desideratum it is difficult to understand why these differentials have not varied with the exceedingly large variation in rates. In making this observation the Board does not concur in the theory that a carrier is justified in burdening a port with a differential for the sole and only reason that the cost of operation from that port is greater than from some other port. It is obvious to the Board that many elements such as volume of traffic, competition, distance, advantages of location, character of traffic, frequency of service and others are properly to be considered in arriving at adjustment of rates between ports. . . .

The Board concluded that the differentials did not violate sections 16 and 17. Of interest is that while the case was decided in 1925 no mention was made of section 8 which was enacted in 1920. Additionally, a differential could be justified by a *number of transportation factors* and not just inadequate service at the ports burdened by the differential. Similarly in *Everett Chamber of Commerce v. Luckenbach S.S. Co.*, 1 U.S.S.B. 149 (1929), arbitraries[54] were imposed on certain West Coast ports which those ports alleged violated section 16 of the Shipping Act. The Board found no violation and in doing so the Board concluded that volume of cargo and *competition between carriers* were factors to be considered when determining a violation of section 16 involving ports.[55] In the same year, 1929, the Board decided *Board of Commissioners Lake Charles H & T.D. v. N.Y. & P.R.S.S. Co.*, 1 U.S.M.C. 154 (1929). In that case Lake Charles complained that respondent New York & Porto Rico Steamship Company was "equalizing" at the Port of New Orleans against Lake Charles in violation of section 16.[56] The Board found no violation. The Board found that before the port at Lake Charles opened almost all rice moved through New Orleans, that respondent had never served Lake Charles, and that respondent's rates were set in an effort to retain the rice traffic at New Orleans. The Board said:

> This situation is manifestly beneficial to the shippers concerned for the reason that they are afforded two routes for the movement of their product; and particularly so in that the route via New Orleans is shorter in total distance by from 94 to 213 miles depending upon point of origin.[57] (page 156).

The Board then took occasion to discuss the "naturally tributary" concept, although it did not use that term. The Board said:

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[54] The arbitraries resulted in higher rates on cargo destined to the ports of Everett and Bellingham than for cargo destined for Seattle and Tacoma.

[55] It is 1929 and there is still no reference to section 8.

[56] The complaint was based on the fact that respondent's rate on rice when added to the rail rate from point of origin to New Orleans was the same as or lower than the through rate via Lakè Charles to Puerto Rico.

[57] Thus at this time at least total distance, land and water, was a factor to be considered, and benefit to shippers would appear a consideration.

> Regarding the contention of the Port of Lake Charles that because of its geographical location it is the normal outlet for shipments of clean rice to Puerto Rico and extending to that contention every consideration to which it may be entitled, yet there is manifestly no provision of the Shipping Act which can be construed to forbid a carrier to meet competition or to enlarge the scope of its patronage and its volume of business if it can do so without unfairness to those whom it serves. The respondent does not now and never did serve the Port of Lake Charles and the complainant presents nothing to show that the rates are unremunerative or that they in any manner burden other traffic in the carriage of which the respondent is engaged.[58]

Some years later in 1936, the Port of Philadelphia complained that a number of lines were charging higher rates from Italian ports to Philadelphia than they were from those same ports to New York.[59] While here complainant was trying to *achieve* "equalization" the basic principle remains the same; and again the Board pointed out that, "The uniformity of treatment contemplated by the Shipping Act is a relative equality based on transportation conditions only."[60]

From the foregoing it can be seen that in the early cases a goodly number of transportation factors must be considered in arriving at a determination as to the validity of rate differentials, arbitraries, absorptions and equalizations both as between shippers and as between ports.[61] Up to this point section 8 of the Merchant Marine Act 1920 had not been considered, weighed, or for that matter, even mentioned, although the geographic advantages or disadvantages of localities or ports had been discussed and considered in deciding cases under sections 16 and 17 of the Shipping Act. It was not until 1941, some twenty years after its enactment that section 8 achieved specific mention in a decision.

In *City of Mobile v. Baltimore Insular Line*, 2 U.S.M.C. 474 (1941), a number of carriers set their rates on shipments to Puerto Rico so that "the combination of the inland rates from point of origin and ocean rates beyond are adjusted so that the lowest combination via any United States port served by a defendant will apply via any other from which any defendant maintains service. . . ." This practice was said to violate sections 16 and 18 of the Shipping Act and section 3 of the Intercoastal Shipping Act. Because this is the first case in which section 8 plays a role it might seem that something in the way of general principles governing the application of the section would have been developed. However, no amount of careful reading and analysis can extract anything remotely resembling a consistent or even coherent theory of the case.

The respondent carriers all operated pursuant to a joint tariff filed by an agent, one G. A. Meyer. They maintained sailing from various ports on the Atlantic and Gulf coasts ranging from New York to Port Arthur, Texas. However, there was no competition between the carriers at any port of origin except New York.

Item 26 of the joint tariff was entitled "Port Equalization." The item among other things authorized a deduction of 3 cents per hundred pounds on carload and less-than-carload traffic to Puerto Rico from New York. The cargo originated at

[58] *See also, Atl. Refining Co. v. Ellerman & Bucknall S.S. Co.*, 1 U.S.S.B. 242 (1932), which involved alleged rate discrimination between shippers at New York and Philadelphia in violation of sections 16 and 17. Quoting Justice Brandeis, the Board said: "To bring the difference in rates within the prohibition of these sections it must be shown that such a difference is not justified by the respective services, by their value, or by other transportation conditions."

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

[60] *See also Commonwealth of Mass. v. Colombian S.S. Co., Inc.*, 1 U.S.M.C. (711) (1938).

[61] For other examples, see *Harbor Comm. of San Diego v. American Mail Line Ltd.*, 1 U.S.M.C. 661 (1937); rehearing 2 U.S.M.C. 23 (1939); *Sun Maid Raisin Growers Assn. v. Blue Star Line, Ltd.*, 2 U.S.M.C. 31 (1939); *Intercoastal Rate Structure*, 2 U.S.M.C. 285 (1940).

rail points named in the item, and there were a great number of specific exceptions to the item exceptions published elsewhere in the tariff. Under the exceptions equalization was practiced on traffic originating in Georgia, Tennessee, the Carolinas and other states in the Southern Territory and from as far West as Denver, Colorado. These and certain other absorptions were disposed of because they failed to meet the tariff filing requirements of section 2 of the Intercoastal Act.

Pointing to a number of instances under Item 26 where favorable inland rates were offset by equalization complainants had argued;

> . . . that the development and maintenance of a port depends upon traffic from inland areas naturally tributary thereto, as well as that which originates at Seaboard; that the equalization practice nullifies inland rate structures through the diversion of traffic to ports to which higher rates ordinarily would apply; and that established, prescribed or approved inland rates should be left undisturbed.

The Commission without reference to this general proposition took up and dealt with several specific instances of equalization. For example, on steel, iron, pipe etc. manufactured in the Birmingham district of Alabama complainants claimed the natural route was through Mobile because of the distance factor and more frequent sailings there. Bull Insular and Baltimore Insular in an effort to compete with Waterman at Mobile and New Orleans reduced their rates from Charleston, South Carolina, by the difference between that port and Mobile. From some origins inland rates were the same to New Orleans as to Mobile yet Waterman reduced only the rate from New Orleans to equalize the rates via the northern ports. Of this practice the Commission said:

> . . . Shippers are thereby deprived of their choice of routes via New Orleans or Mobile, and Mobile is deprived of an opportunity to compete. Such action is unduly prejudicial to Mobile and unduly preferential to New Orleans in violation of section 16 of the Shipping Act, 1916.[62]

Waterman's practice of equalizing rates via New Orleans against those via Galveston was found to be "an unreasonable practice." Apparently it was not equalization as such but Waterman's method of achieving equalization that was disfavored, for the Commission said:

> If any deduction in the local [rail?] rate on traffic moving via New Orleans is warranted such deduction must be made between applicable export [rail] rates over established routes from a common origin to both Texas and New Orleans. The use of a difference between an export [rail] rate to one port and a domestic [rail] rate to another port, or between other unlike rates to different ports, as a basis for reductions in port-to-port rates is in the circumstances an unreasonable practice (p. 481).

Carriers operating out of New York and Baltimore equalized inland rates to those ports on a number of commodities originating at some 800 points in Iowa and points in Minnesota and South Dakota, and on other commodities originating at points in Indiana and Illinois. The variety and disparity of the deductions led the Commission to say:

> . . . Such varying deductions result in innumerable port-to-port rates for substantially similar transportation. The diversion through New York by means of "equalization" of traffic which by reason of a substantially more favorable geographic position is naturally tributary to South Atlantic ports—or to Gulf ports—is uneconomic and unnecessarily wasteful of carrier revenue.[63]

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[62] Minibridge rather than depriving shippers of routes offers them additional ones and additional ports are afforded an opportunity to compete for Far East traffic.

[63] It should be remembered that section 18(a) of the Shipping Act and the Intercoastal Shipping Act were at issue in *City of Mobile, supra.*

Other deductions for the purpose of equalization were found unlawful because they rendered the tariff ambiguous, and still others were found to be beyond the scope of the conference agreement. With this the Commission went on to say that there were many other instances which could be cited but it thought what had been said was "sufficiently illustrative." The Commission then took up arguments for and against equalization generally under Item 26. The supporters urged that it should not be condemned because of the length of time it had been observed, and the fact that shippers and consignees had become accustomed to it and that ports and businesses had been built upon it. The Commission, however, noted, "They offered little evidence."[64] The argument was made that since Item 26 resulted "in shippers paying the same amount via any port and affords carriers and ports an equal opportunity to attract traffic no unlawfulness exist[ed]." The Commission noted that as authority for this proposition *Port Differential Investigation,* 1 U.S.S.B. 61 (1925), was cited and "that at page 71 of that decision the contention of New York and other port interests that rail-water should be equalized via Atlantic and Gulf ports was considered and dismissed on jurisdictional grounds." The Commission merely noted this argument and had nothing to say on its merits at this point; it simply went on to the next point which was made by the "[I]sland interests" that "continuation of equalization was not only desirable, but necessary, in order that the delivered cost of merchandise might be the same to all, thus permitting a consignee to compete with others in the same business." The Commission dismissed this with "Even with equalization the suggested result could not be achieved. All purchasers do not patronize the same manufacturer and the combination of inland-ocean rates is different for each origin."[65]

Urged not to declare equalization unlawful in principle, the Commission merely said that equalization as practiced under Item 26 was "unreasonable."

The argument was then made that the rates fixed under Item 26 were "proportional rates on through traffic" and as such lawful under prior decisions.[66] The Commission agreed proportional rates in water transportation may be proper in some instances, but only when delivery costs at ports are relied upon to fix the differentials between ports. Such was not the case under Item 26. The Commission concluded its discussion with:

> The contention that inland rates to seaboard, whether voluntarily established or prescribed or approved, should not be nullified cannot be entirely ignored. We could not prescribe a rule or regulation designed solely to equalize inland rate differentials. Carriers may do many things which we could not compel, but that privilege is not unlimited. To permit continuation of unrestricted solicitation by carriers for business through condonation of a practice whereby unfavorable inland rates are overcome would wholly ignore the right of a port to traffic to which it may be entitled by

[64] The problem of "little evidence" would seem perennial.

[65] This seems to represent a somewhat confused notion of "equalization."

[66] Cited was *Intercoastal Rate Structure,* 2 U.S.M.C. 285 (1940), where the Commission concluded that certain equalization practices and the rate thereunder were unlawful. After noting that the practices were "primarily designed to entice a larger share of the business away from . . . competitors," the Commission went on to say: "The record in this proceeding shows that the present rates are ambiguous in their application and may be unjustly discriminatory as between commodities and localities. To this extent, they further confuse an already complicated competitive struggle and should be declared unreasonable." The Commission found the rules unreasonable, but stated that, "This finding is without prejudice to the establishment of reasonable rules *designed only to equalize rates where necessary in view of the applicable rail rates to the ports.*" (Emphasis added.) Of further interest is that the Commission found that there was no question of the lawfulness of carriers making absorptions of the cost of on carriage to ports seldom or never served for legitimate competitive reasons.

reason of its geographical location. Such right appears fundamental under statutes designed to establish and maintain ports. Under section 8 of the Merchant Marine Act, 1929, we are required to recognize territorial regions and zones tributary to ports and should there exist rates to seaboard which, among other things, do not recognize the natural direction of the flow of traffic, recommendations may be made to the Interstate Commerce Commission for such action as it deems necessary. The contention has been made that section 8 has no relation to rate regulatory provisions of the Shipping Act, 1916. But to wholly ignore basic policies of Congress would be unwarranted.

The Commission at this point would seem almost to restrict its *duties* under section 8 to reporting unfavorable inland rates to the ICC.

The Commission specifically found that Item 26 and the practices under it resulted in an unjust and unreasonable tariff in violation of section 18 of the Shipping Act, and that equalization as practiced resulted in undue and unreasonable preference and prejudice under section 16 of the Shipping Act. It was further found that Item 26 did not comply with section 2 of the Intercoastal Shipping Act of 1933.

What can be said of the decision in *City of Mobile?* About the only certainty to be found is the uncertainty of the law to be applied to equalization. Some of the practices resulted in an ambiguous tariff in violation of the 1933 Act; some were found to be "unreasonable practices" without mention of any statutory provision; some were found to be "uneconomical and unnecessarily wasteful of carrier revenue," again without statutory reference; some were found unlawful because improper pairs of rail rates were used to fix the differentials; and some because they deprived shippers of a choice of routing. The *City of Mobile* case quite simply provided no guidance in ascertaining the general principles of law which were to be applied in future cases of equalization.

The next case dealing with equalization was *Beaumont Port Commission v. Seatrain Lines, Inc.*, 2 U.S.M.C. 500 (1941), decided the same month as the *City of Mobile* case. In *Beaumont,* Seatrain, on traffic originating at Houston, Galveston, and Beaumont, equalized, through absorption, the cost of making delivery to its vessels at Texas City as against ship's side at Houston, Galveston, and Beaumont. It was alleged that this practice violated sections 16 and 17.[67] For the little over two-month period in question Seatrain had diverted some 2,673 tons of cargo to the three ports. It was the "considered opinion" of complainant's witnesses that the "breakbulk" lines[68] could not long compete with Seatrain at equal rates.

Quoting from its discussion of section 8 in the *City of Mobile* case, (see page 57 of this decision), the Commission said, "This statement is even more applicable in the present situation where the absorption practice permits a carrier to reach into the port itself and draw therefrom the traffic which is local and therefore naturally tributary to that port." The Commission went on to say:

The practice of equalization is not condemned by us as a general principle. But here it creates an undue advantage which cannot be overcome by the break-bulk lines individually, except by resigning from the conference and precipitating a rate war which is a condition contrary to the best interests of the American merchant marine. An absorption practice which would bring about such a result should be condemned.

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[67] A violation of section 15 was also alleged, but the Commission merely found the tariff ambiguous and ordered it amended.

[68] Seatrain's service differed "materially" from the breakbulk carriers, and was conceded by all parties to be of a superior nature.

Three years later, the Commission accepted Seatrain's third petition for reconsideration and held a further hearing.[69] On rehearing the Commission summarized its earlier report:

> The previous report recognized Seatrain's superior service; pointed to the diversion of traffic from Galveston, Houston and Beaumont as a result of the absorption and the consequent crippling of essential carrier services performed by the breakbulk lines serving those ports; stated that the breakbulk lines could not overcome their resulting disadvantage without possibly precipitating a rate war, and found that the practice was unduly prejudicial and discriminatory in violation of sections 16 and 17, respectively, of the Shipping Act, 1916.

On the basis of the facts established at the second hearing, the Commission reached a number of conclusions. Seatrain could not attract traffic at rates higher than the breakbulk lines and thus could not reenter the trade upon a competitive basis without absorption or rate reductions.[70] The fear that Seatrain would monopolize had not been realized; in fact Seatrain's operations had not seriously disrupted or affected the operations of the breakbulk lines, and that the further testimony and argument emphasized the question which the Commission thought decisive to the case—whether the traffic involved was naturally "tributary to Seatrain as well as the breakbulk lines?" The Commission concluded "that the ports of Galveston and Houston and the surrounding territory are centrally, economically and naturally served by Seatrain's facilities at Texas City." Beaumont, it was found, was not within the "Galveston Bay group and traffic through Beaumont was not naturally tributary to Texas City." Finally there was no evidence of discrimination between shippers since a shipper paid the same through transportation costs whether he shipped via Galveston, Beaumont or Texas City. The Commission concluded that Seatrain's equalization against Galveston and Houston did not violate sections 16 and 17. Nothing in this decision would lead one to the conclusion that "adequacy of service" at the port equalized against was the sole defense available to the carriers practicing equalization.

The next case to deal specifically with section 8 was *City of Portland v. Pacific Westbound Conference*, 4 F.M.B. 664 (1955), in which the Conference's tariff Rule 2 was challenged under sections 15, 16, and 17 of the Shipping Act, and was alleged to violate "the principles and policies of the Merchant Marine Act, 1920." Under Rule 2 a member line could meet competiton of the other member lines through equalizing the cost of a shipper of shipping through any Pacific Coast port. The difference between the shipper's cost of delivery to ship's tackle at the nearest port and his cost of delivery to ship's tackle at another port served by the equalizing line was absorbed by that line.

The Board finding that the Conference's equalization practices drew certain cargoes from territory which was naturally tributary to the complaining ports then for the first time cast inadequacy of service as the sole justification for "diverting" cargo from a port through equalization.

Thus, in allowing the practice of equalization on apples to continue, the Board said:

[69] *Beaumont Port Commission v. Seatrain Line, Inc.*, 2 U.S.M.C. 699 (1943).

[70] The conference had filed a modification which would have removed the Texas ports from its jurisdiction and Seatrain announced that it would "shrink" its rates at Texas City so as to equalize the rates via Galveston, Houston and Beaumont.

We will require, however, that equalization on shipments of apples and other deciduous fruits be subject to continuing review. *When reasonably adequate service is provided from the Northwest, the reason for this equalization rule will no longer exist.* (Emphasis added.)

On dairy products the Board permitted equalization "only when service is unavailable in those ports through which such products would normally move but for the conference's equalization practice. . . ." Finally the Board had the following to say:

In view of our findings of unjust discrimination[71] arising out of specific equalization practices, it necessarily follows that those practices are detrimental to the commerce of the United States and violate the principles and policies of section 8 of the 1920 Act. That section requires, all other factors being substantially equal, that a given geographical area and its ports should receive the benefits of or be subject to the burdens incident to its proximity or lack of proximity to another geographical area. To the extent therefore that the ports of a given geographical area *give or can give adequate transportation services, we look with disfavor on equalization rules or practices which divert traffic away from the natural flow of that traffic* (Emphasis added.) (4 F.M.C. 679)[72]

So it was that by 1955, and without anything in the way of explanation, inadequacy of service had become the sole defense to discrimination against a port through *absorption* of inland charges. In 1960 in *Proportional Rates on Cigarettes and Tobacco,* 6 F.M.B. 48 (1960), the adequacy of service doctrine was reaffirmed. However, in 1962, the Commission decided the case of *Surcharge on Shipments from Buffalo, New York,* 7 F.M.C. 458 (1962). In that case the Mediterranean Eastbound Conference established a 10 percent surcharge on all shipments originating at Buffalo. The Governor of New York filed a petition under section 16 First alleging that the surcharge created an undue and unreasonable prejudice against Buffalo and a preference to other Great Lakes ports. No mention was made of section 8. The conference defended on the ground that the surcharge was due to extraordinarily high terminal costs and excessive delays at Buffalo. The Commission concluded that the record would not support the conference and in finding that the surcharge violated section 16 noted that:

There are also other elements which should be considered in determining whether a *rate differential* at a particular port may be upheld, such as volume of traffic, competition, distance, advantages of location, character of traffic, frequency of service and others. (Emphasis added.) (7 F.M.C. 462).

That the surcharge had or would have the effect of diverting traffic from Buffalo is obvious. Thus there would appear only two reasons for the difference in criteria between the *City of Portland* case and the *Buffalo* case: i.e., (1) Unless section 8 is specifically injected into the case there are factors other than adequacy of service to be considered; or (2) It is the manner, method or practice actually used (absorption, surcharge, etc.) to "divert" cargo which determines the defenses available to the carrier. The former would allow the agency to ignore a "basic policy" of Congress and the latter will not bear rational inquiry.

Notwithstanding the *Buffalo* case, the remaining decisions on "port equalization" in which section 8 is at issue, are more or less consistent in their adherence to inadequacy of service as the only defense to a charge of diversion "contrary to

[71] The finding was made under section 15 alone. The section 16 and 17 allegations were not considered on the ground that the action taken under section 15 disposed of the issues. But the principle was to remain the same when sections 16 and 17 were at issue.

[72] On rehearing the Board allowed equalization on explosives because of inadequacy of service (5 F.M.B. 118 (1956)).

the policies of section 8." *See e.g., Stockton Port District v. Pacific Westbound Conference,* 9 F.M.C. 12 (1965);[73] *Sea-Land Service Inc. v. S. Atlantic and Caribbean Line, Inc.,* 9 F.M.C. 338 (1966); *Intermodal Service to Portland, Oregon,* 17 F.M.C. 106 (1973).

From the foregoing we can see that in the early development of the law governing sections 16 and 17 as they applied to ports, many transportation factors were deemed applicable to establishing or defending against a violation of those sections, e.g., volume of traffic, competition between carriers, character of traffic and the ubiquitous legalism "other." *See e.g., Alaska Rate Investigation, supra; Port Differential Investigation, supra; Everett Chamber of Commerce v. Luckenbach S.S. Co., supra.*

Although section 8 made its debut in reported decisions in 1941, inadequacy of service as the sole defense against diversion did not appear until 1955 in *City of Portland* case, *supra*. What may seem surprising is that the report contains no discussion of precedent which would have led one to understand why the "traditional" defenses against charges of discrimination or prejudice were no longer valid.[74] Whatever the reasons, "inadequacy of service" has remained the sole defense against diversion contrary to the policies of section 8. The principle was reaffirmed in the latest Commission decision on equalization, *Intermodal Service to Portland, supra*. But what of the other cases involving section 16 and 17? As already noted the *Buffalo* case reinjects the traditional transportation factors into deliberations on sections 16 and 17 when the question of *arbitraries* is at issue. Moreover in *Discounting Contract/Noncontract Rates,* 12 F.M.C. 20 (1968), (supplemental report on remand) the traditional transportation factors such as volume of traffic, competition, etc., must be considered when "determining the propriety of *rate differentials*" under sections 16 and 17. Here as in the *Buffalo* case there was no mention of section 8. What has emerged would appear to be a double standard. If the alleged preference or prejudice involves *shippers* at competing ports all the traditional defenses are available to the carrier. *West Indies Fruit Co. v. Flota Mercante,* 7 F.M.C. 66 (1962). However, if the alleged preference or prejudice is against a port, as distinguisted from a shipper, and if section 8 is argued, inadequacy of service is the sole defense available to a respondent. Moreover, even if, as in the *Buffalo* and *Contract Rate* cases, *supra*, the alleged harm is to a port, but section 8 is not at issue, or at least not pleaded, the traditional defenses again become available. There is in short no consistent body of precedent dealing with sections 16 and 17; and the decisions contain no explanation or discussion of the seemingly inconsistent treatment meted out under those sections.

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[73] In *Stockton* the following rather interesting statement appears: "In seeking to bring itself within the protection of section 8 . . . Stockton relies on its physical separation from San Francisco Bay proper. But other factors must be considered in making determinations under section 8. Thus the '*economies of transportation*' and the 'natural flow of commerce' are relevant. . . ." (Emphasis added.) (9 F.M.C. at 21) Aff'd *sub nom Stockton Port District v. F.M.C.*, 369 F.2d 380 (9th Cir. 1966), cert. den. 386 U.S. 1031.

[74] In one respect the failure to explain departures from or to distinguish past precedent is not surprising. Until 1966 research into the law of the Shipping Act and the other statutes the administration of which was charged to the various predecessors of the Commission was indeed a sometime thing. One is tempted here to indulge in personal reminiscences, but it is enough to point out that with the publication and binding of Volume 2 of the reports of the United States Shipping Board and the United States Maritime Commission all such activity ceased. The first two volumes contained excellent indices and provided a wealth of legal "precedent." However, after 1951 the decisions were in no way bound, indexed or otherwise arranged to facilitate recourse to the wisdom of the past. Research depended largely on the "remembrance" of colleagues. Sometimes around 1961 or 1962 the Commission undertook to bind and index all past decisions. Volume 3 appeared in 1963 and by 1966 publication was pretty much on an annual basis.

What seems to have been overlooked in the development of the theory of section 8 is that it announces but *one* Congressional policy which is to be considered by the Commission in discharging its duties and responsibilities. There are of course other Congressional policies which bear upon or affect the Commission's responsibilities under the statutes it administers directly which are entitled to equal consideration. But before turning to that problem a closer look at the way past precedent has dealt with the specific language of section 8 is in order.

As has been seen the cases on section 8 have laid down three criteria for the establishment of a violation of sections 16 and 17 when ports are the complainants: (1) there must be a practice by a carrier such as absorptions, differentials, arbitraries, etc. (which practices are generally lumped under the heading of "port equalization"); and the practice must (2) divert cargo which has its origin within territory which is "naturally tributary" to the complaining port; and (3) there must be adequate service at the port from which the cargo is diverted. The latter of course is the reverse of the only defense available to the carrier.

Under section 8 and with the object of "promoting, encouraging, and developing ports and transportation facilities in connection with water commerce," Congress has ordered investigations into "territorial regions and zones tributary to such ports. . . ." In conducting an investigation into these tributary zones and regions consideration is to be given not only to the "natural direction of the flow of commerce" but also to the *economies of transportation by rail, water, and highway.* It is clear from the language of section 8 itself that even if the natural flow of commerce indicates that cargo originating from a zone or region naturally tributary to a port should move through that port, before a carrier can be found guilty of an unlawful diversion of that cargo the *economies of transportation by rail, water and highway* must be considered and weighed in the balance. However, since the *City of Portland* case in 1955 the economies of transportation have received what would appear to be merely lip service.

Thus, in *Stockton Port District v. Pacific Westbound Conf.*, 9 F.M.C. 12 (1965), after specifically stating that the economies of transportation were relevant in cases of diversion and after concluding that the respondent carriers had "ample economic and cost justification for the discrimination" the Commission went on to say at page 23, "But even this would not save respondents' equalization under the *applicable precedents* were it established that the practice drew cargo away from territory which was exclusively and naturally tributary to Seattle."[75] The *Stockton* decision turned on the question of what was Seattle's naturally tributary territory.[76]

It seems to me that it is in this investigation of zones or regions which are naturally tributary and their delineation that the economies of transportation by rail, water, and highway are to be considered. This is what the clear language of section 8 requires; yet this doesn't seem to have been the case in the past. Some example of past definitions should serve to illustrate:

[75] The report fails to cite or discuss the applicable precedents.

[76] An interesting question comes to mind at this point. If inadequacy of service is the only defense against port equalization, why are the reports of the cases replete with so much economic data such as cost of vessels calling at the port, investments in facilities at the port, etc. *See Stockton* case, *supra,* and *Intermodal Service to Portland, supra.* Under the "applicable precedent" it would seem that the only relevant data that need be produced is that dealing with adequacy of service.

. . . section [8] requires that, all other factors being substantially equal, that a given geographical area and its ports should receive the benefits of or be subject to the burdens naturally incident to its proximity or lack of proximity to another geographical area. (*City of Portland,* 4 FMC at 679.)

Citing the above quote from *City of Portland,* the Commission in the *Stockton* case said:

The delineation of a "given geographical area" will almost always of necessity involve the inclusion of ports whose location from specified inland points will vary in distance or mileage. Thus, mileage alone is not the determinative factor. (*Stockton Port District,* 9 F.M.C. at 21, 22.)

In *Pacific Coast European Conference–Rules 10 and 12,* 14 F.M.C. 266 (1971), the Commission said, ". . . areas are naturally tributary to ports if they are 'centrally, economically and naturally' served by such ports." Finally in *Intermodal Service to Portland* an area can be said to be naturally tributary if it is "historically, geographically, economically and commercially" served by that port. The really troublesome feature of the various definitions of naturally tributary is that they are all one-sided. The various elements comprising the definitions are considered only as they apply to or affect the port not the carrier, a situation which of course ignores the economies of transportation as they apply to the carrier.

This one-sided approach to the establishment of naturally tributary areas would not present a problem if in finding undue prejudice or unjust discrimination against a port under sections 16 and 17 two distinct steps were taken, i.e., first a determination that a given area was naturally tributary to that port; and, secondly that the "economies of transportation by . . . water" afforded no justification for the particular practice which resulted in the unlawful diversion which prejudiced or discriminated against the port. Thus, as was almost the case in *Stockton, supra,* the ultimate conclusion that there had been "diversion" contrary to the policies of section 8 and in violation of sections 16 and 17 would be the result of a balancing of interests as between the port and the carriers. Or to put it another way, the impact of the diversion on the port would be weighed against the burden upon or the economic feasibility of the carriers providing direct service to the port. This would be consistent with not only the policy expressed in section 8 but perhaps more importantly the overall policies expressed in the Merchant Marine Act of 1920 and the Shipping Act, 1916,[77] and it would avoid the frozen-in-time aspect of the past approach to port equalization.

This past approach to section 8 has produced yet another curious result. Since 1950 it has been the Secretaries of Commerce and the Army who have been charged with conducting the investigations called for by section 8. Thus, it would seem that if pursuant to section 8 particular zones or regions are to be declared naturally tributary, it should be done by the Secretary of Commerce and the Secretary of the Army. However, with one exception, Commission cases do not seem to contain any reference to investigations conducted by the Secretaries

[77] The preamble to the Merchant Marine Act, 1920, proclaims that the purpose of the Act is, among other things, not relevant here, "To provide for the promotion and maintenance of the American merchant marine. . . ." Certainly this is an expression of Congressional policy which should be given equal weight with the policy stated in but a single section [section 8] of that Act. Additionally one of the purposes of the Shipping Act, 1916, is the "encouraging, developing and creating [of] . . . a merchant marine."

or their designees.[78] Thus, the agencies charged with the administration of section 8 could define one region, zone or area as tributary to a port, while the Commission when considering the *policy* of section 8 could quite conceivably draw quite different boundaries. In short the Commission, an agency not charged with the administration of section 8, more often than not ends up carrying out the investigation which by the literal language of the section is the responsibility of other agencies. Thus, not only has the *policy* of section 8 been applied in a manner which overrides and, indeed, excludes other announced policies of Congress, the *policy* attributed to section 8 does not even square with the literal language of that section.

If the foregoing demonstrates nothing else it shows that the time has come for a reexamination and recasting of the role of section 8 in cases involving diversion of cargo. Accepting this premise, what guidelines can be set for the future?[79] At the outset it should be apparent that there are no easy solutions. As already noted intermodalism generally and minibridge in particular pits the interests of the ports against the interests of the carriers. Given the present statutory scheme, it is in my opinion not practical or feasible to draw future guidelines for measuring the lawfulness of diversion, if by guidelines is meant the drafting of precise rules of conduct under which a particular practice could be judged valid or invalid by the simple process of matching a particular practice against the language of a rule[80]. An example, take the criteria "historically" which has been used as a factor in determining whether an area is naturally tributary to a given port. If an area has been "historically" served by a port does this mean that the past must dictate to the future? To draw the absurd analogy, should the age of sail dictate to the age of steam. Or more realistically should the traffic patterns developed from, and the operations of, an era in which the relatively small breakbulk carriers were predominant be immutable and thereby lay down the operational limitations of today's large and extremely expensive containerships, Lash or RoRo vessels? What benefits do shippers, the ultimate consumers of all the services we are considering, derive from a regulatory philosophy that does not recognize technological and commercial advancements in the state of art? Thus, historicity seems at best a criteria to be applied lightly if at all. All of this is to say nothing of the innovations and changing modes in inland transportation—the most significant of which is, of course, the concept of the container which can be moved either by truck or rail without destroying the integrity of the "pack-

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[78] That such investigations do exist is shown by the one mentioned exception. In the *Stockton* case, *supra*, reference is made to "The Ports of San Francisco and Redwood City, Calif., Port Series, No. 30, Rev. 1951," a joint publication of "the Maritime Administration, Department of Commerce and the Corps of Engineers, Department of the Army, which are of course the governmental agencies charged with the administration of section 8. . . ." The joint publication cited contained a section headed "tributary territory." (9 F.M.C. at 24.)

[79] With the benefit of hindsight, one can see that this case may not have been a particularly happy choice as the vehicle for the establishment of guidelines. Counsel for complainants restricted themselves to a presentation of their particularized case while other counsel equally restricted themselves either to supporting complainants or to defending against complainants' charges. No one offered any discussion, argument or theorization on general principles or future guidelines. All this despite the Commission's designation of the case, and the multiplicity of intervenors.

[80] Using the Commission's present techniques of rulemaking, any rules promulgated would not be based upon the kind of record needed to produce guidelines which encompass the entire spectrum of cargo diversion. Perhaps were the Commission to conduct "legislative" type open hearings designed for the gathering of the vast amounts of information necessary, it would be possible to draft a reasonable set of rules. To date, however, such hearings have not been the usual vehicle for rulemaking.

age."[81] In short and with the later discussion of naturally tributary areas in mind, the historical criteria would seem only to show what past practice had been—not what future developments should be. But it is useful to show what territory *had* been naturally tributary in the past and that can be used to determine the impact of the present or future diversion. Given the limitations of this case any guidelines drawn from the record here must of necessity take the form of general propositions which are of necessity culled from past decisions and the language of the statutes themselves; but more importantly these propositions need to be reevaluated in the light of current conditions in our waterborne commerce.

First, the concept of naturally tributary territory has never been positively defined in any meaningful way. More often than not, the decisions are specific only when they speak to elements which are not sole criteria for defining naturally tributary areas. Thus mileage and the inland rate from a point of origin to a port are not by themselves determinative of the question of whether that point of origin is within territory naturally tributary to that port. *Stockton Port District v. Pacific Westbound Conference,* F.M.C. 12 (1965). Even if the most recent "definition" of naturally tributary territory is considered little is gained that is helpful in fixing the boundaries of such areas in future cases. Having stated that zones or regions are naturally tributary to a port if they have been "centrally, economically and naturally" served by that port, or that an area is tributary if it has been "historically, geographically, economically and commercially" served by a port, just what has been said?

The real problem is that terms like "centrally,"[82] "geographically" or "historically" are not constants; and also that terms like "economically" have real meaning only if they are applied in an evenhanded way, i.e., a port can economically serve a given area if its charges are no higher than its nearest competitor ports, but the port cannot serve an area economically if the carrier lifting the cargo cannot serve the port equally "economically." As for "geographically" tributary, if the term becomes anything more than a means of physically delineating territory which is economically naturally tributary, then it too becomes meaningless. The final descriptive criteria "commercially" is but another way of resorting to economics—not just port economics but carrier economics. Commercial feasibility is nothing but economic feasibility.

The concept of naturally tributary zones, regions, areas or territories is and should be a constantly changing one. It is a concept which includes inland rates, distances, traffic patterns (not only as they were but as they are) and, it seems to me, most importantly shipper preferences or considerations. A suggested approach to the concept of naturally tributary territory would involve: (1) Evidence of the past flow of traffic through the port, (2) the points of origin of all cargoes, (3) the relevant inland rates, and (4) the natural or historical transportation patterns, and of course the amounts of cargo diverted.

Having established that cargo which was naturally tributary to the port had

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[81] If this case does nothing else, it points up the inefficiency if not absurdity of departmentalizing the regulation of transportation. The problem of cargo diversion is not one that involves water carriers only. Minibridge would not be a factor at all if the rail rates were prohibitive. The basic premises underlying the Shipping Act and the Interstate Commerce Act have never, to my knowledge, been examined one in the light of the other, yet that they do interrelate and at times work at cross purposes has, with cases like this become increasingly obvious.

[82] "Centrally" seems to present a special problem since it does not seem to be related to anything that "normally" goes into definitions of naturally tributary territory.

been diverted the second consideration should be the reasonableness of the particular practice of the carrier which has caused the diversion. Any judgment on the question of reasonableness should take into consideration the cost to the carrier of providing direct service to the port, the competitive conditions existing in the trade, any operational difficulties involved in providing direct service, and any other transportation factors that bear upon the carrier's ability to provide direct service. As already noted the economies of carrier operation do not and have not, at least since 1955, figured in determinations of prejudice and discrimination against ports. Adequacy of service as the sole defense against diversion is as has been said a troublesome concept indeed and one which in my opinion is contrary to the specific language of section 8 of the Merchant Marine Act 1920, sacrifices the overall policy of the 1920 act to the limited and misconstrued policy of section 8, and results in creating dual and inconsistent standards for judging carriers' practices under sections 16 and 17 of the Shipping Act. For the reasons already set out above, it is my opinion that if a port has shown that cargo which had been naturally tributary to that port was being diverted by the practice of a carrier then the carrier has the right to resort to what for a lack of a better name are called the traditional defenses available against charges of undue prejudice or unjust discrimination in violation of sections 16 and 17. Having once determined that cargo which had been naturally tributary to a port was being diverted by absorption, rate differentials, arbitraries, or some other practice the carrier should be allowed to show that the practice was the result of competition from other carriers, lack of volume of cargo offered at the port, the port's charges as compared with other ports' charges, adequacy of facilities at the port, and of course whatever else is relevant to the carrier's decision not to call directly at the port. Finally, before the carrier can be said to have violated sections 16 and 17, the harm suffered by the port must be "substantial."[83]

What seems to have been overlooked in "weighing" the Congressional policies expressed in section 8 is that the "encouragement" and "development" of ports was not to be at the expense of or to the detriment of the carriers serving those ports. Yet it seems that this must be the ultimate result if the present course is rigidly adhered to. Now more than ever before would seem the time to apply again the philosophy expressed in *Disposition of Container Marine Lines,* 11 F.M.C. 476 (1968):

> . . . the Commission does not intend to create or permit impediments to the improvement of shipping services. Enlightened regulation is the key to effective regulation; no regulatory agency can permit regulation to be outstripped by new techniques in the industry. Progressive regulation is required in the interest of encouraging the modernization of shipping services. Outmoded principles and rules will surely stifle advancements in all fields, and especially transportation where developments have followed so quickly upon each other.[84]

[83] In *Associated Jobbers & Mfrs. Co. v. Am.-Hawaii S.S. Co.,* 1 U.S.S.B. 161 at 167–168 (1929), the Board said: The standard by which to determine when an advantage to one or a prejudice to some other is undue or unreasonable is not difficult to determine. Whenever it is sufficient in amount to be substantial and of importance to either the one receiving the advantage or to the one suffering the prejudice it must be held to be undue or unreasonable.

[84] The Commission then quoted from the Supreme Court's opinion in *American Trucking v. A.T. & S.F.R. Co.,* 387 U.S. 397, 416 (1967), where the Court in dealing with the rise of rail piggyback by truckers dealt even more forcibly with the need to encourage and not throttle that innovation in service: . . . This kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulating agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adopt their rules and practices to the nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

Minibridge greatly expands the alternative forms of transportation open to the shipper's choice. To unwarrantedly inhibit this freedom of choice would be detrimental to commerce as the Board found in *Swift & Co. v. Gulf & South Atlantic Havana Conf.*, 6 F.M.B. 215, 226 (1961). The Board's words are wholly applicable here:

> The interests and needs of shippers in foreign commerce should dominate where competing methods and new techniques of water transportation are involved. An arrangement would seem to operate to the detriment of the commerce of the United States or to be unfair as between shippers and exporters of the United States and their foreign competitors which prevents the former from having a free choice among competing methods of transportation for cost advantages. Anything which impedes free choice among constantly changing alternatives provided by technical changes in traffic and transportation methods is detrimental to commerce in the long run.

The transportation truisms would of course yield to a plain requirement of the Shipping Act; but that requirement should be a very plain one indeed, and it should be adopted only after a complete reexamination and reevaluation of the limits of yesterday in the light of today's practices.

If the suggestions set out above lead to the "big" case, that of itself is not necessarily a novelty in cases of port equalization. The record in this case stands as an example of the "big" case gone astray under the old limits. It might not have done so if clear principles governing port equalization were to be found in the precedents. Future case records need not necessarily be bigger; they need only be *relevant* to the overall issue presented by carrier practices which allegedly divert cargo from ports.

The foregoing is all that I have been able to furnish by way of suggested guidelines for future cases and it is time now to turn to the resolution on this record of the specific issues raised by complainant. Leaving aside for the moment complainants' assertions of ownership of naturally tributary cargo, they contend that the respondents have violated indifferently sections 16 and 17 by the unlawfulness of shippers' costs and by discrimination against shippers and ports. Without the asserted payment of a shipper's cost there is no absorption and therefore no undue preference, advantage, disadvantage under section 16 and no unjust discrimination under section 17. *Sea-Land Service Inc. v. S. Atlantic & Caribbean Line, Inc.*, 9 F.M.C. 388, 344, 347 (1966).

Complainants claim that minibridge shippers do not pay the West Coast drayage and terminal charges involved in the rail-water transfer. This is true, but for more than a hundred years this has not been a shipper cost for any movement, whether by joint rate or OCP/overland tariff when the shipper or consignee is East of the Rocky Mountains. *Investigation of Overland/OCP Rates and Absorptions*, 12 F.M.C. 184, 189–190, 197, 202 (1969), aff'd *Port of New York Auth. v. Federal Maritime Comm'n.*, 429 F.2d 663 (CA 5, 1970). There is no difference between a minibridge shipment and a shipment under OCP/overland rates at least in the matter of absorptions by the carrier. If the drayage and terminal charges for the rail-water transfer at West Coast ports have for some 100 years been considered for the carrier in OCP shipment, there is absolutely no reason to now distinguish minibridge and make those costs for the shipper—to do so would be to create a distinction without a difference.

Secondly, complainants claim that respondents must be absorbing shipper costs because their net revenue after rail division and transfer costs is less than the net revenue realized in all-water, OCP or local service. At least two things are wrong with this general proposition. First on this record it has not been shown, and indeed it is highly doubtful that the overall net revenue is in fact less than that realized from the other forms of service. Secondly, an unlawful absorption is simply not established by the mere showing of a difference in rate structure or return. Finally, in an argument that borders on the frivolous, complainants assert that absorptions can be found in the east-west imbalance of container movements. Complainants state: "These costs [inland transportation costs] are exacerbated by the fact minibridge westbound movements outnumber minibridge eastbound movements by a ratio of about 4–1so that minibridge ocean carriers also have to beat the cost of repositioning empty containers."

Here as in so many other instances complainants leap from the valid general to the unlawful specific without providing the nexus which the law renders essential. Complainants provide no specific cost figures, do not consider the carrier's total operations (which may be global) and completely ignore such things as container interchange agreements[85] or the lease to rail or truck carriers of empty containers for movements East. The finding of an unlawful absorption cannot rest upon infirmities. Moreover, a carrier's expense is going to vary, from commodity to commodity, from port to port, and from service to service. It has never before been suggested that this variance somehow amounted to absorption of shipper costs. Moreover, if we consider the precise area of container imbalance it would be more costly to remedy the same directional imbalance between the Pacific Coast to Far East which would lead to the finding—if complainants' argument were accepted—that there would be an unlawful absorption every time a trans-Pacific carrier loaded a container.

Thus, on the record before me, I conclude that complainants have failed to establish that respondents have made any absorptions which are unlawful under sections 16 and 17 of the Shipping Act, 1916.

The keystone to complainants' contention that minibridge is unlawful is the assertion that the service diverts local cargo which is naturally tributary to complainant ports. While it is clear that without absorption or other repayment of costs which should be borne by the shipper no "naturally tributary" issue can arise *(Intermodal Service to Portland, supra)* it is nevertheless appropriate to probe the bases of complainants' contentions on this issue.[86]

Complainants simply ignore the "absorption" limitation on the naturally tributary doctrine, and assume that the port has a vested interest, which the Commission is obliged to protect, in handling all cargo local to the port.[87]

Setting aside for the moment the question of whether container cargo is indeed

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[85] This is not to suggest that respondents are parties to such agreements, it is merely mentioned to demonstrate a valid operational factor which complainants did not consider but which has direct relevance to the unlawful practice asserted by them.

[86] On brief, counsel for one respondent attributes such probing to "the redundant habits of our [the legal] profession." While I would be the last to exonerate the profession of redundancy (witness this opinion) I am more of the mind that any "redundancy" results more from the structure of the system than from any desire to *display a talent for saying the same thing in a variety of ways.* Each of us who write, be it argument on brief or exposition in decision, run the risk that the reader will not be persuaded by a single argument or conclusion. So if there are several reasons or conclusions dictating the same result, each must be presented in the hope or conviction that at least one of them will be persuasive.

[87] This seems to have been the basic theory of the 1973 complaint. Indeed some of the complainants took the theory so to heart that they filed a complaint against a line which simply solicited cargo—without any absorption or inducement—in Philadelphia for loading or discharging in Baltimore or New York. This claim was decisively rejected in Docket No. 73–78, *Delaware River Port Authority v. TTT, Inc.*, mimeo, decision served February 4, 1975. *See also Delaware River Port Auth. v. TTT, Inc.*, 501 F.2d 917 (CA 3, 1974).

tributary to but a single port, and using the latest Commission pronouncement on the issue, local cargo is tributary to a port but inland cargo is not. Intermodal Service to Portland, *supra*. Thus, it is necessary (1) to define the territory local to the port, and (2) to determine what part of the minibridge shipments originated in that area. Complainants have failed on both counts.

First, the only effort on the part of CONASA to define "local" territory is confined to an equivocal footnote which says:

> The "port area" is *normally* considered to be the area within a 50-mile radius of the port . . . of course, the naturally tributary area of a port . . . is far broader, being a territory that has particular historic, geographic, commercial and economic ties, with one of the major considerations being the existence of favorable inland rates.

For the "port area," a 50-mile radius, however valid, is precise enough, but for the purpose of delineating the naturally tributary area the definition becomes vague and resorts to the descriptive adjectives which sprinkle past decisions. There is no satisfactory way to demarcate local from inland cargo except to show port by port, the territory from which substantially all containers would in the absence of the minibridge has moved through the port.[88] CONASA has not shown that the cargo would have moved through the complaining ports and while this might not prove fatal CONASA has failed even to show that the cargo in question originated in locally tributary areas. CONASA places its full reliance on the fact that the container was loaded at the railhead at a port city. This is simply not enough. For instance Seatrain had containers originating in or destined to Arkansas, Illinois, Indiana, Kentucky, Michigan, Missouri, Ohio, West Virginia and Wisconsin. In February and March 1975, 26 percent of the identifiable Phoenix containers had origin or destination in a different state than the bill of lading port. Among the shippers whose testimony is part of this record are included a dozen located in Nashville, Cleveland, Minnesota, Florida, Cincinnati, North Carolina, Scranton, Illinois, and Southeast United States.[89] The reasonable assumption is that most but not all of this outlying minibridge cargo would move via the West Coast at overland OCP rates and that most but not all local cargo would move by all-water service. Thus, the record here demonstrates nothing more than that minibridge diverts *some* cargo but there is no way of knowing how much. Thus there is no way of determining or measuring the harm to complainants caused by minibridge operations. The record does show, however, that minibridge does not threaten the viability of complainant ports.

The 1973 minibridge traffic represented only some 4.6 percent of the total container traffic handled by the 10 ports studied—and there is again no way of knowing how much of that 4.6 percent was "naturally tributary" to those ports

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[88] I realize that in the *SACL* case *supra*, a similar test was rejected. In that case Hearing Counsel argued that complainant had failed to show that *but for* respondent's indirect service from Miami the "diverted" cargo would have moved through Jacksonville thus there had been no violation of section 16. The Commission said:

> We reject the "but for" test of Hearing Counsel. In *Phila. Ocean Traffic Bureau*, our predecessor formulated an extreme requirement for a finding of violation of section 16 First. To the extent that this language relates to port equalization or qualifies our expression of the applicable standards for port equalization cases *Phila. Ocean Traffic* is overruled.

No explanation is given as to why the "but for" test is extreme. The rejection of this test immediately raises the question, If the allegedly diverted cargo would not have moved through the port in any event, how has that port been harmed by the practices of the "equalizing" carrier? No answer has been given, and one does not come readily to mind. The "but for" test should be reinstated.

[89] The district court proceedings produced a convenient listing of 74 minibridge shippers and a deposition program could have produced information on cargo origins, shipping practices and intentions in the absence of minibridge. If this was thought to be ambitious CONASA could have at least interrogated the score or so of shippers who appeared for cross-examination in this proceeding.

or how much was actually *diverted* from those ports by minibridge. If the total general cargo handled by the 10 ports is considered the minibridge movements amounted to only about 1.5 percent of the total.

In *Associated Jobbers & MFRs v. Am. Hawaii S.S. Co.*, 1 U.S.S.B. 161 (1929), a predecessor first noted that the preference or prejudice prohibited by section 16 is that which is undue or unreasonable and went on to say:

> In the language of a well considered Federal Court decision construing an identically phrased provision of another regulatory statute it is said:
>
> > The standard by which to determine when an advantage to one or a prejudice to some other is undue or unreasonable is not hard to determine. Whenever it is sufficient in amount to be substantial and of importance to either the one receiving the advantage or to the one suffering the disadvantage, it must be held to be undue or unreasonable.

In the same case it was held that the effect of the allegedly prejudicial practice on all interests—including shippers—must be taken into account when measuring the substantiality of the prejudice or preference.

Here the record permits no measure of any meaning or relevance to the charges made. But even if we accept complainants' assumptions 4.6 percent of container traffic and 1.5 percent of general cargo—the latter being the better gauge, the "harm" to complainants is not substantial within the meaning of an undue or unreasonable prejudice in violation of section 16 First. To find such a violation on this record, which is replete with speculation and unwarranted assumptions, would be tantamount to sacrificing the transportation mode of the future to inflexible criteria designed for an era already a part of transportation history. Respondent minibridge operators have not subjected complainants to any undue prejudice within the meaning of section 16 of the Shipping Act.

Complainants also assert that respondents have violated section 17 by discriminating against ports and shippers. The discrimination which is alleged against shippers is that the respondents:

> By means of the large scale and pervasive absorption of shippers' and inland transportation costs, the minibridge carriers have created systematic discrimination against certain shippers in favor of others. Thus local West Coast shippers effectively pay more than do minibridge shippers. Such a system of which charges varying amounts for identical services is discriminatory and in violation of section 16 First. *Proportional Commodity Rates on Cigarettes and Tobacco*, 6 F.M.B. 48, 55 (1960).[90]

In the first place that the "services" are not identical has long been recognized. *Overland/OCP* case, *supra*. Secondly, "Discrimination against a shipper is necessarily measured by what the shipper pays not what the carrier collects." *Stockton Port District v. Pacific Westbound Conf.*, 9 F.M.C. 12, 27 (1965). Moreover, where no shipper has complained of discrimination the Commission will not hear others complain for them. *Beaumont Port Commission v. Seatrain Lines*, 2 U.S.M.C. 699, 703 (1943). Still alleging "discrimination," CONASA argues that minibridge tariffs force shippers of low-rated cargo to subsidize shippers of higher-rated cargo to subsidize minibridge because the low-rated shipper pays higher rates than would be the case if the minibridge service were "compensatory." CONASA cites *Nonassessment of Fuel Surcharges on MSC*

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[90] Complainants continually lump together both sections 16 and 17 and shippers and ports without regard to the differing criteria or circumstances applicable to each.

Rates, 15 F.M.C. 92 (1972). As will be shown later CONASA has failed to show that the minibridge service is not "compensatory" and the reliance on the *Fuel Surcharge* decision is misplaced. In that case the Commission was dealing with an extraordinary event, one which bore no relationship to the transportation factors normally applicable to the fixing of rates on particular commodities. The surcharge was applied across the board on "commercial" shipments regardless of commodity, rate or other transportation factors. It was not applied to Defense Department shipments. The Commission merely held that in view of this, commercial shipments were subsidizing military shipments. We are not dealing here with any such extraordinary assessment and the Fuel Surcharge case is inapposite.

For the foregoing reasons, I conclude that respondents have not unjustly discriminated between shippers within the meaning of section 17 of the Shipping Act, 1916. There remains, however, the allegation that minibridge discriminates as between ports. As CONASA puts it:

> Minibridge, more importantly, is unjustly discriminatory against CONASA ports in violation of section 17 and subjects them to undue disadvantage in violation of section 16 First [because] Minibridge diverts locally tributary cargo by means of absorption of costs without any justification. (Citations omitted.)

From the above it can be seen that CONASA[91] relies upon the same propositions to establish a violation of section 17 as those already rejected under section 16 First. It would be sufficient to simply refer to the conclusions already set forth were it not for the decision in *North Atlantic Mediterranean Freight Conf.—Rates on Household Goods*, 11 F.M.C. 202 (1967).

In the *Household Goods* case, the Commission attempted to formulate the criteria which apply to undue or unreasonable prejudice against a shipper under section 16 First, on the one hand, and the criteria which would apply to unjust discrimination as between shippers under section 17 on the other. In doing so, the Commission adopted the definition of discrimination formulated by the Supreme Court when it considered section 2 of the Interstate Commerce Act in the case of *Wight v. United States*, 167 U.S. 512 (1897). The Commission said:

> Thus . . . discrimination arises when two shippers of like traffic, shipping over the same [line] between the same points under substantially similar circumstances and conditions are charged different rates. (11 F.M.C. at 212).

However, the Commission was fully aware that in defining discrimination against shippers, it might have created problems in other areas:

> We are of course aware that section 17 also prohibits fares or charges which are unjustly discriminatory between ports; and that in such a case it is difficult to envision a situation where the transportation involved would be "between the same points." But whatever the criteria for measuring or judging unjust discrimination between ports may be, we find no differences in transportation conditions between land carriage under the Commerce Act and water carriage under the Shipping Act which would warrant the continuation of an unfortunate departure from the long established principles governing unjust discrimination between shippers. (11 F.M.C. at 216).

In view of the above and in the light of the Commission's view of this case some analysis of the *Household Goods* decision appears warranted.

Undue or unreasonable preference or prejudices arises when shippers at A and

[91] The arguments of the other ports to the extent they address themselves to the issue are the same in all essentials.

B are competitive in a common market at C, the line hauls from A and B to C are the same and the same competitive influences apply to both. Section 16 First is thus designed to prohibit carrier *favoritism* which enables, say, the shipper from A to deliver his goods to C cheaper than can the shipper from B, thereby giving the shipper from A an advantage in the common marketplace which advantage is based solely on transportation rates. Thus shippers, just as ports, are:

> . . . entitled to all the benefits to be derived from their natural or acquired advantages of geographical location and carriers may not by a difference in rates destroy those advantages unless the difference is justified by the cost of the respective services, by their values or by other transportation conditions. . . . Since the section [16 First] is intended to prevent unlawful favoritism among competitors in the same market place, the allegedly preferred shipper must ordinarily be in competition with the allegedly prejudicial shipper. . . . (11 F.M.C. at 210).

Thus, under section 16 First the shippers must "ordinarily" compete with each other; and before a violation can be found there can be no justification for the difference in rates. The justifications, or defenses available to the carrier are such as: competition from another carrier, convenience to the public, the relative cost of the service and profit to the carrier and the situation and circumstances of the respective customers competitive or otherwise. (See 11 F.M.C. at 210.)

On the other hand discrimination between shippers under section 17 entails different considerations. Again adverting to the Supreme Court's analysis of section 2 of the Interstate Commerce Act, the Commission quoted with approval from *Wight v. U.S.*:

> The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road and to forbid it by any device to enforce higher charges against one than the other. (167 U.S. at 157.)

To establish a violation of section 2 and thus one under section 17, it is not necessary to show that the two shippers involved compete with each other. Moreover where section 17 is involved a carrier may not make a difference in rates because of shippers' circumstances, identity of shippers, or whether a shipper is hurt or not. (11 F.M.C. 212.) But the shipments in question must move on the same carrier from the same point of origin to the same point of destination.

The importance of the *Household Goods* decision is not so much for this case as it is, perhaps, for future cases.

In the very near future however it is likely that the criteria for establishing discrimination between ports will be necessary. When Congress and the Supreme Court defined discrimination between shippers they were dealing with a situation which must have appeared to them as having no justification other than blatant favortism. After all how does a carrier "justify" charging one shipper of barrels of beer more than another shipper of barrels of beer when both are shipping from the same point in origin to the same point of destination on the same railroad, or for that matter water carrier? *Wight v. United States, supra.*[92]

When dealing with "discrimination between ports" a quite different situation arises. Discrimination between ports is the same as *undue preference or prejudice* between shippers—it cannot be equated with *discrimination* between shippers. Discrimination between ports will necessarily involve two separate points of origin. The circumstances requisite for the latter simply do not exist.

[92] *See e.g., Lake, Discrimination by Railroads and other Public Utilities,* (1947).

Thus, the same defenses available to a carrier against a section 16 First allegation must be available to a carrier when the alleged offense is unjust discrimination under section 17. This is because the very operation which gives rise to the allegation involves transportation factors which cannot arise under the *Household Goods* case definition of discrimination. There must of necessity be two ports involved; thus there must be at least two points of destination or two points of origin. That differing transportation factors will affect the rates, practices, charges or whatever is called into issue about the carrier's service or lack thereof at one of the two ports is so obvious as to not need elaboration. Thus, the transportation factors which led to the practice should, under any reasonable statutory interpretation and all practical, logical and common sense guides be taken into account. In short discrimination under section 17 should be treated the same as undue or unreasonable preference or prejudice under section 16 First.[93] Perhaps legislative clarification should be sought.

Thus applying the same criteria to the alleged violation by respondents of section 17, I conclude that there has been no unjust discrimination between ports within the meaning of section 17.

The final allegation to be dealt with is that "Minibridge Rates are Unreasonably Low and Detrimental in U.S. Commerce in Violation of Section 18(b)(5)."

The argument consists (1) of an assertion that "minibridge" rate levels are significantly below the rate levels in any "comparable" services, i.e., local West Coast or OCP; (2) that the purpose of the low rates is diverting cargo from "CONASA and Gulf ports"; and (3) "Such purposeful and systematic diversion has necessitated rate levels which flatly violate the prohibition contained in Section 18(b)(5)."

The first thing to be noted in discussing this allegation is that only Sea-Land disclosed its costs attributable to minibridge carriage.[94] In discussing Sea-Land's submission CONASA first describes it as discredited, then cites it as showing that Sea-Land "is not meeting fully distributed or variable costs," and then dismisses the whole thing as "unresponsive" and "vapid."

Meeting "fully distributed costs" is not a test that the Commission has thus far adopted as a means of determining whether a rate violates section 18(b)(5). Rather, the criteria is whether a particular rate meets "out-of-pocket costs." *Investigation of Rates in the Hong Kong United States Atlantic and Gulf Trade*, 11 F.M.C. 168 (1967). Aside from the particular assertion that the rates do not

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[93] I realize that in treating the discrimination the same as preference or prejudice I am doing to some extent what the Commission condemned counsel in the *Household Goods* case for when it said: "The difficulties experienced by the parties in this case are due to the fact that they have treated sections 16 and 17 as if one or the other was the product of a meaningless redundancy on the part of Congress. . . ." (11 F.M.C. 208.) However, the confusion between discrimination and preference and prejudice existed for at least a decade before the passage of the Shipping Act, 1916, (see e.g., 11 F.M.C. 209, footnote 14.) and the problem alluded to in *Household Goods* seems to me to admit of only the suggested solution.

[94] CONASA asserts that the ruling by Judge Marshall on September 12, 1974, constitutes reversible error. I have examined the ruling and subsequent denial of appeal and am convinced that Judge Marshall's disposition was correct. Judge Marshall clearly limited the second round of interrogatories to matters clearly relevant to the first round of interrogatories. His rulings make clear that this was not the case. CONASA, however, cites the Commission designation of this proceeding as a "leading case" as a reason for the allowance of thair departure from the clear instructions of Judge Marshall. I cannot accept this belated recognition of the asserted importance of this case as grounds for challenging tha rulings. Counsel for CONASA have throughout the entire proceeding treated the case as a restricted complaint case and have not, attempted to break the boundaries of their particular interests, to consider the overall implications of minibridge for all ports, for all carriers or for all shippers—to say nothing of the ultimate consumers of the goods which are carried, handled, stored, charged or otherwise burdened by transportation costs.

exceed "fully distributed costs" CONASA only cites, for whatever reason, the following:

. . . a rate which prevents cargo from moving certainly is detrimental to commerce. But what of a more intangible economic impact, the watering down of profits or the inability of a merchant to enter in a market at all? An unreasonable rate which causes either of these results is detrimental to U.S. commerce. Many situations may arise in which some economic harm other than "lost sales" is worked by a rate upon some aspect of our commerce. Thus, we will not restrict the definition of detriment to commerce to those rates which prevent a commodity from moving. Rather, we will define detriment as something harmful, not limit it to "lost sales" or other rigid formulas. . . .

Presumably CONASA is attempting to show that "merchants" have failed to enter some market or that "intangibles" should be taken into account. No merchants have appeared to support the first proposition and CONASA has failed to point out any intangibles which should be taken into consideration.

Finally the claim that Sea-Land's minibridge service did not return its fully distributed or variable costs is not supported by any discussion which is relevant to the charge that Sea-Land did not meet such costs.

It is difficult to imagine a plausible claim of a section 18(b)(5) violation when the average minibridge TEU in 1973 brought a carrier revenue of $1,058 and the average all-water TEU a revenue $1,111, or when for the five reporting respondents the 1974 per container revenue from minibridge was $1,994 and the all-water and OCP service averaged $2,111.[95]

Complainants have simply (1) failed to show that minibridge rates are so high or so low as to be detrimental to the commerce of the United States; and (2) not established that the criteria they would apply are applicable to a determination that minibridge rates violated section 18(b)(5).[96]

Respondents have not set rates so high or so low as to be detrimental to the commerce of the United States within the meaning of section 18(b)(5).

Finally, it has been suggested that should minibridge be found lawful or rendered so by legislation, the "premium pricing" might be appropriate. By premium pricing is meant the setting of minibridge rates at some fixed percentage above the all-water rates from the East Coast. Whatever validity there may ultimately be in such a proposition the record here neither demonstrates the need nor establishes a basis for such a system of rates.

As an alternative it is suggested that Commission approval of minibridge should be conditioned upon the setting of minimum rate levels—i.e., the minibridge rate should be at least equal to the lowest all-water rate. The proponent of this suggestion "considers that there is developing a trend toward minibridge rate cutting" which if unchecked would result in "massive instability in the East Coast/Far East rate structure. . . ." As in premium pricing the record here simply does not afford any basis for such restrictions on minibridge.

There remains only to deal with a Motion to Strike Portions of Reply Brief of CONASA-ILA filed by Sea-Land. The motion is to "all references, discussion and argument concerning the issue of whether the Federal Maritime Commission possesses the statutory authority to accept joint rail-water tariffs." Sea-Land

[95] The above figures are taken from exhibit 95.

[96] Without delving into the decidedly complex area of when a minibridge rate becomes so low or so high as to be detrimental to commerce, one of the questions to be resolved is whether the minibridge service is to be isolated and considered alone or is to be taken as but a part of a carrier's entire operation.

argues that, "It is significant, however, that it [the jurisdictional issue] was first mentioned in Complainants' Opening Brief (p. 2), and the theory was first developed as a proposition to be considered as material to the disposition of the proceeding in the Complainants' Reply Brief (pp. 1–3)." According to Sea-Land:

> . . . this untimely effort to raise a new issue deprives the FMC itself and the Respondents of adequate notice and places them in the untenable position of not being able to respond to the allegations including the opportunity for cross-examination and presentation of evidence on this issue, to say nothing of now being foreclosed from arguing the matter on brief after an adequate record has been made.

CONASA's reply urges denial of the motion because Sea-Land did have adequate notice and the question of lack of jurisdiction can be raised at any time during the proceeding.

As noted by Sea-Land itself, the "jurisdictional" issue was first raised in CONASA's opening brief thus Sea-Land had it chosen to do so should have addressed the issue on brief as indeed did other counsel. Moreover, since CONASA viewed the issue as one of law and presented no witnesses or "evidence" it is difficult to understand how Sea-Land gives no indication of just what evidence it would present. Accordingly, the motion is denied.

CONASA's position is that the Commission has exceeded its statutory authority by accepting the filing of minibridge tariffs. It would appear that CONASA's argument is based upon the admitted lack of authority in the Commission to "approve" agreements between land and water carriers. Thus CONASA says in a classic non sequitur:

> Although the FMC has acknowledged that it lacks any statutory basis for assuming jurisdiction over [intermodal] tariffs, the FMC staff nevertheless chose not to reject these tariffs.[1]

[1] See 1972 and 1974 testimony of Chairman of the FMC, Mrs. Helen Delich Bentley, to Congressional Committee as quoted in Exh. 1, p. 8: . . . there is no statutory basis for *approval of agreements* entered into between parties subject to the Federal Maritime Commission and those subject to the Interstate Commerce Commission. (Emphasis added.)

Lack of jurisdiction to approve an agreement between parties in a tariff does not of course even imply lack of jurisdiction to accept for filing a tariff between two such parties. The only other "authority" cited by CONASA as supporting its proposition is first a letter from Admiral John Harllee, then Chariman of the Federal Maritime Commission, to the Honorable Warren G. Magnusson, Chairman, Committee on Commerce, dated June 10, 1968, wherein Harllee stated:

> Classical single factor rates entered into between carriers of different modes presently cannot be filed with the Federal Maritime Commission or with the Interstate Commerce Commission. Hearings S. 3235, 90th Congress, Second Session, Serial No. 90–78, p. 15;

and a statement Alan S. Boyd, then Secretary, Department of Transportation, who testified at the above hearings:

> On movement from a point in this country to a point in Europe the shipper will find that the Interstate Commerce Commission believes it cannot accept any rate which incorporates ocean transportation, while the Federal Maritime Commission belives it cannot accept a rate which includes inland movement in the United States. Id., at p. 18.

From the above quotes it is obvious that the rates referred to are single-factor rates which do not "break-out" the water or land portion of the total single-factor rate for showing the agreed divisions between the land and water carrier. Where this is done the ICC as early as 1931 was accepting such rates, *Lewis-Simus-Jones Co. v. Southern Pacific Co.*, 238 U.S. 654 (1931). The Commission itself in 1963 found a tariff of Matson Navigation Co. publishing single-factor rates which included pick-up and delivery charges of a land carrier lawful under section 2 of the Intercoastal Shipping Act, 1933, so long as the specific amounts or allowances for the pick-up and delivery service were stated separately. *Matson Navigation Co.–Container Freight Traffic,* 7 F.M.C. 480 (1963). *See also Disposition of Container Marine Lines,* 11 F.M.C. 476 (1968), where the Commission found lawful under section 18(b) which provided a through service including inland transportation in the United Kingdom so long as the charge for the water portion was broken out and stated separately.

Finally, in 1970 Amendment 4 to General Order 13 was promulgated (35 F.R. 6394). This amendment set forth the requirements for the Filing of Through Routes and Through Rates. See 46 CFR 536.16.

It is a little late in the day—particularly in view of CONASA's failure to discuss or even acknowledge the existence of the above precedents—to challenge the Commission's acceptance of intermodal (including minibridge) tariffs. The Commission's jurisdiction to accept minibridge tariffs is clear.

For the reasons set forth above this proceeding should be dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

WASHINGTON, D.C.
July 11, 1977

APPENDIX A

Intervening on the side of complainants were the Port Authority of New York and New Jersey, the Board of Commissioners of the Port of New Orleans, the Gulf Ports Association, Inc., the Port of Houston Authority, the Houston Port Bureau, the Texas Ports Association, the Board of Trustees of the Galveston Wharves, the Galveston Cotton Exchange and Board of Trade, the Board of Commissioners of Lake Charles (La.) Harbor and Terminal District, the Port of Beaumont, the Port of Corpus Christi (Nueces County Navigation District No. 1), the Greater Baton Rouge Port Commission, the North Carolina State Port Authority (which subsequently withdrew from the case), the New Orleans Traffic and Transportation Bureau, the Brazos River Harbor Navigation District, the Virginia Port Authority, the State of Texas, the Commonwealth of Pennsylvania, the Internationl Association of Great Lakes Ports, U.S. Senator Tower and Congressman Bill Archer from Texas.

Intervenors in support of respondents are the American Importers Association, the City of Oakland, the Alabama State Docks Department, the City of Long Beach, the Atchison, Topeka & Santa Fe Railway Co., the City of Los Angeles, the Southern Pacific Transportation Co., the Penn Central Transportation Co., the Lehigh Valley RR Co., the Erie Lackawanna Railway Co., the Chessie System, the Norfolk & Western Railway Co., the Missouri Pacific Railroad Co., the Texas Pacific Railroad Co., the Union Pacific Railroad Co., the Department of Transportation and Hearing Counsel.

Other intervenors are the Port of Seattle, the Maryland Port Administration, the Military Sealift Command (Department of Defense), the Port of Seattle, and the Port of Portland.

FEDERAL MARITIME COMMISSION

DOCKET NOS. 73-42, 73-61, 73-69, 74-4

BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS, ET AL.

v.

SEATRAIN INTERNATIONAL S.A.

REPORT AND ORDER ADOPTING INITIAL DECISION

August 8, 1978

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

I. THE CONSOLIDATED PROCEEDING

These proceedings arose out of separate complaints filed by the Board of Commissioners of the Port of New Orleans; the Port of Houston Authority and Houston Port Bureau, Inc.; The Port of Beaumont Navigation District of Jefferson County, Texas; and the Board of Trustees of the Galveston Wharves (Complainants or Gulf Ports). Complainants request that the Commission declare the transportation of cargo via a joint rail/water service offered by Seatrain International, S.A. (Seatrain), in conjunction with the Southern Railway System and the Southern Pacific Transportation Company, between the United States Gulf Coast rail terminals in New Orleans, Houston, Beaumont, and Galveston, and ports in Europe and the United Kingdom utilizing the Port of Charleston, South Carolina, constitutes an unfair cargo diversion practice proscribed by Shipping Act sections 16, 17 and 18, (46 U.S.C. 815-817), and section 8 of the Merchant Marine Act, 1920, (46 U.S.C. 867).[1]

The proceedings were consolidated and several parties were granted leave to intervene.[2]

*Concurring in final result.

[1] Seatrain, in conjunction with Southern Railway filed tariffs with both the FMC and the ICC proposing a joint rail/water container service (minibridge) from New Orleans via Charleston, South Carolina to the United Kingdom, Europe and Baltic Range, effective July 15, 1972. Subsequently Seatrain, in conjunction with the Southern Pacific, added rail terminals in Beaumont, Houston, and Galveston. These tariffs delineate a joint through service wherein the water carrier receives the total freight charges from the shipper and in turn pays the railroad a proportional amount (division).

[2] The intervening parties are: State of Texas, Lykes Brothers Steamship Company, Inc., South Atlantic and Gulf Coast District of International Longshoremen's Association, AFL-CIO, New Orleans Traffic and Transportation Bureau, Port of Port Arthur Navigation District of Jefferson County, Texas, Greater Baton Route Port Commission, The Honorable John Tower, The Honorable Bill Archer, Southern Railway System (Southern) and the Southern Pacific Transportation Company (Southern Pacific).

Hearings which produced an evidentiary record totaling 1,202 pages of transcript and 102 exhibits, were held before Administrative Law Judge Stanley M. Levy (Presiding Officer) in New Orleans and in Washington, D.C. A Notice of Intent to Make an Environmental Assessment pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321, *et seq.*, was published initiating a Threshold Assessment Survey (TAS) and resulting in an Environmental Negative Declaration served August 31, 1976. A "Comment" alleging errors in the TAS was filed by Complainants following which a Response was issued by the Commission's Office of Environmental Analysis (OEA).[3]

Oral argument was conducted before the Commission on June 13, 1978.

II. Exceptions to Initial Decision

The Presiding Officer found that (a) no minibridge cargo was diverted from the complaining ports naturally tributary cargo areas as there was no direct showing of minibridge cargo origins or local areas tributary to the Gulf Ports; (b) even if all minibridge tonnage were the result of diversion from the Gulf Ports it was *de minimus* in comparison with the ports' total tonnage; and (c) no absorptions of inland freight charges were proven.

Exceptions to the Initial Decision were filed by each of the Complainants and several intervenors supporting Complainants.[4] Seatrain filed a Reply to Exceptions. Complainants argue that the Presiding Officer erred because:

(1) undue weight was given to the amount of container traffic moving by minibridge; the true measure of economic detriment is not a comparison of the diverted container tonnage to all general cargo tonnage, but rather to all *container* tonnage handled by the Gulf Ports;

(2) the diversion of any cargo, regardless of amount, is illegal *per se* under section 8 of the 1920 Merchant Marine Act;

(3) Complainants did demonstrate the existence of severe economic detriment in both specific and general terms;

(4) a resolution of the Texas Industrial Traffic League opposing minibridge, indicative of shipper opinion and the direction of the public interest in this instance, was improperly excluded from the record:

(5) the collection of the rail divisions of the joint through rate by Seatrain represents an absorption of inland freight charges;

(6) Complainants need not show that minibridge cargo carried by Seatrain would be carried on a direct all-water service "but for" the minibridge service in order to prove a diversion of cargo;

(7) Seatrain was engaged in absorption because it pays drayage and wharfage charges at Charleston normally paid by the shipper;

(8) minibridge is not a faster transportation service than all-water service;[5]

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[3] The OEA's "Notice of Response to Comments on Environmental Negative Declaration," served July 17, 1978, did not constitute Commission action on Complainants' objections to the TAS. Complainants' "Comments" have been independently reviewed by the Commission without reliance on the OEA's supplemental statement.

[4] Separate Exceptions were filed by the Houston Port Bureau and the Port of Houston. Because many arguments were repeated by more than one party or were otherwise redundant, the various Exceptions have been consolidated to facilitate discussion.

[5] One Complainant also argues that because factors *other than cost* make minibridge service more attractive, a premium rate should be imposed.

(9) the Presiding Officer was unfairly biased in resolving the absorption issue;

(10) section 8 of the Merchant Marine Act confers substantive rights upon ports to "naturally tributary cargo areas";

(11) the cargo carried on the minibridge is not naturally tributary to Charleston, but is artificially induced there by low inland freight rates;

(12) naturally tributary cargo is not necessarily local cargo as mileage alone is not determinative and historical movements must be given great weight; local cargo is being diverted by minibridge; if the cargo were not local to the ports initially it would not move on minibridge;

(13) minibridge is not an Overland/OCP type system as it does not serve inland areas, but is restricted to a 200-300 mile range of the Gulf Coast;

(14) the Presiding Officer was required to consider an Environmental Impact Statement (EIS) in making his Initial Decision; evidence was submitted showing that all-water service is more fuel efficient than rail/water movements and less detrimental to the environment; complainants submitted an environmental study (the Cooper Study) that was not considered prior to the rendering of the Initial Decision.

(15) Miscellaneous Exceptions. A group of 13 general and highly redundant "sub-exceptions" was submitted as "Exception No. 10" by the State of Texas. Respondent correctly notes that this Exception does not comply with the requirements of the Commission's Rules of Procedure, 46 C.F.R. 502.227, and it will therefore not be considered further.

Respondent vigorously opposes all of these arguments, claiming that they were properly resolved by the Initial Decision. Respondent contends that the charge of bias is both untimely lodged under section 502.149 of the Commission's Rules and incorrect; and that the resolution of the Texas Industrial Traffic League was properly excluded under section 502.156 of the Rules because it was not susceptible to cross-examination, did not concern the Euro/Gulf minibridge service and contained erroneous assumptions.

Respondent also claims that there is no real environmental impact from the new service because both the trains and ships involved would move with the same frequency without the joint through rate tariff; there is a net reduction in fuel consumption as Gulf Coast port calls are eliminated; a comparison of water miles to rail miles or a comparison to other minibridge services is not proper; and there is no requirement that an EIS be submitted before an initial decision is rendered.

III. Discussion

Most of Complainants' arguments are matters which were presented to the Presiding Officer and adequately resolved by the Initial Decision. The Commission has determined, therefore, to adopt the Initial Decision except to the extent its findings and conclusions concerning Euro/Gulf minibridge are modified by the following discusison of Complainants' Exceptions.

A. Economic Detriment from Cargo Diversion

Diversions of cargo become unlawful within the meaning of Shipping Act sections 16, 17, and 18(b)(5), only if they are substantial and the result of unjustified absorptions, equalizations or other practices. *Beaumont Port Commission v. Seatrain Lines, Inc.*, 2 U.S.M.C. 500 (1941); *Beaumont Port Commission v. Seatrain Lines, Inc.*, 3 F.M.B. 556 (1951); *City of Portland v. Pacific Westbound Conference*, 4 F.M.B. 664, 674 (1955); *Rates From Jacksonville to Puerto Rico*, 10 F.M.C. 376, 383 (1967); *Agreement Nos. T-2108 & T-2108-A;* 12 F.M.C. 110, 123 (1968). Assuming that some naturally tributary cargo is being diverted from the Gulf Ports (and there is no direct evidence of this in the record),[6] and that this diversion is accomplished by inland freight absorptions or rate equalizations (see section B, below), there remain the critical question of whether Euro/Gulf minibridge is covering significant injury to the Gulf Ports.

An adverse effect on the general economy of the various Gulf Ports was alleged. The only proof in this regard was tendered by the Houston Port Bureau,[7] however, this was limited to an analysis of the theoretical development of the Port area's economy from the revenue generated by handling a single container. These calculations are then applied to the 772 containers "diverted" by minibridge in the last three months of 1973 (Ex. 12, Table 13)[8] from which a revenue loss to Houston of $2,804,784 annually and $109.3 million and 500–600 jobs over a ten-year period was projected. This statistical projection fails to consider that portion, if any, of the lost revenues which would be recouped by increased rail activity in the Houston area or to reveal whether inter-port competition was causing Houston to lose any cargo (see Tr., at 728). Complainants have approached the public interest issues in this case solely from the viewpoint of particular port facilities and have advanced only limited and generalized arguments in support of their position.[9] The net effect has been a lack of competent evidence of appreciable economic detriment to the ports[10] and their local economies.

The Port of Houston Authority made much of the asserted fact that a $40 million bond issue, $29 million of which was to be used to build container handling facilities (Ex.9(b)), was floated for the development of Barbours Cut in

[6] "Diversion" requires proof of specific cargo origins and destinations, and of distorted overland transportation patterns. See *Sea-Land Service, Inc. v. Atlantic and Caribbean Line*, 9 F.M.C. 338 (1966), where the Commisson rejected the contention that cargo is not diverted unless it was proven that it would otherwise pass through the complaining port, *Id.*, at 350, but did require proof that the cargo would *not* move through *a more distant port* "but for" the alleged diversionary practice, *Id.*, at 346. In the instant case, the evidence submitted only permits a general inference of diversion based upon the assumption that if minibridge did not exist, some minibridge cargo would have otherwise passed through one of the complaining Gulf Ports. Cargo origins and destinations were not established.

[7] Galveston alleges that the direct call service by Lykes Bros. is jeopardized, but this is unsupported by the record. (Tr. 1168, Ex. 18R.) Lykes, an intervenor, presented no evidence on this issue.

[8] The statistical source of the containers "diverted" was purportedly Seatrain's "Responses to Interrogatories", which are not part of the instant record.

[9] *E.g.*, Complainants allege that the mere intervention of Congressional Representatives on their behalf indicates that minibridge is contrary to the public interest. Port Arthur alleges that the lack of container service there indicates that minibridge is inhibiting the development of this port facility even though this condition pre-dates minibridge (I.D., 20).

[10] The Port of Houston Authority admitted that its revenue loss in 1973–74 was only $26,270.50 less associated expenses (Tr., 1080–81, 1086; Ex. 17 A & B) and that the increased frequency of Seatrain's minibridge service may in fact stimulate the general economy of the area. (Tr., at 583, 1158.)

reliance on continued Seatrain direct water calls. Absent clear proof to the contrary, it must be assumed that a local investment decision of this magnitude was dependent upon a number of factors other than the unsecured assurances of continued vessel calls by a single containership operator. It has been long recognized that, absent unique circumstances, the Shipping Act does not require ocean carriers to provide service to a particular port. *See, Lucking v. Detroit and Cleveland Nav. Co.*, 265 U.S. 346 (1924). Moreover, the Port of Houston failed to equate Seatrain's cessation of service with any particular failure of the Barbours Cut project or the Port's inability to meet its bond obligations.

Alleged specific commodity diversions were rubber at Beaumont and cattle hides at Houston. The only statistical evidence as to rubber showed a large decline between the *total* shipments (breakbulk and container) handled during the last quarter of 1972 and those handled during the last quarter of 1973, (Exs. 16C and 18Q). There was no evidence connecting this decline in any manner with Seatrain's minibridge activities. Nor was specific evidence submitted substantiating the claimed cattle hide diversion at Houston.

Comparison of all minibridge tonnage to the Gulf Port's total cargo volume reveals that the effect of the presumed diversions is insignificant.[11] Complainants, however, contend that the greater percentages obtained by comparing the Gulf Ports' *container* tonnage with the entire minibridge tonnage more accurately portray the diversionary impact of minibridge, and that this amount of diversion is more significant.[12]

Previous Commission decisions indicate that the proportion of diverted traffic to the tonnage of the ports involved have generally been more substantial than that indicated by either of the above tests.[13] We conclude that the diversion of naturally tributary cargo in this case, if any in fact exists, is sufficiently minor in nature so as not to constitute a violation of Shipping Act sections 16 or 17.

B. Absorptions of Cost

The absorptions alleged in this case fall into two categories: (a) direct absorptions of shippers' port charges, and (b) indirect absorptions of rail freight charges by a reduction of the *rail division* of the through rate below the corresponding local rail rate and the passing on of these charges without a mark-up for providing the service of incorporating these charges into one bill of lading.

It was alleged that Seatrain was paying drayage and wharfage charges at Charleston without charging shippers for these services, and Seatrain admitted paying the charges (Tr., at 998). However, it was not shown that the normal practice at Charleston or the Gulf Ports is for shippers and not carriers to pay this cost[14] and a finding of absorption of any specific shippers charges is not supported by the record.

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[11] New Orleans, .075% (I.D. 21); Houston, .73% (I.D. 22); Galveston, .07% (I.D. 23); Beaumont, 1.8% (I.D. 24); Port Arthur had no container movement at least six months prior to the new service and no Seatrain cargo could be traced to that Port (I.D. 20).

[12] New Orleans, 4.23% (I.D. 21); Houston, 5.21% (I.D. 22); Galveston, 2.9% (I.D. 23). No figures available for Beaumont and Port Arthur.

[13] *E.g., Beaumont Port Commission v. Seatrain Lines Inc.*, 2 U.S.M.C. 500, 504 (1941); *Intermodal Service to Portland, Oregon*, 17 F.M.C. 106, 130 (1973); *Investigation of Overland/OCP Rates and Absorptions*, 12 F.M.C. 184, 201 (1969); *Stockton Port District v. Pacific Westbound Con.*, 9 F.M.C. 12, 22–23 (1965).

[14] Wharfage may properly be a charge against cargo *or* vessel. See 46 C.F.R. 533.6(d) (2). Complainants' assertion of absorption rests entirely upon a conclusory averment by the Houston Port Bureau's counsel (Exceptions, at 9).

The indirect absorption argument of the complaining ports is more difficult to fathom. The essence of the argument appears to be that the collection of freight charges for the through movement by Seatrain and the payment to the railroad of a divisional share of the through rate that is substantially lower than the otherwise applicable *local rail rate* constitute an absorption unless Seatrain adds a markup for its administration of the joint arrangements.

Seatrain's tariffs disclose the components of the through movement. No deviation from the published divisional shares or hidden payments to the railroads occurs (Tr., at 560, 602–3, 969–70, Ex. 18), and there is no precedent, argument, or evidence indicating that the mere payment of an agreed upon divisional share by one carrier to another constitutes an absorption of freight charges.[15] In the context of this case, an absorption of inland freight costs by a water carrier would occur if Seatrain had filed a tariff indicating that it serves a given port and offered a *local* rate from that port, but is actually calling at a different port and paying out of its *local* rate revenues the costs of inland shipping of cargo from the port named on the tariff to the one at which its vessels actually called. *Sea-Land Service, Inc. v. S. Atlantic & Caribbean Line, Inc., supra.* Euro/Gulf minibridge does not involve this practice.[16]

C. Loss of Naturally Tributary Cargo

As previously stated, Complainants have made only a sparse showing that any Gulf Coast cargo is being diverted to Charleston. However, Complainants argue that section 8 of the Merchant Marine Act of 1920 makes *any* diversion of naturally tributary cargo an unlawful practice under the Shipping Act unless justified by a lack of adequate service.

The Commission has previously recognized that the mere diversion of cargo originating in locally tributary areas does not establish a violation of the Shipping Act. *See Investigation of Overland/OCP Rates and Absorptions*, 12 F.M.C. 184 (1969); *Delaware River Port Authority v. Transamerican Trailer Transport, Inc.*, 18 F.M.C. 234 (1975), *aff'd* 536 F.2d 391 (1975); *Sea-Land Service, Inc., supra*, at 344.

The recitation of section 8 does not alter the Shipping Act standard that there must be a showing of *significant* detriment due to the diversions. *Beaumont Port Comm. v. Seatrain Lines, Inc., supra.* Section 8 does not require the Commission to incorporate any specific concept of "naturally tributary cargo" into its Shipping Act considerations, nor does it otherwise create substantive rights in Shipping Act proceedings.[17]

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[15] The ICC and not this Commission has jurisdiction *over the rail division of the through rate and its relationship* to the rail carriers' local rates. *See Commonwealth of Pennsylvania v. United States*, 561 F.2d 278, 15 S R R 195 (D C Cir. 1975).

[16] Complainants did not show that the minibridge rate structure was an unfair or unreasonable method of attracting cargo, whereas Seatrain demonstrated that shippers received certain benefits from the service (Tr., at 408–413). The Presiding Officer properly precluded Complainants from introducing a resolution of the Texas Industrial Traffic League opposing minibridges (Tr., at 1176–86) The resolution assumed all the factual elements of Complainants' case and was clearly not reliable and probative. Moreover, the Presiding Officer's statement as to his understanding of "absorption law" after a full discussion of the subject at the hearing (Tr., at 1183) may have been disagreeable to Complainants, but cannot be reasonably construed as bias

[17] *Section 8 is not a statute administered* by the Federal Maritime Commission's *Reorganization Plan No 7 of 1961*, 75 Stat. 840, and contains no directives or prohibitions aimed at water carriers. It merely states a national concern for the development and protection of the economic interests of ports. *Intermodal Service to Portland, Oregon*, 17 F.M.C. 106, 134 (1973). As a broad policy statement it

The general purpose of section 8 is to encourage the movement of cargo through those ports, which because of a combination of transportation considerations, would best serve such cargo. Naturally tributary cargo is basically cargo from a geographical area local to a given port. A naturally tributary zone does not describe a general territory which may be served competitively by a range of ports, and it specifically does not include cargo originating from or destined to the central United States. *Intermodal Service to Portland, Oregon, supra,* at 126. Regardless of historical movement patterns and comparative geographic proximity, the term "naturally tributary cargo" cannot be extended to the point where a port or range of ports can claim a multi-state inland region as its exclusive "territory." This, however, is precisely what the Complainants are attempting to do in this case. (See Ex. 15b; Ex. 6)

The Gulf Ports were basically satisfied to assert that because minibridge cargo was loaded at the Gulf Ports' rail heads it necessarily was local to those ports; they did not attempt to prove that it was locally originated. The record shows that much of the cargo shipped from the Gulf Ports originates from a wide range of mid-southwestern states and as far away as Nebraska, California, and New York, with the majority originating in Texas and Louisiana (Ex. 6). Even if it were assumed that all minibridge cargo originates in Texas and Louisiana, the Gulf Coast ports all lay *equal* claim to these areas and no individual port has established an area locally tributary to it alone. The Commission once recognized geographical boundaries delineating separate tributary areas between the Galveston Bay ports (Galveston and Houston) and Beaumont. *Beaumont Port Commission v. Seatrain Lines, Inc.*, 2 U.S.M.C. 699, 703 (1943). New Orleans has yet another distinct tributary area.

The theory that an entire region of the country might "belong" to a range of ports is not a tenable basis upon which to build a regulatory framework of fair competition between the interests of ports and carriers. Historical movements of cargo are not without some relevance, but it cannot be seriously maintained that Congress intended that section 8 freeze international transportation movements into their 1920 patterns. Merely stating that the inland freight rate economics drawing the cargo to the Gulf Coast determines that cargo as naturally tributary to Complainants is meaningless, when it is considered that it is the inland freight rates that are rerouting this cargo to Charleston. While there may be an inland distance factor giving a "natural advantage" to Gulf Ports, there is an offsetting water distance factor giving a "natural advantage" to Charleston. The Charleston route enjoys a "natural advantage" of a 5% reduction in total mileage savings over the all-water Gulf route from New Orleans, the shortest all-water route in question (Ex. 8).

Section 8 simply authorized the former Shipping Board—whose functions included the promotion and development of the United States Flag carriers and United States port facilities—*to inform the ICC* of inland rate structures that were

must be flexible and adaptable to changing methods, needs and patterns of transportation in a "volatile, changing national economy." *Id.*, at 125, citing *American Trucking Associations, Inc., v. Atchison, Topeka and Santa Fe Railway, Co.*, 387 U.S. 397, 416 (1967), and the meaning and application given the "naturally tributary cargo" concept by the Commission has shifted over the years. See discussion in *Counsel of North Atlantic Shipping Associations v. American Mail Lines, Ltd.*, FMC Docket 73-38, served simultaneously herewith, at pages 44-75 of the Initial Decision.

injurious to a particular port.[18] The right of ports to grow and fairly compete for cargo was and is fully reflected in the language of Shipping Act sections 16 and 17.[19] Independent consideration of the policies reflected in section 8 adds little to those considerations, and in most cases is superfluous.

D. ENVIRONMENTAL CONSIDERATIONS

This proceeding involved various factual and legal disputes regarding compliance with the requirements of the National Environmental Policy Act, *supra*. The relative fuel efficiency of rail and water transportation was litigated at the hearing of this case, and objections were also raised to the issuance of the Initial Decision prior to the promulgation of a Draft Environmental Impact Statement. Both arguments are rendered moot, however, if the instant proceeding is not a "major federal action significantly affecting the quality of the human environment" within the meaning of NEPA.

The Supreme Court has held that before a detailed analysis of the environmental impact of an agency action is commenced there must be a threshold determination made to determine whether the proposed action constitutes a "major federal action," and that the agency has the primary and sole responsibility of determining whether NEPA is applicable to a particular proceeding.[20]

Although Complainants would have us transform the instant Threshold Assessment Survey into an in-depth and detailed analysis tantamount to an Environmental Impact Statement, the latest guidelines issued by the Council on Environmental Quality (CEQ) as to Federal Agency compliance with the NEPA procedural requirements contemplate a brief document discussing the need for the agency action, the alternatives, the potential environmental impacts of the proposed action and alternatives and a list of agencies and persons consulted—enough to provide a sufficient basis for a rational decision as to whether or not an EIS is needed. *Proposed Amendments to 40 C.F.R. 1508.9*, 43 Fed. Reg. 25244 (1978). The TAS in this case is a substantial document of 81 pages plus numerous exhibits and attachments. It clearly complies with the CEQ guidelines and adequately examines the potential environmnental effects of the minibridge service. After reviewing the TAS, and the other environmental documents and evidence in the record, the Commission concluded that the OEA's Environmental Negative Declaration should be adopted. Because a decision as to whether Seatrain's joint rail/water service does or does not violate the Shipping Act is not a federal action significantly affecting the quality of the human environment,

[18] The legislative history of the 1920 Act reveals only a single statement concerning the amendment which eventually became section 8:

> Amendment No. 53 This amendment confers general powers upon the board to investigate terminal facilities at ports, and in case it finds that rates of rail carriers are detrimental to the upbuilding of such ports or that new rates or additional terminal facilities should be made by carriers it may submit its findings to the Interstate Commerce Commission *Joint Conference* Committee on H R. 10378, *American Merchant Marine*, H R. Rep. No 1093, H R No 1102, and H R No 1107, 66th Cong., 2nd Sess 27–28, 27–28, and 25–26 (1920)

[19] Section 17's specific reference to *ports* should be contrasted with the absence of such language in original section 3 of the Interstate Commerce Act, 49 U S.C. 3 The Supreme Court eventually ruled that the ICC lacked the power to protect ports from undue *preference or prejudice by carriers* with respect to export and import traffic *Texas & P. Ry. Co v. U S.*, 289 U.S 627 (1933) Immediately following this pronouncement, the Interstate Commerce Act was amended to provide for such authority in the ICC, 49 Stat 607, effective August 12, 1935

[20] *Kleppe v. Sierra Club*, 427 U S. 390 (1976) Once such a determination is made, *it will not be overturned unless shown to be* "arbitrary." Such a finding is a prerequisite to the preparation of the environmental impact statement broadly outlined in EPA.

preparation of a detailed environmental impact statement is not required under 42 U.S.C. 4332(2) (c).

THEREFORE, IT IS ORDERED, That Complainant's Exceptions are denied; and the Initial Decision is adopted; and

IT IS FURTHER ORDERED, That the Environmental Negative Declaration served August 31, 1976, is adopted; and

IT IS FURTHER ORDERED, That the complaints of the Board of Commissioners of the Port of New Orleans, the Port of Houston Authority and Houston Port Bureau, Inc., the Port of Beaumont Navigation District of Jefferson County, Texas, and the Board of Trustees of the Galveston Wharves, are denied and these proceedings discontinued.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

Nos. 73-42, 73-61, 73-69, 74-4

BOARD OF COMMISSIONERS
OF THE PORT OF NEW ORLEANS, ET AL.

v.

SEATRAIN INTERNATIONAL S.A.

Adopted August 8, 1978

The joint rail/water service between New Orleans, Louisiana, Houston, Beaumont and Galveston, Texas, and ports in Europe and the United Kingdom utilizing the port of Charleston, South Carolina, is not unlawful, unfair, unjustly discriminatory or illegal within the meaning of sections 16, 17, and 18 of the Shipping Act, 1916 [46 U.S.C. §§ 815, 816, and 817] or violative of section 8 of the Merchant Act of 1920 [46 U.S.C. § 867].

Joint rail/water service is an inter-related transportation system, offered jointly by ocean carriers and railroads pursuant to joint through tariffs filed at both the FMC and ICC for the movement of containerized cargo by rail and water in the foreign commerce of the United States.

Section 8 of the Merchant Marine Act of 1920 was never intended to stifle development of maritime commerce if such development were to result in innovations whereby shippers would be offered alternative services and which could result in faster, better or lower cost transportation. The public interest is much larger than the needs or desires of a particular port area.

The joint rail/water service does not violate the concept of naturally tributary cargo in that it does not preclude the development of the Gulf ports and taking into consideration the economies of transportation and the natural direction of the flow of commerce the joint rail/water service between New Orleans, Houston, Beaumont and Galveston and ports in Europe and the United Kingdom utilizing the Port of Charleston, South Carolina, is not detrimental to the commerce of the United States and such service is in the public interest.

The joint rail/water service rebounds to the benefit of the shipper, causes no significant detriment to the Gulf ports and is in the public interest.

Intermodality and the joint rail/water service are the logical extensions of the containerization revolution. To prevent this and require rigidity based on outmoded transportation concepts will redound to the detriment of the maritime commerce of the United States and would be contrary to the public interest.

There is a regulatory obligation to be flexible in adapting to new developments in the transportation art.

The joint rail/water service is a new, additional and innovative service at rates roughly comparable to an all-water service.

No serious detriment has occurred to any port where joint rail/water service is offered in competition to an all-water service.

The amount of tonnage carried in the joint rail/water service is minuscule in relation to total port tonnage; it is minuscule in relation to total containerized tonnage in each port; it is minuscule in relation to containerized tonnage in the particular trade wherein the joint service is offered.

Seatrain's participation in the joint rail/water service and the division between Seatrain and the railroads does not constitute an illegal diversion or absorption practice since neither mode pays the other to perform services which the first mode is obligated to perform. The rates set forth in the tariffs filed with the Commission with respect to such service are comparable to the rates for all water service and are not unreasonable, unfair or discriminatory.

Shippers are not primarily concerned with whether their cargo moves all-water or by joint rail/water service, or whether it goes across the wharves of any particular port. They are concerned with rate structures as well as frequency and quality of service.

In weighing the quality of service, joint rail/water service versus all-water service, the various factors to be weighed are costs of service compared to the other, time of transit, damage potential and processing of claims, frequency of service and availability (capacity). Comparison of these factors by shippers, rather than regulatory fiat, will ultimately determine the degree of utilization of the competing services.

C. C. Guidry and *G. B. Perry* for Board of Commissioners of the Port of New Orleans, complainant, and New Orleans Traffic and Transportation Bureau, intervenor.

F. William Colburn for Port of Houston Authority, complainant.

G. E. Strange and *L. K. White* for Houston Port Bureau, Inc., complainant.

Warner F. Brock for Port of Beaumont Navigation District of Jefferson County, Texas, and Board of Trustees of the Galveston Wharves, complainants, and for Port of Port Arthur Navigation District, South Atlantic-Gulf Coast District of the International Longshoremen's Association, AFL-CIO, and Lykes Bros. Steamship Co., intervenors.

John L. Hill, Rex H. White, Jr., and *David Hughes* for State of Texas, intervenor.

Neal M. Mayer and *Paul D. Coleman* for Seatrain International, S.A., respondent.

INITIAL DECISION OF STANLEY M. LEVY, ADMINISTRATIVE LAW JUDGE[1]

These proceedings, consolidated by orders, dated November 23, 1973, and January 28, 1974, arise out of complaints filed by the Board of Commissioners of the Port of New Orleans (Docket No. 73-42); the Port of Houston Authority and Houston Port Bureau, Inc. (Docket No. 73-61); the Port of Beaumont Navigation District of Jefferson County, Texas (Docket No. 73-69); and the Board of Trustees of the Galveston Wharves (Docket No. 74-4) in which the complainants have requested the Federal Maritime Commission to declare that the movement of cargo by way of joint rail/water service offered by respondent Seatrain International, S.A., in conjunction with the Southern Railway System and the Southern Pacific Transportation Company between United States Gulf Coast rail terminals in New Orleans, Louisiana, Houston, Beaumont and Galveston, Texas, and ports in Europe and the United Kingdom utilizing the Port of Charleston, South Carolina, constitutes an illegal absorption practice by diverting naturally tributary cargo from the complaining ports by use of improper rates and tariffs in violation of sections 16, 17, and 18 of the Shipping Act, 1916, 46 U.S.C. §§ 815-817, and section 8 of the Merchant Marine Act, 1920, 46 U.S.C., § 867.

Permission to intervene has been granted to the State of Texas, Lykes Bros. Steamship Company, Inc., South Atlantic and Gulf Coast District of the International Longshoremen's Association, AFL-CIO, New Orleans Traffic and Transportation Bureau, Port of Port Arthur Navigation District of Jefferson County, Texas, Greater Baton Rouge Port Commission, John Tower, Bill Archer, the Southern Railway System and the Southern Pacific Transportation Company.

Hearings were held in New Orleans April 1-5, 1974, for the purpose of complainants' and supporting intervenors' direct case and cross-examination; on

[1] This decision will become the decision of the Commission in the absence of exceptions thereto or review thereof by the Commission (Rule 13(g), Rules of Practice and Procedure, 46 CFR 502.227).

June 17 and 18, 1974, in Washington, D.C., for respondents' and supporting intervenors' direct case and cross-examination; and hearing for taking of rebuttal testimony was held August 26, 1974, in Washington, D.C. In all, the transcripts of the hearings total 1202 pages, and 102 exhibits (numbered 1a – 25) were received in evidence.

Background

Seatrain, in joint submission with Southern Railway, filed tariffs with the Interstate Commerce Commission and Federal Maritime Commission. These tariffs[2] offered a service between the New Orleans terminal of Southern Railway and ports in the United Kingdom, Europe, and the Baltic Range.[3] Published on statutory notice of thirty days, the tariffs became effective July 16, 1973, subsequent to denial by Division Two of the ICC, on appeal, of New Orleans' petition for suspension and investigation of Southern Railway's race between New Orleans and the point of interchange with Seatrain, that being the Port of Charleston, S.C., Subsequently, Seatrain, in combination with the Southern Pacific Railroad, added rail terminals in Beaumont and Houston effective September 16, 1973. Finally, on February 11, 1974, the rail terminal in Galveston was added to the tariff.

The pertinent tariffs and the joint rail/water service offered and performed by Seatrain and the railroads pursuant thereto are currently subject to the concurrent jurisdiction of the ICC and the FMC.[4] Joint rail/water service is an inter-related transportation system, offered jointly by ocean carriers and railroads pursuant to joint through tariffs filed at both the FMC and ICC for the movement of containerized cargo by rail and water in the foreign commerce of the United States.[5] The joint rail/water tariff provides that the shipper is to pay the water carrier the full transportatin cost, as a matter of convenience, and the water carrier is then to pay over to the railroad its divisional basis in accordance with the tariff on file with both the ICC and FMC.[6] The joint service rates are the same or reasonably comparable to all-water rates out of the Gulf ports.[7]

In addition to the joint rail/water service here in question betwen Gulf Coast rail terminals and Europe, Seatrain provides joint rail/water services between West Coast ports and Europe (Euro-Cal), between Atlantic and Gulf Coast ports and the Far East (Far East), and between Europe and the Far East.

The Joint rail/water service between Gulf Coast ports and Europe operates in the following manner: a shipper, having chosen to utilize the service, arranges for the delivery by Seatrain of a container to wherever the shipper is located.[8]

[2] Seatrain Container Freight Tariff FMC Nos. 38, 39, 40, 41, 42 and 43; I.C.C. Nos. 9, 10, 11, 12, 13, 14. See Exhibits 1a, 1b, 1c, 2a, 2b, 2c, 3a, 3b, and 3c.

[3] Referred to herein as the Gulf/U.K. or Gulf/Europe trade.

[4] The concept of joint through rail/water service containing joint through rates in the international trade was developed in late 1971 and early 1972 and required unique tariff publications acceptable to both the ICC and the FMC in accordance with the requirements of the Interstate Commerce Act, 49 U.S.C. § 1 *et seq.* and the Shipping Act, 1916, 46 U.S.C. § 801 *et seq.* See also CFR 536.16.

[5] Sometimes referred to as land-bridge or mini-bridge service.

[6] Ex. 18, pp. 3–4; Tr. 560; 602–03; 969–70.

[7] There have been some rate increases since the joint rail/water service was established which has resulted in some instances in higher rates than the all-water service. Ex. 18, p. 34, Ex. 23a, b, Ex. 18L. Tr. 370–371, 607; 654; 802–803; 879; 929; 951; 981; 1032, 1104; 1107; 1132; 1136–37; 1137; 1147–8. See also Appendix A.

[8] No shipper is precluded from utilizing a direct all water service if the shipper so desires. See all-water service currently available out of New Orleans, Houston, Galveston, Beaumont. FNS. 12, 20, 57, 75.

After the container is packed or stuffed by the shipper it is delivered at the shipper's expense to the rail terminal at either New Orleans, Houston, Beaumont, or Galveston, for movement by the joint rail/water service. The container is then transported on regularly scheduled trains and vessels.[9] The joint rail/water service generally, however, takes less time than the all-water service from Gulf ports because the Atlantic crossing is shorter from Charleston. Seatrain's Charleston operation to Europe effects a reduction of 23 percent in water miles.[10] With the four containerships Seatrain operates in this trade it offers weekly service from Charleston; this would not be possible with four ships calling directly at Gulf Coast ports.[11]

NEW ORLEANS

The joint rail/water tariff between New Orleans and Europe became effective on July 16, 1973.

Direct all-water service through the Port of New Orleans to the United Kingdom, the Continent and Baltic in competition with Seatrain's joint rail/water service is currently being provided by Lykes Bros. Steamship Company, Sea-Land and Combi Lines, in full container vessels, and in partial containerships by Polish Ocean line, UniGulf Lines, Mexican Lines, Central Gulf Lines, Atlantic Gulf Service, Baltic Shipping Company, and Harrison Lines. Frequency of service by these carriers as of April 1974 totalled approximately 22 sailings per month.[12] The annual container capability in these services is estimated at 70,000 units.

The Deputy Port Director of New Orleans testified that despite Seatrain's discontinuance of direct calls at the Port the regularity and frequency of these direct all-water sailings by Sea-Land, Combi, and others are more than sufficient to meet the needs of shippers.[14]

The Port of New Orleans has a total investment in facilities for the handling of waterborne commerce of $158.5 million, of which about $23 million is devoted to the needs of containerized cargo. In 1973, a total of $63,719 containers (94,603 20-foot equivalents) were handled through all port facilities. In terms of capability, an additional 18,600 (25,750 20-foot equivalents) containers could have been handled without taxing these facilities. To meet the forecasted demand attached to container growth, further expenditures totalling $39,750,000 are anticipated.

The Port of New Orleans has a container capability at other-than-full container berths of approximately 44,000 (53,371 20-foot equivalents) units to accommo-

[9] For example, the train carrying the containers being transported in the joint rail/water service departs Houston every evening, seven days per week. Tr. 583. Vessel sailings, picking up rail/water cargo, are weekly from Charleston, S.C. Regularly scheduled train service from Beaumont, see Tr. 774.

[10] Exhibit 8, p. 5

[11] Seatrain's sailing frequency from Charleston of once per week is the same or more often than the direct water service to the Port of New Orleans by Combi Lines, Inc., Sea-Land Service, Inc., Lykes Bros. Steamship Company, or the other direct water carriers, all of whose vessels also make stops at other Gulf Coast ports during the same sailing. These other stops also serve to lengthen the transit time for the all-water service. Seatrain's Atlantic crossing takes 6 days; Sea-Land's New Orleans-Bremerhaven crossing takes 13 days. Tr. 150–153.

[12] See fn. 8.

[13] 20-foot equivalents.

[14] Exhibit 4, p. 2.

date carriers involved in a combination service of containerized and noncontainerized cargoes.[15]

In order to attract cargo through the Port of New Orleans the Port maintains sales offices in Chicago, St. Louis, New York and overseas, and regularly advertises its services in the paper in New York, Chicago, and San Francisco.[16]

Normal steaming time between New Orleans and Europe is generally ten days if the vessel goes direct from New Orleans to Europe. If the carrier makes calls at other Gulf ports after New Orleans the cargo loaded at New Orleans would have a longer transit time.[17]

In 1973 foreign trade for all types of cargo through the Port of New Orleans totalled 31,636,000 tons; of this, 6,552,467 tons were general cargo; of the general cargo, 564,453 tons were containerized; of containerized cargo, 375,246 tons were in the Gulf/Europe trade.[18]

The 375,246 tons of containerized cargo in the Gulf/Europe trade moved in 32,160 containers; an average of 11.67 tons per container.[19]

HOUSTON

The joint rail/water tariff supplement adding Houston as an origin or destination point for rail/water service through Charleston to or from Europe became effective September 16, 1973.

In addition to Seatrain's joint rail/water service Sea-Land, Combi, and Atlantic Gulf Service provide regular container service between Houston and Europe, offering a total of 7 sailings a month. Lykes offers LASH barge service in this trade with three monthly sailings. All these carriers call at other Gulf ports and the avertised sailing time from Houston to Europe for these lines varies from eleven to sixteen days. Altogether these carriers provide a total potential monthly capacity of 4,767 containers (20-foot equivalents) through 10 sailings.[20] This potential is, however, limited by the number of containers handled by these ships at other Gulf ports of call.[21]

In 1969, approximately three years before Seatrain began direct service at Houston,[22] an unexpected surge of container activity in Houston began and the Port Authority determined that further expansion of Port facilities was vitally necessary. This culminated in April 1973, in the issuance of a $40 million general obligation bond issue for the development of Barbour's Cut, of which $29 million was committed to container facilities.[23]

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[15] Exhibit 5, p. 3

[16] Tr. 126, 130.

[17] Some carriers call first at New Orleans and then other Gulf ports, before sailing to Europe; others call first at other Gulf ports and lastly at New Orleans before sailing to Europe. Tr. 49–50; 150–153.

[18] Exhibit 18f—amended. These figures differ somewhat from the volumes set forth in the testimony of Mr. Perry, consultant to the Port of New Orleans [Exhibit 8], but since they are based on material subsequently furnished by the Port they are relied on. The figures in Exhibit 8 include domestic general cargo as well as foreign [Tr. 136 et seq.] which probably explains the difference between Exhibit 8 and Exhibit 18f—amended. See also Tr. 215 et seq.

[19] Tr. 229.

[20] Exhibit 10, p. 2

[21] Tr. 396.

[22] Subsequently discontinued with the institution of joint rail/water service in 1973.

[23] Tr. 296–97; 320; 1082–83.

As of April 2, 1974, about 95 acres were available at the Port of Houston for containership operations, of which approximately 35 acres were being utilized.[24] None of the marshalling areas are immediately adjacent to shipside;[25] Sea-Land's area, for example, is about a half-mile from the berthing site.

Approximately $18–20 million in Port revenues are needed to operate the Port and meet revenue bond requirements. The Port, however, does not make an analysis on tonnage required to meet its revenue needs.[26] The Port funnels all of its income into one pot from which it pays all of its obligations.[27]

The Port of Houston is presently able to earn enough money to meet its bond commitments[28] but nevertheless contends, "The diversion of cargo caused by Mini-Bridge rates to Charleston threatens the future of the Port of Houston."[29] Mr. Bullock, General Manager—Operations, of the Port of Houston Authority further testified that:

> *** We think except for the fact that there has been an increase in business, export and import, that we would be in trouble now on account of diversions, which have been caused, and loss of business we lost with Seatrain on these commitments. And it is doubtful that we would earn our subscribed amount of money to pay off our abundant indebted service charge if things remained as they were.[30]

Mr. C. A. Rousser, Sales Manager, Port of Houston Authority, testified that:

> Continuation of mini-bridge rates over Houston via Charleston for the European Theatre and return creates a complete denial of all of the initiative, effort and investments by both the Port of Houston Authority and Maritime Industry in trying to build an adequate, functional and efficient facility in our port to serve the growing market. Other solutions must be found to protect the growth of coastal ranges, one versus the other so that the commerce flow native to the port's local market and hinterland is protected. Failure to protect coastal ranges through the mini-bridge rates would ultimately result in the development of the east and west coast ports, denying the continued growth of Gulf and Great Lakes Ports.[31]

Neither Mr. Bullock or Mr. Rousser presented any definitive evidence from which economic detriment of the joint rail/water service could be measured. The record reveals that the Port of Houston is presently prospering, its volume is increasing, it is meeting its debt obligations.[32]

When asked for a definitive statement regarding the amount of cargo loss which would be fatal Mr. Bullock stated that a loss of 15,000–20,000 tons or more annually would make it doubtful if the Port could meet its indebtness.[33] Such estimate was not based on any financial statements or economic analysis[34] though in 1973 a projection was made that the Port would need to handle 150,000 containers in 1975.

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[24] Tr. 286.

[25] Tr. 288.

[26] Tr. 299–200.

[27] Tr. 311.

[28] Tr. 291.

[29] Ex. 9, pp. 8–9.

[30] Tr. 292.

[31] Ex. 10, p. 5.

[32] Tr. 306. In 1973, the Port's reserves increased from 1972.

[33] Tr. 293–294.

[34] Although Houston was asked to provide a pro forma financial analysis to demonstrate the break-even point for the Port in terms of the number of tons of cargo handled totally, whether from containers, bulk cargo or general cargo the Port failed to provide such information for this record. Tr. 307.

Approximately a total of 86 million short tons of cargo—bulk, grain, petroleum, general—moved through the Port of Houston in 1973,[35] of which about 12 million tons were handled through the Port of Houston Authority.[36] In 1972 the Port of Houston Authority handled approximately 10,373,000 tons.[37]

Of the 12 million tons handled by the Port Authority in 1973, only 1,400,367 tons were containerized, of which 802,592 tons was foreign trade cargo.[38] As recently as 1972 only 7.5 percent of Houston cargo was container cargo—all trades.

In 1972 41 percent of the cargo handled at the Port Authority wharves was breakbulk cargo; 4.4 percent bulk grain; 17.0 percent bulk plant; 17.3 percent liquid bulk; and 2.8 percent other dry bulk.[39] None of these cargoes are subject to the joint rail/water service.

Although breakbulk cargo may continue to be subject to inroads of containerization, the realities are that containerized cargo is still a small percentage of the total of general cargo through Houston. Even after the event of the joint rail/water service the number of containers moving through the Port of Houston in 1973 continued to grow.[40] In 1973, tonnage of container cargo through Houston nearly doubled that of 1972.[41] Of this containerized general cargo which moved through Houston in 1973, 43 percent (600,000 tons) was moving in the domestic trade. The 800,000 tons of containerized general cargo which moved in the foreign trades comprised only 13.9 percent of the foreign trade general cargo tonnage. Of this 800,000 tons only a portion is involved in the Europe/U.K. trade.[42]

After Seatrain began calling at Houston in January 1972, the Port used this service, along with pre-existing service provided by Sea-Land, Combi, and other lines, to promote acceptance of the pending bond issue at the upcoming election.

The Port of Houston did not build any facilities which were not otherwise in existence at the time Seatrain offered its joint rail/water service from Oakland to Europe via Houston as an inducement to Seatrain to utilize them for that service.[43]

There is no evidence that the decision to develop the Port facility with its underlying bond issue nor the voters' approval was tied to Seatrain providing direct service at the Port.[44] The bond issue was approved on April 14, 1973. On April 1, 1973, the Port Authority had received a letter from Seatrain, dated March 27, 1973,[45] in which Seatrain expressed an intention to lease terminal

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[35] Tr. 305.

[36] Tr. 364.

[37] Ex. 9, p. 5. Trs. 262–64.

[38] Ex. 9, p. 6; Ex. 18f; Tr. 264, 266.

[39] Ex. 9, p. 5. No similar breakdown is provided by the port for 1973.

[40] Some Doubt is expressed whether 1974 containers will be as great as 1973. Tr. 301.

[41] Tr. 302; Exhibit 9, p. 6. 1,400,367 tons up from 773, 116 tons.

[42] Total foreign trade in 1972 was 19,387,776 short tons; U.K.-Europe share was 23 percent for imports and 33 percent for exports. Tr. 627; Ex. 13, p. 4. Of a total of 5,798,423 tons in the U.K.-Europe trade, 49,907 tons moved in the joint rail/water service. Tr. 629.

[43] Tr. 326.

[44] Ex. 9, p. 3; Tr. 327–329; 364–365.

[45] Ex. 9b, Tr. 329.

facilities then under construction if certain modifications were undertaken by the Port. The letter stated that if the Port would agree to Seatrain's suggestions then the matter would be presented to Seatrain's Executive Committee for approval. In the letter Seatrain "understood that the Port of Houston's offer to proceed on the above basis would be conditional upon satisfactory passage of the $40,000,000 bond issue which is being voted upon by the Harris County voters on April 14, 1973." It is apparent from this letter that the pending bond issue was not dependent on Seatrain utilizing the Port; if anything Seatrain was dependent on the bond issue. In any case, the arrangements discussed in the letter were contingent on the approval by Seatrain's Executive Committee and could be not deemed to be a firm commitment. For a variety of reasons, including Seatrain's financial position and capital requirements, the lease negotiations were never consummated.[46]

When Seatrain began calling at Houston in January 1972, it began to develop new business for the Port.[47] Mr. Rousser, Sales Manager for the Port of Houston Authority, on cross-examination, admitted, "I think Seatrain helped to a large degree in developing new markets."[48] He also was of the opinion that there is a lack of containership service out of Houston which was why shippers were using the joint rail/water service but that if the joint service was stopped the shippers would find it more difficult to move their cargo until additional service was again calling at Houston.[49] At the same time the Port of Houston is attracting shippers from the Ports of Galveston and Beaumont because service is better out of Houston than those ports.[50]

In April 1974, the availability of container bookings at Houston was tight.[51] To the degree that Seatrain makes direct calls at Houston or to the degree that Seatrain offers an alternative, i.e., joint rail/water service, to that degree the booking situation is eased at Houston.[52]

If all the joint rail/water volume for the first three quarters of 1973, 114,263 tons, was business which had previously moved through the Port of Houston, the total possible loss to Houston would be only $26,270.50, less reduced overhead expenses, based on a gross profit to the Port of 23 cents per ton with which to meet overhead and general administrative and other charges of the port.[53]

Before the advent of the joint rail/water service in issue in these proceedings Seatrain filed a tariff with FMC and ICC providing for joint rail/water service from Oakland through Houston to Europe.[54] As early as December 4, 1972, the Port of Houston itself advertised and promoted this service offered by Seatrain.[55]

[46] Tr. 348–349.

[47] Tr. 368.

[48] Tr. 370.

[49] Tr. 379.

[50] Tr. 380–381; 743–744.

[51] Tr. 400.

[52] Tr. 401; 407–408.

[53] Exhibit 17b; Tr. 1080–81, 1086.

[54] Seatrain began a full container service to Europe from Houston on January 26, 1972; it discontinued this service in September 1973. Ex. 10a; Tr. 316, 325.

[55] Exhibits 11; 11a (order, April 15, 1974); Tr. 279, 342. See also Tr. 564.

Since Seatrain no longer calls at Houston this tariff is inoperative. Presumably cargo from Oakland that now moves to Europe via a joint rail/water service can utilize Seatrain's minibridge service through the Port of New York.[56]

BEAUMONT

The joint rail/water tariff supplement adding Beaumont as an origin or destination point for rail/water service through Charleston to or from Europe became effective September 16, 1973.

No full container ships made any calls at Beaumont in 1972 or 1973. Container service in 1972 and 1973 was provided by partial container ship or Lykes Seabee barges (Lash).[57]

Cargo movement through Beaumont is unbalanced. Approximately 95 percent is export; 5 percent import. This imbalance presents a particular problem relating to container equipment and may affect carrier decisions with regard to making direct calls at the Port.[58]

Exclusive of military cargo, a total of 5,189 tons of general cargo were exported from Beaumont to U.K./Europe during the period September-December, 1972, of which 509 tons were containerized.[59] No general cargo originating in U.K./Europe was received at Beaumont during the period September-December, 1972.[60]

Cargo movements through Beaumont in 1973, excluding bulk grain, but including bulk scrap, bulk shell, etc., totalled 628,134 tons. Of this, all foreign trades general cargo (breakbulk and containerized) accounted for about 288,273 tons.[61] Military cargo comprises the largest item in the general cargo category moving through Beaumont. No military cargo moves in the joint rail/water service.[62]

Regular rail service from Beaumont is twice daily.[63] In the period October 1973–July 1974 inclusive, 345 containers moved from Beaumont in the joint rail/water service. None came in.[64] During the period May–July 1974, 112 containers moved. On an annualized basis this amounts to 448 containers, a slight increase over the October 1973–July 1974 period when 345 containers for 10 months (414 annualized) were carried. Based on an average of 11.67 tons per container,[65] 448 containers would carry 5,228 tons, approximately 1.8 percent of the 288,273 tons of Beaumont's foreign trade general cargo movements.

Actual general cargo through Beaumont decreased in 1973 from 1972.[66] The

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[56] Tr. 317.

[57] Tr. 758.

[58] Tr. 765–766.

[59] Exs. 16c, 16d; Tr. 758.

[60] Ex. 16b. Possibly 10 containers, totalling 222 tons and 14 empty containers received during September-December 1972 may have originated in U.K./Europe.

[61] Ex. 16c; Tr. 742–43.

[62] Tr. 779–80.

[63] Tr. 777.

[64] Exs. 18e, additional 18e.

[65] No tonnage figures per container are available. The average tonnage per container is based on average tonnage for New Orleans and Houston.

[66] Tr. 743.

basis for the decline in 1973 general cargo tonnage is not specifically ascertainable.[67] However, a decrease in movement of military cargo in 1973 from 1972 may be a significant factor. Another factor may be that the Beaumont area experienced industrial strikes during the last four months of 1973.[68] Also, Houston has been attracting cargo from Beaumont for regular all-water service.[69] This problem of competition between Gulf ports is also indicated in the Galveston-Houston area.[70]

The joint rail/water competition accounts for only a minor part of the loss of tonnage through Beaumont in 1973. In that it offers what amounts to daily service from Beaumont, coupled with a weekly service from Charleston, it increases service available to the Beaumont area.

GALVESTON

The jont rail/water tariff supplement adding Galveston as an origin or destination point for rail/water service through Charleston to or from Europe became effective on February 11, 1974.[71] Through June 1974 only 22 containers moved from Galveston in the joint rail/water service, and none inbound.[72]

Galveston's container terminal opened in 1972. Container movements increased in 1973 and continued to grow in 1974, despite the institution of the joint rail/water service.[73] In 1973, Galveston handled 9,162 40-foot equivalent containers, of which 1,998 were in the U.S. Gulf and Europe trade. In contrast, 6,658 containers, of which only 14 containers were in the Gulf/Europe trade were handled in 1972.[74]

Direct full container service to Galveston is provided every ten days by Lykes Bros. Steamship Company's Seabee Service.[75] These Lash type vessels send barges to Houston, Beaumont, and Freeport, Texas, which do not receive calls by the mother ship.[76] The average call at Galveston generates about 200 containers inbound and outbound combined, though the trade is not balanced, there being somewhat more inbound than outbound.[77]

Although Lykes Bros. Steamship Company is an intervenor in this proceeding it presented no witness. All testimony regarding Lykes operations at Galveston emanated from witness Parker, Traffic Manager for the Galveston Wharves.[78] He testified that 18 or 20 containers every ten days at Galveston would be insufficient to warrant a direct ship call[79] and that Seatrain would have to attract

[67] Tr. 785.

[68] Tr. 761.

[69] Tr. 380–381; 743–744.

[70] Tr. 728.

[71] Tr. 697.

[72] Ex. 18r.

[73] Tr. 698.727.

[74] Ex. 15, p. 5; Tr. 697.

[75] Tr. 728, 1160, 1167.

[76] Tr. 1171. The mother ship also makes a direct call at New Orleans.

[77] Tr. 1167.

[78] Tr. 728.

[79] Probable limit of Seatrain potential.

at least 40 containers away from each Lykes call to even jeopardize the Lykes call at Galveston.[80] Such a volume would equal 2,000 containers annually—an amount equal to all the containers moved in the Gulf/Europe trade through Galveston in 1973. No witness ventured that Seatrain would ever come close to accomplishing this.[81] Lykes Bros. Steamship Co. has actually added a call per month to Galveston since Seatrain filed its Galveston tariff supplement.[82]

Total tonnage handled through the Port of Galveston in 1973 was 4,268,830 short tons. This includes bulk grains, ores, sugar, etc., and other non-containerable commodities but does not include sulphur moving through the Deval Sulphur Terminal.[83]

Out of a total of 414,427 tons of foreign trade general cargo (containerized and breakbulk) moving through Galveston in 1973, it is estimated that 181,677 tons were destined for Texas consignees and 166,109 tons originated in Texas.[84]

Of the approximately 415,000 tons of foreign trade general cargo moving through Galveston in 1973,[85] approximately 26 percent (107,000 tons) was containerized.[86] Of this approximately 107,000 tons of foreign trade containerized cargo, approximately 23,319 tons were in the Gulf/Europe trade.[87] This 23,000 tons are approximately 5.6 percent of the foreign trade general cargo (414,427 tons) and approximately 0.55% of the port's total tonnage (4,268,830 tons). Galveston's witness claimed that if Galveston were to lose 20 percent of its foreign trade general cargo it would destroy that service.[88] If so, based on the volume of 414,427 tons of foreign trade general cargo which moved through Galveston in 1973, a loss of 82,885 tons would be fatal to the Port's foreign trade general cargo business.[89] However, since only approximately 23,319 tons of container cargo moved through Galveston in 1973 in the Gulf/ Europe trade, even if the joint rail/water service captured all the container cargo it would result in a loss of only 5.6 percent of the foreign trade general cargo tonnage, substantially less than the 20 percent level forecast as destructive of foreign trade service.

The contention by the Port that it cannot survive if the joint rail/water service is allowed to continue is unsupported by the record. At the present time diversion of cargo from Galveston to Houston in regular port versus port competition appears to be a far greater problem to Galveston than loss of business to Galveston as a consequence of the joint rail/water service.[90]

PORT ARTHUR

There is no tariff for joint rail/water service naming Port Arthur as a starting or

[80] Tr. 1166–1168.

[81] Ex. 18, p. 7. Seatrain has very little excess capacity which would enable it to benefit from any meaningful increase in its current volume.

[82] Tr. 1170. 10-day call instead of 15-day.

[83] Late-filed Ex. 15c.

[84] Late-filed Ex. 15c. General cargo constitutes only 25 percent of Texas generated cargo through Galveston. Tr. 716.

[85] Late-filed Ex. 15c.

[86] Tr. 697. Based on an average of 11.67 revenue tons per container as at New Orleans and Houston; there was no testimony on tonnage per container at Galveston. 9,162 containers (Ex. 15, p. 5) × 11.67 = 106,920 tons.

[87] Tr. 697. 1,998 containers (Ex. 15, p. 5) × 11.67 = 23,319 tons.

[88] Tr. 707, 713, 1154–1155, 1166, 1168.

[89] Late-filed Ex. 15c; Tr. 713, 1154–1155.

[90] Tr. 728.

terminating point. There is rail/water traffic from Port Arthur which utilizes the port of Beaumont, Texas, approximately 20 miles distant.[91] Seatrain originated joint rail/water service from Beaumont on September 16, 1973.[92]

In the 12 month period ending March 31, 1974, only one ship and two barges made a direct call at Port Arthur in the LeHavre-Hamburg trade. The barges were for LASH service out of Galveston or Houston.[93] Neither the ship nor the barges picked up any containers; only break-bulk cargo.[94]

No containers moved through Port Arthur between March 1973, and September 16, 1973. Some containers may have moved from Port Arthur to Houston or Galveston between March 1973, and September 1973, but, in any event, one to Beaumont.[95] These movements, all prior to the institution of the joint rail/water service (Houston, Beaumont, September 16, 1973; Galveston February 11, 1974) is another manifestation of the inter-port competition in the Gulf.

The institution of joint rail/water service from Beaumont had no effect on container service at Port Arthur inasmuch as direct container service had ceased at least by March of 1973, six months before the advent of the joint rail/water service. Seatrain has never served Port Arthur nor does it issue Port Arthur bills of lading.[96]

ECONOMIC FACTORS

The Gulf ports contend that the joint rail/water service diverts cargo to Charleston that otherwise would go through their ports to such a degree that it threatens the economic existence of the ports. Whether the drawing away of traffic results in unjust or unfair discrimination or undue or unreasonable preference is a question of fact for determination in each instance.[97]

The simple arithmetic reveals that the ports' contention is unrealistic. At the Port of New Orleans in 1973 the inbound and outbound waterborne foreign trade for all types of cargo totalled 31,636,000 short tons; of this only 6,552,467 tons were denominated general cargo; of the general cargo only 563,453 tons were containerized; of the containerized cargo only 375,246 tons were in the Gulf/Europe trade.[98] The containerized cargo in the Gulf/Europe trade is 1.2 percent of the cargo moving through the Port in 1973.[99]

In 1973 the total number of containers that moved through the Port of New Orleans was 64,020 containers, of which 32,160 containers were utilized in the Europe and U.K. trade to move the 375,246 tons through the Port; an average of 11.67 tons per container.

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[91] Tr. 668-69.

[92] Tr. 671.

[93] Tr. 669.

[94] Tr. 671.

[95] Tr. 672-73.

[96] Tr. 688.

[97] *Rates From Jacksonville, Florida, to Puerto Rico,* 10 F.M.C. 376, 383 (1967); *City of Portland v. Pacific Westbound Conference,* 4 F.M.B. 664 (1955); *Beaumont Port Commission v. Seatrain Lines, Inc.,* 3 F.M.B. 556 (1951).

[98] Exhibit 18f—amended. These figures differ somewhat from the volumes set forth in the testimony of Mr. Perry, consultant to the Port of New Orleans [Exhibit 8], but since they are based on material subsequently furnished by the Port they are relied on. The figures in Exhibit 8 include domestic general cargo as well as foreign [Tr., p. 136 et seq.] which probably explains the difference between Exhibit 8 and Exhibit 18f—amended. See also Tr. 215 et seq.

[99] $375{,}246 \div 31{,}636{,}000 = 1.18613$ percent.

If Seatrain's carriage in the joint rail/water service from or to New Orleans for the months of May, June, and July 1974,[100] the latest figures available in this record, are annualized it will carry 2,044 containers, totaling 23,853 tons. This 23,853 tons is 6.36 percent of the 375,246 tons of containerized cargo in the Gulf/Europe trade; it is 4.23 percent of containerized cargo (all trades); it is 0.36 percent of the total general cargo; and 0.075 percent of the total waterborne cargo which moved through the Port of New Orleans in 1973.

The total cargo potentially jeopardized at New Orleans by the joint rail/water service [i.e., 375,246 tons of containerized cargo in the Gulf/Europe trade] amounted to approximately 1.2 percent of the foreign trade [31,636,000 tons] moving through the Port in 1973. If Seatrain increased its present share [6.35 percent] of the containerized cargo in the Gulf/Europe trade to 100 percent of that trade [from 23,853 tons to 375,246 tons] it would still only impact 1.2 percent of the Port of New Orleans' foreign trade.

The same exercise for the Port of Houston reveals a similar minimal impact on its waterborne commerce. At Houston a total of some 802,592 tons of containerized general cargo moved through the port for all foreign trade in 1973.[101] Annualized Seatrain's 1974 container carrying for Houston the joint rail/water service would amount to 3,584 containers[102] totalling 41,825 tons.[103] This tonnage equals only 5.21 percent of the total containerized cargo in all foreign trades and compares with 4.2 percent in New Orleans.[104] In comparison with Houston's 1973 total of 6,653,193 tons of general cargo (excluding barges)[105] Seatrain's 41,825 tons (annualized) of container cargo carried in the joint rail/water service is only approximately 0.63 percent. In relation to Houston's 1973 5,779,050 tons of foreign trade general cargo[106] Seatrain's 41,825 tonnage is approximately 0.73 percent.

The same pattern is reflected at Galveston. In 1973 Galveston handled 9,162 40-foot equivalent containers, of which 1,998 were in the U.K. and Europe trade.[107]

The joint rail/water tariff supplement adding Galveston as an origin or destination point for rail/water service through Port of Charleston to the U.K./Continent was effective on February 11, 1974.[108] Thereafter, no containerized cargo moved through the rail terminal in the trade until June 19, 1974, when the joint rail/water service carried 22 containers.[109] Annualizing the 22 containers would result in some 264 containers moving in the joint rail/water service. This would amount to approximately 13.2 percent of the U.K./Continent[110] trade and

[100] Ex. 18c—added.

[101] Exhibits 9, p. 6, and 18f.

[102] Exhibit 18d—added.

[103] Based on an average of 11.67 tons per container.

[104] The amount of containerized tonnage for the Europe/U.K. part of foreign trade is not broken out in Houston's Ex. 9, p. 6.

[105] Ex. 9, p. 6.

[106] Ex. 9, p. 6.

[107] Ex. 15, p. 5; Tr. 697.

[108] Tr. 697.

[109] Exhibit 18r.

[110] Galveston witness, Mr. Parker, testified that loss of 20 percent of the Gulf/European trade would destroy that trade insofar as Galveston was concerned. Tr. 713; 1154–1155.

approximately 2.9 percent of the total foreign containerized carriage. In terms of 4,268,829 total tons which were handled through the Port of Galveston's facilities in 1973[111] the 3,081 tons annualized carriage in the joint rail/water service (based on the average of 11.67 tons per container)[112] would amount only to approximately 0.07 percent of Galveston's tonnage.

If we postulate that Seatrain could capture the entire Gulf/Europe containerized business—1,998 containers in 1973 totalling 23,319 tons—such volume would only amount to 22 percent of the total containerized cargo; 11.3 percent of the total foreign general cargo, and 0.55 percent of the total cargo moving through Galveston. From the foregoing we would have to conclude that only if Seatrain siphoned off Galveston's entire containerized Gulf/Europe trade would it approach the twenty percent which has been postulated as the level of loss which would destroy such service at the Port. No evidence in this record even suggests that Seatrain has the capability anywhere near that magnitude. The record indicates, rather, that Seatrain has little capacity to increase its present carryings.[113]

At Beaumont a total of 112 containers moved in the joint rail/water service in the period May-July 1974.[114] Annualized this would amount to 448 containers. In 1973 the total general cargo in all trades totalled 288,278 tons.[115] The 448 containers (at an average of 11.67 tons) would carry 5,228 tons and would be approximately 1.8 percent of Beaumont's general cargo.

Thus from an overall view of the tonnage moving through the ports Seatrain's carriage in the joint rail/water service is comparatively minuscule. Even if Seatrain were to increase its carryings in this service its capability for growth is limited as it does not have extensive excess vessel capacity to move additional cargo.[116]

Mr. Perry, consultant to the Port of New Orleans, testified that the Port was essentially self-sustaining and that "the revenues of the Port are sufficient to pay the cost of operations of the Port, to meet the daily operations of the Port, and that the Port made a profit in 1973, and that it hoped to make a profit in 1974."[117]

When asked if it was fair to state that as of April 1, 1974, the Port of New Orleans was economically healthy, viable, and growing, Mr. Perry answered, "Yes."[118] Asked further whether the Port of New Orleans was healthier now from a traffic income standpoint than any other standards that the witness could think of from any other time in the last five years he replied, "yes," with this explanation:

> . . . The ports have experienced an unusual growth in 1973 that relates to the very unusual growth of cargo by the simple fact that export traffic in this country in 1973 has hit all time highs. So therefore to qualify New Orleans as being unusually healthy or healthy and all those good things in

[111] Late-filed Ex. 15c.

[112] Fn. 87, *supra*. Similar to average per container at New Orleans. Tr. 229.

[113] Ex. 18, p. 7

[114] Ex. Additional 18e. 345 moved during the 10 month period October 1973-July 1974. Annualized this would amount to 414 containers. See Ex. 18e.

[115] Ex. 16e.

[116] Fn. 113, *supra*.

[117] Tr. 122–123.

[118] Tr. 124.

1973, is to say the ports generally are. This is not to say that New Orleans couldn't have done substantially better had it not been subjected to any loss of cargoes.[119]

Also illustrative of this lack of detriment and the same point of view is the following, as set forth in the reply brief on behalf of conplainant, Port of Houston Authority:

At page 38 [Reply Brief] Respondent attempts to excuse its conduct by pointing to the fact that this Complainant has realized an increase in container traffic since the advent of the joint rail/water service. This gambit ignores the thrust of the complaint in this matter which is that Respondent is diverting cargo from the naturally tributary area of the Port of Houston to Charleston, South Carolina. But for such diversion, the increase experienced by Complaint [sic] would have been even greater.[120]

Houston sponsored an economic witness, Mr. Bragg, who testified regarding the economic impact of the Port on the Houston community.[121] His calculations, however, are based on theory, rather than being factually based.[122] His conclusions are based on the assumption that all cargo carried in the joint rail/water service was cargo which previously had moved in the all-water service.[123] He also had no familiarity with the condition of the traffic or the volume moving in the joint rail/water service.[124] His economic conclusions relied on data published by the American Association of Port Authorities[125] and a State of Texas input-output study and were not the result of any independent study.[126] The AAPA data, in any event was not developed for the Port of Houston but is a national average.[127] In addition, the AAPA data is an extrapolation of a study published by the Maritime Administration in 1956. It is unfortunate that the assumptions underlying the methodology of the Marad study cannot be ascertained. In any event, the witness assumed that every ton of container goods shipped across the wharves of the Port had an impact of $20[128] on the community of Houston multiplied by a factor of 2.81 (ripple-effect).[129] The witness, on cross-examination, conceded that cargo moving through the Houston rail terminal in the joint rail/water service would have an economic impact on the Houston community but did not know what it was because his study was limited to cargo moving across the wharves of the Port. He also conceded that many of the factors which entered into his economic impact study of the cargo crossing the wharves were also present in regard to cargo moving through the rail terminal in the joint rail/water service.[130]

[119] Tr. 124.

[120] Reply brief, p. 2.

[121] Exhibit 12, 12a-o; Tr. 485–487.

[122] Tr. 422. For example—see colloquy regarding loss of 47 jobs in Houston. Tr. 421.

[123] Tr. 423; 466. But see Tr. 368. 370.

[124] Tr. 423–424; 469; 485.

[125] Tr. 351. The AAPA considers that each ton of container cargo represents $20 in economic impact to a community. The record does not reveal how much of this is direct benefit to a port authority and how much is a ripple effect; nor, indeed, how much represents the cargo itself.

[126] Tr. 426.

[127] Tr. 426.

[128] Based on AAPA data.

[129] State of Texas input-output study. See also Tr. 548.

[130] Tr. 432–452. See also Tr. 439–443, 447, 450–452, 455, 457, 461, 465, 468, 471, 473, 531, 570–574, 592.

Although in an administrative proceeding great latitude is permitted in admission of evidence into the record, the problems raised by the testimony of Mr. Bragg is exemplified by the following colloquy:

MR. MAYER: Your Honor, I would just, for the record, note that I have the same objection to the use of the State of Texas Input-output study as I have to the $20 AAPA figure on the same grounds and I am assuming that you will rule the same way on it but I do not want my objection to be in the record on that.

JUDGE LEVY: Well, Mr. Mayer, I understand your concern. And it's a concern to me because these are premises which this witness used that are not subject to proper cross-examination to determine the validity of it because you can't get back to the basis for it. As I said before, I am going to allow it, but it's going to the weight of how much reliance we can put on the basic premises without being able to properly evaluate them. You may continue, if you will.[131]

In any event, whatever the validity of the premises and conclusions of the witness regarding the economic impact on the Houston community of a ton of container cargo moving across the wharves, he did not make any similar study of the economic impact on the Houston community of a ton of container cargo moving through the rail terminal in the joint rail/water service [132] though admitting there was an impact.[133] To the extent that a ton of container cargo moving through the rail terminal has an economic impact such impact serves to soften the economic loss to the Houston community of cargo which might otherwise move in the all water service.[134] If the impact of a ton of cargo moving through the rail terminal is equal to the impact of a ton of cargo moving across the wharves the net economic impact on the Houston community would be the same whether the cargo moved through the rail terminal or across the wharves. If anything, the record herein indicates that the joint rail/water service serves to stimulate commerce by offering certain advantages to the shipper.[135] Cargo moves in the foreign commerce of the United States whether by an all-water service or by a joint rail/water service. To the degree that joint rail/water service stimulates commerce it may actually result in increased cargo movements. Certainly no less tonnage will move by reason of the joint rail/water service.

Professor of International Economics Flammang, sponsored by the Port of New Orleans, on cross-examination, testified: " . . . basically my statement [Exhibit 7] says I think that foreign trade is very important to the State of Louisiana and its growth and that [of] the ports of Louisiana are very important to the growth of the State of Louisiana on a historic basis and probably for the foreseeable future."[136]

Asked, "what is your understanding of the joint rail-water service being challenged by ports here?" Professor Flammang replied, "I don't know anything about it. Q. Nothing at all? A. Not really."[137]

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[131] Tr. 453.

[132] Tr. 460, 483.

[133] Tr. 470; 473–474.

[134] Tr. 461. Although the Gulf ports have asserted loss of jobs in the ports caused by the loss of volume siphoned off by the joint rail/water service no witness could substantiate this. See Tr. 521–33, 584–85; also 1092 (stipulation).

[135] Exs. 11, 11a.

[136] Tr. p. 99.

[137] Tr. 99–100.

Professor Flammang also testified that the Port of New Orleans is especially important as a conduit for a majority of Louisiana's exports of manufactured goods and agricultural as well.[138]

There is no serious dispute that the Port of New Orleans plays an important part in the commerce of Louisiana and even beyond. There is serious dispute whether the joint rail/water service in issue here seriously jeopardizes the commerce of the Port and of Louisiana or areas beyond. Certainly Professor Flammang did not assert that such service jeopardizes the commerce of the Port or of Louisiana. In fact Professor Flammang knew nothing about the service or its impact. This raises the question whether, if such service were a serious threat to the area's international commerce and economic well-being, an expert on Louisiana's foreign trade would be unaware of such threat?

We may reasonably conclude that the joint rail/water service does not jeopardize the international commerce of Louisiana. The reason being that the commerce flows out of or into Louisiana whether moved through the Port by all-water service or moved through Charleston via the joint rail/water service.

A further factor which cannot be overlooked in determining the impact of the joint rail/water service on the maritime commerce of the United States is that whatever the economic impact this service may have on the Gulf Ports there must of necessity be a counterbalancing impact on the Port of Charleston.[139] Thus, if viewed from a national point of view, as this Commission by statute must, rather than a sectional point of view, the economic impact of a joint rail/water service is balanced.

NATURAL TRIBUTARY AREAS

Complainants seek to have the joint rail/water service found to violate section 8 of the Merchant Marine Act, 1920. On the issue raised in this proceeding, section 8 states in pertinent part:

> Sec. 8. That it shall be the duty of the board [now the FMC], in cooperation with the Secretary of War, with the object of pomoting, encouraging, and developing ports and transportation facilities in connection with water commerce over which it has jurisdiction, to investigate territorial regions and zones tributary to such ports, taking into consideration the economies of transportation by rail, water, and highway and the natural direction of the flow of commerce;*** and to investigate any other matter that may tend to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally pass through such ports.[140]

The Commission in Intermodal Service to Portland, Oregon, Docket 7019, mimeo p. 40, 14 SRR 107, 132 (October 29, 1973), interpreted the function of section 8 as follows:

> Moreover, as observed by the Court of Appeals for the Fifth Circuit in *Port of New York Authority v. Federal Maritime Commission*, 429 F.2d, *supra* at 670, section 8 is only a statement of congressional policy *** to be given weight by the Commission *** It does not, like section 205, Merchant Marine Act, 1936, for example, proscribe any particular conduct.

It is clear, therefore, that section 8 cannot operate as a statute which confers

[138] Tr., 101–102.

[139] Tr. 470. To this end it is noted that the Port of Houston and Seatrain stipulated that "to the extent that the same amount of cargo would move through the Port of Charleston, that a similar number of [longshoreman] man-hours and similar amounts of wages would be paid." The West Gulf and the South Atlantic are in the same I.L.A. district and have the same contract. Tr. 1092.

[140] This has commonly been expressed as the concept of naturally tributary cargo.

any substantive rights on the complainants. Nevertheless, a consideration of the concept of naturally tributary cargo and its application to the issues raised in this proceeding is necessary for a proper understanding of the role of joint rail/water service in the maritime commerce of the United States.

The question of what constitutes a port's natural tributary area is in large measure similar to the question which came first, the chicken or the egg. Mr. Vianna, the expert witness on natural tributary areas, sponsored by the Gulf ports, defined it as the geographic area within the United States which has historically depended on the port for services. He continued, "In defining the natural tributary area of the Port, then, the question is *not* how important is that area to the Port's cargo movement but rather, how important is the port relative to all shipments to or from the area in question."[141]

If this definition is adapted to its logical conclusion it would mean that once an area ships its first cargo and that first cargo goes through a given port, by definition that port at that moment becomes the most important port relative to all shipments [one] from the area in question. As such, the area—by the witness' definition—becomes naturally tributary to the port. When the second cargo is ready for shipment it must go to the port on which the area has historically depended—that is, the port through which its previous cargo has moved. Thus even though new ports may come into being, though new facilities may be available at other ports, though new modes of transportation may become available whereby other ports may thence be utilized, no cargo may be shipped except through the historic port to which by the witness' concept it is naturally tributary. This concept ignores developing technology, even if such technology were to result in serving shippers faster, better, or at lower cost.

In determining whether cargo is or should be denominated naturally tributary to a particular port a number of obvious questions present themselves, and which, it seems, must be answered in the affirmative to sustain a holding of naturally tributary cargo.

Are the cargo's origin or destination geographically proximate to that port? In what way is the flow of cargo through that particular port in the public interest? What economic factors bind cargo inextricably to a particular port?

None of the complaining ports was able to establish that cargo moving in the joint rail/water service originated in or was destined for areas so geographically proximate to the port as to be susceptible of objective delineation, *i.e.*, a radius within which the cargo can *ipso facto* be denominated naturally tributary.[142]

None of the complaining ports were able to establish that the flow of cargo through that particular port was in the public interest either because the port's financial stability would otherwise be jeopardized, or that unemployment of a serious or substantial nature would occur in that port by reason of the existence of the joint rail/water service or that the port area's economy would be seriously or

[141] Exhibit 6a, p. 1. The Vianna Study on naturally tributary cargo, oriented to origination of cargo and destination by state via specified port, is based on 1970 data which is the latest year in which that particular type of data has been accumulated. Containerized cargo movements through Gulf ports in 1970 were minimal; the overwhelming volume of general cargo was break-bulk. Cargo flows in the study must be construed in that context.

[142] Late-field Ex. 15c estimates cargo originating in or destined for Texas. This cargo is not necessarily that carried in the joint rail/water service nor was such Texas cargo claimed as naturally tributary to any specific port. None of the 1,998 containers that moved through Galveston in 1973 to the UK/Europe could be identified as specifically having originated at a Texas point or were destined to a Texas point. Tr. 702–3.

substantially harmed by reason of the existence of the joint rail/water service.[143]

There is no evidence in this record respecting what economic factors bind cargo inextricably to a particular port. To assert that a service is unreasonble or unjust or unduly prejudicial is insufficient; facts establishing the assertion are required to make such a finding. This record is devoid of economic facts which show that certain cargo is so naturally tributary as to be bound to a particular port and that the public interest would be circumvented if that cargo did not flow through a particular port.

The great advantage of the container is its flexibility. From this stems its greatest utilization—intermodality.

Enabling statutes were conceived before there was any intermodal capability. The legislative history of those statutes does not concern itself with the problems of containerization and intermodality. It is inconceivable that the Congress should have intended to stifle development of maritime commerce if such development were to result in innovations whereby shippers would be offered alternative services and which could result in faster, better or lower cost transportation.[144] Whether intermodality and joint rail/water service offers faster, better or lower cost transportation—as its backers believe—or whether it will change historic traffic patterns to the detriment of present beneficiaries [albeit to the benefit of present non-beneficiaries] as the Gulf ports contend—is presently an open question since the development is in its infancy. But the important thing is that it gives shippers a viable alternative. A choice. As the competing services and competing ports vie for the shippers' consideration they will each strive to improve their attractiveness. This must necessarily redound to the benefit of the shipper, the maritime commerce of the United States and, in the largest and best sense, to the benefit of the public interest. All within the meaning and context of the Shipping Acts.

Intermodality and the joint rail/water service are the logical extensions of the containerization revolution. In order to fully develop this transportation concept "it is imperative that containership cargo be accumulated, through the use of feeder services, in as few of the larger ports as reasonably possible, thus minimizing containership time in port and enhancing frequency and regularity of service. Only through the utilization of load centers can containerships realize their true productive potential. Inevitably, a territory which has been naturally tributary to a port for break-bulk services will not be tributary for full container-

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[143] The economic aspects and impact of the joint rail/water service were previously discussed in detail in the section ECONOMIC FACTORS.

[144] The Commission has aptly put it thusly: We have always striven to administer our regulatory authority in a manner most conducive to the development of the full potential of newly emerging transportation phenomena. *Intermodal Service to Portland, Oregon*, Docket No. 70–19, mimeo p. 34, 14 SRR 107, 128 (October 29, 1973). Similarly in *Disposition of Container Marine Lines*, 11 F.M.C. 476, 489 (1968), the Commission stated: In fact the Federal Maritime Commission can and must play an important role in encouraging improved services for shippers. As was said in the Order of Investigation, the Commission does not intend to create or permit impediments to the improvement of shipping services. Enlightened regulation is the key to effective regulation: no regulatory agency can permit regulation to be outstripped by new techniques in the industry. Progressive regulation is required in the interest of encouraging the modernization of shipping services. Outmoded principles and rules will surely stifle advancements in all fields, and especially transportation where developments have followed so quickly upon each other.

It is indisputable, therefore, that the Federal Maritime Commission must assume a flexible posture and must view broadly, when necessary, its regulatory purposes and governing laws and rules.

See also dissenting opinion: We are now entering an era in transportation when concepts such as "naturally tributary" may no longer suit the needs of transportation. The Commission should make it clear that these concepts cannot prevail if they prevent substantial benefits from inuring to the shipping public or obstruct innovative action in transportation. *Overland & OCP Rates & Absorptions*, 12 F.M.C. 184, 232 (1969).

ship services."[145] Joint rail/water service enables full containership operators to minimize shuttling expensive ships back and forth between ports, and at the same time enables the handling of containers over a broad, geographical range.[146] This method of operating comports with the innovative nature of containerized shipping. If containership operators are able to utilize joint rail/water service in serving shippers, containerized shipping will develop to its full potential. To prevent this and require rigidity based on outmoded transportation concepts will stifle intermodal advances in ocean transportation to the detriment of the maritime commerce of the United States and would be contrary to the public interest.

In determining a definition of natural tributary cargo the ports' expert witness, Mr. Vianna, was asked:

Q. Did you analyze any of the decisions of the Federal Maritime Commission in determining what the legal definition of naturally tributary cargo was?

A. Not to any extent. I did read over excerpts of the *Portland* case. I don't know the number of it. From my understanding of these excerpts I could not find a very rigorous explicit definition of what is naturally tributary based strictly on the data on domestic origin and destination. So they couldn't use this particular approach.

Q. The excerpts were supplied by counsel?

A. Yes, Mr. Perry.[147]

Thus it is clear, that whatever the Commission's concept of "naturally tributary cargo" is it is not the concept utilized by the witness—that is, a definition based on data on domestic origin and destination.

Let there be no misunderstanding regarding the Commission's conception of the term "naturally tributary" as utilized in *Portland*.[148] Recognizing that it was faced with the issue of the extent to which the peculiar features of large, highly specialized containerships should alter the criteria which the Commission had evolved for examining the lawfulness of practices under which carriers serve ports without making direct calls, the Commission in *Portland* continued:

In determining the validity of such practices, we of course recognize our regulatory obligation to be flexible in adopting our procedures to new developments in the transportation art. As the Supreme Court has observed:

> . . . this kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of law and of fair and prudent administration, to adopt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.[149]

The concept of naturally tributary cargo has as its purpose the maintenance of the movement of cargo through those ports which, because of a combination of geographic, commercial, and economic considerations, would naturally serve such cargo. *See, e.g., Stockton Port District v. Pacific Westbound Conference*, 9 F.M.C. 12 (1965), aff'd *sub nom., Stockton Port District v. Federal Maritime Commission*, 369 F. 2d 380 (9th Cir. 1966), *cert. den.* 386 U.S. 1031 (1967); *Sea-Land Service, Inc. v. South Atlantic and Caribbean Line, Inc.*, 9 F.M.C. 338 (1966); *Pacific Coast*

[145] Initial Decision, served October 5, 1970, in Docket No. 70-24, *Agreement No. 9835-Japanese Lines' Pacific Northwest Containerships Service Agreement*, 11 SRR 994; ultimate conclusions adopted by the Commission, 14 F.M.C. 203 (1971).

[146] Ex. 18, p. 7.

[147] Tr. 84-85.

[148] *Intermodal Service to Portland, Oregon*, Docket No. 70-19, mimeo p. 27 et seq., 14 SRR 107, 124 et seq. (1973).

[149] *American Trucking Association, Inc. v. Atchison, Topeka & Santa Fe Railway Co.*, 387 U.S. 397, 416 (1957).

European Conference–Rules 10 and 12, 14 F.M.C. 266, 285–288 (1971). It cannot rationally be applied, and has in fact been specifically rejected, in a situation in which the cargo for which ports compete is destined for or moving to the central United States, *i.e.*, OCP/overland cargo. As we observed in *Investigation of Overland/OCP Rates and Absorptions*, *supra*. "The naturally tributary concept based upon section 8 of the 1920 Act has to do with the territory *locally* tributary to a particular port; not with the general territory which an entire range of ports, or more than one range or seaboard, may serve competitively." (at 224).[150] The Court of Appeals for the Fifth Circuit affirmed this approach to the "naturally tributary" concept, stating " . . . we are not prepared to hold that the midwestern portion of the United States is naturally tributary to petitioner ports. No authority has been called to our attention which would extend the natural tributary scope of §8 to such limits." *Port of New York Authority v. Federal Maritime Commission*. 429 F. 2d, *supra*, at 670.

The Commission further stated:

. . . we have applied the naturally tributary concept to containerized cargo in the past and would continue to do so here were only local cargo involved. But, as shown by the *OCP* case, *supra*, the concept has no materiality to cargo moving to or from the central United States. Such cargo cannot be said to move "naturally" through any particular ocean gateway. The problem with respect to such cargoes is not one of determining through which gateway they would naturally move, but rather one of attempting to define the extent to which carriers may adopt various practices designed to enable them to compete for these cargoes. (Mimeo, p. 31; 14 SRR 127).

In this regard, the testimony of Mr. Perry, consultant to the Port of New Orleans and General Manager of the New Orleans Traffic and Transportation Bureau, intervenor herein, is particularly pertinent:

Q. Of the containerized cargo in the foreign trade that moved from New Orleans or across the wharves of the Board of Commissioners of the Port of New Orleans to Europe and the United Kingdom, do you know how much of the 375,246 tons originated within the local port area of New Orleans? And by local use a radius of 50 miles, if you will.

A. No, but I have an opinion.

Q. What is your opinion, Mr. Perry?

A. I believe that dealing with the fact that you—that Europe and the United Kingdom have opened foreign quite a bit we have experienced a growth in '72 and '73. A substantial volume of this was from approximately a 350-mile range of New Orleans and perhaps to some extent beyond that. But I doubt very seriously if it was within close proximity to New Orleans as within 100 miles, say, being close proximity.

Q. You think most of it was in excess of 100 miles from New Orleans?

A. Yes, I do.

* * *

JUDGE LEVY: Since you are—you were talking about cargo originating. You are talking about cargo ultimately destined. That's what I am trying to say.

Q. Did you mean destined?

A. I did indeed. Originating and destined.

Q. If someone were to pick up that number, what is it? 100 miles from New Orleans, 200 miles?

A. I stated that my range at that point in time would be in the vicinity of 300 miles.

Q. 300 miles or more?

A. Uh-huh. With the substantial part of the increase.[151]

Thus, whatever the merits of the Port's contention, the bulk of the cargo complained of as being carried, or which could be carried in the joint rail/water service, originates in or is destined for areas distant from New Orleans and should not be denominated local cargo.

[150] *See also, Beaumont Port Commission v. Seatrain Lines, Inc.*, 2 U.S.M.C. 699, 703 (1943).

[151] Tr., pp. 142-143.

Insofar as the historical movement of cargo is concerned, Mr. Vianna's study is based on 1970 movements, the latest figures available at the time of the study. In 1970, however, container movements in the Gulf/U.K. and Continent trade were not included in the Department of Commerce's issue of a compilation entitled "Foreign Ocean Borne Trade of the United States, Containerized Cargo on Selected Trade Routes."[152] The report states that it is "designed to cover those trade areas which have the highest concentration of container shipping. The Gulf-U.K. and Continent are not included in the issue concerning the 1970 year." Statistics for the Gulf-U.K. and Continent were not included until 1972.[153] It would thus appear that whatever validity Mr. Vianna's historical flow concept has it was not based on any historical flow of appreciable amounts of container cargo in the Gulf-U.K. and Continent trade. Whatever history container cargo flow has is of recent origin and, to a degree, that history includes the history of the joint rail/water movement.

Seatrain's witness, Mr. Flitter, disputes the Vianna theory of "history" in determining naturally tributary cargo.[154] Mr. Flitter is of the view that "History has no bearing." He admits that geographic proximity may well be a factor in determining naturally tributary cargo but inland mileage rates are also a factor. He points out that the advent of FAK railroad rates between inland points and North Atlantic ports was a tremendous stimulant in funneling container cargo to North Atlantic ports. Thus inland mileage rates were a strong determinant in establishing cargo flow. It is his contention that the growth and development of containerization has radically changed the entire concept of naturally tributary cargo. Old concepts of naturally tributary cargo are practically outmoded, inasmuch as containerization can change cargo flow in accordance with changing economic factors rather than historic factors.[155]

From the foregoing there emerges the proposition that the Commission does not conceive of cargo being "captive" to a port whether it be denominated "naturally tributary cargo" or otherwise.[156] A combination of factors always enter into consideration of whether cargo may lawfully pass through one port as distinguished from its claimed passage through another. The ultimate determination of what is the public interest involves a balancing of these various factors. Economic soundness is a factor which heavily weighs in favor of allowing cargo to flow through either of competing ports as being in the public interest.

As the Commission succinctly put it: "The problem with respect to such cargoes is not one of determining through which gateway they would naturally move, but rather one of attempting to define the extent to which carriers may adopt various practices designed to enable them to compete for these cargoes."[157]

In considering the historic flow of cargo which becomes denominated naturally tributary it must be remembered that various factors have contributed to

[152] Ex. 20.

[153] Ex. 21.

[154] Tr. 986–89.

[155] Ex. 18, pp. 13–14.

[156] A contrary position is taken by Houston witness, C.E. Strange. Tr. 634–636.

[157] *Intermodal Service to Portland, Oregon*, Docket No. 70–19, mimeo p. 31, 14 SRR 107, 127 (1973).

such flow; for example, the location of the shipper, the frequency of service he requires; the in-land rate structure; the in-land transportation network. Undoubtedly other specific factors have influenced specific shippers of specific cargoes at specific times.

Mr. Strange, General Manager of Houston Port Bureau, Inc., testifying on cargo naturally tributary to Houston,[158] stated that from a shipper's point of view, in determining natural flow, you simply look to the service available from the port to the foreign country and determine your total transportation costs. He said, "economics dictate to that shipper's transportation manager to make the best profit for his company."[159] Inventory needs in the foreign country and frequency of service are also factors for the shipper's consideration.

Analysis of this testimony indicates that a shipper's concept of naturally tributary cargo is, "How do I get my cargo from my plant to my consignee in the cheapest, fastest and easiest manner?" A shipper is not primarily concerned with whether his cargo moves all-water or by joint rail-water or whether it goes across the wharves of Port H. or Port C. It would be unreasonable, and not in the public interest, to preclude a shipper from having a choice of alternative services whereby he could make an economic judgment of how "to make the best profit for his company." If the respondent were the only carrier offering container service from the Gulf to the U.K. and Northern Europe its decision whether to call it a particular port or ports would deprive a shipper of the ability to reach an economic judgment of how "to make the best profit for his company." He would simply have to utilize that carrier's port of call and that carrier's frequency of service. If, on the other hand, as is the actual case, a number of carriers offer container service from the Gulf to the U.K. and the Northern Europe, then the shipper has the capability of reaching an economic judgment of how "to make the best profit for his company." The shipper is not dependent on a single port of exit or entry, a single frequency of service. He can freely determine which offered service it is in his best interest to utilize. The total costs of transportation, frequency of service, service, and each and every other factor with which he is concerned can be analyzed and a weighted judgment reached. To the extent that any factor is precluded, to that extent his judgment is boxed in to a predetermined result. If ports, as well as carriers, are obliged to compete, not in cost but in service, then the competition must necessarily redound in improved service and increased benefit to the shipper and to the public interest. If ports direct their efforts to attracting shippers and carriers by increased facilities and service, by eliminating traffic congestion, by increased security, in short by making it desirable to utilize that particular port, then the public interest as well as the port's is advanced and enhanced. If, on the other hand, a port's interest is protected so that competition and alternative services are eliminated, the port may temporarily benefit, but the shipper and the public interest in the largest, best and purest sense of the term will surely suffer.

The Commission has stated that carriers and consignees also have interests which the Commission must strive to protect and that "the public interest is

[158] Tr. 534–538.

[159] Tr. 537.

much larger than the needs or desires [of a particular port area.]''[160] It is unlikely that the Congress, representing all of the people, intended to construe the public interest as the port's interest. What is good for the port may or may not be good for the public. But what is good for the public is certainly good for the maritime commerce of the United States.

The Shipping Act was never intended to eliminate competition. It was intended to eliminate destructive competiton. Competition which benefits a shipper by offering alternatives cannot be said to be destructive. To eliminate the alternative would be a destructive act.

It is found that the joint rail/water service does not preclude the development of the Gulf ports and taking into consideration the economies of transportation and the natural direction of the flow of commerce such service is not detrimental to the commerce of the United States and such service is in the public interest.

ABSORPTIONS

The complainant Ports allege that the joint rail/water service is an unlawful absorption of inland transportation costs by Seatrain.

The joint rail/water tariff provides that the shipper is to pay the water carrier the full transportation cost, as a matter of convenience, and the water carrier is then to pay over to the railroad its divisional share of the revenue. The railroad payments are made on a divisional basis in accordance with the tariff on file with both the ICC and FMC.[161]

The joint rail/water service is in many respects similar to the overland/OCP rate system which this Commission has approved.[162] *See, Port of New York Authority v. Federal Maritime Commission,* 429 F. 2d 633 (5th Cir. 1973), *cert. denied,* 401 U.S. 909 (1971). *See also, Pacific Westbound Conference v. Federal Maritime Commission,* 440 F. 2d 1303 (5th Cir. 1971), *cert. denied,* 404 U.S. 881 (1971). *Board of Commissioners, Port of New Orleans v. Federal Maritime Commission,* 404 F. 2d 1312 (5th Cir. 1971). In the overland/OCP cases, the Commission concluded that the practice of combined usage of rail and water carriers to move cargo in international trade did not violate sections 16 and 17 of Shipping Act, 1916. The Commission found that this practice was designed to meet and foster competition and was not unlawful. *Investigation of Overland/OCP Rates and Absorptions,* 12 F.M.C. 184, 187 (1969); aff'd 429 F. 2d 633 (5th Cir. 1973).

Although the joint rail/water service is similar to the rail/water transportation system known as the overland/ OCP rate system, it has several innovative features which increase its flexibility. Instead of two tariffs and two bills of lading as required in the overland/OCP system, joint rail/water service involves a single tariff and a single through bill of lading.[163] If offers a simplified service for

[160] *Intermodal Service to Portland, Oregon,* Docket No. 70-19, mimeo p. 39 (October 29, 1973), 14 SRR 107, 131. *See also Stockton Port District v. Pacific Westbound Conference,* 9 F.M.C. 12, 28 (1965).

[161] Ex. 18, pp. 3-4; Tr. 560; 602-03; 969-70.

[162] Overland/OCP rates are ocean or water rates covering only the water portion of the freight movement. The rail counterpart of these rates are the export/import rates filed by the railroads and approved by the Interstate Commerce Commission.

[163] The Seatrain specimen bill of lading, required to be filed as part of the tariff, provides for joint responsibility for the goods being shipped.

shippers and provides for payment to one of the participants in the joint service, usually the water carrier, who acts as a conduit for railroad revenue, thereby enabling the shipper to make one payment for rail and water freight charges. As such, the joint through service represents a true joint rate situation.

In a joint rail/water service, the divisions to be paid to each carrier are not in themselves illegal nor can they be deemed to be absorptions unless it can be established that one carrier is paying another carrier for services which the first carrier is obligated to perform and which the second carrier is not obligated to perform. In all cases where the Commission has forbidden absorptions, equalizations, or proportional rate practices the carrier has assumed costs which the shipper otherwise would have borne. In no case has the Commission found such alleged practices to be improper where the carrier has not assumed any costs which would otherwise be borne by shippers. *See Pacific Coast Equalization Rule*, 7 F.M.C. 623 (1963), aff'd sub nom. *American Export Isbrandtsen Lines v. Federal Maritime Commission*, 334 F. 2d 185 (9th Cir. 1964); *Investigation of Overland/OCP Rates and Absorptions*, 12 F.M.C. 184, aff'd sub nom. *Port of New York Auth. v. Federal Maritime Com'n.*, 429 F. 2d 663 (5th Cir. 1970), cert. den. 401 U.S. 909 (1971). There is no evidence in this record of inland freight costs being paid by a water carrier or a railroad that should be for the account of the shipper.[164] Even so, Mr. Doyle G. Owens, Traffic Manager/Sales, for the Port of Beaumont, contended that an absorption exists whenever a carrier's division of the joint rail/water charge is less than the carrier's local rate.[165] The same witness, antithetically, does not consider a railroad export rate to be an absorption even though it is lower than the railroad's local rate.[166] Ultimately, the witness rationalized the contradiction by explaining that in one case there was a diversion from a port and there was no diversion in the other case. Thus, absorption is not really absorption but diversion. And diversion really is the practice complained of. The issue of the course is whether there is a diversion, and if so, whether it is unlawful.

The cases relied upon by the complainants do not support their position. In each case cited, the practice held to violate the Shipping Act involved diversions of cargo by the device of absorption by a water carrier of a shipper's overland transportation costs. In this proceeding, it has already been shown that the shipper pays the full transportation cost, and the participating carriers then split the revenue on the basis of the divisions contained in their filed joint rail/water tariff. There has been no supportable contention in this case that Seatrain absorbs inland freight charges.

The *Portland* decision is not supportive of the complainants' position. That case dealt with inland absorptions by water carriers while joint rail/water service is a true joint rate, though route service not involving absorption of inland costs. The Commission in *Portland* made it clear that the practices there in question, including the ocean carrier paying the freight charges for the inland transportation of cargo from Portland to Seattle (absorption), were different than those involved in joint through service. The Commission stated:

[164] Tr. 680.

[165] Tr. 746.

[166] Tr. 747–48.

> . . . *our regulation with respect to the filing* of through routes and through rates was not intended to apply to a service like that under consideration. Mimeo p. 46; 14 SRR at 136.

> [The concept of naturally tributary cargo] cannot rationally be applied, and has in fact been specifically rejected, in a situation in which the cargo for which ports compete is destined for or moving to the central United States, i.e. OCP/overland cargo. As we observed in *Investigation of Overland/OCP Rates and Absorptions, supra,* "The naturally tributary concept based upon section 8 of the 1920 Act has to do with the territory *locally* tributary to a particular port; not with the general territory which an entire range of ports, or more than one range or seaboard may serve competitively." (Mimeo p. 28; 14 SRR at 125).

Complainants also rely on *City of Mobile v. Baltimore Insular Line, Inc.* 2 U.S.M.C. 474 (1941). Again, the case simply is not supportive of their position. In that case the Commission's predecessor agency prohibited a conference practice in the U.S./Puerto Rico trade which permitted unlimited equalization between all U.S. Atlantic and Gulf Ports.

Given the unqualified and unjustified nature of the conference's equalization absorption practices in *City of Mobile,* the relative length of the overland and ocean portions of the total movement therein, the different statutory basis for judging domestic tariffs, and the vast changes in transportation techniques since the ruling of *City of Mobile,* this case in no way should be deemed a precedent to be applied in this proceeding.

The Commission's decision in *Sea-Land Service, Inc. v. South Atlantic Caribbean Line, Inc.,* 9 F.M.C. 338 (1966), cited by complainants, does not change this result. The service of the respondent water carrier in that proceeding involved the absorption of freight charges between Jacksonville and Miami, Florida, on substantial amounts of cargo destined for Puerto Rico. The water carrier continued to show Jacksonville as one of its terminal ports, with ocean rates between Jacksonville and San Juan identical with those between Miami and San Juan, yet when goods arrived overland to Jacksonville through substituted service, they were reloaded and sent by rail and truck to Miami, with the water carrier, for the most part, paying an extra amount for the substituted service to the land carrier.

There is no similarity between the service in *Sea-Land* and the joint rail/water service. No "extra" amount is being paid to the railroads in the joint rail/water service; they receive only the division expressed in the ICC and FMC approved tariffs. The joint service is not a "substitute service"; Seatrain does not hold out an all-water service and then perform part of that service by substitute truck service. The rail/water service in issue in this proceeding is the service provided without any deviations from the published tariffs on file at the FMC and the ICC. The record is devoid of any payment by Seatrain of any expenses attributable to the shipper or to the railroad.

In a joint rail/water service the obligations of each carrier mode are clear—to transport the goods between given points. And this performance is not an absorption even if the division between the carriers is not based on a precise cost-of-service formula. The division is a matter of contractual agreement between the modes, subject to approval by the regulatory agency having appropriate jurisdiction, and neither mode pays the other to perform services which the first mode is obligated to perform. Accordingly, it is concluded that Seatrain's participation in the joint rail/water service and the division between Seatrain and the railroads does not constitute an illegal diversion or absorption practice.

Although the Gulf ports in these proceedings oppose the joint rail/water service via Charleston they do not oppose similar services from the West Coast via Gulf ports to Europe or Gulf/Far East joint rail/water service.[167] Apparently the basis for opposition or non-opposition is that the Gulf ports consider the Charleston service to be a diversion whereas they do not consider the others which benefit the Gulf ports as ports of entry or departure as diversions. However, there appears to be no substantive difference in the tariffs for the Gulf/Far East joint rail/water service which the Gulf ports favor and the Gulf/Europe joint rail/water service which they oppose and the testimony reveals no rational basis for concluding one service is a diversion and the other is not.[168]

The complainant ports allege that Seatrain's rates are non-compensatory. The record, however, establishes that Seatrain's share of the joint service revenues is substantially equal to its gross revenue for direct water service from Charleston on a per box basis.[169] As its division share, during the period from October 1973 when the joint rail/water service became operational, to July 1974, Seatrain's net revenue per container increased substantially. The net to vessel per container in the joint rail/water service is $1,341.00;[170] in an all-water service $1,370.00.[171]

The ports introduced no evidence on whether Seatrain's revenues bore a reasonable relationship to costs. Absent evidence on cost or expenses, allegations of non-compensatory rates cannot be upheld. The Commission in *Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trade*, 11 F.M.C. 168 (1967), held that rates are compensatory if they exceed out-of-pocket expenses. Any finding that Seatrain's share of the division is less than its out-of-pocket expenses and therefore non-compensatory simply cannot be supported on this record.

Seatrain's minimum rate provisions of the joint rail/water tariffs have been increased in some instances. The effect of these increasing charges is to keep them competitive with all-water service from the Gulf ports.[172] The tariff itself is the basis for concluding that the service does not discriminate nor contain prejudicial or unreasonable rates.

CONCLUSIONS

In line with the Supreme Court's directive in *American Trucking Association, Inc. v. Atchison, Topeka & Santa Fe Railway Co.*, 387 U.S. 397, 416 (1967), an

[167] Exs 11, 11a; Tr 183–187, 204.

[168] Tr 184 et seq —see particularly 199–201 for position that no diversion is inherent in a joint rail/water service from Oakland, California, to Europe via Port of New Orleans See also fn. 55, *supra*.

[169] Exs 18c, 18c—added, 18i, Tr. 1057

[170] See additional Exhibits 18c, 18d, 18e and 18r For the latest period which figures are available—July 1974 for containers from or to the rail terminals in New Orleans, Houston and Beaumont and June 1974 from Galveston—a total of 468 containers were carried by Seatrain whose net revenue share was $627,713 $627,713 + 468 = $1,341 net to vessel in the joint rail/water service.

[171] Exhibit 18i. This is based on container net to vessel from Charleston in regular all-water non-intermodal service One would expect the joint rail/water containers to return substantially less but the evidence does not support any such conclusion. In considering the longer voyage distances and time involved in a Gulf-Europe service compared with the Charleston-Europe service the greater total carrying capacity potential by reason of the shorter voyage weigh heavily in favor of a potentially increased total net to vessle from containers in the joint rail/water service than would be realizable from an all-water service to/from the Gulf even if the samples utilized in added Exhibits 18c, d and e and 18i contain variable error because of small size of the sample.

[172] Exs. 18c, 18j

approach of dynamic realism is required. To this end, in *Japan Line, Ltd. v. I.C.C.* and *N.Y.K. Lines, Inc. v. ICC*, Nos. C-74-1511 SC and C-74-2029 SC, USDC No. Calif., January 22, 1975, in a case involving intermodal transportation services the court found that the ocean carriers "implemented programs which permit their customers to realize significant savings in transit time, freight charges, documentation costs, and insurance losses, when shipping goods from Japan to Chicago via inter-connecting transportation services." In concluding that such programs did not thereby convert the carriers into Part IV freight forwarder subject to ICC jurisdiction the court, citing *American Trucking Association,* said "In closing we note that plaintiffs' services will provide a vital improvement to intermodal transportation service without any added expense to shippers and that not burdening plaintiffs with the complexities of regulation by two separate federal agencies advances the Supreme Court's determination that 'encouragement of [intermodal] coordination is in the public interests."

This nation's growth is vibrant proof that, as a people, we have not been afraid of innovation. It would strain the interpretation of the Shipping Acts beyond credulity to conclude that they require the Federal Maritime Commission to destroy and prevent a significantly innovative development in the maritime commerce of the United States[173] which redounds to the benefit of the shipper [i.e., the consumer—in that the consumer utilizing the goods which move in commerce ultimately absorbs the cost]. Not only does the innovative service redound to the benefit of the shipper but on this record no significant detriment can be shown to redound to the ports.

What we have here is a new, additional and innovative service at rates roughly comparable to an all-water service. The public interest and the economy as a whole is enhanced anytime the public is offered an additional service which it may or may not utilize at its own discretion.

The tide of events by which new and efficient operating modes come into existence cannot be held back by the dead hand of outmoded conventions. Even if we were to try to do so we would be doomed to failure. The public interest cannot be perverted by precluding the utilization of more economically efficient and effective transportation modes and services.[174] And nowhere in the statutes can there be found any language which would lend credence to a doctrine of economic inversion. Like Lot's wife, we would find looking back a fatal act. Our economy cannot afford additional shackles.

There is no specific evidence that any particular cargo which moved in the joint rail/water service had previously moved in direct water service from/to any particular Gulf port and would have continued to do so but for the new service. No shipper testified that cargo moving by the joint service would otherwise have moved through any specific port. All testimony to this effect was conjecture. By any standard of burden of proof the complainants have failed. Surely if com-

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[173] The Commission has stated that "we have always striven to administer our regulatory authority in a manner most conducive to the development of the full potential of newly emerging transportation phenomena." *Intermodal Service to Portland, Oregon*, Docket No. 70-19, Mimeo. p. 34, 14 SRR 107, 128 (October 29, 1973).

[174] Anything which impedes a free choice among constantly changing alternatives provided by technical changes in traffic and transportation methods is a deteriment to commerce in the long run. *Swift & Co., v. Gulf and South Atl., Havana Conf.*, 6 F.M.B. 215, 226 (1961).

plainants' theory of diversion had any substance they should have been able to introduce some tangible evidence in support thereof.

Nothing in this record indicates any death blow or even serious detriment to any port where the joint service is offered in competition to an all-water service. What specific evidence there is in this proceeding shows that the amount of minibridge tonnage in relation to total port tonnage is in every case minuscule. The amount of minibridge tonnage in relation to containerized tonnage in all trades in each port is minuscule. The amount of minibridge tonnage in relation to containerized tonnage in the particular trade wherein the joint service is offered is minuscule. The record in this case shows that less than 1 percent of all the cargo moving out of these ports is moved by rail/water service and such service should, therefore, constitute no threat to investments in port facilities. It must be concluded that the competition between direct water service at complaining Ports and the joint rail/water service now and for the foreseeable future comprises such a small fraction of port tonnage that the joint rail/water service does not constitute any unjust or undue discrimination against the Ports.

Even if the joint rail/water service were to multiply many times over the tonnage presently involved, in comparison to total port activities it would still remain a comparatively small fraction. And even if the growth were so great, and even if the service expanded into the other trades to the point where the impact on the ports became substantial we would then have to ask ourselves why has this come about? Would it have been caused by any unconscionable, unscrupulous, underhanded, undercutting competitive methods or because a better mousetrap has been fashioned? On this record there is no showing of any unconscionable, unscrupulous, underhanded, undercutting competitive method.

Whether the all-water service through the Port of New Orleans or the joint rail/water service is superior is a matter in dispute. Mr. Perry, for the Port of New Orleans, was of the opinion that the service through the Port was superior and that the joint rail/water service performed no useful purpose.[175] Asked why, if the Port service was superior, would a shipper select the joint rail/water service, Mr. Perry answered:

> Well, we keep telling the shipper but we continue to lose some service because of it. I think it's best that we rid ourselves of the situation I think that's the best answer.[176]

In determining the quality of the service, joint rail/water versus all-water service, from the shippers' point of view, the various factors to be weighed are costs of one service compared to the other; time of transit; damage potential; frequency of service; availablity (capacity).[177]

Seatrain contends that when shippers are given a choice of all-water or joint rail/water, the greater service frequency and shorter transit time, coupled with the single bill of lading and single rate, at no greater cost, make the intermodal joint service uniquely attractive to shippers. It is additionally attractive because it combines simplicity of documentation, easy ascertainment, of total transit charges with single bookkeeping and insurance entries. In addition, the shipper need look only to a single carrier regarding damage claims; the carriers will

[175] Tr 156

[176] Tr 157.

[177] Tr. 408-13.

ascertain liability as between themselves.[178]

The complainants cannot expect the Commission to find that the public interest is served by concluding that the all-water service is superior and banning the inferior service if shippers have the choice, use the joint rail/water service because in their opinion it serves their interest better than the all-water service. If they thought otherwise it is reasonable to believe they certainly would utilize the all-water service. It is concluded, therefore, an option of service has been offered the shipping public which the shipping public believes in its own best interest to utilize.

For every man hour of labor lost by one port a man hour of labor is gained by another port.[179] In addition, rail man hours are brought into existence by the service which could not have been realized but for the offered service. The record indicates a more efficient fuel and energy allocation by reason of the joint service by eliminating the need of ships to transit the Gulf.[180] On no basis but self-interest can the position of the ports be justified on the record in this proceeding. In the larger arena of the public interest and general economic welfare of the nation as a whole, the joint rail-water service should be welcomed and encouraged rather than condemned.[181]

The joint rail/water service does not violate the concept of naturally tributary cargo in that it does not preclude the development of the Gulf ports and taking into consideration the economies of transportation and the natural direction of the flow of commerce the joint rail/water service between New Orleans, Houston, Beaumont and Galveston and ports in Europe and the United Kingdom utilizing the Port of Charleston, South Carolina, is not detrimental to the commerce of the United States and such service is in the public interest.

Seatrain's participation in the joint rail/water service and the division between Seatrain and the railroads does not constitute an illegal diversion or absorption practice since neither mode pays the other to perform services which the first mode is obligated to perform. The rates set forth in the tariffs filed with the Commission with respect to such service are comparable to the rates for all-water service and are not unreasonable, unfair or discriminatory.

The joint rail/water service between New Orleans, Louisiana, Houston, Beaumont and Galveston, Texas, and ports in Europe and the United Kingdom utilizing the Port of Charleston, South Carolina, is not unlawful, unfair, unjustly discriminatory or illegal within the meaning of sections 16, 17, and 18 of the Shipping Act, 1916 [46 U.S.C. §§ 815, 816, and 817], or violative of section 8 of the Merchant Marine Act of 1920 [46 U.S.C. § 867].

(S) STANLEY M. LEVY
Administrative Law Judge

WASHINGTON, D.C.
September 5, 1975

[178] Tr. 942.

[179] See fns. 134 and 139, *supra*.

[180] Tr. 584.

[181] O. E. Strange, General Manager, Houston Port Bureau, admitted on cross-examination that the public interest concept must extend to shippers and other port areas and necessarily extends beyond the parochial view of the Port of Houston or the Houston Authority. The public interest encompases the "whole benefit of the United States as to the various means of shipping." Tr. 594–5.

APPENDIX A

A comparability rate study was made by Houston's witness, White, in an attempt to establish that Seatrain's rates were undercutting all-water rates.

Witness White sponsored Exhibits 23a and 23b which purported to compare joint rail/water rates with all-water rates. These exhibits, after being corrected to reflect bunker surcharges and with an understanding that minimum revenue provisions in the tariffs may apply, showed that the charges for the service and those of Combi Lines, the only carrier that was compared, were extremely competitive, and in a large number of instances, Combi's charges were lower.[1]

Mr. White's comparisons, however, were selective and were less than half of the rates on file, with no valid reasoning behind selecting the pattern of choice in the rates used. The White thesis was contradicted by Witness Flitter's statement that joint service rates were indeed equal or higher than all-water rates.[2] Also, since the time of the drafting of White's exhibits, all rates for Seatrain shown as lower than Combi have been brought up to the level of the Combi rates effective August 8, 1974.

Mr. White also sponsored Exhibit 24gg. In carrying out his statistical analysis, White assumed that all rates are the same, only differing in amount. You cannot, however, compare the Seatrain house-to-pier rates with Combi's pier-to-house rates, as they are entirely different services to shippers.

Aside from the problem of comparing two different services, Exhibit 24gg is a comparison of only hypothetical movements of traffic. The witness had no knowledge that the cargo moved under the rates shown.[3] Taking the hypothetical, for bicycle parts moving under the minimum revenue provisions, Seatrain's rate is approximately $62 a ton higher than Combi's[4] and could be more if a railroad other than the Southern Pacific was used, as a drayage charge is incurred.[5] By the same procedure of comparison and using a drayage charge, the rates on automobile tires would be equal for the two services.[6] Finally, there can be no comparison of rates on bowling equipment and feed bran in bags, as the services are different for each carrier.[7]

[1] Tr. 1136–37.

[2] Tr. 879.

[3] Tr. 1112.

[4] Tr. 1113.

[5] Tr. 1114.

[6] Tr. 1114, 15.

[7] Tr. 1116–17.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76–60

PETITION FOR DECLARATORY ORDER OF SEATRAIN INTERNATIONAL, S.A.

ORDER

August 9, 1978

Seatrain International, S.A., (Seatrain) has filed a Petition for Declaratory Order (Petition) requesting the Commission to rule that section 14(b) of the Shipping Act, 1916, limits applications of the 15% maximum spread between contract and noncontract rates to the *ocean segment* of joint through intermodal rates, and not to the entire through rate.[1]

Section 502.68 of the Commission's Rules provides that "[t]he Commission may issue a declaratory order to terminate a controversy or to remove uncertainty."[2] It is generally in appropriate, however, for the Commission to "terminate" a controversy in a pending adjudicatory proceeding by independently issuing a declaratory order. The question Seatrain seeks to have resolved by declaratory order was squarely raised by the Order of Investigation in FMC Docket No. 76–11, *In Re Agreements Nos. 150 DR-7 and 3103 DR-7*. That case is presently pending decision by an Administrative Law Judge and involves some 1570 pages of transcript and 35 exhibits, a record which should prove valuable to the Commission in analyzing and resolving the important issues of law and public policy presented in that proceeding.

No compelling reason was offered as to why the Commission should prejudge the section 14(b) issues raised in Docket No. 76–11, especially since Seatrain is itself a party thereto. Moreover, as Seatrain itself acknowledges, a resolution of this question "results in certain legal *and factual* issues concerning tariff format and the possibility or impossibility of carriers maintaining a fixed dual rate spread . . . ."[3] Declaratory orders are not suited to dispose of contested factual issues.

THEREFORE IT IS ORDERED, That the Petition for Declaratory Order of Seatrain International, S.A., is Denied.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[1] Replies were received from: the U.S. Department of Justice (Antitrust Division); the Pacific Coast European Conference and the Pacific Straits Conference; fourteen conferences in the Atlantic-European trades (eastbound and westbound), filing jointly with the Mediterranean North Pacific Coast Freight Conference and the U.S. Atlantic and Gulf/Australia-New Zealand Conference; the Japan/Korea-Atlantic and Gulf Freight Conference and the Trans-Pacific Freight Conference of Japan/Korea; and the Far East Conference. Comments were received from: the L.A. Parish Company; the Atlantic and Gulf-Indonesia Conference and the Atlantic and Gulf-Singapore, Malaya and Thailand Conference; the Pacific Westbound Conference; Sea-Land Service, Inc.; Seatrain International, S.A.; the Bureau of Hearing Counsel; and the Council of European and Japanese Shipowner's Associations.

[2] 46 C.F.R. 502.68.

[3] *Petition*, page 4 [Emphasis supplied].

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–20

PUERTO RICO MARITIME SHIPPING AUTHORITY—
RATES ON GOVERNMENT CARGO

Domestic offshore carrier's rates for government cargo found not to violate the Shipping Act.

Domestic offshore carrier's classification system for rating government cargo found to violate Shipping Act section 18(a) and the purposes of P.L. 93–487 insofar as it permits government shippers to choose between "Government Cargo" rates and individual commercial commodity rates, and to employ shipping documents which do not reveal the contents of each shipment in terms readily convertible to commercial cargo classifications.

Domestic offshore carrier's commodity classifications system for government cargo found not to otherwise violate the Shipping Act.

Mario F. Escudero, Dennis H. Barnes and *Wayne M. Lee* for Puerto Rico Maritime Shipping Authority.

David F. Anderson and *Peter P. Wilson* for Matson Navigation Company.

Alan F. Wohlstetter and *Edward A. Ryan* for Household Goods Forwarders Association of America, Inc.

Dudley J. Clapp, Jr., Milton J. Stickles, Jr., John L. Degurse, Jr., and *E. Duncan Hamner, Jr.* for Military Sealift Command.

Harold S. Trimmer, Jr., Maurice J. Street and *Francis X. Davis* for General Services Administration.

Russell T. Weil and *James P. Moore* for United States Lines, Inc.

Donald J. Brunner, John Robert Ewers, Charles L. Haslup, III, C. Jonathan Benner, C. Douglass Miller and *Bruce Love* for the Bureau of Hearing Counsel.

REPORT AND ORDER

August 9, 1978

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 on June 6, 1975, by an Order of Investigation and Suspension directed at those portions of Puerto Rico Maritime Shipping Authority's (PRMSA) Tariff FMC-F No. 1 containing rates and commodity classifications for "Government Cargo, N.O.S.," "Government Cargo, Vehicles," and "Government Cargo, Refrigerated."[1]

Protests to the instant tariff matter were filed by the Household Goods

[1] Tariff Items 6A, 13 and 14 as they appeared at 1st Revised Pages 172–179, 516 and 517, and Original Pages 518–521. The Commission suspended PRMSA's government rates until October 8, 1975 Except for increases in the level of rates, the subject tariff items continue in effect today in substantially their 1975 form. PRMSA is a common carrier by water in interstate (domestic offshore) commerce within the meaning of Shipping Act section 1.

Forwarders Association of America, Inc. (HGFA) and Matson Navigation Company (Matson) which were made parties to this proceeding. United States Lines, Inc. (USL) intervened in support of Complainants. The Military Sealift Command (MSC) and the General Services Administration (GSA) intervened in support of the tariff rates.[2]

BACKGROUND

Both the classification scheme and the particular rates under investigation had been employed by PRMSA since at least January 1, 1975, pursuant to a contract between PRMSA and the Military Sealift Command,[3] but were not published in the carrier's tariff until May 1, 1975. Prior to 1975, greatly relaxed tariff filing requirements for government cargoes had been in effect, 32 *Fed. Reg.* 12753 (1967).[4] The Commission's former tariff filing policy was based on former section 6 of the Intercoastal Shipping Act (47 Stat. 1427) which effectively precluded economic regulation of government rates.[5] On October 26, 1974, section 6 was repealed and Intercoastal Shipping Act section 5 was amended to provide for full Shipping Act regulation of government cargo. P.L. 93–487, 88 Stat. 1463.[6]

At issue in the instant proceeding was whether PRMSA's Government Cargo Tariff contained "just and reasonable" rates and regulations pursuant to Shipping Act section 18(a),[7] or subjected nongovernment shippers to "undue or unreasonable prejudice or disadvantage" pursuant to Shipping Act section 16 First.[8] In making these determinations, it was necessary to examine the effect of P.L. 93–487 upon sections 16 First and 18(a). An evidentiary hearing was conducted in which 808 pages of transcript and 27 numbered exhibits were produced.

On February 10, 1978, Administrative Law Judge Seymour Glanzer (Presiding Officer) issued an Initial Decision invalidating PRMSA's Government Cargo Tariff. He interpreted P.L. 93–487 as barring special commodity classification for government shippers and found the following violations of section 18(a): (1) the ability of government shippers to "pick and choose" between government and commercial rates by tendering different shipping documents made the overall level of revenues derived from PRMSA's government rates unreason-

[2] Those parties, including the Commission's Bureau of Hearing Counsel (Hearing Counsel), opposing PRMSA's Government Cargo Tariff are categorically referred to as "Complainants."

[3] MSC is the principal shipper using PRMSA's "Government Cargo Tariff."

[4] By Domestic Circular Letter No. 1–75, dated February 7, 1975, the Commission announced that domestic offshore carriers must file their government cargo rates in regular tariff form upon the expiration of any existing contracts with the government. PRMSA's contract with MSC (CA 1870) terminated June 8, 1975 and the suspended tariff matter was to have taken effect on that date.

[5] Section 6 provided that: [N]othing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates, for the United States, State, or municipal Governments or for charitable purposes.

[6] The stated purpose of P.L. 93–487: [P]rovide for economic regulation by the FMC of ocean freight rates applicable to the transportation of Government and charitable cargo in the domestic offshore trades of the U.S. in order to insure that such rates meet the same statutory standards of reasonableness and fairness as presently apply to rates charged for the transportation of commercial cargo in these trades. H.R. Rep. No. 93–1348, *Intercoastal Shipping Act, 1933*, 93rd Cong., 2d Sess. (1974), at 1; S. Rep. No. 93–1278, *Economic Regulation by Federal Maritime Commission of Government and Charitable Cargo In U.S. Domestic Offshore Commerce*, 93rd Cong., 2d Sess. (1974), at 1.

[7] 46 U.S.C. 817 (a).

[8] 46 U.S.C. 815 First.

able;[9] and (2) PRMSA's government cargo classification scheme unreasonably discriminated against similarly situated shippers because the classifications were based solely on shipper identity.[10]

POSITION OF THE PARTIES

Exceptions to the Initial Decision were filed only by MSC, which seeks reversal of all findings of Shipping Act violation. Hearing Counsel, USL and HGFA submitted Replies to Exceptions urging adoption of the Initial Decision.

MSC makes the following allegations of error: (1) the burden of proof was improperly placed on PRMSA; (2) the level of PRMSA's government rates was reasonable because MSC did not in fact pick and choose between commercial and government rates; (3) if wharfage and "arrimo" charges were considered in determining the difference between PRMSA's commercial and government rates; the government rates would have produced greater revenues; (4) Public Law 93–487 was not intended to preclude all simplified tariff structures for government cargoes; (5) Shipping Act section 18(a) does not preclude carriers from charging rates which are unjustly discriminatory within the meaning of Shipping Act section 17; (6) PRMSA's government cargo classification scheme cannot be considered unreasonable merely because commercial rates change frequently and make rate comparisons difficult; (7) the practice of publishing "alternate" rates for government shipments is not an unjust or unreasonable *practice* within the meaning of section 18(a).

DISCUSSION

Section 3 of the Intercoastal Act places the burden of proof on the carrier when "new" rates or practices are being investigated and the matters in issue involve information uniquely in the possession of the carrier.[11] Despite PRMSA's previous application of the instant "Government Cargo" rates and classifications, these matters were "new" from a regulatory standpoint when they first appeared in the carrier's tariff. It was not until the passage of P.L. 93–487 and the issuance of Domestic Circular Letter No. 1–75 that PRMSA could have been required to justify the level of its government rates under section 18(a). The fact that its June-December, 1975 rates were identical to its January-June, 1975 rates is coincidental under the circumstances.[12] PRMSA has the burden of establishing that its Government Cargo Tariff is in compliance with section 18(a).

PRMSA has not met this burden in certain respects and its government cargo

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[9] During 1975, PRMSA's rates on several commercial commodities, including beer, disposable diapers, bakery goods, refrigerators, soap and Coca-Cola, were less than its $992 per container rate for "Governmental Cargo, N.O.S." MSC is capable of identifying and describing the items in ships under commercial tariff nomenclature, at least in the case of single commodity shipments.

[10] The Presiding Officer held that section 18(a) incorporates the prohibition against "unjust discrimination" found in section 17 first paragraph, thereby applying it to domestic offshore commerce. By its terms, Shipping Act section 17 applies only to foreign commerce, 46 U.S.C. 816.

[11] *See Commonwealth of Puerto Rico v. Federal Maritime Commission*, 468 F.2d 872 (D.C. Cir. 1972). The carrier does not necessarily bear the burden of proof on all questions which might result in the suspension and investigation of a rate under Intercoastal Shipping Act section 3. For example, information concerning injury to or competitive relationships between shippers is not ordinarily in the possession of the carrier. A carrier is expected to produce the cost, revenue, rate base, and similar data necessary to determine the "justness and reasonableness" of a rate.

[12] MSC contracts for ocean transportation in six month periods and the suspended rates were those applicable to a new MSC contract period. PRMSA's government rates have changed several times since the June-December, 1975 contract period.

classification system will be enjoined for noncompliance with section 18(a) to this extent. The Commission does not, however, interpret P.L. 93-487 as broadly as do the Complainants or the Presiding Officer.

P.L. 93-487 requires that government rates and practices meet the same standards of "reasonableness and fairness" as commercial rates.[13] It does not flatly prohibit the practice of establishing a separate commodity classification for "Government Cargo," and the Commission has previously recognized that carriers may employ such a commodity description if it is based upon legitimate transportation factors and not solely upon the identity of the shipper. See *Department of Defense and Military Sealift Command v. Matson Navigation Company,* 17 S.R.R. 1, 6 (1977); *Report and Order in Docket No. 76-40,* 42 Fed. Reg. 54810, 54811, (1977); *Household Goods Forwarders Association of America, Inc. v. American Export Lines,* 17 S.R.R. 499, 503 (1978).

The rate charged for transporting legitimately described "Government Cargo" is evaluated under section 18(a) in the same fashion as any other commodity rate. It may be neither unreasonably high nor low, but need not exactly equal the carrier's commercial rates for comparable commodities. In this instance, PRMSA demonstrated that its government shipments produced *greater* total revenues (*including* wharfage and "arrimo" charges) at the "Government Cargo" rates than would have been produced if they were transported at the various commercial rates otherwise applicable. This showing is sufficient to establish that the level of PRMSA's "Government Cargo" rates is just and reasonable within the meaning of section 18(a). It is not significant that some items shipped by MSC as "Government Cargo" would have yielded higher freights if individually rated under commercial cargo commodity descriptions.[14] Other items would have yielded less, and the net result compares reasonably to PRMSA's commercial rate structure.

PRMSA's "Government Cargo" commodity description contemplates the transportation of "trailerload" containers loaded with a single commodity as well as containers of mixed commodities in situations where a government agency is both shipper and consignee and the goods are tendered with government prepared shipping documents. Cargo rating activities by ocean carrier personnel are minimized under this system. Although not so stated in the tariff, "Government Cargo" is essentially noncommercial in nature, and noncommercial cargo generally has a different "value of service" than does commercial cargo.[15] "Government Cargo" is also characterized by certain other actual or

[13] Congress was primarily concerned with the level of government rates, especially those for Defense Department cargo. The legislative history reveals that P.L. 93-487 was a reaction to the allegation that Armed Services Procurement Regulations disallow certain fixed operating costs (*e.g.*, interest expense) customarily considered in setting commercial rates, thereby lowering a carrier's overall profit, putting upward rate pressure on commercial shippers and increasing consumer costs in the "island" economies of Hawaii, Alaska, Guam, Puerto Rico and other domestic offshore locations. H.R. Rep. No. 93-1348, *supra,* at 2-3; S. Rep. No. 93-1278, *supra,* at 3; Senate Committee on Commerce, Ser. No. 93-101, *Amend the Intercoastal Shipping Act, 1933* (Hearing on S. 3173, August 9, 1974), at 11, 12, 27-29, 31; House Committee on Merchant Marine and Fisheries, Ser. No. 93-47, *Merchant Marine Miscellaneous, Part 3,* (Hearings on H.R. 13561, H.R. 13615, July 10, 1974), at 4-5, 7, 34-35, 36, 40, 42-43, 43 (Question No. 2), 47-52.

[14] The potential for alternating between "Government Cargo" and commercial rates—a practice not followed by MSC in the instant trades—is not a matter which directly reflects upon the reasonableness of the "Government Cargo" *rate*, but goes instead to the reasonableness of the commodity description scheme which permits such alternate arrangements to be employed.

[15] A significant portion of MSC's shipments are items destined for military commissaries and post exchanges, but no "Government Cargo" carried by PRMSA appears to be offered for resale by or to a conventional commercial enterprise.

potential efficiencies, including large and frequent shipments, reduced holding time on piers, and reduced solicitation expense.[16]

The presence of these distinguishing transportation characteristics—to the extent they are set forth in the carrer's tariff—would ordinarily be adequate to justify the establishment of a separate commodity classification for "Government Cargo." PRMSA's classification scheme is rendered illusory, however, by the fact that government shippers need only tender shipments with a bill of lading rather than a shipping order to obtain a commercial rate.[17] Under PRMSA's present tariff arrangements, the sole factor differentiating "Government Cargo" from other commodity descriptions is the Goverments's choice of shipping documents, *a matter to which no transportation significance can be said to attach based on the instant record.*[18]

For "Government Cargo" to be considered a separate and distinct commodity, all government shipments possessing the same transportation characteristics must be rated as "Government Cargo." PRMSA's establishment of a "Government Cargo" commodity description which permits shippers to alternate between government and commercial rates simply by switching the form of the shipping document employed is unreasonable within the meaning of section 18(a) because demonstrably different transportation circumstances do not attach to the choice of shipping documents. A carrier may not allow a specified commodity the same transportation service at whichever of two rates the shipper finds advantageous.[19] Consequently, the "Government Cargo" description adopted by PRMSA may not be employed unless it is modified to require that *all* shipments of qualifying items tendered by government agencies be rated as "Government Cargo."[20]

The Commission further finds that section 18(a) and the purpose of P.L. 93–487 require that commodity descriptions limited to government, noncommercial, or other generic types of cargo include an express requirement that the shipping documents employed identify each item shipped in a manner which permits the shipment to be accurately rated under any more specific tariff classification otherwise applicable. Routine preparation of this information will allow the carrier, the shipper and the Commission to better determine the reasonableness of the rates assessed for such generic commodities,[21] and reduce

[16] Different credit or collection procedures which result in cost savings to, or more efficient handling by the carriers may also apply to government shipments, but PRMSA has failed to demonstrate that such procedures exist in this instance. Moreover, despite the testimony of PRMSA's Vice President for Traffic (Ex. 4) regarding the tendency of MSC shipments to move off PRMSA's terminals quickly, PRMSA's tariff allows "Government Cargo" shipments of two or three containers a longer free time period than it allows commercial shipments of two or three containers.

[17] The Commission adopts the findings of the Presiding Officer concerning MSC's ability to identify the items it ships under commercial tariff nomenclature. Initial Decision, at 12–13, 13–16, 40. See also "Military Standard Transportation and Movement Procedures," Vol. I, at G–11(b), G–12(b), which contemplates use of both Government and commercial bills of lading for transportation of Defense Department cargo, as circumstances require (Ex. 2).

[18] The shipping order prescribed by section 6A or PRMSA's tariff may actually prescribe *greater* responsibilities upon the carrier than the bill of lading used when MSC ships at commercial rates. All things being equal, greater carrier responsibility should result in higher Government Rates.

[19] The tariff matter under investigation is subject to section 531.5(g) (1) of the Commission's Rules until PRMSA files a new tariff in compliance with revised Part 531 or until January 1, 1979, whichever comes first. 42 Fed. Reg. 54810, 54813 (1977). Section 531.6(a) of the revised regulations was not intended to remove the prohibition against "optional" rates found in former section 531.5(g). Multiple rates for the same commodity and same service are also duplicative, conflicting and equivocal, within the meaning of the revised regulation, and continue to be grounds for tariff rejection or suspension.

[20] PRMSA may, however, completely excludes certain commodities from its tariff description of "Government Cargo."

[21] Such determinations must be made promptly because of the relative shortness of both the MSC contract period (six months) and the Intercoastal Shipping Act's rate suspension period (four months).

the likelihood that military cargo rates will unjustifiably generate less revenues than the publishing carrier's rates for comparable civilian shipments. A more precise cargo identification procedure is also consistent with 10 U.S.C. 2631, which requires that ocean transportation rates for military supplies not exceed the charges for transportation of "like goods" for private persons. By requiring full commodity identification of MSC shipments, the Commission hopes to forestall violations of the Shipping Act and to advance the national military procurement policy represented by 10 U.S.C. 2631.

The Initial Decision relies in part upon the conclusion that PRMSA's "Government Cargo" commodity description is based exclusively upon the identity of the shipper, and therefore an "unjustly discriminatory" practice within the meaning of Shipping Act section 17.[22] This conclusion was not accompanied by findings as to the similarly situated shippers allegedly discriminated against, and such findings cannot be made on the record before us. As indicated above, the instant commodity descriptions possess transportation characteristics which could distinquish them from most commercial commodities shipped under PRMSA's tariff if alternation with commercial rates were precluded. Under such circumstances, unjust discrimination would not be present. "Government Cargo" is a different commodity than "Beer." Before a violation of section 17 could be found, it would be necessary to show that a person shipping assorted noncommercial cargoes similar to those shipped by MSC has been denied access to similar simplified rating arrangements or that a shipper of commodities which possess all the qualifying transportation characteristics of "Government Cargo" has been denied a rate equal to the "Government Cargo" rate.

THEREFORE, IT IS ORDERED, That the Exceptions of the Military Sealift Command are granted to the extent indicated above and denied in all other respects; and

IT IS FURTHER ORDERED, That sections 6A, 13 and 14 of Puerto Rico Maritime Shipping Authority's Tariff FMC-No. 1 establishing commodity descriptions and rates for "Government Cargo" are cancelled effective September 15, 1978; and

IT IS FURTHER ORDERED, That Puerto Rico Maritime Shipping Authority cease and desist from publishing or filing government cargo commodity descriptions or rates which do not: (1) forbid qualifying government shipments from employing any other PRMSA rate item; and (2) require the use of shipping documents which fully identify the items tendered for transportation in terms which would allow the items to be accurately classified and rated under PRMSA's commercial tariff (i.e., at non "Government Cargo" rates).

(S) FRANCIS C. HURNEY
Secretary

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[22] The Presiding Officer held that "unjust discrimination" was subsumed by the "unjust and unreasonable" language of section 18(a) and therefore applicable to domestic offshore commerce as well as foreign commerce. Because the Commission finds no "unjust discrimination" present in PRMSA's creation of the instant "Government Cargo" commodity description, it is unnecessary to answer MSC's contention that Congress intended to allow such discrimination in domestic offshore commerce. Nonetheless, it should be noted that commodity rates may be unreasonable under section 18(a) if they inexplicably vary from those charged to similarly situated shippers. Discriminations between shippers may also result in "undue prejudice" under Shipping Act section 16 First, even in situations where competitive injury is not present. *See General Mills, Inc. v. State of Hawaii*, 17 F.M.C. 1, 4 (1973; *Nonassessment of Fuel Charges*, 15 F.M.C. 92, 98 (1972). It is doubtful, however, that the broad interpretation given *Pacific American Fisheries, Inc. v. American-Hawaiian S.S. Co.*, 2 U.S.M.C. 270 (1940), by the Presiding Officer (Initial Decision, at 44), reflects the true relationship between section 18(a) and sections 17 and 18 First. *See also*, note 11, *supra*.

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.

Respondent non-vessel operating common carriers by water found to have violated sections 16 and 18(a) of the Shipping Act, 1916.

Respondents ordered to pay Complainants the amounts of demurrage found due and owing plus interest at the rate of eight percent per year from and after 30 days of each bill for container demurrage charges.

John Mason and *Paul J. McElligott* for Maritime Services Corporation.
Ruben O. Figueroa, Enrique Nassar Rizek and *Carlos Rodriguez* for Capitol Transportation, Inc.
Raymond P. deMember for El Faro Shipping Co., Inc.

REPORT AND ORDER ADOPTING INITIAL DECISION

August 14, 1978

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

This proceeding is before the Commission on exceptions from Respondents Capitol Transportation, Inc. (Capitol) and El Faro Shipping Co., Inc. (El Faro) to the Initial Decision of Administrative Law Judge Charles E. Morgan (Presiding Officer) in which he determined that Respondents were, at times pertinent to the complaint, non-vessel operating common carriers by water (NVOCCs) in the trade between the United States and Puerto Rico and, that while so engaged, Respondents had violated sections 15, 16, 17 and 18 of the Shipping Act 1916 (the Act). The Presiding Officer concluded that each Respondent owed and must pay certain outstanding demurrage charges.

For the reasons set forth below, we conclude that the Presiding Officer's findings and conclusions were proper and well founded with respect to the section 16 and 18 violations, but were erroneous with respect to the section 15 and 17 violations. Without disturbing any of the findings of facts with which we

* Maritime Service Corporation (MSC) which filed the complaint as authorized agent of the carriers under agreement DC—38 approved by the Commission has since been dissolved. Accordingly, the named carriers are substituted as complainants.

agree, we find that certain matters raised on exceptions warrant discussion. Exceptions not specifically considered or discussed have nevertheless been reviewed and found to be rearguments of contentions already made before the Presiding Officer and properly disposed of by him.

On exception Capitol and El Faro maintain that there is no basis in the record for a finding that Capitol and El Faro were NVOCCs subject to the Act. These two Respondents carefully avoid alleging that they are not NVOCCs, but insist there is no evidence in the record to support a finding that they are NVOCC's. Respondents are incorrect in this assertion.

Capitol by its own account acknowledges that it is:

> A Puerto Rican corporation devoted mainly to the movement of household goods in between the different points of the world and Puerto Rico. During the time covered by the complaint, Capitol was a prime mover of household goods for members of the Armed Forces of the United States Air Force and United States Navy.

Further, in citing MSC'c refusal to separate government shipments from commercial shipments in billing demurrage[1] as the "real cause for the situation presented in this case," Capitol in effect admits that it carried cargo for the military and for the government, both under special government contracts and under commercial bills of lading. In fact, Capitol advises that 80 percent of its carriage was military and 20 percent was commercial. Because Capitol is not a vessel operating common carrier, it must be concluded that Capitol carried those shipments as an NVOCC by using the services of the ocean carrier represented by MSC.

The same can be said of El Faro, which at one time was a member of the Pan American Movers Association of Puerto Rico, an association which, the Presiding Officer found, was composed of NVOCCs and forwarders. Testimony in the record shows that El Faro maintained a principal office in New York from which it *arranged shipments* from the United States to Puerto Rico and that bills for demurrage charged in Puerto Rico were sent for payment to the New York office. Consequently, Capitol's and El Faro's contentions that the record does not support the Presiding Officer's determination that they were NVOCCs are without merit.[2]

Capitol and El Faro insist that with respect to matters alleged in the complaint they were acting as shippers and consignees, and were therefore beyond Commission jurisdiction under section 22 of the Act. The Commission has heretofore considered and rejected this argument[3] and the Presiding Officer properly concluded that Respondents were not merely shippers, NVOCCs subject to the Act.

Capitol and El Faro also take issue with the Presiding Officer's finding that

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[1] The Presiding Officer, however, found that MSC had billed demurrage to Capitol only for commercial shipments on which the listed consignee is Capitol.

[2] With the exception of Nunez Express which neither answered the complaint nor in any manner participated in the proceeding, the remaining five Respondents either confirmed their status as NVOCCs (Alvarez Shipping Co., Inc. and Rico Shipping Co.) or did not deny it (Columbus Shipping Co., Inc., Malabe Shipping Co., Inc., and Rodriguez Shipping (Rodriguez Trucking)).

[3] In its Order of July 23, 1973 denying motions to dismiss Puerto Rico Forwarding Co., Inc. and Twin Express, the Commission refused to accept the proposition that because an NVOCC is a "shipper" vis-a-vis the underlying ocean carrier, the Commission has no jurisdiction, at least under section 22 of the Act, over the NVOCC's dealings with the underlying water carrier. The Commission reaffirmed that when handling transportation of property subject to regulation under the Act, the NVOCC retains its common carrier status even when it assumes the role of a shipper vis-a-vis the underlying ncean carrier. Puerto Rico Forwarding Co., Inc. and Twin Express were later dismissed from the proceeding.

they violated section 16 of the Act.[4] The Presiding Officer held that Respondents, by knowingly and wilfully refusing to pay demurrage accrued under the carrier's published tariffs, in effect obtained transportation at less than the applicable rates and charges;[5] that they collectively conspired to withhold demurrage for the purpose of coercing concessions or rebates in the amounts due; and that Capitol misled MSC by first suggesting that auditors be jointly appointed to review the accounts and then, upon completion of the audit, refusing to honor the conclusions of its own auditors or to pay even a portion of any undisputed claim.

Citing *Hohenberg Bros. v. Federal Maritime Commission*, 316 F2d 381, 385 (D.C. Cir. 1963), Capitol and El Faro argue that the record fails to indicate that their refusal to pay disputed transportation charges was clothed with the element of concealment, falsification, deception or fraud, which, they insist, must be present before a violation of section 16 can be established. We do not agree. First, section 16 is not so limited.[6] Secondly, even were we to accept Capitol's and El Faro's argument, we find that the requisite element of fraud or concealment is established by Capitol's and El Faro's unexplained and apparently unjustified avoidance of any payment of the amounts found due and owing.

Furthermore, while all Respondents assert in general terms that MSC's billing is inaccurate and deny that they owe the amounts found to be due, none has specifically indentified any alleged errors or proven the inaccuracy of MSC's billings, even though the information regarding those charges is peculiarly within the knowledge of the Respondents. This indicates to the Commission that in order to avoid payment of owed demurrage charges due and owing, Respondents made claims they knew or should have known were false. We believe that this clearly is the type of knowing and wilful conduct proscribed by section 16.[7]

With respect to violations of section 15, although there is some indication of at least a tacit understanding among the Respondents to oppose dealing with MSC and disregard its billings, we find the record inadequate to support the Presiding Officer's conclusion that Respondents have in fact violated section 15 of the Act.[8] Ordinarily, we would remand the proceeding for the purpose of supplementing the record in this respect. However, in the interest of resolving an already protracted matter expeditiously, and because the record establishes violations of other sections of the Act sufficient to sustain an order directing the payment of the demurrage charges in controversy, we see no purpose in further delaying the proceeding by pursuing the section 15 issue.

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[4] Section 16 reads in part: That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person . . . knowingly, and wilfully . . . by means of false billing, false classification, false weighing, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise applicable. 46 USC 815.

[5] In view of the pendency of this proceeding Respondents' refusal to pay demurrage can only be viewed as an attempt to pay less than due under the applicable tariffs.

[6] In *Hohenberg* the court held that a claim the plaintiff knew or should have known was false can be considered similar in nature to "false billings", "false classifications" etc., and "may properly be covered by the phrase 'any other unjust or unfair device or means.'" It concluded that "while section 16 covers the situation where the carrier is deceived or defrauded, *it is not so limited*." 316 F.2d at 385 (Emphasis added)

[7] "Wilfully . . . means purposely or obstinately and is designed to describe the attitude of a carrier who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements." *U.S. v. Illinois Cont. R. Co.*, 303 U.S. 239, 242 (1938) citing *St. Louis & S.F.R. Co. v. U.S.*, 160 Fed. 69 (9th Cir., 1908).

[8] Nor do we find any violation of section 17 on the facts and circumstances presented here.

The Commission also has before it at this time a Motion to Substitute Parties Complainant filed by MSC, and Capitol's Petition to Include Additional Information to its earlier Motion to Dismiss. In view of the fact that MSC acted solely as agent of the carriers and the substitution of the parties would neither change the cause of action, which rests on the same claims, nor prejudice the Respondents in the case, MSC's motion is hereby granted and Sea-Land Service, Inc., Seatrain Line, Inc., Transamerican Trailer Transport, Inc., Gulf Puerto Rico Lines, Inc. and Puerto Rico Maritime Shipping Authority are named in place of Maritime Service Corporation as Complainants herein.

Capitol's Petition to Include Additional Information is denied as untimely filed. The Petition comes approximately five years after the filing of the Motion to Dismiss during which time Capitol has had ample opportunity to introduce the information in the record. Moreover, as set forth herein, the Commission has determined that at times pertinent to the complaint, Capitol acted as an NVOCC and was, therefore, subject to the Commission's authority under section 22 of the Act. That it may have acted without a tariff on file is, while possibly forming the basis for a separate violation of the Act, irrevelant to the purpose of this proceeding.

Therefore, subject to the aforesaid modifications, we adopt the Initial Decision, a copy of which is attached hereto and made a part hereof.

The proceeding is discontinued.

It is so ordered.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

ATTACHMENT

FEDERAL MARITIME COMMISSION

No. 73–3

MARITIME SERVICE CORPORATION

v.

ACME FAST FREIGHT OF PUERTO RICO, ET AL.

Adopted August 14, 1978

Eight respondent non-vessel operating common carriers found subject to sections 15, 16 17 and 18 of the Shipping Act, 1916, and said eight respondents found to be in violation of those sections. Said eight respondents ordered to pay complainant certain amounts of demurrage found due and owing by said respondents, plus interest at the rate of eight percent per year from and after 30 days of each bill for container demurrage charges.

John Mason and *Paul J. McElligott* for complainant, Maritime Service Corporation.
Ruben O. Figueroa and *Enrique Nassar Rizek* for respondent, Capitol Transportation, Inc.
Raymond P. deMember for respondent, El Faro Shipping Co., Inc.

INITIAL DECISION OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE

The complainant, Maritime Service Corporation (MSC), filed the subject complaint against 23 respondents, all of whom were at times pertinent to the complaint non-vessel operating common carriers (NVOCC's) in the trade between the Atlantic and Gulf Coasts of the United States and Puerto Rico (Puerto Rico Trade).

Under Agreement DC–38, approved by the Commission, MSC is the authorized agent for the billing and collecting of certain demurrage due to four vessel operating common carriers in the Puerto Rico trade, namely Sea-Land Service, Inc. (Sea-Land), Seatrain Lines, Inc. (Seatrain), Transamerican Trailer Transport, Inc. (TTT), and Gulf-Puerto Rico Lines, Inc. (GPRL). These four vessel operating carriers left the Puerto Rico trade on or about October 1974, when the Puerto Rico Maritime Shipping Authority (PRMSA) was organized and entered the trade. On behalf of these four carriers, MSC issued its first demurrage invoice on October 3, 1970, and the last on March 31, 1975. Since its inception MSC issued a total of 80,919 demurrage invoices to numerous shippers and consignees, including many others besides the respondents herein. MSC estimates that it invoiced demurrage on about 400,000 trailers with an average demurrage of $40 per trailer, or a total estimated billing of $16 million. Collecting all the demurrage due has not been an easy task for MSC, but it has persisted diligently in its duty.

The complainant alleges that the respondents have failed and refused to pay demurrage due under the terms of the tariffs of the four vessel operating common carriers.

In addition, the complainant also alleges that the respondents acted in concert in refusing to pay demurrage, either directly, or by conscious parallel deeds, or by membership in organizations having that purpose, in violation of section 15 of the Act. It also is alleged that the respondents subjected property entrusted to them as NVOCC's to liens for unpaid demurrage without the knowledge or consent of the owners of the property, an unreasonable practice related to the receiving, handling, storing and delivering of property in violation of sections 17 and 18(a) of the Act. Further, it is alleged that the respondents by withholding payments of accumulated unpaid demurrage charges have attempted by unjust means or device to obtain transportation by water at less than the lawful rates, and have had the aim and purpose of coercing concessions or rebates, in violation of section 16 of the Act.

Prehearing conferences were held on June 16, 1975, and on September 23, 1975. Before, and after, the prehearing conferences upon motions by MSC 10-½[1] of the respondents were dismissed because, either they were not served with the complaint and were no longer in existence, or had settled MSC's claims. These dismissed respondents were Acme Fast Freight, Maritime Trucking, El Seis de Mayo, La Flor de Mayo Express, Sea Freight Express, San Lorenzo Express, Los Hermanitos, Brito Shipping Company (final dismissals effective June 16, 1975), El Sol de Mayo (dismissed July 8, 1975), La Rose del Monte (August 22, 1975), and Set Forwarders, Inc. (September 15, 1975).

An initial hearing was held on October 14, 1975, with testimony from witnesses for the complainant. At this time testimony and exhibits regarding one group of the remaining respondents were presented, with testimony regarding the other remaining respondents being set for a later time. After this initial hearing settlement was made with certain respondents. Puerto Rican Forwarding and Twin Express were dismissed as respondents on February 2, 1976. Drake Marine Division (Drake Motor Lines) was dismissed on April 8, 1976. Acme Fast Freight (Dolphin Forwarding, Inc.) was dismissed on April 14, 1976. Consolidated Express, Inc. (Conex), was dismissed on June 8, 1976.

Of the eight respondents remaining not dismissed, the only two which offered testimony and exhibits were Capitol Transportation, Inc., and El Faro Shipping Co., Inc.[2]

The remaining six respondents not offering any testimony or exhibits are Alvarez Shipping, Columbus Shipping, Malabe Shipping, Nunez Express, Rico Shipping, and Rodriguez Shipping. Based on unrefuted testimony and exhibits, it is found and concluded that these six respondents owe unpaid demurrage as follows:

Alvarez Shipping	$45,440.00
Columbus Shipping	5,290.00

[1] Acme's ownership was split time-wise, resulting in its partial dismissal at one time, and remaining dismissal at a later time as Acme (Dolphin).

[2] After the hearings were closed and after opening and reply briefs had been filed, El Faro Shipping Co., Inc., pleaded that it believed that it had settled its obligations, and sought time to obtain an attorney. The matter was reopened on a limited basis on August 12, 1977, to receive the testimony of two witnesses for El Faro Shipping. They testified on September 13, 1977.

Malabe Shipping	8,320.00
Nunez Express	1,500.00
Rico Shipping	12,490.00
Rodriguez Shipping	1,760.00

By the terms of the tariffs of Sea-Land, Seatrain, TTT and GPRL, consignees and shippers of containers were allowed a "freetime" within which to unload or to load the containers at destinations and origins without any charge in addition to the ocean freight rate charges. However, consignees and shippers were subject to container demurrage charges for each day a container was retained after the expiration of the free time.

The complainant over a long period sought payment of the demurrage bills from the respondents. Some of the NVOCC's stated that they would not pay the demurrage because these NVOCC's would not deal with the complainant as an agent for Sea-Land, Seatrain, TTT or GPRL.

The complainant has been diligent in correcting or adjusting the demurrage bills submitted to the respondents, so as to correct any errors in the bills, to reflect payments already made, and to make any changes required by applicable tariff rules.

In Special Docket No. 456, *Plaza Provision v. Maritime Service,* 17 F.M.C. 47, 48, the nature and purpose of MSC was stated as follows:

Uniformity in the practices of ocean common carriers in the allowance of free time and the collection of container demurrage, including the publishing of appropriate tariff rules relative to free time and container demurrage, is both desirable and necessary to insure that shippers and consignees are treated equally and fairly.

MSC was formed in the summer of 1970 to take over the task of billing and collecting container demurrage charges for the four carriers herein on all arrivals at, and all sailings from Puerto Rico on and after September 6, 1970.

MSC's first invoices were mailed in October 1970, but its collection efforts were met with widespread shipper and consignee resistance.

By the bill of lading contracts relevant to this complaint, which are parts of their filed tariffs, Sea-Land, Seatrain, TTT and GPRL have liens for the ocean freight and other charges including demurrage on the property carried by them.

In Docket No. 71-32, *Puerto Rico Trades-1968,* 17 F.M.C. 251, 257, it was stated:

To eliminate the practice of shipper favoritism which naturally flows from a system where compromises and concessions on demurrage are obtained by playing one carrier against another, Puerto Rico Ocean Service Association has, among other things, established the Maritime Service Corporation (MSC), a central collection agency, which handles the billing and collection of all the demurrage charges due the member lines. Agreement No. DC-38 in permitting the consolidation of demurrage in a central agency, has served to eliminate a very real demurrage related malpractice which flourished when the individual carriers billed and collected their own demurrage.

All of the respondents withheld payment of container demurrage charges. Collectively the respondents appeared to have conspired with one or more of the other respondents and with other persons, not parties hereto, to boycott the payment of container demurrage charges. This boycott was done apparently with the purpose of either avoiding the payment of any part of the accumulated demurrage charges, or with the purpose of coercing a concession or rebate in the amount of some part or all of the demurrage charges.

The free time and demurrage charges in issue herein applied in Puerto Rico on the ocean carriers' containers or trailers, and varied according to the type of container or trailer. For example, more free time was allowed on dry cargo trailers than on refrigerated cargo trailers, and the demurrage charge per 24 hours was higher on refrigerated trailers than on dry trailers. The tariff rules also varied depending on whether the shipper on outbound loads or the consignee on inbound loads had shipments on the same sailing of not more than three trailers, or of four or more trailers. The free time periods for four or more trailers were 120 hours for dry trailers and 96 hours for refrigerated trailers, whereas for three or less trailers the free time periods were 72 hours for dry trailers and 48 hours for refrigerated trailers. Also for shipments of four or more trailers on one sailing, there were certain free time credits for consignees for trailers released or returned before the free time expired, such credits being applied to extend the free time on trailers received on the same sailing and held in excess of the free time.

Generally, the demurrage charge for each 24 hour period beyond the free time was $10 on dry trailers, $12.50 for the first 24 hour period and $25 for each succeeding 24 hour period on refrigerated trailers.

Of MSC's demurrage billings it was estimated that the average demurrage per trailer was $40.

Generally, no demurrage was applicable for any delay caused by the ocean carrier in the receipt or delivery of trailers.

Free time generally commenced on inbound loads at the first 8:00 A.M. following complete discharge of the ocean-going vessel or arrival of the trailers at destination terminal, and on outbound loads at the first 8:00 A.M. following removal of the trailers from the ocean carrier's premises, excluding Saturday, Sunday, and Holidays.

Trailers received by the ocean carrier at its terminal not later than 10:00 A.M., by tariff rule, were considered as having been received prior to 8:00 A.M. of that day for the purpose of computing free time and demurrage.

The complainant alleges that Capitol Transportation owes $57,940.00 in unpaid demurrage. The complainant and Capitol Transportation appointed auditors to review demurrage billings. The complainant furnished additional documents and invoices to Capitol Transportation, and Capitol's auditor informed the complainant that he had completed the audit of Capitol's account. Nevertheless, Capitol Transportation has not paid any demurrage, not even any portion of any undisputed demurrage.

On September 20, 1970, a group of shippers and consignees, organized under the name of the "Import and Export Council of Puerto Rico," passed a resolution suggesting that Council members "not recognize, or honor, billings for demurrage submitted by Maritime Services Corporation which is a subsidiary of Prosa." Capitol Transportation was an early member and organizer of the Import and Export Council. Mr. Charles Darmanin, the president of Capitol Transportation, was secretary of the Import and Export Council of Puerto Rico.

A number of the remaining respondents are members of the Pan American Shippers and Movers Association (PAMA), an association of NVOCC's and freight forwarders, organized in May, 1970, for the common interests of the members, particularly movements of household goods. Mr. Malabe of respondent Malabe Shipping was the first Chairman of this association. Respondents who are PAMA members are Malabe Shipping, Rico Shipping and Columbus Shipping. It is understood by complainant's witness Vasquez that Alvarez Shipping and Rodriguez Shipping also were members of PAMA.

Mr. Vasquez was informed that Alvarez had suggested to another respondent, La Rose del Monte, not to pay demurrage, but to go to hearing in this. La Rose del Monte however paid its demurrage and was dismissed as a respondent.

Some respondents have offered to settle demurrage for a fraction of the amount due and owing. Capitol Transportation offered to settle for one-third of its account. Malabe sought to settle its accounts for 25 percent. These two offers of settlement were rejected by the complainant. In fact the complainant was compelled by law to reject these offers, inasmuch as it must charge the amounts specified in the appropriate tariffs, so as to treat all shippers and consignees fairly and equally.

The Commission already has determined that it has jurisdiction over the subject complaint. It has been determined that as NVOCC's and forwarders, the respondents are both common carriers and other persons subject to the Shipping Act, and that under section 22 of the Act, a complaint may be filed against these respondents. (Order of the Commission served July 23, 1973, denying motion to dismiss.) The fact that the NVOCC was technically a shipper in relation to the vessel operating water carrier did not take away the jurisdiction of the Commission over the NVOCC, because in relation to the real shipper of the goods the NVOCC retained its status as a common carrier. The NVOCC had no proprietary or beneficial interest in the cargo, and the NVOCC's primary business was the furnishing of transportation facilities, and the NVOCC's entire operation was subject to the Commission's jurisdiction.

The exclusive primary jurisdiction of the Commission over MSC's complaint was acknowledged by the United States District Court for the District of Puerto Rico on January 22, 1975, when it granted a motion by Capitol Transportation to dismiss an action by MSC based on Capitol's refusal to pay demurrage.

Section 16 of the Act provides in part that it is unlawful for any shipper, consignee, forwarder or other person subject to the Act, knowingly and willfully, directly or indirectly, by unjust or unfair device or means to obtain or to attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

Demurrage is a transportation rate, *Agreement No. 8905–Port of Seattle and Alaska S.S., Co.*, 7 F.M.C. 792, 797 (1964).

The respondents by knowingly and willfully refusing to pay demurrage applicable under the published tariffs in effect have obtained transportation by water for property at less than the applicable rates and charges in violation of section 16 of the Act.

Capitol Transporation joined the Export and Import Council. Other Council members have honored MSC's demurrage billings, but Capitol has refused. Capitol Transportation mislead MSC by suggesting that joint auditors be appointed, and upon completion of the audit Capitol Transportation refused to honor the conclusion of its own auditor. Other remaining respondents who are members of PAMA have refused to pay the remaining demurrage claims of MSC.

A number of the remaining respondents joined the Pan American Movers Association, which had as one condition of membership a limitation on competition among members. Rule 14 of PAMA was "No open competition with other member or members of the Association." The PAMA agreement between its members appears to provide a cooperative working arrangement among persons subject to section 15 of the Act. This Association agreement was not submitted to or approved by the Commission.

Capitol Transportation joined with other companies in the Export and Import Council of Puerto Rico. A primary purpose of this Council was concerted action of its members in refusing to honor MSC billings and failure to pay proper demurrage charges. Other members of the Export and Import Council included companies such as Plaza Provision Company (Plaza). Mr. J.J. Teale of Plaza was president of the Export and Import Council of Puerto Rico. As noted in Special Docket No. 456, *Plaza Provision v. Maritime Service,* 17 F.M.C. 47 (1973), Plaza agreed to settle its demurrage bills. Other shippers or consignees, such as Grand Union Stores, Sears Roebuck, and R.J. Reynolds Industries, apparently periodically paid in full MSC's invoices. *Same,* 17 F.M.C. 47, at 52. In fact it appears that the remaining respondents in this proceeding, such as Capitol Transportation, are some of the few remaining holdouts who have refused to pay their legitimate demurrage bills, or even any undisputed portions of those bills.

The remaining respondents, by entering into agreements within the scope of section 15 and not filing those agreements for approval, or by acting in concert pursuant to unfiled agreements, or by participating as members of organizations having the purpose of refusing to honor MSC's billings for demurrage, or otherwise engaging in conscious parallel actions with other NVOCC's in refusing to pay demurrage to MSC without an approved section 15 agreement, have violated section 15 of the Act.

Section 17 of the Act in part requires certain persons subject to the Act to establish, observe and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Section 18(a) of the Act in part requires that common carriers by water in the domestic trades to observe and enforce just and reasonable regulations and practices relating to the delivering of property for transportation, the facilities for transportation, and all other matters related to or connected with the receiving, handling, transporting, storing, or delivering of property.

Respondent NVOCC's hold themselves out to the public to provide transportation facilities between the United States and Puerto Rico. Respondents carry the property of the shipping public which utilizes their services. That carriage of property is subject to the tariffs of the vessel-operating common carriers engaged by the respondents. The bill of lading contracts, a part of the filed tariffs of the vessel-operating common carriers for which MSC acts as agent, provide for liens against the cargo for ocean freight and other charges for the transportation.

The respondents' failure to pay applicable demurrage charges subjected the property of the shipping public vessel-operating common carriers' liens, and this practice resulted in the respondents' failure to establish, observe and enforce just and reasonable practices in connection with the receiving, handling or delivering of property, in violation of section 17 and section 18(a) of the Act.

The arguments of respondent Capitol in defense of its refusal to pay demurrage are two-fold. Capitol first contends that the Federal Maritime Commission has no authority to order respondent Capitol to pay demurrage or reparation. Capitol argues that the purpose of the Shipping Act is to regulate the carriers, and not to regulate the consignees. Capitol emphasizes that it was a shipper or consignee, but intentionally overlooks the fact that also it was a carrier (NVOCC) and freight forwarder, and thereby was subject to the Shipping Act. The Commission turned down the same argument of other respondents in its order in this proceeding served July 23, 1973, denying motion to dismiss.

The second argument of respondent Capitol is that MSC has charged demurrage to Capitol for shipments which clearly belonged to the Armed Forces of the United States, that none of the other respondents herein are similarly situated with respect to MSC's demurrage bills, and "that the refusal of M.S.C. to separate the government shipments from the regular commercial shipments when billing Capitol Transportation is the real cause for the situation presented in this case." Capitol does not have its facts straight. MSC has billed demurrage to Capitol only for commercial (non-governmental) shipments on which the listed consignee is Capitol. A review of the TIR's (Trailer Interchange Receipts) shows that Capitol is the customer and consignee for all of the containers listed, and is thus, liable for all of the demurrage billed. MSC has not billed demurrage to Capitol where some other person, military or otherwise, was shown to be the customer or consignee of the containers.

While it is possible that Capitol may have made arrangements with the military for the delivery of certain containers of household goods and Capitol may have some claims against the military, nevertheless such arrangements and claims cannot defeat MSC's rights as the agents of the vessel operating water carriers herein, such as Sea-Land, to collect billed demurrage due from Capitol where Capitol was the named consignee. As consignee Capitol was the party responsible for the demurrage. Capitol cannot escape its liability for demurrage incurred on containers consigned to Capitol.

In the past, military or government cargoes could be carried either (1) by contracts or tenders between the vessel operating water carriers and the military or government agencies under section 6[3] of the Intercoastal Shipping Act on government bills of lading, or (2) by regular commercial bills of lading under the usual commercial tariffs.

MSC did not have the responsibility for the first category of cargoes above, that is, the government bill of lading type of traffic. The vessel operating common carriers billed and collected the ocean freight charges and demurrage charges from the appropriate military or government agency on this type of cargo.

What is pertinent in this proceeding is that MSC was responsible for the billing and collection of demurrage on the second category of cargo above, that is,

[3] While section 6 of the Intercoastal Act is no longer effective, it formerly provided, "That nothing in this Act shall prevent the carriage, storage, or handling free or at reduced rates, for the United States, State, or municipal Governments, or for charitable purposes." Section 6 was repealed by P.L. 93–487, effective October 26, 1974.

where the cargoes moved on commercial *bills of lading, including* commercial bills of lading for the household goods of military or government personnel.

To sum up, where there was a commercial bill of lading naming Capitol as consignee, Capitol was and remains responsible for the appropriate demurrage. The demurrage billed Capitol subject to this complaint is all in connection with commercial bills of lading.

In correspondence between MSC and Capitol about the demurrage bills, Capitol over a period of years did not claim that it was not responsible for the demurrage on movements of household goods. It is apparent that Capitol, in belatedly raising the issue, is merely continuing its policy of refusing to pay any demurrage, using whatever excuse or "strawman" which came or comes to Capitol's mind.

Capitol insists that it has never refused to pay the correct amount of demurrage, and contends that MSC has been unable to demonstrate that it has complied with the tariff, pointing out that the tariff requires that a "notice of arrival" be given by mail no later than the day when the free time begins. This arrival notice issue is another one belatedly raised by Capitol.

Capitol's attorney sought copies of the arrival notices for the first time on September 23, 1975, at the second prehearing conference. None of the correspondence from Capitol to MSC for the five years prior to that conference alleged that Capitol had not been notified of the arrival of the containers. The president of Capitol in his testimony did not allege that Capitol did not receive timely notices of arrival of containers.

The vessel operating common carrier's tariff, using Sea-Land's as an example, item 580, note 4 (Sea-Land Tariff No. 158, FMC-F-No. 21) provides:

No demurrage is applicable for delay caused by ocean carrier in receipt or delivery. Claims for waiver or demurrage in such instances shall be filed in writing, stating all facts upon which the claim is based, with the carrier's agent, Maritime Service Corporation, P.O.. Box 1986, San Juan, Puerto Rico 00903. Such claims shall be allowed where carrier fault is established.

Capitol never filed any such statement with MSC during the many years of MSC's existence. No other party has pursued requests for arrival notices. Capitol's request at the second prehearing was made nearly five years after MSC first billed demurrage to Capitol.

MSC's counsel explained the difficulty in obtaining arrival notices for a specific consignee. For example, Sea-Land's documents were put in storage after the time Sea-Land left the Puerto Rico trade, and in order to obtain copies of arrival notices to Capitol, it would be a tremendous task just to try to indentify such notices among the thousands of documents in storage. TTT's documents in storage in Puerto Rico are not separated by shippers or consignees, especially since the period in issue goes back into 1970, 1971, and 1972.

Furthermore, there was a ruling made that there would be no additional discovery by Capitol because of its unconscionable delay in commencing discovery. Ruling by the Administrative Law Judge, served August 22, 1975, also citing the expense of the investigation sought, and the fact that Capitol's auditor had been supplied all information as early as September 13, 1973, as then requested by the auditor. The ruling of August 22, 1975, was appealed, and reconsideration was denied by ruling served September 15, 1975. So far as the record shows, Capitol's trailers in most instances were picked up on the first day when free time started, and it must be concluded that Capitol received timely notices of arrival. Capitol has waived its rights to object by its failure to comply with the tariff requirements of the vessel operating common carriers regarding claims for waiver of demurrage, and by its failure to promptly seek discovery. Furthermore, in view of the facts that many of Capitol's trailers were very promptly picked up by Capitol, and yet incurred substantial demurrage, none of which has been paid by Capitol, it is reasonable to conclude that Capitol received timely notices of arrival, and it is concluded that the vessel operating common carriers have complied with the tariff requirements in respect to Capitol's trailers. The record is convincing that the appropriate arrival notices were given to Capitol, that copies somewhere are in storage, but that retrieving them from storage is impractical and unnecessary in the circumstances. Common sense dictates this finding in view of the probable expense and difficulty of finding particular copies of Capitol's arrival notices especially in view of Capitol's long delay in raising the issue of arrival notices.

There remains the issue of demurrage allegedly due by El Faro. This demurrage relates primarily to TTT, but also to Sea-Land and Seatrain. Respondent El Faro contends that payment has been made for the demurrage billings of TTT, whether billed by TTT or billed by MSC for TTT. El Faro is a small family run business conducted by a father and his daughter, who conducted the business without great formalities. The father and daughter met informally from time to time with a vice president of TTT to go over various invoices and bills for demurrage making amicable adjustments of disputed bills. Counsel for El Faro states that it is understandable that El Faro took too lightly the formal proceedings in this matter, and that El Faro assumed that there was no need to hire lawyers to participate in matters already settled in the view of El Faro. Checks dated January 1972, and January 1974, in the total amount of $4,250 were given to TTT by El Faro, and according to El Faro these checks covered all of its obligations as to TTT demurrage.

On the other hand, MSC's witness showed that no part of the $4,250 above applied to billings of demurrage by MSC, that El Faro owed $14,810 to TTT which was incurred between January 1969, and September 30, 1970, all prior to any MSC billings of TTT demurrage. That is, the settlement of $4,250 applied only to the $14,810 billings of demurrage by TTT to El Faro prior to October 1970. Even as to this $4,250 agreed settlement sum, TTT had to sue El Faro in Superior Court in San Juan, Puerto Rico, and that it was not until 1974 that El Faro paid the balance of that agreed settlement.

El Faro never paid anything to MSC, and in fact never contacted MSC about MSC's billings to El Faro. These billings total $8,390, running from October 3, 1970, to Februrary 15, 1974.

El Faro's witness had no answer when queried why El Faro had not paid the Sea-Land and Seatrain demurrage billed by MSC, which El Faro acknowledges that El Faro owes. The MSC-Sea-Land billing was for $110 on December 15, 1970, and MSC-Seatrain billings were for $40 total on September 13, 1971, and September 27, 1971.

El Faro was a member of the Pan American Movers Association, an organization with a number of members who have refused to pay demurrage to MSC.

El Faro has produced no document to show that its payment of $4,250 to TTT covered any part of MSC's invoices to El Faro. El Faro's witnesses could only speak in generalities, and when specific critical questions were asked could only say they did not know or that someone else would have to answer.

Generally it appears that El Faro always failed to pay demurrage billed by MSC. El Faro had no explanation for its failure of paying demurrage which it acknowledges that it owes (the demurrage relating to Sea-Land of $110.00 and to Seatrain of $40.00 billed by MSC), and the record is completely convincing that El Faro has paid nothing on the demurrage of $8,240 which El Faro owes relating to TTT, all billed by MSC on and after October 1970.

ULTIMATE CONCLUSIONS

The record as a whole is completely convincing that the remaining eight respondents owe the demurrage listed on brief and billed by MSC. Six of these respondents offered no defense. The other two respondents (Capitol and El Faro) have a history of either not paying or of a consistent pattern of evasiveness of their obligations to pay demurrage. These eight listed respondents apparently are some of the last holdouts or stragglers against paying demurrage. In these circumstances justice requires that they not only pay demurrage, but also pay interest on the demurrage at the rate of eight percent as suggested by MSC.

It is concluded and found that the eight remaining respondents owe demurrage to MSC as follows:

Alvarez Shipping	$45,440
Capitol Transportation, Inc.	57,940
Columbus Shipping	5,290
El Faro Shipping Co., Inc.	8,390
Malabe Shipping	8,320
Nunez Express	1,500
Rico Shipping	12,490
Rodriguez Shipping	1,760

It is further concluded and found that the said eight respondents listed next above are non-vessel operating common carriers subject to sections 15, 16, 17, and 18 of the Shipping Act, 1916; and that the said eight listed respondents are in violation of those sections.

It is ordered that the said listed eight respondents pay the complainant MSC the amounts of demurrage listed under these ultimate conclusions, plus interest at the rate of eight percent per year from and after 30 days of each bill for container demurrage charges.

(S) CHARLES E. MORGAN
Administrative Law Judge

January 18, 1978

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–45

AGREEMENT NO. 8005–7 BETWEEN MEMBERS OF THE NEW YORK TERMINAL CONFERENCE

Proponents of section 15 agreement extending terminal conference's price fixing authority have burden of demonstrating that their agreement is required to meet a serious transportation need, confer an important public benefit or further a valid regulatory purpose.

A reduction in the number of tariffs containing free time and demurrage provisions applicable at New York terminals is not alone sufficient justification for an anticompetitive section 15 agreement in the absence of evidence that a multiplicity of tariffs was causing signficant commercial or regulatory difficulties.

Terminal conference members failed to demonstrate an abuse of ocean carrier conference authority to set free time and demurrage rates or the existence of other justifying factors sufficient to confer the right to set such rates upon the terminal conference.

Thomás D. Wilcox for New York Terminal Conference.
Stanley O. Sher and *Howard A. Levy* for ocean carriers belonging to twelve North Atlantic freight conferences.
Paul J. McElligott for Sea-Land Service, Inc.
Gary E. Koecheler and *Richard A. Lidinsky, Jr.* for Maryland Port Administration.
John Robert Ewers, Patricia E. Byrne, and *Aaron W. Reese* for Bureau of Hearing Counsel.

REPORT AND ORDER

August 14, 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 on October 2, 1974, by a Commission Order of Investigation into the approvability of Agreement No. 8005–7 (Agreement) under section 15 of the Shipping Act, 1916. The proposed Amendment No. 7 would *delete* existing language from the organic agreement of the New York Terminal Conference (NYTC) which prohibits NYTC members from concertedly fixing free time and demurrage rates on certain types of cargo.[1]

Sea-Land Service, Inc. (Sea-Land), a group of ocean carriers comprising the membership of twelve North Atlantic Steamship Conferences (Carrier Confer-

[1] The language to be deleted from Agreement No. 8005–6 took its present form following a negotiated settlement terminating a previous dispute on this subject. *New York Terminal Conference Agreement,* 10 F.M.C. 314 (1967). Agreement No. 8005 was first approved in 1955, but did not include any free time and demurrage provisions until April 25, 1960 (Amendment No. 2). Since that time the Agreement has expressly limited NYTC's free time and demurrage authority to *trades* where carrier conference tariffs do not contain such provisions. The 1967 dispute concerned Amendment No. 4 which proposed, *inter alia,* to add provisions concerning free time and demurrage on *export cargoes*. As finally approved, export cargo was added, but the carrier tariff exclusion was broadened to include trades with nonconference carrier tariffs.

ences), and the Commission's Bureau of Hearing Counsel appeared in opposition to the Agreement.[2] Sea-Land and the Carrier Conferences regularly serve the Port of New York and New Jersey (New York) as common carriers by water under FMC tariffs containing carrier established free time and demurrage rules. The Maryland Port Administration intervened on behalf of NYTC.

Paragraph 1 of NYTC's presently approved Agreement No. 8005-6 states, in pertinent part, as follows:

1. The parties shall establish, publish and maintain a tariff and/or tariffs containing just and reasonable rate charges, classifications, rules, regulations and practices with respect to the service of:

Storage of waterborne import and export freight on pier facilities, including the fixing of free time and demurrage thereon, *provided, however, that no tariff or tariffs so issued shall include trades covered by tariffs now or hereafter published and filed by, or pursuant to agreements among, common carriers by water, [insofar as the latter tariffs cover free time and demurrage]*; [emphasis supplied].

Protestants asserted that deletion of the underscored proviso clause would extend NYTC's price fixing authority without adequate justification and alter longstanding practices in New York for the worse by causing confusion, discrimination and disruptive competition between carriers.

Following a hearing which produced 834 pages of testimony from nine witnesses and 27 Exhibits, Administrative Law Judge Stanley M. Levy (Presiding Officer) rejected Protestants' contentions and entered an Initial Decision holding that Amendment No. 7 should be approved. This result was based upon the following major conclusions of law and fact:

1. Free time and demurrage practices are, by their nature, more a function of onshore terminal operations than of ocean transportation. NYTC members—as terminal operators—have a "greater" and more logical interest in fixing free time and demurrage practices at their piers than do the ocean carriers using these piers.
2. If NYTC members were allowed to jointly establish all free time and demurrage practices at their facilities, the number of *tariffs* applicable to these facilities would be reduced. A reduction in the number of tariffs would lessen the possibility of confusion concerning free time and demurrage applicable to any given shipment.
3. If NYTC members were to jointly establish all free time and demurrage practices at their facilities, the potential for undue preference or prejudice to shippers using the same terminal facilities would be significantly reduced. Greater uniformity in the free time and demurrage provisions applicable at NYTC terminals would be a public benefit and meet a serious transportation need.
4. It would generally serve the public interest if NYTC members were able to jointly determine all free time and demurrage practices at member facilities. NYTC should not be handicapped in negotiating use charges with ocean carrier conferences which are themselves allowed to act concertedly in such matters.
5. Although Amendment No. 7 falls within the *Svenska* rule, circumstances place the burden on the Protestants to demonstrate why Amendment No. 7 should be disapproved. NYTC members should not be denied the right to determine how free time and demurrage rules will be established at their own terminals unless the Protestants can demonstrate that the public interest requires such denial.

Exceptions to the Initial Decision were filed by each of the three Protestants. A joint "Reply to Exceptions" was filed by NYTC and the Maryland Port Administration (Proponents). Oral argument was conducted before the Commission on June 20, 1978.

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[2] The complaining parties are hereafter referred to as "Protestants." The American Importers Association, Inc.; Barber Steamship Lines, Inc.; Dafra Lines; Black Star Line, Ltd.; Compagnie Maritima Belge, S.A./Compagnie Maritime Congolaise, SCCL (jointly); and Farrell Lines, Inc., were granted leave to intervene, but introduced no evidence and filed no Exceptions. The Green Coffee Association of New York City, Inc., was also granted leave to intervene, but withdrew from the proceeding at an early stage.

Position of the Parties

Protestants advance eight arguments for overturning the Initial Decision and disapproving Agreement No. 8005–7: (1) NYTC has not met its *Svenska* burden of justifying a price fixing agreement; (2) Agreement No. 8005–7 is unapprovable because it does not provide for "adequate policing"; (3) Agreement No. 8005–7 is unapprovable because NYTC's present tariff permits NYTC members the choice of applying "3 to 5 days" free time on import cargo; (4) Agreement No. 8005–7 is contrary to the public interest because it would tend to create destructive competition among carrier conference members; (5) the Presiding Officer incorrectly concluded that terminal operators have a greater interest in establishing free time and demurrage provisions than do ocean carriers; (6) the Presiding Officer incorrectly concluded that where more than one ocean carrier tariff applies at a terminal, an undue or unreasonable preference to similarly situated consignees may result; (7) the Presiding Officer made and relied upon several findings of fact not supported by the record;[3] and (8) the Presiding Officer refused to make several relevant findings of fact which are supported by the record.[4]

In reply, Proponents' principal contentions are that: (1) NYTC met the burden of justification contemplated by the *Svenska* decision by demonstrating that the Agreement allows NYTC members the *choice* of deferring to ocean carrier tariffs on free time and demurrage matters, and that the availability of this choice serves a valid regulatory purpose by offsetting the concerted bargaining power of the conferences; (2) assuming that *Svenska* hurdle has been cleared, Protestants failed to demonstrate that the Amendment should be disapproved; (3) ocean carriers have no preeminent right to set free time and demurrage and frequently do not do so; (4) approval of Agreement No. 8005–7 would not preclude the carrier conferences from controlling intra-conference competition on free time and demurrage matters; (5) carrier-set free time and demurrage arrangements prevent NYTC members from providing equal treatment to all users of their services; (6) if the flexible "3 to 5 day" free time provision in NYTC's tariff is improper, the Commission should not disapprove the Amendment, but order the "3 to 5 day" rule amended; (7) the fact that the Carrier Conferences self-police their members and NYTC does not, does not justify a prohibition against NYTC members establishing free time and demurrage rates and practices for the use of their own property.

Discussion

Amendment No. 7 proposed a major extension of NYTC's authority to concertedly establish free time and demurrage rates and practices at terminal

[3] *Protestants attack 19 factual findings of the* Presiding Officer and assert that these findings have a relevant, material effect on the Initial Decision. Most of Protestants' allegations in this regard are erroneous, misleading, trivial, or irrelevant when read in context. None were critical to the Presiding Officer's ultimate conclusion.

[4] Protestants describe some 28 findings of fact which allegedly should have been made by the Presiding Officer. Several of these requested findings have been made by the Commission. The remaining requests relate to the Carrier Conferences' assertion that there is a legal and factual necessity for ocean carriers to control *free time and demurrage of New York terminals rather than terminal* operators. Although a majority of Protestants' proposed findings are supported by the record, the record as a whole fails to support the conclusion that Protestants have or should have a superior *right* to control free time and demurrage practices.

facilities controlled by its members. Because price fixing is *per se* violative of the antitrust laws,[5] a section 15 agreement to fix prices is contrary to the public interest unless specially justified by the persons seeking approval of the agreement. Justification requires a showing that the proposed activity is required to meet a serious transportation need, confer an important public benefit or further a valid regulatory purpose. *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238, 243 (1968); *Canadian-American Working Arrangement,* 16 S.R.R. 733, 736–737 (1976). The burden of demonstrating the necessary connection between a proposed agreement and such a need, benefit, or purpose is always upon the Proponents. In the instant case, however, the Presiding Officer not only found that Amendment No. 7 was necessary to confer an important public benefit and meet a serious transportation need, but further indicated (I.D., at 18) that the *Svenska* burden of justification was inapplicable because NYTC's members were only proposing to exercise the basic right of terminal operators to establish free time and demurrage practices at their own facilities.

The right of an *individual* terminal operator to establish free time and demurrage cannot be reasonably challenged.[6] However, this superior right to control the operation of one's own facilities—subject to Shipping Act regulation—does not govern the disposition of a proposal to concertedly conduct such operations in violation of the Sherman Act. Amendment No. 7 must be justified by its Proponents in the same fashion as any other agreement which is anticompetitive *per se*. The principal question before the Commission is whether NYTC has supplied that justification. Upon examination of the entire record in this proceeding, it is concluded that the *Svenska* standard has not been met and that Amendment No. 7 must be disapproved.

The record reveals that import shippers occasionally request NYTC or its member terminals to adjust free time and demurrage practices applicable to a particular commodity and that Agreement No. 8005–6 precludes NYTC from accommodating these requests because ocean carrier tariffs govern most import shipments.[7] If the ocean carriers do not adjust their tariffs in accordance with such shipper requests, NYTC terminals could lose business to other ports with more favorable free time and demurrage practices.[8] Some ocean carriers also make free time and demurrage arrangements which NYTC members consider burdensome or of questionable validity.[9] Finally, there are approximately 40 ocean carrier conference tariffs applicable to NYTC, many (but not all) of which

[5] 15 U.S.C. 1; *United States v. Trenton Potteries,* 273 U.S. 392 (1927).

[6] The Commission fully adopts the Presiding Officer's findings and conclusions that the rights and interests of a single terminal operator in free time and demurrage matters are ordinarily superior to those of an ocean carrier, and that Protestants have not proven that special conditions exist in New York which warrant deviation from this general principle.

[7] Steamship lines using NYTC piers rarely publish free time and demurrage rules on export cargo.

[8] NYTC Chairman Jesse A. Chebuske testified that NYTC had been approached by importers of green coffee and rubber requesting free time adjustments on import cargo. [Tr., at 67–71] Mr. Chebuske further stated that rubber once handled through New York now passes through Norfolk, but failed to establish the volume and nature of such shipments, the ocean carriers and terminals involved, the free time arangements in question, or how Amendment No. 7 would necessarily remedy the situation. [Tr., at 71–72, 151–152, 298–301]

[9] NYTC views the "multiple container" exceptions in many Carrier Conference tariffs as unjustified concessions to large shippers and that calculating demurrage on an "as freighted by the ocean carrier" basis could distort a terminal's cost of storing and handling a particular shipment. [Tr., at 99–101, 239–240, 445–446]

contain different free time and demurrage provisions, especially for containerized import cargoes.[10]

The Presiding Officer found that this situation could *potentially* lead to shipper confusion, additional administrative work for NYTC members and unreasonable discrimination among shippers using the same terminals. Nonetheless, it is clear such undesirable results have not actually occurred to any measurable extent.[11] NYTC is satisfied with the level of revenues it receives from existing free time and demurrage arrangements. It primarily wishes to control these practices so it can better compete for cargoes by responding to the special needs of local consignees when it would be advantageous to do so.[12]

Although the inability to directly set free time and demurrage provisions in the NYTC terminal tariff causes minor annoyances to NYTC's members, NYTC's evidence leaves no doubt that the purpose of Agreement No. 7 is to improve its ability to promote the interests of NYTC terminals, vis-a-vis both other New York terminals and terminals in other ports. The instant record does not demonstrate that NYTC terminals are suffering any competitive disadvantage under the present system whereby NYTC members must individually negotiate free time and demurrage arrangements with their ocean carrier clients. The mere potential for minimizing shipper confusion and lessening the possibility that ocean carriers will violate Shipping Act section 16 First or section 17, second paragraph,[13] is not the type of showing which establishes that an anticompetitive section 15 agreement is *necessary* to meet a serious transportation need or confer an important public benefit.[14] Because NYTC failed to establish a basis for approving Amendment No. 7 under the *Svenska* doctrine, it is unnecessary for us to reach Protestants' other exceptions.

[10] It is unlikely any terminal operator applies as many as 39 different tariffs to its facilities, and of those which do apply, not all of them differ on free time and demurrage. [Tr., at 254–255, 389–393]

[11] Errors in applying ocean tariffs by terminal operators occur infrequently, free time and demurrage provisions in ocean carrier tariffs change infrequently, and NYTC receives only five or so shipper complaints concerning free time and demurrage practices annually. [Tr., at 171–172, 182, 511–513.] Amendment No. 7 was motivated not by shipper complaints, but by the business judgment of NYTC's Chairman. [Tr., at 353–354.] No single demurrage clerk would be involved with all 40 ocean carrier tariffs applicable at New York [Tr., at 404, 485], and additional terminal employees are not retained to administer the varying free time and demurrage provisions in ocean carrier tariffs. [Tr., at 511, 565–566, 568.] Managers of carrier owned terminals do not view the application of several free time and demurrage tariffs to be confusing or administratively difficult. [Tr., at 645, 803]

[12] Mr. Chebuske stated that uniformity in ocean carrier tariff provisions would not solve NYTC's "basic problem." This problem is not the difficulty in applying divergent tariffs, but the absence of the *right* to concertedly establish free time and demurrage rates for NYTC facilities. [Tr., at 152–154, 198–201.]. Shippers tend to be more interested in flexibility than in uniformity. [Tr., at 366–368; see also Harry R. Alford's statements regarding NYTC's use of special free time provisions. Tr., at 506–507]

Mr. Chebuske also indicated that NYTC desired to have the "penalty" of demurrage payments fall directly on the shipper and not be absorbed by the carrier [Tr., at 327–328] because this would more effectively prevent congestion. No evidence showing the presence of congestion at NYTC facilities was introduced, however.

[13] NYTC's stated concern that its members could violate the Shipping Act because different shippers are assessed different demurrage charges for using NYTC piers overlooks the fact that NYTC members do not assess the charges. The ocean carriers are responsible. Should a New York shipper believe it is being subjected to undue prejudice by an ocean carrier offering discriminatory free time and demurrage arrangements under one or more tariffs, the shipper may file a complaint with the Commission seeking relief from the practice. *See generally, Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525, 544–547 (1966).

[14] Serious transportation need and important public benefit were the bases for the Presiding Officer's recommendation of approval. NYTC has also failed to show that the Amendment No. 7 would further a valid regulatory purpose—the third basis for justification under the *Svenska* test.

THEREFORE, IT IS ORDERED, That the Exceptions of the Protestants are granted to the extent indicated above; and

IT IS FURTHER ORDERED, That Agreement No. 8005-7 is disapproved; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–45

MADEPLAC S.A. INDUSTRIA DE MADERIAS

v.

L. FIGUEIREDO NAVEGACAO, S.A.
A/K/A FROTA AMAZONICA, S.A.

ORDER ON RECONSIDERATION

August 15, 1978

By Order served April 12, 1978 (April Order), the Commission adopted the Initial Decision on Remand of Administrative Law Judge William Beasley Harris denying the complaint of Madeplac, S.A. Industria de Madeiras (Madeplac or Petitioner) against L. Figueiredo Navegacao, S.A., a/k/a Frota Amazonica, S.A. (Amazonica). Petitioner had sought reparation for overcharges allegedly paid by it and received by Amazonica in violation of section 18(b)(3) of the Shipping Act, 1916. Madeplac has now filed a Petition for Reconsideration requesting reversal of the April Order and the payment of reparations in the amount of $24,461.18, plus interest. A "Reply to Petition for Reconsideration" was filed by Amazonica.

Our April Order held that Madeplac failed to establish a misclassification or misrating of the cargo in question, and the instant Petition contains no allegations not previously considered by the Commission. There is no factual dispute as to the *physical description* of the items shipped. Rather, the controversy concerns the *characterization* of those items under Amazonica's tariff. Inquiry into the meaning of a tariff provision is not limited to *Webster's Collegiate Dictionary;* analysis of available commodity classifications in light of reasonable commercial usage is also required. The item shipped constituted all the necessary parts for one prefabricated free-standing "LRF II Special Butler Building." The building, albeit a large structure, was properly classified under the tariff provision for "*Buildings, Portable, Knocked Down, In Sections or Set-Up.*"* No tariff ambiguity is present as a matter of law.

THEREFORE, IT IS ORDERED, That the relief requested by the "Petition for Reconsideration" of Madeplac, S.A. Industria de Madeiras is denied, and the Commission's "Order of Adoption of Initial Decision" is affirmed.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

* Any notion that Petitioner's building should not have been rated as a single commodity rather than as numerous individually rated component parts is dispelled by Amazonica's Tariff Rule 1(b), which provides: Commodities shipped disassembled shall be rated as a unit instead of applying rates for various parts comprising the unit unless otherwise specified.

Moreover, if Petitioner had argued successfully that its shipment was not properly classified as a "knocked down" or "portable" building, it still would have failed to make a case for reparations. Petitioner's expert witness testified that he could not determine whether there was an overcharge and, based upon the record, would have assigned a "Cargo, N.O.S." classification. The "Cargo, N.O.S." rate was substantially higher than that paid by Madeplac.

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-4

KUEHNE & NAGEL, INC.

v.

VAASA LINE

NOTICE OF DETERMINATION NOT TO REVIEW

August 15, 1978

Notice is given that the Commission on August 9, 1978, determined not to review the order of dismissal of the Administrative Law Judge in this proceeding served July 13, 1978.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

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FEDERAL MARITIME COMMISSION

No. 78–4

Kuehne & Nagel, Inc.

v.

Vaasa Line
(Hanseatic-Vaasa Line)

MOTION TO DISMISS COMPLAINT GRANTED

Finalized on August 15, 1978

On *July 13, 1978*, the following letter, dated and postmarked New York, N.Y., July 10, 1978, and signed by counsel for the complainant in this proceeding, was received:

> I have been informed by my client that the Vaasa Line has commenced proceedings in Finland to have itself declared bankrupt. This being so, my client has decided no useful purpose would be served by continuing the above-cited proceeding.
>
> Accordingly, it is requested that the complaint herein be dismissed. Should you so desire, you may consider this letter as a motion requesting such action.

As indicated, the letter is considered a motion to dismiss, and there are no circumstances in this proceeding which in any way vary the right of a complainant not to proceed with an action instituted by it.

Wherefore, upon consideration of the above and the record herein, it is Ordered:

(A) The motion to dismiss the complaint be and hereby is granted.

(B) This proceeding be and hereby is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

July 13, 1978

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-5

IN RE: AGREEMENT NO. 9973-3—
JOHNSON SCANSTAR SERVICE VOTING PROVISION

The "Equal Terms and Conditions" clause of section 15 of the Shipping Act, 1916, requires that a joint service which acts as a single carrier exercise no greater conference voting power than any other single carrier.

The determination of when a joint service, or other such amalgamation of carriers, must be treated for conference voting purposes as a single carrier is to be made on a case by case basis, and depends upon a number of specific factors.

There is no requirement that the exercise of unequal voting power by a single carrier be shown to have resulted in "actual harm" to other carriers; unequal voting power is violative of the Shipping Act, 1916, section 15, as a matter of law.

John R. Mahoney and *Wade S. Hooker, Jr.*, of Burlingham, Underwood & Lord, New York, New York, for Johnson ScanStar, Blue Star Line, Ltd., the East Asiatic Company, Ltd., and Rederiaktiebolaget Nordstjernan (Johnson Line).

Russell T. Weil and *James P. Moore* of Kirlin, Campbell & Keating, Washington, D.C. for United States Lines, Inc.

Edward M. Shea and *C. Michael Tarone* of Ragan and Mason, Washington, D.C., for Sea-Land Service, Inc.

John Robert Ewers and *Deana C. Rose* for the Bureau of Hearing Counsel.

REPORT AND ORDER

August 15, 1978

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

I. BACKGROUND

Agreement No. 9973 is an agreement among Blue Star Line, Ltd. (BSL), East Asiatic Company, Ltd. (EAC), and Johnson Line to form the Johnson ScanStar Combined Service (JSS). Johnson ScanStar now operates between U.S. Pacific ports and ports in the United Kingdom, Eire and the European Continent except the Mediterranean, and also serves inland points in the United Kingdom, Eire and the European Continent, via such ports. Agreement No. 9973 was first approved by the Commission on March 30, 1972, for five years.

As originally filed on October 20, 1976, Amendment No. 3 restated the basic agreement among the parties, as amended, and extended its term through December 31, 1981. Separate protests were submitted by United States Lines, Inc. and Sea-Land Service, Inc. (Protestants). Ultimately, the Protestants op-

posed only the existing JSS voting provision allowing each party to the Agreement an individual vote in any conference of which Johnson ScanStar Service is, or becomes, a member.[1]

By Order dated March 31, 1977 (March Order), the Commission found that the basic Agreement, as modified by Amendment No. 3, continues to be in the public interest by meeting a serious transportation need and/or conferring important public benefits, but that a hearing on the contested voting provision was required. Accordingly, Agreement No. 9973-3 was approved pending a hearing on the voting provision. By Order dated May 2, 1977 (May Order), the proceeding was limited to the submission of affidavits of fact and memoranda of law, and Protestants having the burden of proof were required to file the opening affidavits and memoranda.

By Order dated August 18, 1977 (August Order), the Commission ruled that discovery was available, and an Administrative Law Judge subsequently was appointed for the limited purpose of supervising discovery. Discovery is now complete, the affidavits and memoranda of Proponents and Protestants have been filed,[2] and the matter is ripe for decision.

II. POSITIONS OF THE PARTIES

A. *Positions of Protestants*

1. *Burden of Proof*

U.S. Lines is the only Protestant objecting to the Commission's allocation of the burden of proof to Protestants. U.S. Lines contends that because the joint service agreement (as a whole) would be violative of the antitrust laws, the Commission cannot approve the voting provisions unless Proponents prove a serious transportation need, important public benefit, or valid regulatory purpose exists to justify the voting provisions; placing the burden of proof with Protestants assertedly is contrary, *inter alia,* to the Shipping Act, the Supreme Court's holding in *FMC v. Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238, and existing FMC regulations and policy.

2. *Nature of Proof*

Maritime Fruit Carriers Ltd. and Refrigerated Express Lines (A/Asia) Pty., Ltd., is cited as the only reported case wherein the Commission has attempted to address the question of multiple votes for joint services or cooperative working agreements.[3] Protestants observe that the opinion of the Commission, which was

[1] Several of Protestants' original objections were eliminated when Proponents modified Amendment No. 3 to limit chartering of additional space for JSS use and to limit the term of the Agreement to March 30, 1980.

[2] The Bureau of Hearing Counsel is also a party to the proceeding and is included within the term "Protestants" unless otherwise indicated by the context.

[3] 15 F.M.C. 233 (1972), *affirmed per curiam sub nom. Farrell Lines, Inc. v. Federal Maritime Commission*, 475 F.2d 1332 (D.C. Cir. 1973), hereinafter cited as *Maritime Fruit Carriers*. This decision involved an integrated service composed of two member lines. One of the contested issues was whether these two lines should be characterized as a "joint service." The key issue was whether any set consequence should follow from a determination that "joint service" status exists. In a plurality formed by the joint opinion of Chairman Bentley and Vice Chairman Barrett, with Commissioner Morse concurring separately, the Commission allowed the integrated service to exercise two votes. Chairman Bentley and Vice Chariman Barrett took the approach that "actual harm" to other carriers from multiple voting is the critical factor, not "labels" such as "joint service" or "cooperative working arrangement." Commissioner Morse did not look to "actual harm," but rather turned to the four criteria spelled out in section 15; in doing so, he found that nothing in the record enabled him to find the proposed voting provision violative of these four section 15 standards, and therefore be concurred with the result reached by Commissioners Bentley and Barrett. Commissioner Day, dissenting, would have applied the *Svenska* standards to the voting provisions, and found that the voting provisions were not justified under these standards, and therefore not approvable under section 15. Commissioner Hearn, dissenting, found that the agreement in question, taken as a

a plurality opinion with Commissioner Morse concurring separately, turned specifically upon the factual setting of the case. Protestants suggest that the case should be limited to its facts, and would distinguish it from the instant case because: (1) in *Maritime Fruit Carriers*, it did not matter whether the two members of the integrated service in that case had one-sixth or two-sixths of the votes because the integrated service did not have enough voting power to compel affirmative conference action in either event; (2) the record in the *Maritime Fruit Carriers* case was devoid of evidence as to the past or future operational impact of multiple voting on conference operations; and (3) there was a serious dispute as to the nature of the arrangement between the parties, *viz.*, whether or not they were operating as a joint service, whereas in the instant case, it is clear that JSS is a joint service, and hence an analysis of the impact of its voting is unnecessary, although an adverse impact could in fact be shown.

3. *Johnson ScanStar's Status as a Joint Service*

Protestants chide JSS for belatedly suggesting that it is not a joint service within the definition of FMC General Order 24 (46 C.F.R. section 522.2(a)(4)), and argue that JSS's denial that it is a joint service is procedurally improper, since JSS acquiesced in being referred to as a joint service throughout the proceedings. Protestants observe that Johnson ScanStar, in addition to operating as a single carrier, holds itself out to the public as a joint service by advertising "Johnson ScanStar, a joint service of Johnson Line, the East Asiatic Company and Blue Star Line." They argue that Proponents' interests outside JSS are minimal, and have been exaggerated by Proponents. None of the JSS members has individual sailings outside the joint service but within the trade covered by the North Europe/U.S. Pacific Freight Conference (NEUSPFC) or Pacific Coast/European Conference (PCEC) sufficient to meet the sailing requirements for membership in those conferences. Allowing JSS members individual votes is therefore not only violative of the Shipping Act, Protestants argue, but also contrary to the membership requirements of the conferences. Additionally, Protestants note that Article 4 of the JSS agreement provides that the parties to it "shall concentrate their efforts upon cargo suitable for carriage in [JSS] container vessels," and each party covenants not to compete with JSS for cargoes. Proponents' evidence boils down, in Protestants' view, to proof that Blue Star Line and Johnson Line have selectively entered the trade only on isolated occasions, while EAC has not participated at all in the trade, except through JSS. Protestants conclude that since JSS is a joint service, the guidelines articulated in FMC General Order 24 (46 C.F.R. section 522.6(b)(1)) are opposite, and should be applied to accord the joint service a single vote in conference activities.

4. *Evidence of Actual Harm*

Protestants claim that direct proof of actual harm from Proponents' exercise of multiple voting rights is difficult to obtain because the main impact of the multiple voting rights is to "pre-censor," or exercise a chilling effect upon, the activities of individual lines. In the eastbound (PCEC) conference, two joint services together have veto power over conference activity and each joint service

whole, warranted the conclusion that a single operating entity was created in the trade. This being so, Commissioner Hearn found that allowing joint service members a separate vote would violate that separate provision of section 15 which guarantees conference membership on equal terms and conditions.

has veto power if it can secure one other vote.[4] In the westbound (NEUSPFC) conference, JSS has veto power over conference action when it is allowed to have multiple votes.[5] The effect of this voting power allegedly has been to cause Protestants to despair of introducing measures for conference approval when it knows that JSS would oppose it.

Additionally, Sea-Land cites two specific examples in the NEUSPFC and one in the PCEC where it alleges that rate action proposed by it was blocked by JSS (although JSS disputes these facts). Sea-Land points out that the voting statistics presented by JSS are based upon a "total number of votes taken" at conference meetings that falls far short of the number of annual agenda items before the conferences in question. According to Sea-Land, JSS's statistics therefore refer to only a fraction of the conference votes taken, and the inferences JSS attempts to draw from them are therefore unreliable and should be rejected.

Finally, Protestants observe that, despite the existence of these eastbound and westbound conferences in the trade, separate rate agreements have been necessary as "safety valves" to assure truly equal participation. This assertion is verified in Protestants' view by the fact that the corresponding 48 hour rate agreement, (No. 10023), was permitted to expire after NEUSPFC adopted a "one carrier, one vote" amendment, while the 48 hour rate agreement, (No. 10052), corresponding to the PCEC, remains in effect in the trade covered by the PCEC, which still allows multiple votes for joint services. The inference is that separate rate agreements are needed when joint services dominate a particular conference. Sea-Land states that one reason for its resignation from the PCEC and the NEUSPFC was the multiple vote allowed joint services, and points out that three carriers who had been members of the corresponding rate agreement joined NEUSPFC after NEUSPFC amended its voting provisions to allow only single votes for joint services.

5. *"Multiple Votes" for Joint Services as a Matter of Law*

Protestants seek to distinguish the *Maritime Fruit Carriers* case on the ground that it dealt more with the question of how to resolve a factual dispute as to whether two parties constitute a joint service than it did with how to handle joint services, and because the decision in that case was, after all, reached by a plurality joined by Commissioner Morse in a separate opinion. It is suggested that ICC cases be consulted for persuasive authority on the matter of voting by joint services. Section 5(a) of the Interstate Commerce Act has basically the same legislative purpose as section 15 of the Shipping Act, and Protestants argue that the ICC has held repeatedly that no carrier may have greater representation than any other carrier. ICC cases cited by U.S. Lines for the foregoing proposition include *Oil Capital Bureau, Inc.—Agreement,* 321 I.C.C. 263 (1963), *Eastern Railroads–Agreement,* 277 I.C.C. 279 (1950), and *Columbia River Tariff Bureau–Agreement,* 294 I.C.C. 303 (1955).

[4] In the PCEC, decisions at duly called meetings are to be made by a three-fourths vote of members present and entitled to vote; otherwise they are to be made by three-fourths vote of all members entitled to vote. Changes in the agreement require a unanimous vote of all members. Three fourths of the members constitute a quorum. During U.S. Lines' membership, there were 15 total votes, with 12 needed to pass and 4 votes needed to block a measure when all members were present. JSS with three votes thus needed only one other vote to join it in order to prevent a motion for passing. With three votes, the Euro-Pacific Joint Service would have the same potential.

[5] In the NEUSPFC, all decisions require a three-quarters vote of all members entitled to vote, except that alteration of the basic agreement requires unanimous consent of all members. A quorum consists of three quarters of the members. During U.S. Lines' membership, there were ten members, with 8 votes required to pass a motion, and 3 votes required to block a motion. With its 3 votes, JSS could block, or "veto" any action in the conference.

Hearing Counsel argues that Proponents want "the best of both worlds" by acting as a single joint service while at the same time exercising three conference votes. Hearing Counsel states that this is inherently unfair, and that the "price" for being allowed to amalgamate into an anticompetitive arrangement such as a joint service is that the joint service have only a single vote to reflect its status as a single carrier.

Hearing Counsel disputes JSS's position that there are numerous examples of other joint services with multiple votes[6] and contends that FMC precedent does not preclude a ruling that joint services, if they constitute a single party in interest, should be accorded only one vote in conferences in which they participate.

Protestants argue that the "equal terms and conditions" requirement in section 15 of the Shipping Act implicitly requires equal terms for participation following membership. Voting rights are said to be the essence of participation, and unequal voting rights therefore constitute unequal participation.[7] Protestants maintain that the prospect of unequal participation discourages individual carriers from entering conferences with joint services exercising multiple votes, and that this constitutes a barrier to entry. They assert that there has been specific injury to the conference system as a result of multiple voting provisions, as evidenced by dissension in the conferences and by the air of controversy leading to proceedings such as this one.

B. *Position of Proponents Blue Star Line, East Asiatic Company, and Johnson Line*

1. *Burden of Proof*

The parties to the Johnson ScanStar Agreement (hereinafter referred to collectively as "JSS") concur with the allocation of the burden of proof contained in the Commission's May Order and further assert that the Protestants have failed to meet this burden.

2. *Nature of Proof*

JSS relies heavily upon the plurality opinion of Commissioners Bentley and Barrett in the *Maritime Fruit Carriers* decision, *supra*, in analyzing the evidentiary issues of the present case. JSS observes that the writers of this opinion refused to establish a set rule prohibiting multiple votes for joint services and refused to read the General Order 24 guidelines as establishing such a rule. The plurality was hesitant, JSS notes, to fix a set rule for "joint services" because of the difficulty of determining when a particular agreement constitutes a "joint service," and called for a case-by-case analysis of the actual operational impact of individual voting by members of an approved agreement upon conference operations, particularly with respect to the impact upon other conference members. In the case before the Commission in *Maritime Fruit Carriers*, JSS argues that no proof of adverse impact upon other carriers in the conferences in

[6] These examples, contained in Proponents' affidavits, are all, according to Hearing Counsel, either defunct agreements or not joint services, with two exceptions—Agreements Nos. 9902 and 10162. Agreement No. 9902 is the Euro-Pacific Joint Service, which is itself currently under FMC investigation, including the issue of voting. Agreement No. 10162 is the Trans-Royal Joint Service, which is presently not a member of any conference.

[7] Sea-Land cites as being apposite here landmark cases in the area of voters' rights and equal protection of the laws, such as *Baker v. Carr*, 369 U.S. 186 (1962), *Gray v. Sanders*, 372 U.S. 368 (1963), and *Reynolds v. Simms*, 377 U.S. 533 (1964).

question was found to be present, and therefore the right of the individual members of the alleged "joint service" to separate votes in conference activities was approved. JSS maintains that Protestants' affidavits establish no palpable harm of the type required by the *Maritime Fruit Carriers* case, but constitute speculative and unfounded allegations of possible harm. JSS points out that the Commission has repeatedly held that the mere possibility that a section 15 agreement may result in some future violation of the Shipping Act is not a sufficient basis for disapproving an agreement.

3. *Johnson ScanStar's Status as a Joint Service*

In its memorandum of law, JSS asserts that, even if the suggestion in General Order 24 that joint services share only one vote were taken as mandatory, JSS does not fall within General Order 24's definition of a "joint service." JSS notes that it does not fix rates or publish tariffs, since these matters are controlled by the conferences of which JSS is a member. JSS also points out that its members each maintain their own ships and equipment contributed to JSS and engage in separate marketing activities to promote their individual specialty services outside the scope of the JSS agreement. JSS also objects to the conclusory statements in William Jarrel Smith, Jr.'s affidavit regarding JSS's status as a joint service because they constituted an expression of opinion on the ultimate legal issues in the proceeding.[8]

4. *Evidence of Actual Harm*

JSS has submitted data to establish that its multiple votes have caused virtually no results adverse to Protestants in conference voting, and that disagreements have been over relatively inconsequential matters. The completeness and validity of JSS's data were challenged by Protestants, but they presented, in JSS's view, no clear evidence of past harm from JSS votes. JSS further states that Protestants never objected to the voting arrangements while conference members, nor can they establish any pattern of voting by JSS which reflects an effort to put them at a disadvantage. On the other hand, JSS argues that it needs separate representation of its component carriers so that they can maintain and protect their separate interests that are outside the JSS agreement, but within the scope of conference activity. If JSS's "veto power" in a particular conference is objectionable, this can be remedied, JSS states, by requiring modification of the conference agreement. The FMC assertedly should not use "overkill" by modifying JSS's organic agreement.

5. *"Multiple Votes" for Joint Services as a Matter of Law*

The inflexible rule resulting from the "one man, one vote" analogy was implicitly rejected in the *Maritime Fruit Carriers* case in favor of a case-by-case approach, JSS asserts, and in any case that doctrine has no application in a commercial context. Contrary to the approach of Sea-Land and U.S. Lines, JSS argues that there is no central principle of law imposed by the Shipping Act in the matter of voting rights; only a case-by-case factual analysis of the type set forth in the *Maritime Fruit Carriers* case is required in JSS's view.

[8] Hearing Counsel introduced the affidavit of the then Director of the Bureau of Compliance to establish that JSS was in fact a joint service. Large portions of this affidavit constitute opinions as to the ultimate legal and policy issues before the Commission, and as such do not constitute evidence.

JSS claims that multiple votes for joint services have been approved in the past by the Commission and by the Interstate Commerce Commission.[9]

III. Discussion

A. *Burden of Proof*

In its May Order, the Commission stated that "while the burden of going forward with evidence may shift from time to time during the consideration of the approval of . . . agreements, the burden of proof never departs from those opposed to the agreement." U.S. Lines takes issue with this allocation of proof, citing the *Svenska* case and its progeny. *Svenska*, however, applies only in cases where the concerted activities proposed would violate the antitrust laws. In such cases, there is *prima facie* evidence that the proposed activities are contrary to the public interest, which can be overcome only if proponents come forward with evidence establishing a serious transportation need, important public benefit, or valid regulatory purpose to be derived from the proposal. U.S. Lines argue that because Amendment No. 3 in its *entirety* would require justification under the *Svenska* standards, the specific voting provisions now before the Commission must also be so justified.

Amendment No. 3, taken as a whole, admittedly would be *per se* violative of the antitrust laws, but the March Order of Interim Approval specifically found the basic Agreement to be in the public interest because its continued existence provides important benefits that overcome the *Svenska* presumption. A hearing was ordered to determine *only* whether the separate voting provisions of the proposed agreement comply with the standards of section 15. *The separate voting provisions do not, in and of themselves, violate the antitrust laws*. There is no presumption against their approval under the *Svenska* case, and Protestants therefore have the burden of coming forward with evidence to establish that the proposed agreement is violative of the Shipping Act. As will be explained below, the specific matter to be proved is that JSS constitutes a single carrier.

B. *Applicable Standard for Approval of Multiple Voting Arrangements*

Maritime Fruit Carriers, supra, note 3, is the only reported FMC case which presented the multiple votes for joint services question that is raised here. A majority of three Commissioners approved the multiple voting arrangement there in issue, with two Commissioners holding that *actual harm* to other conference carriers must be shown before multiple voting provisions can be disapproved. In a separate concurring opinion, Commissioner Morse noted that nothing in the record enabled him to make any of the findings required by section 15 of the Shipping Act as a condition precedent to disapproval. Both Commissioner Morse and the plurality expressed reluctance to establish a set rule applying to "joint services" because of the difficulty of defining that term, and preferred a case-by-case approach.

The approach taken in *Maritime Fruit Carriers* avoids the problem of determining when a group of carriers should be treated as a single carrier for voting

[9] *I.e.*, FMC Agreement Nos. 9925, 9714, 9715, 9944, 9718, 9731, 9835 and 9975, 277 I.C.C. 279 (1950), 279 I.C.C. 40 (1950), and 278 I.C.C. 525 (1950).

purposes, but it calls for a more difficult, and more subjective, determination instead, *viz.*, whether the joint service is "abusing" its voting power by taking positions harmful to other carriers. The determination of "actual harm" will fluctuate continually with the membership and voting provisions of the conferences involved, and matters can change upon short notice.

Section 15 of the Shipping Act requires that all conference agreements provide "reasonable and equal terms and conditions for admission and readmission to conference membership. . . ." Equal access to membership would have little meaning without equal participation after membership, and voting is the essence of participation after membership, and voting is the essence of participation. Consequently, the principle of equal voting power for every member must be inherent in the conference system.

The hegemony of large carriers in the trade over smaller carriers is a feature of unbridled competition that the conference system is designed to avoid. Unequal voting power violative of section 15's "equal terms and conditions" clause exists where one conference member is granted more votes in the conference than another member merely because of its size or composition.

Indeed, JSS does not seriously assert that it should have three votes because of its large investment in the trade. Rather, it claims three votes so that the JSS component carriers can protect their "separate interests" in the trade.[10] JSS apparently would have the Commission weigh the value to its members of having their "separate interests" in the trade reflected by individual votes in conference activity against the *actual harm* done to Protestants by multiple representation. Protestants advocate weighing Proponents' interest as a joint service against their other interests in the trade to determine whether they should be treated as a single party.

We find the latter approach to be prefereable becaue it best reflects the principle that voting power that is in fact unequal is violative of the Shipping Act. The manner in which the power has been previously exercised is of little relevance if the potential for injury or unfairness continues to exist. It is not administratively feasible for the Commission to monitor continually the exercise by one party of a triple vote in a conference, yet this would be required by JSS's approach.

Where the members of a joint service have a community of interest so that they constitute, in effect, a single carrier, provisions in the joint service agreement allowing for multiple votes foster a violation of the Shipping Act if the joint service joins any conference not limiting it to one vote. The ultimate issue in this case, therefore, is not whether "actual harm" has resulted from JSS's exercise of multiple votes,[11] but whether JSS should be treated as a single carrier.

C. *Johnson ScanStar's Status as a Joint Service*

The ultimate question in this case is whether the JSS members have formed a single carrier in the trades covered by the PCEC and the NEUSPFC. The

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[10] To the extent JSS merely wishes each *of its members to have* an individual voice at conference meetings, this could be accomplished by sending three representatives who would share a single vote.

[11] This was the primary *issue addressed in the conflicting* affidavits of the parties referring to JSS's voting record and its effect upon Protestants. The extent and significance of the JSS members' carryings *outside* the service but in the trade was also in dispute, and retains some relevance under our holding in this case.

plurality opinion in the *Maritime Fruit Carriers* case recognized that labels, such as "joint service" or "cooperative working arrangement," are not determinative of this issue, but offered no guidelines as to the factors which collectively determine when carriers should be treated as operating a single service. In order to provide greater guidance to the industry, the Commission will henceforth use a case-by-case approach in which the following indicia of single carrier status will be considered:

(1) coordination of sailings;
(2) pooling or other mutual allocation of costs, revenues, or profits;
(3) covenants not to compete with the joint venture;
(4) limitations of tonnage used in the joint venture;
(5) common offices or direction by a jointly owned corporation;
(6) common agents;
(7) common tariffs;
(8) common bill of lading;
(9) common name for combined service;
(10) common vessel identification;
(11) common arrangements with terminals, stevedores, and other parties;
(12) joint advertising and/or solicitation;
(13) lack of significant individual interests in the trade outside the joint venture;
(14) the duration of the joint venture; and
(15) limitations, if any, on the type of cargo carried by the service.

These factors are not, of course, all of equal weight, nor can any fixed formula be used to determine which combinations of factors will compel the conclusion that the members of the joint service or similar arrangement are a single party in interest entitled to a single vote. They will be useful in analyzing such questions, however, and the presence of several factors may well create a rebuttable presumtpion of "single carrier status."

Turning to the JSS agreement and the available facts, it is indisputable that factors (1), (2), (3), (6), (9), and (12), at the very least, apply to JSS. Additionally, close analysis of the record appears to establish the existence of factor (13). Cargo movements by individual JSS members outside the joint service and in the trade do not appear to be of sufficient regularity to meet the sailing requirements for any conference in the trade, [18] and these individual interests are relatively insignificant compared to the parties' interest in Johnson ScanStar. Johnson ScanStar holds itself out to the public as a joint service and acts in important respects like a single carrier; it should be treated as such.

IV. CONCLUSION

Johnson ScanStar (JSS) is a joint service operating in the U.S. Pacific Coast/European trades as a single carrier. Because the Agreement presently before the Commission for renewal allows it, JSS exercises three votes in the Pacific Coast European Conference (PCEC) and is precluded from doing so in the Northern Europe/U.S. Pacific Freight Conference (NEUSPFC) only by a temporary amendment to that conference's agreement. The individual members of JSS have minimal interests in the trade outside their interest in JSS, and these fall far short of meeting the sailing requirements for individual conference membership. Protestants Sea-Land Service and United States Lines were entitled to only one vote in the PCEC and NEUSPFC. As a result, they were not afforded the membership on "equal terms and conditions" required by section 15 of the Shipping Act. The Commission will remedy this violation by requiring modification of that portion of the Agreement allowing the joint service a triple vote as a condition of continued approval. This will bring the JSS Agreement into conformity with other such joint service agreements, as well as assuring that other conference members are protected against the exercise of unequal power.

THEREFORE, IT IS ORDERED, That Agreement No. 9973-3 is approved, on condition that paragraph one thereof be modified to read as follows:

1. The parties agree either to belong to, or operate independently from, any conference as a group, so as to insure uniformity of rates for the Service. *In any conference, or other such voting body of which the parties to this agreement are members as a group, the parties collectively, and/or as a joint service, shall not exercise a greater total number of votes than that number (normally one) which is accorded a single carrier member of such conference or other voting body. The parties may develop a joint position regarding conference votes and membership.*

IT IS FURTHER ORDERED, That the approval in the first ordering paragraph hereof shall become effective upon receipt by the Secretary of the Federal Maritime Commission, 1100 L Street, N.W., Washington, D.C. 20573, of an original and certified copies of Agreement No. 9973-3 modified as specified in the first ordering paragraph hereof and signed by the parties thereto; and

IT IS FURTHER ORDERED, That, if Agreement No. 9973-3 is not modified as specified in the first and second ordering paragraphs hereof within sixty days from the date of this Order, then Agreement No. 9973-3 is disapproved, effective 60 days from the date of this Order.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 557

NEW JERSEY ZINC COMPANY

v.

ORIENT OVERSEAS CONTAINER LINE

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

August 15, 1978

No exceptions have been filed to the initial decision in this proceeding and the Commission has determined not to review that decision. Notice is given that the initial decision became the decision of the Commission on August 9, 1978.

It is Ordered, That applicant is authorized to waive collection of $3,467.00 of the charges previously assessed New Jersey Zinc Company.

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

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 557 that effective July 29, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period July 29, 1977, through August 21, 1977, the Group 1 rate on 'Titanium Dioxide' is $88.00W, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff.

It is further Ordered, That waiver of the charges shall be effectuated within thirty (30) days of service of this notice and applicant shall within five (5) days thereafter notify the Commission of the date and manner of effectuating the waiver and submit a copy of the published tariff notice.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

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FEDERAL MARITIME COMMISSION

Special Docket No. 557

New Jersey Zinc Company

v.

Orient Overseas Container Line

Adopted August 15, 1978

Application to waive collection granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90-298), and Rule 92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Orient Overseas Container Line (Orient or Applicant) has applied for permission to waive collection of a portion of the freight charges on two shipments of titanium dioxide, which moved from Baltimore, Maryland, to Keelung, Taiwan, under Orient bills of lading dated July 29 and August 18, 1977. The application was filed December 16, 1977, and later amended by letter (with attachments) dated March 28, 1978. Additional documentation (affidavits) also was submitted with letter of June 22, 1978, from Eckert Overseas Agency, Inc. (Eckert), the general agents for Orient.

It should be noted that New Jersey Zinc Company, the shipper, is a subsidiary of Gulf & Western Industries (Eckert letter of March 28, 1978, and amended application attached thereto).

The subject shipments moved under Orient Freight Tariff No. 44, 1st revised page 387, item no. 4635, according to the rate for titanium dioxide (to Group 3 ports), effective May 24, 1977. The aggregate weight of the shipments was identical: 123,300 pounds (55.929 kilos) each. The rate applicable at time of the shipments was $119 per 1000 kilograms (W only). The rate sought to be applied is $88 per 1000 kilos (W only) less $3 H/H allowance, or a net of $85 per 1000 kilos in this instance. See Orient Freight Tariff No. 44, FMC No. 44, 2nd revised page 387, item no. 4635 (Group 3 ports), effective August 23, 1977.

[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).

[2] 46 U.S.C. 817, as amended.

Aggregate freight charges payable, pursuant to the rate applicable at time of shipment, amounted to $12,975.52. Aggregate freight charges at the rate sought to be applied amount to $9,507.92. The difference sought to be waived is $3,467\60. The Applicant is not aware of any other shipment of the same commodity which moved via Orient during the same period at the rates involved in these two shipments.

The clerical error involved in the publication of an already-agreed special rate for this commodity was in not filing the agreed rate in its proper port-group column, i.e., $88.00 was filed in the Group 1 (Japan Base Ports) column, instead of in the Group 3 (Kaohsiung/Keelung) column. (See Eckert letter dated March 28, 1978, at p. 2.)

Orient, through Eckert, its general agent, further explains in its application the meeting where the special rate was agreed to by the parties and the eventual, later clerical error as follows:

(4) At a meeting, March 9, 1977, between complainant and respondent it was agreed to publish a rate on titanium dioxide from USEC to Taiwan of $88.00 per 1000 kgs., subject to $3.00 house to house discount. This rate was to be published upon booking of cargo.

Through clerical error publication was not made at time of cargo booking and cargo was billed at the then applicable tariff rate $119.00 per 1000 kgs. Subsequent to the shipments in question the error was discovered and the $88.00 per 1000 kgs. rate was filed by telex filing effective August 22, 1977.

On November 15, 1977 we received letter from complainant and payment was made on basis of rate of $88.00 per 1000 kgs. as previously agreed to publish in tariff.

In addition to the facts set forth in and attested to by the Special Docket application, at the request of the presiding Administrative Law Judge, Eckert also transmitted two affidavits attesting to the occurrence of the March 9, 1977, meeting referred to in the application. (See attachments to Eckert letter of June 22, 1978). Further amplification and explanation of some of the confusing details are set forth in the Eckert letter of March 28, 1978, from Robert G. Jufer to Chief Judge Cograve.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 92(a), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected 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 an 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 . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to file the special rate in the proper ports-group column for shipments of titanium dioxide destined for Keelung, Taiwan, as had been agreed-to in advance with the shipper.

2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Orient filed a new tariff which set forth the rate on which such waiver would be based.

4. The application was filed within 180 days from the date of the subject shipment.

Accordingly, permission is granted to Orient Overseas Container Line to waive collection of a portion of the freight charges, specifically the amount of $3,467.60. An appropriate notice will be published in Orient's tariff.

(S) THOMAS W. REILLY
Administrative Law Judge

WASHINGTON, D.C.
July 17, 1978

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-16

UNION CARBIDE CORPORATION

v.

JAPAN LINE, LTD.

NOTICE OF ADOPTION OF INITIAL DECISION

August 15, 1978

No exceptions were filed to the initial decision in this proceeding and the Commission has determined not to review that decision. Notice is given that the initial decision became the decision of the Commission on August 9, 1978.

The following corrections should be made in the initial decision:

1. The references to "$7,589.19" on lines three and four of page two should read "$7,585.19."

2. The references to "$2,360.22" on line four of page two and in the findings and conclusions on page four should read "$2,364.22."

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 78–16

UNION CARBIDE CORPORATION

v.

JAPAN LINE, LTD.

Adopted August 15, 1978

Reparation awarded.

Warren Wytzka, Manager—Liner Services, Union Carbide Corporation, for complainant.
David Snow, Manager, Rates and Conferences, Japan Line (USA), Ltd. for respondent.

INITIAL DECISION[1] OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

The respondents ". . . agree with cargo data as submitted by complainant." (Reply served June 15, 1978, p. 1). The complainant asserts the shipment consisted of 3850 bags Sevin Technical, measuring 4849 cubic feet, weighing 217,174 pounds or 98.509 thousand kilos; the shipment originated at South Brunswick, N.J., destined for Tokyo, Japan, on respondent's vessel *Queensway Bridge* under Bill of Lading Number MNYKB-OY020 dated April 27, 1977; that the freight rate assessed was $101.00 per 1000 kilos ($101.00 × 98.509 thousand kilos = $9,949.41) per item 512.0672.10 of Pacific Westbound Conference Tariff No. 8, FMC No. 15, the total freight was $9,949.41 which the complaint paid (complaint, p. 2 and 3). According to the complainant the correct freight rate is $77.00 per 1000 kilos per item 512.0672.60 of the said tariff, for a correct total freight of $7,589.19. The alleged overcharge ($9,949.41 — $7,589.19 = $2,360.22) is $2,360.22. The complainant says the correct Bill of Lading description of the goods should have been: "5–40' containers STC 19 pallets of 40 bags total 95 pallets STC 3850 bags." (Note: 19 pallets × 40 bags = 760 bags. 760 bags × 5 containers = 3800 bags as does 95 pallets × 40 bags = 3800 bags.)

Bill of Lading Number MNYKB-OY-020 shows, *inter alia*, "5–40' containers each said to contain 19 pallets of 40 bags—Sevin Technical Insecticides, Sevin Unfinished (Naphthyl Methyl Carbamate) IMCO page 9028 UN 1615 No Label Total 95 pallets said to contain 3850 bags—freight prepaid. Booking No.

[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).

1-MU3.108 Oakland House to House Containers Service. Gross Weight 217174 pounds, Measurement 4849'."

The respondent says the shipment had two tariff descriptions on the covering documents, i.e., "Sevin Technical" and "Naphthyl Methyl Carbamate," tariff items No. 512.0672.10 and 512.0672.12 respectively. On the other hand the 7th Revised Page 427 of the applicable tariff lists "Insecticides, viz: Sevin Unrefined, Item 512.0672.10; Naphthyl Methyl Carbamate, Item 512.0672.12; and 1-Naphthyl-N-Methyl Carbamate, Item 512.0672.60." The respondent in its reply, p. 3, stated, "For reasons not determinable at this time, the general category rate of *napthyl methyl carbamate* in the conference tariff was reduced below the level of the brand name specific item of *Sevin*."[2] The complainant contends such listing created an ambiguity which requires resolution thereof to be in favor of the shipper. The respondent's statement quoted above tends to admit an ambiguity. It is found and concluded the ambiguity is to be resolved in favor of the shipper as supported by complainant's citing of *United Nations Children's Fund v. Blue Sea Line*, Docket No. 71-25, 15 F.M.C. 206 (1972), supporting the well established rule of law that in a matter of contractual interpretation, any ambiguity is construed most strongly against the writer of the contract. (*Ibid.*, p. 208.)

The 8th Edition of the *Condensed Chemical Dictionary*, page 781, lists Sevin as the trademark of Union Carbide Corporation for 1-naphyl-N-methyl carbamate, and says see Carbaryl. Carbaryl at page 166 of the said dictionary is the "Generic name for 1-napthyl N-methlycarbamate $C_{10}H_7$ OOCNHCH."

It is reiterated there is basically no dispute as to the goods shipped or as to the presence of ambiguity.

Respondent does invoke Rule 19 of the pertinent tariff which requires claims based on changes in description to be submitted to the carrier before the cargo leaves the custody of the carrier at destination; all other types of claims to be submitted within 6 months; that the shipment in question originated April 27, 1977, and that complainant's initial claim to the carrier was dated November 11, 1977; that respondent was advised by Staff of Pacific Westbound Conference that any refund claim honored by payment after 6 months proviso of Rule 19 had passed, would be violative of Tariff Rule 19.

The Shipping Act, 1916, in section 22, provides for filing of a complaint setting forth any violation of the Act, within two years after the cause of action accrued. Bill of Lading No. MNYKB-04-020 herein dated 4/27 indicates prepayment of $9,949.41 freight charges. (The Bill of Lading does not show the year, however, the Dock Receipt in support shows the 1977 year as to the shipment.) The complaint in this proceeding was served May 18, 1978. It is found and concluded the complaint was filed timely. A carrier tariff limitation on the time for filing claims such as Rule 19 in this instance, may not be construed, without consideration of the merits, as a foreclosure of the right to seek remedy for overcharges during the entire two-year period of limitations provided by law. Docket No. 115(I)—*Colgate Palmolive Co. v. United Fruit Co.*, 11 SRR 979 (1970).

[2] Respondent stated in its reply, page 2, "The conference took further action to eliminate the item 'Sevin'."

PROCEDURAL BACKGROUND

The complainant having requested that this proceeding be conducted under the shortened procedure (complaint served May 15, 1978, p. 4, Mailgram of June 26, 1978, confirming choice) and the respondent having consented thereto (letter dated June 15, 1978), the Presiding Administrative Law Judge, pursuant to the consent and Rule 181 of the Commission's Rules of Practice and Procedure, 46 CFR 502.181, approved this proceeding being conducted under the shortened procedure without the taking of oral testimony.

FINDINGS AND CONCLUSION

Upon consideration of all the aforesaid, the Presiding Administrative Law Judge *finds* and *concludes*, in addition to the findings and conclusions hereinbefore stated:

Reparation in the amount of $2,360.22 should be awarded to complainant for respondent's violation of section 18(b)(3) of the Shipping Act, 1916.

Wherefore, it is ordered:

(A) Reparation in the amount of $2,360.22 is awarded to complainant against respondent.

(B) This proceeding be and hereby is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

WASHINGTON D.C.
July 12, 1978

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 573

CAMPBELL SOUP

v.

PACIFIC WESTBOUND CONFERENCE

DENIAL OF REQUEST FOR PERMISSION TO REFUND

August 15, 1978

This proceeding involves an application by Pacific Westbound Conference for a determination by the Commission that Note 1 of PWC Tariff Item 099 0500 49, as it appeared on November 11, 1977, read incorrectly as a result of a clerical error and that refund of charges based on that error should be authorized.

Note 1 applied to a $50.00 special rate on "Soups, Packed N.O.S." and read:

> When shipped in 6.096 m (20 ft.) containers, rate is subject to minimum of 17.5 Kilo Tons Shipments failing to meet this minimum will be subject to the $78.00 WT rate.

PWC suggests that Note 1 was intended to read:

> When shipped in 6.096 m (20 ft.) containers, rate is based on actual weight of the shipment but not less than 17.5 Kilo Tons. If lower charges result from assessing the $78.00 Wt Rate based on the actual weight shipped, such rate will apply.

The $78.00 Wt Rate also appeared in the Special Rate on this tariff item.

Upon review of the initial decision we determined that the record afforded an inadequate basis for concluding that there was an error of an administrative or clerical nature in Note 1. The initial decision had concluded there was such an error, apparently because application of Note 1 as it read at the time of shipment would result in an inequity whereby shippers of lesser quantities could be required to pay more than shippers of greater quantities. We found, however, that the resulting inequity, standing alone, does not prove that inclusion of the provision was unintended or resulted from a clerical or administrative error. It could have been intended and merely resulted from poor judgment which the Conference later wanted to correct. Nothing had been submitted to reflect the Conference's intent. The conference minutes of September 28, 1977, of which official notice was taken, further confused the matter. The minutes show that the Conference in fact intended a third version of Note 1. Under this version shipments failing to meet the minimum would be subject to rates in Item 099.0500.09, the regular rate for "Soups, Packed N.O.S." This provision was filed by PWC Tariff Circular 41-77 but was later amended effective October 5, 1977, to reflect the version of Note 1 which was in effect at the time of shipment.

No minute entry for the latter change could be located.

In view of the lack of corroborative evidence regarding the Conference's intention and in view of the mentioned inconsistency and confusion reflected in the Conference minutes and subsequent tariff filings we determined to vacate the initial decision and provided applicant with an additional opportunity to clear the confusion. Applicant was directed to submit additional information to show its actual intent in establishing Note 1 and to support its allegation of clerical error.

Applicant has now submitted a sworn statement from its Executive Assistant. This sworn statement describes the intent of the Conference in establishing Note 1 and credits the "mistake" in the tariff to the Executive Assistant's own failure to give clear instructions to the tariff typist. The affidavit furnishes no details, however, to explain all the differences between the actions said to have been intended, the intention as reflected in the Conference minutes, and the intention as reflected in the subsequent tariff revisions 7, 8, and 9 of page 298.

To find in applicant's favor we must infer that there was a series of different mistakes in recording the Conference's action in the minutes, in implementing the action in a tariff filing, and in later amending the tariff filing.

We think the record leaves too much to inference and, accordingly, deny the application for refund. The affidavit of the conference representative is insufficient to establish good cause for awarding the refund where, as here, many questions are left unanswered. Applicant was alerted by the Commission's order on review that these areas of concern existed and has failed to adequately explain the discrepancies as to the true intent of the Conference in establishing Note 1.

Accordingly, it is ordered that the application for refund is denied and the proceeding is discontinued. This action is without prejudice to the filing by nominal complainant of a formal complaint under Section 22 of the Shipping Act, within the limitation period, alleging a violation of the Act.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 521

TEXAS FIBERS, INC.

v.

LYKES BROS. STEAMSHIP CO., INC.

ORDER PERMITTING WAIVER OF CHARGES

August 15, 1978

This proceeding involves a request by Lykes Bros. Steamship Company for permission to waive collection of a portion of freight charges pursuant to Section 18(b)(3) of the Shipping Act. Lykes had alleged that due to an error of an administrative nature it inadvertently failed to file an extension of its rate on cotton linters to cover the shipment in question.

Upon review of the initial decision we found that applicant had not substantiated its allegations of inadvertent error. We provided further oportunity for Lykes to correct this deficiency. Lykes was also directed to clarify when the cargo in question was received on board.

Lykes has now submitted affidavits from its Director of Market Development and its Dallas District Manager who personally were involved in the decision to extend the rate in question. The affidavits establish such intention and explain the circumstances regarding the failure to implement such intention. The affidavits also clarify when the cargo was received on board.

These affidavits, from officials of Lykes who actually participated in the decision to extend the rate, cure the deficiencies previously found in the record. The application complies with all of the other requirements of Section 18(b)(3) and, accordingly, applicant is authorized to waive collection of $2,916.37 of the charges otherwise applicable.

It is ordered that applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision in Special Docket 521 that effective January 1, 1977 for purposes of refund or waiver of freight charges on shipments which may have been shipped during the period from January 1, 1977, through June 13, 1977, the rate on 'cotton linters', in compressed bales, measuring up to and including 75 cft. per ton minimum 300 tons per barge Houston/Worms is $78.50 WFO subject to all applicable rules, regulations, terms, and conditions of said rate and this tariff."

It is further ordered, that waiver of the charges will be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify

ion of the date and manner of effectuating the waiver and furnish a
ariff notice.
mmission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 582

DOME EAST CORPORATION

v.

SEA-LAND SERVICE, INC.

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

August 15, 1978

No exceptions have been filed to the initial decision in this proceeding and the Commission has determined not to review that decision. Notice is given that the initial decision became the decision of the Commission on August 9, 1978.

It is Ordered, That applicant is authorized to waive collection of $6,016.19 of the charges previously assessed Dome East Corporation.

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

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 582 that effective February 3, 1978, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period February 3, 1978, through March 22, 1978, Sea-Land Service, Inc. Tariff No. 256-A, FMC-136 should include the following project rate: 'Machinery, Equipment and Supplies (Proprietary Cargo) for the construction and maintenance of Eurosystems Hospitalier—Riyadh, Bill of Lading to be claused accordingly. In carrier's 35 ft. container as described in Rule 298: Minimum 50 M.T. per container $104.00M (not subject to Rule 225) (Subject to a maximum charge of $5200.00 per container). In carrier's 40 ft. container as described in Rule 298: Minimum 60 M.T. per container $100.50M (not subject to Rule 225) (Subject to a maximum charge of $6030.00 per container). Exceptions: Dangerous or Hazardous Cargo, Refrigerated Cargo, Non-Containerizable Cargo, Household Goods and Personal Effects' subject to all other applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within thirty (30) days of service of this notice and applicant shall within five (5) days thereafter notify the Commission of the date and manner of effectuating the waiver and submit a copy of the published tariff notice.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SECIAL DOCKET NO. 582

DOME EAST CORPORATION

v.

SEA-LAND SERVICE, INC.

Adopted August 15, 1978

Permission to waive collection of $6,016.19 of aggregate freight charges of $27,646.19, granted.

INITIAL DECISION[1] OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

The aggregate freight charges in this proceeding were $27,646.19. By affidavit subscribed and sworn to April 17, 1978, the complainant Dome East Corporation certified that charges of $21,630.00 on the shipments involved herein were paid and borne as such by it. (Copy of complainant's check No. 5837, drawn on the Chase Manhattan Bank, N.A. shows date of 3/17/78, the amount of $21,630.00 payable to Sea-Land Service, Inc., with notation "B/L 901-793439 Short payed per Paul Davis Mid East Pricing." The application of Sea-Land, Inc., for waiver states the $21,630.00 was collected from Dome East Corporation on 2/10/78.)

Sea-Land Service, Inc., the carrier or respondent, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a), and section 18(b)(3) of the Shipping Act, 1916, has filed a timely application (within 180 days of involved shipment) seeking permission to waive collection of $6,016.19 of the aggregate freight charges of $27,646.19, (the $21,630 collected + $6,016.19 sought to be waived total $27,646.19) for the benefit of Dome East Corp., the complainant. The $6,016.19 would be, if not waived, in addition to the $21,630 paid by the complainant to the carrier, for shipment of project cargo for Eurosystem Hospitalier from New York, N.Y., to Damman, Saudi Arabia, on the carrier's vessel *Sea-Land Market 90 E* under Bill of Lading No. 901-793439 dated February 3, 1978.

[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 said Bill of Lading describes 1-40 foot container and 3-35 foot containers said to contain proprietary cargo for Eurosystems Hospitalier Riyadk, Saudi Arabia.

The carrier asserts charges should have been assessed as follows:

3-35 ft. containers at $104.00 per 40 cf minimum 50 M.T. per 35 foot container. Subject to a maximum charge of $5,200.00 per container = $15,600.00.

1-40 ft. container at $100.50 per 40 cf minimum 50 M.T. per 40 foot container. Subject to a maximum charge of $6,030.00 per container = $6,030.00.

Total charge = $21,630.00.

Tariff authority—Item No. 4, 14th RP 73, Sea-Land Service, Inc., Tariff No. 256-A, FMC-136.

It was on the above basis that freight charges of $21,630.00 were collected. However, the rate applicable at the time of shipment was $152.50 per 40 cf min 40 M.T. per container Item #15—5th R.P. 74 Sea-Land Tariff 256-A, FMC-136—for aggregate freight charges of $27,646.19. The rate sought to be applied is that rate on which freight charges of $21,630.00 were collected.

In support for waiver of the $6,016.19 the application states as facts the following:

A. On January 14, 1978, Mr. E. W. Aldridge, a Sea-Land salesman met with Mr. Thomas of Dome East Corp. concerning his movement to Damman. From Mr. Thomas' office, Mr. Aldridge called Mr. Davis, Sea-Land's Pricing Manager, for its Mid-East service, requesting the rate to be applied on the shipment. Mr. Davis advised Mr. Aldridge to quote $5,200 per 35′ van and $6,030 per 40′ van to Mr. Thomas, and if Mr. Thomas accepted, to confirm in a teletype to Mr. Davis. Mr. Davis is located at Iselin, New Jersey.

B. January 16, 1978—a teletype confirming the request was sent by Mr. Aldridge from New York to Mr. Davis in Iselin, N.J. The telex was never received in Iselin and, consequently, the agreed to rates were not filed. The day the telex was sent there was a power failure in the Iselin office which may account for the lost message.

C. On January 3, 1978, Dome East Corp. booked four containers, three 35′ and one 40′.

D. January 28, 1978—Dome East made a shipment of four containers of project material. Sea-Land supplied two 35′ and two 40′ containers. Sea-Land substituted one 40′ for a 35′ at its convenience.

E. February 23, 1978—Mr. Thomas of Dome East advised Mr. Aldridge that the shipment had moved and it was not rated at the agreed to basis.

F. March 23, 1978—the agreed to rate of $5,200 per 35′ container and $6,030 per 40′ container was published in Item 4, 14th RP 73 to Sea-Land Tariff No. 256-A, FMC-136.

Upon consideration of the above, and the documents submitted with the application, the Presiding Administrative Law Judge deems the application for permission to waive collection of portions of the freight charges comports with Rule 92, Special Docket Applications, Rules of Practice and Procedure, and with section 18(b)(3) of the Shipping Act, 1916, referred to above, and that the error was one within the contemplation of said rule and section of the Act.

Therefore, it is found and concluded:

(1) There was an error of a clerical or administrative nature corrected by effective tariff before this application was filed which resulted in having freight charges due if not waived.

(2) The waiver requested will not result in discrimination as between shippers.

(3) The application having been filed timely and having shown acceptable cause, should be granted.

Wherefore, it is ordered:

(A) The application be and hereby is granted to waive $6,016.19 of the aggregate freight charges.

(B) An appropriate notice shall be published in Sea-Land's tariff.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

WASHINGTON, D.C.
July 13, 1978

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–21

WEST GULF MARITIME ASSOCIATION

v.

PORT OF HOUSTON AUTHORITY OF THE
PORT OF HOUSTON, TEXAS

REPORT AND ORDER ADOPTING INITIAL DECISION

August 16, 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 is a complaint proceeding instituted by West Gulf Maritime Association (WGMA or Complainant), alleging violations of Shipping Act sections 15 and 17 by the Port of Houston Authority (PHA). The Commission's Bureau of Hearing Counsel (Hearing Counsel) and the Board of Commissioners of the Port of New Orleans (New Orleans) intervened in support of PHA.[1]

WGMA is a trade associaton composed of: (1) almost all steamship agents representing operators of deep sea cargo vessels using ports from Lake Charles, Louisiana to Brownsville, Texas; (2) the owners of some of these vessels; and (3) stevedoring firms associated with these vessel interests. Its complaint lies against revisions to PHA Tariff No. 8, effective July 1, 1975, which shifted the responsibility for billing and collecting wharfage charges from PHA to the vessel owners *and their agents*, imposing upon the latter the duty of acting as guarantors of collection, and allowing them a 4% "discount" on the charges collected to compensate them for their efforts and obligations in this regard. Complainant seeks an order declaring these provisions unlawful. Reparation is not requested.

PHA is an agency of the State of Texas charged with administering the public facilities at the Port of Houston under the Texas Water Code. Texas law also requires that PHA establish fees and charges sufficient to produce the revenue necessary to carry out its responsibilities and functions.

The hearing held before Administrative Law Judge Seymour Glanzer (Presiding Officer), consumed four days and generated 535 pages of transcript and 27

[1] Two additional parties, Georgia Ports Authority and South Carolina Ports Authority, were granted leave to appear specially at the hearing of the case, but did not actually participate in the proceeding.

numbered exhibits. The Initial Decision served April 12, 1978, found for the Respondents. Exceptions were filed by WGMA. Replies to Exceptions were submitted by PHA, New Orleans and Hearing Counsel (hereinafter jointly referred to as "Respondent").

The Presiding Officer held that terminal tariffs are not agreements within the meaning of section 15.[2] He also determined that the PHA tariff provisions were not unjust or unreasonable, because the carrier's obligation to the shipper requires it to provide terminal facilities, the vessel agents separately *agreed* to be liable for the charges, and port efficiency is promoted by making the carrier's agent responsible for payment of the vessel's charges for the use of the facility.[3] The 4% allowance was found to be reasonable and compensatory to the vessel interests.

The Presiding Officer also decided that PHA violated its own tariff by continuing to collect wharfage charges directly from cargo interests on certain direct movements of bulk cargo pursuant to written leases, without remitting the 4% commission to the vessel agents who had in fact billed for these charges pursuant to the tariff requirement. PHA was ordered to pay the allowance on these items to vessel interests, prospectively and retroactively, and to amend its FMC tariff to define the services rendered under the "terminal charge" provisions thereof.

POSITION OF THE PARTIES[4]

Complainant alleges the following errors in the Initial Decision: (1) The Initial Decision contains three erroneous findings of fact;[5] (2) the burden of proof was improperly imposed on Complainant when the Presiding Officer found a "rebuttable presumption of reasonableness" to be present; (3) PHA's terminal tariff provisions should have been held subject to section 15 filing and approval requirements; (4) the imposition of wharfage charges on vessel owners and agents is unreasonable and unjust regardless of whether agents have independently agreed to be liable for wharfage through credit arrangements provided for their convenience; and (5) state law is determinative of the reasonableness of the PHA conduct in question.

In reply, Respondents contend that: (1) the factual errors alleged are irrelevant to the Initial Decision; (2) *Rorie*, *supra*, and *Kerr*, *supra*, are dispositive of the

[2] *City of Galveston v. Kerr Steamship Co., Inc.*, 366 F. Supp 280 (S.D. Tex. 1973) and *Rorie v. City of Galveston*, 471 S.W. 2d 789 (Tex. 1971), were cited as dispositive of the instant section 15 question. Part 533 of the Commission's Rules (General Order 15; 46 C.F.R. Part 533) requires terminal operators to file tariffs for informational purposes on or before the tariff's effective date. Terminal tariffs may be implemented without prior Commission approval.

[3] This practice was found to be prevalent at U.S. ports, *e.g.*, Galveston, Miami and Puget Sound, and virtually identical tariff provisions have been adjudged lawful by courts and the Commission alike.

[4] The Commission has promulgated rules regulating the presentation of exceptions to initial decisions which have not been complied with by the Complainant. The Exceptions filed by Complainant do not indicate with particularity the alleged errors, many of the Exceptions are not briefed, and numerous allusions to the record are unsupported by specific citations. Exceptions filed in violation of 46 C.F.R. 502.227(a) may be rejected without further consideration. *Inter-American Freight Conference Pooling Agreements*, 11 S.R.R. 48 (1969).

[5] Complainant's specific exceptions were: (1) PHA performed unloading operations not loading; (2) PHA did have contacts with freight forwarders and custom house brokers; (3) PHA billed from service orders not delivery orders. It was not stated how these Exceptions (Nos. 1–3) relate to the ultimate issues or outcome of the case. The record does indicate that: (1) PHA engaged in loading operations as well as unloading operations (Tr., at 326), but stopped all operational functions by 1973; (2) If PHA had some limited contacts with freight forwarders and customhouse brokers as "persons shipping the cargo" the contacts were certainly not as pervasive as those of vessel owners and agents and were not of the type that would facilitate effective collection of wharfage as were those of the vessel interests; and (3) PHA billed by delivery orders (Tr., at 326), but service orders are directly based on delivery orders.

section 15 issue; (3) the *Boston Shipping* cases[6] are dispositive of the section 17 issue; (4) the record clearly supports the ultimate finding that PHA's wharfage practices are fair and reasonable.

The majority of WGMA's present arguments were raised before and resolved by the Presiding Officer. The Commission has reviewed the entire record in this proceeding and concluded that the result reached by the Initial Decision was essentially correct. Accordingly, the findings and conclusions of the Initial Decision shall be adopted and made a part hereof except as they may be modified or clarified by this Report.

DISCUSSION

Prior to 1964, steamship agents in Houston were billed for wharfage charges which accrued to cargo. By 1964, pressure from WGMA and several carriers resulted in a change in the terminal practice wherein PHA assumed the burden of billing cargo interests directly. In February 1975, PHA initiated discussions with both cargo and vessel interests that eventually led, over WGMA's protests, to a new tariff being issued on June 1, 1975, effective July 1, 1975, reinstituting the practice of billing vessel owners and agents for wharfage charges. Although the tariff retained the language that the cargo was "liable" for the wharfage charges the vessel owners and agents were made responsible for billing and for payment as "guarantors" of collection.

The change in practice allows the number of invoices mailed to be significantly reduced by aggregating wharfage invoices on a per-ship rather than per-shipment basis and requiring the vessel interest to bill the individual cargo interests. Moreover, because vessel interests in Houston remain in direct contact with shippers and have more extensive physical control over the cargo through their retained stevedoring agents, they are in a better position to enforce collection. WGMA attempted to prove that the new practice was unfair and neither efficient nor better suited for collection enforcement, but the evidence presented on this point supported the PHA's position and not WGMA's. (Tr. 96–110, 140–158, Ex. 20)

1. *Factual Issues*

WGMA excepts to three factual findings of the Presiding Officer (see footnote 5 above). There is merit in exception #2 to the extent that there were some limited contacts between PHA and "persons shipping the cargo," but inasmuch as all three findings are irrelevant to the proper disposition of the proceeding, they need not be discussed further.

2. *The Presumption of Reasonableness and the Burden of Proof*

The Commission has recognized that the historical usage of the term "wharfage" referred to a charge against either the cargo or the vessel[7] *or* both, in accordance with local customs.[8] Recognition of historical diversity might lead

[6] *Boston Shipping Association v. Port of Boston*, 11 F.M.C. 1 (1967); *Boston Shipping Association v. Port of Boston*, 10 F.M.C. 409 (1967).

[7] 46 C.F.R. 533.6(d) (a), wherein wharfage is defined as a "charge assessed against cargo *or* vessel."

[8] *See Baton Rouge Contractors, Inc. v. Cargill, Inc.*, 18 F.M.C. 140, 173 (1975), *aff'd* 530 F.2d 1062, 15 SRR 62 (D.C. Cir. 1976), *Report and Order in Docket No. 875*, SR 325:52, 30 Fed. Reg. 12681 (1965). In the instant case, the tariff imposed a form of liability on both cargo *and* vessel interests.

one to conclude that a *legal* "presumption" has been created favoring the reasonableness of any wharfage assessment practice, especially in light of the deference which may be afforded to the managerial expertise of terminal operators. *See In the Matter of Agreement No. T-2598*, 17 F.M.C. 286, 297 (1974). Such a conclusion would not be accurate, and was not made in the Initial Decision. The Presiding Officer's statement concerning the burden of proof (I.D., at 22) does not fairly indicate that Complainant bore any greater or different burden than that imposed by the Administrative Procedure Act, 5 U.S.C. 556(d), and section 502.155 of the Commission's Rules. The burden of proof in adjudicative proceedings is upon the party proposing the rule or order, unless otherwise provided by statute. Because WGMA is the party proposing to halt existing tariff practices of PHA, and, no statute places the burden of proof on the Respondent, the burden of proof is squarely on the Complainant.[9]

3. *The Section 15 Issue*

It is established Commission policy that business arrangements of the type ordinarily contained in terminal tariffs are not agreements subject to Shipping Act section 15. *Rorie v. City of Galveston*, 471 S.W. 2d 789, 8 S.R.R. 20,713 (Tex. 1971); *City of Galveston v. Kerr Steamship Co., Inc.*, 362 F.Supp. 280, 8 SRR 20,925 (S.D. Tex. 1973).[10] The applicability of this policy to the present proceeding is clear. First, the terminal tariff is a unilaterally promulgated and uniformly applicable directive of the Port Authority.[11] Secondly, the "consent" language that Complainant relies on as indicative of an agreement is not an integral part of the tariff and adds no independent validity to the imposition of liability provisions.[12] Third, vessel agents are not an entity included in section 1 of the Act,[13] a fact which precludes any independent significance being given to the credit "agreements" negotiated between PHA and the vessel agents. Finally, even if the tariff were characterized as a section 15 agreement, the act of shifting liability from the cargo to the vessel interests would most probably be deemed a

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[9] The practices in question do not require prior approval to be effective and terminal tariffs are not subject to suspension. In *Commonwealth of Puerto Rico v. Federal Maritime Commission*, 468 F.2d 872, 8 SRR 20,852 (1972), the court reversed a Commission ruling that the burden of proof will be imposed upon the proponent of a rule or order, in all instances, including carrier rate cases arising under Intercoastal Shipping Act section 3 and Shipping Act section 18(a) where no suspension of the rate had been ordered. The court reasoned that there is a "common lore of basic approach in rate regulation" derived from the various federal enabling statutes wherein a regulated company seeking to increase its rates and having sole possession of the relevant evidence, has the burden of proof in any such proceeding. This case has been followed in other types of regulatory proceedings in a broader context, *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (1973); *Alabama Power Co. v. Federal Power Comm.*, 511 F.2d 383, 391, n. 14 (1974); *Environmental Defense Fund, Inc. v. Environmental Protection Agency*, 548 F.2d 998, 1017 (1976). In the instant case, however, there is no indication that PHA has sole possession of all relevant evidence concerning the "reasonableness" of its collection practices.

[10] In *Rorie*, the essential issue was whether a crane operator was a borrowed servant subject to the control of a stevedore who rented the crane with its operator, both furnished by the port, under a *lease that, pursuant to the requirements of the terminal tariff, essentially* placed him under the stevedore's control. The stevedore defended, in part, on the theory that the tariff, and hence the lease term controlled by the tariff, was void as it had not been approved by the FMC pursuant to section 15. On this issue the Texas Supreme Court accepted the opinion expressed in the Commission's "*Memorandum Amicus Curiae*" that *terminal tariffs, as such, do not need section* 15 approval to be valid and enforceable. This same rule concerning the section 15 status of terminal tariffs was again relied upon in a fact situation more analogous to the instant case. In *Galveston*, the port authority sued vessel interests for strike demurrage charged to them under the provisions of the terminal tariff. The vessel interests defended on the ground that the tariff provisions were unenforceable as they had not been approved by the Commission.

[11] The mere use of the terms "acceptance and acknowledgement" does not indicate a bilateral agreement within the meaning of section 15, but is more akin to the concept of "consent" or "acquiescense" to conditions unilaterally imposed without the exchange of consideration usually indicated by the term "agreement". *See Rorie* and *Kerr*, *supra*.

[12] *See State of Israel v. Metropolitan Dade County, Fla.*, 431 F.2d 925, 927 (5th Cir. 1970), *indicating that consent provisions of* tariffs are "probably superfluous".

[13] There must be an agreement between two or more persons subject to the Act before section 15 jurisdiction attaches. *Grace Line, Inc. v. Skips A/S Viking Line*, 7 F.M.C. 432, 448 (1962); *Hong Kong Tonnage Ceiling Agreement*, 10 F.M.C. 134, 140 (1966).

routine commercial adjustment rather than an agreement modification requiring prior section 15 approval. *Boston Shipping Association v. Port of Boston* (strike storage), 10 F.M.C. 409, 413–414 (1967); *Boston Shipping Association v. Port of Boston* (wharfage assessment), 11 F.M.C. 1, 5–6 (1967).

4. *The Section 17 Issue*

The core issue in this proceeding is whether the tariff provisions in question are unjust or unreasonable within the meaning of Shipping Act section 17, and on that issue *Boston Shipping Association v. Port of Boston Marine Terminal,* 11 F.M.C. 1 (1967) is solidly on point. There, the Massachusetts Port Authority, by amending its tariff provisions, had shifted the imposition of wharfage charges from the cargo to the vessel. This was attacked by the Boston Shipping Association, a group of the same interests as comprise WGMA, on the ground that, *inter alia,* it violated section 17. The Commission essentially found that wharfage was an appropriate charge against the vessel interests because the terminal provided a service which furthered the carriers' transportation obligation to provide shippers with adequate terminal facilities.

WGMA seeks to distinguish the *Boston* wharfage case by showing that PHA *elected* to assess wharfage against cargo in 1964, and, having made that election, is stopped from now holding vessel interests liable as well. Nothing in *Boston Shipping* or any other authority cited by Complainant mandates such an irrevocable election by a terminal operator, and the Commission rejects this rigid interpretation of section 17. Shipping industry practices should be flexible and innovative as long as they are also fair. If it can be reasonable for vessel interests to be made *primarily* liable for wharfage as users of the service, it can be equally reasonable to make them jointly liable with the cargo interests (who are likewise users of the service).

The reasonableness of PHA's tariff amendment becomes manifest when scrutinized under section 17 standards. The test of reasonableness as applied to terminal practices is that the practice must be otherwise lawful, not excessive, and reasonably related, fit and appropriate to the ends in view. *Investigation of Free Time Practice—Port of San Diego, Cal.,* 9 F.M.C. 525, 547 (1966); *Boston Shipping, supra,* at 9; *Assembly Time–Port of San Diego,* 13 F.M.C. 1, 13–14 (1969); *Agreement No. T-2598–Port Canaveral and Luckenbach S.S.,* 17 F.M.C. 286, 300 (1974).[14] A just and reasonable allocation of charges is one which results in the user of a particular service bearing at least the burden of the cost to the terminal of providing the service. *Boston Shipping Association v. Port of Boston,* 10 F.M.C. 409, 414 (1967). There is no question that vessel owners, agents and cargo interests are "users" of the terminal facilities and derive a benefit therefrom, at least in a vicarious sense. It is irrelevant that steamship agents do not directly use the facility, they are agents for persons who do. The only things that actually physically use the facilities are inanimate objects (the ships and the goods) and the loading and unloading crews. It would be contrary to all common sense to say that only those physically using the facility can be liable for the charges associated therewith. *Boston Shipping Association* (strike storage), *supra,* at 416–417.

[14] The level of charges must also be reasonably related to an actual service performed or a benefit conferred on the person charged. *Volkswagenwerk A. G. v. F.M.C.,* 390 U.S. 261, 282, 8 SRR 20,109, 20,132 (1968); *Indiana Port Commission v. Federal Maritime Commission,* 521 F.2d 281, 15 SRR 45, 49 (1975); *Baton Rouge Contractors, Inc. v. Cargill, supra,* at 174.

There is no question of the level or apportionment of the charges presented here as this issue has not been raised in the proceeding. It only remains to determine whether the practice is reasonably related to the ends in view. PHA's objective is to promote overall port efficiency by reducing the costs of facility operations. The practices of imposing the billing and collection of wharfage on the party who can most efficiently effectuate and enforce the same, insuring all revenues due the port are collected by extending the liability for wharfage to all persons who derive a benefit from the use of the wharves, and looking first to the parties over whom the port has the highest degree of collection leverage, all bear a reasonable relation to these stated ends.

Several other West Gulf Ports follow these practices, particularly the Port of New Orleans where a similar tariff provision has proven to be most reasonable, efficient, and capable of achieving "the ends in view" (Ex. 23). Personnel from PHA testified as to the advantages of the new system and the disadvantages of the old (Tr., at 322, *et seq.;* Ex. 20), indicating that duplicitious re-billing was eliminated, credit arrangements were facilitated, problems of determining responsible parties were eliminated, and the volume and costs of invoicing wharfage charges were drastically reduced. Conversely, WGMA personnel admitted (Tr., at 127, *et seq.;* 184, *et seq.*) that by utilizing good business practices no substantial losses were incurred from uncollectible wharfage charges, and no appreciable added expenses had actually been experienced.

The record does not contain substantial evidence indicating that WGMA is experiencing undue costs or risks under the new collection system. Moreover, the burden of establishing the unreasonableness of the practice is squarely upon WGMA.

5. *Agency Law and State Law Contentions*

Complainant relies heavily on principles of legal duress, business coercion and agency in an attempt to establish that the terms of the tariff under attack are unlawful under section 17, as a matter of law. That is, they assert that if the tariff provisions run afoul of state law concerning business duress and coercion principles or common law agency principles that this is a *per se* violation of section 17.[16]

The simple answer to both these assertions is that, while tenets of state and common law may be evidence of reasonableness and of local business practices, they are not alone dispositive of Shipping Act issues, absent a showing that these principles directly apply to Shipping Act considerations. *Terminal Lease Agreement at Long Beach, Cal.* 11 F.M.C. 12, 26 (1967). WGMA has not demonstrated that the alleged transgressions of Texas or common law have such an application, and the Commission could end its inquiry into these Exceptions at this point.

The Presiding Officer, however, dealt with these "issues" at length, and to ensure full exposition of WGMA arguments, some discussion of these matters is warranted.

[16] Federal Court decisions concerning agency law principles establish *state* rather than federal law. Although certain specific subjects of "federal common law" may still exist following *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938), see annotation 31 L. Ed. 2d 1006, agency principles are determined by the law of the situs of the agency arrangement. RESTATEMENT OF CONFLICT OF LAWS, sections 342, 343; 3 Am. Jur. Agency, section 8.

As to the issue of duress under Texas law, the gist of Complainant's theory appears to be that the imposition of terms of a terminal tariff upon a party using the terminal when deemed onerous by that party constitutes unlawful duress and business coercion. PHA, however, is a public facility open to all comers willing to be subject to its terms and conditions of usage. If one finds PHA's tariff terms unbearable, the record indicates that one may simply utilize the private facilities at the port and eschew the public facility.[16] All who do decide to use the public facilities are users of their own free will. If WGMA's theory were accepted by the Commission, no terminal tariff at any public facility in the State of Texas would be enforceable unless each and every user of the facilities found all terms acceptable to it. This does not appear to be the import of Texas law. *Rorie* and *Kerr,* both Texas decisions, allowed the imposition of unilaterally promulgated tariff terms upon parties unwilling to accept the force of law behind those provisions.[17]

As to the issue of the application of agency law principles in finding vessel agents lawfully liable under the tariff, the factual circumstances of this case fail to indicate anything illegal about PHA's practice. The best justification under agency law to find the vessel agents liable for wharfage charges is their prior course of conduct, normal business practices, and continuing and voluntary use of the facility, all of which indicate that they have in fact separately agreed to be liable. The prior practice between the parties has been that the agents established independent credit arrangements with the port on behalf of their principals with the understanding that PHA was extending the credit "knowingly and exclusively."[18] *to the agent* rather than going through the burdensome routine of having the vessel owners post adequate security for each ship berthing at the port. (Tr., at 330–331, Ex. 20.)

Even without the prior course of conduct, agency law does not prohibit an offeror of services to the public to condition the rendering of services to any party upon that party agreeing to be personally liable for the charges regardless of whether they are using the service on their own behalf or for a principal, disclosed or not. That is, there arises an agreement outside the scope of the agent's agreement with its principal that is not controlled by agency principles. This is exactly the situation presented in this case and is the principle embodied in the tariff impliedly agreed to by the agents when utilizing the facility. *Folgner v. Italian Line,* 383 F.Supp. 816, 818 (D.C. C.Z. 1974). There is nothing to prevent the agent from obtaining an indemnification agreement from its principal or requiring the principal to furnish advance security directly to PHA.

6. *Miscellaneous Matters*

Several issues initially pursued by WGMA, were not raised on Exceptions and will be deemed to have been abandoned. However, to make the record complete

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[16] Of thirteen private facilities at Houston the record discloses that only Manchester Terminal Company has not adopted the subject PHA Tariff Provision (Ex 10, Tr at 133–138). The other private facilities are Adams Terminal, Anchortank, Inc., Bethlehem Steel Corp, GATX Terminals Corp., Goodpasture, Inc, Greens Bayou Terminal, Houston International Terminal, Intercontinental Terminal, New Terminal Warehouse, Oiltanking of Texas, Wisco Terminal, Todd Shipyard Corp

[17] *See also* Annotation 79 ALR 655, wherein it appears that there must be the threat of *serious* financial injury, no *viable alternative* business course of conduct and a *lack of resort* to the courts, to constitute unlawful business coercion

[18] This would seem to fulfill the requirements of liability under Texas agency law as stated by WGMA in its Exception No. 31 (Exceptions, at 9) citing *American Appraisal v. Constantin,* 985 S.W. 2d 1003 (Ft Worth Civ. App. 1936).

a summary of these matters is in order. The 4% commission to the vessel interests was found to be compensatory by the Presiding Officer. Nothing in the record suggests error in this regard. Similarly, the 4% commission due the vessel interests on certain direct movement bulk cargoes of terminal lessees still billed directly by PHA should be paid in accordance with the tariff provisions for those items actually billed by vessel interests. The tariff should be amended to reflect the actual practice at which time no further payments need be made in this regard. Also the definition of "Terminal Charge", a "service" for which users of the facility are assessed, should be stated in PHA's tariff, pursuant to 46 C.F.R. 533.6, as all services for which users of a terminal are billed must be defined in the tariff.

THEREFORE, IT IS ORDERED, That the Initial Decision issued in this proceeding is adopted, as supplemented herein, and the Exceptions of West Gulf Maritime Association are denied; and

IT IS FURTHER ORDERED, That the complaint of West Gulf Maritime Association is denied; and

IT IS FURTHER ORDERED, That within 30 days following the service of this Report, the Port of Houston Authority amend its Terminal Tariff No. 8 to accurately reflect the actual practices employed in direct billing and collection of wharfage charges on certain direct loading movements of bulk cargo or to cease and desist from following collection practices not stated in said tariff; and

IT IS FURTHER ORDERED, That the Port of Houston Authority promptly pay collection commissions, without interest, on direct movement cargoes to all vessel interests that have complied with Terminal Tariff No. 8's provisions regarding the billing and collection of wharfage charges on such movements between July 1, 1975, and the 30th day following the service of this Report; and

IT IS FURTHER ORDERED, That the Port of Houston Authority file with the Commission's Secretary within sixty (60) days from the service date of this Report a full accounting of all collection commission payments made pursuant to the preceding ordering paragraph; and

IT IS FURTHER ORDERED, That the Port of Houston Authority amend its Terminal Tariff No. 8 to include a definition of "terminal charge"; and

IT IS FURTHER ORDERED, That this proceeding be discontinued.

(S) FRANCIS C. HURNEY
SECRETARY

FEDERAL MARITIME COMMISSION

No. 75-21

WEST GULF MARITIME ASSOCIATION

v.

PORT OF HOUSTON AUTHORITY OF THE
PORT OF HOUSTON, TEXAS

Adopted August 16, 1978

PHA's practices and tariff provisions making the vessel, vessel owners and vessel agents responsible for payment of wharfage charges found not to violate sections 15, 16 First or 17 of the Shipping Act.

Complaint ordered dismissed and proceeding ordered discontinued.

PHA ordered to comply with provisions of its tariff requiring payment of 4% allowance to vessel interests on wharfage charges collected by PHA from lessees at PHA's terminal.

Robert Eikel, for West Gulf Maritime Association, complainant. *F. William Colburn*, for Port of Houston Authority, respondent. *Edward Schmeltzer, Edward J. Sheppard, J. Thomas Esslinger* and *George Weiner*, for the Board of Commissioners of the Port of New Orleans, intervenor.

John Robert Ewers and *Lizann Malleson Longstreet*, as Hearing Counsel.

Sam H. Lloyd, for Georgia Ports Authority, appearing specially. *Marion S. Moore, Jr.*, for South Carolina Ports Authority, appearing specially.

INITIAL DECISION[1] OF SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE

This is a complaint proceeding, filed June 11, 1975, pursuant to the provisions of section 22 of the Shipping Act, 1916,[2] by West Gulf Maritime Association (WGMA), complainant, alleging violations of sections 15 and 17 of the Shipping Act, 1916,[3] by Port of Houston Authority of the Port of Houston, Texas (PHA),[4] respondent, and requesting that specified tariff matter published by the respondent be declared void, unjust, unreasonable, discriminatory, and unlawful and further requesting the issuance of an order requiring respondent to cease and desist from putting that tariff matter into effect or acting in conformity with that tariff matter or seeking to enforce that tariff matter against complainant's members and requesting still further the issuance of such orders as may be

[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).

[2] 46 U.S.C. 821.

[3] 46 U.S.C. 814 and 816.

[4] PHA's proper name is Port of Houston Authority of Harris County, Texas.

necessary to secure compliance with the law by respondent. Reparation is not requested.

PHA answers that the tariff matter is just and reasonable and not discriminatory and that it is not violative of any provision of law.

WGMA is a trade association composed of (1) almost all the steamship agents representing operators of deep sea cargo vessels using the ports of the Gulf of Mexico from Lake Charles, Louisiana, to Brownsville, Texas, inclusive, (2) the owners of some of those vessels and (3) stevedoring firms whose employees load and unload those vessels. The complaint is on behalf of the steamship owner and agent members engaged in business operations at the Port of Houston.

PHA is a governmental agency and body politic of the State of Texas, established under authority of Article 3, Section 52 of the Texas Constitution. Under provisions of the Texas Water Code[5] PHA is authorized, among many other things, to acquire land and purchase, construct, enlarge, extend, repair, maintain, operate or develop wharves and docks and all other facilities or aids incidental to or useful in the operation or development of its ports or waterways or in aid of navigation and commerce in the ports and on the waterways (Section 60.101). PHA is also empowered to prescribe fees and charges, to be collected for use of its land, improvements and facilities. The fees and charges must be reasonable, equitable, and sufficient to produce revenue adequate to pay expenses set forth in the Code (Section 60.103).

In particular, WGMA's complaint lies against certain revisions in PHA's tariff dealing with billing and collection of "wharfage charges assessed by the respondent against cargo moving outbound and inbound across respondent's wharves" which were issued June 1, 1975, and became effective July 1, 1975. The complaint places in issue the following tariff provisions which appear in PHA's Tariff No. 8 at Thirteenth Revised Page No. 14, Item 3:

> 3. Terminal Charges, set forth in item No. 59, and Wharfage Charges, set forth in Item No. 65, are liabilities of the owner of the cargo; however, the collection and payment of same to the Port Authority must be guaranteed by the vessel, her owners and agents, and the use of Port Authority facilities by the vessel, her owners and agents, shall be deemed an acceptance and acknowledgement of this guarantee.
>
> 3.2. As compensation to said vessel, her owners and agents, for such collection and payment of terminal and wharfage charges, as specified in Items 59 & 65, the Port Authority shall pay a fee of four per cent (4%) of the total terminal and wharfage charges incurred and billed to the vessel, her owners and agents.
>
> 3.3. Wharfage charges on cargo shall be assessed on the basis of manifest weights, unless otherwise provided herein.[6]
>
> Wharfage is defined in the tariff[7] as follows: A charge on any commodity placed in a transit shed or on a wharf, or passing through, over, or under a wharf; or transferred between vessels, or loaded to or unloaded from a vessel at a wharf, regardless of whether or not wharf is used. It does not include sorting, piling, weighing, handling, insurance, custom charges, revenue stamps, or fees of any nature imposed by the State or Federal Government against the shipments or vessels transporting them.

Neither the definition of wharfage, the wharfage charge nor the levels of charges for wharfage set forth in Item No. 65 of PHA's tariff[8] are under attack.

[5] The cited provisions of the Texas Water Code formerly appeared in Article 8247a, Sections 1 and 2, V.T.C.S. .

[6] Although mentioned in the complaint, the validity of Item 3.3 is not assailed.

[7] PHA's Tariff No. 8, First Revised Page No. 11.

[8] *Id.*, beginning at Twenty-Third Revised Page No. 72.

Therefore these matters are not in issue. However, it may be observed that both the definition and method of computation of wharfage charges appear to comport with the requirements of regulation.[9]

Terminal Charge is not defined in PHA's tariff. As is the case with wharfage, neither the terminal charge itself nor the level of any charge thereunder in Item No. 59 is in issue. According to the tariff,[10] terminal charges are in addition to wharfage charges, but there are only two commodities, automobiles and bananas, subject to terminal charges. WGMA proffered no testimony or argument in opposition to the terminal charge.

There are two intervenors, Hearing Counsel and the Board of Commissioners of the Port of New Orleans (New Orleans). New Orleans is an agency of the State of Louisiana created for the purpose of regulating and promoting the commerce and traffic at that port and administering and maintaining its public wharves and other terminal facilities. Both participated in the proceeding. Two other persons were allowed to make special appearances at the hearing. They are the Georgia Ports Authority and South Carolina Ports Authority. Neither of them participated in the proceeding.

There were four days of hearing. The record comprises 535 pages of transcript and 27 numbered exhibits. All participating parties submitted briefs.

POSITIONS OF THE PARTIES

WGMA urges that the guarantee in Item No. 3 and another provision of PHA's tariff, Item No. 2, entitled Application and Interpretation of Tariff,[11] which has been in effect since, at least, 1959, and which provides—"The use of the waterways and facilities under jurisdiction of the Navigation District shall constitute a consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their owners and agents, and other users of such waterways and facilities to pay all charges specified and be governed by all rules and regulations herein contained."—are nullities because lawful tariff provisions do not rest upon consent and therefore should be given no consideration in the determination of the complaint; that those provisions, which have not been approved by the Commission, constitute a violation of section 15; that only those tariff provisions which are required by law to be included within a tariff are binding upon persons dealing with a public utility or government agency. Therefore tariff provisions like those in Item Nos. 2 and 3 which are not required to be filed and which impose upon vessels and vessel's agents the duty to bill for and collect from cargo interests wharfage charges owing to the port by such interests and the duty to guarantee payment of those charges are illegal and void; that tariff provisions requiring vessels and vessels' agents to bill and collect cargo charges constitutes duress and business coercion, therefore those provisions are void and unenforceable; that Item No. 3 is discriminatory, unjust and

[9] The Commission's Regulations for Filing of Tariffs by Terminal Operators define wharfage as follows, 46 CFR 533.6(d)(2): A charge assessed against the cargo or *vessel* on all cargo passing or conveyed over, onto, or under wharves or between vessels (to or from barge, lighter, or water), when berthed at wharf or when moored in slip adjacent to wharf. Wharfage is solely the charge for use of wharf and does not include charges for any other service. (Emphasis supplied.)

[10] PHA's Tariff No. 8, Thirteenth Revised Page No. 58.

[11] *Id.*, Original Page No. 12.

unreasonable, hence unlawful and in violation of sections 16[12] and 17 of the Shipping Act. In its reply brief WGMA also urges that Item Nos. 2 and 3 have the effect of unlawfully making vessels and vessel's agents the agents of the port without consent.

PHA asserts that the tariff provisions constitute fair and reasonable measures adopted by it in the discharge of statutory duties placed upon it in the operation of public port facilities and that the tariff provisions and wharfage billing pratices are not in violation of sections 15 and 17. New Orleans argues that the tariff provisions are necessary to the efficient operation of ports, are not precluded by General Order 15[13] and are not discriminatory or unreasonable and that questions of Texas law are irrelevant. Hearing Counsel contends that the tariff matter is consistent with the requirement of law, are not discriminatory, preferential, prejudicial or unreasonable and are lawful.

Historical Background of the Tariff and Comparison with Other Ports' Tariffs

Going back as far as 1933 and continuing to 1964, wharfage charges were billed to and collected from the vessels, vessel owners or vessel agents by PHA.[14] During that time, the tariff provision relating to wharfage provided (Item 3(c)).

All vessels and their owners receiving any commodity on a wharf or in a transit shed, or loading or unloading any commodity while at a wharf, hereby contracts to pay and are responsible for the wharfage on such commodities, at the rate provided herein, to be collected either from vessels, their owners or their agents.

In 1964, in response to requests made by vessel owners and agents, PHA changed its wharfage billing and collection practices by shifting liability for wharfage charges to the owner of the cargo and placing responsibility for payment of invoices upon the cargo owner or his agent—the freight forwarder on outbound cargo and the customs broker on inbound cargo. This was accomplished by substituting a new Item 3(c), effective April 1, 1964. It provided:

Liability for wharfage charges, set forth in item number 65, will be the responsibility of the owner of the cargo and the Port Authority will invoice and collect from such owner or authorized agent.

About 1972 or 1973 PHA made another changeover in its practices. Until then it had performed as an operating terminal, loading outbound cargoes aboard vessels. When it stopped those terminal operations, PHA advised vessel owners and agents that it was contemplating a further change in its wharfage billing practices by way of reversion to tariff provisions similar to those in effect until April, 1964. PHA did not implement that change immediately. The matter remained dormant for a while, but PHA's interest in effectuating the change revived in 1975. There then ensued numerous discussions involving PHA officials and staff members, vessel owners and agents, freight forwarders and others. The outcome of those discussions was a revocation of Item 3(c) as it

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[12] 46 U.S.C. 815. N.B. The complaint does not invoke section 16. Even if evidence of undue preference or prejudice had been adduced, complainant made no motion to amend the complaint or to have the pleadings conform to the proof.

[13] 46 CFR 533.1 et seq.

[14] Formerly, PHA was known as Harris County Houston Ship Channel Navigation District.

existed since 1964. It was replaced by Item Nos. 3 and 3.2, the tariff provisions in issue here.

The net effect of Item Nos. 3 and 3.2 is to assess wharfage charges on the cargo according to its manifest weight, but to make the vessel, its owner or agent, directly responsible for collection and payment of those charges to PHA. In consideration of the collection and payment efforts of vessel owners and agents, PHA commits to pay them compensation at the rate of 4% of the total of wharfage and terminal charges collected by PHA.

Tariff provisions, virtually identical to Item Nos. 3 and 3.2, are published by New Orleans. However, New Orleans pays only a 3% fee for collection and payment to vessel owners and agents. The practice of looking to vessel owners and agents at New Orleans dates back to a time at least before World War I, and probably goes back to the creation of New Orleans in 1896.

Provisions similar to Item No. 3 appear in tariffs published by the Port of Lake Charles, Louisiana, Port of Corpus Christi, Texas, and Port of Port Arthur, Texas, since, at least, 1968, 1974 and 1972, respectively.

WGMA vessel owner and vessel agent members serve one or more of the ports named above.

FACTS

PHA reinstituted the practice of looking to vessel owners and agents for collection and payment of wharfage charges on the basis of staff recommendations for various reasons. Generally, PHA took into account that collecting from the cargo interests was inefficient because it required redundant administrative procedures in order to insure collection; and that collecting from cargo interests was costly because of that redundancy and because all too often PHA was unable to collect the charges from cargo interests—sometimes not at all and other times only after repetitious solicitation—due mostly to the fact that many cargo interests were beyond the jurisdiction of Texas for the service of legal process. PHA also recognized that while it had no direct contact with the persons shipping the cargo, shipowners and their agents almost invariably did. E.g., 99% of the cargo transported out of New Orleans and PHA by Hellenic Lines Limited, a ship owner, was booked by Hellenic following solicitation of that cargo from shippers by Hellenic employees or Hellenic's network of agents.

The particular difficulties encountered by PHA under the tariff provisions in effect from 1964 to 1975 and the anticipated benefits under the new tariff provisions were explained by PHA's Controller.

Under his supervision in 1974, there were 52 employees whose major responsibility was insuring that PHA be paid the charges due PHA for the use of its facilities. In that year PHA spent more than $400,000 in salaries and fringe benefits for those employees. Approximately half of those salary expenses were occasioned by the need to redundantly oversee the billing, collection, and audit of wharfage charges due PHA from cargo interests.

The Comptroller pointed out the more notable deficiencies of the old system.

A basic document used by PHA in billing wharfage charges was the delivery order. But, delivery orders, prepared by the cargo interest or cargo representative, frequently showed estimated volume. Thus, because wharfage charges under the tariff are based on actual volume, a second invoice often became necessary, but the required adjustment could not be made until PHA received a copy of or audited the vessel manifest which showed the actual volume of the shipment. By the time PHA obtained the manifest or audited it, the vessel was at sea.

Vessel owners or their agents in Houston or other cities often booked shipments for cargo interests which had not established credit or had no previous business experience with PHA. This created processing delays because PHA service orders could not be issued until credit arrangements were made. Making those arrangements entailed added expense to PHA. Anomalously, in view of the nature of the complaint, in most instances those arrangements were made with WGMA vessel owners and vessel agents who volunteered to accept on behalf of the cargo interests the billing of wharfage and other terminal charges to their credit accounts with PHA.

Vessel owners or their agents permitted stevedores to load outbound cargo directly from the overland surface carrier to the vessel and inbound cargo directly from the vessel to the overland surface carrier without advising PHA nor providing PHA with information identifying the cargo interests responsible for payment of wharfage charges. These facts would come to PHA's attention only after a detailed audit of the vessel manifest. But by the time the audit could be conducted, a task which in itself involved substantial clerical time and effort and which was often subject to further delay because of failure to provide the manifest promptly, collection of wharfage charges from cargo interests would become difficult even in the case of cargo interests located in Houston. If the cargo interest was located beyond Houston or had no local representative or had no credit arrangement with PHA, collection was frequently impossible or uneconomical and had to be written off. This drawback to the old system was particularly severe in the case of inbound cargo because, once the customs broker had released the cargo from the dock his relationship with the cargo interest terminated and there remained no local cargo interest to look to for payment.

Not only did the practices under the former rule adversely affect PHA's efforts to collect wharfage promptly and efficiently, but they also impeded PHA's wharf demurrage efforts because PHA had to rely upon documents in the possession of vessel interests which were either not turned over to PHA in time to bill the cargo interests while the shipment was at the terminal or did not become available until PHA's audit.

The changeover to billing the vessel interests was productive of immediate benefits to PHA. This was revealed statistically. During the months of April, May, and June 1975, the last three months prior to the change PHA issued 14,888, 17,269 and 15,320 original wharfage invoices, respectively. Afterwards, in July and August 1975, PHA issued but 6,149 and 3,888 original wharfage invoices, respectively. Also, during April, May, and June 1975, PHA issued 772, 567 and 753 wharfage adjustment invoices, respectively. However, in August 1975, only 467 wharfage adjustment invoices were issued. It was estimated that the number of adjustment invoices will be further reduced to about 100 per month after all the pre-changeover adjustments have been accounted for.

Another estimate, based upon 1974 statistics shows that the net annual reduction in PHA's expenses to be achieved by the changeover will amount to $195,000. The 4% allowance to vessel interests will absorb about $155,000 of that sum per year. Thus, PHA is expected to save $40,000, annually, on salaries, in addition to insuring collection of all wharfage charges due it.

Although vessel owners and vessel agents will incur greater bookkeeping expenses under the changeover, most, if not all, of those expenses will be recouped by the 4% allowance. This is evidenced by the experience of one vessel owner operating at both New Orleans and PHA. At New Orleans, that vessel owner would have been fully compensated by the 3% allowance provided by New Orleans, had it recovered all wharfage charges from cargo interests. Because that vessel owner will not release inbound cargo until all wharfage is paid,[15] it is the collection of outbound cargo wharfage, primarily from freight forwarders, which makes the 3% allowance less than fully compensatory. But that vessel owner sometimes does not press its claim for outbound wharfage out of fear of loss of business from freight forwarders who represent the cargo interest in the selection of water carriers.

There is ample evidence that the 4% allowance will be fully compensatory to vessel owners and vessel agents if they collect all wharfage charges from cargo interests and if PHA pays the 4% allowance on all wharfage it collects. In some instances PHA does not pay that allowance, that is—where, under written lease agreements between PHA and lessees, the wharfage is paid directly to PHA by the lessee. However, vessel interests are not informed of those lease provisions. Consequently, they do incur the expense of billing PHA's lessees for wharfage and collection until the lessee advises that the charges have been paid directly to PHA. Contrary to the requirements of its tariff, PHA has not paid the vessel interests the 4% allowance in those situations. PHA stated that it would correct this situation which it had overlooked prior to the hearing. As of the time of this initial decision no correction has been made.

THE STATUTES

As pertinent, section 17 provides:

Every * * * other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

As pertinent, section 13 provides:

That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or

[15] The practice of not releasing inbound cargo until wharfage is paid is followed by at least one vessel agent at PHA.

cooperative working arrangement. The term "agreement" in this section includes understanding, conferences, and other arrangements.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation;***

DISCUSSION AND CONCLUSIONS

A: GENERAL

The underpinning of WGMA's complaint alleging that PHA's tariff violates sections 15 and 17 of the Shipping Act seems to lie in a deep rooted conviction that, under both the common law and the Shipping Act, terminals are bound to look only to the cargo and never the vessel for payment of wharfage charges and that any departure from that principle somehow must be in violation of law. WGMA's preoccupation with its theory, for which it cites no supporting common law authority nor any Commission or Court decisions under the Shipping Act, is what leads WGMA astray in this proceeding,[16] the common law has been preempted by the statutory provisions of the Shipping Act and the rules and regulations promulgated pursuant to that Act. *See, e.g., Adams Express Co. v. Croninger,* 226 U.S. 491 (1913); *Boston and Maine RD. v. Hooker,* 233 U.S. 97 (1914). It is well settled by case law and the Commission has sanctioned by regulation that wharfage is an appropriate charge against the vessel. Indeed, tariff provisions, of the very type in issue here, have received approbation of the Commission and the Courts in the past. I will explain.

B: WHARFAGE AS A CHARGE AGAINST THE VESSEL

Those persons, including governmental instrumentalities, like PHA, who operate terminal facilities are "other persons subject to this [Shipping] Act" as defined in section 1 of the Act, 46 U.S.C. 801. The quoted phrase covers "any persons not included in the 'term common carrier by water,' carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water." Thus, "there can be no doubt that wharf storage facilities provided at shipside for cargo which has been unloaded from water carriers are subject to regulation by the Commission." *California v. United States,* 320 U.S. 577 586 (1944). "[A]s the expert body established by Congress for safeguarding this specialized aspect of the national interest, [the Commission] may, within the general framework of the Shipping Act, fashion the tools for so doing." *Id.*

Under its mandate, the Commission formulated regulations governing the filing of tariffs by terminal operators. 46 CFR 533.1 et seq. Recognizing that wharfage is a terminal service which is provided "in furtherance of the *carriers* obligation," *see, Boston Shipping Assn. v. Port of Boston Marine Terminal,* 11 F.M.C. 1, 9 (1967), the Commission determined that "wharfage is an appropri-

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[16] Inasmuch as, historically, the ocean common carrier's transportation obligation extended beyond carriage on the high seas and included the obligation to provide terminal facilities which could be made accessible to consignors and consignees of cargo, see discussion, *infra,* it is difficult to perceive how, at common law, the cargo interests and not the vessel interests would be considered primarily liable for wharfage charges.

ate charge against the vessel." *Id.* Consequently, the regulations governing terminal operators' tariffs expressly sanction the practice of assessing wharfage charges against vessels. See text of 46 CFR 533.6(d)(2) at n. 9, *supra,* in which wharfage is defined as a "charge assessed against the cargo or *vessel.*" The rationale of the regulation and *Boston Shipping Assn.* conforms to principles laid down in a host of other cases, as will be seen.

The validity of assessing wharfage against the vessel interests, under section 17, is subject to a test of reasonableness, that is—whether the practice is "fit and appropriate to the end in view." *Investigation of Free Time Practices–Port of San Diego,* 9 F.M.C. 525, 547 (1966); *Boston Shipping Assn. v. Port of Boston Marine Terminal, supra.* Reasonableness under this standard turns on whether the charge is assessed by the terminal against the user of the service. In other words, "A just and reasonable allocation of charges under section 17 is one which results in the user of a particular service bearing at least the burden of the cost to the terminal of providing the service (citations omitted)," *Boston Shipping Assoc., Inc. v. Port of Boston,* 10 F.M.C. 409, 414 (1967). Failure to impose wharfage charges on users causes mischief because it makes that service parasitic on other terminal rates. "Where the users of a particular service do not provide their share of essential terminal revenues a disproportionate share of the burden is unjustly and unreasonably shifted to users of other terminal services." *Id.*

In urging that wharfage should be assessed against the cargo interests (that is, shipper, consignee, freight forwarder, broker or other cargo representative), complainant appears to lock on the words in PHA's tariff that "Wharfage Charges . . . are liabilities of the owner of the cargo" as dispositive of the question of user. However, complainant is in error for this assumption overlooks the nature of the obligation of the carrier to the shipper. It is well settled that the carrier's responsibility to the cargo does not end when the vessel ties up at the dock. Judge Prettyman stressed the extent of the obligation in *American President Lines v. Federal Maritime Board,* 317 F. 2d 887, 888 (D.C. Cir. 1963):

> Ships bringing transoceanic freight into port are required by their transportation obligation, absent a special contract, to unload the cargo onto a dock, segregate it by bill of lading and count, put it at a place of rest on the pier so that it is accessible to the consignee and afford the consignee a reasonable opportunity to come and get it. This was settled by the courts many years ago. (Footnote citations omitted.)

Thus, on inbound cargo, the vessel's obligation does not end until it makes a tender of the cargo for delivery to the consignee at the pier. Afterwards, "Consignees are obligated, after notice and reasonable opportunity to come and pick up their goods at the pier." *American President Lines, v. Federal Maritime Board, supra,* this allowance by the carrier to the consignee of a reasonable opportunity to come and get 'his cargo' is what is known in the industry as 'free time'."[17] *Investigation of Free Time Practices–Port of San Diego,* 9 F.M.C. 525, 529 (1966).

[17] Wharf demurrage charges, or those charges which accrue after the expiration of free time, are not involved in this proceeding. Therefore, it is unnecessary to discuss the circumstances, like strikes, under which the carrier's obligation might be extended beyond normal free time periods. *Cf. The Boston Shipping Assoc., Inc. v. Port of Boston, supra; The City of Galveston, v. Kerr Steamship Co., Inc.,* 362 F. Supp. 280 (S.D. Tex 1973), *aff'd* 503 F. 2d 1401 (5th Cir. 1974), *Cert. denied* 420 U.S. 975 (1975).

Responding to an argument similar to the one urged here by complainant, the Commission offered a further explanation of why the obligation for wharfage lies with the vessel, despite the euphemism that wharfage is a liability of the cargo, in *The Boston Shipping Assoc., Inc. v. Port of Boston, supra,* 10 F.M.C. at 416–417:

> When the cargo is in free time, the terminal facility—the pier—is being provided by the terminal to the carrier so that the carrier may discharge its full transportation obligation to the consignee. It is the duty of the carrier to provide this service to the consignee and it has chosen to do so through an arrangement with the terminal. No one would argue that the carrier should pay the terminals' cost of providing the pier for the free time period itself.* * *
>
> That the services in question were supplied to the cargo is in one sense a valid statement. In transportation all the services, be it the actual carriage or the variety of attendant services, are performed for or supplied to the cargo, the ultimate object being to move the cargo from the point of origin to its ultimate destination. But the cargo cannot be divorced from the persons owing obligations to it. In the past when considering the proper allocation of terminal charges, it has been customary to divide terminal services into two general categories: those performed for the "vessel" and those performed for the "cargo." While we have no desire to change this customary usage, it must always be borne in mind that the cargo is not some separate entity which is itself capable of paying for services rendered. The charges must be paid by some person standing in a prescribed relationship to the cargo.[18] Thus, where the terminal is the intermediate link between the carrier and the shipper or consignee, one of these two persons must pay the terminal's costs of providing the services rendered. The question here in which of these two should pay the charge in issue. [Footnotes omitted.] We would place the burden upon him who * * * owes an undischarged obligation to the cargo.

Heretofore in this discussion, the carrier's obligation for wharfage has been canvassed in the context of inbound cargo. But it is settled that the same principles are applicable to outbound cargo as well. The vessel is required, as part of the obligation of carriage, to provide terminal facilities for the receipt of outbound cargo and to afford a reasonable free time period for the shipper to assemble the cargo prior to loading aboard ship. Therefore, the terminal becomes, in effect, the agent of the carrier for this service. Accordingly, it is appropriate to place liability for payment of outbound wharfage on the vessel—the user of the service. *See, e.g., Investigation of Free Time Practices–Port of San Diego, supra,* in which the Commission explained, at 539:

> It is the carrier's obligation not only to afford the necessary free time but also to provide terminal facilities adequate to render such free time meaningful and realistic. *Intercoastal Rates To and From Berkeley, Etc.*, 1 U.S.S.B.B. 365 (1935). This obligation may be fulfilled either by the carrier itself or through an agent. *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. 400 (1935).
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> The tariffs on the ocean carriers in the foreign offshore trades calling at San Diego make no provision for free time, nor do the carriers provide wharfs or piers at San Diego for the receipt and delivery of cargo. [Footnote omitted.] The port of San Diego provides these facilities, and the free time in question is provided for in its tariff. Under these circumstances the port becomes in effect the agent of the carrier for the performance of these obligations of the carrier.[19]

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[18] By way of footnote, the Commission indicated it assumed "that convenience alone led to the substitution of 'cargo' for the term 'shipper or consignee' depending *inter alia* whether the shipment was inbound or outbound." 10 F.M.C. at 417. n. 10. Another aspect of the origins of the custom of assessing charges against "cargo" is offered in *Middle Atlantic Conference v. United States*, 353 F. Supp. 1109 (D.C. D.C. 1972). There, the court expressed the belief it "is an outgrowth of a legal concept, peculiar to contracts of shipment at maritime law 'under which the vessel is deemed to contract' in respect to the freight, rather * * * than with the shipper." *Id.* at 1114.

[19] *Cf. Intercoastal S.S. Frt. Ass'n. v. N.W.M.T. Ass'n.*, 4 F.M.B. 387 (1953), in which the principles, expressed earlier in *Terminal Rate Increases–Puget Sound Ports*, 3 U.S.M.C. 21 (1948), and *Terminal Rate Structure–California Ports*, 3 U.S.M.C. 57 (1948), that allocation of terminal charges is to be determined by the nature of the transportation obligations of the carrier to the

Next, complainant urges that the tariff provisions placing liability on the vessel interests are unlawful because those provisions are not required by law to be filed and therefore have no binding effect. In support of this argument complainant cites a provision of the Commission's terminal tariff rules, 46 CFR 533.3 and three court cases, *Port of Tacoma v. S.S. Duval,* 364 F. 2d 615 (9th Cir. 1966); *Pacific S.S. Co. v. Cackette,* 8 F. 2d 259 (9th Cir. 1925), *cert. den'd* 46 S. Ct. 203; *Middle Atlantic Conference v. United States, supra.* The cited cases are inapposite. The rule, as I read it in conjunction with 46 CFR 533.2 and 46 CFR 533(d)(2), mandates a statement in the tariff concerning the identity of the person liable for wharfage.

Complainant's statement of the rule of law in the three cited cases is, of course, correct. In *Middle Atlantic Conference v. United States, supra,* the court expressed the rule this way, 353 F. Supp. at 1122:

> A long line of cases have held under various transportation acts that attempts by carriers to engraft onto a tariff a gratuitous unilaterial provision not contemplated or required by the statute authorizing the filing of tariffs is entirely ineffectual.

Thus, in *Middle Atlantic Conference,* the court affirmed a decision of the Interstate Commerce Commission prohibiting motor carriers from specifying in their tariffs that particular persons, generally referred to as warehousemen, who were not named in the bill of lading as consignors or consignees of shipments, are liable under certain circumstances for charges for undue detention of trucks being loaded or unloaded at their premises. Obviously, the carriers sought to create a new rule of liability by means of a tariff and thereby to effectuate a legislative change in the law which places liability for motor transportation charges on the parties to the contract for transportation.

In *Port of Tacoma v. S.S. Duval, supra,* the court held invalid a lien arising from a tariff provision making vessel interests liable for wharfage because the tariff provision had the effect of nullifying a notice provision of the Maritime Lien Act, 46 U.S.C. 971–975, and particularly, section 973.[20] However, the court struck down only the tariff provisions which conflicted with the lien law. It did not invalidate another tariff provision virtually identical to the one at issue here.

In *Pacific S.S. Co. v. Cackette, supra,* the court held a tariff provision invalid which, contrary to the applicable law at that time, required a passenger to give written notice of a baggage claim within ten days after landing.

Unlike the circumstances in the three cases cited by WGMA which involved tariff provisions in conflict with the law, here, in my opinion, the Commission's rules implementing section 17[21] constrain terminal operators to set forth in their tariffs the identity of the person or persons liable for payment of charges for the different services provided. Under 46 CFR 533.3 terminal operators are required

shipper or consignee and the identity of the user of the terminal services, were reaffirmed. Accordingly, upon findings that the terminal operators, in receiving lumber for outbound movements, were performing a service for shippers and not for carriers, it was held improper to allocate the charge to the carriers. The allocation of charges for a similar service provided by terminal operators for general cargo for the use of carriers was left undisturbed.

[20] That provision has since been deleted. See discussion in *Gilmore & Black, The Law of Admiralty,* §§ 9–41 through 46a at 672–688 (Second Ed. 1975).

[21] The regulations governing the filing of tariffs by terminal operators, 46 CFR 533.1 et seq., are promulgated pursuant to the general rule making authority of section 43 of the Shipping Act, 1916, 46 U.S.C. 841a, which provides: "The Commission shall make such rules and regulations as may be necessary to carry out the provisions of this Act."

to file a "tariff showing all its rates, charges, rules, and regulations relating to or connected with the receiving, handling, storing, and/or delivering of property at its terminal facilities." That rule also carves out an exemption from terminal charges covered by *negotiated* agreements, as follows: "*Provided, however* that rates and charges for water carriers pursuant to negotiated contracts * * * need not be filed for purposes of this part."

Clearly then, absent a negotiated contract with vessel interests, and none has been shown on the record, the tariff must show the rates and charges for wharfage. Recalling that 46 CFR 523.6(d)(2) defines wharfage as a charge assessed against *cargo* or *vessel*, it is imperative for PHA, or any other terminal facility similarly situated, to have its tariff distinguish, by tariff rule or regulation, with clarity, whether it is the cargo or vessel interest which is liable for wharfage. Otherwise one of the major purposes of the terminal tariff regulations—keeping the Commission and the public informed of terminal practices[22]—could not be satisfied. Thus, the tariff provision serves to comply with, rather than being in defeat of regulation, and is entirely necessary and proper.

Given the carriers' transportation obligation to provide accessible terminal facilities, including the use of the wharf, for inbound and outbound cargo, in my opinion 46 CFR 533.6(d)(2) should be construed to mean that ordinarily the wharfage charge in a terminal tariff must be stated as the liability of the vessel interests because the carriers' vessels ordinarily are the users of the wharves.[23] On the other hand, where there is a special contract[24] *(see American President*

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[22] See 46 CFR 533.2, which provides: The purpose of this part is to enable the Commission to discharge its responsibilities under section 17, Shipping Act, 1916, by keeping informed of practices and rates and charges related thereto, instituted and to be instituted by terminals, and by keeping the public informed of such practices.

WGMA also focuses a part of its argument on Item No. 2 of PHA's tariff, entitled "Application and Interpretation of Tariff" which provides: The use of the waterways and facilities under jurisdiction of the Navigation District shall constitute a consent to the terms and conditions of this tariff, and evidence an agreement on the part of all vessels, their owners and agents, and other users of such waterways to pay all charges specified and be governed by all rules and regulations herein contained.

WGMA urges that Item No. 2 is a nullity because tariffs have the force and effect of law, *see Atlantic Coast Line R. Co. v. Atlantic Bridge Co.*, 57 F. 2d 654, 655 (5th Cir. 1932), and do not rest upon agreement or consent. It is correct to say, as WGMA does, that consent cannot alter the effect of a tariff, but that principle and the supporting authorities cited by WGMA have no application to Item No. 2. *Pittsburgh & C. Ry Co. v. Fink*, 250 U.S. 577 (1919), one of the cases cited by WGMA, will serve to illustrate the misapplication of the principle to PHA's tariff.

In *Pittsburgh v. Fink*, the consignee argued that he did not have to pay the railroad's tariff charges because of an agreement he had with the consignor. The Court held that the agreement could not "lessen the obligation of the consignee to pay *the legal tariff rate* when he accepted the goods." 250 U.S. at 582. It is obvious that WGMA misreads the rule of that case which stands for the proposition that a *separate contract entered into* between a consignor and consignee for payment of transportation charges did not supersede the carrier's tariff provisions invoked by the bill of lading, insofar as the liability imposed by law for the payment of transportation charges is concerned. This is so because "the provisions of the tariff enter into and form a part of the contract of shipment." *Boston & Maine RD v. Hooker, supra*, 233 U.S. at 111. (This Commission's tariff rules applicable to domestic and foreign commerce require carriers to include specimen copies of their bill of lading in their filed tariffs. 46 CFR 531.5(b)(8)(vii), 46 CFR 536.5(d)(8).)

But, by custom and usage, ports, like PHA, do not enter into a written contract with vessels for the use of port and terminal facilities. The obligation of the vessel interest to PHA arises from the use of PHA's facilities and this is all Item No. 8 establishes. In so providing in its tariff, PHA carries out its obligation, under 46 CFR 533.2, to keep the Commission and the public informed of the terminal's practice. I cannot visualize any benefits to be gained from upsetting an *efficient practice* by *requiring* PHA to eliminate Item No. 2 from its tariff and force it to enter into written contracts instead. I do foresee that if written contracts were required to be substituted for Item No. 2 that there would ensue a more costly and less efficient operation with resultant additional expenses to shippers. See discussion concerning vessel agents, *infra*.

Moreover, tariff provisions, substantively the same as Item No. 2 of PHA's tariff, have been upheld in the past by the Commission and by the courts. *See, e.g., Selden & Co. v. Galveston Wharves*, 7 F.M.C. 679 (1964); *City of Galveston v. Kerr Steamship Co., supra*, and other cases referred to in the text.

[23] *Accord, Terminal Rate Structure–Pacific Northwest Ports*, 5 F.M.B. 53 (1956), "where such services are performed, the terminal is entitled and obliged to recover compensation therefor, *from the person for whom the services have been performed.*" *Id.* at 57.

[24] *But see, Terminal Rate Structure–Pacific Northwest Ports*, 5 F.M.B. 326 (1957), amending 5 F.M.B. 53, in part. Recognizing that the language in the earlier decision, quoted in n. 23, *supra*, could be construed to require terminals to bill the cargo interest in a

Lines v. Federal Maritime Board, supra,) or special circumstances (as with lumber shipments in *Intercoastal S.S. Frt. Assn. v. N.W.M.T.Assn., supra,)* the liability for wharfage may be that of the cargo or cargo interests.

This means that in a proceeding to determine the lawfulness of a terminal tariff provision placing liability for payment of wharfage on the vessel interests, there arises a rebuttable presumption of reasonableness of that tariff provision and the burden of proof to overcome that presumption lies with the party assailing the tariff provisions.[25] Here, WGMA adduced no evidence to overcome that presumption by showing that vessel interests were not the users of the wharves or that there existed special contracts or other special circumstances tending to establish the unreasonableness of the wharfage liability provisions in PHA's tariff. WGMA has failed its burden of proof.

C: The Agent's Liability for Wharfage

Although not entirely clear, WGMA seems to contend, as it has in a related proceeding against PHA and other Texas ports,[26] that whatever may be the responsibility of the vessel to the terminal, the vessel agent cannot be made responsible for payment of vessel charges to the terminal because he is an agent for a known principle. The rule of law relied upon is well established. "Where the principal is disclosed, and the agent is known to be acting as such, the latter cannot be made personally liable *unless he agreed to be so.*" (Emphasis supplied.) *Whitney v. Wyman,* 101 U.S. 392 (1880). The rule has been construed to mean that vessel agents acting for a vessel (rather than for the vessel owner) act for a known principal—the theory being that by naming the ship, the agent has sufficiently disclosed the identity of the principal for whom he acted. *See, e.g., Valkenburg, K.-G. v. The S.S. Henry Denny,* 295 F. 2d 330, 333 (7th Cir. (1961)); *Instituto Cubano De Establizacion Del Azucar v. The SS Theotokos,* 155 F. Supp. 945, 948 (S.D.N.Y. 1957); *Hudson Trading Co. v. Hasler & Co., Inc.,* 11 F. 2d 666, 667 (S.D.N.Y.) 1926). The implication which WGMA would draw from this familiar rule of agency law is that its agent members, acting for vessels, are immunized from becoming liable for the vessel's obligation to pay for wharfage and that PHA's tariff provisions holding them liable somehow amount to unlawful coercion and duress under Texas law. I am unable to reach the conclusion suggested by WGMA.

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case where the contract of affreightment involves a tackle to tackle rate, but noting, too, that terminals are not parties to that contract and are unable in any given case to determine the identity of the party ultimately liable, the Board authorized the terminals to bill and collect from the carriers all handling and service charges incurred between point of rest and ship's hook, both inbound and outbound. Point of rest is defined as "that area on the terminal facility which is assigned for the receipt of inbound cargo from the ship and from which inbound cargo may be delivered to the consignee, and that area which is assigned for the receipt of outbound cargo from shippers for vessel loading." 46 CFR 533.6(c).

[25] Under the Administrative Procedure Act, 5 U.S.C. 551 et seq., which governs proceedings before regulatory agencies and the Rules of Practice of this Commission, 46 CFR 502.1 et seq., the burden of proof is on the proponent of a rule or order. "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. 556(d). To the same effect, see 46 CFR 502.155.

[26] Docket No. 74-15, *West Gulf Maritime Association v. Port of Houston Authority, et al.*, pending initial decision.

[27] In *Valkenburg*, the court said, "The identity accorded by maritime law to a ship as a person also charges those who deal in maritime commerce with the knowledge as to the ownership and operation of a named ship which accepted maritime publications as Lloyd's Registry of shipping would disclose. 295 F. 2d at 233. *But see Port of Tacoma v. S.S. Duval, supra,* also *Puamier v. Barge BT1793*, 395 F. Supp. 1019, 1030 (E.D. Va. 1974), where the court commented, "The Supreme Court and various lower courts have held repeatedly that the true ownership of a vessel is not dependent upon its registry." (Citations omitted.)

To begin with, it should be understood that "public wharves, piers and marine terminals are affected with a public interest." *American Export-Isbrandtsen Lines, Inc. v. Federal Maritime Commission,* 444 F. 2d 824, 828 (D.C. Cir. 1970).[28] Because terminals are of vital importance to transportation, they may be deemed public utilities for purposes of regulation by this Commission. *Id.*, at 829. The court continued, also at 829:

> The power thus conferred [on the Commission] is to be used for the purpose of facilitating the free flow of commerce by guaranteeing an efficient terminal system.

Earlier, that court explained what is meant by an efficient terminal system, *Id.*, at 828:

> Efficiency of manpower, ships and vehicles is dependent upon the prompt handling of such cargo and determines whether the flow of interstate and foreign commerce is obstructed or facilitated. The public interest in their efficient operation is unquestioned.

If a terminal is, in effect, a public utility, it follows that it must render service—including the use of its facilities like berths and wharves—to all vessels which call at the port. However, this does not mean that the terminal may not fix some standards which must be adhered to in order to promote efficiency of the terminal's operation. This requires the terminal to take such action as is necessary, whether by the device of a tariff or otherwise, to insure that berthing, unloading, loading, and vessel departure be accomplished with dispatch so as not to impede the flow of traffic and the movement of cargo. In the same manner, the terminal is required to ensure that it is paid for the use of its facilities so that costs properly allocated to the vessel do not, by nonpayment, become a charge on other terminal services or impair the terminal's ability to keep, maintain, and improve its facilities so that it may continue to serve the public interest.[29]

As seen, wharfage is the liability of the vessel interests and PHA is required to collect wharfage charges from those interests. But, may the tariff make the vessel agent, as an agent for a known principal, liable for the principal's obligations? The teaching of *Whitney v. Wyman, supra,* is that this may be done if the agent agrees to be bound. In my opinion, vessel agents have agreed, both factually and legally, to accept the obligation to pay PHA for wharfage.

It is clear that PHA deals not with vessel owners, except those owners who maintain a physical presence at the port, but with their agents. Agents usually represent more than one shipowner and are in daily contact with the port to obtain berth assignments for their principals' vessels. At Houston, the agents, alone, know the identity of the principal and the nature and ownership of the cargo carried by the vessel and the berthing and wharfage requirements. PHA relies on the expertise of those agents in assigning berths and wharves to the vessels they represent. Of at least equal importance, PHA cannot afford to nor does it, in fact,

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[28] *See also Perry's Crane Service v. Port of Houston Authority of Harris County, Texas,* 16 SRR 1459, 1484 (1976) (initial decision), partially adopted, ____ SRR ____ (February 25, 1977).

[29] This mandate is also imposed by the State of Texas. PHA, as a state agency, acts in a fiduciary capacity and is bound by the Texas Constitution to operate essentially on a cash basis. Article 3, Section 50 of the Texas Constitution provides: The Legislature shall have no power to create or to lend, or to authorize the given or lending, of the credit of the State, in aid of, or to any person, association or corportion, whether municipal or other, or to pledge the credit of the State in any manner whatsoever for the payment of liabilities, present or prospective, of any individual, association of individuals, municipal or other corporations whatsoever.

Article 11, Section 3, of the Texas Constitution, provides: No county, city or other municipal corporation shall hereafter become a subscriber to the capital of any private corporation or association, or make any appropriation or donation to the same, or in anywise loan its credit. . . .

rely on the credit of absentee vessel owners for payment of charges allocated to vessels. Rather, PHA deals with the agent and relies on the credit of the agent for payment of the vessel's charges.

It must be understood that shipowners are located around the globe and if PHA were to be forced to bill and collect for charges incident to each vessel call, the administrative cost of obtaining payment would soar and charges would correspondingly increase. Moreover, many of the charges cannot be accurately determined until after the vessel is gone. It would then be a difficult task, indeed, to collect without the security of the vessel.[30] Without that security, the port would be placed in the position of maintaining law suits around the world in order to collect its charges. It is manifest, then, that PHA and the vessel agents mutually understand their undertaking with each other. Instead of delaying the berthing, unloading, loading and departure of the vessel to await the filing of a bond or other security by the vessel owner to guarantee payment of charges, PHA extends the use of its facilities to the agent's vessels in reliance on the agent's credit and its implied agreement to be bound by the terms of the tariff.

In other words, what has occurred is that PHA, New Orleans and other terminals, which publish similar tariff provisions making the vessel agents liable for vessel charges, have let it be known they recognize that vessel agents hold themselves out to be agents for known principals, but that the terminals will not do business with the agent *qua* agent. The terminals have offered another choice which the agents are free to accept or reject, that is, the terminals will serve the principal directly, but only if the transaction is secured in advance, or, the terminals will extend credit to the agents as independent contractors. By arranging for and using terminal facilities for vessels, without prior security having been furnished by the vessel owner or operator, the agents have accepted the terminals' offer and, as independent contractors using the terminals' facilities, the agents become bound by the terms and conditions of the tariffs.[31]

The understanding between the port and the agent has been reduced to a tariff provision, stating that the use of the port's facilities shall constitute a consent to the terms and conditions of the tariff and evidence the consent of the vessel agent to pay the tariff charges accruing to the vessel. At law, it is probably not necessary to include the provision in the tariff, although I have previously implied that it serves a useful regulatory purpose. Referring to virtually the same tariff provision, as is assailed here, in a Miami port tariff, Chief Judge Brown observed that it was "probably superfluous [that] the tariff contained a contractual consent clause." *State of Israel v. Metropolitan Dade County, Florida*, 431 F. 2d 925, 927 (5th Cir. 1970). It is probably superfluous because, by making use of the terminal facilities in its own behalf, the agent impliedly consents to be bound

[30] Under some circumstances the vessel itself may not be subject to a lien, *see Gilmore and Black, The Law of Admiralty, supra; Port of Tacoma v. S.S. Duval, supra.*

[31] This does not appear to be contrary to principles of Texas law. See comments at 2 Tex. Jur. 2d, Sec. 212: Ordinarily, however, though the facts of the case may be such as to put the third party on notice that the agent has a principal who must bear the liability, it is usually the agent's duty, if he would escape personal liability on the agreement, to make a disclosure of the agency relationship himself, rather than to rely on any discovery of this fact by the third party. In any event, in cases of this character, the paramount question to be determined is simply this: To whom was the credit knowingly extended, according to the understanding of both parties to the contract? *For he to whom such credit was extended, knowingly and exclusively, by the other party to the Contract is the one who will incur liability on the agreement, regardless of whether he is the principal or the agent.* (Emphasis supplied.)

by the tariff terms. This was confirmed in *Folgner v. Italian Line,* 383 F. Supp. 816 (D.C.C.Z. 1974), where the court stated, at 818:

A party who makes use of the facilities or services offered by another, which are offered or rendered under the terms of a lawfully established tariff, impliedly consents to be bound by the tariff terms. *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 59 S. Ct. 612, 83 L. Ed. 953 (1939). The terms of a lawfully promulgated tariff become (in essence) the only agreement permitted between the party who supplies the facilities or services and the party who utilizes them. *Union Wire Rope Corp. v. Atchison, T. & S.F. Ry.*, 66 F.2d 965 (8th Cir. 1933). These rules apply with equal force to tariffs governing terminal operations. *United States v. ICC,* 91 U.S. App. D.C. 178, 198 F.2d 958 (1952); *State of Israel v. Metropolitan Dade County, Florida,* 431 F.2d 925 (5th Cir. 1970).

The tariff places no unreasonable onus on the agent. If he wishes to avoid binding himself to the obligation to pay, he is free, under his agency agreement, to require the vessel owner to furnish satisfactory security to the port to cover all port charges properly allocated to the vessel in advance of berthing.

D: Duress Under Texas Law

WGMA calls upon the Commission to determine that under Texas law the provisions of the tariff making agents responsible for payment of wharfage constitutes duress and business coercion. Assuming, for the moment, that the tariff provision may be contrary to Texas law, because they impose duties and obligations on persons without their consent,[32] this issue is not before the convenient forum. Moreover, it is also incorrect to characterize the business relationship between the port and the agents as non-consensual. As seen, the initial consent here arises not from the tariff provision but from the terms of the bargain struck by PHA and the agent whereby the agent's vessels are given the use of the port's facilities without a security deposit. Further, reliance on Texas law is not a proper basis for an adverse finding under the Shipping Act, particularly where, as here found, the tariff provisions pass muster under the Shipping Act. *See Agreement Nos. T-4, T-5,* 8 F.M.C. 521, 533–534 (1965); *Terminal Lease Agreement at Long Beach, California,* 11 F.M.C. 12, 26 (1967), where the Commission states:

While we might consider State or local law in determining what the public interest may be, we cannot in this case disapprove the agreements on this basis. The record does not show that any adverse ramifications will ensue upon approval of the agreements. Since we cannot anticipate any consequences which might be contrary to the public interest, the legality of the terms of the leases under California law is a matter for the State, not for the Commission in a section 15 proceeding.

The principle of those cases fully applies to this proceeding involving section 17 as well as section 15 issues.

E: The Section 15 Issue

Complainant raises the section 15 issue at only one place in the text of its opening brief. The argument, in its entirety, is phrased by WGMA as follows:[33]

Is not such relief of cargo and its representatives (as well as the port itself of course) of the cost of collection, and liability for payment of, cargoes' charges clearly giving to the port, to cargo, and to

[32] In view of the decisions by the Texas Supreme Court in *Rorie v. The City of Galveston,* 471 S.W. 2d 789 (Tex. 1971), and by the United States Disctict Court for the Southern District of Texas in *The City of Galveston v. Kerr Steamship Co., Inc., supra,* upholding tariff provisions virtually identical to those under attack here, see discussion, *infra,* it is rather doubtful that the duties and obligations of the agents to PHA would be construed as having been imposed by PHA by means of duress and business coercion under Texas law.

[33] WGMA's opening brief, p. 12.

cargoes' representatives "special privileges and advantages", expressly forbidden by Section 15 of the Shipping Act of 1916 (46 U.S.C.A. §814) (if this be a matter of "agreement", as the tariff provision reads).

The short answer to the question posed is that a tariff is not an agreement within the meaning of section 15 but is governed by the provisions of 46 CFR 533.1 *et seq.* issued pursuant to section 17, This is the position of the Commission as it was stated in an amicus brief filed in *Rorie v. City of Galveston, supra,* and its was adopted by the Texas Supreme Court in that case. The Commission's position upheld as "obviously most reasonable" in *The City of Galveston v. Kerr Steamship Co., Inc., supra,* 362 F. Supp. at 293, by the United States District Court for the Southern District of Texas. At issue in the Kerr case was a Galveston terminal tariff provision virtually identical to Item 3 of PHA's tariff, but concerning strike demurrage charged to the vessel. Galveston sued vessel owners and agents and therefore the principles enunciated there apply with full force and effect here, not only with regard to the section 15 issue, but the section 17 issue and the section 16 First[34] matter as well. The District Court concluded as a matter of law, 362 F. Supp. at 292–294:

> The tariff in question was promulgated by the Galveston Wharves to govern the operation of the wharves facility. First, although the statute is to be construed most broadly, *Volkswagenwerk Akt. v. F.M.C.*, 390 U.S. 261, 88 S.Ct. 929, 19 L.Ed.2d 1090 (1968), a tariff is obviously not a multi-party agreement. Nothing in the record suggests that this tariff is anything other than a set of rates, rules and regulations unilaterally issued by the owner of the facility. Secondly, *neither the tariff provisions relevant here, nor any other tariff provision, fit the categories enumerated in the statute* [*section 15*]. In *Rorie v. City of Galveston*, 471 S.W. 2d 789 (Tex. 1971), the Texas Supreme Court adopted the view that Section 15 of the Shipping Act does not apply to a Galveston Wharves tariff. The court there enforced a provision in a predecessor to Circular No. 4–D against the claim of unenforceability for lack of F.M.C. approval under Section 15.
>
> Counsel for the Federal Maritime Commission filed an amicus brief in the *Rorie* case supporting enforcement of the statute. Although the courts are the final authority on issues of statutory construction, *F.T.C. v. Colgate-Palmolive,* 380 U.S. 374, 385, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965), the construction put on a statute by the agency charged with administering it is entitled to deference by the courts. *N. L.R.B. v. Hearst Publications*, 322 U.S. 111, 131, 64 S.Ct. 851, 88 L.Ed. 1170 (1944). This is particularly so if the construction has been consistent and of long duration.
>
> In the amicus brief, the Commission contended *the tariff was not an agreement within the meaning of Section 15 but was instead governed by the Commission's General Order 15,* 46 C.F.R. § 533, issued pursuant to Sections 17 and 21 of the Shipping Act, 46 U.S.C. § § 816, 820. That order requires all persons carrying on the business of furnishing wharfs, docks, warehouses, or other terminal facilities to file a schedule or tariff showing all rates, charges, rules and regulations governing the operation of the facility with the F.M.C. The order does not require the Commission's explicit approval of any tariff. The Commission reviews the filed tariff, considers any objectives and contacts the filing party if any changes are necessary. The predecessor to the Galveston tariff was challenged and upheld in *Selden & Co. v. Galveston Wharves,* 7 FMC 679, 1964 A.M.C. 1621 (1964).
>
> *The Commission's interpretation of the Act is obviously most reasonable.* Section 15 (46 U.S.C. § 814) applies to a broad range of agreements between parties who are subject to the Act. This section requires filing and approval of such agreements by the Commission. Section 17 (46 U.S.C. § 816) and the Commission orders issued pursuant thereto apply to unilaterally fixed rates, rules and regulations. This section requires filing but no formal approval. Tariff Circular No. 4–D plainly falls into the second category; it must be filed but needs no formal approval to be enforceable.
>
> * * *

[34] As stated earlier, section 16 First was not put in issue in the proceeding. Nevertheless, WGMA argues that the tariff provisions are violative of its provisions, as an undue preference because the tariff shifts the burden of payment and collection of wharfage charges to vessel interests from cargo interest (payment) and PHA (collection). In essence, it is the same argument made by WGMA in regard to section 17. Neither section has been violated.

In accord with Item #30 of the Tariff, pier demurrage charges for cargo remaining beyond free time may be assessed *against vessels and their agents.*

Defendants refer to the Item #5 definition of pier demurrage as "a charge assessed against cargo remaining in or on the terminal facilities after the expiration of free time unless arrangements have been made for storage." Defendants also point to other charges which are charged against the vessel. Defendants conclude that these definitions preclude plaintiff from charging vessels or vessel agents with pier demurrage.

The definitions only deal with the manner in which charges are accrued. They do not purport to establish which parties are liable for the charge. Liability for the various charges is fixed by Item #30 of the Tariff, quoted in Finding of Fact 1. Items #5 and #30 are neither conflicting nor ambiguous. [[35]]

A provision with similar language to that of Item #30 was found effective and binding on the parties in *Selden & Co. v. Galveston Wharves,* supra.

Obviously, the charge which the City of Galveston assesses against a party must be reasonably related to the party's use of the facility. As discussed in Findings of Fact 5, 6 and 7, *assessment of pier demurrage against the vessel's agent is a reasonable charge.* (Emphasis supplied.)

F: The 4% Allowance

In its complaint, but not in its opening brief, WGMA alleges the 4% allowance to be a "pittance." I have previously found it to be reasonably compensatory.

Nevertheless, the tariff issued by PHA does require it to pay vessel interests a 4% allowance for collection and payment of wharfage charges. PHA must comply with the terms and conditions of its own tariff. Although PHA, pursuant to written leases with some cargo interests, collects wharfage directly from them, and does not pay the 4% fee to vessel interests which attempt to collect wharfage in those situations, the facts of record show that the vessel interests have complied with the tariff's requirements and should be paid the fee, in accordance with Item 3.2 of the tariff, for wharfage paid directly to PHA by lessees. Therefore, unless and until PHA changes the terms of Item 3.2,[36] PHA will be required to pay the allowance to vessel interests, prospectively and retroactively.

G: Terminal Charge

Item No. 59 of PHA's tariff publishes rates for what is called a Terminal Charge. That term is not defined in PHA's tariff. The record fails to disclose what service is rendered or what facility is provided to justify the charge. However, the lawfulness of the charge was not placed in issue and PHA was not obligated to come forward with evidence to show the kind of service or facility it offered to earn that charge. Nevertheless, the Commission's tariff regulations applicable to terminal operators, 46 CFR 533.1 *et seq.,* do require terminal tariffs to set forth a definition of all services or facilities provided, 46 CFR 533.6. PHA is remiss in this regard insofar as the definition of terminal services is concerned and is admonished to correct the situation forthwith.

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[35] Similarly, I find that Item No. 3 of PHA's tariff is not ambiguous and does not conflict with other provisions in its tariff or with 46 CFR 533.1 *et seq.* Nevertheless, I believe the language of Item No. 3 can be improved to reflect its intended result. I would change "Wharfage Charges . . . are liabilities of the owner of the cargo" to "Wharfage Charges are assessed against the cargo."

[36] Inasmuch as the issue is not before me, I express no opinion concerning the validity of a particular change deleting the allowance in a written lease situation.

H: Summary of the Dominant Issues

The practice of placing liability for payment of wharfage charges on vessel owners and vessel agents is prevalent at many United States ports and in all probability the practice has been dictated by the same considerations shown here, that is: the carrier is the user of the facility pursuant to its transportation obligation and port efficiency is promoted by having the agent agree to be responsible for payment of the vessel's charges for the use of the facility. The record discloses that virtually identical tariff provisions reflecting the practice appear in tariffs published by terminals at the ports of New Orleans, Lake Charles, Corpus Christi and Port Arthur. In addition, court and Commission cases reveal that nearly identical tariff provisions have been reviewed without being found in violation of law at Galveston, Miami and Puget Sound. There is nothing in the record to warrant a different conclusion in regard to PHA's tariff.

One other comment is warranted. In bringing this complaint proceeding, WGMA is, essentially, relitigating the issues in *The City of Galveston v. Kerr, supra,* and *Rorie v. The City of Galveston, supra,* and contending that the decisions handed down in those cases are wrong and should be overturned. The proper method to be used to achieve that result is to distinguish those cases from the proceeding at bar on the facts of the law. That method would be particularly appropriate in this proceeding in the light of WGMA's insistence that, over and beyond Shipping Act issues, the action of PHA contravenes Texas law. In these circumstances it is remarkable that WGMA makes no attempt to explain why the *Rorie* and *Kerr* cases should not be controlling or, at least, not be persuasive. Indeed, WGMA totally ignores *Rorie* and *Kerr* in its opening and reply briefs, having failed to cite either case or the conclusions reached by the Texas Supreme Court and the United States District Court for the Southern District of Texas in those cases.

Conclusion

I find that the practices of the Port of Houston Authority of Harris County, Texas, and the provisions of its tariff, Item Nos. 2, 3, 3.2 and 3.3, which dictate the practices and are in issue in this proceeding directly or indirectly, and which make the vessel, vessel owners and vessel agents responsible for payment of wharfage charges, do not violate sections 15, 16 First or 17 of the Shipping Act, 1916.

I find that PHA has inadvertently failed to comply with Item No. 3.2 of its tariff in that it has not paid the appropriate vessel interests the 4% allowance for wharfage charges paid directly to PHA by persons occupying facilities under written leases from PHA.

Order

It is ordered that the complaint is dismissed and the proceeding is discontinued.

It is further ordered that PHA make payment prospectively and retroactively, of the 4% allowance to the appropriate vessel interests for wharfage charges collected by PHA from lessees, occupying facilities pursuant to written leases with PHA, in accordance with the terms of Item No. 3.2 of PHA's tariff.

(S) SEYMOUR GLANZER
Administrative Law Judge

WASHINGTON, D.C.
April 12, 1978

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 585

MR. EDOUARD HAZAN—GENERAL MANAGER
SOCAFEX, AGENTS AND FORWARDERS

v.

LYKES BROS. STEAMSHIP CO., INC.

NOTICE OF ADOPTION OF INITIAL DECISION

August 17, 1978

No exceptions were filed to the initial decison in this proceeding served July 24, 1978. Notice is given that the Commission having determined not to review the initial decision, it became the decision of the Commission on August 16, 1978.

It is ordered that applicant shall waive collection of freight charges, publish a tariff notice (and provide a copy for the record), and give notice to the Commission of compliance, in the time and manner required by the initial decision.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 585

MR. EDOUARD HAZAN—GENERAL MANAGER
SOCAFEX, AGENTS AND FORWARDERS

v.

LYKES BROS. STEAMSHIP CO., INC.

Adopted August 17, 1978

Application for permission to waive a portion of freight charges in the amount of $8,706.14 granted. Carrier applicant found to have negotiated special reduced rates on oil and gas well drilling equipment, related supplies and parts, with a French importer, on which rates the importer relied, but to have failed through inadvertence to file a conforming tariff page reflecting the negotiated rates prior to the time of shipments. This inadvertence found to be the type of error contemplated by P.L. 90–298, amending section 18(b)(3) of the Shipping Act, 1916.

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

This proceeding began with the filing of an application by Lykes Bros. Steamship Co., Inc. (Lykes), in which Lykes seeks permission to waive a portion of freight charges on various shipments. Such applications are permitted under section 18(b)(3) of the Shipping Act, 1916 (the Act), as amended by P.L. 90–298 and are processed under Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a).

The application was filed (received by the Commission's Secretary) on June 30, 1978, and involves nine shipments of oil and gas well drilling equipment and related supplies and parts which moved under bills of lading dated January 5 and 8, 1978, from Houston, Texas, to Le Havre, France. They were carried on the Lykes' vessel *TILLIE LYKES* which sailed out of Houston on January 9, 1978. Lykes seeks permission to waive a total of $8,706.14 in freight charges in order to carry out its agreement with the French importer and nominal complainant in this case, "Socafex," represented by the latter's general manager, Mr. Edouard Hazan. As stated in the application, although Lykes had agreed to charge special lower rates on the shipments, through inadvertence, Lykes failed to file a new tariff with the Commission prior to the time of the shipments. At the tariff rate in effect at the time of shipments, the freight would be $30,527.22. At the tariff rate

[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).

which Lykes negotiated with Mr. Hazan, however, and now wishes to apply, the freight would amount to only $21,821.08. This was the freight which Mr. Hazan actually paid. The difference between the two figures ($8,706.14) is the amount of freight which Lykes seeks permission to waive.

The above summary of the factual situation which gave rise to the filing of this application is amply supported by a wealth of materials which Lykes has attached to its application, including pertinent rated bills of lading, invoices, manifest correction notices, telexes, and tariff pages. These materials demonstrate a classic example of one type of error which P.L. 90–298 was designed to cover, namely, a carrier's inadvertent failure to file a new tariff reflecting a rate which both carrier and shipper had agreed upon through negotiation. A more complete description of the facts follows.

Some time in December of 1977, Mr. Hazan visited Houston, Texas, and met with officials of Lykes to discuss the possibility of shipping oil and gas well drilling equipment and related parts and supplies via Lykes' vessels at mutually agreeable rates. Mr. Hazan met with Messrs. J. G. Tompkins, III (who verified Lykes' application), Senior Vice-President West Gulf Group, and with Mr. Gerardo Coterillo, General Traffic Manager-Houston. Mr. Hazan was interested in shipping these goods on a Lykes vessel sailing out of Houston for discharge in Le Havre, France, and wished to book additional shipments during the year with Lykes. The goods were destined for France and other countries[2] and were associated with a project known as "Focos Project."

The parties appear to have been aiming for a voyage of the *TILLIE LYKES* (No. 42 E) which sailed out of Houston on January 9, 1978. Under the tariff then in effect, the rate for shipments of oil and gas well drilling equipment, supplies and parts, etc., was $116.50 W/M (which included a general rate increase effective January 1, 1978) plus a 4.5% currency adjustment factor plus heavy lift charges of $83.50 W/M and $34.75 W/M. The parties were able to reach agreement, however, to reduce these rates and charges so that the rate would be $116.50 W/M less 20% plus the 4.5% currency adjustment factor and 50% of heavy lift charges. No charge would be made for extra lengths.

News of the agreement with Mr. Hazan was sent to the New Orleans headquarters of Lykes from Houston. From New Orleans, Mr. S.A. LeBlanc, Vice-President of Lykes' Seabee Division, advised Lykes' European headquarters of the negotiated rate.[3] Although not technically required to obtain the consent of the members of the Gulf European Freight Association (GEFA), of which Lykes is a member, because GEFA's agreement specifically permits each member to file its own rates,[4] Lykes nevertheless notified and obtained the concurrence of the other member lines. Apparently believing that the negotiated

[2] According to the information shown on the rated bills of lading, most of the shipments were destined for France but others were ultimately destined for Libya, Iraq, Cameroun, and Dubai, United Arab Emirates.

[3] The facts concerning the agreement reached in Houston and the communication from Mr LeBlanc in New Orleans confirming this agreement on behalf of Lykes are shown in a telex sent by Mr. LeBlanc attached to the application as "Attachment #1." Since this telex contained numerous initials rather than names and was thus not completely clear on its face, I telephoned Mr Tompkins, Lykes' Senior Vice-President of Lykes' West Gulf Division, who had filed the application, for a more complete explanation as to who the various parties who were mentioned by initials happened to be Mr. Tompkins provided clarifications and confirmed his conversation in writing by letter to me dated July 7, 1978, which I have transmitted to the official docket file

[4] The GEFA agreement in effect during the relevant time period specified that each member carrier reserved the right to file its own rates subject only to the condition that it notify the other members of its action *See* GEFA Agreement No 9360–3, paragraph 2.

rates had become effective, Lykes' rating personnel actually rated the shipments loaded on the *TILLIE LYKES* at Houston which sailed on January 9, 1978, at the negotiated rate, as shown in the copies of the rated bills of lading which Lykes furnished. Despite all of these developments, however, the employee of Lykes headquarters in New Orleans responsible for the carrying out of Mr. LeBlanc's ratification of the negotiated rate failed to cause the new tariff page to be filed prior to the time of the shipments. However, within three days after the *TILLIE LYKES* sailed out of Houston the oversight was noticed and Lykes telexed a filing of the tariff page to the Commission reflecting the negotiated rate, effective January 12, 1978. *See* GEFA Tariff FMC-3, 6th Revised page 186-A.[5] Unfortunately, Lykes' agents in Le Havre, France, despite the fact that the bills of lading had been rated according to the negotiated fee, and despite the fact that Mr. LeBlanc had notified Lykes' agents in Europe by telex dated December 16, 1977, that a special rate had been negotiated, sought to apply the tariff rate in effect at the time the ship left Houston and billed Mr. Hazan accordingly. However, on February 20, 1978, Mr. Hazan, understandably puzzled, telexed Mr. Tompkins in Houston, asking clarification and billing in accordance with the agreed rate. Following this communication, Lykes' agents in Le Havre billed Mr. Hazan at the negotiated rate. Mr. Hazan thereafter paid the freight at the agreed-upon rate.

The following table summarizes the freight actually collected on the nine shipments involved by bills of lading at the negotiated rate, the amount of freight calculated on the basis of the higher tariff rate in effect at the time of these shipments, and the amount of waiver requested. These figures are corroborated by copies of each rated bill of lading and other documents which Lykes has furnished.[6]

	At Negotiated Rate	At Tariff Rate	Waiver Requested
B/L 24	$17,514.31	$25,143.73	$7,629.42
B/L 13	212.71	265.88	53.17
B/L 18	326.27	407.84	81.57
B/L 2	277.57	346.97	69.40
B/L 23	267.83	334.80	66.97
B/L 16	1,175.73	1,469.66	293.93
B/L 15	321.40	401.75	80.35
B/L 14	1,462.30	1,827.89	365.59
B/L 11	262.96	328.70	65.74
TOTAL	$21,821.08	$30,527.22	$8,706.14

[5] This tariff page bears an effective date on the top of the page of January 27, 1978. However, opposite the commodity item "Oilwell, Gaswell Drilling Equipment . . ." there appears the notation "(Eff Jan 12, 1978)." Furthermore, a footnote reference is made to the statement at the bottom of the page announcing "Filed by telex to teh (sic) FMC January 12, 1978." As I note below, telexed filings are permitted under the Commission's regulations (46 CFR 536.10(c)(1) and 536.10(c)(5), effective January 1, 1978).

[6] In addition to the nine shipments affected by the error in failure to file the new tariff, there were 11 bills of lading involving very small-sized shipments which were not subject to the negotiated rate and were rated as required by the tariff's minimum bill of lading rules. These small shipments are therefore not part of the request for waiver. However, Lykes has furnished all of these rated bills of lading together with related documents as well as the pertinent tariff page containing the minimum bill of lading rules, GEFA Tariff FMC-3, original page 46.

DISCUSSION AND CONCLUSIONS

As in all special-docket cases, the question to be decided is whether the application shows that the carrier committed the type of error contemplated by the remedial provisions of section 18(b)(3) of the Act contained in P.L. 90–298. Moreover, the application must show that the other requirements of that law are met, namely, that the application was filed within 180 days after date of shipment, that a new tariff has been filed prior to the filing of the application, and that no discrimination among shippers will result if the application is granted. In my opinion, these requirements have been met. The ample evidence furnished by Lykes demonstrates clearly that Lykes had entered into an agreement with Mr. Hazan representing the French importer "Socafex," that Mr. Hazan had relied upon the agreement, that Lykes had fully intended to carry it out, but that an employee in the New Orleans headquarters of Lykes inadvertently failed to have the proper tariff page filed on time. This error, furthermore, has not only caused Lykes to go to great pains to assemble a massive amount of materials showing every detail of the situation but has caused Lykes additional embarrassment because of the fact that Lykes' agents in Le Havre initially billed Mr. Hazan at rates other than those agreed. This is unfortunate especially since Lykes, although not technically required to do so, fully advised other members of GEFA and obtained their concurrence, and filed the corrective tariff effective only three days after the *TILLIE LYKES* sailed out of Houston.

Public Law 90–298, which amended section 18(b)(3) of the Act, was designed precisely to afford an avenue of relief in situations of the kind described above. Before the enactment of this law shippers were required to pay higher rates on file in tariffs at the time of shipment even if carriers had agreed to charge and file lower rates, shippers had relied upon the carriers' word, and the carrier, through its own fault, had failed to file the tariff on time. *See Mueller v. Peralta Shipping Corp.*, 8 F.M.C. 361, 365 (1965); *United States v. Columbia S.S. Company,* 17 F.M.C. 8, 19–20 (1973). Congress recognized the inequities and hardships resulting from the above situation and identified the source of the problem and the purpose of the amending legislation as follows:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, 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.[7]

The Senate Report states the *Purpose of the Bill:*

> [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.[8]

Accordingly, section 18(b)(3) of the Act, 46 U.S.C. 817(b)(3), was amended in pertinent part to read as follows:

[7] House Report No. 920, 9th Cong. 1st Sess., November 14, 1967 [to accompany H.R. 9473], pp. 3, 4.

[8] Senate Report No. 1078, 90th Cong. 2d Sess., April 5, 1968 [to accompany H.R. 9473], p. 1.

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where 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. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

As I have remarked above, Lykes has furnished ample evidence that it committed an error of the type envisioned by the Congress in enacting this remedial legislation. It is abundantly clear that after agreeing to charge rate payer, Mr. Hazan, special lower rates on oil and gas well drilling equipment, parts, supplies, etc., Lykes inadvertently failed to file the new tariff rates on time. This is a classic example of "an error due to an inadvertence in failing to file a new tariff" in the statutory language. Furthermore, the record is also clear that Lykes had fully intended to charge and file the new rate prior to the time of shipment, i.e., that this case does not involve merely a mistake in judgment or an illicit decision to reward a shipper with a cash refund after the shipment. This element of prior intent is critical to support a finding of bona fide inadvertence remedial under P.L. 90–298. *See* Senate Report, cited above, p. 1, referring to an "intended" rate; House Report, cited above, pp. 3, 4, referring to the situation in which the carrier "intends to file a reduced rate and thereafter fails to file;" Hearings Before the Subcommittee on Merchant Marine and Fisheries, 90th Cong. 1st Sess., August 15, 16, 1967, p. 103, in which this question of intent is emphasized; *Munoz y Cabrero v. Sea-Land Service, Inc.*, 17 SRR 1191, 1193 (1977), emphasizing a "prior intended rate;" Special Docket No. 573, *Campbell Soup v. Pacific Westbound Conference,* Order on Review of Initial Decision, June 8, 1978, again emphasizing the need to show bona fide intent, not merely "poor judgement" on the part of the carrier filing the tariff.

Having found that there was an error due to inadvertence in failing to file a new tariff, I must now determine whether the other statutory requirements have been met, namely, that the application was filed within 180 days after date of shipment, that Lykes filed a new tariff prior to filing its application, and that discrimination among shippers will not result if the application is granted. I find that all of these requirements have been met.

The application was filed (received by the Commission's Secretary) on June 30, 1978. The shipments all moved under bills of lading dated either January 5 or 8, 1978. This time period is well within the 180-day period.

Prior to filing the application, Lykes telexed a filing of its new tariff with the Commission, effective January 12, 1978, as I have noted earlier. This was followed by a permanent tariff page, as permitted by Commission regulations.[9]

Lykes' application states that there were no shipments of the same or similar commodity which moved via respondent during approximately the same period of time as the shipments in question. This statement is corroborated by other

[9] See 46 CFR 536.10(c)(1) and 536.10(c)(5), effective January 1, 1978.

facts. Specifically, the shipments involved oil and gas well drilling equipment, supplies, and parts, which were connected with a particular project known as "Focos Project." Mr. Hazan, on behalf of "Socafex," which paid the freight, had negotiated the special rates with Lykes for this particular project. It does not seem likely that there was another "Focos Project" during this period of time. Even if so, however, the tariff notice which Lykes will cause to be published in the GEFA tariff will be applicable to any other similar shipment which might have been involved in the "Focos Project," thus assuring that discrimination among shippers will not occur.

Therefore, the application for permission to waive a portion of freight charges in the amount of $8,706.14 in connection with shipments of oil and gas well drilling equipment, supplies, parts, etc., that moved on the *TILLIE LYKES* which sailed out of Houston, Texas, on January 9, 1978, is granted. If this decision is adopted by the Commission and subject to whatever modifications the Commission may make, it is ordered that:

1. Lykes is authorized to waive collection of a portion of freight charges as described above for the benefit of "Socafex," the nominal complainant and importer who was responsible for and paid the freight, represented by its general manager, Mr. Edouard Hazan.

2. Lykes shall cause to be published the following notice in an appropriate place in the GEFA tariff:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 585, that effective January 5, 1978, and continuing through January 11, 1978, inclusive, the rate on Oilwell, Gaswell Drilling Equipment, Supplies and Parts, etc., as described in Item No. 718.4202, for Cargo designated "Focos Project" is $116.50 WM, extra lengths to be walved, heavy lift per tariff scale less 50 percent, min 250 payable tons tariff AQ rate less 20 percent (Rate includes GRI 1/1/78), subject to all applicable rules, regulations, terms and conditions in this tariff. This Notice is efffective for purposes of refund or waiver of freight charges on any shipments of the goods described which may have been shipped during this period of time.

3. Waiver of the portion of freight charges shall be effectuated within 30 days of service of the Commission's notice of adoption of this decision (if adopted) and Lykes shall within 5 days thereafter notify the Commission of the date and manner of compliance with this order.

(S) NORMAN D. KLINE
Administrative Law Judge

WASHINGTON, D.C.
July 24, 1978

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-41

BERTHING OF SEATRAIN VESSELS IN
SAN JUAN, PUERTO RICO

Puerto Rico Maritime Shipping Authority and Puerto Rico Ports Authority found in violation of section 16 First and section 17 of the Shipping Act, 1916 for failing to provide for secondary use of privately owned cranes situated on public property.

Amy Loeserman Klein, William Karas, Morris R. Garfinkle, and *Thomas A. Johnson* for Puerto Rico Ports Authority.

Mario F. Escudero, Karol L. Newman, and *Edward J. Sheppard* for Puerto Rico Maritime Shipping Authority.

Neil M. Mayer, Charles L. Haslup III, and *Paul D. Coleman*, for Seatrain Lines of Puerto Rico, Inc; and Seatrain Gitmo, Inc.

John Robert Ewers, C. Douglass Miller, Joseph B. Slunt, Jack E. Ferrebee, and *Alan Jacobson*, for the Bureau of Hearing Counsel.

REPORT AND ORDER ADOPTING INITIAL DECISION

August 18, 1978

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

This investigation was instituted as a result of a Petition for Directive Order filed by Seatrain Lines of Puerto Rico[1] (Seatrain), on August 2, 1976. In its Petition, Seatrain alleged that the Puerto Rico Ports Authority (PRPA or Ports Authority) is violating sections 16 First and 17 of the Shipping Act, 1916 (the Act) by failing to provide adequate berths to Seatrain vessels and requests the Commission to immediately direct PRPA to make a berth at the Isla Grande terminal, San Juan, Puerto Rico available to Seatrain vessels. A supplemental Petition for Directive Order requesting the Commission to direct the Puerto Rico Maritime Shipping Authority (PRMSA) to make its container cranes at Isla Grande available to Seatrain on a noninterference basis was also filed by Seatrain, on August 4, 1976.

* Commissioner Karl E. Bakke not participating.

** Commissioner Kanuk will file a separate dissenting opinion.

[1] Seatrain Lines of Puerto Rico provides terminal facilities and support activities to Seatrain vessels calling in Puerto Rico. Seatrain Gitmo, Inc. and Seatrain Lines, Inc. are common carriers serving Puerto Rico in the domestic and foreign trades respectively and were granted leave to intervene in this proceeding. All of the Seatrain companies are collectively referred to herein as Seatrain.

PRMSA and PRPA filed replies to the Seatrain Petitions in which they argued, *inter alia,* that the Commission lacked the authority to grant the relief sought by Seatrain. By Order served September 7, 1976, we referred the Seatrain Petitions, together with the responses thereto, to an Administrative Law Judge for hearing and decision. On August 10, 1977, Administrative Law Judge Stanley M. Levy (Presiding Officer) served his Initial Decision in which he found PRPA and PRMSA in violation of sections 16 First and 17 of the Act (46 U.S.C. 815 and 816). PRMSA and PRPA filed exceptions to the Initial Decision to which Seatrain and the Commission's Bureau of Hearing Counsel have replied. We heard oral argument on June 27, 1978.

DISCUSSION

In our Order initiating this proceeding, we directed the Presiding Officer to address fourteen (14) specific issues in considering Seatrain's requested relief and its allegation that PRPA and PRMSA were in violation of the Act by PRPA's refusal to assign Seatrain an adequate berth at Isla Grande and by PRMSA's refusal to grant Seatrain access to its container cranes located on Isla Grande. Also at issue in this proceeding is whether the Commission has jurisidiction over terminal operators and facilities located in Puerto Rico and the extent to which private property situated on the public terminal at Isla Grande becomes dedicated to public use.

In addressing the jurisdictional issue, the Presiding Officer concluded that terminal operators and their facilities in Puerto Rico are subject to the Commission's jurisdiction. In discussing the 14 issues raised in the Order of Investigation, the Presiding Officer found that, for the purpose of this proceeding, PRPA and PRMSA are so closely related as to be considered one person. He held the Isla Grande facility to be a public facility that is virtually inoperable without the use of shoreside gantry cranes situated thereon and that Seatrain has not been offered these facilities at Isla Grande or any other adequate facility in the Port of San Juan, Puerto Rico. He determined that while PRPA has the statutory authority to control berthing assignments in San Juan, PRPA has, through inaction, surrendered its control over the Isla Grande facility to PRMSA. He reached this determination on the basis of finding that PRPA will not assign a vessel to Isla Grande "unless such vessel may be feasibly worked at the berth." He concluded that because a vessel can *not* feasibly be worked without the use of the shoreside cranes, and because PRMSA refuses to permit secondary use of its cranes, PRMSA effectively controls berthing assignments at Isla Grande.

The Presiding Officer also found that both Seatrain and PRMSA could "practicably" utilize the Isla Grande terminal facilities providing Seatrain altered its arrival schedule to avoid PRMSA's "peak utilization" of the facilities.[2]

On the basis of his finding that Isla Grande was a public facility which may not be feasibly utilized without PRMSA's shoreside cranes, the Presiding Officer concluded that PRMSA's cranes had become vested with a public interest

[2] In support of this finding, the Presiding Officer relied principally upon Exhibit No. 96, which, as PRMSA notes in its Exceptions, *was not admitted into evidence. This error is harmless, however,* because as PRMSA also recognizes, Exhibit No. 115 was admitted into evidence, *in lieu* of Exhibit No. 96, and contains essentially the same data found in Exhibit 96

PRMSA and PRPA filed replies to the Seatrain Petitions in which they argued, *inter alia,* that the Commission lacked the authority to grant the relief sought by Seatrain. By Order served September 7, 1976, we referred the Seatrain Petitions, together with the responses thereto, to an Administrative Law Judge for hearing and decision. On August 10, 1977, Administrative Law Judge Stanley M. Levy (Presiding Officer) served his Initial Decision in which he found PRPA and PRMSA in violation of sections 16 First and 17 of the Act (46 U.S.C. 815 and 816). PRMSA and PRPA filed exceptions to the Initial Decision to which Seatrain and the Commission's Bureau of Hearing Counsel have replied. We heard oral argument on June 27, 1978.

DISCUSSION

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The Presiding Officer also found that both Seatrain and PRMSA could "practicably" utilize the Isla Grande terminal facilities providing Seatrain altered its arrival schedule to avoid PRMSA's "peak utilization" of the facilities.[3]

On the basis of his finding that Isla Grande was a public facility which may not be feasibly utilized without PRMSA's shoreside cranes, the Presiding Officer concluded that PRMSA's cranes had become vested with a public interest

[3] In support of this finding, the Presiding Officer relied principally upon Exhibit No. 96, which, as PRMSA notes in its Exceptions, was not admitted into evidence. This error is harmless, however, because as PRMSA also recognizes, Exhibit No. 115 was admitted into evidence, *in lieu* of Exhibit No. 96, and contains essentially the same data found in Exhibit 96.

thereby *subjecting* their use to government regulation. For failing to establish just and reasonable regulations concerning berth assignments and the utilization of public areas, and for giving undue and unreasonable advantage to PRMSA by permitting public areas, which have private fixtures thereon to become dedicated to private and exclusive use, the Presiding Officer found PRPA to be in violation of sections 16 First and 17 of the Act. Likewise, because PRMSA failed to establish just and reasonable regulations for the use of its cranes situated on public property and because PRMSA granted unto itself an unreasonable preference by its exclusive utilization of the public areas at Isla Grande and by its exclusive use of the cranes situated on public property, the Presiding Officer found PRMSA in violation of sections 16 First and 17 of the Act.

The exceptions filed by PRPA and PRMSA to the Presiding Officer's Initial Decision constitute nothing more than a recapitulation of contentions already exhaustively argued before the Presiding Officer and properly disposed of by him. Upon consideration of the entire record in this proceeding, including the exceptions, replies and matters presented at oral argument, we are adopting the Initial Decision in this proceeding. In so doing, we deem it appropriate, however, to clarify certain matters addressed on Exceptions as they relate to the violations found.

Section 16 First

As found by the Presiding Officer, and admitted by PRPA, Isla Grande is a "public" marine terminal facility for which, insofar as is pertinent to this proceeding, there exists no approved section 15 agreement permitting any carrier or "other person" (as that term is used in the Act) preferential or exclusive use in whole or in *any* part.[3] The record reveals, however, and the Presiding Officer found, that notwithstanding PRPA's claim that vessels are assigned to Isla Grande on a first come, first serve basis, PRPA will not assign vessels, other than those of PRMSA, to Isla Grande unless such vessels "can feasibly work at the berth." Yet, PRPA acknowledges that a vessel berthing at Isla Grande cannot feasibly be worked without the use of shoreside cranes and that PRMSA, whose cranes are situated on Isla Grande by PRPA's sufferance, will not permit secondary use of those cranes.[4] Thus, the only carrier which may "feasibly" berth and work a vessel at Isla Grande is PRMSA. PRPA, by its acquiescence in PRMSA's refusal to allow secondary crane use by other carriers, which prevents such carriers from using Isla Grande, has thereby in effect granted unto PRMSA exclusive use and control of an otherwise public marine terminal without the benefit of an approved section 15 agreement.[5]

On exception, PRPA argues that its relationship with PRMSA should be measured by that line of cases in which we held that not all exclusive or

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[3] Section 15 of the Shipping Act, 1916 (46 U.S.C. 814) makes it unlawful to implement any agreement between carriers or other persons subject to the Act prior to Commission approval.

[4] While we realize, as PRPA notes in its Exceptions, that even without the shoreside cranes, container operations are difficult because of the physical characteristics of Isla Grande, the fact is that the cranes *are* situated on Isla Grande and it is the *failure to provide* for secondary crane use of these cranes that prevents other carriers from using this public facility.

[5] See our Report in Docket No. 76-38—*Arrangements Relating to the Use of Isla Grande Marine Terminal, San Juan, Puerto Rico,* also decided this date in which we find PRPA and PRMSA in violation of section 15 of the Act for implementing an agreement relating to PRMSA's use of Isla Grande prior to Commission approval.

preferential terminal lease agreements are violative of section 16 First.[6] Although we agree with PRPA's analysis of the cases cited, those authorities do not preclude us from finding a section 16 First violation where, as here, the preference or advantage is undue or unjust.

As we have stated, Isla Grande is a public facility open to all on a first come, first served basis that may not feasibly be utilized without benefit of PRMSA's shoreside cranes. PRMSA's cranes are situated on the facility with PRPA's permission. PRPA has the authority and in the past has required owners of the cranes to provide for secondary use of the cranes situated on Isla Grande. PRPA, by failing to exercise this authority and by refusing to assign other vessels to the facility, unless such vessel makes arrangements to use PRMSA's cranes, which use PRPA knows will not be granted, has granted PRMSA an undue preference and advantage by effectively allowing PRMSA to control and use exclusively the public marine terminal facilities at Isla Grande.

PRPA's failure to ensure that the public areas at Isla Grande do not become dedicated to private and exclusive use is found to be in violation of section 16 First as is PRMSA's exclusive utilization of these public areas at Isla Grande. PRMSA's argument that a triangular relationship between the preferred, the preferring, and deferred persons is always necessary before a violation of section 16 First can be established was rejected in *Investigation of Free Time Practices —Port of San Diego,* 9 F.M.C. 525, at 547 (1966); and *Violation of Sections 14, 16 First and 17 Shipping Act, 1916,* 15 F.M.C. 92 at 98. It was determined in those cases that a competitive relationship is *not* a prerequisite to a section 16 First violation where terminal type services are involved.[7]

As we stated in *A.P. St. Philip v. Atlantic Land and Improvement Company,* 13 F.M.C. 166, at 174, with respect to section 16 and its application to terminals:

> The manifest purpose of section 16 of the Shipping Act is to impose upon persons subject to this Act the duty to serve the public impartially. In no other area is this requirement of equality of treatment between similarly situated persons more important than in the terminal industry. . . . [for] terminals are for all practical purposes public utilities.

Likewise, in *Pittston Stevedoring Corporation v. New Haven Terminal, Inc.,* 13 F.M.C. 33, at 35, we stated that the language of section 16 forbidding any undue or unreasonable prejudice or disadvantage in any respect whatsoever is specifically directed against *every* form of unjust discrimination against the shipping public irrespective of the competitive relationship.

In this proceeding, PRMSA, through its purchase of certain assets from Seatrain, has placed upon a public marine terminal shoreside gantry cranes. PRMSA has refused other carriers the use of its cranes and is thereby precluding any other carrier from being assigned the use of this public area. Because Isla Grande is a public area, the exclusive or preferential use of which is not approved pursuant to section 15, PRMSA's right to utilize Isla Grande is no greater than any other carrier wishing to use that facility. By depriving others of the use of this facility, PRMSA has granted itself in violation of section 16 First of the Act,

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[6] *E.g., Agreement No. T-2598,* 17 FMC 286; *Terminal Lease Agreement at Long Beach,* 11 F.M.C. 12; *Terminal Lease Agreements Oakland,* 9 F.M.C. 202.

[7] Because we find PRMSA to be an "other person" for the purposes of this proceeding, *infra,* it is unnecessary to address PRMSA's argument that the triangular relationship cannot be satisfied by a finding of self preference.

an undue and unreasonable preference and advantage over others who are entitled to the use of this facility.

Section 17

On exception, PRMSA argues that the Presiding Officer erred in finding a section 17 violation because that section only applies to carriers in foreign commerce and to "other persons," as that term is defined in the Act, and that PRMSA is allegedly neither. We disagree.

PRMSA's attempted distinction completely ignores its role at Isla Grande. As previously noted, the Isla Grande facilities are virtually inoperable without the use of PRMSA's shoreside cranes. Further, PRPA will not assign another vessel a berth at Isla Grande unless such vessel may be feasibly worked at the berth, which in practical terms means making arrangements to utiilize PRMSA's cranes. Because PRMSA refuses to permit secondary use of its cranes, PRMSA in effect controls berthing assignment at the Isla Grande piers, and thus is furnishing terminal facilities at those piers. By definition, this makes PRMSA an "other person," within the meaning of sections 1 and 17 of the Act.

In *A.P. St. Philip, supra*, respondent there owned certain terminal facilities which it leased to its parent company. The lease provided the parent the sole and exclusive right and power to hold, occupy and use the facilities. By virtue of this lease, the presiding officer found that respondent had divested itself of any control of the facility and that as to the leased facilities, respondent was no longer an "other person" within the meaning of the Act. In rejecting this argument, we found that while respondent had granted its parent exclusive use and control over the facilities, a measure of control was retained because carriers using the facility were required to utilize a tugboat service employed by respondent.

The situation in *A.P. St. Philip* can be analogized to the one here for although PRMSA is not the lessor of the facilities at Isla Grande PRMSA's significant degree of control of the berthing assignments at those facilities renders it an "other person" subject to the requirements of section 17.[8]

Adjudication v. Rulemaking

We now turn to PRPA's contention that the findings and conclusions of the Presiding Officer, which we have adopted, are so novel and have such far-reaching and unknown consequences that a formal rulemaking proceeding is required. PRPA argues that there are a growing number of judicial expressions which favor rulemaking proceeding over adjudication in cases involving a rule or policy of general application to a given industry. *S.E.C. v. Chenery Corp.*, 332 U.S. 194 (1947); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

PRPA's reliance on these authorities is misplaced. While the Court in those decisions did express concern over the use of adjudicatory proceedings in lieu of rulemaking proceedings, the Court nevertheless specifically upheld an agency's

[8] We also find PRMSA to be an "other person" because it owns and operates the only feasible means of working a vessel at Isla Grande. As we said in *Phillipine Merchants Steamship Co., Inc. v. Cargill, Inc.*, 9 F.M.C. 155 at 163; "[o]ne who operates an important link in the chain of tranference of goods furnishes a terminal facility."

right to proceed through either forum.[9] Indeed, the Court in *Chenery, supra* at 202, 203, recognized that:

Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations.

In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. . . . Or the problem may be so specialized and varying in nature, as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problem on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.

Thus, the cases relied upon by PRPA uphold an agency's right to formulate new standards and "make new law" through adjudication. In any event, we do not share PRPA's fears that our decision is so novel and will have such far reaching and unknown consequences on "property situated on docks all over the country" so as to require a rulemaking proceeding. Our decision in this proceeding is based on a particular set of facts and circumstances and is intended to right a wrong which we found to exist at Isla Grande, San Juan, Puerto Rico. It is not intended to apply indiscriminately to "docks all over the country."

Accordingly, upon careful consideration of the entire record in this proceeding, we conclude that the Presiding Officer's findings of facts and legal conclusions are supported by the record and correct. Exceptions not specifically discussed herein have nevertheless been reviewed and found either to constitute a reargument of contentions already properly disposed of by the Presiding Officer or to be otherwise without merit. We therefore adopt the Initial Decision, as clarified herein, as our own and make it a part hereof.

THEREFORE IT IS ORDERED, That the Initial Decision in this proceeding be adopted.

IT IS FURTHER ORDERED, That this proceeding be discontinued.

(S) FRANCIS C. HURNEY
Secretary

[9] See also 3 Mezines, Stine, Gruff, Administrative Law, Section 16.01.

FEDERAL MARITIME COMMISSION

No. 76–41

BERTHING OF SEATRAIN VESSELS IN SAN JUAN, PUERTO RICO

Adopted on August 18, 1978

The Federal Maritime Commission, pursuant to section 1 of the Shipping Act, 1916, has jurisdiction over the Puerto Rico Ports Authority with respect to the issues set forth in its Order of Investigation.

PRMSA and the Ports Authority are so closely connected in the matters which are the subject of this proceeding as to be considered as one person.

None of the facilities offered by the Ports Authority to Seatrain can be considered as adequate for servicing full container ships.

The labor unions would serve Seatrain at Puerto Nuevo if Seatrain is otherwise in compliance with the union rules in the Port of San Juan. The Ports Authority's duty to provide adequate facilities is not involved in union rules in the Port of San Juan.

Other than a few limited calls by Seatrain, the facilities at Isla Grande have not been used by carriers other than PRMSA since PRMSA acquired Seatrain's assets at Isla Grande.

PRMSA has made an offer to carriers, other than Seatrain, to utilize PRMSA cranes at Isla Grande and to furnish terminal facilities and services to such common carriers at Isla Grande, but no action has yet occurred pursuant to such offer.

The Isla Grande facility is inadequate for Seatrain's container service without the use of PRMSA's container cranes.

Since PRMSA acquired Seatrain's assets at Isla Grande, that facility has not in fact been operated as a public terminal.

Two carriers, whose calls do not coincide, can, as a practical matter, operate at Isla Grande.

Other than leased areas, there is presently very limited and marginal space available at Puerto Nuevo for marshalling containers. The Ports Authority by a policy of inaction has passed to PRMSA effective control of terminal assignments, at least insofar as it concerns Isla Grande.

PRMSA and the Ports Authority are not jointly furnishing container crane services at Isla Grande to common carriers.

Equal access to and use of a public terminal is an essential requirement for the free flow of the maritime commerce of the United States.

The Ports Authority's failure to require secondary-use clauses in its terminal agreements results in a situation whereby public areas which have private fixtures and property thereon become effectively dedicated to private and exclusive use. Such private and exclusive use of public areas constitutes the giving of an undue and unreasonable advantage to the owner of such fixture and property as to be in violation of section 16 First of the Shipping Act, 1916.

The exclusive utilization by PRMSA of public areas by the erection thereon of container rails and cranes constitutes the giving to itself an unreasonable preference and subjects other potential users of such public areas to an unreasonable disadvantage to be in violation of section 16 First of the Shipping Act, 1916.

The Ports Authority is in violation of section 17 of the Shipping Act, 1916, by its failure to establish and enforce just and reasonable regulations concerning assignment of berths and utilization of public areas at Isla Grande in connection with the delivery, handling and storage of property.

PRMSA is in violation of section 17 of the Shipping Act, 1916, by its failure to establish just and reasonable regulations concerning secondary utilization of its container cranes and rails located in the public areas at Isla Grande.

Amy Loeserman Klein, William Karas, Morris R. Garfinkle, and *Thomas A. Johnson* for Puerto Rico Ports Authority.

Mario F. Escudero, Karol L. Newman, and *Edward J. Sheppard* for Puerto Rico Maritime Shipping Authority.

Neal M. Mayer, Charles L. Haslup, III, and *Paul D. Coleman* for Seatrain Lines of Puerto Rico, Inc.; Seatrain Gitmo, Inc.

John Robert Ewers, C. Douglass Miller, Joseph B. Slunt, Jack E. Ferrebee, and *Alan J. Jacobson,* Hearing Counsel.

INITIAL DECISION[1] OF STANLEY M. LEVY, ADMINISTRATIVE LAW JUDGE

On August 2, 1976, Seatrain Lines of Puerto Rico, Inc. (Seatrain) filed with the Federal Maritime Commission a Petition for Directive Order. The Petition requested that the Commission direct the Puerto Rico Ports Authority (PRPA or Ports Authority) to make an adequate berth available immediately to Seatrain at Isla Grande terminal, San Juan, Puerto Rico, and to make similar berths available for subsequent calls by other Seatrain vessels and barges at Isla Grande on a noninterference basis at least until its vessels may once again call at the Pan American Docks.

A Supplemental Petition for Directive Order was filed on August 4, 1976, which in addition to the relief sought against the Ports Authority, Seatrain also requested that the Puerto Rico Maritime Shipping Authority (PRMSA) be directed to make its cranes at Isla Grande available to Seatrain on a noninterference basis.

The Commission determined that it had no interlocutory or injunctive powers and while it may issue orders to cease and desist, it may do so only after a hearing and upon a finding of a violation of the Shipping Act, 1916. It declared that the relief requested in this proceeding could therefore only be granted after finding as a matter of law that a violation is occurring. The Commission stated that it could not then make such a finding inasmuch as the various pleadings before it raised a number of disputed factual issues which must be resolved before a determination on the merits of Seatrain's Petitions could be made. Accordingly, by Order served September 7, 1976, it referred the Petition and the Supplemental Petition for a Directive Order, together with the responses thereto, to an Administrative Law Judge for hearing and Initial Decision.

In its Order, the Commission directed that the parties address themselves specifically to the following enumerated issues and such additional issues as the Presiding Administrative Law Judge might find were relevant and material to the violations alleged:

1. Whether PRMSA and Ports Authority were so closely connected or related that they should be considered as one person;

2. Whether the facilities offered by Ports Authority to Seatrain are adequate for a container carrier service;

3. Whether the labor unions at Puerto Nuevo have refused to service Seatrain's vessels and what the effect of that refusal is with regard to the Ports Authority's duty to provide adequate facilities;

[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).

4. Whether the facilities at Isla Grande have been used by carriers other than PRMSA since PRMSA acquired Seatrain's assets at Isla Grande;

5. Whether PRMSA has offered its container cranes at Isla Grande to other carriers;

6. Whether carriers other than PRMSA have used the container cranes at Isla Grande since PRMSA acquired title to the container cranes;

7. Whether PRMSA has been furnishing terminal facilities at Isla Grande to common carriers by water;

8. Whether the Isla Grande facility is adequate for Seatrain's container service without the use of PRMSA's container cranes;

9. Whether Isla Grande has in fact been operated as a public terminal since PRMSA acquired Seatrain's assets at Isla Grande;

10. Whether two carriers can practically operate at Isla Grande;

11. Whether there is marshalling space available at Puerto Nuevo;

12. Whether PRMSA has any control over Ports Authority which would influence the terminal assignments;

13. Whether the Ports Authority has any control over the container cranes at Isla Grande; and

14. Whether PRMSA and Ports Authority are jointly furnishing container crane services at Isla Grande to common carriers.

Two prehearing conferences were held and, after a period of discovery, twenty-three days of hearings were held beginning in San Juan, Puerto Rico, on November 30, 1976, through December 3, 1976, and intermittently in Washington, D.C., from December 7, 1976, to February 2, 1977. In the course of the hearing, 166 exhibits were identified, of which 151 in whole or in part were admitted in evidence. Of the 151 exhibits in evidence, 21 were denominated "confidential." The transcript of the hearings totaled 3,608 pages.

Pursuant to agreement of counsel and rulings made at the conclusion of taking of testimony in this proceeding, Seatrain and Hearing Counsel served Opening Briefs, PRPA and PRMSA served Answering Briefs, and Seatrain and Hearing Counsel served Reply Briefs.

PARTIES

The Puertó Rico Ports Authority (Ports Authority or PRPA) is a public corporation established by Act of the Puerto Rico Legislature (Law No. 125, May 7, 1942, as amended, 23 *Laws of Puerto Rico Annotated,* §1331, *et seq.*). PRPA has jurisdiction over marine terminal areas in Puerto Rico, including facilities known as Isla Grande and Puerto Nuevo.[2] The Ports Authority was vested with responsibility to, *inter alia,* "develop and improve, own, operate, and manage any and all types of transportation facilities and . . . marine services in, to, and from the Commonwealth of Puerto Rico . . ." (23 L.P.R.

[2] Ex. 28, p. 4.

§333) and charged with "making available the benefits of transportation facilities in the widest economic manner" (23 L.P.R. §336).

The Governing Board of PRPA consists of a single member, who at all times pertinent herein was Rafael L. Ignacio, the Secretary of Transportation and Public Works at the Commonwealth of Puerto Rico, who is appointed by the Governor.[3]

The Secretary appoints the Executive Director, who is responsible for carrying out the day-to-day functions of the Ports Authority. The Executive Director has total power to act on behalf of the Ports Authority.[4]

At all times pertinent to this proceeding, Julio Maymi Pagan was the Executive Director of PRPA.[5]

The Puerto Rico Maritime Shipping Authority (PRMSA) is a non-stock public corporation created on June 10, 1974, by Law No. 62 of the Legislative Assembly of the Commonwealth of Puerto Rico. PRMSA was established for the purpose of providing ocean transportation service between Puerto Rico and the exterior.[6]

PRMSA is governed by a Board of seven, one of whom is the Secretary of Transportation and Public Works, with a Chairman selected by the Governor. Policy directives of the Governing Board are delegated to the Executive Director (at all times pertinent to this proceeding, Esteban Davila Diaz).[7] The day-to-day PRMSA operations are performed under a management contract by Puerto Rico Marine Management, Inc. (PRMMI).[8]

On or about September 30, 1974, PRMSA became a common carrier by water in the U.S. Atlantic and Gulf/Puerto Rico trades utilizing the vessels and equipment formerly operated by Sea-Land Service, Inc., Seatrain Lines, Inc., and Transamerican Trailer Transport, Inc. These assets were acquired by purchase, lease or stock acquisition.[9]

In addition to the vessels and related rolling stock, PRMSA acquired certain terminal leasehold improvements from the three private carriers.[10]

Seatrain Gitmo, Inc., is a direct subsidiary of Seatrain Lines, Inc., and is a common carrier by water in the U.S. domestic containership trade. Seatrain International, S.A. is an indirect subsidiary of Seatrain Lines, Inc., and is a common carrier by water operating in the foreign containership trade. Seatrain Lines of Puerto Rico provides the terminal facilities and services operating and marketing activities to support all vessels of Seatrain Gitmo, Inc., and Seatrain International, S.A., calling at Puerto Rico.[11] (In this Initial Decision, all Seatrain companies are referred to as Seatrain.)

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[3] Exs. 12, p. 1; 28, p. 5.

[4] Ex. 28, pp. 5–6; Tr. 1025–1029.

[5] Ex. 28, p. 1.

[6] Exs. 59, p. 2; 60.

[7] Exs. 59, pp. 3–4; 60.

[8] Ex. 59, p. 4.

[9] Ex. 59, pp. 5–6.

[10] Ex. 59, pp. 6–8.

[11] Ex. 1, p. 3.

PORT OF SAN JUAN

In order that the issues hereinafter set forth may be more easily followed, a description of various facilities in the Port of San Juan, Puerto Rico, is deemed appropriate.[12]

ISLA GRANDE

The Isla Grande Terminal Facility, roughly bounded by San Juan Bay to the West, San Antonio Channel to the North, and Isla Grande Airport Runway to the South, consists of (a) two berths, 663 feet in length each, suitable for container vessels; (b) two parallel crane rails, supported by foundations, extending 1,185 feet along the wharf; (c) two 45 ton moving rail gantry container cranes placed on the rails; (d) a ramp (32′ × 43′, 8° slope) at the Eastern end of the facility is used for small roll-on/roll-off vessels; (e) a paved area of approximately 1,800,000 square feet (approximately 35 acres); (f) an office building, a maintenance shed, a guardhouse, several trailers for employee services and employee parking; and (g) fences encircling the property with gates.[13]

Paralleling the wharf, there is an area of 15 to 22 feet in width which is some 1½ to 3 feet lower than the wharf. This area is known as the "dip." Located about every 100 feet along the center of the dip are "bitts," steel piles 2 feet in diameter and 2½ feet to 3 feet in height.[14]

The acreage of the terminal at Isla Grande is approximately 34.95 acres.[15] Of this amount, nearly 14 acres are denominated a "transit" area.[16]

The marshalling area at Isla Grande used for parking loaded containers covers approximately 21 acres.[17] This area is being used pursuant to an alleged oral lease between PRPA and PRMSA.[18]

As a general rule, each acre of marshalling area can be used to store (or park) 40 or more containers.[19] With block stowage of empties, the capacity per acre can be increased to as much as 58 containers.[20]

The number of spaces available for containers at the Isla Grande facility is 1,057.[21] The 1,057 spaces at Isla Grande work out to almost 50 containers per acre. An area designated as E-2 on Ex. 16 is also available for enlarging the marshalling area. This would permit an estimated 50 or 60 additional spaces.[22] With block stowage of empties, the marshalling area could accommodate as many as 1,217 containers, increasing utilization to 58 per acre.[23]

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[12] In the course of this hearing, a tour of these facilities was made by the presiding Judge, accompanied by representatives of all the parties.

[13] Exs. 14, pp. 5–6; 16; 95; 135; Tr. 2346; 3475–80.

[14] Exs. 5, p. 15; 14, p. 6.

[15] Ex. 135; Tr. 3475.

[16] Tr. 3479.

[17] *Id.*

[18] Ex. 135; Tr. 1782; 3475.

[19] Tr. 187; 213; 2000–2001.

[20] Ex. 93; Tr. 2700; 3481.

[21] Ex. 96; 115; 135; Tr. 3471–82.

[22] Tr. 2701.

[23] Tr. 3481. Seatrain, by stacking at Pier 16, has achieved a density of 65–70 per acre; albeit at the price of reduced efficiency and higher handling cost.

PUERTO NUEVO

The Puerto Nuevo marine terminal in San Juan Harbor consists of one 600-foot berth suitable for roll-on/roll-off vessels (Berth C); three berths for break-bulk vessels (Berths A, B and D); and eight and ½ 600-foot berths (Berths E, F, G, H, J, K, L, M, ½N).

Berths E, F, G and H are operated as fully developed container facilities (including associated back-up areas for marshalling containers.)[24]

Berths J and K have crane rails but no cranes and no improved back-up facilities.[25] These crane rails were built for Sea-Land and PRPA has agreed to reimburse Sea-Land for the cost of the crane rails if they are used by another carrier.[26]

Berth L has one crane rail; Berths M and ½N have no crane rails. Neither Berth L nor M or ½N has improved back-up facilities.[27] Berths L, M and ½N were designed mainly for roll-on/roll-off operations.[28]

Prior to PRMSA's inception in 1974, Sea-Land utilized the container terminal at Berths E–H at Puerto Nuevo by virtue of various leases and other agreements entered into between PRPA and Sea-Land at various times between 1962 and 1968.[29]

Sea-Land's current lease with PRPA relating to Berths E and F at Puerto Nuevo gives Sea-Land exclusive use of certain parcels of marshalling area at Puerto Nuevo[30] and preferential use of the berths and adjacent transit areas on the dates reflected on a monthly schedule to be furnished to PRPA.[31]

Sea-Land still utilizes Berth E under this agreement.[32] PRMSA utilizes Berth F under the terms of the Sea-Land lease by virtue of FMC Agreement DC–75.[33]

Berths G and H at Puerto Nuevo are currently under lease from PRPA to Sea-Land by virtue of a lease contract dated November 20, 1968,[34] which provides for the preferential use of the berths and adjacent transit areas on the dates reflected on a monthly schedule[35] and exclusive use of approximately 23 acres of land—to be reclaimed—immediately behind the transit areas.[36] However, as with Berth F, PRMSA currently utilizes Berths G and H under FMC Agreement No. DC–75.[37]

Under the terms of FMC Agreement No. DC–75, PRMSA currently has no

[24] Ex. 14, pp. 10–11; 17.

[25] Ex. 33.

[26] Ex. 18, p. 1; Tr. 500–134; 500–137.

[27] Tr. 735.

[28] Tr. 500–123.

[29] Ex. 104; 105; 114; 131; Tr. 3433–36.

[30] Ex. 131, pp. 2–5.

[31] Ex. 131, pp. 5–7.

[32] Tr. 500–126 to 500–128; 2141.

[33] Ex. 128.

[34] Ex. 105.

[35] Ex. 105, pp. 4–5.

[36] Ex. 105, pp. 2–3.

[37] Ex. 128.

greater rights to the berths and cranes at Berths F–H at Puerto Nuevo than the rights granted to Sea-Land by PRPA under the various existing agreements.[38]

The term of the lease for Berths E and F is for fifteen years from approximately 1963, with a right in Sea-Land to renew the lease for an additional five-year period.[39] The term of the lease for Berths G and H is for fifteen years from approximately 1968.[40]

The leases for Berths E–H at Puerto Nuevo give PRPA the right to berth other vessels at the facilities at times other than those shown on the monthly schedule.[41]

With respect to the marshalling areas adjacent to Berths F, G and H, PRMSA is currently using Lots B, C and D (among others) situated behind Berth F.[42] Sea-Land has an option to take over preferential use of Berth F and acquire the use of Lots B, C and D. Lot D[43] contains PRMSA's control building, maritime operations building, maintenance garages, container yard gate, scales and exit/entry control facilities.[44] If Sea-Land exercises its options, PRMSA would be in a difficult operational situation and would immediately have to build new facilities.[45] PRMSA has an option for a 32-acre tract behind Berths J and K.[46]

PRPA has offered to negotiate a preferential use agreement with Seatrain for Berths L and M.[47] Seatrain has refused because it contends an investment of up to $8 million would be required of it to turn Berths L and M and back-up areas into a modern container terminal.[48]

The unimproved marshalling areas adjacent to Berths L and M at Puerto Nuevo consist of Parcels X, VIII, IV and parts of VII and V.[49] The total area of Parcels X, VIII and IV is 25.7 cuerdas,[50] or 25 acres, while the combined area of those parts of Parcels VII and V are 19.3 cuerdas, or 18.7 acres.

To install crane foundations and rails and develop marshalling areas for container operations at Berths L and M would require extensive capital investment and a period of time to construct.[51]

There are five container cranes at Berths E–H at Puerto Nuevo. Four of the cranes were installed in 1965 and 1966 by Sea-Land pursuant to an agreement between Sea-Land and PRPA dated September 21, 1965. These cranes serve Berths E, F and G.[52] The fifth crane was installed at Puerto Nuevo on November

[38] Exs. 128; 129; 130.

[39] Ex. 131, p. 3.

[40] Ex. 105.

[41] Exs. 105, pp. 4–5; 131, pp. 6–7.

[42] Ex. 17

[43] B-2 on Ex. 17.

[44] Exs. 129, pp. 4–5; 141, p. 1.

[45] Exs. 141, p. 1; 142, p. 2.

[46] Exs. 17; 41.

[47] Ex. 33.

[48] Tr. 500–124—500–125.

[49] Ex. 17.

[50] A cuerda is equal to .9712 acres. See Ex. 16.

[51] Tr. 14; 237; 500–139; 500–141; 500–159; 509–511; 1923–1936; 2125; 3042; 3485–3488.

[52] Exs. 104; 125; Tr. 3425–26.

2, 1971, and currently serves Berth H. The authority to install such crane is contained in an agreement between Sea-Land and PRPA dated November 20, 1968.[53] This crane was subsequently sold to PRMSA.

The 1965 agreement under which the first four cranes were installed at Berths E, F and G gives PRPA the right to request Sea-Land to operate those cranes for other vessels provided that such operations would not, in Sea-Land's view, interfere with Sea-Land's operations.[54] Since 1974 Sea-Land has allowed PRMSA the use of these cranes at Berths F, G and H.[55] And pending approval by the Federal Maritime Commission, Sea-Land and PRMSA Have agreed to interchange their respective cranes at Puerto Nuevo as the need arises.[56]

Pan American Dock

When Seatrain reentered the U.S. East Coast Puerto Rico trade in January 1976, it was assigned berthing by PRPA at the Pan American Dock, a facility in close proximity to Isla Grande on the San Antonio Channel. This is a breakbulk terminal, ill-suited for containership operations in that it has no container cranes and insufficient marshalling area.

Seatrain employed mobile truck cranes to work the vessel and leased supplemental marshalling space several miles from the berth.[57]

Seatrain could move on the average only 6.5 containers per crane per hour at the Pan American Dock.[58] Because of lack of modern off-loading and loading facilities, Seatrain alleges that because of utilization of mobile truck cranes, it incurred $39,849 per vessel voyage in stevedore expense beyond that it would have incurred had it berthed at Isla Grande and utilized high speed container cranes.[59]

At Pan American Dock, Seatrain had access to a very congested common-user terminal of 4 acres, plus two sub-lots totaling 2 acres.[60]

Frontier

Because of the collapse of the Pan Am Dock on July 27, 1976, Seatrain was assigned berthing facilities at the Frontier Pier, another PRPA breakbulk facility located across the San Antonio Channel from the Pan Am Dock.[61]

For container operations, Frontier is the least adequate of all facilities in San Juan on which there was evidence introduced in this proceeding.[62] There are no container cranes at Frontier, forcing the use of mobile cranes. The marshalling

[53] Exs. 114; 125.

[54] Ex. 104, p. 6.

[55] Exs. 128; 130; Tr. 3501–2.

[56] Ex. 79; Tr. 1661; 3519–20.

[57] Ex. 1, p. 8.

[58] Ex. 1, pp. 9–10.

[59] Ex. 1, p. 75.

[60] Tr. 142.

[61] Ex. 1, p. 9; Tr. 369.

[62] Tr. 762.

yard (about 5 acres) is unpaved and has no lighting. Further, several raised concrete slabs inhibit access to and movement of containers.[63] Seatrain made two calls at Frontier.[64] Seatrain alleges that these calls resulted in additional stevedoring expense above the costs at the Pan Am Dock.[65]

PUERTO RICAN DRYDOCK

On August 29, 1976, Seatrain leased Pier 16, located South and East of the Isla Grande terminals, from the Puerto Rico Drydock and Terminal Company.[66] Built originally as a breakbulk facility and one time used by self-contained container ships, Pier 16 lacks container cranes. Seatrain's vessel has no self-loading or unloading equipment and Seatrain utilizes three mobile truck cranes at this facility.[67]

Seatrain rents 7 acres at Pier 16, part of which is occupied by a transit shed abutting the apron. The shed inhibits the free movement of containers from the apron to the open area.[68] With a total area of only 7 acres, Seatrain, by stacking containers, realizes a utilization of 65 to 70 containers per acre.[69] Seatrain leases additional lots for marshalling but even so, overall lack of marshalling space contributes in limiting the number of containers Seatrain presently can carry in the trade.[70]

By utilizing three truck cranes at Pier 16, the maximum number the apron can accommodate, Seatrain achieves a total of approximately 24 moves per hour.[71]

There is also a lack of sufficient water depth alongside Pier 16, causing occasional bottoming by the *Transindiana*.[72]

Pier 16 is considered only marginal as a container terminal[73] because (a) it lacks sufficient marshalling area, (b) it lacks sufficient stevedoring area on the apron, (c) it does not have shoreside cranes on rails, and (d) it has minimal length at the berth and minimal draft to accommodate container vessels.[74]

HISTORY AND OPERATIONS

Prior to October 1974, Seatrain utilized the container terminal at Isla Grande by virtue of a lease between PRPA and Seatrain dated December 26, 1972.[75] Said lease was neither filed with nor approved by the Federal Maritime Commission and is a subject of the Order to Show Cause proceeding in FMC Docket 76–38.

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[63] Exs. 1, p. 9; 7, p. 1.

[64] Ex. 5, pp. 5–6.

[65] Tr. 617–618.

[66] Exs. 1, p. 9; 3; 94; Tr. 303.

[67] Ex. 1, pp. 9–10.

[68] Tr. 101; 143; 202. See Ex. 94.

[69] Tr. 184; 208–210. Forty to fifty containers per acre is considered the optimum operation for modern facilities.

[70] Tr. 208–10; 305; 2011; 3079.

[71] Ex. 1, pp. 9–10; Tr. 76; 227; 2543.

[72] Tr. 500–9.

[73] See Ex. 94.

[74] Ex. 1, p. 9; Tr. 9; 100–101; 202; 209–211.

[75] Ex. 8.

The lease under which Seatrain operated at Isla Grande gave Seatrain exclusive use of the marshalling yard at that terminal, subject to the right of ingress and egress of other carriers[76] and preferential use of the berths and transit area on the dates reflected on a monthly schedule to be furnished to PRPA.[77]

The lease under which Seatrain operated at Isla Grande also gave PRPA the right to berth other vessels at the facility at times other than those reflected on Seatrain's monthly schedule[78] and the right to require Seatrain to operate the container cranes at that facility for such other vessels, provided that such operation would not substantially reduce the capacity and efficiency of Seatrain's operations.[79]

Seatrain's lease for Isla Grande was for a period of fifteen years from December 26, 1972, with an option for Seatrain to renew for two additional terms of five years each.[80]

On or about September 30, 1974, PRMSA became the successor to four common carriers (including Sea-Land Service, Inc., and Seatrain Lines, Inc.) which had served Puerto Rico from the East and Gulf Coasts of the United States.[81]

Seatrain helped develop the terminal facilities at Isla Grande, installing crane rails, cranes, paving and other leasehold improvements. On October 11, 1974, Seatrain sold the cranes, the crane rails and the other leasehold improvements at Isla Grande to PRMSA and left the trade.[82] PRMSA is now the owner of the improvements located on the Isla Grande facility.[83]

However, before PRMSA purchased Seatrain's assets at Isla Grande, Seatrain requested that all Seatrain obligations with respect to its Isla Grande lease with PRPA be terminated.[84] PRPA refused to terminate the Seatrain Isla Grande lease until it received assurances from PRMSA that PRMSA would assume all obligations of Seatrain's lease.[85] By letter of September 30, 1974, Teodoro Moscoso, Chairman of the Board of PRMSA, advised PRPA that PRMSA would enter into a contract with PRPA assuming all obligations under the Seatrain lease at Isla Grande.[86] After receiving assurances from PRMSA that it would assume all of Seatrain's obligations under the Isla Grande lease, PRPA agreed to and did terminate the Seatrain lease on October 4, 1974.[87]

Although PRMSA had bought the improvements at Isla Grande, there were no negotiations at that time between PRPA and PRMSA concerning the use of Isla Grande by PRMSA vessels, even though PRMSA began calling at that facility

[76] Ex. 8, pp. 4–5.

[77] Ex. 8, pp. 1–3.

[78] Ex. 8, p. 3.

[79] Ex. 8, pp. 10–11.

[80] Ex. 8, p. 14.

[81] Ex. 59, p. 5.

[82] Exs. 30; 59, pp. 7–8; 63; Tr. 258; 312.

[83] Tr. 259.

[84] Ex. 59, p. 7.

[85] Tr. 882.

[86] Ex. 34.

[87] Ex. 29.

on October 13, 1974,[88] and currently uses one berth on Wednesday and Sunday of each week.[89] Except for calls by certain Seatrain vessels in 1974 and 1975, no vessels other than PRMSA vessels have berthed at the Isla Grande terminal since October 1974.[90]

No lease for the use of Isla Grande was entered into between PRMSA and PRPA until May 13, 1976.[91] This lease between PRPA and PRMSA for use of Isla Grande has been submitted to the Federal Maritime Commission for approval and is still pending Commission action.[92] Pending such action, there is purported to be an oral lease agreement between PRMSA and PRPA at Isla Grande.[93]

There have not been nor are there presently any FMC-approved preferential or exclusive use agreements for PRMSA's use of the Isla Grande terminal.[94]

Seatrain reentered the U.S. East Coast–Puerto Rico trade in January of 1976, with a converted C4 U.S.-flag vessel, the *Transindiana,* with a capacity of 481 40-foot containers.[95] The *Transindiana* is the sister-ship of the three vessels currently being utilized by PRMSA which call at the Isla Grande container terminal in San Juan.[96]

Seatrain operates the *Transindiana* on a fourteen-day cycle between the ports of New York, New York; San Juan, Puerto Rico; Guantanamo Bay, Cuba; Charleston, South Carolina; and Norfolk, Virginia.[97] It also presently operates a weekly barge service between San Juan and the Dominican Republic to and from which cargo is transshipped at San Juan via the *Transindiana.*[98]

The barge currently utilized has a capacity of 72 40-foot containers. Since October 1974, Seatrain has served San Juan with various feeder vessels ranging in capacity from 58 to 88 40-foot containers.[99]

Prior to reentering the U.S. East Coast–Puerto Rico trade, Seatrain requested from PRPA the use of the Isla Grande facility,[100] the same facility Seatrain operated in its previous service at Pueto Rico.[101] Seatrain requested preferential berthing rights, coordinated with PRMSA (who is currently calling at Isla Grande), the use of both cranes at Isla Grande for loading and discharging, a marshalling area of 7 to 10 acres, and office space.[102]

Caribbean Overseas Lines (Carol), a consortium composed of French Line,

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[88] Exs. 13; 103.

[89] Ex. 89, pp. 13, 18.

[90] Ex. 89, p. 13.

[91] Exs. 48; 59, p. 12; Tr. 891; 899.

[92] Originally Agreement T-3308. Subsequently withdrawn and replaced by Agreements AP-76-77-(4)100 and AP-76-77-(4)101. Exs. 28; 143; 144.

[93] Tr. 500–62; 822; 1843; 1871–72.

[94] Tr. 687–89.

[95] Ex. 1, p. 4.

[96] Ex. 1, pp. 4, 13; Tr. 2064; 2337.

[97] Ex. 1, pp. 4–5; Tr. 3036.

[98] Ex. 1, p. 3.

[99] Exs. 1, p. 5; 5, pp. 10–11; Tr. 317–318.

[100] Ex. 35.

[101] Tr. 257–8.

[102] Ex. 35.

Hapag-Lloyd Line, Harrison Line and K.N.S.M. Line, has been planning to and has introduced a fully containerized service between Europe and Puerto Rico.[103]

On August 23, 1976, PRMSA submitted a proposal to Carol for use of PRMSA facilities at Isla Grande.[104] PRMSA would rent its cranes for Carol's use and "is prepared to consider the return of . . . property [at Isla Grande] for release [by PRPA] to Carol Lines."[105]

The commitment by PRMSA to Carol was considered as a possible "checkmate Seatrain's request to use Isla Grande?"[106]

The offer to permit Carol to utilize Isla Grande establishes that utilization there by another carrier is feasible. The objection to Seatrain is based on competition with Seatrain, not unfeasibility.[107]

EMERGENCY: JULY 29–AUGUST 22, 1976

On July 29, 1976, PRPA instructed Seatrain not to use the Pan American dock facility because of damage that had occurred to the berth and apron.

On July 30, 1976, Seatrain believed it impossible to work at Frontier Pier because 840 cars were parked on it.[108]

Seatrain requested PRPA to make the berth and cranes at Isla Grande available to Seatrain for the *Transindiana* call scheduled for August 3, 1976.[109]

The berths at Isla Grande were not occupied from 0200 August 2, 1976, to 2000 August 5, 1976.[110]

The berths at Isla Grande were not occupied from 0800 August 6, 1976, to 1100 August 8, 1976.[111]

PRPA refused to make Isla Grande available and suggested La Botella. Seatrain berthed the *Transindiana* at La Botella on August 3, 1976, without working the vessel. Seatrain then sailed the *Transindiana* to Guantanamo Bay to discharge military cargo and returned to San Juan on August 7, 1976, at which time it berthed at the Frontier Pier and worked the vessel using mobile truck cranes.[112]

Seatrain was able to use Frontier Pier only because it worked the vessel during weekend hours, prestaged containers from the Pan Am Dock and returned them to the Pan Am Dock. Despite all its efforts, Seatrain had one container turn over and was forced to sail without containers which had been scheduled for loading.[113]

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[103] Conf. Ex. 9; Tr. 1856.

[104] Conf. Exs. 4; 7; 14. As of the close of the record herein, this proposal had not been acted upon. See discussion of Questions IV, V, VI, VII.

[105] Conf. Ex. 7.

[106] Conf. Ex. 17.

[107] Ex. 88, p. 2.

[108] Ex. 6, p. 4; Tr. 399.

[109] Ex. 5, p. 3.

[110] Exs. 5, p. 4; 12; 13.

[111] Exs. 12; 13.

[112] Ex. 5, pp. 3–5; Tr. 395.

[113] Ex. 7.

After the experience at Frontier Pier on August 7-9, Seatrain continued its requests for use of Isla Grande based on its hope that access to Isla Grande would be obtained.[114]

On August 8, 1976, Seatrain requested use of Berths J, K, L, M and N at Puerto Nuevo for a vessel arriving August 17, 1976. This request was for "interim use" and Seatrain advised PRPA on August 10, 1976, that Seatrain understood it might have to use mobile truck cranes at these berths.[115]

On August 13, 1976, PRPA advised Seatrain that only Frontier Pier was available to Seatrain.[116] Pursuant to schedules of PRMSA and known to PRPA, the berths at Isla Grande were not to be and in fact were not occupied from 0130 on August 16, 1976, to 0600 on August 18, 1976, covering the period when the *Transindiana* was originally scheduled to call in San Juan.[117]

On August 13, 1976, Seatrain advised PRPA it was altering the *Transindiana* schedule so that the vessel would arrive in San Juan on August 20, 1976, at 0900 instead of August 17, 1976.[118]

On August 16, 1976, the Ports Authority answered Seatrain's request by offering Seatrain Berths L and M, or both, but no back-up area for the August 20 call.[119]

On August 16 the area in back of Berths L and M (as well as the areas in back of J, K and ½N) were under a month-to-month lease to PRMSA. PRMSA was using the area for container storage while it was installing equipment on and paving marshalling areas behind Berths F through H. The Ports Authority stated that upon concluding arrangements with Seatrain, it would give PRMSA 30-days notice to remove all vehicles from the back-up areas to Berths L and M.[120] The Ports Authority subsequently offered Seatrain the preferential use of Berths J or K (or both) on an interim basis provided Seatrain would enter into a long-term lease and develop the back-up areas to Berths L and M and install a crane.[121]

On August 21, 1976, the *Transindiana*—originally scheduled to call August 17, 1976, but based on Seatrain's hope of obtaining access to Isla Grande, rotated to Guantanamo first—called and was worked again at Frontier Pier.[122]

The berths at Isla Grande were not occupied from 1900 on August 18 through 1430 on August 22, 1976.[123]

JURISDICTION

Although the Commission has directed that evidence shall be taken with respect to at least fourteen matters deemed necessary of resolution in this proceeding, PRPA has raised a threshold issue which, by its nature, might

[114] Ex. 5, p. 6.

[115] Exs. 9; 10; Tr. 415.

[116] Ex. 32.

[117] Exs. 12; 13.

[118] Ex. 32.

[119] Ex. 33, p. 1.

[120] Ex. 33, p. 2.

[121] Ex. 37.

[122] Exs. 1, p. 4; 5, p. 6; Tr. 415.

[123] Ex. 2, p. 5.

preclude resolution of any of the matters the Commission specified. PRPA asserts that the Commission lacks jurisdiction under section 1 of the Shipping Act of the subject matter of this proceeding.

This case involves alleged violations of sections 16 and 17 of the Shipping Act which, insofar as they are applicable to PRPA, are applicable only because these sections speak to "other person[s] subject to this Act." The Shipping Act defines these other persons to include:

> . . . any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

It is undisputed that PRPA supplies wharfage and dock facilities to common carriers by water.

PRPA argues that Congress has placed Puerto Rico harbor facilities under the control of the government of Puerto Rico and that sections 16 and 17 are no more applicable to persons furnishing dock and wharfage facilities in Puerto Rico than they are applicable to such persons operating in Rotterdam, Tokyo, or any other port not under U.S. sovereignty. PRPA, in essence, argues that Puerto Rico is not under U.S. sovereignty.

In support of its contention, PRPA relies upon sections 7 and 8 of the Jones Act, 48 U.S.C. §§747 and 749,[124] incorporated as part of the Puerto Rican Federal Relations Act, 48 U.S.C. §731.

In 1950 Congress passed Public Law 600, Act of July 13, 1950, Ch. 446, 64 Stat. 319, providing for Puerto Ricans to draft a constitution. In Public Law 447, Act of July 3, 1952, Ch. 567, 66 Stat. 319, Congress approved the Puerto Rican Constitution.

Relying on *Alcoa Steamship Co. v. Perez,* 295 F. Supp. 187, 197 (D.P.R. 1968), *vacated on other grounds* 424 F.2d 433 (1st Cir. 1970), wherein the Federal District Court for the District of Puerto Rico declared:

> The Commonwealth of Puerto Rico is a body politic which has received, through a compact with the Congress of the United States, full sovereignty over its internal affairs in such a manner as to preclude a unilateral revocation, on the part of Congress, of that recognition of power.

PRPA concludes that sovereignty over internal affairs is equivalent to sovereignty from the United States in matters which are the subject matters of the Shipping Act, 1916. Certain aspects of the Shipping Act involve a territory physically within the geographic limits of a State or a Commonwealth, such as ports and terminals. Yet, jurisdiction with respect to ports and terminals in such

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[124] Section 7 of the Jones Act, 48 U.S.C. §747, provides: . . . all the harbor shores, docks, slips, reclaimed lands, and all public lands and buildings not reserved by the United States for public purposes prior to March 2, 1917, is placed under the control of the government of Puerto Rico, to be administered for the benefit of the people of Puerto Rico; and the Legislature of Puerto Rico shall have authority, subject to the limitations imposed upon all its acts, to legislate with respect to all such matters as it may deem advisable. Section 8 of the Jones Act, 48 U.S.C. §749, provides: The harbor areas and navigable streams and bodies of water and submerged lands underlying the same in and around the island of Puerto Rico and the adjacent islands and waters, owned by the United States on March 2, 1917, and not reserved by the United States for public purposes, are placed under the control of the government of Puerto Rico, to be administered in the same manner and subject to the same limitations as the property enumerated in sections 747 and 748 of this title. All laws of the United States for the protection and improvement of the navigable waters of the United States and the preservation of the interests of navigation and commerce, except so far as the same may be locally inapplicable, shall apply to said island and waters and to its adjacent islands and waters. Nothing in this chapter contained shall be construed so as to affect or impair in any manner the terms or conditions of any authorizations, permits, or other powers lawfully granted or exercised in or in respect of said waters and submerged lands in and surrounding said island and its adjacent islands by the Secretary of the Army or other authorized officer or agent of the United States prior to March 2, 1917.

States or Commonwealths involved in the maritime commerce of the United States cannot be deemed interference in the internal affairs of such entities.

In *Caribtow Corporation v. Occupational Safety and Health Review Commission*, 493 F.2d 1064 (CA-1, March 18, 1974), *cert. denied* 419 U.S. 480 (1974) the Court held that the fact that the Commonwealth now possesses its own Constitution, and is governed with the consent of its inhabitants, does not establish that it is now so independent of the federal government that it may ignore or nullify national legislation and exert powers in this regard that are denied to the states, each of which also possesses a Constitution and a republican form of government (p. 1066).

Federal statutes otherwise applicable to Puerto Rico may not be nullified by any unilateral action of the Puerto Rican legislature. *Guerrido v. Alcoa Steamship Company*, 234 F.2d 349 (CA-1 1956); *Feliciano v. United States*, 297 F. Supp. 1356 (D.P.R. 1969).

Since the passage of the Shipping Act, 1916, the Commission and its predecessor agencies have consistently exercised their authority in Puerto Rico, often in proceedings in which Puerto Rico itself was a litigant.[125] Other persons subject to the Shipping Act, as defined by its first section, have often been the subject of the Commission proceedings which focuses on the Puerto Rican trade.[126] The jurisdiction of the Commission over transportation activities in the Puerto Rico trade has frequently been acknowledged by the federal courts, both in the mainland United States and in Puerto Rico.[127]

Whether PRPA in its terminal operation is subject to Commission jurisdiction was presumably answered in the affirmative by the Commission in *J.M. Altieri v. Puerto Rico Ports Authority*, 7 F.M.C. 416, 418 (1962).

PRPA had argued in *Altieri* that section 17, Shipping Act, 1916, was not applicable to it because it was not a "common carrier by water in foreign commerce." Even so, the Commission, in distinguishing the first and second paragraphs of section 17 stated:

By its terms, the second paragraph of section 17 applies to "other persons subject to this act." This includes persons providing terminal facilities, according to the definition of the phrase "other

[125] See *e.g.*, *Fares and Charges for Transportation by Water of Passengers and Baggage Between the United States and Puerto Rico*, 1 U.S.M.C. 739 (1938); *Puerto Rican Rates*, 2 U.S.M.C. 117 (1939); *The People of Puerto Rico v. Waterman S.S. Corp.*, 2 U.S.M.C. 407 (1940); *U.S. Atlantic and Gulf/Puerto Rico Rate Increase*, 5 F.M.C. 426 (1958); *Pacific Coast/Puerto Rico Rates*, 7 F.M.C. 525 (1963); and *Reduced Rates on Autos-North Atlantic Coast to Puerto Rico*, 8 F.M.C. 404 (1965).

[126] See *e.g.*, In *Re Rubin, Rubin & Rubin Corp.*, 6 F.M.C. 235 (1961) violation of section 16 of the Shipping Act, 1916, by a freight forwarder in Puerto Rican Trade; *Freight Forwarder Investigation*, 6 F.M.C. 327 (1961) freight forwarder rules replaced by P.L. 87–254; *Misclassification of Goods–Containerized Vans*, 8 F.M.C. 453 (1965) violation of section 16 by forwarder in Puerto Rico Trade.

[127] In *Federal Insurance Company and Robert A. Clair Co., Inc. v. Transconex, Inc.*, Civil No. 74–1379, July 12, 1976, D.C. D.P.R., the Court categorically stated "Neither the statute or any case we know indicates that the Shipping Statutes (Shipping Act of 1916, *supra*, and the Intercoastal Shipping Act of 1933, *supra*) or the Rules and Regulations of the Federal Maritime Commission are inapplicable to Puerto Rico. . . ." In *Air-Mar Shipping, Inc., v. F.M.C.*, D.C. D.P.R., August 11, 1972, 8 SRR 20,847, the plaintiff contended that section 44 of the Shipping Act, 1916, relating to freight forwarders did not apply to Puerto Rico because it was enacted after Puerto Rico became a Commonwealth and did not make specific reference to Commonwealth. The plaintiff argued that Puerto Rican legislation on the matter would exclude federal legislation, citing *Fonseca v. Prann*, 282 F.2d 153. The Court held that jurisdiction of the Federal Maritime Commission was not so nebulous as to warrant enjoining the Commission from enforcing the statute with respect to freight forwarders located in Puerto Rico. The Court said that while the issue was debatable, the Court was persuaded to find a congressional intent of including Puerto Rico in the statute. See *e.g.*, *South Atlantic & Caribbeon Line, Inc., v. F.M.C.*, 424 F.2d 941 (D.C. Cir. 1970), affirming order of FMC requiring carrier to cease and desist from enforcing embargo in Miami-Puerto Rico trade, see *South Atlantic and Caribbean Line, Inc.*, 12 F.M.C. 237 (1969); *Commonwealth of Puerto Rico v. F.M.B.*, 288 F.2d 419 (D.C. Cir. 1961), authority over rates of carriers in Puerto Rican trade recognized, case remanded for further Commission action; *Maldonado v. Sea-Land Service, Inc.*, 240 F. Supp. 581 (D.P.R. 1965) and *Carlos Crespo Trucking Service, Inc., v. Sea-Land Service, Inc.*, 260 F. Supp. 858 (D.P.R. 1966) where the Court acted to allow the FMC to assert its primary jurisdiction under the Shipping Act.

persons subject to this act" in section 1. See *California v. United States*, 320 U.S. 577 (1944). This paragraph does apply to domestic commerce insofar as *Charges and Practices, etc.*, 2 U.S.M.C. 143 (1939).

It is concluded that pursuant to section 1 of the Shipping Act, 1916, the Commission does have jurisdiction over PRPA to determine the issues set forth in its Order of Investigation.

Having concluded that the Commission had jurisdiction over the parties and of the subject matter of this proceeding, it now becomes necessary to resolve the question which the Commission set forth in its order of September 7, 1976:

I.

Whether PRMSA and Ports Authority are so closely connected or related that they should be considered as one person?

The evidence in this proceeding establishes that PRMSA is directed by a seven-member Governing Board whose Chairman was Teodoro Moscoso from shortly after PRMSA's inception on June 10, 1974, until at least November 19, 1976.[128]

Teodoro Moscoso was also a member of the *ad hoc* committee appointed by the Governor of Puerto Rico to negotiate the acquisition of shipping assets for PRMSA.[129]

In addition to his membership on the Board of PRMSA, Teodoro Moscoso, from at least June 10, 1974, and possibly before that date, until June 22, 1975, was a member of the Board of Directors of PRPA.[130]

In August 1976, when the Pan Am Dock had collapsed and Seatrain was seeking berthing at Isla Grande, PRPA's only director, Rafael Ignacio, was also a PRMSA director.[131]

Rafael Ignacio either as Chairman of the Board or as sole director of PRPA during the period from at least September 1974 through December 7, 1976, and Teodoro Moscoso as Chairman of PRMSA during the period from at least June 10, 1974, through November 19, 1976, were each members of the Board of Directors of both PRMSA and PRPA during such periods as are critical to the relations of PRMSA, PRPA and Seatrain to each of the other insofar as they relate to the issue in this proceeding.[132]

In 1974 Mr. Moscoso, a representative of the Commonwealth of Puerto Rico, and at that time on the Board of PRPA, entered into a nonbinding memorandum of understanding with Sea-Land, looking to the leasing to Sea-Land of facilities at Isla Grande previously owned by Seatrain and to be acquired by the Commonwealth or PRMSA, if and when a PRMSA enabling statute was enacted. The terms of Sea-Land's lease were to be the same as Seatrain's lease at Isla Grande, except the term should be twenty-five years and wharfage charges as set forth in the memorandum of undertaking.[133]

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[128] Exs. 13, pp. 1, 2; 59, p. 3.

[129] Tr. 1849.

[130] Ex. 12, p. 2.

[131] Exs. 12, pp. 1, 2; 13, p. 1; 28, p. 5.

[132] Exs. 12, pp. 1, 2; 13, p. 1; 28, p. 5.

[133] Ex. 46.

On May 8, 1975, PRMSA's general counsel requested Mr. Moscoso, Chairman of PRMSA, that since Mr. Moscoso was also a member of PRPA's Board of Directors he expedite for consideration by PRPA a matter involving leasing by PRMSA of port facilities.[134]

The original concept that Sea-Land would transfer its operations to Isla Grande[135] could not be carried out due to labor difficulties. Accordingly, another tentative arrangement between PRMSA and Sea-Land was worked out. Mr. Ignacio, a director of both PRPA and PRMSA, at a meeting of the PRMSA Board on November 10, 1975, approved the tentative agreement. The key to approval required the PRMSA Board to make certain improvements at Puerto Nuevo for PRMSA needs in the event Sea-Land exercised certain options in the tentative agreement. PRMSA Board approved the expenditure of funds for such improvement on the representation of Mr. Ignacio that PRPA did not then have the resources to do so. The resolution for PRMSA expenditure, moved by a Mr. Hernandez and seconded by Mr. Ignacio, was then unanimously approved.[136]

The nature of the connection between PRMSA and PRPA is in part revealed by the circumstances surrounding an application by PRMSA for federal assistance under the Public Works Employment Act of 1976. In order for PRMSA to meet the requirements of the Act, it requested PRPA to grant it three options to renew upon their expiration lease contracts for certain parcels of land at Puerto Nuevo. Three options without any charge therefore, were thereupon granted by PRPA to PRMSA.[137]

Of all the dealings which bear on the issue whether PRMSA and PRPA are so closely connected or related that they should be considered as one person are the circumstances relating to the use of the container cranes at the Isla Grande.

Prior to October 1974, Seatrain utilized the container terminal at Isla Grande by virtue of a lease between PRPA and Seatrain dated December 26, 1972.[138]

The lease under which Seatrain operated at Isla Grande also gave PRPA the right to berth other vessels at the facility at times other than those reflected on Seatrain's monthly schedule[139] and the right to require Seatrain to operate the container cranes at that facility for such other vessels, provided that such operation would not substantially reduce the capacity and efficiency of Seatrain's operations.[140]

Seatrain sold all of the Isla Grande terminal assets to PRMSA when PRMSA acquired Seatrain's vessels, equipment and facilities on October 11, 1974.[141]

PRPA refused to terminate the Seatrain Isla Grande lease until it received assurances from PRMSA that PRMSA would assume all obligations of Seatrain's lease.[142]

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[134] Ex. 54.

[135] See Memorandum of Understanding, Ex. 46.

[136] Ex. 142.

[137] Exs. 39; 40; 41.

[138] Ex. 8.

[139] Ex. 8, p. 3.

[140] Ex. 8, pp. 10–11. Often referred to as the "secondary-user" clause.

[141] Exs. 30; 59, p. 7–8; 63; Tr. 259.

[142] Tr. 882.

By letter of September 30, 1974, Mr. Moscoso, the Chairman of the Board of PRMSA, advised PRPA that PRMSA would assume all obligations under the Seatrain lease at Isla Grande.[143]

After receiving assurances from PRMSA that it would assume all of Seatrain's obligations under the Isla Grande lease, PRPA agreed to and did terminate the Seatrain lease on October 4, 1974.[144]

PRMSA began calling at Isla Grande on October 13, 1974, although no lease for its use thereof was entered into between PRMSA and PRPA until May 13, 1976.[145]

Pursuant to PRMSA's agreeing "to enter into contracts with the P.R. Ports Authority assuming all obligations under Lease AP 72–73–111 dated December 26, 1972, by and between Seatrain Lines of Puerto Rico and the P.R. Ports Authority"[146] negotiations for execution of a lease between PRMSA and PRPA were begun. Despite Mr. Moscoso's assurances on behalf of PRMSA that "we will be happy to execute at your earliest convenience any and all instruments that you deem necessary to effectuate this agreement,"[147] the negotiations were not concluded until May 13, 1976.

PRPA originally took the position that the new lease be identical in all respects to the former Seatrain lease. However, despite the prior assurances of Mr. Moscoso, PRMSA was unwilling to assume the obligation regarding "secondary use" of the container cranes. Thereupon, whereas previously it had been the policy of PRPA to insist upon crane-sharing provisions as being in the best interest of the Port of San Juan,[148] it did not so insist insofar as its lease with PRMSA was concerned. By way of rationalization, PRPA now contends that the inclusion of such crane-sharing provisions served an important purpose when the Seatrain terminal lease was executed because the Puerto Nuevo containership berths were not then fully developed; other than the facilities used by Sea-Land and Seatrain, there were no berths, wharves or land suitable for containership operations. Hence, the Ports Authority found it in the best interest of the Port of San Juan to negotiate for crane-sharing provisions with its container-carrier lessees to assure that no containership operator need be turned away. With the proper development of Puerto Nuevo, however, crane-sharing provisions not only became unnecessary, it contends they became unwise as well. Now, the Ports Authority envisions Puerto Nuevo, not Isla Grande, as the major container terminal in San Juan. Inasmuch as the use of Puerto Nuevo as a container terminal clearly must be encouraged by the Ports Authority if its overall plan of port development is to succeed, it claims that the inclusion of a crane-sharing provision in the Isla Grande lease would substantially undermine that policy by giving containership carriers the opportunity to berth at Isla Grande rather than Puerto Nuevo.

[143] Ex. 34.

[144] Ex. 29.

[145] Exs. 13; 48; 59, p. 12; 103.

[146] Ex. 34.

[147] Ex. 34.

[148] Ex. 28, pp. 15–16; Tr. 891–92.

Although Mr. Maymi, the Executive Director of PRPA, testified that an economic analysis of the situation revealed that a crane-sharing provision at Isla Grande would run counter to the Ports Authority's master plan for development of the Port of San Juan, no such analysis was ever documented and submitted as an exhibit in this proceeding in support thereof. Further, the documentation of the negotiations between the parties fails to evidence any reason for deleting the crane-sharing provision except PRMSA intransigence.

The drafts of the lease show PRPA's inclusion of such provision, PRMSA's refusal and the final deletion.[149] At no time did PRPA preclude PRMSA from using the facility nor did PRPA ever suggest that it had recourse against PRMSA for having released Seatrain in reliance on the written assurance that PRMSA would assume "all obligations of Seatrain" including obligations relating to crane-sharing and not limited to PRMSA assuming only "financial" obligations.

What the record does support is a conclusion that the community of interest of both Mr. Moscoso and Mr. Ignacio, at all times material to negotiations for the obtaining of and the use thereof of the facilities at Isla Grande, supports the conclusion that insofar as Isla Grande terminal and its facilities are concerned, PRMSA and PRPA are so closely connected or related that they should be considered one person.

II.

Whether the facilities offered by Ports Authority to Seatrain are adequate for a container carrier service?

The answer to this question lies primarily in a definition of "adequate."

Containers can be loaded or off-loaded in a variety of ways by a variety of equipment. Yet the means and equipment available can spell the difference between an efficient, effective and economically viable service and one that is slow, susceptible to damage and economically unsound.

Under any reasonable definition of adequate for container carrier service, the facility must be capable of permitting an efficient and economically viable operation. The container age has seen a shift from a labor intensive to a capital intensive maritime industry. It has been said in many contexts, but in none is it more apt that "time is money" when it is applied to the operation of full container ships. As will be set forth elsewhere in this Initial Decision, one of PRMSA's principal objections to sharing the facilities at Isla Grande is that tight scheduling and fast turn arounds are so essential to its operation that any possible impediment by way of others using the facility would have grave economic consequences for PRMSA.

The evidence in this proceeding[150] establishes that an adequate container facility requires:

(a) A berth with sufficient draft of water and length to accommodate a container vessel of the type and size generally utilized in the trade.

(b) Shore-side container cranes of sufficient capacity and capability to handle containers of a size and type generally utilized in the trade; less desirable but marginally adequate in specific situations

[149] Exs. 81; 82.

[150] Exs. 1, p. 7; 28, p. 10; 89, pp. 3-5; Tr. 213; 2104.

are berths without permanent cranes but with aprons of sufficient strength and width to accommodate mobile cranes or to permit utilization of ship's cranes.

(c) Adequate clear stevedoring area alongside the vessel to allow efficient traffic patterns by vehicles used to transport containers between shipside and marshalling area.

(d) A marshalling area of adequate size relative to the operation involved and reasonably close to the berth. The marshalling area, in turn, should be reasonably accessible to public roads and highways.

Marshalling areas should permit all weather and round-the-clock operation which normally requires secured paved areas and utilities.

The co-efficient between utilization of container cranes and mobile truck cranes is 2.6 or 2.7 to 1.[151]

By the foregoing standards, only the Isla Grande terminal and Berths E, F, G, and H at Puerto Nuevo can be considered adequate for container service in the Port of San Juan. None of these facilities were offered by PRPA to Seatrain.

A marginally adequate container facility in the Port of San Juan is Puerto Rican Drydock Pier 16.[152] Seatrain now operates at that facility by utilization of mobile cranes. The apron and marshalling area at Pier 16 cannot be deemed adequate for an efficient container service operation.

The Pan American Dock, before collapse of a portion of the apron, was a marginally adequate facility. Seatrain operated there with mobile cranes prior to collapse of the apron.

By no stretch of the imagination can the Frontier Dock be deemed an even marginally adequate facility for container service. The two calls made available by PRPA to Seatrain at this facility can only be characterized as an emergency situation analagous to "any port in a storm." Such calls cannot be deemed support for a contention that such facility is adequate.

PRPA has offered Seatrain use of Berths L and M at Puerto Nuevo. Whatever the potential of L and M as an adequate facility for container service, it now lacks cranes, crane rails, and paved marshalling areas. These berths have an apron susceptible of permitting the use of mobile cranes and they are sufficient in length and have depth of water to permit berthing of Seatrain container vessels.

III.

Whether the labor unions at Puerto Nuevo have refused to receive Seatrain's vessels and what the effect of that refusal is with regard to the Ports Authority's duty to provide adequate facility?

Labor for loading and unloading container vessels in the Port of San Juan falls under the jurisdiction of the International Longshoremen's Association (ILA). ILA Local 1740 has exclusive jurisdiction over the Isla Grande area, and ILA Local 1575 has exclusive jurisdiction over the Puerto Nuevo area.[153]

In the Port of San Juan, a stevedore can contract with only one local at a time. That is, Local 1575 will not sign a contract with Stevedore X if Stevedore X is already in contract with Local 1740 and *mutatis mutandis*. Thus, a stevedore conducting operations at the Pan Am or Isla Grande docks, which are under the

[151] Tr. 3524.

[152] Isla Grande compared to Pier 16 in terms of marine operation is probably "2 to 1." Tr. 3527.

[153] Ex. 5, pp. 11-12; Tr. 461-62; 464; 484.

jurisdiction of Local 1740, cannot simultaneously stevedore at Puerto Nuevo, because the latter is under Local 1575's jurisdiction.[154]

Although a stevedore cannot sign concurrent contracts with Locals 1575 and 1740, there is no impediment against a carrier signing separate contracts with two stevedores, one of whom has a contract with Local 1740 and the other a contract with Local 1575.[155] In such event, a carrier could make calls at Isla Grande and be stevedored by a firm that has a contract with Local 1740 and also make calls at Puerto Nuevo and be stevedored by a firm that has a contract with Local 1575.[156]

The prototype of the union contract is identical for both local unions (the present union contract runs for three years and expires on September 30, 1977) and is available to any interested person at the local union hall.[157]

A carrier desiring to start a service to Puerto Rico can either negotiate with the relevant ILA local directly or it can engage the services of a stevedore to negotiate with the appropriate ILA local.[158]

In either event, neither Local 1575 nor 1740 will work a vessel without a contract, even if the vessel call involves only a single berthing.[159]

Seatrain does not have a contract with either ILA local in San Juan. Rather, its vessels are worked by an independent stevedoring company, Maritima Del Caribe, which has a contract with ILA local 1740 to work the *Transindiana*.[160]

Because Maritima Del Caribe had a stevedore contract for Seatrain's *Transindiana* with Local 1740, it could not contract with Local 1575 to engage in stevedoring activities at Puerto Nuevo.

Seatrain would prefer to continue its stevedoring relationship with Maritima Del Caribe because its experience with this contractor has been very satisfactory and it, therefore, prefers to make calls at terminals which would permit it to continue to utilize Maritime Del Caribe and its stevedore.

There would be no impediment to working the *Transindiana* at Puerto Nuevo if (a) Seatrain were to employ a stevedore who had a contract with Local 1575 or (b) Seatrain itself were to enter into a contract with Local 1575 and perform its own stevedoring.[161]

Although it now appears that under the circumstances as given above it would be possible for Seatrain to be served at Puerto Nuevo, the labor problem is even now after extensive testimony not entirely free from doubt. Mr. Ortiz, president of Local 1575, testified regarding whether his union would service Seatrain vessels at Puerto Nuevo. He testified in Spanish and although an official translator was present, it was, nevertheless, difficult to comprehend his position. Nor did questions put to him for clarification by the Presiding Judge seem to

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[154]. Tr. 2783; 2805.

[155] Tr. 2781–82.

[156] Tr. 492.

[157] Tr. 2766–67; 2770–71.

[158] Tr. 2565; 2772.

[159] Tr. 486; 490; 495; 498; 500; 2769.

[160] Ex. 5, p. 12; Tr. 479–81; 500–23; 500–24.

[161] Conf. Tr. 592.

assist in any way. Mr. Ortiz's answer to the bottom-line question whether Local 1575 would serve Seatrain at Puerto Nuevo at times seemed to be yes, at other times seemed to be no;[162] who knows; it depends, possibly.

Thus, although the conclusions set forth above are believed to be accurate as to the labor situation in the Port of San Juan, they were determined only after a careful consideration and analysis of a complex and often confusing record. It is not surprising, therefore, that Seatrain may have had concerns whether their vessels would be faced with a labor "problem" at Puerto Nuevo.

Seatrain never having called or attempted to call at Puerto Nuevo, the labor unions have never in fact refused to service its vessels. Under appropriate conditions, they apparently would service Seatrain vessels. They would not service Seatrain vessels at Puerto Nuevo if Seatrain retained its current stevedore.

For reasons elsewhere set forth in this Initial Decision, the Ports Authority's duty to provide adequate facilities is, in any event, not dependent on labor factors.

IV, V, VI, VII

Whether the facilities at Isla Grande have been used by carriers other than PRMSA since PRMSA acquired Seatrain's assets at Isla Grande; whether PRMSA has offered its container cranes at Isla Grande to other carriers; whether carriers other than PRMSA have used the container cranes at Isla Grande since PRMSA acquired title to the container cranes; and whether PRMSA has been furnishing terminal facilities at Isla Grande to common carriers by water?

Prior to October 1974, Seatrain utilized the container terminal at Isla Grande by virtue of a lease between PRPA and Seatrain dated December 26, 1972.[163]

In 1974 Seatrain sold the cranes, the crane rails and other leasehold improvements at Isla Grande to PRMSA and left the trade.[164]

PRMSA has been berthing its vessels at the Isla Grande terminal since October 1974 and currently uses one berth on Wednesday and Sunday of each week.[165]

Between December 1974 and September 1975, while Isla Grande was operated by PRMSA, Seatrain vessels called at the Isla Grande facility and utilized the container cranes for loading and discharging on twenty different occasions. Included in these calls was one call by the *Transindiana* shortly after Seatrain sold its assets to PRMSA, on which the vessel discharged some 180 revenue loads, picked up six revenue loads and discharged and picked up certain empty equipment. The purpose of the call was to pick up loose-end cargo and retrieve some containers tendered to but not accepted by PRMSA.[166]

The remaining nineteen calls were pursuant to a transshipment agreement then in effect between Seatrain and PRMSA and involved vessels, principally barges,

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[162] See for example Confidential Tr p. 485, line 5; p 486, lines 14 and 20, p 487, line 17, p. 488, line 3, p 489, line 19; p 492, line 17; p 496, lines 2–9, Tr. 499–50-1.

[163] Ex. 8.

[164] Exs 30, 59, pp. 7–8, 63, Tr. 258; 312.

[165] Exs. 13; 89, pp. 13, 18; 103.

[166] Exs. 5, pp 10–11, 89, p. 13; Tr. 122; 315–16; 2214

having one-sixth of the capacity of the Transindiana. No more than forty to fifty containers were loaded or unloaded on any of these calls.[167]

PRMSA cranes were used for all of the above vessel and barge calls.[168]

Other than the foregoing calls by Seatrain vessels, no carrier has used either the facilities at Isla Grande or the cranes at Isla Grande since October 1974.[169]

However, between May or June 1975 and August 1976, PRMSA negotiated with Carol Line for the use of the facilities at Isla Grande, including the container cranes.[170]

PRMSA made an offer to Carol on August 23, 1976, which would permit Carol, *inter alia,* to use the Isla Grande cranes at a fixed rental per hour.[171]

Also, PRMSA "is prepared to consider the return of . . . property [at Isla Grande] for re-lease [by PRPA] to Carol Lines."[172]

At the close of this record, PRMSA and Carol had not entered into any final agreement regarding Carol berthing at Isla Grande, and at the close of the record Carol had not berthed at Isla Grande.

VIII

Whether the Isla Grande facility is adequate for Seatrain's container service without the use of PRMSA's container cranes?

The container cranes at Isla Grande rest on and move along two parallel crane rails, supported by foundations, extending 1,185 feet along the wharf. Extending alongside the wharf, there is an area of 15 to 22 feet in width which is some 1½ to 3 feet lower than the wharf. This area, known as the "dip," is bounded on one side by the first of the two parallel crane rail foundations and on the other side by water. Located about every 100 feet along the center of the dip are "bitts," steel piles 2 feet in diameter and 2½ feet to 3 feet in height.[173]

Other than using the container cranes on rails, there are possibly two other methods of discharging container vessels at Isla Grande—(1) by mobile truck cranes; and (2) by vessel self-loading and unloading equipment.

Mobile crane operations, however, cannot feasibly or practicably be operated at the Isla Grande facility.[174] In order to feasibly load or discharge a vessel by use of mobile truck cranes, several problems would have to be resolved. First, the "dip" area would need reinforcement by means of platforms alongside the "dip." Second, a ramp would have to be constructed between the area adjacent to the "dip" and the "dip" to allow the mobile truck cranes to move into and out of the "dip," because the cranes would not reach the vessel from any area beyond the "dip." Third, the mobile cranes would have to work around the "bitts," an extremely cumbersome and time-consuming process. Fourth, the

[167] Ex. 89, p. 13; Tr. 1477; 1489.

[168] Ex. 5, p. 11.

[169] Ex. 89, p. 13; Tr. 1422.

[170] Ex. 89, p. 14; Conf. Tr. 1434–35; 1460; 1535; 2218–19; Tr. 1427.

[171] Conf. Exs. 4; 7, p. 2; 14; Ex. 88; Tr. 1462; 1476; 1483; 1509; 1516–17; 2240–41.

[172] Conf. Ex. 7.

[173] Exs. 5, p. 15; 14, p. 6.

[174] PRPA Brief, p. 94.

containers could not be placed on the crane rails immediately beyond the "dip" without rendering the container crane system unusable.[175]

Similarly, vessel self-loading and unloading equipment cannot feasibly or practicably be operated at the Isla Grande facility for much the same reasons as preclude use of mobile truck cranes.[176]

The dip area is 22 feet wide. Vessel self-loading and unloading equipment would either have to unload the cranes onto the "dip" or reach from the vessel across the width of the dip to the crane rail area to deposit the container. To unload the container onto the "dip" would then present the difficult problem of removing the container from the "dip" for transit to consignee. To straddle the "dip" and deposit the container on the crane rails not only may be beyond the reach of the equipment,[177] but depositing the containers on the crane rails would render the container crane system unusable.

In any event, the Seatrain vessel has no self-container loading and unloading equipment.

For all of the foregoing reasons, it is concluded that the Isla Grande facility without the use of PRMSA's container cranes would not be adequate for Seatrain's container service.

IX.

Whether Isla Grande has in fact been operated as a public terminal since PRMSA acquired Seatrain's assets at Isla Grande?

Prior to October 1974, Seatrain utilized the container terminal at Isla Grande by virtue of a lease between PRPA and Seatrain dated December 26, 1972.[178]

The lease under which Seatrain operated at Isla Grande gave Seatrain exclusive use of the marshalling yard at that terminal, subject to the right of ingress and egress of other carriers[179] and preferential use of the berths and transit area on the dates reflected on a monthly schedule to be furnished to PRPA.[180]

The lease under which Seatrain operated at Isla Grande also gave PRPA the right to berth other vessels at the facility at times other than those reflected on Seatrain's monthly schedule[181] and the right to require Seatrain to operate the container cranes at that facility for such other vessels, provided that such operation would not substantially reduce the capacity and efficiency of Seatrain's operations.[182]

On September 30, 1974, PRMSA, through Teodoro Moscoso, advised PRPA that PRMSA would enter into contracts with PRPA assuming all obligations under the former Seatrain lease for Isla Grande.[183] In fact, PRMSA subsequently

[175] Exs. 14, p. 7; 28, p. 28

[176] PRMSA, through PRMMI, considers that container vessels "cannot be served at this berth with shipboard gantrys " Conf Ex 7.

[177] Tr. 1085

[178] Ex. 8.

[179] Ex 8, pp. 4–5

[180] Ex. 8, pp. 1–3.

[181] Ex. 8, p. 3.

[182] Ex. 8, pp. 10–11.

[183] Ex. 34.

refused to accept a lease containing an obligation to permit secondary use of the cranes and resists efforts of Seatrain to obtain nonconflicting preferential berthing at Isla Grande. Technically, PRMSA says it does not oppose nonconflicting berthing of other lines but that berthing of other lines always presents a conflict with PRMSA schedules. PRMSA says in any event preferential berthing is within the province and control of PRPA. PRPA says it cannot grant such preferential berthing to Seatrain since Seatrain would only block the berth and be unable to unload and that it would have no objection otherwise to permitting Seatrain to berth at Isla Grande. Thus, we see the game of Alphonse and Gaston. PRMSA says it is up to PRPA; PRPA says that as a practical matter it is up to PRMSA. Each says they don't control or have common cause with the other.

After PRMSA had bought the improvements from Seatrain at Isla Grande, it began calling at that facility on October 13, 1974.[184]

PRMSA witnesses contend that it entered into an oral lease for PRMSA's use of Isla Grande pending execution of a written lease. Assuming the possibility that pursuant to Puerto Rican law there could be an oral lease regarding real property, there is no evidence that such was ever entered into between PRMSA and PRPA for the use of Isla Grande.

Mr. Ysern, Executive Assistant, Puerto Rico Ports Authority, on cross-examination, testified as follows:[185]

Q. Is it the policy of the Ports Authority to have all of their agreements for land in writing?
A. Yes, sir.
Q. Do you have any oral agreements at the present time for marshalling space?
A. Not that I recollect.

Mr. Maymi, Executive Director of PRPA, testified on direct examination with regard to the marshalling area at Isla Grande as follows:[186]

Q . . . is it the Ports Authority's position that the marshalling area at Isla Grande is part of a public terminal?
A. In a sense, yes. As you know, we have negotiated an agreement at Isla Grande, submitted for approval . . .
Q. Is it the Ports Authority's position that pending such approval the marshalling area is a public terminal, part of a public terminal?
A. I would say yes.[187]

Mr. Maymi, on cross-examination, testified with regard to the transit area at Isla Grande as follows:[188]

Q. Do you have an agreement with PRMSA concerning whether or not they may use the transit area at Isla Grande for the marshalling area?
A. I don't remember that we have that type of agreement with PRMSA.

Mr. Davila, Executive Director of PRMSA, testified on cross-examination as follows:

Q. When you refer to an oral lease at Isla Grande, Mr. Davila, were you referring to the marshalling area at Isla Grande?

[184] Exs. 13; 103.

[185] Tr. 500–62.

[186] Tr. 687.

[187] See also Ex. 28, p. 12. "At the present then, we have a container facility at Isla Grande which is a public container terminal."

[188] Tr. 822.

A. I am referring to the marshalling area at Isla Grande. (Tr. 1835.)

Q. Now you were asked whether or not you used the marshalling area under an oral lease, and your position was yes. Can you explain . . . whether it is your position that Mr. Mayami is wrong, that it is not a public terminal?

A. My position is it is not.

Q. When was it [the oral lease] entered into, Mr. Davila, when?

A. At the time that we closed the transaction with Seatrain.

Q. Who negotiated the oral lease?

A. My staff basically.

Q. With whom?

A. With the Ports Authority.

Q. Who on the Ports Authority made the agreement for the oral lease?

A. That was part and parcel of the closing. That was with the request of Seatrain obligations. (Tr. 1836.)

Q. Who on behalf of PRMSA negotiated the lease?

A. Our lawyer did.

Q. With whom did they negotiate a lease?

A. With Ports Authority lawyers.

Q. Did they give you a memorandum of the terms of that oral lease?

A. No. (Tr. 1837.)

Judge Levy: Who on behalf of PRMSA executed the oral lease?

A. There was no execution of an oral lease. (Tr. 1838.)

Judge Levy: Who authorized and bound PRMSA on the oral lease?

A. [unresponsive.]

Judge Levy: Who said that PRMSA will be responsible?

A. Our lawyers did.

Q. Who authorized the lawyers?

A. I did.

Judge Levy: You did, and what did you authorize them to be responsible for? What terms and conditions?

A. Basically the terms and conditions that the Port Authority had established. In general, they had established that they wanted a lease which would be similar to what Seatrain had.

Judge Levy: Did the oral lease include the crane sharing agreement which was in the Seatrain?

A. No.

Judge Levy: How do you know that?

A. Because it was not bargained for. (Tr. 1838–9.)

Q. Is the understanding basically that PRMSA will use the marshalling area at Isla Grande and pay for that use under the rates in effect under the old Seatrain rates?

A. That is pretty much the case.

Q. And there is nothing in the oral lease, as you understand it, that gives you an absolute exclusive use of that area, is there?

A. . . . we basically have the right to use it exclusively until such a point as the former lease is approved. (Tr. 1841.)

Q. Who told you that you had exclusive use lease of the marshalling area at Isla Grande? Who told you that?

A. It was understood that way all the time.

Q. Understood. How did you understand that, from whom?

A. We pay for all of the improvements in that area, and I guess it goes without saying it, that you pay for the improvements that are contained within the leased area. It is not for you to share it with whomever the Ports Authority wants.

Q. What day was the lease negotiated?

A. At the time that the release of Seatrain from its obligations.

Q. Is it your testimony that you authorized your lawyers to negotiate and enter into a binding agreement, binding PRMSA to spend substantial sums of money for a lease of marshalling area, is that your testimony?

A. Yes.

Q. Did they give you a memorandum that said, yes, we entered into an oral lease?

A. No.
Q. This is all done orally?
A. Yes. (Tr. 1842.)
Q. Did you report to your governing board that you had exclusive oral lease there?
A. Yes.
Q. When did you do that?
A. At various points.
Q. Is there minutes to support that?
A. There is a lot of things that are not reflected in the minutes, Mr. Mayer. I don't think we keep a stenographic record of what goes on in the Board meetings. (Tr. 1843.)
Q. Are you telling me that there is no place anywhere in PRMSA files or in your lawyers' files or anywhere else that contains the written oral memorandum of the terms of this oral agreement, that it was entered into orally, that it was executed on oral authority, the terms were reported to you orally, is that your testimony?
A. Yes. (Tr. 1844.)

From the foregoing, it is concluded that PRMSA in fact occupied exclusively the marshalling area at Isla Grande from October 1974 until the close of the record herein. It is concluded that PRPA considers the entire terminal at Isla Grande to be a public terminal until such time as an agreement permitting exclusive use is approved by the FMC pursuant to section 15 of the Shipping Act, 1916. It is concluded that the PRPA does not, as a matter of policy, enter into oral leases for use of PRPA properties. It is concluded that no documentation exists which establishes that there is an oral lease for the use of Isla Grande terminal.

It is concluded that the ownership of improvements in or on public terminal areas convey no exclusive right to use or preempt those areas absent an express agreement approved by the FMC which would permit the exclusive use of such areas and the exclusive use of the improvements and properties thereon which by their nature inhibit the use of the public areas by any other party.

On the basis of the record in this proceeding, it is concluded that PRPA has officially always considered Isla Grande to be a public terminal. Thus, when leased to Seatrain, pursuant to PRPA policy, it required that although Seatrain was granted exclusive use of the marshalling yard at that terminal, it was subject to the right of ingress and egress of other carriers[190] and granted preferential use of the berths and transit areas only on the dates reflected on a monthly schedule to be furnished to PRPA.[191]

Further, the lease under which Seatrain operated at Isla Grande also gave PRPA the right to berth other vessels at the facility at times other than those reflected on Seatrain's monthly schedule[192] and the right to require Seatrain to operate the container cranes at that facility for such other vessels, provided that

[189] Tr. 1835–1844.

[190] The Seatrain lease, Article II, EXCLUSIVE RIGHTS, contained the following provision:

> When and if a water carrier or vessel operator is granted the right of use by the Authority provided hereinabove, then in that event, the water carrier, vessel operator or the applicable trucker shall have the right to traverse and cross the involved portions of the exclusive use area designated by Seatrain and Seatrain may, during the term of this Agreement, amend, revise, change or alter said designated portions of the exclusive use area. Seatrain, however, expressly agrees that it will make available such right of ingress and egress at all required time. By the terms of this Article the parties hereto expressly agree that this right being granted by Seatrain is limited to the right of ingress or egress and that all parking, storing, staging or other use of the involved use area is prohibited.

[191] Ex. 8, pp. 1-3.

[192] Ex. 8, p. 3.

such operation would not substantially reduce the capacity and efficiency of Seatrain's operations.[193]

Nevertheless, despite its claimed policy that Isla Grande was a public terminal, PRPA did not when PRMSA began to use the facility and does not now—require in its lease arrangements that PRMSA's rights to the marshalling is subject to the right of ingress and egress by other carriers.[194]

Most importantly, despite PRPA considering that Isla Grande is a public terminal, it had entered into an agreement with PRMSA with respect to the use of the container cranes which negates such policy and which it did not negate when Seatrain was the lessee.

Seatrain's lease, Article IV—CONSTRUCTION AND USE OF CONTAINER CRANES, also contained the following provision:[195]

B. 4) Seatrain shall operate the shoreside cranes for vessels belonging to or Operated by another company if so requested, but the use by others in no way would substantially reduce the capacity and efficiency of Seatrain's own operations at the berthing area. If the Authority determines that shipping containers destined to move across the berthing area, carried or to be carried by vessels belonging to or operated by another company, can be loaded or unloaded with the crane without substantially reducing the capacity and efficiency of Seatrain's operations. Seatrain shall, if requested by the Authority, furnish to such other company crane service under the following conditions.

a) Submission of a hold harmless and indemnity receipt in favor of the Authority and Seatrain by such other company.

b) Evidence of insurance by such other company satisfactory to the Authority and Seatrain.

c) The operation of the cranes for loading or unloading of vessels belonging to or operated by shipping companies other than Seatrain does not release Seatrain of any responsibilities assigned by this Agreement, or of any liability to the Authority due to the operation of the cranes.

However, Seatrain shall have the right to request such other shipping companies to take over the responsibilities and liabilities due to the operation of the cranes as a condition precedent to said loading or unloading.

d) Charges for use of the crane by others may be made by Seatrain and all such charges shall accrue to the account of Seatrain. Seatrain shall charge no more for the use of the crane than is allowed by the Public Service Commission or any other (Gobernmental) [*sic*] body having jurisdiction.

No such comparable provision is contained in PRMSA's proposed lease.[196]

Whatever PRMSA's rights to the use of its own cranes are, they are no more than Seatrain's rights were when Seatrain owned the cranes. Then PRPA required Seatrain to make them available to other users under the conditions set forth in the lease. PRPA has not required this of PRMSA. By not so requiring, Isla Grande in fact has not been operated by PRPA as a public terminal as required by its enabling statute since PRMSA began operations there.

Oral lease or not, PRMSA has in fact occupied Isla Grande since October 1974 until the present. And whatever its status as a tenant may be, the record discloses that it has asserted exclusive domain over the premises. Except for the Seatrain calls by permission of PRMSA and for the mutual benefit of Seatrain and PRMSA, no other carrier has been given berthing rights at Isla Grande by PRPA since October 1974. Further, PRMSA has undertaken to negotiate with Carol

[193] Ex. 8, pp. 10–11.

[194] Exs. 143; 144.

[195] Ex. 8, pp. 10–11.

[196] Exs. 143; 144.

shared use of Isla Grande without making PRPA a party to the negotiations despite the fact that PRPA is the owner/lessor of the terminal and PRMSA does not occupy the premises pursuant to any lease which has been approved by the FMC nor by any other lease which this record can ascertain. The arrogation of proprietorship of Isla Grande terminal by PRMSA since October 1974 is inconsistent with any concept that Isla Grande or any part thereof is being operated as a public terminal.

X.

Whether two carriers can practically operate at Isla Grande?

The Isla Grande Terminal Facility, roughly bounded by San Juan Bay to the West, San Antonio Channel to the North, and Isla Grande Airport Runway to the South, consists of (a) two berths, 663 feet in length each, suitable for container vessels; (b) two parallel crane rails, supported by foundations, extending 1,185 feet along the wharf; (c) two 45-ton moving rail gantry container cranes placed on the rails; (d) a ramp (34′ × 43′, 8° slope) at the Eastern end of the facility is used for small roll-on/roll-off vessels; (3) a paved area of approximately 1,800,000 square feet (approximately 35 acres) utilizable for transit or container marshalling space.[197]

Seatrain is presently calling at San Juan with the *Transindiana*, a converted C-4 U.S.-flag container vessel having a maximum capacity of 481 40-foot containers. This vessel is the sister-ship of the three vessels currently being utilized by PRMSA which call at the Isla Grande container terminal in San Juan.[198]

Considering the requirements for a container terminal[199] and the facilities available at Isla Grande, it is concluded that Isla Grande is a terminal adequately equipped to service full container ships of the class presently employed by PRMSA and Seatrain in their calls at San Juan.

Of the 35 acres of space at Isla Grande, 21 acres are now being used by PRMSA for marshalling containers.[200]

The marshalling area has a capacity of 1,057 container spaces—non-block stow.[201] This works out to almost fifty containers per acre. With block stowage of empties, the marshalling area has a potential capacity of 1,217 spaces, a utilization factor of fifty-eight containers per acre.[202] Approximately fifteen or twenty additional spaces might be utilized at the extreme western end of the terminal.[203]

It is possible for two vessels the size of the *Transindiana*[204] to berth at Isla Grande at the same time.[205] It is also quite feasible to berth and work the

[197] Exs. 14, p. 5; 16; 48, p. 2; 95; 135; Tr. 3475–80.

[198] Ex. 1, pp. 4, 13; Tr. 2064; 2337.

[199] Exs. 1, p. 7; 28, p. 10; 89, pp. 3–5; Tr. 213; 2104. See also discussion of question II elsewhere.

[200] Tr. 2015; 3466; 3479.

[201] Ex. 96.

[202] Tr. 3481.

[203] Ex. 195; Tr. 3509.

[204] The vessel is 633 feet in length. Tr. 2348.

[205] Ex. 5, p 9; Tr. 2564; 2570.

Transindiana and the Caribbean feedership at the same time.[206] However, two vessels the size of the *Transindiana* cannot be worked by the PRMSA container cranes at Isla Grande at the same time.[207] This is because although the wharf is over 1,300 feet, permitting berthing of two ships, the crane rails extend only 1,185 feet along the wharf. This 1,185 feet is further diminished in terms of crane lift mobility. The cranes are constructed somewhat on an outrigger basis so that the actual lift may be 50 feet or more from the bumper at the end of the rails.[208] Thus, taking into consideration the minimum distance necessary between ships on the berth,[209] the lesser length of the crane rails, the still shorter length for actual crane lift capability, the net result is that with two ships on berth, several rows of containers on each ship furthest from the center line of the rails could not be serviced by the cranes.

However, consideration must now be given to whether Isla Grande is capable of handling the operation of both PRMSA and Seatrain calling at different times.

PRMSA has been berthing its vessels at the Isla Grande terminal since October 1974 and currently uses one berth on Wednesday and Sunday of each week.[210] In 1976 its average time on berth was between thirteen and fourteen hours.[211] Thus, the Isla Grande berths are currently unoccupied approximately ten out of every fourteen days.[212].

The *Transindiana* currently makes a fortnightly call at San Juan every other Tuesday, operating between San Juan, Charleston, Norfolk, New York, and Guantanamo Bay. [213].

Ex. 115, Isla Grande Yard Utilization, indicates that at peak times[214] during the period October 4-November 26, 1976, an average 978 containers or chassis occupied the marshalling area. Of these 978 spaces, an average of 374 were empties, chassis, or "deadlined" containers. These 374 spaces constitute 38 percent of yard utilization.[215]

PRMSA has a very fast delivery of cargo to its customers. "For example, 90 percent of our cargo moved from the docks in San Juan to Mayaguez and Ponce on the first day, 9 percent on the second day, and only one percent on the third day."[216] Therefore, the peak number of containers in the marshalling area "would normally either be the ship day or the day immediately after or preceding."[217] During this peak period, as many as 1,514 containers, including empties and chassis, may be in or pass through the terminal in a twenty-four hour

[206] Ex. 5, p. 9; Tr. 2345.

[207] Tr. 2345–49.

[208] Tr. 2348.

[209] *Id.*

[210] Ex. 89, pp. 13, 18; Tr. 2061; 2609.

[211] Ex. 2; Tr. 2328.

[212] Ex. 5, p. 9.

[213] Ex. 1, pp. 4–5.

[214] Sailing days.

[215] Ex. 115; Tr. 2978. Based on a yard capacity of 1,057 spaces. Ex. 96.

[216] Ex. 76; Tr. 2066.

[217] Tr. 2039.

period, though with containers entering or departing, being loaded or unloaded, the number in the terminal at any given moment is constantly changing.[218]

PRMSA's witness, Mr. Katim, testifying on terminal operation, stated that the efficiency of a terminal operation is "probably about the same" whether the boxes which move through the terminal in two weeks are handled by reason of a biweekly service or when an equal amount is handled by reason of two calls on a weekly service.[219] In other words the capability of the terminal to handle the flow is determined by the amount of boxes at any given moment rather than the total during any time period. The evidence in this proceeding is that 21 acres of marshalling area have a capability to handle more containers than are actually moving through the terminal at any given moment. In PRMSA's operation the marshalling area is often by-passed; the evidence being that many containers depart the terminal on the ship arrival day, moving out directly from the transit area.[220]

The average number of container movements by PRMSA per berthing at Isla Grande during the period October-November 1976 was 600; 503 southbound loads and 97 northbound loads.[221] On that basis the movement of 600 containers through the marshalling area by reason of a given sailing should not unduly congest the terminal or the marshalling area. Put another way, the movement of 1,200 containers per week through the terminal by reason of two sailings per week does not strain the capacity or capability of the terminal particularly when most of the containers do not remain in the terminal more than a day. Outbound containers arrive at the terminal either on ship day or the day before. Inbound containers depart the terminal either on ship day or the day after.

Inasmuch as PRMSA has a throughput of 600 containers per sailing,[222] the terminal a capacity of at least 1,057 on a non-block stow basis,[223] and during sailing days an average of 374 empties or chassis are parked in the marshalling area—38 percent of the total units there during peak days,[224] it is apparent that the Isla Grande marshalling area has a capability of accomodating a second user even if an overlap should occur on occasion. The problems of overlap would be diminished to the degree that the number of empty or deadlined units were stacked or stored in less critical areas, for example Puerto Nuevo.

The marshalling area, in any event, is ample for the handling of three vessel calls a week when the carriers utilize vessels no larger than the vessels currently in the service and utilize a chassis system[225] which permits fast throughput.

There is little doubt that the marshalling area would be strained if peak utilization by both carriers was simultaneous. PRMSA has two peak periods during the week coincident with ship berthings. It has valleys at the time interval furthest from such berthings. Seatrain arrivals, if scheduled for a Friday, for

[218] Ex. 96.

[219] Tr. 2180.

[220] Ex. 76; Tr. 2039.

[221] Ex. 96.

[222] *Id.*

[223] *Id.*

[224] Ex. 115; Tr. 2978.

[225] Both PRMSA and Seatrain utilize such a system.

example, would be most distant in time from Wednesday or Sunday, scheduled arrivals of PRMSA's vessels. Even allowing for the vagaries on occasion of ship arrivals, there would appear to be sufficient latitude in such a schedule as to permit use by both carriers without unreasonable interference by either of the other's activity.

If we assume that no excess marshalling space is available at Isla Grande, to prevent congestion Seatrain would need to move a maximum of 960 containers through the gate in a twenty-four hour period—480 outbound and 480 inbound. The capability of the cranes to discharge and load this number is indicated by the fact that PRMSA can discharge, load and turn a full shipload in far less than twenty-four hours.[226] *Transindiana* calls, working with mobile truck cranes, required an average of 30.5 hours at the Pan Am dock, 25.6 hours at Frontier and 27 hours at Pier 16.[227] Seatrain estimates that if permitted to call and use the highspeed container cranes at Isla Grande, its time on berth would average 14.45 hours per call.[228] This compares with PRMSA average time on berth at Isla Grande of between thirteen and fourteen hours.[229]

PRMSA disputes this, alleging that Seatrain's stevedore could not be expected to utilize the cranes as efficiently and effectively as PRMSA's stevedoring operation.[230] Therefore, PRMSA asserts that Seatrain's estimate of time on berth, which compares favorably with PRMSA's experience, cannot be deemed reliable.[231] And if Seatrain is on berth for a longer period, it could disrupt PRMSA's tight schedule at Isla Grande. Further, PRMSA contends that necessary downtime for crane maintenance takes up substantial periods of time between PRMSA calls, thus making them unavailable even if Seatrain's vessel could be shoehorned in between PRMSA calls.[232]

PRMSA realizes a productivity of thirty-eight boxes per hour.[233] Under stevedoring conditions which had previously prevailed at Isla Grande, Seatrain productivity was less.[234] But given the changed stevedoring conditions under which PRMSA now operates, it is reasonable to conclude that Seatrain's producitivity under the same conditions with the same cranes should be reasonably comparable to PRMSA productivity.

As to berthing conflicts, if Seatrain were scheduled to arrive on a day of the week—Tuesday—Ex. 91 establishes that such a hypothetical arrival by Seatrain at Isla Grande in the period 6 January-20 July 1976, would have presented a conflict with PRMSA actual berthings during that period on only one occasion—the 13th of April. While ships do not always arrive and depart on schedule, the nature of liner service requires a carrier to constantly strive to that end. During the last five months of 1976, PRMSA's "schedule was very well

[226] Thirteen to fourteen hours. Ex. 2; Tr. 2328.

[227] Ex. 1, p. 40. Less containers were handled at Frontier.

[228] Ex. 1, p. 15; Tr. 58.

[229]. Ex. 2; Tr. 2328; 2558.

[230] Tr. 2612.

[231] Ex. 89, p. 27; Tr. 2608; 2610.

[232] Ex. 89, pp. 21-22; Tr. 2583-97.

[233] Tr. 2339; 2543; 2567; 2583.

[234] Tr. 2340.

kept."[235] Potential berthing conflicts with a four-day interval between PRMSA calls—Wednesday to Sunday—would be less than conflicts which might result during the three-day interval—Sunday to Wednesday.

Thus, in order to ameliorate potential berthing conflicts as well as minimizing terminal congestion at Isla Grande, Seatrain should schedule San Juan arrivals for Friday rather than Tuesday as now.

PRMSA's witness, Mr. Katim, contended that Pier 16 was a suitable facility to handle Seatrain's container service.[236] This despite the fact that Pier 16 has no high-speed container cranes and a marshalling area of only 7 acres, including a shed.[237] Inasmuch as Isla Grande has two high-speed container cranes and a total area of approximately 35 acres, of which at least 21 acres are open, paved and otherwise unimpeded for utilization in the handling, storing or through movements of containers, it is reasonable to conclude that Isla Grande could handle an operation of at least three times the capacity of the *Transindiana*. That is to say, Isla Grande could reasonably handle and move through the terminal approximately 2,880 40-foot containers a week. This is the optimum capacity of three vessels, each capable of carrying 480 40-foot containers. Thus, if PRMSA makes two calls a week, it could carry as many as 960 containers inbound and 960 outbound; Seatrain could carry 480 inbound and 480 outbound.[238] For no voyage would more than 960 boxes impact the terminal. The terminal is more than capable of handling this amount in any twenty-four hour period. Even with three voyages, in the week that Seatrain would be scheduled to call at San Juan, the average of terminal time allowable for each voyage's cargo would be fifty-six hours. Fifty-six hours is more than sufficient time to receive, handle and move 960 40-foot containers through Isla Grande. Even allowing for outbound containers which arrive as early as a day and half before departure and inbound containers which are not dispatched to consignees until a day and a half after arrival, the capability of the 21 acres of usable marshalling space at Isla Grande to handle the containers for three equally spaced voyages a week is a reasonable conclusion.

There would be an overlap of marshalling area utilization by a Seatrain arrival in the interval between PRMSA's Wednesday and Sunday arrivals. But such overlaps would occur during the valley operation of both PRMSA and Seatrain.

This is demonstrated as follows:

PRMSA's vessels averaged thirteen to fourteen hours on berth during 1976.[239] Most outbound containers are received the day of ship arrival or the day before; most inbound containers are dispatched to consignees the day of ship arrival or the next day.[240] Thus, a period of thirty-six hours plus or minus ship arrival is the period for greatest terminal utilization by PRMSA. Assuming a noon Wednesday arrival, peak periods are the twenty-four hours from 00:01 Wednesday until

[235] Ex. 134; Tr. 3452. Earlier, in May 1976, Mr. Diaz, Executive Director of PRMSA, was proclaiming in the *Journal of Commerce* "Navieras' [PRMSA] sailing schedules are being maintained faithfully." Ex. 76.

[236] Ex. 89, p. 11; Tr. 2159.

[237] See photo, Ex. 94.

[238] These optimum capacities are not now being utilized.

[239] Ex. 2; Tr. 2328; 2558.

[240] Tr. 2039.

23:59 Wednesday, with outbound loads arriving as early as thirty-six hours before ship arrival (00:01 Tuesday) and the bulk of inbound loads dispatched by thirty-six hours after ship arrival (23:59 Thursday). Assuming a Seatrain vessel at noon Friday, and an operation similar to PRMSA, the peak terminal utilization by Seatrain would be the twenty-four hours 00:01 Friday to 23:59 Friday. Outbound loads arriving thirty-six hours previously (00:01 Thursday) would overlap with PRMSA inbound cargo not yet dispatched to consignees; and Seatrain's inbound loads not dispatched to consignees until Saturday would overlap with PRMSA outbound loads beginning to arrive for shipment on Sunday's vessel.

Isla Grande's marshalling areas could probably handle overlapping peak periods of PRMSA and Seatrain. It is more than adequate to handle overlapping valley periods.

It is recognized that business conditions can fluctuate between the carriers. It is also recognized that on some voyages a carrier will carry more or less than on others and also that there are seasonal fluctuations. Nevertheless, it is reasonable to assume that two carriers in the same trade operating the same type of vessels will have approximately the same volume per voyage and occupy a berth for approximately the same time and have similar operating and stevedoring problems. Accordingly, it is concluded that the physical aspects of the Isla Grande terminal do not preclude or prevent an operation by both PRMSA and Seatrain in the magnitude of that susceptible with two vessel calls a week by PRMSA and a biweekly call by Seatrain each using vessels of the *Transindiana* class.

Caribbean Overseas Lines (Carol), a consortium composed of French Line, Hapag-Lloyd Line, Harrison Line and K.N.S.M. Line, has been planning to and has introduced a fully containerized service between Europe and Puerto Rico.[241]

PRMSA has extended two offers to Carol to make its container cranes at Isla Grande available to Carol.[242] In addition, PRMSA would consider returning to PRPA a portion of the land it now occupies at Isla Grande for Carol's use.[243]

No studies have been made by PRMSA regarding berthing and terminal operations at Isla Grande either with regard to use thereof by Seatrain or by Carol.[244] In Seatrain's case, PRMSA was, and continues to be, opposed to sharing use of that facility.[245] In Carol's case, however, PRMSA has striven to negotiate an accommodation for shared use.

To the extent that PRMSA has considered accomodating Carol at Isla Grande,[246] to that same extent it weakens whatever validity PRMSA argument may have that no excess capability exists at Isla Grande to accommodate any more than PRMSA carryings.

[241] Conf. Ex 9; Tr. 1856.

[242] Conf. Exs 4, 7

[243] Conf. Ex 7

[244] Tr 2647–2648.

[245] Ex. 136—PRMSA staff negative position

[246] Tr. 2569–2573.

XI.

Whether there is marshalling space available at Puerto Nuevo?

There are eight and ½ 600-feet berths at Puerto Nuevo which are suitable or potentially suitable for container ships; Berths E, F, G, H, J, K, L, M, ½N.[247]

Of these, Berths E, F, G, and H are fully developed container facilities, with high-speed shore-side container cranes and large adjacent paved and fully equipped marshalling areas.

The marshalling areas at E, F, G, and H are under lease by PRPA to either Sea-Land or PRMSA and are not otherwise available.

Berths J, K, L, M and ½N are not fully developed in that Berths J and K have crane-rails but no cranes; Berth L has only one crane rail; Berths M and ½N have no crane rails; the areas adjacent to Berths J, K, L, M and ½N are large enough for use as a marshalling area for container ship service but none of the areas are paved or otherwise developed. PRMSA has an option for a 32-acre tract adjacent to Berths J and K.[248]

To pave and otherwise fully develop the marshalling areas adjacent to Berths L and M would cost between $1,000,000 to $1,400,000.[249]

To pave and otherwise fully develop the marshalling areas adjacent to Berths L and M would take four or five months time.[250]

The marshalling areas adjacent to Berths L and M consist of Parcel X, VIII, IV and parts of VII and V.[251] The total area of Parcels X, VIII, and IV is 25.7 cuerdas, or 25 acres.[252] The area of Parcels VII and V totals 19.3 cuerdas, or 18.7 acres.[253] Altogether the back-up area adjacent to Berths L and M total approximately 43.7 acres.

PRPA offered Seatrain an exclusive lease of the undeveloped marshalling areas behind Berths L and M and asserts that improvements thereon, such as paving, drainage, installation of lighting and other facilities are to be borne by the lessee carrier. This is the manner in which other marshalling areas at Puerto Nuevo have been developed.

To the extent that Berths J and K are now not being utilized, the apron of Berths J, K, L and M could be utilized as a transit and marshalling area.[254] Such utilization would only be in conjunction with mobile cranes for off-loading or loading since there are no container cranes at those berths, and in the case of Berth L, only one rail has been installed and no rails at all at Berth M.

The use of the apron of Berths J, K, L and M and ½N (approximately 2,700 feet in length by 250 feet in width) as a transit and marshalling area is marginal. Ingress and egress is circuitous. The apron is not a secure area. There are no utilities. Marshalling and transiting in the same long narrow area would present

[247] Exs. 14, pp. 10–11; 17.

[248] Exs. 17; 41.

[249] Ex. 26.

[250] Tr. 500–139.

[251] Ex. 17.

[252] A cuerda is equal to .9716 acres. Ex. 16.

[253] Ex. 17.

[254] Ex. 37, p. 1; Tr. 731; 975.

serious maneuvering problems. And if mobile cranes are to be utilized in this narrow strip, the problem is compounded as they move up and down the apron alongside the ship.

XII.

Whether PRMSA has any control over Ports Authority which would influence the terminal assignments?

PRPA is required by Puerto Rican law to assign berths in a non-discriminatory manner.[255] " . . . until such time as the Ports Authority/PRMSA lease is approved by this Commission, we [*i.e.*, PRPA] have the responsibility for determining whose vessels will be assigned to the berth."[256] "However, so long as the facility is public, we will also berth at the Isla Grande facility any other carrier's vessels provided that such vessels may be feasibly worked at the berth. In practical terms, this means that such other carriers either will have to make their own arrangements for use of the mechanized cranes owned by the prospective lessees or, alternatively, must arrange for the loading and discharge of their vessel by some other workable method. Such appropriate arrangements must be made because the Ports Authority, as a furnisher of marine real estate, does not own, operate, or control container loading and discharging equipment or provide related terminal services."[257]

The key to answering the question posed by the Commission is to be found in the words "provided that such vessels may be feasibly worked at the berth. . . . carriers will have to make . . . arrangements for the use of . . . cranes owned by the prospective lessees [*i.e.*, PRMSA]." This clearly is the Alphonse-Gaston syndrome. PRPA says we control the berth assignment but we will not assign if PRMSA will not permit the berth to be feasibly worked. Then despite the claim by PRPA that Isla Grande is indeed a public terminal and PRPA indeed controls terminal assignments, it permits PRMSA to monopolize the apron by abdicating any PRPA control under the cover that cranes on the public apron are owned by PRMSA and PRPA does not thereby have any control over their use in the public terminal.

Stripped of all its verbiage and self-pity, PRPA has by its policy of inaction at this terminal passed to PRMSA effective control over PRPA in terminal assignments.

Further support for such conclusion can be found from the fact that in January 1976, PRMSA determined that " . . . we cannot allow preferential berthing at this facility [*i.e.*, Isla Grande] by another steamship carrier."[258] This is, however, the province of PRPA and not PRMSA.

It indicates that the relationship between PRMSA and PRPA was such that PRMSA was capable of believing and arrogating to itself control of berthing at Isla Grande. In fact, PRMSA has no preferential rights to the use of the berth at Isla Grande though there are presently pending before the Commission agreements to this effect.[259]

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[255] 23 L.P.R. §394, *inter alia*, "No one but the Ports Authority has authority to assign berths or anchoring places to vessels. . . ."

[256] Ex. 28, p. 12.

[257] Ex. 28, p. 13.

[258] Ex. 103; Tr. 2624, *et seq.*

PRPA is fully cognizant that there are no other workable methods for Seatrain to load or discharge the *Transindiana* except by use of the PRMSA cranes. This is true also for any other carrier, even those whose container ships have ship gantrys for loading or off-loading.[260] Nor can mobile cranes be utilized at Isla Grande. PRPA by its policy thus precludes not only Seatrain from using Isla Grande, but any other carrier—except, of course, at the sufference of PRMSA.

XIII.

Whether the Ports Authority has any control over the container cranes at Isla Grande?

PRPA takes the position it has no control over the container cranes because the title thereto rests solely in PRMSA.

PRPA chooses to ignore the fact when title to the container cranes rested solely in Seatrain, PRPA exerted control through the secondary-user provision of its lease to Seatrain.

This secondary-user provision is so critical to statutory responsibility under the statute creating PRPA setting forth that it shall " . . . own, operate and manage . . . transportation facilities . . . and to make available the benefits thereof in the widest economic manner . . . ,"[261] it is incompatible therewith to exclude such a provision in its lease with PRMSA, or for that matter with any other lessee where the utilization of private property will otherwise preempt for private use areas, as is the case at Isle Grande, which are otherwise public transit areas.

Indeed, there is a serious question whether it is in fact *ultra vires* by reason of its enabling statute for PRPA to enter into a lease with PRMSA which deletes such a secondary-user clause. And, despite any conflicting views whether absence of such a clause would or would not be contrary to Puerto Rican law, deletion is contrary to one *condition precedent* for approval of a lease pursuant to section 15[262] in that a secondary-user clause is necessary to secure important public benfefits, to wit, free access to and utilization of the apron and transit area of a public terminal.

In 1965 PRPA and Sea-Land entered into an agreement regarding preferential berthing privileges at Berths E and F at Puerto Nuevo.[263] The agreement permitted Sea-Land to install two or more cranes (not to exceed four)[264] for the loading or unloading of its vessels at Berths E and F. Terms and Conditions Paragraph 5 requiring secondary use of the cranes, provided " . . . the use of others in no way impair Sea-Land's right of preference for use of the berths and the cranes, and Sea-Land may refuse use of the crane by others if such requested use would interfere with the operations of Sea-Land."

[259] Agreement Nos. AP-76-77-4(100); AP-76-77-4(101).

[260] PRMSA, through PRMMI, its operations arm, considers that container vessels "cannot be served at this [Isla Grande] berth with shipboard gantrys." Conf. Ex. 7.

[261] 23 L.P.R. §336.

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

[263] Ex. 104.

[264] Four were installed by 1966. Ex. 125; Tr. 3429.

On September 24, 1968, PRPA and Sea-Land entered into an agreement for preferential berthing by Sea-Land at Berths G and H.[265] In order to operate at G and H, Sea-Land requested PRPA to construct foundation beams and rails at G and H for which Sea-Land would pay but title to which would be in PRPA. The agreement further provided that Sea-Land would have the right to install its own cranes at G and H "subject to terms and conditions to be negotiated by the parties at the time of such installation."[266] Despite such provision, a fifth crane was subsequently installed and operated by Sea-Land without any subsequent negotiation by the parties of terms and conditions relative to the use of the cranes.[267]

Cranes number 251 and 252 are two of the four cranes installed in 1966 pursuant to agreement dated September 2, 1965, for Berths E and F.[268] They are now serving Berth G[269] and used by PRMSA. Accordingly, cranes 251 and 252 are subject, *inter alia,* to secondary-user clause contained in the agreement of September 2, 1965.

The subsequent agreement of November 20, 1968, for Berths G and H, is incomplete; to the same extent that the cranes at G are incorporated into the provisions of the earlier agreement, so also crane number 393 at Berth H, installed in 1971 pursuant to incomplete agreement of November 20, 1968, is deemed by use to be governed by the secondary-user provisions of the earlier agreement.

In 1972 PRPA and Seatrain entered into a lease under which Seatrain operated at Isla Grande. This lease provided that PRPA retained the right to berth other vessels at the facility at times other than those reflected on Seatrain's monthly schedule and further, PRPA had the right to require Seatrain to operate the container cranes at that facility for such other vessels, provided that such operation would not substantially reduce the capacity and efficiency of Seatrain's operations.[270]

At the outset of its negotiations with PRMSA, the Ports Authority included the "secondary user" provision of the Seatrain lease in the proposed agreement.[271] It was not successful in this negotiation. PRMSA's Executive Director was opposed to such a provision, and he refused to sign a lease with that provision.[272] PRPA thereupon agreed to delete the secondary-user clause from the lease. It now says it determined not to press for a secondary-user provision for two reasons:

1. It was very concerned that, having canceled its lease with Seatrain, it had no written lease for this important facility.[273] The Ports Authority's financial supervisors and consultants, who were responsible to the Ports Authority's bondholders and hence always maintained close watch over the Ports Authority's

[265] Ex. 114.

[266] Ex. 114, Article VI, A.

[267] Tr. 3418; 3528–3530. This fifth crane was sold by Sea-Land to PRMSA.

[268] Ex. 104.

[269] Ex. 125.

[270] Exs. 8, pp. 3, 10–11; 28, p. 15–16; Tr. 951–52.

[271] Exs. 59, p. 12; 65, p. 2; 81; 82; Tr. 882; 880–90; 1371–72.

[272] Ex. 59, p. 12; Tr. 890.

[273] Tr. 883; 894–96; 1296; 1308.

activities to assure their financial soundness, pressed the Ports Authority for a signed lease. The pressure was continuous and constant.[274] It must be noted, however, no documents support this contention of "pressure."

2. More important, upon reflection it was clear to the Ports Authority that such a provision was not only presently unneeded, but was inconsistent with the Ports Authority's overall policy as to the proper development of the Port of San Juan.[275] This had not always been the case. In the past, it was in the best interests of the Port of San Juan to insist upon crane-sharing provisions in terminal leases. In the Ports Authority's original lease with Seatrain in 1972, the Ports Authority insisted upon a provision whereby the Ports Authority could require Seatrain to operate its cranes for vessels of other companies provided it did not interfere with Seatrain's operations.[276]

The inclusion of such crane-sharing provisions served an important purpose when the Seatrain terminal lease was executed because the Puerto Nuevo containership berths were not fully developed. Other than the facilities used by Sea-Land and Seatrain, there were no berths, wharves or land suitable for containership operations. Hence, the Ports Authority found it in the best interest of the Port of San Juan to negotiate for crane-sharing provisions with its container-carrier lessees to assure that no containership operator need be turned away.[277]

With the proper development of Puerto Nuevo, however, crane-sharing provisions not only became unnecessary, they became unwise as well.[278] Contrary, however, to this assertion by PRPA as the basis for its changed attitude on secondary-user clauses, the record clearly establishes that the development at Puerto Nuevo now is not substantially different than it was in 1972 when the Seatrain lease was executed for Isla Grande. Container Berths E, F, G, and H and the five container cranes there were all operational at Puerto Nuevo[279] in 1972. No additional container berths or cranes are operational in Puerto Nuevo today. Berths J and K have crane rails but no cranes; the back-up areas of J and K have not been improved. Berth L has one crane rail; Berths M and ½N none. Back-up areas for Berths L, M and ½N have not been improved.

Now, the Ports Authority envisions Puerto Nuevo, not Isla Grande, as the major container terminal in San Juan. The Puerto Nuevo facility is losing money even though the Ports Authority has invested $60 million in developing it.[280] Desiring that the use of Puerto Nuevo as a container terminal be encouraged by the Ports Authority if its overall plan of port development is to succeed, the inclusion of a crane-sharing provision in the Isla Grande lease, it argues, would substantially undermine that policy by giving containership carriers the opportunity to berth at Isla Grande rather than Puerto Nuevo.[281] As an analysis of the sit-

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[274] Tr. 894–96; 905; 1309; 1320; 1345–66; 1382

[275] Tr. 891–92.

[276] Ex. 28, pp. 15–16; Tr. 951–52.

[277] *Id.*

[278] Ex. 28, p. 18; Tr. 953–56.

[279] Ex. 125.

[280] Ex. 14, p. 12; Tr. 891; 903.

[281] Ex. 28, p. 32.

uation revealed that a crane-sharing provision at Isla Grande would run counter to the Ports Authority's master plan for development of the Port of San Juan, it determined to sign a lease with PRMSA for Isla Grande which did not contain a crane-sharing provision.[282]

This second reason is without basis in fact, patently illogical, contrary to "pressure" as the reason, and contrary to the previously stated and pursued policy of PRPA. But most important, as with the first reason, no documentation contemporary with the negotiations with PRMSA supports the second reason now put forth as the basis for deletion.

There is no documentary evidence to support any change to what now is claimed as its reason for deleting the secondary-user clause in the PRMSA lease. Nor any for the proposition that a secondary-user clause is unnecessary and unwise. All the documentation, including the early drafts of the lease between PRPA and PRMSA, support the proposition that a secondary-user clause was deemed appropriate by PRPA and was to be included in agreements for use of container berths.[283] Not until the oral testimony in this proceeding has there been any contention that a secondary-user clause is deemed unnecessary and unwise. If such policy was ever determined by PRPA to be its new and present policy, such policy was never set forth or in any way delineated in any document or minutes of PRPA or in any form until contended in this proceeding. It is concluded that the deletion of a secondary-user clause in the agreement with PRMSA was not for the reason that port development necessitated such deletion, but rather that PRPA and PRMSA are not independent parties dealing at arm's length but in fact are pursuing a single interest and are for all practical purposes a single entity insofar as their dealings regarding Isla Grande are concerned.

Despite PRPA's desire that use of Puerto Nuevo is to be encouraged, it never encouraged such use by requiring PRMSA to have secondary-user clauses in the agreements for berths at Puerto Nuevo. If, as PRPA now claims, a secondary-user clause at Isla Grande would give other carriers the opportunity to use Isla Grande to the detriment of use at Puerto Nuevo, then a secondary-user clause at Puerto Nuevo berths should induce carriers to berth at Puerto Nuevo.

The domination of PRPA by PRMSA is repugnant to any concept of PRPA independence from PRMSA control.

It is concluded that PRPA has the statutory and legal capacity and capability of exercising control over the container cranes. While it formerly excercised such control, it is presently failing to assert any such right to control, asserts it has no right to control, and is not, in fact, now experiencing any control.

XIV.

Whether PRMSA and Ports Authority are jointly furnishing container crane services at Isla Grande to common carriers?

The operation of the container cranes at Isla Grande are presently carried out by PRMSA and those within its employ. There is no evidence that the PRPA

[282] Tr. 953-56.

[283] In fact, in 1975 and 1976, when it began negotiating with PRMSA, it included a secondary-user clause and only deleted it when faced with opposition from PRMSA to its inclusion. Exs. 59, p. 12; 65, p. 2; 81; 82; Tr. 882; 888-890; 1371-72.

actively engages in any plan of furnishing container crane services at Isla Grande.[284]

No PRPA personnel are actively engaged in any of the terminal operations at Isla Grande.

CONCLUSIONS OF LAW

PRPA admits that Isla Grande is being operated as a public terminal[285] pursuant to terminal tariffs filed with the Commission. PRMSA currently pays dockage and wharfage in accordance with that tariff. There are presently pending before the Commission Agreement Nos. AP-76-77-(4) 100 and AP-76-77-(4) 101[286] for preferential berthing and lease of marshalling areas at Isla Grande.

There is no dispute that the PRMSA cranes at Isla Grande are located in the transit area, otherwise a public area.[287] Thus, the issue in dispute is whether private ownership or public area is the controlling factor in determining the utilization of the cranes. Put another way, under what circumstances, if any, may private property be subject to governmental control? In deciding the particular issue herein, two cases are relied on as being applicable. *Munn v. Illinois,* 94 U.S. 113 (1876) and a case involving this Commission which relied on it, *American Export Isbrandtsen Lines, Inc., v. F.M.C.,* 444 F.2d 824 (D.C. Cir. 1970).

In upholding the power of the state to regulate privately owned grain warehouses located in public terminals, the Supreme Court in *Munn* found that:

> . . . when private property is "affected with a public interest, it ceases to be juris private only" . . . Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest in that use, one must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control. 94 U.S. at 126.

In *American Export Isbrandtsen Lines, Inc. v. Federal Maritime Commision,* 444 F.2d 824, 825 (D.C. Cir. 1970), in dealing with truck detention rules, the Court of Appeals said:

> The law for centuries has recognized that public wharves, piers and marine terminals are affected with a public interest.* These terminals stand athwart the path of trade. A substantial part of all ocean-going export and import cargo that flows through the Port of New York passes over their piers.
>
> Efficiency of manpower, ships and vehicles is dependent upon the prompt handling of such cargo and determines whether the flow of interstate and foreign commerce is obstructed or facilitated. The public interest in their efficient operation is unquestioned.
>
> The terminal here stands in the same relation to commerce as the grain elevators in *Munn v. Illinois, supra,* and the stockyards in *Stafford v. Wallace, supra.* They are a related service to public transportation, are charged with a public interest and are properly subject to the type of regulation here ordered in accordance with the Shipping Act of 1916.
>
> *Lord Chief Justice Hale (1609-1676) in one of his famous treatises, De Portibus Maris, pointed out that duties imposed for cranage, wharfage, pesage, etc. of a public wharf were required to be reasonable and moderate because the "wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris private* only; as if a man set out a street in a new building on his own land it is now no longer bare private interest but is affected with a public interest." Hargrave Tracts 77-78. (Italics added.)

[284] Tr. 2600.

[285] Ex. 12, p. 2; Tr. 687; 689.

[286] Exs. 143; 144.

[287] PRPA Brief, p. 29; PRPA Proposed Finding of Fact 60.

PRPA suggests that rather than reliance on *Munn* or *American Export Isbrandtsen,* the issue is better considered in *Louisville & Nashville Railroad Co. v. West Coast Naval Store Co.*, 198 U.S. 483 (1905), and *Weems Steamboat Co. of Baltimore City v. People's Steamboat Co.*, 214 U.S. 345 (1909).

In *Louisville & Nashville* the railroad was granted authority by the city of Pensacola and the State of Florida to build a wharf at the foot of a public street. The court held the wharf could not be used by any vessel without the consent of the railroad.

PRPA is on weak ground in its reliance on *Louisville v. Nashville* as controlling in this proceeding. The reason why it is not controlling is set forth in *Southern Pacific Terminal Company v. Interstate Commerce Commission,* 219 U.S. 498 (1911). In *Southern Pacific,* the court found that the Interstate Commerce Commission had jurisdiction and control over an alleged private terminal because of its use in public commerce. In rejecting the Southern Pacific's contention that the decision in *Louisville & Nashville* was controlling, the Supreme Court dismissed the argument by stating in reference to *Louisville & Nashville:*

> In the latter case there was no discrimination against the West Coast Company by the railroad company or a preference given to any person. The West Coast Company had the same privilege of using the wharves of the railroad company as other shippers were given. It asserted other privileges. 219 U.S. 498, 518.

In the situation before us, neither PRMSA nor the PRPA contend that Seatrain is being given the same privilege of using the cranes of PRMSA as others are given, unless it be the same non-privilege.

Nor is *Weems,* upon which PRPA relies, a strong reed. *Weems* was the exclusive lessee of the wharves in question and utilized it for its own purposes. The court held that this was a private wharf. "The right to use the property has been withdrawn by the owner as to the public in general." 214 U.S. 345, 359. But the wharf at Isla Grande is not a private wharf but, even PRPA admits, a public one.[288] One cannot convert a public transit area into a private one by construction of a private facility thereon and thereby attempt to preclude the use of the area to the public. It does not unduly paraphrase *Munn* by stating that one erects private facilities in public areas at the peril of being required to make such facilities reasonably available to the public.[289] That is not to say that such are to be made available without compensation. To the contrary, a reasonable and proper charge may be made.[290] Indeed, it would be the taking of property without due process otherwise.

The secondary-user clauses utilized in the Sea-Land and Seatrain agreements follow the rationale of *Munn* and *American Export Isbrandtsen.* They permit utilization of public areas for private use with private equipment and at the same time make such accessible and reasonably available for use by others on a nondiscriminatory compensatory basis.

Private cranes located on a public container terminal which thereby preclude

[288] Ex. 12, p. 2; Tr. 687; 698. See also PRPA Brief, p. 95.

[289] This was required of Seatrain by PRPA. Ex. 8, pp. 10–11.

[290] This was also set forth in the Seatrain agreement with PRPA.

the effective use of that terminal except by the crane owner do not occupy the same status accorded private property as exemplified by *Weems*.

Equal access to and use of a public terminal is an essential requirement for the free flow of the maritime commerce of the United States.

If the PRPA and PRMSA are to be permitted to enter into an agreement for the utilization of Isla Grande, then it is the responsibility of this Commission to assure that such utilization does not give any undue or unreasonable preference or advantage to any common carrier or as a consequence of such utilization subject any other common carrier to undue or unreasonable prejudice or disadvantage. Further, such utilization must be pursuant to just and reasonable regulations and practices.

PRPA's failure to insure that public areas which have private fixtures and property thereon do not become effectively dedicated to private and exclusive use constitutes the giving of an undue and unreasonable advantage to the owner of such fixture and property as to be in violation of section 16 First of the Shipping Act, 1916.

The exclusive utilization by PRMSA of public areas by the erection thereon and the exclusive use of such container rails and cranes constitutes the giving to itself an unreasonable preference and subjects other potential users of such public areas to an unreasonable disadvantage as to be in violation of section 16 First of the Shipping Act, 1916.

The private rights of PRMSA to own and operate container cranes on a public terminal are by their very nature vested with a public interest. As such, those rights are subject to regulation.

PRPA argues that unless PRMSA is permitted exclusive use of its cranes, it is tantamount to transforming private property of public property.[291] Nothing could be further from reality. Such argument is rejected since its premise is fallacious. A requirement that PRPA mandate a secondary-user clause for cranes at the Isla Grande terminal is nothing more than assuring that the public aspect of the terminal and public use thereof is preserved. This is no more than PRPA has done in the past and as it originally conceived it should do. Under such a provision PRMSA would not thereby be precluded from the proper use and enjoyment of its property, nor precluded from receiving reasonable compensation for its use by others. PRPA cannot allow PRMSA to preempt the use of a public area and prevent the use thereof by others under the guise that use by others will thereby interfere with private property. The interference occurred in the first instance by placing private property in the public area. When it was originally placed by Seatrain, the public was protected against Seatrain preemption by a secondary-user clause.[292] This was necessary and proper. The same circumstances mandate that it is necessary and proper for a secondary-user clause to be imposed on PRMSA ownership and use.

PRPA is in violation of section 17 of the Shipping Act, 1916, by its failure to establish and enforce just and reasonable regulations concerning assignment of

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[291] See Brief of PRPA, p. 79.

[292] Ex. 8, pp. 10–11.

berths and utilization of public areas at Isla Grande in connection with the delivery, handling, and storage of property.

PRMSA is in violation of section 17 of the Shipping Act, 1916, by its failure to establish just and reasonable regulations concerning secondary utilization of its container cranes and rails located in the public area at Isla Grande.

Assuming, *arguendo,* that there is presently sufficient room at the Isla Grande facility, or in its environs, to accommodate vessels presently used by Seatrain and PRMSA and to provide back-up areas for their respective services, and further assuming that there is sufficient time available for the cranes, even including maintenance time, to service PRMSA vessels and Seatrain vessels now in service, PRPA asks, what happens when (1) PRMSA expands its service; and/or (2) Seatrain expands its service; and/or (3) a third carrier comes in; and/or (4) the third carrier expands its service; and/or (5) a fourth carrier comes in, etc.?

These are reasonable questions and they pose situations which do not lend themselves to easy solutions. The geographical and physical limitations of Isla Grande are well documented in this record. No one doubts that the steamship industry is a dynamic one with changing patterns of trade. Thus the short and direct response to PRPA's inquiries is that the resolution reached in this decision is based on the record and situation as it presently exists. The decision in this proceeding is one designed to eliminate current prejudicial practices. Problems which may arise if the situation changes must be approached and resolved in the same manner as was the present problem—*i.e.*, how will the public interest be best served.

Ordered:

The Ports Authority is hereby Ordered and Directed to make an adequate berth available immediately to Seatrain at Isla Grande terminal for calls by Seatrain vessels and barges on a noninterference basis.

The Puerto Rico Maritime Shipping Authority is Ordered and Directed to make its cranes at Isla Grande available to Seatrain vessels on a noninterference and reasonably compensatory basis.

(S) STANLEY M. LEVY
Administrative Law Judge

WASHINGTON, D.C.
August 10, 1977

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-38

ARRANGEMENTS RELATING TO THE USE OF
ISLA GRANDE MARINE TERMINAL, SAN JUAN, PUERTO RICO

The Puerto Rico Ports Authority and Seatrain Lines of Puerto Rico found in violation of section 15 of the Shipping Act, 1916 by implementing a 1972 agreement relating to Seatrain's use of the Isla Grande Marine Terminal prior to Commission approval.

Puerto Rico Ports Authority and Seatrain Lines of Puerto Rico found in violation of section 15 of the Act by implementing the Lease Termination Agreement prior to Commission approval.

Puerto Rico Ports Authority and Puerto Rico Maritime Shipping Authority found in violation of section 15 of the Act by implementing an agreement relating to use of the Isla Grande Marine Terminal prior to Commission approval. Respondents ordered to cease and desist from implementing such agreement until approved.

Amy Loeserman Klein, William Karas and *Olga Boikess* for the Puerto Rico Ports Authority.

Mario F. Escudero, Karol L. Newman, Dennis N. Barnes, George M. Weiner, Edward J. Sheppard, Louis A. Rivlin, John T. Schell and *Lawrence White* for the Puerto Rico Maritime Shipping Authority.

Neal M. Mayer and *Paul D. Coleman* for Seatrain Lines of Puerto Rico and Seatrain Gitmo, Inc.

John Robert Ewers, C. Jonathan Benner, Joseph B. Slunt, and *Alan J. Jacobson,* for the Bureau of Hearing Counsel.

REPORT AND ORDER

August 18, 1978

BY THE COMMISSION: *(Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice Chairman;* James V. Day, *Commissioner;* Leslie L. Kanuk, *Commissioner,* concurring.)**

The Commission by Order served July 12, 1976, (July Order) directed the Puerto Rico Ports Authority (PRPA) and Seatrain Lines of Puerto Rico (Seatrain), and the Puerto Rico Maritime Shipping Authority (PRMSA) to show cause:

(1) Why an agreement executed on December 26, 1972, between PRPA and Seatrain relating to the latter's use of the marine terminal at Isla Grande, San Juan, Puerto Rico should not be found to be subject to section 15, Shipping Act, 1916 (the Act) and why the parties should not be found in violation of section 15 for having implemented this agreement prior to Commission approval.

* Commissioner Karl E. Bakke not participating.

** Commissioner Kanuk's concurring opinion is attached.

(2) Why an agreement executed on September 30, 1974 between PRPA and Seatrain entitled "Lease Termination Agreement" should not be found to be subject to section 15 and why the parties should not be found in violation of that section for having implemented this agreement prior to Commission approval.

(3) Why the Commission should not find the present and previous arrangement between PRPA and PRMSA for the latter's use of the marine terminal at Isla Grande, San Juan, Puerto Rico to be an agreement subject to section 15 and why the parties should not be found to be or have been in violation of section 15 for having implemented or continuing to implement their previous or present arrangement prior to Commission approval.

(4) Why the Commission should not order PRPA and PRMSA to cease and desist from implementing their present arrangement for PRMSA's use and operation of the Isla Grande terminal until said arrangement has been filed with and approved by the Commission pursuant to section 15 of the Act.

(5) Why the Commission should not find PRMSA in violation of section 16 First of the Act for subjecting other carriers, including Seatrain Gitmo, Inc. to an undue or unreasonable prejudice or disadvantage by failing to operate its container cranes on Isla Grande for such carriers on a non-interference basis.[1]

(6) Why the Commission should not find PRPA in violation of section 16 First for having granted PRMSA an undue or unreasonable preference or advantage by granting PRMSA the use of Isla Grande without conditioning such use on PRMSA operating its cranes located on the terminal for other carriers, including Seatrain Gitmo, on a non-interference basis when so requested by PRPA.[2]

In addition, PRPA has questioned our jurisdiction over terminal facilities and operators in Puerto Rico.[3]

Memoranda of Law and Affidavits of Fact were filed by PRPA, PRMSA, Seatrain, Intervenor Seatrain Gitmo, Inc.; and the Commission's Bureau of Hearing Counsel.[4]

Background

There are three distinct and separate agreements at issue in this proceeding. Two of these agreements, between Seatrain and PRPA, concern Seatrain's use of the terminal at Isla Grande from 1972 to 1974. The other agreement at issue here, between PRPA and PRMSA, relates to PRMSA's use of the Isla Grande facilities from October, 1974, to the present.

1972 Agreement

As early as December 27, 1962, PRPA and Seatrain entered into Agreement, No. T–87, granting Seatrain preferential use of the berths at Isla Grande and

[1] By Order served September 7, 1976, the Commission, amended its July Order by deleting this issue because it was "overlapping" with one raised in Docket No. 76–41—*Berthing of Seatrain Vessels in San Juan, Puerto Rico,* Decision served this date.

[2] Because our decision in Docket No. 76–41, *Berthing of Seatrain Vessels in San Juan, Puerto Rico,* effectively disposes of this issue, we find it unnecessary to address it here. We therefore, insofar as is pertinent here, incorporate by reference our findings in Docket 76–41 with respect to PRPA's violation of section 16 First of the Act.

[3] This issue was also raised and disposed of in a companion proceeding, Docket No. 76–41, *Berthing of Seatrain Vessels in San Juan, Pueto Rico.* We shall not address the question of jurisdiction here, but rather incorporate by reference our findings in Docket No. 76–41, with respect to that question.

[4] Seatrain Lines of Puerto Rico provides terminal facilities and support activities to Seatrain vessels calling in Puerto Rico. Seatrain Gitmo, Inc. is a common carrier by water serving Puerto Rico in the domestic trade.

exclusive use of certain marshalling areas adjacent to the berth. That agreement was filed with the Commission on December 24, 1963, and subsequently determined by the Commission's staff not to be subject to section 15. On December 30, 1968, PRPA and Seatrain filed an amendment to Agreement No. T–87, which was also determined not to be subject to section 15. On December 26, 1972, these same parties entered into an agreement, designated "AP–72–73--111" (hereinafter referred to as the 1972 Agreement), which superseded Agreement No. T–87, as amended. This is one of the agreements at issue in this proceeding.

Termination Agreement

On June 10, 1974, the Commonwealth of Puerto Rico through an act of its Legislative Assembly created PRMSA, a nonstock public corporation authorized to acquire, construct, own, operate and maintain maritime shipping lines and terminal facilities. Under terms of an agreement dated October 4, 1974, and entitled "Agreement for Lease and Purchase of Assets" (Assets Agreement) between Seatrain Lines, Inc.[5] and PRMSA, PRMSA acquired certain marine terminal assets from Seatrain Lines, Inc., which consisted of equipment and improvements at, or used in connection with, Seatrain's marine terminal facilities at Isla Grande. The Assets Agreement further provided that PRMSA shall arrange for the termination of the release of Seatrain from any liability arising under the 1972 Agreement. On September 30, 1974, PRPA and Seatrain entered into an agreement entitled "Lease Termination Agreement" (hereinafter referred to as Termination Agreement) which cancelled the 1972 Agreement and which relieved Seatrain of all its obligations and liabilities arising under its earlier agreement. The Termination Agreement also modified the 1972 Agreement by allowing Seatrain to retain title to the crane rail system which Seatrain had constructed pursuant to the 1972 Agreement.

PRPA/PRMSA Arrangement

On or about September 30, 1974, PRMSA became a common carrier by water in the trade between ports in Puerto Rico and ports in the continental United States. By letter of September 30, 1974, Teodoro Moscoso, PRMSA's Chairman of the Board, advised PRPA that the governing board of PRMSA had approved a resolution authorizing PRMSA to "enter into contracts with PRPA *assuming* all obligations" under the 1972 Agreement. Upon the commencement of its operation, PRMSA, although initially planning to consolidate its operation at Puerto Nuevo, began using the berth and the backup areas at Isla Grande.

By letter dated May 13, 1976, Julio Maymi Pagan, PRPA's Executive Director, transmitted to the Commission an agreement designated Agreement No. T–3308, between PRMSA and PRPA which granted PRMSA preferential use of the berth at Isla Grande and exclusive use of the adjacent backup area. Though transmitted in May of 1976, the agreement indicated it had been entered into on October 1, 1975, and that it was to be effective from this earlier date.

[5] Seatrain Lines, Inc. is the parent and affiliate company of Seatrain Lines of Puerto Rico.

Seatrain protested approval of Agreement No. T-3308 and requested a hearing. PRMSA, in reply, urged the Commission to deny the Seatrain protest, but requested that in the event a hearing was ordered that such hearing be consolidated with the one in Docket No. 76-38 or, in the alternative, that the Commission hold "any further proceedings with respect to Agreement No. T-3308 in abeyance pending the outcome" of Docket No. 76-38. In March 1977, the parties withdrew Agreement No. T-3308.

DISCUSSION

The 1972 Agreement

Seatrain concedes that the 1972 Agreement between it and PRPA was entered into and implemented by the parties without first having been filed with and approved by the Commission. However, Seatrain argues that because the 1972 Agreement was not discriminatory or "operated in an unfair manner toward other carriers or shippers," the Commission should retroactively approve the 1972 Agreement. Seatrain concludes that, in any event, there are mitigating circumstances surrounding the alleged violation, i.e., the 1972 Agreement would in all likelihood, have been approved if filed and it was being implemented with the knowledge of the Commission.

PRPA contends that: (1) because it and Commission employees believed that the 1972 Agreement had been filed and approved, the Commission should, in all fairness, now be estopped from finding PRPA in violation of section 15; (2) the 1972 Agreement followed the terms of an earlier Seatrain lease executed in December of 1962, i.e., Agreement No. T-87, as amended in 1966, which the Commission determined not to be subject to section 15.

The arguments of PRPA and Seatrain are similar to those we considered and rejected in *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); and *Unapproved Section 15 Agreement—South African Trade,* 7 F.M.C. 159, (1962). There the respondents argued that they should not be found in violation of section 15 for having implemented unfiled and unapproved section 15 agreements because: (1) the agreements, if filed, would have been approved and (2) Commission employees were aware of the existence and implementation of the agreements. In rejecting this argument, the Commission stated in *Unapproved Section 15 Agreement, supra,* at 197:

> Respondent's argument that the arrangement . . . was in the public interest and was not objectionable under section 15, is quite beside the point. Such matters were for the Board (now the Commission), the agency administering the Shipping Act, to weigh and determine before and during the time the anticompetitive activities occurred. They were not for the respondents to decide themselves.
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> It goes without saying that we find untenable the suggestion that respondents' arrangements constituted a technical violation of the law. It should be noted, furthermore, that section 15 affords little room for so called technical violations. To us the breadth and force of its language literally implore attention and obedience or at the very least inquiry if in any doubt as to the propriety of proposed conduct.

Likewise, we find little merit to the Seatrain and PRPA argument that they should not be found in violation of section 15 because the 1972 Agreement was

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DISCUSSION

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The arguments of PRPA and Seatrain are similar to those we considered and rejected in *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); and *Unapproved Section 15 Agreement—South African Trade,* 7 F.M.C. 159, (1962). There the respondents argued that they should not be found in violation of section 15 for having implemented unfiled and unapproved section 15 agreements because: (1) the agreements, if filed, would have been approved and (2) Commission employees were aware of the existence and implementation of the agreements. In rejecting this argument, the Commission stated in *Unapproved Section 15 Agreement, supra,* at 197:

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Likewise, we find little merit to the Seatrain and PRPA argument that they should not be found in violation of section 15 because the 1972 Agreement was approvable and its existence was well known to Commission employees. As we said in *Unapproved Section 15 Agreement, supra,* these arguments are matters which should be presented in response to any civil penalty claim that may arise from our decision in this proceeding.

We now turn to the PRPA contention that the 1972 Agreement is not subject to section 15 because it tracks the language of Agreement No. T-87, as amended, and that, under the standards applicable in 1972, the Commission would have determined that the Agreement is not subject to section 15. It is well settled that any prior determination made by the Commission or its staff does not bind the Commission in perpetuity. The Commission may modify or even reverse past policies and rulings if a sufficient basis exists, and if that basis is explained. *Marine Space Enclosures, Inc. v. F.M.C.*, 420 F.2d 577 (D.C. Cir. 1969). The 1972 Agreement grants Seatrain preferential berthing rights and exclusive use of certain marshalling areas adjacent to the berth. That agreement further provides that PRPA shall have the right to assign other carriers to the berth when it is not in use by Seatrain and that such carriers shall have the right to traverse the marshalling area leased by Seatrain. In addition, the 1972 Agreement requires Seatrain, if requested by PRPA, to furnish crane service to other carriers using the berth, when PRPA determines that such an operation will not substantially reduce the capacity or efficiency of Seatrain's operation. Finally, the 1972 Agreement provides, insofar as is pertinent to this proceeding, that Seatrain's use of the facility shall be subject to the rules and regulations of PRPA. In short, this agreement allows PRPA to maintain a measure of control over Seatrain's operations.

The 1972 Agreement permits PRPA to retain a measure of control over the operations of the lessee through either unilateral action or mutual agreement. As such, PRPA continues to furnish terminal facilities and is an "other person" within the meaning of section 1 of the Act. 46 CFR 530.5(b) (2). Furthermore, the 1972 Agreement grants Seatrain *exclusive and preferential rights* to the Isla Grande facility within the meaning of section 15 of the Act and accordingly is subject to the filing and approval requirements of that section.[6] Thus, the parties to the 1972 Agreement may not legally implement any of its provisions prior to approval by this Commission. Because the 1972 Agreement grants Seatrain preferential and exclusive rights to the terminal facilities at Isla Grande, and because PRPA retains a measure of control over Seatrain's operations, we find the 1972 Agreement to be subject to section 15. Further, we find PRPA and Seatrain in violation of that section for having implemented the 1972 Agreement prior to filing with, and approval by, the Commission.

Termination Agreement

The Termination Agreement amends the 1972 Agreement between these parties by modifying the term of the 1972 Agreement and by permitting Seatrain to retain title to certain improvements situated on Isla Grande including the crane rail system.

[6] The Commission has also advised that "where doubt exists," such agreements "should be submitted to the Commission for examination." 46 C.F.R. 530.5.

Seatrain and PRPA argue that the Termination Agreement is beyond the scope of the Commission's section 15 jurisdiction. They submit that the language of section 15 does not encompass an agreement to cancel a prior section 15 arrangement but rather only encompasses agreements that create ongoing activity or relationships. In this regard, PRPA and Seatrain rely on *Seatrain Lines v. Federal Maritime Commission*, 460 F.2d 932, *aff'd* 411 U.S. 726 (1973), where the court held that the Commission lacks section 15 jurisdiction over an agreement providing for the sale of assets by one common carrier to another. The court there distinguished agreements that reflect a "one time discrete transaction" and those that provide for an ongoing relationship between the parties. Applying the court's rationale here, PRPA and Seatrain argue that because the Termination Agreement only cancelled the 1972 Agreement, and concomitantly the Seatrain-PRPA relationship and did not create any ongoing activities or relationships it is beyond the scope of the Commission's section 15 jurisdiction.[7]

In further support of its position, PRPA relies on a letter dated August 13, 1976, from the Commission's staff which advises that a section 15 agreement is not required to terminate an existing terminal lease. Whatever the basis for this advice, it is clearly contrary to our finding in *Agreement Nos. 10107 and 10108—Rate Agreements in the Trade from Hong Kong and Taiwan to Ports on the West Coast of the United States (Agreement No. 10107) and to Ports on the Gulf of Mexico and East Coast of the United States (Agreement No. 10108)*, 16 S.R.R. 752 (1976). There we held that the cancellation of a section 15 agreement requires affirmative action by the Commission and may be accomplished in one of three ways:[8]

(1) The parties can specifically provide for cancellation in the body of the approved agreement, or;[9]

(2) The parties could submit for Commission approval a modification to the Agreement cancelling the Agreement, or;

(3) The Commission can cancel the Agreement after appropriate proceedings.

The method chosen by PRPA and Seatrain to terminate the 1972 Agreement falls within (2) above and requires Commission approval prior to effectuation.

Moreover, although PRPA and Seatrain attempt to characterize the termination amendment as a "one time discrete transaction" involving the transfer of assets, they ignore the fact that such amendment also provided that Seatrain would retain title to the crane rail system located on Isla Grande. As a result, the so-called Termination Agreement constituted a *modification* of an agreement which was subject to section 15 and should have been filed pursuant to that section.[10] And, as we explained in *In the Matter of Agreement No. T-2455/T-2453*, 18 F.M.C. 115 (1974), once it is determined that a portion of an agreement

[7] PRPA further argues that the term "cancel", as used in section 15, is intended to give the Commission authority to "nullify" a portion of an agreement rather than authorizing it to approve agreements which terminate a prior arrangement.

[8] Section 15 of the Shipping Act, 1916, provides, in pertinent part:

That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission . . . every agreement . . . or modification or cancellation thereof, to which it may be a party. . . .

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, ...

[9] The 1972 Agreement did incorporate a clause providing for its termination but under circumstances not relevant here.

[10] In *States Marine Lines, Inc. v. Trans-Pacific Freight Conference of Japan*, 7 FMC 204 at 215 we held that parties to a section 15 agreement "are not empowered to alter their terms *inter se*." The parties "must file an amendment and secure Commission approval."

is subject to section 15, the entire agreement must be filed for approval, not just the portion giving rise to jurisdiction. Accordingly, we find PRPA and Seatrain in violation of section 15 for having implemented the Termination Agreement prior to filing with, and approval by, this Commission.

The PRPA/PRMSA Arrangement

We will now examine the relationship between PRPA and PRMSA in order to determine if there exists a section 15 agreement between these parties, relating to the latter's use of Isla Grande, which has been implemented prior to filing with and/or approval by this Commission. Before addressing the merits of that issue, however, a discussion of the factual situation surrounding PRMSA's utilization of Isla Grande is in order.

By virtue of the Assets Agreement between Seatrain Lines, Inc. and PRMSA, PRMSA acquired certain marine terminal assets owned by Seatrain Lines, Inc. and its affiliate at the Isla Grande marine terminal. The Assets Agreement also required PRMSA to arrange for the termination and release of Seatrain and its affiliates from any liability resulting from the 1972 Agreement with PRPA. Although the record in this proceeding does not reveal what role if any PRMSA played in arranging for Seatrain's release of liability, on September 30, 1974, Seatrain and PRPA executed the Termination Agreement which released Seatrain from any liability under the 1972 Agreement and which permitted Seatrain to retain title to the crane rail system and certain other improvements at Isla Grande.[11]

PRPA now advises, however, that because it was concerned about "substantial loss of revenue" it would not consent to relieving Seatrain from liability, unless PRPA extracted "a commitment on the part of PRMSA to enter into a new long-term lease." On September 30, 1974, the day the Termination Agreement was executed, PRMSA's Director advised that he was authorized to execute any agreement assuming all of Seatrain's obligations under the 1972 Agreement. PRPA and PRMSA now explain that the agreement between them was not drafted until October 1, 1975, and that this agreement (Agreement No. T-3308) was not executed until May 13, 1976, at which time it was filed with the Commission. In any event, PRMSA, on or about October 11, 1974, initiated its operations in the Puerto Rican trade and began calling at Isla Grande with vessels formerly owned by Seatrain. With the exception of a few calls made by Seatrain vessels, no other carriers have used the Isla Grande facility since PRMSA began its operation.

PRPA alleges that although only PRMSA's vessels have been assigned to Isla Grande, this is a result of efficient port management rather than the implementation of an unfiled section 15 agreement. PRPA argues that container operations, unlike breakbulk operations, require sophisticated equipment including cranes, and substantial marshalling areas in order to be efficient. PRPA explains that, in view of the fact that PRMSA owned such equipment on the area adjacent to the Isla Grande berth, it was clearly appropriate to assign PRMSA's vessels to Isla

[11] By letter of September 27, 1974, PRPA advised Seatrain that it consented to Seatrain's assignment to PRMSA of all "rights, covenants, and obligations" under the 1972 Agreement.

Grande on a vessel-by-vessel basis pending the execution, filing, and approval of a long-term terminal lease agreement. In addition, PRPA submits that it "would be absurd" to assign PRMSA's vessels to any other berth in view of the fact that PRMSA's terminal assets are situated adjacent to the Isla Grande berth, but also because "the backup area behind the public wharves is committed to, and is being used by, PRMSA under an oral temporary landlord tenant arrangement between PRPA and PRMSA until Agreement No. T-3308 (which includes provisions for the exclusive lease of this land area to PRMSA) is approved."[12]

PRMSA's argument with respect to this section 15 issue is essentially identical to that of PRPA. Additionally, PRMSA points out that its arrangements with PRPA, "under which PRMSA utilized the Isla Grande facility, fall into two separate and distinguishable time periods." PRMSA alleges that during the period from October, 1974, to May, 1976, it leased the backup area at Isla Grande pursuant to an "oral arrangement" and docked its vessels at the berth as assigned for which it paid all pertinent wharfage and dockage charges.[13] During the more recent period, May, 1976, to the present, PRMSA denies violating section 15 of the Act by implementing portions of its agreement [Agreement No. T-3308 and presumably its successors T-3453 and T-3453A] with PRPA. However, PRPA does advise that the "portions of the agreement [T-3308] that have been implemented do not require Commission approval." In this regard, PRMSA explains that the provisions of Agreement No. 3308 which relate to the backup area, the exclusive use area, as well as its prior "oral agreement" with PRPA for the use of the adjacent backup area, are merely landlord tenant arrangements that are not subject to section 15 and which do not therefore require Commission approval prior to implementation.

Although PRPA and PRMSA have not admitted the existence of an unfiled section 15 agreement relating to PRMSA's use of the berthing area at Isla Grande, their admission of an "oral agreement" for the use of the adjacent backup area coupled with the evidence adduced in this proceeding and in Docket No. 76-41, *Berthing of Seatrain Vessels in San Juan, Puerto Rico*, of which we take official notice,[14] leads us to find that PRPA and PRMSA have violated section 15 by implementing an agreement relating to PRMSA's use of Isla Grande prior to filing with and approval by this Commission.

On September 27, 1974, PRPA advised Seatrain that PRPA "consents to the assignment by Seatrain of its rights, convenants, and obligations" under the 1972 Agreement to PRMSA.[15] Subsequently, PRMSA's Chairman advised

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[12] After withdrawing Agreement No. T-3308, PRPA and PRMSA submitted separate agreements for PRMSA's use of the Isla Grande terminal areas, *i.e.*, the berth and the adjacent backup area. Agreement No. T-3453 granted PRMSA preferential use of the berth and Agreement No. T-3453A granted PRMSA exclusive use of the backup area adjacent to the berth. Although the parties argue that this latter agreement was not subject to section 15, we have clearly held in the past that where marshalling areas are in the locale of the berth and are *essential* to the operation of the berth, an agreement relating to the lease of the adjacent backup area is subject to section 15. *Agreement No. T-4-Terminal Lease Agreement at Long Beach, California*, 8 F.M.C. 521 at 528, (1965).

[13] We note that Article III(A)(1) of Agreement No. T-3308 requires PRMSA to pay all applicable dockage and wharfage charges even when it berths its vessels at Isla Grande pursuant to the preferential right granted in that agreement.

[14] See Rule 226 of our Rules of Practice and Procedure, 46 C.F.R. 502.226; *Alaska Steamship Co. v. Federal Maritime Commission*, 344 F.2d 810 (1965); *Bakers of Washington, Inc. et al*, Pike and Fischer Administrative Law (2d) 334, Federal Trade Commission, 1964); *National Fire Insurance Company v. Thompson*, 281 U.S. 331, (1930); *Crichton v. United States*, 56 F.Supp. 876 (S.D. N.Y. 1944), *aff'd* 323, U.S. 684(1945); Davis, 2 Administrative Law Treatise, 381-384, section 15.06.

[15] In Docket No. 76-41, we determined that PRPA and PRMSA are to be considered as "one person" insofar as Isla Grande and its facilities are concerned.

PRPA that he was authorized to execute a contract assuming Seatrain's obligation under the 1972 Agreement. Although PRMSA and PRPA did not execute a written agreement, by which PRMSA assumed Seatrain's 1972 Agreement, Mr. Davila, PRMSA's Executive Director, testified in Docket No. 76-41 that when PRMSA closed the transaction with Seatrain, PRPA and PRMSA orally agreed that PRMSA would have the exclusive use of the backup area under terms similar to those found in the 1972 Agreement. Despite Respondents' arguments to the contrary, this oral arrangement which permits PRMSA to exercise *exclusive* control of this *essential* backup area, is clearly the type of arrangement that is subject to the filing and approval requirements of section 15. As the parties themselves admit, this adjacent area is one of the essential ingredients necessary for an efficient container vessel operation at Isla Grande. The backup area provides a container vessel docking at the berth the essential area needed for marshalling containers, or alternatively, if the area is occupied by an exclusive lessee, provides the only efficient means of ingress and egress for carriers who do not have rights to marshall their containers in this backup area adjacent to the berth. As such, any agreement between persons subject to the Act which provides for the exclusive use of this backup area must be filed with and approved by this Commission prior to implementation by the parties to the agreement. *Agreement No. T-4, supra.*

In addition, although the parties have only admitted to an agreement relating to the backup area, the evidence establishes the existence of an unfiled, unapproved agreement relating to PRMSA's use of the berthing area at Isla Grande. Although purportedly a public facility open to all carriers on a first come first served basis, Isla Grande has not been utilized by another carrier since PRMSA began its operations. Situated on this public terminal, with PRPA's acquiescenc ., are PRMSA's terminal assets, including shoreside gantry cranes, which PRMSA, again with PRPA's acquiescence, will not make available to other carriers. PRPA also acknowledges that it will not consider assigning a vessel, other than PRMSA's, to the Isla Grande berth unless such carrier can "feasibly work at the berth." Because PRPA is fully aware that PRMSA will not allow use of its cranes, and because PRPA realizes that in practical terms shoreside cranes are the only feasible means of working a container vessel at Isla Grande, Isla Grande, for all practical purposes, is not available to other carriers, on a first come first served or any other basis. When this evidence is considered in light of other evidence, including PRPA's "consent to assignment" of September 27, 1974; the Moscoso letter of September 30, 1974; the effective date contained in Agreement No. T-3308; and the unity of PRMSA and PRPA insofar as Isla Grande is concerned, it becomes clear that there has existed, since PRMSA began its operations, an unfiled section 15 agreement relating to PRMSA's use of the berth at Isla Grande.

Even if we assume for the sake of argument that there is insufficient independent evidence to find an agreement between PRPA and PRMSA relating to the latter's use of the berth, from October, 1974, to May, 1976, it would not preclude us from finding PRPA and PRMSA in violation of section 15 with respect to PRMSA's use of the berth at Isla Grande. As heretofore noted, Agreement No. T-3308 granted to PRMSA preferential use of the berthing area at Isla Grande and exclusive use of the adjacent backup area. PRMSA in response to our Order initiating this proceeding advised: "the portions of the agreement that have been implemented do not require Commission approval." Thus, PRMSA, by its own admission, has together with PRPA, implemented part of Agreement No. T-3308 prior to Commission approval pursuant to section 15 of the Act.

PRMSA's admission was offered in support of its argument that the portion of Agreement No. T-3308 that relates to the backup area is not subject to section 15. Even if we concurred with PRMSA's argument, which we do not, the other provisions of the agreement relating to preferential berthing rights are clearly matters that are subject to the filing and approval requirements of section 15. As such, the entire agreement becomes subject to section 15 and may not be implemented prior to filing with and approval by this Commission. This is fully consistent with the rationale expressed by the Commission in *In the Matter of Agreement No. T-2455/T-2453,* 18 F.M.C. 115 (1974) that:

> Once it is determined that a particular part [of an agreement is subject to section 15] the statute is clear that the *entire* agreement must be filed not only the clause giving rise to jurisdiction. And before approval, no part of the agreement may be implemented.

REQUEST FOR EVIDENTIARY HEARING

On July 1, 1977, after the record was closed, we granted Hearing Counsel's Petition to Reopen the record in this proceeding for the receipt of additional evidence that purportedly supported their argument that PRMSA and PRPA had implemented an unfiled section 15 agreement relating to PRMSA's use of Isla Grande. We explained then that our purpose in reopening the proceeding was to examine this newly discovered evidence and determine its importance to our decision in this proceeding. We have now examined this evidence, along with the affidavits submitted by Respondents, and find it unnecessary to a decision on the issues raised in this proceeding, nor have we relied, to any extent, on the evidence submitted on reopening.[16]

THEREFORE IT IS ORDERED, That PRMSA and PRPA cease and desist implementing any arrangement which grants PRMSA preferential or exclusive use of any part of the Isla Grande Marine Terminal until such arangement has been filed with and approved by the Commission pursuant to section 15 of the Act.

FURTHER, IT IS ORDERED, That Respondents' request for evidentiary hearing is denied.

FINALLY, IT IS ORDERED, That this proceeding be discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

Commissioner Leslie Kanuk, concurring. I concur in the result reached by the majority, that the failure to file the two agreements between Seatrain and PRPA concerning Seatrain's use of the terminal at Isla Grande from 1972 to 1974 and

[16] Because this determination obviates the need for any evidentiary hearing on disputed issues of fact that may have been raised by the newly introduced evidence, the request for such a hearing is denied.

the agreement at issue between PRPA and PRMSA relating to PRMSA's use of the Isla Grande facilities from October, 1974, to the present constitutes violations of section 15 of the Shipping Act, 1916.

This finding, however, in no way reflects an incorporation by reference of any other conclusion expressed by the majority in their opinion.

FEDERAL MARITIME COMMISSION

TITLE 46—SHIPPING

CHAPTER IV—FEDERAL MARITIME COMMISSION

SUBCHAPTER A—GENERAL PROVISIONS

[General Order No. 16, Amdt. 25; Docket No. 78–12]

PART 502—RULES OF PRACTICE AND PROCEDURE

Simplification of the Rules Governing Special Docket Applications for Permission to Refund or Waive Portions of Freight Charges in the Foreign Commerce

August 21, 1978

ACTION: Final Rules

SUMMARY: The Commission's rule governing the filing of applications by common carriers by water in the foreign commerce of the United States or conferences of such carriers seeking permission to refund or waive portions of freight charges because of tariff errors is amended. The amendments are necessary to eliminate unnecessary technicalities and ambiguities in the present rules which have caused undue delay in the processing of such applications. The effect of the amendments will be to eliminate participation of unnecessary parties, clarify when such applications must be filed, simplify the standard form used to submit relevant information, and ensure that applicants furnish adequate evidence justifying the relief sought.

EFFECTIVE DATE: 30 days after publication in the *Federal Register*.

SUPPLEMENTAL INFORMATION:

The Commission instituted this proceeding by Notice of Proposed Rulemaking (Notice) published in the *Federal Register* on May 1, 1978 (43 F.R. 18572) to amend Rule 92(a) of its Rules of Practice and Procedure, 46 CFR 502.92(a). As explained in the Notice, the purpose of the proposed amendments is to eliminate unnecessary delay in deciding special-docket cases caused by the present rule.

The proposed amendments would eliminate the need to obtain concurrences or affidavits from shippers, consignees, or freight forwarders, clarify the re-

quirement that applications be filed within 180 days from date of shipment, and simplify the application. The amendments would also ensure that applicants furnish adequate supporting information and that other steps would be taken to carry out the purposes of Public Law 90–298, which amended section 18(b) (3) of the Shipping Act, 1916, 46 U.S.C. 817(b) (3).

Comments were submitted in response to the Notice by three conferences (the Conferences),[1] Sea-Land Service, Inc. (Sea-Land), Elkan Turk, Jr., an attorney who practices before the Commission, E. I. du Pont de Nemours and Company (du Pont), and the United States Department of Agriculture (USDA). All of these commentators except USDA state that they generally support the proposed rule changes. USDA confines its comments to specific proposed changes.

The commentators disagreed on the definition of the term "date of shipment." The Conferences, Sea-Land, and Mr. Turk support "date of sailing" as the definition while du Pont and USDA suggest "date of payment of the freight."[2] The Commission proposed "date of issuance of the rated bill of lading" but specifically invited comments regarding this as well as other definitions.

Neither the Shipping Act nor its legislative history provides a definition of the term "date of shipment" and this omission has caused recurring problems. The Commission believes that it must fix a definition to ensure equality of treatment among applicants and meet the congressional intent to provide equitable relief but only so long as such relief is sought within a certain period of time.

The Commission carefully considered the arguments favoring "date of sailing" and "date of payment of the freight" suggested by the commentators as well as other definitions which have been used, such as "date of issuance of rated bill of lading," "date of loading," and "date of on board bill of lading." We believe the most suitable definition is "date of sailing of the vessel from the port at which the cargo was loaded." This date can be easily ascertained from carrier and other records, e.g., Lloyd's Voyage Record. Dates of bills of lading, especially on board bills of lading, are often found to be unreliable. Use of this definition also gives applicants an additional period of time to seek equitable relief for shippers and consignees beyond that which would apply if date of issuance of rated bill of lading or on board bill of lading were used. Use of this definition also ensures that the shipment was loaded aboard ship and that it commenced its ocean voyage whereas dates appearing on bills of lading do not necessarily indicate that the cargo actually left the carrier's terminal on those dates. As Sea-Land commented: "Many times bills of lading are issued and rated but due to unforeseen operational reasons the cargo is not loaded on the scheduled vessel."

The Commission apppreciates the desire of shippers such as du Pont and USDA to use "date of payment" as the definition. We find this to be unsatisfactory. In some instances, a shipper or consignee may be unwilling or unable to pay

[1] These conferences are: Japan-Puerto Rico & Virgin Islands Freight Conference; Japan/Korea-Atlantic and Gulf Freight Conference; Trans-Pacific Freight Conference of Japan/Korea.

[2] No one opposed the proposed definition of "filing" of applications to mean date the application is received by the Commission or the date it is deposited in the mail, as duly certified by the applicant, whichever occurs sooner.

the freight in whole or in part.[3] In such instances, the time for filing special-docket applications would be prolonged indefinitely, leaving the parties in a state of uncertainty. Furthermore, contrary to USDA's contentions, using date of payment does not necessarily protect shippers or assist them in making prompt and correct payments. As the Record in *Proposed Rule-Time Limit on Filing Overcharge Claims* shows, numerous shippers conduct little or no audit of their freight bills and consequently do not become aware of discrepancies until more than six months after payment has been made. Moreover, even if notice to shippers is the determining factor, although nothing in the statute or its legislative history so indicates,[4] receipt of the freight bill, not date of payment, would be the proper standard. It is the former event which puts shippers on notice of any discrepancies.

Accordingly, we are adopting ''date of sailing of the vessel from the port at which the cargo was loaded'' as the definition of ''date of shipment.''

The commentators refer to several other proposed rule changes which they believe require clarification or further amendment. The Conferences contend that the portion of proposed Rule 92(a) (4) referring to other steps which the Commission may order to be taken if an application is denied is too broad and should be restricted to collection of undercharges. The Conferences also suggest that proposed Rule 92(a) (2) be further amended to refer to conferences if conference tariffs are involved. We have considered these comments and believe that the amendments suggested are unnecessary.

If an application for refund or waiver is denied, action other than an order to collect undercharges may be warranted. Such action should be consistent with Public Law 90–298 and the requirements of due process. For example, a finding of violation of other provisions of the Shipping Act could not be made in a special-docket proceeding nor could reparation be ordered because of the notice requirements of the Administrative Procedure Act. However, in some cases it might be appropriate to order an applicant not only to collect undercharges but to file an affidavit of compliance. Furthermore, since shippers and consignees are not required to be parties to special-docket proceedings, it might be appropriate to order carriers to notify the shipper or consignee of the denial or to provide them with copies of the Commission's decision. Such action might be warranted if the record showed that although special-docket relief could not be granted, the shipper or consignee concerned might have the right to file a claim under the carrier's tariff or a complaint under section 22 of the Shipping Act because of an apparent misrating due to arithmetic error, misclassification, misdescription, or similar mistake.

We find no reason to further amend proposed Rule 92(a) (2) by inserting a reference to conferences. The Notice of Proposed Rulemaking, proposed Rule

[3] For example, in Special Docket No. 527, *Ford France, S.A. v. Sea-Land Service, Inc.* (Initial Decision, November 29, 1977), the consignee-complainant has been prevented from making payment on four shipments that occurred in early 1977 because of exchange control restrictions imposed by the French Government. Furthermore, in *Proposed Rule-Time Limit on Filing Overcharge Claims*, 12 F.M.C. 298 (1969), the record showed that shippers such as the U.S. Government, because of its extensive transportation activities, could not always make prompt payment.

[4] In some statutes, notice is expressly made the determining factor. For example, in the Interstate Commerce Act, institution of suits in loss and damage cases must commence within two years, ''such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim. . . .'' Section 20(11), 49 U.S.C. 20(11).

92(a) (1), and the revised form incorporated into the new rules indicate that conferences as well as individual carriers are indispensable parties if conference tariffs are involved. The Commission explained in the Notice that inclusion of conferences in the revised form was necessary because the present form makes no specific provision for conference concurrence or verification. Therefore, the proposed rule provides that both the carrier and the conference join in the application when a conference tariff is involved.

Sea-Land suggests that proposed Rule 92(a) (1) be amended to include consignees as well as shippers and that proposed Rule 92(a) (5) delete the requirement that supporting evidence be furnished regarding date of payment. We find it unnecessary to change the text of proposed Rule 92(a) (1). The portion of the present rule to which Sea-Land refers is unchanged. The Commission has always interpreted the term "shipper," as used in Public Law 90–298, to include consignees if they paid or were responsible for payment of freight charges. The proposed revised form indicates that special-docket applications are filed for the benefit of the "person who paid or is responsible for payment of freight charges." The requirement that supporting evidence regarding date of payment be furnished in proposed Rule 92(a) (5) should be deleted. Such evidence is unnecessary since we are not adopting "date of payment" as "date of shipment."

Mr. Turk suggested clarification of references to "number of shipments" and "aggregate" freight charges. Under the present rule "shipment" refers to the information shown on an individual bill of lading and "aggregate" refers to total freight charges derived by adding separate bills of lading. These are the intended meanings in the revised form.

USDA suggests that the rule should permit the concurrence and participation of shippers in the preparation and filing of applications. USDA fears that because the statute allows only carriers or conferences to file applications, a carrier might not have the incentive to file an application unless the shipper can concur and participate. We cannot amend the statute. There is nothing in the proposed rule to prevent shippers from assisting carriers in preparing applications or from urging carriers to file applications. Shippers may even petition for leave to intervene in the proceeding under Rule 72, 46 CFR 502.72. Consequently, there is no need to amend the rule as recommended by USDA.[5]

Therefore, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553),and sections 18(b) (3), 21, and 43 of the Shipping Act, 1916, (46 U.S.C. 817(b) (3), 820, and 841a), Part 502 of Title 46, is amended to read:

1. Paragraph (a) of section 502.92 is revised to read as follows:

§502.92 Special Docket Applications.

(a)(1) A common carrier by water in foreign commerce which publishes its own tariff or, if the common carrier does not publish its own tariff, the carrier and the conference to which it belongs, may file an application for permission to refund or waive collection of a portion of freight charges where it appears that there is (i) an error in a tariff of a clerical or administrative nature or (ii) an error due to inadvertence in failing to file a new tariff. Such refund or waiver must not result in discrimination among shippers.

[5] We have, however, made certain minor changes to the proposed form in paragraphs (1) and (4) to conform with our intentions and provide more adequate information.

(2) The Commission must have received an effective tariff setting forth the rate on which refund or waiver would be based prior to the filing of the application.

(3) The application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment. An application is filed when it is placed in the mail or, if delivered by another method, when it is received by the Secretary of the Commission. Filings by mail must include a certification as to date of mailing. Date of shipment shall mean the date of sailing of the vessel from the port at which the cargo was loaded.

(4) By filing, the applicant(s) agrees that

(i) if permission is granted by the Commission

(A) an appropriate notice will be published in the tariff or

(B) other steps will be taken as the Commission may require which give notice of the rate on which such refund or waiver would be based and

(C) additional refunds or waivers shall be made with respect to other shipments in the manner prescribed by the Commission's order approving the application.

(ii) if the application is denied, other steps will be taken as the Commission may require.

(5) Application for refund or waiver shall be made in accordance with the form set forth below. Any application which does not furnish the information required by the prescribed form or otherwise comply with this rule may be returned to the applicant by the Secretary without prejudice to resubmission within the 180-day limitation period.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO.

Application of ______________________________ for
(Applicant(s))

the benefit of ____.
(Name of person who paid or
is responsible for payment of freight charges.)

(1) Shipment(s)

Commodity (according to tariff description) ______________

Number of shipments
(a) weight or measurement of individual shipment ______________
(b) aggregate weight or measurement of all shipments ______________

Date of shipment (sailing)
(furnish supporting evidence) ______________

Shipper and place of origin ______________

Consignee and place of destination ______________

Name of carrier and date shown on bill of lading
(furnish legible copies of bill(s) of lading) ______________

Names of participating ocean carriers and routing ______________

Name(s) of vessel(s) involved in carriage ______________

Amount of freight charges collected
(furnish legible copies of rated bill(s) of lading or freight bill(s), as appropriate)
(a) per shipment ______________
(b) in the aggregate ______________
(c) by whom paid ______________
(d) who is responsible for payment if different ______________

Rate applicable at time of shipment
(furnish legible copies of tariff page(s)) ______________

Rate sought to be applied
(furnish legible copies of tariff page(s))
Note: Must be on file with Commission prior to application ______________

Amount of freight charges at rate sought to be applied
(a) per shipment ______________
(b) in the aggregate ______________

Amount of freight charges sought to be (refunded) (waived)
(a) per shipment ______________
(b) in the aggregate ______________

(2) Furnish docket numbers of other special docket applications or decided or pending formal proceedings involving the same rate situations.

(3) State whether there are shipments of other shippers of the same or similar commodity which (a) moved via applicant(s) during the period of time beginning on the day the bill(s) of lading was issued and ending on the day before the effective date of the conforming tariff and (b) moved on the same voyage of the vessel(s) carrying the shipment(s) described in (1) above.

(4) Fully explain the clerical or administrative error or error due to inadvertence showing why the application should be granted. Furnish affidavits, if appropriate, and legible copies of all supporting documents. If the error is due to inadvertence, specify the date when applicant(s) intended or agreed to file a new tariff.

____
(Applicant) (Carrier)

By: ______________________________
(Signature)

____
(Typed or printed name of person signing)

____
(Title)

____
(Date)

State of ______________________, County of ______________________,
ss:

I, ________________, on oath declare that I am ________________ of the above-named carrier-applicant, that I have read this application and know its contents; and that they are true.

Subscribed and sworn to before me, a notary public in and for the State of __________, County of ______________________, this ________ day of __________, A.D. 19 ____.

[SEAL]

____
(Notary Public)

I certify that the date shown below is the date of mailing of the original and three copies of this application to the Secretary, Federal Maritime Commission, Washington, D.C. 20573.

Dated at ____________________ this ____________ day of ________, 19 ____.

(Signature) ______________________________

(For) ______________________________

2. Paragraph (c) of section 502.92 is amended by revising the first sentence to read as follows:

(c) Applications under paragraphs (a) and (b) of this section shall be submitted in an original and three (3) copies to the Office of the Secretary, Federal Maritime Commission, Washington, D.C. 20573.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–9

UNITED NATIONS

v.

HELLENIC LINES LTD.

NOTICE OF ADOPTION

August 21, 1978

No exceptions were filed to the supplemental initial decision in this proceeding served July 19, 1978. Notice is given that the Commission on August 16, 1978, determined to adopt the conclusion of the Administrative Law Judge in this matter.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 77–9

UNITED NATIONS

v.

HELLENIC LINES LIMITED

Conclusion Adopted August 21, 1978

SUPPLEMENTAL DECISION[1] OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

To the July 22, 1977, Initial Decision served in this proceeding shall be added the following reasons for the findings and conclusions contained therein:

1. It was found and concluded that the respondent inadvertently failed to charge for extra length of the freight. The complainant established to the satisfaction of the Presiding Administrative Law Judge that the respondent should have charged the complainant $508.75 under the applicable tariff for the extra length of the freight; and not having done so, the respondent undercharged the complainant that amount. Section 18(b)(3) of the Shipping Act, 1916, frowns upon greater or less being charged than the rates in the tariff on file. Either, greater or less charge, must be corrected. As was pointed out in the Initial Decision, it is the responsibility of the carrier to proceed to collect this undercharge from the shipper.

2. It was found and concluded the complaint was timely filed, the action having accrued in July 1975 when the freight charge was paid. Section 22 of the Shipping Act, 1916, provides for filing of a complaint within two years after the cause of action accrued, and the complaint was so filed.

3. It was found and concluded that the truck mounted 36 duo drill was properly rated under the respondent's tariff. This finding was because upon consideration of the record, and the contentions of the parties, the Presiding Administrative Law Judge is persuaded the contentions of the respondent are supported by documents supplied in the cause. The respondent's contentions, that Item 965 classification is not restricted to the listings as given above by the complainant, that Item 965, Road Vehicles, is not intended to be restricted to vehicles used 10% or 100% of the time on primary or secondary roads and therefore covers any vehicle moved over a primary or secondary road, are regarded as more persuasive than those of the complainant. That further contentions and answers of the respondent also tend to support the respondent applied the proper tariff rate, are agreed to by the Presiding Judge.

The complainant contends for rate of $159.25 per 40 cu. ft. of Item 575 of the tariff. In the said Item 575 (Attachment 8 to Complaint) the respondent points out

[1] Commission's Order herein of July 17, 1978. This decision is supplemental to Initial Decision served herein July 22, 1977.

that the rate requested by the complainant specifically exempts trucks from the machinery rate as this cargo is firstly a truck with special equipment. With this, the Presiding Administrative Law Judge agrees. That the cargo was firstly a truck in part is supported by facts showing the truck without accessories cost more than the drill without accessories but with accessories or special equipment the drill was more.

Finally, there are no contentions or facts as to any ambiguity in the tariff that would warrant construction of the tariff against the carrier and in favor of the shipper, once, as here, it is determined the cargo was firstly a truck properly rated under Item 965 of the applicable tariff.

Orders propounded in the July 22, 1977, Initial Decision are hereby reasserted.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

WASHINGTON, D.C.
July 19, 1978

FEDERAL MARITIME COMMISSION

No. 77-9

UNITED NATIONS

v.

HELLENIC LINES LTD.

Conclusion Adopted August 21, 1978

Reparation denied.

Blaine Sloan, Director, General Legal Division, Office of Legal Affairs, and *John F. Scott*, Acting Director, Office of Legal Affairs, for complainant.
James E. Ganzekaufer, Manager, Red Sea/East Africa Service, for respondent.

INITIAL DECISION[1] OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

This complaint case, at the request of the complainant United Nations, consent thereto of the respondent Hellenic Lines Limited (Hellenic Lines) and approval by the Presiding Administrative Law Judge, was conducted under the Shortened Procedure as provided in Rule 181 *et seq.* of the Commission's Rules of Practice and Procedure, 46 CFR 502.181, *et seq.*

The United Nations shipped freight, including a 1-piece unit 36 Duo Drill, on the respondent's vessel *SS Hellenic Sky* under Bill of Lading No. T001 dated April 16, 1975, from New York for transportation to Djibouti for transshipment to Aden, "Freight Prepaid to Aden."[2]

Bill of Lading T001 replaced an initial Hellenic Lines Bill of Lading P017 dated April 16, 1975, which was cancelled. Bill of Lading P017 called for transportation of freight from New York to Hodeida. Bill of Lading T001 called for transportation of freight from New York to Djibouti to be transshipped to Aden. The change in routing to Aden via Djibouti was at the request of complainant for which there was a diversion charge of $7.00 per ton as freighted, which charge the complainant regards as having been assessed properly.

The only portion of the shipment in question is the 1-piece unit 36 Duo Drill (complaint, p. 5, 7).

[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).

[2] The Presiding Administrative Law Judge under date of June 3, 1977, wrote to the complainant (copy to the respondent) asking the complainant to supply the date payment was made of the freight charges, etc. In a reply dated June 23, 1977 (received June 27, 1977), the complainant enclosed the following material applicable to the payment of the shipment: (1) a copy of cancelled check No. 008027 dated July 18, 1975, in the amount of $22,365.72 drawn on the Chemical Bank New York Trust to the order of Schenkers International Forwarders, Inc. The check is stamped paid Chemical Bank July 22, 1975; (2) a copy of Schenkers' invoice dated May 9, 1975.

The 1-piece 36 Duo Drill unit, unpacked, weighed 49,500 lbs. with a cube of 3700 cu. ft. For the 3700 cu. ft., the respondent, using Item 965 of its tariff, Hellenic Lines Limited, U.S. Atlantic and Gulf/Red Sea and Gulf of Aden Freight Tariff FMC No. 4, charged \$181.50 per 40 cu. ft. or \$16,788.75 (3700 cu. ft. ÷ 40 cu. ft. = 92.5 40 cu. ft. \$181.50 × 92.5 = \$16,788.75); Heavy Lift Scale charge 3700 cu. ft. × \$31.00 per 40 cu. ft. \$31.00 × 92.5 = \$2,867.50; Diversion charges, 3700 cu. ft. × \$7.00 per 40 cu. ft. \$7.00 × 92.5 = \$647.50—Total \$20,303.70 (See Bill of Lading No. T001).

The complainant contends the correct tariff rate for the 1-piece cyclone 36 Duo Water Well should be \$159.25 per 40 cu. ft. as per Item 575, 16th Revised Page No. 32 of Freight Tariff FMC No. 4 of Hellenic Lines Limited. Thus, 3700 cu. ft. at \$159.25 per 40 cu. ft. is \$159.25 × 92.5 = \$14,730.62; heavy lift scale 3700 cu. ft. at \$31.00 per 40 cu. ft. is \$31.00 × 92.5 = \$2,867.50 and Diversion charge 3700 cu. ft. at \$7.00 per 40 cu. ft. is \$7.00 × 92.5 = \$647.50. Sub-Total \$18,245.62. Complainant alleges further the freight was 37 feet in length, that being over 35 feet in length and not exceeding 40 feet it was subject to \$5.50 W/M Extra Length charges per Rule 17, 8th Rev. Page 16 of the applicable tariff, which charge inadvertently was omitted in the original freighting by the respondent. The extra length charge (\$5.50 × 92.5) would amount to \$508.75 bringing the total to \$18,754.37. The respondent, as shown above, charged \$20,303.70. Under the complainant's view the charge would be \$18,754.37, a difference of \$1,549.33 for which reparation is sought by the complainant from the respondent carrier.

The complainant alleges the difference for which reparation is sought is a payment by it to the carrier of a rate for transportation of the freight in question, which is unjust and unreasonable in violation of section 18(b)(3) of the Shipping Act, 1916.

The respondent, on the other hand, insisting the rate charged was correct, objects to the allegations of the complainant.

DISCUSSION

Patently, the complainant has introduced overcharges and undercharges into this proceeding. Undercharges enter the picture as the complainant contends the carrier inadvertently failed to charge for extra length of the freight in an amount of \$508.75. Since only a single bill of lading, No. T001, is involved, offsetting is permissible and does not constitute an award of reparation against the shipper but is merely a consideration of all elements of the total transaction, i.e., the overcharges and undercharges under a single bill of lading in determining whether injury to the shipper resulted from the carrier's violation. If a proven charge under a single bill of lading exceeds a proven undercharge under that bill of lading then an award of reparation is authorized for an amount by which the overcharge exceeds the undercharge. *Colgate Palmolive Co. v. The Grace Line*, Docket No. 194(I), 17 F.M.C. 279, 280 (1974).

The respondent made no reply as to the alleged inadvertent failure to charge for extra length of the freight. The complainant has satisfactorily established that the \$508.75 should have been charged, and that there was an undercharge. Section 18(b)(3) of the Shipping Act, 1916, provides, in part, "No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or lesser 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. . . . "

The complainant argues in support of the $159.25 per 40 cu. ft. rate that the Packing List (Attachment 5 to complaint) shows that 1-piece 36 Duo Drill that was shipped, was a 36 Duo Drill, S/N–75–10 Rotary Type, for drilling water wells, with the detailed components comprising this 1-piece unit. Complainant describes the unit as "Rotary Type Water-Well Drilling Truck Mounted and Powered Drill Rig, heavy in weight and large in size, in excess of regular road and highway weight limitations, geared and designed for rough terrain exploration and drilling for water-wells in all types of remote and rugid *(sic)* areas." Complainant insists it is not a road vehicle and that it was error for the carrier to have applied its tariff provision Item 965 for "Road Vehicles with Special Mechanical or special equipment or Devices NOS up to and including 8960 lbs." Complainant insists that provision is for special purpose vehicles for the road such as ambulances, armored cars, crash trucks, hearses, mobile health clinics, police patrol wagons, radar trucks, and the like, that are vehicles for regular everyday use on the roads and highways.

The respondent contends the Item 965 classification is not restricted to the listings as given by the complainant, but applies to any vehicle that is specially equipped, unless classified elsewhere in the tariff. Respondent says ambulances and hearses are cases in point, being listed under Item 75m, p. 18 of the tariff. Further, the respondent argues Item 965, Road Vehicles, is not intended to be restricted to vehicles used 10% or 100% of the time on primary or secondary roads and therefore covers any vehicle moved over a primary or secondary road. Also says respondent the rate the complainant requests under Item 575 specifically exempts trucks from the machinery rate as this cargo is firstly a truck with special equipment. In addition the respondent argues that the complainant at page 5 of the complaint confirms the machine is "truck mounted" and that attachment 5 to the complaint shows both the mud pump and the air compressor of the drilling machine are powered from the truck engine and apparently cannot be operated without power being received from the truck.

Attachment No. 3 to the complaint, Classification of Exports, Schedule B718.4262 Well-drilling machines, n.e.c., directs that for truck-mounted drilling machines, see 7320330. The latter, in Attachment No. 4, refers to non-military trucks, with derrick assembly, winches and similar equipment, for drilling, and respondent says this was used.

Complainant contends the documentary evidence determines clearly that the well-drilling machine with the complete Drill Rig was a truck-mounted drilling machine comprising the consist of subject shipment, with water-well drilling machine components in 3 crates for the truck-mounted Drill Rig for a two-year period of operation.

Attachment No. 6 to the complaint, the invoice, shows the Drill costing $33,511, F.O.B. Orrville, Ohio, and the Ford Model LT9000 truck, $37,500.

The drill price with accessories was $71,760. The price of the truck and accessories was $66,091.91.

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:

(1) That this action accrued when the freight charge was paid in July, 1975. Complaint was filed and served in April, 1977, and was timely having been filed within two years of the time the right to action accrued.

(2) That this truck mounted 36 duo drill was properly rated under the respondent's tariff.

(3) That the respondent inadvertently failed to charge for the extra length of the freight as provided in its tariff, a sum of $508.75, but reparation is not permissible against a shipper, nor is this a situation of a single bill of lading where overcharge and undercharge are permissible set offs, because

(4) Reparation should be denied.

(5) The carrier should proceed to collect the undercharge referred to in (3) above and keep the Commission advised of the efforts and results.

(6) The complaint should be dismissed and the proceeding discontinued.

Wherefore, it is ordered,

(A) Reparation is denied.

(B) The carrier shall proceed to collect from the shipper the undercharge occasioned by carrier's inadvertence in not charging as per tariff requirement for extra length of freight. Carrier shall keep the Commission informed of the carrier's efforts and results in collecting undercharge.

(C) The complaint be and hereby is dismissed.

(D) The proceeding be and hereby is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

WASHINGTON, D.C.
July 22, 1977

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–22

ROBINSON LUMBER COMPANY, INC.

v.

DELTA STEAMSHIP LINES

NOTICE OF DETERMINATION NOT TO REVIEW

August 28, 1978

Notice is given that the Commission on August 24, 1978 determined not to review the order of discontinuance in this proceeding served July 31, 1978.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

July 31, 1978

No. 75–22

ROBINSON LUMBER COMPANY, INC.

v.

DELTA STEAMSHIP LINES, INC.

SETTLEMENT APPROVED; COMPLAINT DISMISSED WITH PREJUDICE; AND PROCEEDING DISCONTINUED

Finalized on August 28, 1978

At the opening of the hearing, the parties announced that they had agreed upon terms of settlement of their dispute and, in substance, requested dismissal of the complaint, with prejudice, and discontinuance of the proceeding upon approval of the settlement by the Commission.

In my judgment, the settlement should be approved, the complaint should be dismissed, with prejudice, and the proceeding should be discontinued.

BACKGROUND

The complaint alleged violations of sections 15, 16, 17, and 18 of the Shipping Act, 1916, 46 U.S.C. 814, 815, 816 and 817, arising from the carriage of numerous shipments of particular varieties of lumber (mahogany, guatambu and ipe tabaco) from South American (Brazil) ports to United States Gulf Coast ports between April 18, 1973, and January 31, 1974. Reparation in the amount of $23,377.55 was sought.[1]

The record does not disclose with utmost clarity all the factual details of the case or the precise nature of the alleged violations of law. Nevertheless, several documents read together, primarily the complaint, the joint statement of the parties and the further joint statement of the parties, may fairly be construed to

[1] The amount of reparation would have to be reduced by about $500.00 inasmuch as reparation for some of the shipments was time barred under the two year jurisdictional requirement of section 22 of the Shipping Act, 1916, 46 U.S.C. 821. This is so because the complaint was not filed within two years after the cause of action accrued, i.e.—the charges for some shipments were *paid* more than two years before the complaint was filed. See *U.S. ex rel Louisville Cement Company v. I.C.C.*, 246 U.S. 638, 644 (1918). Cf. *Aleutian Homes, Inc. v. Coastwise Line*, 5 F.M.B. 602, 611 (1959), and *United States of America v. Hellenic Lines Limited*, 14 F.M.C. 255, 260 (1971).

mean[2] that complainant's principal claim alleges facts and circumstances similar to those found to have constituted a violation of section 16 First of the Shipping Act, 1916, 46 U.S.C. 815 First, in *Valley Evaporating Co. v. Grace Line, Inc.*, 14 F.M.C. 16 (1970).

Briefly, the facts in *Valley Evaporating* were that the conference, in an effort to eliminate "paper rates" on nonmoving commodities, published a new tariff which did not include dried fruit as a specific commodity in the new tariff although it had moved in volume for some time. Because the complainant was not a subscriber to the conference tariff it did not receive notice of the proposed rate change.

In the instant matter, the conference[3] undertook a survey of lumber categories, to determine which commodities were moving in the trade, to simplify the tariff and to eliminate "paper rates." Like the shipper in *Valley Evaporating,* the complainant, here, was not a subscriber to the tariff and did not receive notice of the rate changes based on the conference's survey. Whether or not the rates on mahogany, ipe tabaco and guatambu were included in the changes because of "oversight" is not clear, but it is evident that those three varieties have moved in quantity since 1973.[4]

After complainant instituted this proceeding, the respondent filed a lawsuit against complainant in the United States District Court for the Eastern District of Louisiana[5] alleging damages of $100,000 arising from the same shipments which formed the basis for this proceeding.[6]

In addition, the respondent has another outstanding claim against complainant arising from a lumber shipment which it carried in September, 1975, in the amount of $1,928.73.

THE SETTLEMENT

The respondent has, in effect, agreed to pay complainant the sum of $2,000 to resolve all the outstanding claims of both parties.[7] If approved by this agency, the parties have agreed to seek dismissal of both this complaint and the court action, with prejudice.[8]

If not approved, of course, the compromise is without prejudice to the parties. The compromise is "solely for the purpose of effecting a satisfaction of all . . . claims to avoid further costs and expenses of litigation and the prolongation of the controversies. . . ."[9]

[2] "It is the duty of the Commission to look to the substance of the complaint rather than its form and it is not limited in its action by the strict rules of pleading and practice which govern courts of law." *Stockton Port District v. Pacific Westbound Conference*, 9 F.M.C. 12, 33 (1965); *City of Portland v. Pacific Westbound Conference*, 5 F.M.B. 118, 129 (1956).

[3] The respondent is a member of the Inter-American Freight Conference which had on file, at the times relevant to the complaint, Tariff No. 1 (FMC #3) for Section C covering Trade from Brazilian ports to United States Atlantic and Gulf ports.

[4] During the period to which the complaint relates, freight was charged by the respondent and paid by complainant in the amount of $148,314.08.

[5] Civil Action No. 76–677.

[6] It was alleged that the plaintiff was injured because it undercharged the defendant due to misstatements in measurements.

[7] The financial details require respondent to pay $3,928.73 to complainant and simultaneously therewith, complainant is to pay $1,928.73 to respondent.

[8] Whatever inequities resulted from the tariff changes designed to eliminate "paper rates" were subsequently removed by publication of remedial tariff provisions satisfactory to complainant.

[9] Exhibit 1, p. 2.

DISCUSSION

The Commission may authorize settlement of a proceeding on the basis of a compromised reparation payment, absent an admission or finding of violation of law in a case arising under provisions of the Shipping Act, 1916, other than section 18(b)(3). *Com-Co Paper Stock Corporation v. Pacific Coast-Australasian Tariff Bureau,* 18 SRR 619 (1978) (The Commission determined not to review on July 27, 1978). However, as implied earlier, although the complaint alleged a violation of section 18(b)(3),[10] it is manifest that the principal claim alleged a violation of section 16 First. Thus, the instant money settlement, despite the absence of a determination of violation, may be approved if the terms of settlement are meritorious. *Id.*

The record discloses that the terms of settlement warrant approval. The overall agreement was effected through negotiations by counsel. It was based on a weighing of several disputes, including claims for unliquidated amounts which claims are not within the jurisdiction of the Commission, and counsel's assessment of the prospects of winning or losing coupled with the expense of litigating the several cases.

There is no likelihood of discrimination against other shippers who did not institute proceedings against respondent or other members of the conference, for the obvious reason that those other shippers sat on whatever rights they may have had and for the additional reason that most, if not all, of the moneys will go toward the costs of litigation already incurred by the complainant.[11]

I am satisified that the settlement will not result in rebates or other violations of the Shipping Act; that the settlement agreement reflects pragmatic judgments by managements of both parties; and that the settlement agreement warrants approval as an appropriate compromise of differences. "The law, of course, encourages settlements and every presumption is indulged in which favors their fairness, correctness and validity generally." *Merck Sharp and Dohme v. Atlantic Lines,* 17 F.M.C. 244, 247 (1973).

Therefore, it is ordered that the settlement agreement be approved.

It is further ordered that the complaint be dismissed, with prejudice, and the proceeding be discontinued.

(S) SEYMOUR GLANZER
Administrative Law Judge

July 31, 1978

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[10] Although the complainant did not specify section 18(b)(3), it invoked section 18 and alleged overcharges. Thus, it may be concluded that section 18(b)(3) was intended. See n. 2, *supra*.

[11] The proceeding was hotly contested prior to the scheduled hearing. Numerous pleadings, including a complex motion for summary judgment were filed, replied to and ruled upon.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-58

TRAILER MARINE TRANSPORT CORPORATION (TMT)—PROPOSED REVISED AND REDUCED TRAILERLOAD RATES ON SYNTHETIC YARN FROM PORTS IN PUERTO RICO TO UNITED STATES ATLANTIC PORTS

NOTICE OF DETERMINATION NOT TO REVIEW

August 28, 1978

Notice is given that the Commission on August 24, 1978,determined not to review the order of discontinuance in this proceeding served July 31, 1978.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

July 31, 1978

No. 77–58

TRAILER MARINE TRANSPORT CORPORATION (TMT)—PROPOSED REVISED AND REDUCED TRAILERLOAD RATES ON SYNTHETIC YARN FROM PORTS IN PUERTO RICO TO UNITED STATES ATLANTIC PORTS

DISCONTINUANCE OF PROCEEDING

Finalized on August 28, 1978

All parties are in agreement that this proceeding should be discontinued. Certain facts have been stipulated and received as late-filed exhibits in this proceeding. (Separate ruling this date.)

The Commission's order of investigation served December 8, 1977, stated that three questions were left unanswered by the protests to TMT's proposed rates and the replies to these protests.

One question was whether TMT's rates on synthetic yarn from Puerto Rico to Jacksonville, Florida, would unduly divert cargo from the port of Charleston, South Carolina. During a longshoremen's strike in 1977 which shut down PRMSA, TMT continued to operate because it employed teamster labor. TMT carried 73 containers of synthetic yarn during the strike. Since the strike TMT carried only nine containers of yarn. Most of the yarn has been routed via PRMSA and to the Port of Charleston since the end of the strike. PRMSA has filed rate revisions which would eliminate any rate advantage which TMT might have had in the past. There is little or no likelihood that TMT rates will unlawfully divert cargoes of yarn from Charleston in the future. PRMSA withdrew from this proceeding, and the South Carolina State Ports Authority, while challenging the diversion of nine containers of yarn, states that this is an insignificant diversion and agrees that further diversion is now unlikely.

A second question which the Commission sought to be resolved was whether TMT's rates are discriminatory and burdensome to local traffic. TMT carries far more loaded containers southbound to Puerto Rico than it carries northbound. TMT's northbound proportional rates in issue herein apparently recover the incremental costs of carriage of the trailers and make some contribution to overall revenue, thereby reducing the expense of repositioning containers (which moved southbound) which expense must be borne by other cargoes including northbound local cargo. Since the TMT northbound proportional rates on yarn exceed the incremental costs of carriage, they do not burden local cargo.

A third question which the Commission sought to be resolved was what are the applicable inland motor carrier rates from Jacksonville and from Charleston to four destinations in North Carolina and South Carolina. Answers are found in late-filed exhibit nos. 5–M and 5–N.

Inasmuch as all of the issues herein have been resolved, and since all parties agree that the proceeding be discontinued, there appears no good cause for continuing this matter. The subject proceeding hereby is discontinued.

(S) CHARLES E. MORGAN
Administrative Law Judge

July 31, 1978

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 576

PERRY H. KOPLICK AND SONS, INC.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION

August 28, 1978

No exceptions were filed to the initial decision in this proceeding served July 26, 1978. Notice is given that the initial decision was adopted by the Commission on August 24, 1978.

It is ordered that applicant shall waive collection of freight charges, publish a tariff notice (and provide a copy for the record) and give notice to the Commission of compliance, in the time and manner required by the initial decision.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 576

PERRY H. KOPLICK AND SONS, INC.

v.

SEA-LAND SERVICE, INC.

Adopted August 28, 1978

Waiver of collection of a portion of freight charges in the aggregate amount of $16,533.90 on two shipments of wastepaper granted.

Carrier found through inadvertence to have failed to file lower rate applicable to two shipments of wastepaper.

INITIAL DECISION[1] OF STANLEY M. LEVY, ADMINISTRATIVE LAW JUDGE

This proceeding was commenced by an application filed by Sea-Land Service, Inc. (Sea-Land), pursuant to section 18(b) (3) of the Shipping Act, 1916 (Act), 46 U.S.C. 817(b) (3), as amended by P.L. 90-298, and pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a).

In its application, received June 2, 1978, Sea-Land requests permission to waive collection of a portion of freight charges for the benefit of the shipper, Perry H. Koplick and Sons, Inc., the nominal complainant in this proceeding, incurred on two shipments[2] of wastepaper from New Orleans, Louisiana, to Leghorn, Italy.

On shipment No. 1, December 12, 1977, freight bill numbers 031-733553 and 031-736187, the charges assessed total $13,059.95, of which $7,657.25 has been paid and of which $5,402.70 is requested to be waived.

On shipment No. 2, December 19, 1977, freight bill 031-734117, the charges assessed are $15,505.99, of which $4,374.79 has been paid and of which $11,131.20 is requested to be waived.

The payments, totalling $12,032.04 were paid on February 24, 1978, on behalf of the shipper by Francesco Parisi, Inc., freight forwarder.[3]

The tariff involved in this application is Sea-Land Tariff 233, FMC-105, Item 5860, 7th Revised Page 111.

[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).

[2] The shipments on December 12 and 19, 1977, were 172 days and 165 days respectively prior to the filing of the application and thus within 180 days from the "date of shipment" as required by law.

[3] Per check No. 21346, a copy of which, with endorsement on reverse thereof, was requested by the Administrative Law Judge and transmitted under separate cover on July 11, 1978.

The rate applicable for wastepaper at the time of shipments was $104.50W— measuring up to and including 80 cubic feet per ton.[4]

On November 1, 1977, a special rate on wastepaper of $50.00/W minimum 20 WT per container was deleted from Sea-Land Tariff No. 233, FMC-105, 5th Revised page 111.[5]

During the period November 1 and November 7, 1977, discussion between H. Thomas, Jr., of Sea-Land and J. Pryne of Koplick (shipper), together with F. Spielman of Parisi (freight forwarder) revealed that if Sea-Land would approve a rate of $60.00 per long ton with a minimum of 18 tons per trailer a considerable amount of wastepaper could be moved. The shipper indicated that at the then current rate of $90.00 the rate was too high to move any cargo. Sea-Land thereupon agreed to file a $60.00 rate effective November 14, 1977.[6]

However, because of layoff of clerical personnel during the longshoremen's strike, it was the intent to keep the actual publication pending till the end of the strike, but unfortunately in the mass of paperwork accumulated during the strike the request was mislaid and rate of $60.00W was inadvertently not filed until January 10, 1978.[7] Consequently, when shipper on December 12, 1977, offered Sea-Land a shipment of wastepaper, Sea-Land had no alternative but to charge $104.50/W in accordance with the measurement scale on 6th Revised Page 111.

On the basis of the foregoing Sea-Land has requested that it be granted permission to waive a portion of the ocean charges to conform to the intention to file a $60.00 rate to be effective November 14, 1977, prior to the shipments in December, 1977, but because of error due to inadvertence was not filed until January 10, 1978.

Sea-Land avers that it does not believe that any discrimination among shippers will result from a waiver of the amount involved. Sea-Land further agrees to publication of a notice, or of such action as the Commission may direct, if permission to a waiver of freight charges is granted.

Discussion

The question to be decided in this case is simply whether the application for permission to waive a portion of freight charges and the supporting evidence establish that the type of error contemplated by P.L. 90-298 occurred and that the application meets all other requirements in that law regarding the time of filing the application and corrective tariff and the assurance that no discrimination among shippers will result if the application is granted. All of these requirements appear to have been met.

P.L. 90-298, which amended section 18(b)(3) of the Act, was designed to remedy inequities and financial harm visited upon shippers which resulted from inadvertent errors in tariff-filing by carriers. Thus, when a carrier intended to apply a lower rate on a particular shipment but failed to file an appropriate tariff conforming to the carrier's intention and usually the shipper's understanding,

[4] Sea-Land Tariff 233-FMC No. 105, Item 5860, 6th Revised page 111. See attachment No. 4 to application.

[5] See attachment No. 1 to application.

[6] See Sea-Land inter-office correspondence, dated November 7, 1977—attachment No. 2 to application.

[7] See TWX filing—102019—attachment No. 3 to application.

prior to the enactment of P.L. 90–298, the carrier was bound to charge the higher, unintended rate even if the shipper had relied upon the carrier's representations that a lower rate would be charged and that an appropriate tariff would be filed.

This inequitable result was unavoidable because of the governing principles of law requiring strict adherence to tariffs effective at the time of shipment regardless of equities. *See Mueller v. Peralta Shipping Corp.*, 8 F.M.C. 361, 365 (1965); *United States v. Columbia S.S. Company,* 17 F.M.C. 8, 19–20 (1973).

In recognition of the fact that this hard and fast doctrine could result in inequities and hardships, Congress passed P.L. 90–298. The legislative history to P.L. 90–298 illustrates the types of mistakes which the statute was designed to remedy as follows:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, 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 rate.[8]

The Senate Report states the *Purpose of the Bill:*

> [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.[9]

Accordingly, section 18(b)(3) of the Act, 46 U.S.C. 817(b) (3), was amended in pertinent part to read as follows:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: *Provided further,* That the . . . carrier . . . has, prior to applying for authority, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based: *Provided further,* . . . That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment.

In the application herein Sea-Land failed to file the specific commodity rate of $60 through inadvertence. It is clear that it was Sea-Land's intention to apply the $60 prior to the shipments involved. Such intention is a necessary element to establish that there was an error in a tariff due to an inadvertence in failing to file a new tariff, as the legislative history to P.L. 90–298 demonstrates.[10] See also *Munoz y Cabrero v. Sea-Land Service, Inc.,* 17 SRR 1191, 1193 (1977), in which case the Commission stated:

> [I]t is clear that the "new tariff" is expected to reflect a *prior intended* rate, not a rate agreed upon after the shipment. (Emphasis added.)

I therefore find that there was an error in Sea-Land's tariff due to an inadvertence in failing to file a new tariff.[11]

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[8] House Report No. 920, 9th Cong. 1st Sess., November 14, 1967 [to accompany H.R. 9473], pp. 3, 4.

[9] Senate Report No. 1078, 9th Cong. 2d Sess., April 5, 1968 [to accompany H.R. 9473], p. 1.

[10] Thus, the Senate Report, cited above, at page 1, refers to the situation "where through inadvertence there has been a failure to file a tariff reflecting an *intended* rate." (Emphasis added.) *See also* Hearing Before the Subcommittee on Merchant Marine and Fisheries, etc., 90th Cong. 1st Sess., August 15, 16, 1967, p. 103, in which a witness stated that "in the inadvertence cases the question of relief swings on the question of the intent of the particular carrier and the shipper applying for relief."

[11] The new tariff has been filed prior to application for waiver, in conformity with statutory requirement.

The application sets forth that Sea-Land does not believe that any discrimination among shippers will result from a waiver of the amount involved. No evidence has been presented to indicate that other shippers of wastepaper shipped via Sea-Land during the period November 14, 1977, and the effective date as actually subsequently filed. Even if other shippers might have been involved, however, the possibility of discrimination will be eliminated by the publication of a notice in Sea-Land's tariff, as ordered below, which will mean that any other shipments of the commodity in question will be entitled to the same rate. Therefore, permission to waive a portion of the freight charges in this case will not result in discrimination among shippers.

With respect to the requirement that the carrier file a new tariff prior to filing its application for permission to refund or waive, I find that this requirement has been met inasmuch as the new tariff was filed, effective January 10, 1978, whereas the application was filed (received by the Commission's Secretary) on June 2, 1978.

CONCLUSIONS AND ORDER

Sea-Land failed to file a tariff conforming to its intentions to charge complainant a $60 rate through inadvertence, a type of error which is contemplated by P.L. 90-298.

Sea-Land has met the other statutory requirements regarding the filing of its application within the 180-day period prescribed by law and the filing of its corrective tariff prior to the filing of its application.

No discrimination among shippers will result if the application is granted since there do not appear to be any other shipments of the commodity in question which were similarly affected by Sea-Land's inadvertence and the tariff notice to be published, as ordered below, will insure that even if such shipments did in fact occur, they will be treated similarly.

Therefore, the application for permission to waive a portion of the freight charges is granted. If this decision is adopted by the Commission and subject to whatever modifications the Commission may make, it is ordered that:

1. Sea-Land is authorized to waive collection of freight in the aggregate amount of $16,533.90 in connection with two shipments of wastepaper on December 12 and 19, 1977, for the benefit of the shipper Perry H. Koplick and Sons, Inc.

2. Sea-Land shall publish promptly in an appropriate place in its tariff the following notice:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 576 that the rates and charges for Item 5860, Sea-Land Tariff No. 233, FMC-105, as shown on seventh revised page 111, shall be deemed to be applicable during the period November 14, 1977 and January 9, 1978, inclusive, subject to all applicable rules, regulations, terms and conditions in this tariff, for purposes of refund or waiver of freight on any shipments which may have been shipped during this period of time.

In addition to publishing the foregoing tariff notice, Sea-Land shall send a copy of such tariff notice to each and every shipper of wastepaper, if any, who during the period November 14, 1977-January 9, 1978, shipped commodity Item 5860 pursuant to Tariff No. 233, FMC-105, 6th revised page 111.

Waiver of the portion of freight charges shall be effectuated within 30 days of service of the Commission's notice of adoption of this decision (if adopted) and Sea-Land shall within 5 days thereafter notify the Commission of the date and manner of compliance with this order.

(S) STANLEY M. LEVY
Administrative Law Judge

WASHINGTON, D.C.
July 26, 1978

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 578

INTERNATIONAL HARVESTER COMPANY

v.

ATLANTIC CONTAINER LINE

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

August 29, 1978

No exceptions have been filed to the initial decision in this proceeding and the Commission has determined not to review that decision. Notice is given that the initial decision became the decision of the Commission on August 24, 1978.

It is Ordered, That applicant is authorized to refund $6,380.00 of the charges previously assessed International Harvester Company.

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

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 578 that effective March 23, 1978, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period March 23, 1978 through April 4, 1978, the rate on 'Model 241 Hay Baler' is $685 L.S., subject to all applicable rules, regulations, terms and conditions of said rate and this tariff.

It is further Ordered, That refund of the charges shall be effectuated within thirty (30) days of service of this notice and applicant shall within five (5) days thereafter notify the Commission of the date and manner of effectuating the refund and submit a copy of the published tariff notice.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 578

INTERNATIONAL HARVESTER COMPANY

v.

ATLANTIC CONTAINER LINE

Adopted August 29, 1978

Application to make refund granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298), and Rule 92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), the Atlantic Container Line (ACL or Applicant) has applied for permission to refund a portion of the freight charges on a shipment of forty-four hay balers, which were moved from Portsmouth, Virginia, to Liverpool, England, under ACL bill of lading dated March 25, 1978. The application was filed June 16, 1978.

The subject shipment moved under North Atlantic United Kingdom Freight Conference (NAFC) Tariff No. 48, FMC–3 (ACL Open Rate Section), 4th revised page 323, effective February 1, 1978, under the rate for agricultural implements (by cubic range). The aggregate weight of the shipment was 151,419 pounds and total measurements were 22,924 cubic feet. The rate applicable at time of shipment was $830 each. The rate sought to be applied is $685 each, per prior written agreement between the parties and the late-filed tariff, NAFC Tariff No. 48, FMC–3 (ACL Open Rate Section), 13th revised page 321, effective April 5, 1978.

Aggregate freight charges payable, pursuant to the rate applicable at time of shipment, amounted to $36,520. Aggregate freight charges at the rate sought to be applied amount to $30,140. The difference sought to be refunded is $6,380. The Applicant is not aware of any other shipment of the same commodity which moved via ACL during the same time period at the rates involved in this shipment.

Atlantic Container Line offers the following as grounds for granting the application:

[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).

[2] *46 U.S.C. 817, as amended.*

On December 16, 1977, ACL quoted $685.00 Each for 50 Model 241 Hay Balers to be shipped by International Harvester Company from Portsmouth, Va. to Liverpool, England. On March 23, 1978, ACL issued Bill of Lading No. C-62014 on the Atlantic Conveyor Voyage No. 219 for 44 Model 241 Hay Balers rated at $830.00 Each.

It was brought to our attention that we had failed to file the quoted rate of $685.00 Each in the tariff and were therefore required to charge the rate on file at the time of shipment of $830.00 Each.

Effective April 5, 1978, ACL filed the quoted rate of $685.00 Each in the tariff. We hereby request permission to refund $6380.00 to International Harvester Company, Chicago, Illinois as overpaid freight due to the fact that 44 Model 241 Hay Balers were shipped twelve days before ACL filed the rate that was quoted for the movement of this cargo.

It should be noted that the letter from ACL to International Harvester (December 16, 1977) which confirms the special rate for "Model 241 Big Row balers" also refers to an understanding that *fifty* balers will be shipped and on *one* vessel; however, the agreement does *not* make the special rate contingent upon "at least fifty" balers being shipped, nor does the filed tariff specify any minimum number for the shipper to qualify for the special rate. The carrier points out in a supplemental affidavit[3] that their policy is *not* to make their special rates dependent upon any minimum quantities[4] to be shipped, as this might tend to discriminate against the small shippers. Indeed, a close examination of other tariffs in this carrier's Open Rate Section discloses that minimum quantities are never specified. Coincidentally, the carrier points out that if the number "50" were somehow regarded by the Commission to be essential to this shipper qualifying for the special rate, another six units of this same commodity ("Model 241 Big Row balers") were shipped on April 14, 1978 (ACL voyage #223, vessel: *Atlantic Causeway,* bill of lading #C-62007, supplemental exhibit). This latter shipment was not referred to in the original application because the corrective tariff had, by then, already been filed and, accordingly, that later shipment was correctly billed at the agreed and intended special rate. However, the carrier maintains that the "understanding" in the letter of December 16th referring to 50 balers and one ship was merely that—a general understanding between the parties of approximately how many units would probably be involved and that they would probably be shipped on one vessel, but that neither the number "50" nor the "one vessel" were essential prerequisites for the special rate agreement. Since the shipper was not able to arrange for all fifty balers to arrive at dockside in time to go on one vessel, they left on two vessels (44 on the *Atlantic Conveyor* on March 23; 6 on the *Atlantic Causeway* on April 14). Thus, all fifty balers were shipped within the same 30-day period, which also seems to be part of the understanding in the December 16 letter.

After due consideration of the application, the supplementary documentation submitted and a review of the carrier's existing tariff structure, I conclude that the parties did not intend to establish a minimum number requirement for the special rate, nor was it deemed essential that all units be shipped on one vessel.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 92(a), *Special Docket Applications,* Rules of

[3] Now marked "Item E" to conform to the four earlier exhibits marked Items "A" through "D."

[4] This should be clearly distinguished from the repeated references in the tariffs to unit weights and cubic measurements, and also should be distinguished from those commodity items that are customarily shipped in another container or on a flatbed trailer, in which latter case minimums may be specified of the number of units *per container* or on *each flatbed* (e.g., Reels, empty, min. 3 per flatbed; or boats, 2 or more disassembled, with cradle). Note that in these cases no minimum *shipment* is required to qualify for the listed rates.

Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of §18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected 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 an 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 . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[5]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to file the special rate for shipments of the Model 241 Big Row hay baler, as had been promised the shipper.

2. Such a refund of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for permission to refund a portion of the freight charges, ACL filed a new tariff which set forth the rate on which such refund would be based.

4. The application was filed within 180 days from the date of the subject shipment.

Accordingly, permission is granted to the Atlantic Container Line to refund a portion of the freight charges to the International Harvester Company, specifically, the amount of $6,380. An appropriate notice will be published in ACL's Open Rate Section of the North Atlantic United Kingdom Freight Conference Tariff.

(S) THOMAS W. REILLY
Administrative Law Judge

WASHINGTON, D.C.
July 31, 1978

[5] For other provisions and requirements, see §18(b)(3) and §502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 531(F)
L. BRAVERMAN & COMPANY

v.

LYKES BROS. STEAMSHIP COMPANY

NOTICE

September 12, 1978

Notice is given that the time within which the Commission could determine to review the initial decision in this proceeding has expired with no such determination being made. Accordingly, review will not be undertaken.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 531(F)
L. BRAVERMAN & CO.

v.

LYKES BROS. STEAMSHIP CO., INC.

Finalized September 12, 1978

Request for Commission Order compelling carrier to pay brokerage denied.

Complaint by freight forwarder alleging violation by carrier of §44(e)) of the Shipping Act, 1916, and General Order 4, for refusal of carrier to pay brokerage to forwarder, after carrier already paid brokerage to ocean freight broker, held to not constitute a cause of action for reparation.

Carrier is prohibited by statute (§44(e)) and Commission's Regulations (46 CFR 510.24(h)) from paying a freight forwarder any compensation on the same cargo whereon the carrier has already paid brokerage to an ocean freight broker, or where the carrier has incurred an obligation to pay brokerage to said broker.

David W. Gray, Executive Vice President of L. Braverman & Co., for complainant L. Braverman & Co.

Edward S. Bagley, Esq., of Terriberry, Carroll, Yancey & Farrell, for respondent Lykes Bros. Steamship Co., Inc.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

This proceeding initially started as a formal complaint proceeding (Docket No. 77-62), was later referred to a Settlement Officer for adjudication under the informal procedures of Subpart S[2] of the Commission's Rules of Practice (46 CFR 502.301 *et seq.*) at the request of the complainant, and still later was transformed into a Subpart T[3] proceeding (46 CFR 502.311 *et seq.*) at the request of the respondent.

By complaint dated December 9, 1977, the complainant, L. Braverman & Co. (Braverman), a licensed independent ocean freight forwarder, charges that the respondent, Lykes Bros. Steamship Co., Inc. (Lykes), a common carrier by water in foreign commerce, engaged in transportation between the ports of Houston, Texas, and Rotterdam, Netherlands, violated section 44(e)[4] of the Shipping Act, 1916, and the Commission's General Order 4,[5] by failing and

[1] Pursuant to the Commission's Rules of Practice, Subpart T–Formal Procedure for Adjudication of Small Claims, this decision will become the decision of the Commission unless, within 22 days from the date of service, either party requests review thereof, or unless, within 45 days, the Commission exercises its discretionary right to review See 46 CFR 502.318, as recently amended

[2] Subpart S–Informal Procedure for Adjudication of Small Claims, 46 CFR 502 301–304

[3] Subpart T–Formal Procedure for Adjudication of Small Claims, 46 CFR 502.311–321.

[4] Section 44(e), 46 U S.C. 841b, 75 Stat. 522.

[5] General Order 4 (Rev.), 33 Fed. Reg. 12654, September 6, 1968, 46 CFR Part 510, §510 1 *et seq.*

refusing to pay brokerage to the complainant on a particular shipment of black beans that moved from Houston to Rotterdam under Lykes bill of lading dated July 27, 1976. (More precisely, Lykes at first paid the disputed brokerage to Braverman, then later debited Braverman's account for that amount, withholding other brokerage payments until the amount of the "mistaken" brokerage payment was made up.) Braverman alleges that this constitutes a violation of the Shipping Act and General Order 4, entitling it to reparation in the form of reimbursement for the lost brokerage ($543.75), costs of time spent "researching the claim" ($150), and the cost of the "accounting time spent adjusting 25 brokerage bills" ($78.05). The complainant, Braverman, requests the Commission to order the respondent carrier, Lykes, to pay the total reparation amount of $771.80, "or such other sum as the Board may determine to be proper as an award of reparation."

The Answer of the respondent denies the violation allegations in the complaint, and further states that space for the cargo in question was booked by the Bresnan Shipping Co., Inc. (Bresnan), as ocean freight brokers; that brokerage was paid to Bresnan therefor; that Bresnan's authority to book the space was confirmed in writing with the shipper; and that having paid Bresnan the brokerage or incurred an obligation to pay Bresnan, the respondent carrier was not only justified in not paying brokerage (again) to Braverman but, in fact, the carrier was precluded from doing so by its tariffs,[6] the Commission's General Order 4, and section 44 of the Shipping Act, 1916.

Both the Complaint and Answer have attached thereto copies of several documents relating to the disputed transaction. There are also many other documents that were submitted later at the request of the earlier-assigned FMC Settlement Officer and the present presiding Administrative Law Judge (ALJ).

For the convenience of the parties, pertinent portions of the applicable statute (§44(e), 46 U.S.C. 841b)[7] and the Commission's Regulations (46 CFR 510.21, 510.24)[8] are set forth in footnotes below:

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[6] Gulf European Freight Association (GEFA) Tariff item 24, para 2, FMC-2

[7] 46 U.S.C. 841b, 75 Stat 522, Shipping Act, 1916, 44(e). A common carrier by water may compensate a person carrying on the business of forwarding to the extent of the value rendered such carrier in connection with any shipment dispatched on behalf of others when, and only when, such person is licensed hereunder and has performed with respect to such shipment the solicitation and securing of the cargo for the ship or the booking of, or otherwise arranging for space for, such cargo, and at least two of the following services

(1) The coordination of the movement of the cargo to shipside;

(2) The preparation and processing of the ocean bill of lading,

(3) The preparation and processing of dock receipts or delivery orders,

(4) The preparation and processing of consular documents or export declarations;

(5) The payment of the ocean freight charges on such shipments:

Provided, however, That where a common carrier by water has paid, or has incurred an obligation to pay, either to an ocean freight broker or freight forwarder, separate compensation for the solicitation or securing of cargo for the ship or the booking of, or otherwise arranging for space for, such cargo, then such carrier shall not be obligated to pay additional compensation for any other forwarding services rendered on the same cargo. Before any such compensation is paid to or received by any person carrying on the business of forwarding, such person shall, if he is qualified under the provisions of this paragraph to receive such compensation, certify in writing to the common carrier by water by which the shipment was dispatched that he is licensed by the Federal Maritime Commission as an independent ocean freight forwarder and that he performed the above specified services with respect to such shipment. Such carrier shall be entitled to rely on such certification unless it knows that the certification is incorrect

[8] 46 CFR §510.21—Definitions

(a) The term "licensee" means any person licensed by the Commission as an independent ocean freight forwarder, or any independent ocean freight forwarder who, on September 19, 1961, was carrying on the business of freight forwarding under a valid registration number issued by the Commission, or its predecessors, who filed an application for such a license (Form FMC-18) on or before January 17, 1962, and whose application has not been denied.

DISCUSSION

At the outset, I can find no justification in the law or the Commission's Regulations for the award, in an FMC reparation case, of such consequential damages as the last two items recited in the "damages" portion of the complaint (i.e., cost of research time and cost of accounting time), even assuming that this complaint otherwise spelled out a valid, meritorious reparation claim.

This proceeding, in essence, boils down to a dispute over whether an "independent ocean freight forwarder" or an "ocean freight broker" is entitled to the brokerage commission arising from the "solicitation and securing of (a) cargo (of beans) for the ship or the booking of, or otherwise arranging for space for, such cargo."[9] The complainant, a freight forwarder, insists that he should have been paid the brokerage while the respondent ocean carrier argues that an "ocean freight broker" performed the brokering service, billed the carrier for the brokerage fee, and the carrier properly paid said fee to the broker. The carrier also points to the statute and Commission Regulation that prohibit the carrier from (again) paying the brokerage to a forwarder once the carrier has paid such a fee to an ocean freight broker or become obligated to do so.[10]

There is a difference between freight forwarding services rendered to a shipper and ocean freight broker service rendered for a carrier. Freight forwarding services include a long list of paperwork and document preparation, transportation arrangements, arranging for warehouse storage, dealing with Customs, insurance companies and banks relative to a particular cargo, and *can* include the booking of cargo space. (See 46 CFR 510.2(a) & (c) for definitions of "independent ocean freight forwarder" and "freight forwarding service.") The term

* * *

(e) The term "principal" means the shipper, consignee, seller, purchaser who employs the services of a licensee

(f) The term "ocean freight broker" means any person who is engaged by a carrier to sell or offer for sale transportation, and who holds himself out by solicitation or advertisement as one who negotiates between shipper and carrier for the purchase, sale, conditions and terms of transportation

(g) The term "freight forwarding fee" means payment by a shipper, consignee, seller purchaser, or any agent thereof, to a licensee for the performance of a freight forwarding service as defined in §510 2(c)

(h) The term "compensation" means payment by an oceangoing common carrier for the performance of services as specified in §510 24(e)

(i) The term "brokerage" means payment by a common carrier by water to an ocean freight broker for the performance of functions specified in paragraph (f) of this section

* * *

46 CFR §510 24·

(d) No oceangoing common carrier shall compensate a licensee when such carrier has reason to believe that receipt of such compensation by the licensee is prohibited by these rules, or by the Act.

(e) Before any compensation is paid by an oceangoing common carrier to a licensee, or before a licensee may accept any such compensation, the licensee shall incorporate the certification set forth below on one copy of the ocean bill of lading, parcel receipt, or forwarder's invoice covering such shipment and endorse the certification Where certification is made on a copy of a bill of lading such copy shall be referred to as the "Line Copy" and shall be retained in the possession of the carrier The oceangoing carrier shall be entitled to rely on such certification unless it knows that the certification is incorrect. The form of certification follows

* * *

(f) An oceangoing common carrier may compensate a licensee to the extent of the value rendered such carrier in connection with any shipment forwarded on behalf of others when, and only when, such carrier is in possession of a certification in the form prescribed in paragraph (e) of this section Every tariff filed pursuant to section 18(b)(1), Shipping Act, 1916, shall specify the rate or rates of compensation to be paid licensed forwarders certifying in accordance with paragraph (e) of this section and the conditions of payment

* * *

(h) Where an oceangoing common carrier has paid, or has incurred an obligation to pay brokerage to an ocean freight broker, or compensation to a licensee, then such carrier shall not pay additional compensation for any other forwarding services rendered on the same cargo

[9] See Shipping Act, 1916, §44(e), and 46 CFR 510.24(e).

[10] Shipping Act, 1916, §44(e), and 46 CFR 510.24(h).

"ocean freight broker" means "any person *who is engaged by a carrier* to sell or offer for sale transportation, and who holds himself out by solicitation or advertisement as one who negotiates between shipper and carrier for the purchase, sale, conditions and terms of transportation." (46 CFR 510.21(f), emphasis added.) The term "freight forwarding fee" means "*payment by a shipper,* consignee, seller, purchaser, or any agent thereof, to a licensee (forwarder) for the performance of a freight forwarding service as defined in §510.24(e)." (46 CFR 510.21(g), emphasis added.) The term "brokerage" means "payment by a common carrier by water to an ocean freight broker for the performance of functions specified in paragraph (f) of this section" (referring to 510.21). (46 CFR 510.21(i).)

It should be noted in reviewing the above definitions that *either* an ocean freight broker or an independent ocean freight forwarder (i.e., "licensee") may perform the brokering service and become entitled to the brokerage. It should also be noted that there are fees paid for both types of service, and it is possible for a freight forwarder to collect *both* fees for the same shipment, e.g., a "freight forwarding fee" *from the shipper* for freight forwarding services rendered to the shipper, and a brokerage commission *from the carrier.* However, the carrier is protected by law and Commission Regulation from being obligated to pay any such brokerage commission to a broker or freight forwarder *after* he has already paid or become obligated to pay the brokerage to some *other* broker or forwarder. Where there are dual claims to such brokerage, obviously we must look to the facts to determine which party actually performed[11] the brokering service (i.e., who was engaged by the carrier to sell or offer for sale transportation on the carrier's vessel, or who "booked the space" for the cargo).

Since the sole issue in this proceeding is the brokerage commission and *not* the fee for the freight forwarding services, the complainant had the burden of proving: (1) that complainant Braverman provided the brokerage service to the carrier entitling him to the brokerage commission from the carrier, and (2) that no prior payment or obligation to pay arose which would absolve the carrier from any further liability for brokerage pursuant to 46 CFR 510.24(h) of the Commission's Regulations and section 44(e) of the Shipping Act, 1916.

The complainant supplied copies of documents and correspondence which established that Braverman: (1) did indeed perform a myriad of freight forwarder services relating to the subject shipment, and (2) Braverman repeatedly *claimed* he was entitled to the brokerage commission and had performed the brokerage service. However, aside from *claiming* to have performed the brokerage service (including certification on the bill of lading), there were no documents indicating or supporting the actual *performance* of such brokerage service.

On the other hand, the carrier supplied documents, contemporaneous with the time cargo space was being negotiated and arranged for on the carrier's vessel, which clearly established that both the carrier and the shipper (Benson Quinn-Joseph Export Co. of Minneapolis) were aware of and dealing directly with the

[11] The answer to this question is controlling, *not* the question of who got paid the brokerage *first*

Bresnan Shipping Company of New York, as broker for the cargo space for the shipper's shipment of beans to the Netherlands.[12] In addition to those documents, the carrier later supplied, at the request of the presiding ALJ, a copy of the brokerage commission invoice sent by the Bresnan Shipping Company to the carrier (Lykes) on August 12, 1976, and marked "Approved For Payment" by Lykes on October 21, 1976.[13] Lykes voucher #CV-11-2690 and check number 75311 were used in payment of the Bresnan brokerage invoice.[14]

The confusion that generated this conflict arose when Lykes' brokerage department mistakenly *also* approved the complainant's request for brokerage, undoubtedly relying on complainant's rubber stamped certification on the bill of lading that he (Braverman) had performed all the items listed in 46 CFR 510.24(e), including the "booking of space." Another factor that might have led the complainant into believing that it had some sort of "vested interest" in the brokerage commission for this cargo was the long-standing connection this forwarder had with handling, storing and processing virtually all the papers connected with it, including acting as U.S. Customs Brokers for the Guatemalan government (the original owner of the cargo) when it first arrived in this country, and placing the cargo in and withdrawing it from a U.S. bonded warehouse after a year of storage. The complainant also made complicated and extensive efforts in transporting the shipment from the warehouse to dockside. However, all these efforts come under the heading of freight forwarder services and not freight brokerage, as defined in the Commission's Regulations.[15] A freight forwarder has no right to "automatic" collection of brokerage payments from carriers simply by virtue of having had a long-standing pre-existing connection with the cargo or having provided a long series of freight forwarder services *to the shipper* on such cargo. *Cf., N.Y. Foreign Freight Forwarders & Brokers Association v. FMC,* 337 F.2d 289, 300 (2d Cir. 1964). A licensed forwarder must have actually solicited and secured the cargo, or booked it or arranged for its space on a ship

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[12] Respondent's Exhibit "A" to Answer is comprised of three documents

(1) Confirmation of Booking, dated 7-1-76, listing shipper as "Benson Quinn Company," broker: "Bresnan Shpg. Co., Inc.," signed by James J. Ham for the Bresnan Shipping Co., "as Brokers only," and by L M. Sanders for the Lykes Steamship Co., Inc., and also stating under the description of "3 SeaBee barges black beans in bulk". "Brokerage Payable as Costomary (sic) IE 1-¼% As Per Tariff Rule 24 GEFA Tariff #2 FMC 2 Copy Attached."

(2) Letter from Bresnan Shipping Co "As Brokers Only" to L M. Sanders of Lykes Bros. Steamship Co., Inc., dated July 2, 1976, acknowledging receipt of Lykes booking note and adding amendments to the booking note "after discussion with our Principals," again listing Benson Quinn Co. as shipper, again referring to the Seabee Barges of black beans in bulk, and again referring to the commission of 1.25%.

(3) Letter from Bresnan (A.A. Mintoo) to Lykes, dated July 19, 1976, transmitting the original of the Liner Booking Note, now duly signed on the Charterer's behalf, and seeking the (ship)owner's signature.

Exhibit "B" to Answer is a copy of July 15, 1976, letter from the shipper, Benson Quinn-Joseph Export Co. of Minneapolis, to the Bresnan Shipping Company, thanking Bresnan for the Lykes booking note "in accordance with our booking," and asking Bresnan to sign the original "in our behalf" (the shipper's behalf).

[13] Now marked "Resp. Exhibit D"

[14] Respondent's Exhibits "E" and "F," respectively.

[15] See, e.g., Report from the Committee on Merchant Marine & Fisheries, 87th Cong., 1st Sess. Rep. No. 1096, *Report on Providing for Licensing Independent Ocean Freight Forwarders,* (Comm. Print, 1961), at 3.

Section (e) of the bill, as amended, sets out certain prescribed duties which the forwarder must perform *for the carrier* in order to be entitled to receive compensation from the carrier in the form of brokerage. In this connection "the solicitation and securing of the cargo for the ship or the booking of, or otherwise arranging for space for, such cargo," are mandatory prerequisites to the receipt of brokerage from the carrier. * * * (I)t goes back to the age-old concept of the services for which brokerage was paid, that is, the bringing together of the cargo and the ship." (Emphasis added.)

* * *

To summarize the feeling of the committee, we might say that services which have been performed by forwarders *for shippers* should be compensated for *by the shippers* and that where brokerage fees have been earned by the forwarders or brokers, then the carriers in turn should pay for these services at the historical rate" (Emphasis added.)

(and not merely "certified" that he did so), as well as performing at least two of the additional services itemized in section 44(e), Shipping Act, 1916, *for the carrier* before the forwarder is entitled to claim brokerage from the carrier. It is the value of the service rendered *to the carrier* that triggers the right to brokerage—not the series of forwarder services provided for the *shipper*.[16] The providing of freight forwarding services to a shipper entitles the forwarder to a fee (from the shipper) for such services, but there is no automatic "tie in" to the brokerage commission for securing cargo space on a vessel. In this case, the shipper and owner of the cargo never asked Braverman to perform that latter service; on the contrary, the shipper clearly and unambiguously arranged with Bresnan & Company to do so, only Bresnan & Company performed the ocean freight brokering service, and the documentation clearly establishes that the carrier dealt only with Bresnan on the booking of space. It is true that the complainant furnished its rubber stamp certification (for brokerage purposes) on the bill of lading reciting all the required elements of 510.24(e), which probably triggered the mistake in the carrier's busy book-keeping department (brokerage department), but the carrier is not bound to accept the bald assertion of the rubber stamp as conclusive proof on who gets the brokerage. §510.24(e) expressly states that the "carrier shall be entitled to rely on such certification *unless it knows that the certification is incorrect*." From its course of dealing with Bresnan & Company, the carrier knew that the Braverman certification was incorrect. The forwarder cannot bootstrap its rubber stamp coupled with a book-keeping error into a valid claim for brokerage in the face of documented proof that another party actually performed the brokerage.

Beyond the foregoing discussion of the factual merits of the claim, there is an interesting legal question on whether section 44(e) can properly be used to grant the relief requested, i.e., whether the statute was ever intended to authorize the Commission to be used as a "collection agency" in compelling payment between carriers and such middle-men as forwarders and brokers. That is, if we were to assume *arguendo* that every allegation made by the complainant were true (and ignore all the contrary documentation), does the Commission have the jurisdiction to order a carrier to make payment in what is, in essence, a simple contract matter (express or implied contract) between the ocean carrier and a freight forwarder? This is not a tariff reparation dispute between a shipper and a carrier. (This case of a freight forwarder seeking a brokerage commission should be clearly distinguished from those cases wherein a *shipper* seeks reparation from a carrier for cargo misdescription, misclassification of cargo or misapplication of tariff rates.) I can discern no compelling regulatory purpose in the FMC intruding into the ordinary judicial functions and judicial remedies of the established courts of law in routine commercial contract enforcement matters,

[16] See *Hugo Zanelli d/b/a Hugo Zanelli & Co.*, 18 F.M.C. 68, 73 (1974):
As a result of its investigation, the Board revised its earlier forwarder regulations dating from 1950 and promulgated new regulations as General Order 72 Revised, which among other things, would have absolutely prohibited the payment of brokerage. * * * Faced with what the forwarding industry described as a substantial loss of revenue because of the proposed ban on brokerage, the forwarders appealed to Congress for the enactment of legislation which would permit such payments under appropriate safeguards. The ultimate result was Public Law 87-254. Instead of a total ban on brokerage as the Board has proposed, Congress decided to permit compensation from carriers, i.e., brokerage, but only where the forwarder rendered specified services of value and remained independent, i.e., free of any affiliation with a shipper, consignee, seller, purchaser of the shipment, or with any person having a beneficial interest in the goods shipped, in order to eliminate indirect rebates to shippers.

which can involve complex counter-claims and set-offs. Such traditional contract matters would appear not to require the special technical expertise of this agency to enable adjudication.

There is also some difficulty in pinning down precisely what the statutory violation is that Braverman is alleging the carrier committed, so as to give this Commission jurisdiction over the matter. Complainant's Exhibit "F"[17] attached to the Complaint states succinctly: "The point in question is whether or not brokerage on this shipment is due us. Lykes feels it is not and we contend that it is." What portion of section 44(e) does that conclusion of the carrier violate? Section 44(e) was designed to protect ocean carriers from dual claims for brokerage commission and from claims for brokerage where no brokerage service had been rendered. (See *N.Y. Foreign Frt. F. & B. Assn., supra.*) To this extent, the statute and the Regulations thereunder appear to be permissive in nature (e.g., setting forth when a carrier "*may* compensate" a freight forwarder, when a carrier *may* rely on a certificate alleging brokerage is due, and telling a carrier when he may *not* pay compensation or dual compensation), but neither the statute nor the Regulations *order* the carrier to make such payments nor specify when it *must* make payment.

FINDINGS OF FACT AND CONCLUSION OF LAW

Assuming that this Complaint properly falls within the Commission's jurisdiction to entertain, after due consideration of the documents submitted by the parties, I make the following findings and conclusions of the factual merits of the claim:

1. There is no evidence that the complainant supplied brokerage service on the subject shipment.
2. There is evidence that the Bresnan Shipping Company of New York, an ocean freight broker, performed the brokerage service.
3. There is no evidence that the complainant was requested or authorized by the shipper to perform brokerage service, i.e., book the space on a ship for the subject shipment.
4. There is evidence that the Bresnan Shipping Company was requested and authorized by the shipper to perform the brokerage service.
5. There is evidence that the Bresnan Shipping Company was engaged by the carrier to perform the brokerage service.
6. There is evidence that the complainant was requested and authorized by the shipper to perform several freight forwarding and transportation services for the shipper, and that the complainant did perform such services for the shipper—but the forwarder (complainant) must look to the shipper for his fee for such services, and not to the carrier.
7. The complainant forwarder had no "vested interest" or other right in the subject shipment by virtue of its earlier services on the shipment performed for the shipper which would "automatically" entitle the complainant to expect the brokerage service and brokerage commission to belong to him.

[17] Complainant's Exhibit "F": Letter dated May 10, 1977, from David W. Gray, Executive Vice President of Braverman, to Charles L. Clow of the Federal Maritime Commission.

8. Based on the documents supplied to the carrier, the carrier (respondent) had the right to rely on the Bresnan Shipping Company's written representation that it alone was performing the brokerage and was entitled to the brokerage commission.

9. The carrier properly became obligated to pay the Bresnan Shipping Company of New York the brokerage fee, and did pay such fee to the Bresnan Shipping Company.

10. Once having become obligated to pay the brokerage fee to Bresnan, the carrier was not only *absolved* from any obligation to pay such fee to the complainant, the carrier was *prohibited* from making any such payment to complainant by virtue of its filed tariffs, Commission Regulations and §44(e) of the Shipping Act, 1916.

Accordingly, the Complaint is ordered DISMISSED.

(S) THOMAS W. REILLY
Administrative Law Judge

WASHINGTON, D.C.
August 8, 1978

FEDERAL MARITIME COMMISSION

TITLE 46—SHIPPING

CHAPTER IV—FEDERAL MARITIME COMMISSION

[General Order 7; Docket No. 73–64]

Part 507—Self-Policing Systems

September 14, 1978

ACTION: Reconsideration and Modification of Final Rules

SUMMARY: Several modifications in language and numbering were made throughout the rules in the interest of clarity and simplification. The standards applicable to requests for exemption from the independent or neutral body requirement were relaxed. Reporting requirements were simplified. The term "associate" was more clearly defined and its use restricted. A provision was added which prohibits rate-fixing agreements from preventing the release of self-policing body records to the Commission.

DATES: To become effective January 1, 1979

SUPPLEMENTAL INFORMATION:

The Commission has before it 19 Petitions for Reconsideration of its April 26, 1978, Report and Order (April Order) amending Part 528 of its Rules. General Order 7, 46 C.F.R. Part 528, 43 Fed. Reg. 181875.[1] A Reply to Petitions was filed by the Commission's Bureau of Hearing Counsel (Hearing Counsel).

[1] Petitions were filed by Sea-Land Service, Inc., and the ocean carriers comprising the membership of the following section 15 organizations:

Gulf/Mediterranean Ports Conference; Far East Conference; Pacific Westbound Conference; Atlantic and Gulf-Indonesia Conference and Atlantic and Gulf-Singapore, Malaya and Thailand Conference (jointly); seven conferences serving areas of India, Pakistan, Ceylon, Burma, East Africa, South Africa, Bangladesh, the Red Sea and the Gulf of Aden (jointly); Marseilles North Atlantic U.S.A. Freight Conference, Med-Gulf Conference, and West Coast of Italy/North Atlantic Conference (jointly); North Atlantic Mediterranean Freight Conference and Greece/U.S. Atlantic Rate Agreement (jointly); Mediterranean-North Pacific Coast Freight Conference and New Zealand Rate Agreement (jointly); U.S. Atlantic & Gulf/Australia-New Zealand Conference and Australia/Eastern U.S.A. Shipping Conference (jointly); Spanish Eastbound Freight Agreement; Iberian/U.S. North Atlantic Westbound Freight Conference; South Atlantic/Spanish, Portuguese, Moroccan and Mediterranean Rate Agreement; Rate Agreement No. 8900; Pacific Coast European Conference; Japan/Korea-Atlantic & Gulf Freight Conference and Trans-Pacific Freight Conference of Japan/Korea (jointly); Agreement Nos. 7190, 192, 8190, 90, 191, 8100 and 9474 (jointly); Agreement Nos. 10107, 10108, 7190, 192, 9190, 90, 191, 5700, 5600, 8100, 9474 and 14 (jointly); and 15 North Atlantic Conferences (jointly). United States Lines, Inc., disassociated itself from several of the Petitions. The viewpoints of various conference members occasionally diverged on specific issues raised in their joint petitions.

Petitions for exemption from the requirement of establishing an independent self-policing body were received from the ocean carriers comprising the South Sea Islands Rate Agreement, Pacific Coast Rate Agreement, Pacific Coast Australasian Tariff Bureau, and Australia Pacific Coast Rate Agreement. These carriers contend that their activities meet the standards for

Part 528 of the Rules prescribes standards for self-policing by ocean carriers participating in rate fixing agreements approved under section 15 of the Shipping Act, 1916.[2] The April Rules were adopted after analysis of comments received in response to regulations proposed on October 17, 1973 (Proposed Rules).[3]

The instant Petitions urge the retraction of all or part of provisions modified by the April Order and raise the following general objections to that Order: (1) the Commission lacks authority to require an independent self-policing authority or to direct any specific type of self-policing activity; (2) some of the regulations are vague and unlikely to produce uniform or reliable results; (3) inadequate notice was given of certain features contained in the final regulations, especially the reporting requirements; (4) self-policing should also be required for carriers which do not belong to rate-fixing agreements; and (5) the rules may not be implemented until General Accounting Office review has been completed pursuant to the Federal Reports Act, 44 U.S.C. 3512(c).

The Commission stayed the effective date of Part 528 through September 15, 1978 and will not implement the finally revised version adopted today until January 1, 1979, or 30 days following the completion of General Accounting Office review, whichever is later. Nothing more is required to comply with the Federal Reports Act.

Petitioners' jurisdictional argument (1) and their claim that independent carriers should also be subject to Part 528(4) were fully considered in the April Report. In 1961 Congress concluded that carrier conferences must be adequately self-policed in order to continue receiving an exemption from the antitrust laws. P.L. 87–346, 75 Stat. 764. Independent carriers are not subject to section 15's express self-policing requirement. The conferences therefore cannot claim that the Commission's failure to place identical self-policing requirements on carriers not fixing rates in violation of the Sherman Act is an arbitrary administrative action.

Petitioners' jurisdictional objection to the imposition of minimum self-policing requirements—inconsistent as it is with their request for the replacement of general phrases like "adequate staffing" with detailed specification—fails to recognize that Part 528 does not permit the disapproval of an agreement without the notice and hearing required by law. Over ten years experience in reviewing bare bones self-policing reports has made it evident to the Commission that existing self-policing systems rely primarily upon member initiated complaints, and have failed to confront or control major incidents of rebating in both the

exemption found in section 528.4(b)(3) of the rules published on April 26, 1978 (April Rules), but alternatively request that if exemption is denied under the April Rules, that section 528.4(b)(3) be modified to whatever extent the Commission deems necessary to grant them an exemption. These petitions add nothing of substance to the instant proceeding and are being processed solely as exemption petitions.

Several Petitioners, as well as a number of other carriers not seeking reconsideration, requested a stay of the July 1, 1978, effective date of revised Part 528. On June 26, 1978 the Commission postponed the effective date until September 15, 1978, 43 Fed. Reg. 28496 (1978).

[2] 46 U.S.C. 814 states, in pertinent part, that:

"The Commission shall disapprove [a section 15 agreement], after notice and hearing, on a finding of inadequate policing of the obligations under it, or failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints."

[3] 38 Fed. Reg. 28841. The Proposed Rules were themselves a modification of earlier self-policing proposals contained in a broader section 15 rule making. Docket No. 73–5, 38 Fed. Reg. 4982. Unless otherwise indicated, references to particular section numbers are to the numbers designated in the April Rules.

Atlantic and Pacific trades.[4] Under such circumstances no evidentiary hearings or detailed factual findings are necessary to support our determination that independent self-policing bodies with broad investigatory powers and more detailed reporting responsibilities are necessary features of adequate self-policing—as a general rule. To the extent a particular factual setting may warrant a different result, the Commission has provided a procedure for exempting smaller conferences operating in relatively "clean" trades from the requirement of retaining an independent self-policing body.

Petitioners' remaining objections (2 and 3) should be met by the modifications in the April Rules being adopted today. The Commission's 1973 Notice of Proposed Rule Making informed all parties of the general scope of this proceeding. Although that notice emphasized the independent body issue and the document availability issue,[5] it also discussed the need for more thorough investigations and specific self-policing reports than had previously been required. The Commission clearly proposed that the nature and basis of each investigation conducted, the findings of each investigation, the identity (coded) of the member investigated, the exact violation found, and the exact sanction imposed be set forth in every semiannual report.[6] The April Rules merely added detail to these requirements. The majority of Petitioners' complaints concerning lack of notice also allege that certain of the reporting details added by the April Order were ambiguous or unrealistic. Upon reconsideration, the Commission has clarified and simplified the reporting requirements in accordance with Petitioners' comments whenever feasible. A section by section discussion of these comments and modifications follows.

Section 528.1 Scope and Purpose. The last two sentences of section 528.1 were not found in the 1973 proposal. Several Petitioners requested deletion of both sentences because they purportedly reflect an intention to disapprove section 15 agreements without the prior notice and hearing required by law and impose illogical and improper standards for judging agreements. The first concern is unfounded, but in the course of revising and shortening section 528.1, we have eliminated the penultimate sentence. The last sentence has also been relocated and modified to more accurately reflect the Commission's intention. The existence of a vigorous self-policing system which uncovers an appreciable number of violations during a reporting period does not create an evidentiary presumption that an agreement is or is not "adequately policed" within the meaning of section 15. Such circumstances are, however, reliable evidence of the nature and extent of malpractices in a trade and of the adequacy of a given self-policing system in curbing malpractice.

Section 528.2 General Requirements. Several commentators objected to the definition of the term "associates" found in section 528.2, and to its use in sections 528.3(a), (b) and (d) and 528.6(10) (ii), where it could be construed as

[4] Some 30 settlement agreements have been reached in FMC rebating investigations since January 1, 1977. The civil penalties incurred under these agreements exceed $5,000,000. An equal number of FMC enforcement claims seeking another $5,000,000 for alleged rebating violations is currently outstanding. Still other rebating cases are currently being processed by the Commission's staff.

[5] The manner in which the conferences would make their self-policing records available to the Commission.

[6] See sections 528.2(b) and 528.4(a) of the Proposed Rules. The April 25, 1974 reply comments of the North Atlantic Conferences illustrates Petitioners' awareness that greater specificity in semiannual reporting was under consideration.

imposing self-policing *sanctions* upon persons not subject to a rate fixing agreement. Revisions have been made in former sections 528.3 and 528.6 to clarify the Commission's intention that only agreement *members* are subject to self-policing sanctions.

The fact remains that members may violate an agreement through a number of devices, including the use of intermediaries, and it is important that self-policing authorities be empowered to examine the activities and records of those intermediaries most likely to be employed. Accordingly, the definition of "associates" has been revised to eliminate the allegedly unnatural phrase "corporate relation," and include all agents, employees, or other persons subject to the *control* of a member, persons *controlling* a member, and persons *controlled by* persons who control a member.[7] Members must arrange for self-policing authorities to have access to and the cooperation of such "associates." Protection against the possibility that self-policing investigations might result in unrestricted invasions of the non-Shipping Act activities of corporate parents and subsidiaries has been provided by the inclusion of a limited challenge for relevancy procedure in final section 528.2(c).

Section 528.3(c) and 528.4(c) Duty to Investigate Complaints. Exception was taken to language in sections 528.3(c) and 528.4(c) stating that the self-policing authority must investigate all complaints received from any source. It was contended that these provisions could be read as requiring all complaints to be investigated in the same manner, no matter how "frivolous, unreliable, stale or malicious" they might be. This was not the Commission's intention. Self-policing authorities are expected to be both thorough and energetic, but need not adhere to unrealistic and nondiscretionary standards. Former sections 528.3 and 528.4 have been modified to clarify this situation and accommodate some of Petitioners' complaints.

The final regulations shall require self-policing bodies to promulgate reasonable procedures for the submission of complaints and to investigate all complaints. Self-initiated on-site investigations must also be conducted regularly (*e.g.*, annually) into the activities of each member line. It is unnecessary, however, for all investigations to be identical in scope. Self-policing bodies are expected to possess reasonable discretion in conducting their investigations. It is sufficient that each allegation be examined in a manner and to an extent which is reasonable under the circumstances.

Self-policing bodies may establish procedures for investigating written complaints, provided that oral and other informal communications (including anonymous messages) continue to be received and investigated. A self-policing body shall not require a complaint to be in writing or the identity of the complainant to be revealed before commencing an investigation. Petitioners failed to demonstrate a reasonable basis for limiting the class of persons who may lodge complaints and the final rules allow no such restrictions.

Section 528.4(b)(3) Exemption Petitions. The April Rules provided for exemptions from the independent self-policing body requirement of section 528.4(b) when it is demonstrated that an agreement has few members, applies to

[7] The Commission considers it unnecessary to define the term "control" in Part 528, but intends that the term shall include all incidents of "working" or "*de facto*" control, whether achieved through ownership, common management or both.

a narrow range of ports, handles only a small percentage of cargo *in the trade,* and the trade has been relatively free of malpractices. It is now alleged that these factors are rigid and unrealistic—especially the "percentage of the trade" standard—and will preclude many, if not all, small conferences from qualifying.

Modifications have been made in the final rules to provide a more flexible approach to the granting of waivers. Determinations will be made on a case-by-case basis where it appears that maintaining an independent self-policing body would unfairly burden a conference because of the size and condition of the trade and the probable effectiveness of the alternative self-policing arrangements proposed.

Section 528.3(e) Identity of Complainant. Two petitioning conferences requested that the provisions allowing self-policing bodies to withhold the name of a complainant be amended to *require* the deletion of this information from any materials furnished an accused member. The only support offered for this request was the unclear assertion that the existing language is "inconsistent with the Commission's effort to give the industry effective self-policing" (emphasis supplied). The Commission believes it preferable to permit divergent practices in this area. Self-policing bodies may reveal or withhold the names of complainants as may best enable them to effectively investigate, and curb, malpractices. They should not, of course, reveal identities in circumstances which encourage retaliation by or against members, or withhold identities when it would unfairly prejudice the member's ability to rebut any material allegations made against it (*e.g.*, if a case depended upon the statement of an unknown accuser).

Sections 528.4(b) and 528.6(a) Application of Part 528 to "Misrating Programs." Some conferences maintain special programs for inspecting cargo carryings and shipping documents, ascertaining cargo misdescriptions or mismeasurements, and requiring that member lines correct any misratings so discovered. These misratings are typically unintentional tariff deviations resulting from clerical errors or reliance upon cargo measurements and descriptions provided by a shipper. It appears that most misrating programs are not presently conducted by self-policing authority personnel, in part because the conferences do not consider misratings to be "malpractices."[8] The April Report firmly rejected the notion that "malpractices" could be limited to intentional breaches, but did state that conferences could establish separate investigative bodies for detecting misratings provided that such bodies also complied with Part 528 of the Rules. Several Petitioners commented upon an alleged lack of clarity concerning the status of "misrating programs" under the April Rules, but proposed no amendments to correct the purported problem.

The reporting requirements of section 528.6 have been modified to differentiate between unintentional misratings discovered by the self-policing authority and those discovered by other organizations. This modification does not alter the requirement that misratings be treated as a breach of the rate-fixing agreement, but should further indicate that a nonindependent "misrating program" may coexist with a self-policing authority. A conference is welcome to take additional

[8] Petitioners recognize that not all misratings are innocent or unintentional, and at least some of them provide for repeated or otherwise suspicious incidents to be referred to the self-policing body for investigation.

steps to curtail misratings. The critical factor is whether the conference has clearly authorized its self-policing authority to investigate any and all misratings, the self-policing body actually exercises this authority when circumstances reasonably require it, and appropriate damages are assessed for both unintentional overcharges and undercharges. When a "misrating program" is not independent of the conference and its membership, the self-policing authority must be assured of regular and complete access to all of the "misrating program's" findings, reports, and records.

Section 528.6 Disclosure of Carrier Identity. One of Petitioner's major interests throughout this proceeding has been to avoid exposing conference members to civil or criminal penalties under the Shipping Act by virtue of their compliance with section 15's self-policing requirement. Consequently, objections were raised to some of section 528.6's reporting requirements because of the possibility that literal compliance would permit the Commission to ascertain the identity of the accused member.[9] The semiannual report is not intended to routinely reveal *which* members might have violated the Shipping Act during the reporting period. Although the Commission intends to make appropriate use of semiannual reports in its enforcement activities, the reports will neither be examined for the purpose of ascertaining carrier identity nor be treated as evidence that a violation has occurred. Modifications have therefore been made in the final rule which should lessen its alleged susceptibility to "identity disclosure."

This does not mean, however, that carrier identities are not of legitimate interest to the Commission in a variety of contexts and may not be obtained under the Shipping Act. Accordingly, a new provision has been added to final section 528.1 stating that rate-fixing bodies shall not forbid compliance with a Commission request for self-policing authority records. This requirement merely restates existing Commission policy in this area.[10]

One of the primary justifications for the conference system is its potential for curbing malpractices. Section 15 plainly requires self-policing. Congress also intended the Shipping Act to be enforced. It is neither improper nor unfair for the Commission to employ self-policing data in aid of its wider responsibility to fairly and effectively enforce the Shipping Act.[11] A conference imposed penalty for breach of a rate fixing agreement is conceptually and legally distinct from a penalty for Shipping Act violations. Both are a means toward the common end of eliminating malpractices.

However, because the Commission's enforcement activities are not revenue generating measures, and because the Commission wishes to promote effective self-policing to the greatest extent practicable, it shall henceforth be our policy to afford significant weight to any self-policing damages paid by a carrier when the same conduct of that carrier becomes the object of an FMC civil penalty claim.

[9] Disclosure of the "location" of investigations and listing all past violations within a five year period were particularly mentioned in this regard

[10] See *Agreement No 5600-36 and Agreement No 5600-23* Orders Denying Reconsideration, decided simultaneously herewith.

[11] The complaint of "unfairness" in disclosing member identities appears to consist solely of the possibility that members may eventually be required to pay Shipping Act penalties. Examination of self-policing records is not substantially different from the examination of bills of lading or other commonly maintained carrier records

As a minimum, credit shall be given for damages paid under a self-policing system. In the case of isolated, less serious Shipping Act violations, no civil penalty claim shall be pursued when the carrier has cooperated fully with the Commission and reasonable self-policing penalties have been paid. To help effectuate this policy, final section 528.1(c) shall also forbid rate-fixing bodies from prohibiting their member lines from disclosing self-policing sanctions imposed against them (or any other aspect of their own dealings with the self-policing system) should they desire to do so. Such disclosures may be made on the member's own motion or in response to a Commission order.

Section 528.6(b) Certification of Reports. Petitioners object to section 528.6(b)'s requirement that self-policing reports be certified for accuracy and completeness by the reporting officer, the head of the policing authority, and any impartial arbitrators employed during the reporting period. It was contended that the various persons involved would not have personal knowledge of the report's entire contents and should therefore limit their certification to those matters over which they do have such knowledge.

The Commission has modified the rule to eliminate the need for three certifications. Final section 528.5(d) now requires the conference "reporting officer" to certify that the document transmitted is the report of the self-policing authority designated by the conference in full conformity with Part 528 of the Commission's Rules. The head of the self-policing authority must certify the accuracy and completeness of the report (including arbitration decisions). Both certifications shall be made under penalty of perjury and may be sworn to before a notary or may be an unsworn declaration pursuant to 28 U.S.C. 1746. It is incumbent upon the reporting officer to oversee the activities of the self-policing authority and to have personal knowledge of its staffing, budget, investigative policies, and general operations. No certification shall be required from the impartial arbitrator. All matters brought before it and all decisions that it renders shall be reported by the self-policing authority.

Section 528.6(1) Reporting Requirements Generally. Perhaps the most commonly protested provision of the April Rules was section 528.6. Petitioners claimed that certain terms appearing in the reporting requirements for the first time (*e.g.*, "cargo inspections," "office record examinations," "intelligence gathering activities") were ambiguous and that literal compliance with section 528.6 would be truly burdensome and generate little information of practical value to the Commission. The need to report all of a member's past breaches for a five year period was also viewed as onerous, both because of the length of the period and the rule's failure to indicate whether the requirement arose immediately or was to be applied prospectively.

The Commission has modified section 528.6 to eliminate the allegedly vague terms, reduce the "past violations period" to three years and apply section 528.6(a)(10)(ii) prospectively.

Other Modifications. The Commission has generally edited and renumbered the April Rules without intending to alter their substance. One such editorial change was the recognition that the term "impartial adjudicator" and "impartial arbitrator" are considered interchangeable. There have also been certain substantive changes in the Final Rules.

The inclusion of a specific prohibition against agreement provisions which attempt to block the disclosure of self-policing documents or activities to the Commission has already been discussed. Another substantive amendment has been to require self-policing authorities to maintain detailed records of their activities for a five year period (final section 528.3(f)). These records must include the names of the accused members (and any associates) involved in any alleged, potential, or actual breach. Both the self-policing authority records and the semiannual self-policing report must assign case or processing numbers to all investigations, whether instituted by complaint or on the self-policing authority's own initiative.[12] All investigations need not be of the same duration or extent, and it is assumed that self-initiated "investigations" into unintentional misratings would consist of little more than the routine notification of the member of its apparent liability for the penalty prescribed for such breaches.

A further amendment with substantive effect requires a description of the self-policing authority and the impartial arbitrator in the semiannual report (final section 528.5(b)).

THEREFORE, IT IS ORDERED, That the various Petitions for Reconsideration filed in this proceeding are granted to the extent indicated above and denied in all other respects; and

IT IS FURTHER ORDERED, That pursuant to section 4 of the Administrative Procedure Act and sections 14, 15, 16, 18(b), 21, 35 and 43 of the Shipping Act, 1916, Part 528 of the Commission's Rules is amended as set forth in the attached appendix; and

IT IS FURTHER ORDERED, That revised Part 528 of the Commission's Rules shall become effective January 1, 1979, provided that General Accounting Office review pursuant to 44 U.S.C. 3512(c) has been completed by that date; and

IT IS FURTHER ORDERED, That all conference agreements and other rate-fixing agreements approved under section 15 of the Shipping Act, 1916, shall be amended to conform to the requirements of revised Part 528 of the Commission's Rules and filed with the Commission on or before January 1, 1979; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.*

(S) JOSEPH C. POLKING
Assistant Secretary

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[12] A relatively simple approach to this requirement would be to designate complaint cases by the letter "C" and a number, and to designate self-instituted investigations by the letter "I" and a number.

* Commissioner Bakke dissents in part. His views will be issued separately.

APPENDIX

PART 528—SELF-POLICING REQUIREMENTS FOR SECTION 15 AGREEMENTS

AUTHORITY: This Part is issued pursuant to sections 14, 15, 16, 18(b), 21, 35 and 43 of the Shipping Act, 1916 (46 U.S.C. 812, 814, 815, 817(b), 820, 833a and 841a).

528.0 *Purpose and Scope*

(a) Section 15 of the Shipping Act, 1916, prohibits the approval of agreements which are not adequately self-policed. It also contemplates that self-policing provisions be included in certain agreements subject to the Shipping Act, and that the Commission be kept informed of the manner in which such provisions are being implemented. The provisions of this Part are designed to establish minimum standards for judging the adequacy of self-policing activities, assist ocean carriers obtain expeditious approval of their section 15 agreements insofar as self-policing is concerned, provide the Commission with reliable information concerning the nature and performance of self-policing systems, and curtail rebating and other malpractices by ocean carriers.

(b) This Part shall apply to all conference and other rate-fixing agreements between common carriers by water in the foreign or domestic offshore commerce of the United States (hereafter referred to as "agreements"), whether or not previously approved by the Commission.

528.1 *General Requirements*

(a) Every agreement shall contain provisions establishing and describing a system for self-policing its members. These provisions shall describe the methods employed and the standards used to investigate, adjudicate and penalize breaches of the agreement by the common carriers by water signatory thereto (hereafter referred to as "members"), and shall include within their scope the activities of all persons, firms, associations, or corporations that are agents, employees or affiliates of members, or are otherwise subject to the control of a member, or which themselves control a member, or are commonly controlled by any person, firm, association or corporation which controls a member (hereafter referred to as "associates").

(b) Self-policing provisions shall establish both a policing authority and an impartial "arbitrator" or "adjudicator" and describe the functions and authority of each entity. The impartial arbitrator shall be functionally separate and distinct from the policing authority.

(c) No self-policing system shall contain provisions which purport to:

(1) deny access to or copies of any self-policing records, statistics,

reports, or other information (including the identity of members) in contravention of a duly issued order of the Federal Maritime Commission (or a Commmission employee with delegated authority to issue such orders); or

(2) preclude any of its members from disclosing the nature and extent of their *own* involvement with the self-policing authority (*e.g.*, any damages paid by the member) in any administrative or judicial proceeding to enforce the Shipping Act.

(d) Compliance with the requirements of this Part shall not relieve rate fixing bodies of their absolute responsibility to adequately police their activities or preclude the Commission from disapproving an agreement when sufficient evidence of rebating or other malpractices exists to warrant a conclusion that the members' self-policing efforts have been inadequate.

528.2 *Specific Requirements: Self-Policing Provisions*

Agreements shall contain the following self-policing provisions:

(a) *Breaches (general).* A statement that any violation or breach of any provision of the agreement, or any tariff, rules or regulations promulgated thereunder (hereafter referred to as a "breach"), by any member of the agreement (directly or through an associate) shall subject such member to self-policing sanctions;

(b) *Permissable Damages.* A statement specifying the maximum damages, or range of damages, or the method of calculating the damages, which may be assessed against members of the agreement upon finding that such members have committed a breach. Such statement may specify damages for specific breaches and a general category of breaches, or both, and may relate to each and every breach, or to the number of times the member has previously been found guilty of a breach;

(c) *Investigation of Breaches.* An effective procedure for investigating all matters which are the subject of complaints or which otherwise suggest or allege the existence of breaches:

(1) The procedure shall require the self-policing authority to:

(i) receive or gather information concerning breaches from any and all sources;

(ii) make investigations both in response to complaints and upon its own initiative;

(iii) examine, audit or inspect, upon demand, with or without notice and wherever located: any books, records, accounts, invoices, bills of lading or other documents, cargo, containers, ships, property, and facilities owned, used, or transported by any member of the agreement or its associates which *may be* relevant to the member's participation in the trade. Provided, however, that examination of particularly identified materials may be postponed for a reasonable period pending a prompt determination of relevancy by the impartial arbitrator under conditions which assure that the materials in question are sealed or otherwise kept unaltered during the determination period;

(iv) adopt and publicize procedures for the filing of complaints;

(v) compile and retain for at least five years a complete and thorough record of all its investigatory and prosecutorial activities, including a description of all complaints, the basis, nature and scope of all self-initiated investigations, and the disposition of all investigations.

(2) The procedure shall require all officers, employees, and associates (including officers, employees and controlling owners) of members to cooperate with, and freely provide information to, the policing authority and its agents;

(d) *Adjudication of Breaches*. A procedure for adjudicating alleged breaches which affords accused members the right to a hearing before an impartial arbitrator. The impartial arbitrator shall adjudicate such claims solely and finally, either initially or upon review *de novo* on the record of an initial determination by the policing authority. "Review *de novo* on the record" requires the impartial arbitrator to have full authority to affirm, modify or set aside any finding of fact, conclusion of law, or penalty made or imposed by the policing authority;

(e) *Procedural Guarantees*. A statement that fundamental fairness will be afforded all members accused of committing a breach (hereafter referred to as "the accused"), which includes the following specific procedural guarantees:

(1) The accused shall be charged in writing, within a reasonable time prior to the initial hearing, in a manner which fairly and clearly discloses the nature of the alleged breach. Such charges need not reveal the identity of the complainant;

(2) The accused shall be furnished with all evidence within a reasonable time prior to the initial hearing. Evidence developed thereafter shall also be furnished to the accused and a delay granted, if necessary, to allow it an opportunity to use such evidence in its defense. The identity of the complainant may be deleted from any evidence furnished the accused;

(3) The accused shall be given a full and fair opportunity to rebut or explain any evidence introduced against it and to present evidence which might show mitigating or extenuating circumstances;

(4) The impartial adjudicator shall receive and consider only that evidence which has been furnished to the accused by the self-policing authority or has been furnished by the accused in its defense;

(f) *Designated Official*. A statement designating a particular officer or official of the rate-fixing body to be responsible for the filing and certifying of self-policing reports with the Commission in accordance with section 528.5 of this Part;

Section 528.3 *Policing Authorities (Minimum Requirements)*

(a) Policing authorities shall have an adequate and qualified staff, adequate facilities and an adequate budget.

(b) Policing authorities shall be headed by, and composed of, persons not otherwise employed by, having any financial interest in, or affiliated with, the conference or rate-fixing body established by the agreement or any member or associate thereof; Provided, however, that:

(1) An individual or entity may act as the policing authority for more than one rate-fixing body;

(2) An independent certified public accountant (referred to hereafter as an ICPA) may act as the policing authority, even though it has a client which is a member of the agreement or an associate of such member, where such relationship is disclosed prior to being named as the policing authority and it is

disqualified from acting as the policing authority with respect to the member which is, or whose associate is, a client of the ICPA. If the ICPA named as the policing authority discloses that it has a member of the agreement or an associate of such member as a client, an alternate policing authority must be appointed to receive and investigate any complaints against such member;

(3) Upon petition to the Commission, an exemption may be sought to allow officers or employees of a rate-fixing body to act as the head of, or be assigned to duties under, the policing authority, if such person or persons are not otherwise employed by, affiliated with, or have any interest in, any member or any associate of a member. Petitions for exemption will not be lightly granted and must include a convincing showing that:

(i) the persons conducting self-policing activities are qualified and their self-policing activities would not substantially conflict with their other duties and responsibilities;

(ii) the agreement is so limited in scope that the retention of an independent self-policing authority would impose an unrealistic financial burden on the members. The number of members, the financial condition of the members, the nature and extent of the trade, and other activities of the members both within and without the trade (*e.g.*, participation in other agreements) are all relevant considerations;

(iii) the trade covered by the agreement has been relatively free of rebating or other conduct violative of the Shipping Act in the five years preceding the year when exemption is sought and is likely to continue to be characterized by a minimal level of such malpractices.

(c) The policing authority of each agreement shall be required to establish reasonable written procedures for the receipt and investigation of complaints which shall be made available to any person upon request. Such procedures may include special provisions for the handling of written complaints and for summary investigation of frivolous or incomplete allegations (whether written or not). These procedures may not, however, require that complaints be in writing or restrict the class of persons entitled to lodge a complaint.

(d) Policing authorities shall be required to investigate all complaints filed in accordance with its established procedures.

(e) Policing authorities shall be required to conduct self-initiated investigations whenever they receive information providing reasonable cause to do so and to periodically conduct self-initiated investigations into the activities of each member. All self-initiated investigations shall include, but not necessarily be limited to, the unannounced inspection of books, records, accounts, shipping documents, invoices, cargo, ships, containers, equipment, and facilities of the member and its associates.

(f) Policing authorities shall compile and retain for at least five years a sufficient written record of their activities to demonstrate compliance with this Part. This record shall include:

(1) all complaints received (written or oral), the processing or case numbers assigned to each complaint, a description of the steps taken to investigate each complaint (including hearings or arbitration proceedings) copies or summaries of the evidence gathered, and the final disposition of each investigation;

(2) a chronological log summarizing all information (other than complaints) received or gathered which alleges or suggests the existence of a breach and describing the consideration given to this information, including all reports of unintentional cargo misdescriptions and mismeasurements, anonymous tips, and rumors of malpractices;

(3) a description of all self-initiated investigations, the processing or case numbers assigned to each investigation, a description of all investigatory measures employed (including hearings or arbitration proceedings), copies or summaries of the evidence gathered, and the final disposition of each investigation;

(4) a brief statement as to why each investigation was finally disposed of in the particular manner chosen. This statement shall include an exact description of any breach found to have occurred, any decision of the impartial arbitrator and the nature and amount of any penalty assessed and paid.

Section 528.4 *Impartial Arbitrators (Minimum Requirements)*

(a) The impartial arbitrator shall be a totally disinterested person or entity, unaffiliated with the rate-fixing body or any member or associate thereof, and may be appointed on permanent basis or selected on an *ad hoc* basis from a panel of arbitrators pursuant to traditional rules of commercial arbitration.

(b) The impartial arbitrator shall be vested with final authority to adjudicate disputes and assess damages within the scope of the self-policing system.

(c) The impartial arbitrator shall not perform any other duties under the self-policing system with regard to any matter before it for adjudication, including investigation or prosecution.

Section 528.5 *Reporting Requirements*

(a) Each rate-fixing body shall mail (air mail postage prepaid) or hand deliver a semiannual report to the Secretary, Federal Maritime Commission, Washington, D.C. 20573, on or before January 31 and July 31 of each year covering that body's self-policing and adjudicatory activities during the six-month period immediately preceding the respective reporting month (*i.e.*, January or June).

(b) Each semiannual self-policing report may exclude the identity of all parties to an allegation of breach, investigation or penalty assessment, but shall contain the following detailed information:

(1) The name and address of the self-policing body employed during the reporting period and a complete description of its staff, facilities, and budget, and the name and address of the impartial arbitrator employed during the reporting period and a descriptoin of its qualifications;

(2) The date, location (community or port area where inspection occurred) and nature of each examination or inspection (including audits) of cargo, facilities, shipping documents, or office records performed during the reporting period. The type and approximate number of accounts, documents, cargo containers, and other items inspected shall also be stated. Each such inspection shall be correlated to a particular investigation bearing a processing or case number;

(3) The number of cargo misdescriptions or mismeasurements detected by:

(i) the self-policing authority or any division thereof;

(ii) any other organization retained by the rate-fixing body to make misrating determinations and regularly report them to the self-policing authority. When such a separate "misrating committee" or similar organization is employed by a rate-fixing body, the self-policing report shall also identify that organization by name, and address, and provide a thorough description of its staffing (including other affiliations with the conference or its members), authority and routine activities, and describe the procedures by which it reports its findings to the self-policing authority;

(4) The number of breaches of the agreement (other than unintentional cargo misdescriptions and mismeasurements) which were detected through the investigation of complaints;

(5) The number of breaches of the agreement (other than unintentional cargo misdescriptions and mismeasurements) which were detected by self-initiated investigations;

(6) A thorough summary of the basis, nature, and scope of each investigation commenced during the reporting period, including any hearings or arbitration proceedings. Each investigation shall be identified by a processing number and the summary shall indicate whether the investigation was initiated by complaint or upon the initiative of the self-policing authority;

(7) A list of information received or gathered during the reporting period alleging or suggesting the existence of a breach, but which was not made the subject of an investigation;

(8) A list (by processing number) of investigations commenced in previous reporting periods and still pending, and a description of the action taken with respect to each during the reporting period (including hearings and arbitration proceedings);

(9) A list and description (by processing number) of all final actions taken with respect to investigations of any type. An action is not "final" unless:

(i) the investigation revealed insufficient evidence to establish a breach; or

(ii) the accused was assessed damages, either based on a voluntary settlement or a decision rendered by the policing authority or the impartial arbitrator.

(10) When a final action involves an assessment of penalties, the report shall also include:

(i) a detailed description of the alleged or adjudicated breach, the amount or type of penalty assessed, and whether the assessment was met;

(ii) a list of all other breaches (other than unintentional cargo misdescriptions and mismeasurements) committed by the member during the period subsequent to the effective date of this Part, but not greater than three years prior to the final action in question.

(c) The report shall clearly indicate those final actions handled by the policing authority and those matters, including rulings on the relevancy of documents or things sought to be examined by the policing authority, handled by the impartial arbitrator.

(d) The reporting officer designated pursuant to section 528.2(f) of this Part shall certify under penalty of perjury that the semiannual report has been prepared by the self-policing authority specifically designated by the rate-fixing body to act in full accordance with the requirements of this Part during the reporting period. The accuracy and completeness of the report shall be sworn to under penalty of perjury by the head of the designated self-policing authority.

(e) If there are no complaints, investigations or final actions during the period, the report shall contain an express statement to this effect as to each category of information required by subparagraph (b) above.

Section 528.6 *Two Party Rate-Fixing Agreements*

Rate-fixing agreements with no more than two signatory parties shall be exempt from the requirements of this Part.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73-34

NEW YORK SHIPPING ASSOCIATION—
MAN-HOUR/TONNAGE ASSESSMENT FORMULA

NOTICE

September 15, 1978

Notice is given that the time within which the Commission could determine to review the August 11, 1978, order of discontinuance in this proceeding has expired with no such determination being made. Accordingly, review will not be undertaken.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

August 11, 1978

No. 73–34

NEW YORK SHIPPING ASSOCIATION—
MAN-HOUR/TONNAGE ASSESSMENT FORMULA

DISCONTINUANCE OF PROCEEDING

Finalized on September 15, 1978

This proceeding is an investigation of Agreement No. T–2804, a man-hour/tonnage assessment formula of the New York Shipping Association for the longshoremen's labor contract years 1971–1974, to determine whether Agreement No. T–2804 should be approved, modified, or disapproved pursuant to section 15 of the Shipping Act, 1916, and whether Agreement No. T–2804 violates sections 16 and 17 of the Act.

In the "Tentative Discontinuance" ruling of the Administrative Law Judge served July 14, 1978, it was stated that settlement of the issues in the proceeding apparently should be considered as final and complete. Also, any party opposing discontinuance was directed to so state by motion served by July 31, 1978. No party has responded to the said directive, and it is concluded that no party opposes discontinuance of the proceeding.

Certain agreements previously have been approved by the Commission, settling the so-called Puerto Rican, automobile, and newsprint issues in No. 73–34. Agreement No. T–2804 by its own terms expired in 1974, and there remain no contentions that it is unlawful.

Accordingly, it is found that the record justifies approval of the agreement, and to the extent that any of its terms previously have not already been approved, Agreement No. T–2804 hereby is approved pursuant to section 15 of the Shipping Act, 1916 (the Act), and is further found that the said agreement does not violate sections 16 and 17 of the Act.

Good cause appearing, the subject proceeding hereby is discontinued.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 70–50

MARINE TERMINAL PRACTICES OF THE PORT OF SEATTLE—POSSIBLE VIOLATION OF SECTION 17, SHIPPING ACT, 1916

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

REPORT AND ORDER ADOPTING INITIAL DECISION

September 15, 1978

This proceeding was instituted by an Order of Investigation served December 16, 1970, to determine whether certain marine terminal practices of the Port of Seattle (the Port) are subject to and violative of section 17 of the Shipping Act, 1916 (the Act).[1] The Commission listed as issues for investigation, *inter alia,* the permissibility of the Port's practices in providing free consolidation services for inbound Overland Command Point (OCP) shipments, and in failing to indicate the availability of its consolidation service in its terminal tariff. Other parties to the proceeding are the Commission's Bureau of Hearing Counsel (Hearing Counsel), and eleven intervenors,[2] all of whom oppose the position taken by the Port.

The consolidation service in question is provided by the Port for the inbound cargo[3] of interested consignees, for a 1½ percent service charge based upon the inland shipment invoice.[4] If consolidation is requested, the necessary information is placed into the Port's computer, which keeps an inventory of cargo available for consolidation. Port personnel can then locate and select cargo for consolidation, and the computer prints out a pick-up order (for the inland carrier) and master bill of lading, adjusts its cargo inventory, and prints out a final movement order to notify the customer of the manner and time of the inland

[1] 46 U.S.C. 816.

[2] The California Association of Port Authorities, the City of Los Angeles, the Port of San Francisco, the Port of Oakland, the Port of Long Beach, the San Diego Unified Port District, the Port of Portland, the Port of New York and New Jersey Authority, Import Freight Carriers, Inc., Traffic Board of the North Atlantic Port Association, and Frank P. Dow, Inc.

[3] OCP cargo is usually, but not always, involved.

[4] At the time of the Order of Investigation, the service was provided without charge. In the fall of 1974, a 1 percent charge was assessed. Since May 1, 1977, the charge has been 1½ percent.

shipment. The computer and paperwork related activities, but not the actual physical loading and unloading, are performed by Port personnel in the Port's administrative offices. Consignees generally pay freight all kinds (F.A.K.) rates on the consolidated inland shipments.

A threshold issue in this investigation was whether the Commission has jurisdiction over the Port's consolidation services. The parties filed stipulations of fact (set forth in the Initial Decision) detailing the services involved and agreed to litigate only the issue of jurisdiction, reserving the question of reasonableness until such time as jurisdiction was determined to exist. No other evidence was presented. The stipulations, along with other documents[5] admitted to record, comprise the entire factual record in this case.

Administrative Law Judge Norman D. Kline (Presiding Officer) issued an Initial Decision on March 9, 1978, which found Shipping Act jurisdiction to be present and further ruled that in not describing the consolidation service and the charges assessed in its FMC terminal tariff, the Port had violated both section 17 of the Act and Part 533 of the Commission's Rules.[6]

POSITION OF THE PARTIES

The Port filed Exceptions to the Intitial Decision which take issue with most of the Presiding Officer's findings and conclusions. Hearing Counsel and Intervenor California Association of Port Authorities filed Replies to the Port's Exceptions, which generally supported the findings and conclusions in the Initial Decision.

The Port's Exceptions raise the following arguments:

1. The Port is not an "other person" subject to the Shipping Act in providing its consolidation service;

2. The consolidation service does not constitute providing terminal services;

3. The record supports the factual findings and conclusion that the consolidation service is a "totally separate, independent service with no physical, operational or data connection with any other Port operation," and which:

   a. does not utilize data from the Port's other terminal operations;

   b. is provided for cargo at any location, not just terminals operated by the Port or its lessees; and

   c. does not involve the lessees;

4. Section 1 of the Shipping Act distinguishes forwarding and consolidation activities from "other terminal facilities";

5. "[L]egislative, decisional and statutory history" prohibits Commission jurisdiction over the service;

6. The service could not be found subject to the Shipping Act unless it were a terminal service under section 1; and

7. By providing the consolidation service, the Port is not performing an ocean carrier's obligation to provide a reasonable opportunity for consignees to take possession of their property.

[5] These include answers to interrogatories, an affidavit by a Port Traffic Manager, correspondence among counsel, a Seattle Harbor Pier Directory, and sample rail and truck consolidation documents.

[6] General Order 15, 46 C.F.R. Part 533.

DISCUSSION

For the most part, the Port's Exceptions constitute reargument of contentions already considered at length and properly disposed of, in the Initial Decision. The Commission agrees with the Presiding Officer's finding that the consolidation service is part of a broader marine terminal process, to the extent that the Port, in providing it, is furnishing terminal facilities in connection with common carriers by water. We also concur that the service relates to the receiving, handling, storing, or delivering of property. We find that the Commission has Shipping Act jurisdiction over the consolidation service offered by the Port, and that the Port is in violation of section 17 and General Order 15 in not including the service in its terminal tariff.

The service plainly appears to be a convenient and efficient means to facilitate the transfer of cargo from one mode of transportation to another, a primary function of a marine terminal. Moreover, in most instances, the cargo consolidated is part of a continuous stream of transportation to overland common points. We find, therefore, no error in the Presiding Officer's treatment of the service as part of a general ocean terminal operation rather than a separate inland operation, especially since the service is performed prior to the time the cargo is released to inland carriers.

A broad view of the Port's operation is justified here. The Port is a terminal operator in other respects, and this fact calls for closer scrutiny of the service in light of the Port's overall operations. Such an approach indicates that the movement of cargo through the Port is facilitated because of the service, which utilizes computer facilities which already serve other terminal functions of the Port. Consignees who have had OCP cargo shipped via the Port and who use the service take advantage of lower freight all kinds rates. The service benefits not only the consignees, but also the Port and its lessees, as terminal operators, by promoting the use of the Port's other terminal facilities for inbound and especially OCP cargo. It is, therefore, connected with the Port's overall terminal process in its purpose, operation, and effect. The fact that separate data are fed into the computer for the consolidation service does not alone defeat Commission jurisdiction over the service. The presence of Shipping Act jurisdiction here is in no way inconsistent with that Act's legislative history, which indicates that the term "other person" in section 1 is to be broadly construed.

The argument raised in item 3(b) above is without merit. Stipulation No. 2 indicates that the Port either owns and operates, or owns and leases to other operators, the marine terminals which the service involves. We also reject as meritless and unfounded the Exceptions listed as 4 and 5 above.

The Port's allegations of two specific errors in the Initial Decision (6 and 7 above) will be discussed individually.

Item 6 refers to the following conclusion in the Initial Decision:

> Even if the Port's computerized equipment and personnel working the equipment were not terminal facilities within the meaning of section 1 of the Act, the Port furnishes such facilities on its own and through its lessees and a consolidation service relates to the delivering of property from the various terminal facilities and locations owned or operated by the Port.

What the Presiding Officer said, in effect, was that even if the Port were not an "other person" solely on account of its consolidation service, its consolidation activities would still be subject to section 17. This statement was initially made in the context of a discussion refuting the Port's contention that "terminal facilities" have to be physical structures in the nature of docks and warehouses. The Presiding Officer apparently meant that the Port was a terminal operator, furnishing structures such as docks and warehouses, and was, therefore, an "other person" irrespective of its consolidation activities. Because it performed other services constituting the provision of the terminal facilities, reasoned the Presiding Officer, the consolidation service, which relates to the facilities, is also subject to section 17.

The above rationale places undue emphasis on the significance of the Port's other terminal facilities. The Port's Exception is granted, and the above-quoted portion of the Initial Decision is not adopted. Because the providing of the service does constitute furnishing terminal facilities, however, it is irrelevant that the Presiding Officer considered that the service could be subject to section 17 even if it did not constitute furnishing terminal facilities. Therefore, our rejection of the objectionable language does not alter the outcome of this proceeding.

The seventh item refers to the following sentence in the Initial Decision:

> The terminal operator is in reality only performing the obligations of common carriers by water who must arrange a convenient location for consignees to take possession of their property.

The Port characterizes this statement as a significant conclusion about the specific practices of the Port. The context indicates that it was merely a continuation of a general comment about the duty of ocean carriers and/or terminal operators to provide inland carriers adequate access to inbound cargo. There is nothing inaccurate or objectionable about the comment unless, as was done here, it is taken out of context and interpreted as a finding or conclusion specifically describing the Port's consolidation service. Moreover, the statement is not essential to the ultimate conclusion reached in the Initial Decision. The Exception is denied.

This leaves the question of future proceedings. It is noted that there have been no allegations of discrimination by the Port in performing its service, and that the Port no longer provides the service free of charge. We do not consider further proceedings, formal or informal, to be necessary at this time. We are satisfied that at such time as a new investigation is necessary it can be instituted promptly.

THEREFORE, IT IS ORDERED, That the Exceptions of the Port are granted to the limited extent indicated above, and denied in all other respects; and

IT IS FURTHER ORDERED, That the Initial Decision of the Presiding Officer is adopted except as indicated above; and

IT IS FURTHER ORDERED, That, within 30 days from the date of service of this Order, the Port of Seattle publish in its terminal tariff a description of its consolidation service and the applicable service charge; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) Joseph C. Polking
Assistant Secretary

FEDERAL MARITIME COMMISSION

No. 70–50

MARINE TERMINAL PRACTICES OF THE PORT OF SEATTLE— POSSIBLE VIOLATION OF SECTION 17, SHIPPING ACT, 1916

Adopted September 15, 1978

Respondent Port of Seattle offers a consolidation service in which its personnel use computerized equipment to locate cargoes on marine terminals, select cargoes for inland consolidation, and prepare relevant documents for inland movement. The Port does not publish this service in its terminal tariff and contends that the service is *not* subject to the jurisdiction of the Federal Maritime Commission. It is held that:

(1) The Port in performing this service is furishing terminal facilities in connection with common carriers by water within the meaning of section 1 of the Shipping Act, 1916, and the service relates to the delivering of property within the meaning of section 17 of that Act.

(2) Even if the service does not constitute furnishing terminal facilities, the Port otherwise furnishes such facilities as owner or operator of terminals and the service relates to the delivering of property.

(3) The Commission's jurisdiction over the subject service continues until the cargo is relinquished to an inland carrier. In performing the subject service, the Port is merely carrying out the obligations of common carriers by water and the obligations of terminal operators to promote the efficient flow of cargo through their terminals.

(4) The Commission's jurisdiction cannot be defeated by advances in technology such as that employed by the Port. Sections 1 and 17 of the Act are remedial statutes and should be read broadly to effectuate their purposes.

(5) The Port is in violation of section 17 of the Act and the Commission's General Order 15 for failure to publish the service in its terminal tariff.

There is no evidence that the Port has granted excessive free time or otherwise departed from published rates in its tariff.

The Port now publishes a drayage charge in its terminal tariff which it had not previously published and the tariff is not ambiguous. If there is any need to improve the tariff in this particular regard, the Commission's staff ought to consult with the Port informally.

Further formal evidentiary proceedings regarding the question of the reasonableness of the Port's charges for its consolidation service ought to be avoided if possible and less formal procedures employed to determine that question.

Edward G. Dobrin, Peter D. Byrnes, Ronald T. Schaps, Richard D. Ford, and *Gerald B. Grinstein* for respondent Port of Seattle.

Leslie E. Still, Jr., for interveners California Association of Port Authorities and the Ports of Los Angeles, Long Beach, Oakland, San Diego, and San Francisco.

Ellen K. Carver for intervener California Association of Port Authorities.

J. Kerwin Rooney for Port of Oakland.

H. Neil Garson for intervener Import Freight Carriers, Inc.

Gary Koecheler for intervener Traffic Board of the North Atlantic Ports Association.

Rowland C. Hong for intervener City of Los Angeles.

Mary Edwards for intervener Frank P. Dow, Inc.

S. H. Moerman for intervener Port of New York and New Jersey Authority.

Thomas T. Soules for intervener Port of San Francisco.
Thomas J. White for intervener Port of Portland, Oregon.
Joseph D. Patello for intervener San Diego Unified Port District.
John Robert Ewers, Director, Bureau of Hearing Counsel, *Paul J. Kaller*, Deputy Director, and *Bert I. Weinstein* as Hearing Counsel.

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

This proceeding was initiated by the Federal Maritime Commission by Order of Investigation and Hearing served December 16, 1970. The Commission stated that it was beginning the investigation because it had become aware that "current marine terminal practices, particularly consolidation practices, of the Port of Seattle (Port) may be unlawfully affecting the established cargo patterns at Pacific Coast ports with the Port of Seattle obtaining a disproportionately high share of such cargoes." (Order, p. 1.) The Commission further stated on the basis of "[i]nformation available to the Commission" that there were indications that the Port was performing marine terminal services free of charge on inbound OCP traffic and was assessing a drayage charge for movement of cargo from piers to warehouses that did not appear to be based upon any item in its terminal tariff. Therefore, the Commission stated that it wished to determine if the Port's consolidation service and any other services performed in connection therewith might be prohibited by section 17, Shipping Act, 1916, (the Act) as being unjust or unreasonable. The Commission framed four specific issues arising under section 17 of the Act as follows:

1. Whether the Port's practices in providing consolidation services and any other services in connection therewith free of charge and only for inbound OCP shipments are permissible under section 17, Shipping Act, 1916.
2. Whether the assessment by the Port of a drayage charge, as an element of its per carton fee for movement of cargo from piers to warehouses for sorting, segregating, and labeling prior to dispatch, should be included in its terminal tariff as a service performed in connection with the receiving, handling, storage, or delivery of property at its terminal facilities.
3. Whether the failure of the Port to indicate the availability of its consolidation service in its terminal tariff is contrary to the Commission's General Order 15, 46 CFR 533, and section 17, Shipping Act, 1916.
4. Whether the Port has failed to bill for, or collect, applicable terminal charges which have occurred on cargo in amounts prescribed by its terminal tariff.

Finally, the Commission ordered that should the Port's consolidation practices or other services performed in connection therewith be found not just and reasonable under section 17, Shipping Act, 1916, the Commission may determine, prescribe, and order enforced just and reasonable practices.

The Port of Seattle was named as respondent. The Commission's Bureau of Hearing Counsel became a party automatically as provided by the Commission's

[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).

rules. 46 CFR 502.42. In addition several other ports, Associations, and companies were granted leave to intervene.[2]

HISTORY OF THE PROCEEDING

A number of events occurred following commencement of the proceeding which prevented the case from proceeding to prompt decision. The following recitation of these events will explain the lengthy history of the case.

Early in the proceeding two problems arose, one regarding the scope of the investigation, the other concerning the question of the Commission's jurisdiction to investigate the Port's consolidation practices. The first problem was settled by then Presiding Examiner John Marshall who ruled at the first prehearing conference and later that the proceeding would be limited to the four specified issues because the general reference in the Commission's Order to "such others [i.e., issues] as may rise in the course of the proceeding" was meaningless as a matter of law under the Administrative Procedure Act. See Petition for Further Ruling Denied, April 14, 1971, and prehearing transcript, pp. 30–34. No appeal was taken.

The second problem proved to be the main reason for the inordinate passage of time in this case. This dealt with the Port's contention that the Commission lacked jurisdiction to investigate its consolidation practices, a position which the Port maintains to this day. On March 23, 1971, the Port moved to terminate those portions of the investigation referring to its consolidation practices and more specifically, issues (1) and (3) set forth above. The Port maintained then as it does now that its consolidation activities were those of "shippers' agents" conducted in connection with the inland dispatch of shipments, not in connection with common carriers by water, and that such activities therefore fell outside the scope of the Shipping Act. After replies in opposition to the motion were filed by Hearing Counsel and certain interveners and a reply by the Port was filed, Examiner Marshall denied the motion. He found that since the record did not then show whether the practices in question related exclusively to inland forwarding rather than ocean terminal functions, he would note "probable jurisdiction" of the Commission, as suggested by Hearing Counsel, reserving final decision until completion of the evidentiary hearing. At the same time he denied the Port's request for leave to appeal. (See Motion to Terminate Denied, May 3, 1971.)

This ruling of Examiner Marshall did not dispose of problems, however. Although the Port generally produced information in response to Hearing Counsel's discovery requests as regards issues and matters other than its consolidation practices, it resisted production of information regarding such practices, again on jurisdictional grounds. (See Hearing Counsel's Motion for Order Requiring Production of Documents and Application for Order Compelling Answers, June 14, 1971.) Therefore, Hearing Counsel filed the Motion pre-

[2] By March 8, 1971, 11 interventions had been granted to the following parties: Import Freight Carriers, Inc., the Port of Long Beach, Calif., the Port of Oakland, Calif., the Traffic Board of the North Atlantic Ports Association, Inc., the California Association of Port Authorities, the City of Los Angeles, Frank P. Dow Co., Inc., the Port of New York Authority, the Port of San Francisco, the Port of Portland, and the San Diego Unified Port District. See Interventions, March 8, 1971 (John Marshall, Presiding Examiner). Only six of the above interveners filed briefs after closing of the evidentiary record, namely, the California Association of Port Authorities, and the Ports of Los Angeles, Long Beach, Oakland, San Diego, and San Francisco.

viously mentioned, seeking answers and production to numerous questions and requests which had not been answered out of an original list of 123 questions. The Port opposed the motion not only on the basis of lack of jurisdiction but because of failure to show good cause, inadequacies in the requests, excessive broadness and irrelevancies, etc.

On August 6, 1971, Examiner Marshall granted Hearing Counsel's motion, ordered answers and production and denied oral argument, but granted protective orders to prevent disclosure of sensitive competitive information. However, on September 29, 1971, the Commission remanded the matter to the Examiner for further explanation which could form the basis for possible court enforcement but agreed with his treatment of the jurisdictional problem. Thereafter, in February 1972, Hearing Counsel recast their discovery requests, filing 41 interrogatories and a motion for production of documents primarily related to the consolidation practices. After replies to these requests were filed and oral argument was heard, on April 28, 1972, Presiding Examiner Stanley M. Levy, to whom the case had been reassigned, issued orders directing the Port to respond as requested. The Port respectfully declined to comply, however, choosing to defend its position before the courts. Thereafter, on July 5, 1972, the Commission commenced an action seeking enforcement of the Examiner's orders in the United States District Court for the Western District of Washington. Federal Maritime Commission v. Port of Seattle, Civil Action No. 22-72H2. The Port provided some information pursuant to agreement among counsel and court order. However, after the Port had furnished certain information, the District Court, in the person of Judge Walter T. McGovern, to whom the case had been reassigned, concluded in a letter dated August 15, 1973, that the Commission lacked jurisdiction with regard to issues (1) and (3). After entry of a formal judgment by the District Court in October 1973, the Commission appealed to the United States District Court for the Western District of Washington. *Federal Maritime Commission v. Port of Seattle,* Civil Action No. 22-72H2. The Port discovery orders provided that the lower court determined that such orders were regularly made and duly issued. *Federal Maritime Commission v. Port of Seattle,* 521 F.2d 431 (9 Cir. 1975).

On January 29, 1976, pursuant to stipulation and order of the District Court, the Port agreed to make available for inspection and copying certain documents and, with certain modifications and amendments, agreed to furnish other information, all to be accomplished on or before March 1, 1976, unless otherwise ordered or agreed by the parties. *See* Stipulation, *F.M.C. v. Port of Seattle,* U.S. D.Ct. Civil No. 22-72H2, January 29, 1976.

The Modern Phase of the Proceeding

Hearing Counsel visited Seattle to inspect the documents as provided by the stipulation and order cited above sometime in March 1976. Nothing further was reported to me, to whom the case had been reassigned (on April 19, 1973). Accordingly, on September 27, 1976, I issued an order instructing Hearing Counsel to make known their intentions to proceed. (See Order to Submit Status Report, September 27, 1976.) Hearing Counsel responded, stating that they had verified Seattle's answers to interrogatories and suggested that the jurisdictional issues could be resolved on the basis of affidavits of fact and memoranda of law, with Seattle taking the initiative in filing such documents. Hearing Counsel also suggested that other parties be permitted to enter into settlement discusssions. The Port suggested that the case be dismissed without prejudice to any party's position should a similar investigation commence in the future. The various replies demonstrated that a discussion among the parties was necessary. Accordingly, a prehearing conference was scheduled for January 5, 1977, to determine the future course of the proceeding. (See Notice of Prehearing Conference and Matters to be Discussed Therein, November 10, 1976.)

At the prehearing conference, several matters were decided. Issues (1) and (3) referring to Seattle's consolidation practices involved the question of the Commission's jurisdiction over such practices as well as the reasonableness of those practices. The Port's motion to dismiss these issues was denied but the question of reasonableness was deferred pending on the question of jurisdiction. The parties were instructed to prepare stipulations of fact on these issues and, absent factual disputes, the filing of briefs would be scheduled.

Issues (2) and (4) referring to drayage and terminal (free time) practices were, according to Hearing Counsel, amenable to dismissal based upon the information obtained by Hearing Counsel in the discovery phase. Accordingly, Hearing Counsel were instructed to prepare and file motions to dismiss these issues, replies to be filed by the Port and interveners. (See Notice of Procedural Rulings Made at Prehearing Conference, January 11, 1977.)[3]

With some modifications, the above procedure was carried out. Hearing Counsel moved for dismissal of issue (4) relating to the question whether the Port had failed to bill for applicable terminal charges, but did not file a comparable motion regarding issue (2), as I had instructed, regarding the publication of a drayage charge in the Port's tariff, stating that the Port was in a better position to prepare the relevant facts and file the motion. Hearing Counsel and the Port indicated that such motion could be filed by the Port on September 26, 1977, and permission was granted to do this. (See Procedure Established for Disposition of Proposed Stipulation and Motions to Dismiss Certain Issues, September 12, 1977.)

Ultimately, stipulations of fact were filed and admitted into evidence together with underlying materials as to issues (1) and (3) regarding the Commission's jurisdiction and all motions and replies regarding dismissal of issues (2) and (4) were filed. The former stipulations and materials were admitted by ruling served October 25, 1977. Opening and reply briefs as to issues (1) and (3) were filed (mailed) by Hearing Counsel, the Port, and the California Association of Port Authorities for itself and the Ports of Los Angeles, Long Beach, Oakland, San Diego, and San Francisco (CAPA, *et al.*) in early December 1977 and mid-January 1978. Replies to the Port's motion to dismiss issue (2) and to Hearing Counsel's motion to dismiss issue (4) were filed by CAPA *et al.*, by letter dated

[3] Other rulings not relevant here were also made. Thus, I denied the Port's request that other ports, especially those in California, be required to answer discovery requests made by Seattle, Seattle contending that it had information that other California ports were carrying on practices similar to those at Seattle. I found these requests rather belated and cited the well-known principle that an agency need not investigate everybody engaging in similar practices at the same time. The record does not show furthermore, nor need it, exactly what other ports are doing which might resemble Seattle's consolidation practices, although the record before the Court of Appeals seems to suggest that similar activities may be going on at other ports. *See* Brief for Petitioner-Appellant Federal Maritime Commission, July 5, 1974, p. 32, citing portions of the record before that Court.

October 21, 1977. Hearing Counsel filed a reply to the Port's motion to dismiss issue (2) on October 26, 1977. None of the replies opposed the granting of these motions.

FINDINGS OF FACT

The evidentiary record developed for the purpose of determining issues (1) and (3) regarding the question of the Commission's jurisdiction over the Port's consolidation practices consists of a stipulation of facts supported by pertinent documentary materials. The stipulation is the culmination of efforts by the parties to avoid unnecessary trial-type hearings and to utilize the sizeable amount of information obtained by Hearing Counsel from the Port pursuant to court rulings enforcing administrative discovery orders. The source material for the stipulation in large measure was not only furnished under oath but was scrutinized by numerous intervening parties, including parties whose interests were adverse to Seattle's. See Admission into Evidence of Stipulation and Other Materials, October 25, 1977.

The following narrative contains the stipulations:

1. The Port of Seattle (Port) is a municipal corporation with a wide variety of responsibilities and operations, ranging from parks and marinas to industrial development and operation of the Seattle-Tacoma International Airport. The Port's data processing equipment is utilized for all Port functions as necessary, including accounting, administration, engineering, maintenance, real estate, airport operations, etc.

2. One aspect of the Port's overall operations is the operation and/or ownership of marine terminals and piers. In this regard, the Port is both an operating (i.e., owns and operates marine temrinals) and a non-operating (i.e., owns marine terminals which are not operated by the Port but which are leased to other entities who operate them under their own tariff arrangements) port. The record contains a Seattle Harbor Directory showing various piers, terminals and other developments and their ownership. The Port only operates Terminals 18 (portion), 19, 20, 37, 90–91 (portion), and the container freight stations located on site 102. The container freight station had been operated by another entity until about August 1972. The Port also operates warehouses on Site No. 106. The Port publishes tariffs applicable to each of the above operations. No vessel can, or does, dock, load or unload at site 106.

3. Three to four days in advance of a vessel's arrival, the Port receives a copy of the ship's manifest by mail and/or messenger from the local steamship offices. Production of such manifests in advance of a vessel's arrival is pursuant to Port tariff 2–F, Item 10280.

4. Data from the ship's manifest is fed into a computer which produces sort books for use by cargo checkers. Upon the vessel's arrival, discharged cargo is checked and entered into the sort books. The data from the sort books is fed into the computer which automatically feeds out any variation between the ship's manifest and the cargo actually received. The ship is informed of any overage or shortage of cargo or damaged cargo. None of this information is utilized for any solicitation purposes or to consolidate cargo.

5. The Port's Marine Terminal Department uses data processing equipment to record the inbound cargo received (and its condition), to maintain inventory control of such cargo, to print delivery receipts for such cargo and to record delivery of such cargo to inland carriers. The data processing equipment is not used for outbound cargo except for after-the-fact tonnage statistics. The data processing equipment is also used to compute stabilization on outbound vessels.

6. Where the Port receives a request from the owner of the cargo or his agent for the cargo to be warehoused, container(s) are brought to Port operated warehouses to be unstuffed and their contents stored by Port employees pursuant to tariff. When a container is unstuffed, a van unloading slip is manually prepared. From that slip a warehouse receipt is prepared manually. The warehouse receipt is keypunched into the computer for inventory control purposes. After storage for whatever period of time the owner desires, the goods in the warehouse will be picked up by an inland carrier for inland transportation. Storage charges on the cargo are assessed pursuant to tariff.

7. The Port does not furnish manpower for loading inbound LTL OCP cargo into containers. If an inland carrier was to pick up cargo at the Port's container freight station, manpower for rail car loading would be provided by the container freight station if requested by the carrier. Charges would be assessed pursuant to tariff. However, West Coast truckers load their own trucks.

8. Information as to cargo placed into the computer as outlined in the previous paragraphs is not available to Port personnel, or anyone else, for any purpose relating to the consolidation or shipment inland of any cargo. Information as to availability for consolidation or inland shipment of cargo stored in a Port operated warehouse or located on a Port operated terminal is available from the computer only after (and based upon) the receipt by the Port of letters of instruction and supporting documents and the separate placement of that information into the computer as outlined below.

9. A letter of instructions is received by the Port from the ultimate consignee or its agent requesting either consolidation or straight dispatch of the cargo. The Port generally receives simultaneously a copy of the ocean bill of lading, a check for the ocean freight or evidence of payment, and evidence of customs clearance or "Immediate Transportation" entry (for movement in-bond). The information with respect to the cargo is entered into the computer and is used in consolidating shipments of OCP cargo for inland delivery.

10. If a straight dispatch is involved, the computer automatically prints out a pick-up order and a master inland bill of lading for the inland carrier.

11. If consolidation is requested, the computer places the information into its inventory of cargo available for consolidation.

12. The cargo is not released from the computer for dispatch or consolidation until payment of the ocean freight and proper customs papers are received from the customer. If the customer does not surrender the ocean bill of lading, any arrangement for a bank guarantee that it will be surrendered is strictly a matter between the customer and the ocean carrier. The Port does not guarantee, or arrange for the guarantee of, the surrender of any original ocean bill of lading. Any statement on Port forms relating to the inland carrier's protecting the

surrender of the original bill of lading, is simply an outdated statement with reference to historical practices of inland carriers.

13. In making up consolidations, the computer furnishes Port personnel, upon command, with information as to all cargo awaiting consolidation to a certain area.

14. Port personnel select cargo for a particular consolidation and place that selection into the computer which then automatically prints out a separate pick-up order to the inland carrier for each item of cargo in that consolidation and a master bill of lading. The computer then automatically withdraws that cargo from its inventory of cargo awaiting consolidation. The pick-up orders and master bill of lading are delivered to the various inland carriers, who pick up the cargo at various terminals or warehouses. The inland carrier furnishes the Port with information as to each item picked up for a given consolidation and issues its bill of lading and waybills. This information is then placed into the computer which automatically prints out a final movement order ready for mailing to the customer to notify him of the manner (including rail car or trailer number) and time of the inland shipment of his cargo.

15. The Port is shown on the master bill of lading as the shipper, but is not shown as the consignee, rather the owners of the cargo are shown as split delivery consignees. The Port does not consolidate or dispatch for multiple consignees by boxcar.

16. No specific charge is assessed by the Port for preparation of inland bills of lading. Some inland bills are prepaid and charges are prorated to the various ultimate consignees, others are sent collect and charges paid by the consignee. Advances are paid out of a Port general fund. Service charges and delinquent charges are assessed.

17. At the time of institution of the consolidation service and until the fall of 1974 no charge was assessed for the consolidation service. A 1 percent service charge was assessed thereafter until May 1, 1977, when the service charge was increased to 1½ percent. The service charge is based upon the invoice for the inland shipment.

18. The Port offers consolidations by truck and by rail piggyback service. With respect to consolidation shipments, the Port allocates inland transportation charges between multiple consignees based on individual weight of shipments as compared to the total, and takes into consideration stop charges and multiple delivery charges. The inland rates are generally based on the freight all kinds rate which provides the basis for the transportation charge assessed by the inland carrier for a specific pool.

19. Delivery to final destination is dependent on, and the responsibility of, the inland carrier service.

20. The Port activities described in paragraphs 9 through 19 above are all performed in the Port's administrative offices by personnel employed exclusively at that location. With regard to the activities described in paragraph 5 above, whenever any carrier arrives at a Port operated marine terminal, a remote computer terminal is used to print a delivery receipt and after delivery, to record the fact of delivery and any notations as to shortage or damaged cargo.

21. The Port does not physically consolidate any cargo and does not provide any area or facility for the physical consolidation of any cargo. In the event two or more lots of cargo belonging to separate consignees are picked up by an inland carrier at the Port operated container freight station for shipment in the same rail car and rail car loading is requested, such cargo would be loaded in accordance with paragraph 7. Rail carriers, however, do not spot rail cars at the Port's CFS or at any Port terminal or warehouse, and have not done so at any time herein relevant. All rail carriers serving the Port of Seattle pickup cargo by truck and reload the cargo into containers or onto rail cars in their own yards.

22. The Port performs the functions described in paragraphs 9 through 19 above, for both OCP and non-OCP inbound cargo when requested to do so, although requests relating to non-OCP cargo are substantially fewer than requests relating to OCP cargo.

23. The functions performed by the Port as described in paragraphs 9 through 19 above frequently involve cargo located at terminals or warehouses operated by entities other than the Port, such as, for example, Sea-Land or privately operated warehouses and container freight stations.

Discussion and Conclusions

The two jurisdictional issues relate to issues (1) and (3) in the Commission's Order of Investigation and Hearing. These are:

(1) Whether the Port's practices in providing consolidation services and any other services in connection therewith free of charge and only for inbound OCP shipments as permissible under section 17, Shipping Act, 1916; and

(3) Whether the failure of the Port to indicate the availability of its consolidation service in its terminal tariff is contrary to the Commission's General Order 15, 46 CFR 533 and section 17, Shipping Act, 1916.

If the Port's consolidation services are not those contemplated by section 1 or 17 of the Shipping Act, 1916, and the Commission consequently lacks jurisdiction over any such activities, it makes no difference whether the Port charges for these services, whom it charges, or whether the Port publishes anything about the services in its terminal tariff.

If these activities are within the regulatory scheme of the Act, then the Commission's authority must stem from sections 1 and 17 of the Act, i.e., the Port must be found to be acting as an "other person subject to this act" as defined in section 1 and its consolidation activities must be found to be "practices relating to or connected with the receiving, handling, storing, or delivering of property" within the meaning of section 17 of the Act.

Section 1 defines an "other person subject to this act" as follows:

> The term "other person subject to this act" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water. 46 U.S.C. 801.

Section 17 states in pertinent part:

> Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Commission finds that any such regulation or

practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice. 46 U.S.C. 816.

The Nature of the Issues Further Described

The Port does not dispute that it is an other person subject to the Act, or, as such person is commonly known, a "terminal operator." Admittedly the Port owns or operates marine terminals, warehouses, piers, and container freight stations in connection with common carriers by water and publishes a terminal tariff when operating these facilities. (Port's Opening Brief, p. 2.) However, the Port contends that its consolidation service is a separate activity not conducted in connection with common carriers by water. Essentially, the Port claims that its consolidation service relates to the inland dispatch of cargo which is facilitated by its computerized equipment. The Port does not provide any physical handling or moving of cargo in its consolidation service but merely arranges for inland movement at the request of inland consignees and deals exclusively with such consignees and inland rail or motor carriers. The Port characterizes these activities as those of a "shipper's agent" or as those resembling a forwarder or broker with regard to inland dispatching. The Port cites numerous cases in which the Commission has disclaimed juridiction over storage of grain in grain elevators, leases of "back up areas" behind marine terminals, persons engaging in forwarding-type activities on inbound movements of cargo, terminals which carry on separate inland forwarding services, and truckers picking up inbound cargo at ports.[4] The common thread in all of these cases, according to the Port, is that ocean transportation had ended and that the activities were not being performed in connection with water carriers, a jurisdictional prerequisite.

Hearing Counsel contend that the Port's consolidation services are almost entirely performed after the cargo is discharged from the vessel and prior to release to an inland carrier. Therefore, Hearing Counsel argue that the terminal character of the service is maintained, citing Investigation of Storage Practices, 6 F.M.B. 301 (1961). Hearing Counsel also contend that the Port's consolidation services are performed in order to facilitate transfer of cargo to inland carriers, thereby operating terminal facilities, as defined by the Commission in *Status of Carloaders and Unloaders*, 2 U.S.M.C. 761, 767 (1946). Finally, Hearing Counsel argue the necessity of finding the practices in question to be within the Commission's jurisdiction so that the regulatory purposes of the Act can be effectuated, for example, by preventing possible noncompensatory rates and discriminatory practices. Without regulation, they argue, there would be "an open door to the very abuses which section 17 was intended to prevent." (Hearing Counsel's Opening Brief, p. 12.)

CAPA *et al.* contend that the Commission has jurisdiction over the practices in question and that if such practices are found to be unjust or unreasonable, the Commission should take remedial action including the prescription and enforce-

[4] The cases cited are: *Investigation of Wharfage Charges at Pacific Coast Ports*, 8 F.M.C. 654, 656 (1965) (storage of grain in elevators); *Agreement Nos. T-1685, Etc.*, 16 SRR 887, 905-908 (1976), affirmed, 16 SRR 1677 (1977) (leases of back up areas behind marine terminals); *United States v. American Union Transport, Inc.*, 327 U.S. 437 (1946); *Port of New York Freight Forwarder Investigation*, 3 U.S.M.C. 157 (1946); *Freight Forwarder Investigation*, 6 F.M.B. 327 (1961) (outbound forwarding only); *Portalatin Velasquez Maldonado v. Sea-Land Service, Inc.*, 10 F.M.C. 362, 370–371 (1967) (truckers picking up inbound cargo at ports).

ment of just and reasonable practices.[5] CAPA *et al.* argue that it is beyond question that the Port is an "other person" and that it is clear from the facts of record that it is carrying on the business of forwarding or furnishing terminal facilities in connection with common carriers by water with respect to the subject services. CAPA *et al.* state that the root of the problem which competing ports are facing is that the Port was providing the subject services free of charge or at noncompensatory rates. This situation is the type of problem which the Commission is authorized to remedy, according to CAPA *et al.*, citing *California v. United States,* 320 U.S. 577 (1944). CAPA *et al.*, furthermore argue that the Commission has jurisdiction with respect to a variety of practices at terminals, such as free time and demurrage, method of establishing charges at grain elevators, truck and lighter loading, and also forwarding activities which are intimately connected with the receiving, handling, storing, or delivering of property.[6] Therefore, argue CAPA *et al.*, it must be concluded that the Commission has jurisdiction over the subject practices. Furthermore, CAPA, as do Hearing Counsel, view the subject practices as existing in a continuum of transportation connected with ocean transportation and agree with Hearing Counsel that so long as cargo has not been relinquished to the custody of an inland carrier, consolidation activities which facilitate this relinquishment are terminal practices within the meaning of sections 1 and 17 of the Act.

In rebuttal, the Port reiterates its contention that the subject services consist solely of paper work relating to the inland dispatch of cargo and are not connected with common carriers by water. Furthermore, the Port vigorously disputes the contention that because the Port's consolidation services may be conducted while cargo is still physically located somewhere on the Port's premises, such services can be considered to be those in connection with common carriers by water. The Port calls this contention Hearing Counsel's "terrestrial time coincidence theory of expanded jurisdiction." It argues that in the cases cited by Hearing Counsel, the respondents were providing terminal services physically and that in other cases the Commission found no jurisdiction over a separate service even though it was being performed while goods were on a marine terminal's premises.[7]

In my opinion, the Port's contentions are not persuasive. On close analysis it appears that they focus almost exclusively on the inland-related area of the activity in question, ignore the primary reason for institution of the consolidation service, underestimate the significance of the point in time when cargo discharged from oceangoing vessels is placed in the custody of inland carriers, and

[5] As mentioned above, it was agreed that the question of reasonableness of the subject practices was to be deferred until the question of jurisdiction was decided.

[6] The cases cited are: *California v. United States,* 320 U.S. 577 (1944); *Free Time and Dumurrage Charges at New York,* 3 U.S.M.C. 89 (1948) (free time and demurrage); *Rates and Practices of the Pacific Northwest Tidewater Elevators Association,* 11 F.M.C. 369 (1968) (method of establishing charges at grain elevators); *Truck and Lighter Loading and Unloading Practices at New York Harbor,* 12 F.M.C. 166 (1969) (truck detention); *Proposed Rules Governing Business Practices of Freight Forwarders,* 5 F.M.B. 328 (1957) (forwarding activities). *Truck and Lighter Loading* was affirmed *sub. nom. American Export Isbrandtsen Lines, Inc. v. F.M.C.,* 444 F.2d 824 (D.C. Cir. 1970).

[7] *Status of Carloaders and Unloaders,* 2 U.S.M.C. 761 (1946); *Portalatin Velasquez Maldonado v. Sea-Land Service, Inc.,* 10 F.M.C. 362 (1967); *G.C. Schaefer v. Encinal Terminals,* 2 U.S.M.C. 630 (1942); *Agreement Nos. T-1685 As Amended and T-1685-6,* 16 SRR 887 (1976), affirmed, 16 SRR 1677 (1977); *Investigation of Wharfage Charges at Pacific Coast Ports,* 8 F.M.C. 654 (1965).

disregard the legislative history and statutory purposes of those portions of the Shipping Act in question.

Why Consolidation Practices are Terminal Services

It is true, as the Port maintains, that an agency cannot confer jurisdiction on itself if its parent statute fails to confer such jurisdiction. As the Commission itself stated in this regard:

> . . . [W]e wish to point out that this agency's jurisdiction is as set out in statute, and we cannot, by our own act or omission enlarge or divest ourselves of that statutory jurisdiction. *American Union Transport v. River Plate & Brazil Confs.*, 5 F.M.B. 216, 224 (1957).

See also *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726 (1973); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213–214 (1976).

If no authority was granted by the Congress, the obvious remedy is to seek appropriate legislation. However, it is also true that the Shipping Act, like the Interstate Commerce Act and other regulatory statutes, is remedial in nature and that it should be broadly construed to effectuate the remedies intended. In this regard the Commission has stated in *Tariff Filing Practices, Etc. of Containerships, Inc.*, 9 F.M.C. 56, 69 (1965):

> In order to effectuate the remedies intended by the enactment of a regulatory statute such as these, [i.e., the Shipping Act and Intercoastal Act] it is necessary to allow flexible and liberal interpretation of the statute. In this respect the court, in *I.C.C. v. A.W. Stickle and Co.* 41 F. Supp. 268, 271 (1961) . . . stated:
>
> "[I]n determining the true nature of the transportation, it is necessary to have in mind the purpose of the Act. . . . In addition, the court should have in mind the fact that this legislation [i.e., the Interstate Commerce Act] is remedial and should be liberally interpreted to effect its evident purpose and that exemption from the operation of the act should be limited to effect the remedy intended."

See also, *Freight Consolidators Co., Inc. v. U.S.*, 230 F. Supp. 692, 699 (S.D.N.Y. 1964) emphasizing that exemptions from a remedial statute like the Interstate Commerce Act should be strictly construed.

It is therefore proper to interpret legislative intent in terms of the problems which the framers of the legislation had in mind and to consider the legislative purposes, the mischief intended to be eliminated, and the machinery established to do so. *Reduced Rates—Atlantic Coast Ports to Puerto Rico*, 9 F.M.C. 147, 149 (1965), *Richland Development Co. v. Staples*, 295 F.2d 122, 128 (5 Cir. 1961), *Gemsco, Inc. v. Walling*, 327 U.S. 244, 260 (1945). Furthermore, if a statute is drafted in broad language, an agency should not construe it narrowly so as to frustrate congressional intent. *Volkswagenwerk v. Federal Maritime Commission*, 390 U.S. 261, 273 (1968), *United States v. American Union Transport, Inc.*, 327 U.S. 437, 457 (1946), 90 L. ed. 772, 782.

There are two key phrases in sections 1 and 17 of the Act which are at the heart of this controversy. The first is the phrase "other terminal facilities in connection with a common carrier by water" in section 1. The second is the phrase "practices relating to or connected with the receiving, handling, storing, or delivering of property" in section 17.

It seems reasonable to link the determination of the status of an other person subject to this act (for the sake of convenience, a "terminal operator") defined in section 1 of the Act to the type of activity set forth in section 17. After all, the major reference to practices of terminal operators in the Shipping Act, other than in section 15, which is not relevant here, is section 17.

The Port argues correctly, I believe, that merely because a person happens to be a terminal operator does not mean that everything he does is to be regulated by the Commission. For example, no one would argue that the Port's operation of the Seattle-Tacoma International Airport is subject to the jurisdiction of a water-transportation regulatory agency. Nor would one argue that the Port's operation of parks or marinas unrelated to ocean transportation would fall under the Commission's regulation. Obviously there must be some "connection with common carriers by water" as defined in the Shipping Act and the practices in question must be "relating to or connected with the receiving, handling, storing, or delivering of property" which will move or has moved via common carriers by water. The Commission has long realized that a person would subject himself to Commission regulation only by engaging in such practices or activity. *See Wharfage Charges and Practices at Boston, Mass.*, 2 U.S.M.C. 245, 247 (1940); *Portalatin Velasquez Maldonado v. Sea-Land Service, Inc.*, 10 F.M.C. 362, 371 (1967); cf. *Intercoastal Investigation, 1935*, 1 U.S.S.B. 400, 432 (1935).

If there is one principle that is well settled, however, it is that the status of a person is not determined by his own declarations as to what he is but by what he is in fact doing. *See Possible Violations of Shipping Acts*, 16 SRR 425, 434–435 (1975), and cases cited therein. Very briefly, the Supreme Court stated with regard to regulated common carriers:

> . . . whether a transportation entity is a common carrier depends not upon its corporate character or declared purposes but upon what it does *United States v. California*, 297 U.S. 175, 181 (1936), cited in *Possible Violations of Shipping Acts*, cited above, 16 SRR at p 435

It is sometimes necessary to pierce surface appearances to determine the real character of a business. *Lifschultz v. United States*, 144 F. Supp. 606, 611 (S.D.N.Y. 1956). It is also necessary to make sure that a person subject to regulation is not segregating his activities for the purpose of avoiding lawful regulation and engaging in discriminatory activities. *New Orleans Steamship Association v. Bunge Corp.*, 8 F.M.C. 687, 695 (1965); *Agreement 9597*, 12 F.M.C. 83, 101–102 (1968).[8]

The fact that the Port calls itself a "shipper's agent" when performing its consolidation services or believes that it resembles a type of inland forwarder has no legal significance. Self-designations do not control, as the cases cited show. Interestingly, persons have called themselves "shipper's agents" in past cases to avoid regulation under the Shipping Act but have not prevailed. *See, e.g., Possible Violations of Shipping Acts*, cited above; *New York Freight Forwarder Investigation*, 3 U.S.M.C. 157, 164 (1949); *United States v. American Union Transport, Inc.*, cited above, 90 L. ed. at p. 773 (summarizing this argument by independent freight forwarders erroneously claiming not to be subject to Shipping Act regulation).[9]

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[8] There is absolutely no evidence that the Port has deliberately set up its consolidation services either in order to avoid lawful regulation or to perpetrate discriminations In fact as I discuss later, the motivation for instituting such services seems to be purely economic and promotional, i e., to enhance the attractiveness of the Port

[9] Under the Interstate Commerce Act, a "shippers's agent" is a recognized entity and is specifically not regulated as a Part IV

Let us therefore examine closely what the Port is really doing when performing its consolidation services. The Port emphasizes that it furnishes no labor in moving cargo from its premises when performing these services but rather fills out documents and arranges for inland pickup by inland carriers. The Port claims that it is performing only paper work and some type of inland forwarding on behalf of consignees. Therefore, according to the Port, it is not furnishing a terminal service in connection with common carriers by water nor a service relating to receiving, storing, delivering, etc., as set forth in section 17. Furthermore, these services are supposedly performed when ocean transportation has ended.

But these claims are simplistic and distorted. For one thing they ignore the fact that the property which the Port is assisting to dispatch from its premises has originated in the Far East, has traveled thousands of miles by water via common carriers, has been discharged from vessels, stored in warehouses and marine terminals owned by the Port, and is destined in most instances for distant inland locations, as "OCP" cargo.[10] In other words, the cargo is moving in a continuous stream of transportation, the largest segment of which is, by far, ocean transportation. This situation casts serious doubt on the Port's claim that the consolidation services have no connection with common carriers by water. But let us look further.

Even before the cargo arrives at the Port, the Port receives a copy of the ships' manifests by mail or messenger from the local steamship offices. Production of such manifests is even provided by the Port's tariff 2-F, Item 10280. Information from the manifests is fed into the Port's computer. This is done to determine overages, shortages or damages to cargo, not for consolidation purposes. The Port also uses this data processing equipment to record inbound cargo received, print delivery receipts and record delivery to inbound carriers. The Port operates warehouses and provides labor for rail car loading from the container freight stations which it operates, if requested. West Coast truckers provide their own labor for truck loading.

The Port thus maintain an inventory on all cargo stored at marine terminals and warehouses and the container freight station which it operates. Its consolidation service is triggered by a request from an inland consignee or his agent who sends a letter of instruction and supporting documents. At that point the information stored in the Port's computer showing cargo locations is made available to Port personnel for purposes of consolidation and facilitation of inland dispatch via inland carriers. The computer specifically furnishes Port personnel with information as to all cargo awaiting consolidation to a certain area. Port personnel select cargo for a particular consolidation and place that selection into the computer which then prints out a separate pick-up order to the inland carrier for each item of cargo in that consolidation and a master bill of lading, such cargo

Freight Forwarder. But a person must truly be performing the limited functions of such an "agent" to be free of regulation under that Act. *See Columbia Shippers and Receivers Association, Inc. v. U.S.*, 301 F. Supp. 310, 321–322 (D.Del. 1969); *Metropolitan Shipping Agents of Ill., Inc. v. United States*, 342 F. Supp. 1266 (D.N.J. 1972); *Chicago R. Co. v. Acme Fast Freight Co.*, 336 U.S. 465, 484–485 (1949); 49 U.S.C. 1002 (c) (2).

[10] "OCP" cargo is explained in Investigation of *Overland/OCP Rates and Absorptions*, 12 F.M.C. 184 (1969), affirmed *sub.nom.*, *Port of New York Authority v. F.M.C.*, 429 F.2d 663 (5 Cir. 1970). "OCP" cargo is cargo arriving from the Far East and adjacent areas which is destined to inland points in the United States, roughly east of the Rocky Mountains. The conferences which employ "OCP" rates design them with the intention of causing cargo to be routed through West Coast ports on its way to the inland territory.

then being withdrawn from the inventory of cargo awaiting consolidation. The pick-up orders and master bill of lading are delivered to inland carriers who pick cargo up at various terminals or warehouses. The inland carriers give the Port information as to each item picked up for a given consolidation and issue their bills of lading and waybills. The Port's computer then uses this information to print out a final movement order ready for mailing to the customer, notifying him of the manner and time of the inland shipment of his cargo. Some inland bills are prepaid (advanced by the Port from its general fund) and charges prorated to various ultimate consignees. Others are sent collect. The Port offers consolidations by truck and by rail "piggy-back" service. Inland rates are generally based on freight all kinds rates offered by inland carriers. The Port allocates inland charges among multiple consignees on the basis of individual weights compared to totals. Port personnel involved in the above activities are employed at the Port's administrative offices. No physical labor is provided by the Port as to actual loading or consolidating by the inland carriers. Frequently the Port's consolidation services described above involve cargo located at terminals, warehouses, or freight stations operated by lessees of the Port and sometimes involve non-OCP cargo.

The above services are essentially a sophisticated form of maintaining an inventory by computer, which aids in the preparation of documents and assists Port personnel in selecting cargo for consolidation, and preparing shipping documents for inland carriers and ultimate consignees. The benefits are obvious. Cargo movement is facilitated, inland carriers are given instructions promptly, and ultimate consignees enjoy the benefits of lower FAK rates through consolidation. Are these "terminal" services "in connection with water carriers" which are "relating to . . . delivering property" or merely inland dispatching? Although it is tempting to concentrate merely on the inland dispatching feature of the service, it is nevertheless impossible to ignore as does the Port, the fact that the cargo is moving in a stream of transportation, the bulk of which is transoceanic and that the essential purpose of the service is to facilitate the exchange of cargo between two modes of transportation, something which epitomizes the function of any terminal.

That the operations of the Port in connection with consolidation and inland dispatch are those of terminals is apparent on the basis of numerous cases defining the functions of terminals and terminal facilities. The essential nature of a marine terminal as a point of interchange designed to make transfer of goods from one mode or phase of transportation to another has long been recognized. In *Philippine Merchants Steamship Co., Inc. v. Cargill, Inc.*, 9 F.M.C. 155, at p. 163 (1965), the Commission defined "terminal facilities" to mean "all those arrangements, mechanical and engineering, which make an easy transfer of passengers and goods at either end of a stage of transportation service." The Commission cited the same definition in an early case, *Status of Carloaders and Unloaders*, 2 U.S.M.C. 761, 767 (1946). The Commission further explained the nature and role of one furnishing terminal facilities, stating:

In that case [i.e., *Status of Carloaders and Unloaders*] independent contractors who transferred property between railroad cars and place of rest on a pier were held to be "furnishers of terminal facilities" because the equipment and labor they furnished did provide for such easy transfer. . . . One who operates an important link in the chain of transference of goods "furnishes" a terminal facility whether or not he owns that link. *Id.*, p. 163.

The very essence of a terminal operation is that of a point of interchange or a link between one mode of transportation and another. Indeed that is its reason for being. The vital role of such operations as a link in the stream of transportation has been recognized by the Commission and the courts not only in the cases cited above but in others as well. For example, in *The Boston Shipping Assoc., Inc. v. Port of Boston*, 10 F.M.C. 409, 414 (1967), collateral appeal denied, *sub. nom., Marine Terminal vs. Rederi. Transatlantic*, 400 U.S. 62 (1970), the Commission stated:

Terminal operators form an intermediate link between the carriers and the shippers or consignees. In consequence *the terminal operators perform some services for the carriers and some services for the shippers*. (Case citation omitted.) (Emphasis added.)

The Commission said virtually the same thing regarding the function of a terminal as constituting an "intermediate link" performing "some services for the carriers and other services for the shippers" in *Terminal Rate Increase—Puget Sound Ports*, 3 U.S.M.C. 21, 23 (1948).

In *American Export Isbrandtsen Lines, Inc. v. F.M.C.*, 444 F.2d 824 (D.C. Cir. 1970), the Court emphasized the terminal operator's status as tantamount to that of a public utility and its duty to maintain efficiencies so as to facilitate the flow of cargo over its piers. In this regard the Court stated:

The law for centuries has recognized that public wharves, piers and marine terminals are affected with a public interest. (Footnote omitted.) These Terminals stand athwart the path of trade. . . . Efficiency of manpower, ships and vehicles is dependent upon the prompt handling of such cargo and determines whether the flow of interstate and foreign commerce is obstructed or facilitated. The public interest in their efficient operation is unquestioned. 444 F.2d at p. 828.

The Court proceeded to discuss the duties of the Commission to insure that the public interest in efficiencies at terminals be safeguarded, stating:

Because of the vital importance of these Terminals to interstate and foreign commerce, Congress in the Shipping Act of 1916 provided for their regulation by the Federal Maritime Commission and authorized it to promulgate and enforce just and reasonable regulations and practices related to or connected with the receiving, handling, storing, or delivering of property at harbor terminal facilities. . . . The power thus conferred is . . . to be used for the purpose of facilitating the free flow of commerce by guaranteeing an efficient terminal system. *Id.*, at p. 829.

Again, in *American Export Isbrandtsen Lines, Inc. v. F.M.C.*, 389 F.2d 962, 968 (D.C. Cir. 1968), the Court not only recognized the importance of facilitating movement of cargo through marine terminals but emphasized that the Commission acted well within its authority under section 17 of the Act in ordering terminal operators to devise rules which would penalize the operators for causing undue delay in making cargo available for trucks at the terminals. The court stated in this regard:

Imposing liability for truck detention on the terminal operators will create an incentive for them to take whatever steps they can to reduce the congestion and the costly, wasteful delays which now characterize pier operations on the New York waterfront. Savings from efficiencies will presumably be passed on to shippers and receivers and, ultimately, will accrue to consumers. *Obviously the order of the Commission bears directly on a practice or rule relating to the handling of cargo and is clearly within its statutory authority.* (Emphasis added.)

There are several greatly significant points to remember when reading the above cases as well as cases I will discuss below. First, the Commission's *jurisdiction* over *activities* of *terminal* operators is to be broadly construed because of the vital importance of marine terminals in the stream of transportation and the congressional intent to prevent unreasonable or discriminatory practices at such terminals. Secondly, section 17 of the Act is not confined to practices involving physical labor in moving cargo around piers and terminals. It extends also to activities affecting terminal efficiencies and matters involving facilitation of cargo through the terminals, regardless whether some of the services are performed for consignees rather than for carriers; that is, some activities falling under the purview of section 17 may be ancillary or auxiliary to physical services performed by others at the terminals. There are many cases illustrating these principles in addition to those cited above.

In *American Export Isbrandtsen Lines, Inc. v. F.M.C.*, cited above, 389 F.2d 962, and further discussed below, the terminal practice involved payments of penalty moneys for detaining trucks and referred additionally to an "appointment system" to schedule trucks for service. Such payments and appointments were ancillary to physical labor provided in loading trucks and were designed to improve the flow of cargo through the terminals.

In *Philippine Merchants Steamship Co., Inc. v. Cargill, Inc.* cited above, 9 F.M.C. at p. 159, such non-physical, auxiliary terminal services as the following were published in the respondent's terminal tariff: "checking cargo to or from vessel as required," "ordering cars," "preparing manifests, loading lists or tags covering cargo loaded aboard vessel," "supplying shippers and consignees with information regarding cargo and sailing and arrival dates of vessels," "provide a telephone service."

In *Baton Rouge Marine Contractors v. Cargill, Inc.*, 18 F.M.C. 140 (1975), affirmed, *sub. nom. Cargill, Inc. v. Federal Maritime Commission*, 530 F.2d 1062 (D.C. Cir. 1976), the terminal's "service and facilities" charge imposed on stevedores which was under investigation under section 17 included the furnishing of such things as "water, toilets, telephones and utilities." *Id.*, 18 F.M.C. at p. 163.

Other examples of ancillary or auxiliary services or practices held to fall within the scope of section 17, although they do not directly constitute physical moving of cargo off terminal premises, are free time and demurrage, allocation methods of establishing terminal charges, establishment of truck detention rules, and ocean forwarding. (See cases cited by CAPA *et al.* in footnote 6 above.)

Indeed, in some cases the Commission has upheld the assessment of a terminal charge known as "wharfage" under section 17 even when virtually no services are performed at all. *See Investigation of Wharfage Charges at Pac. Coast Ports*, 8 F.M.C. 653 (1965); *Evans Cooperage Co., Inc. v. Board of Commissioners*, 6 F.M.B. 415 (1961).

Finally, the position of the Port that its consolidation services which promote movement of cargo from terminals to inland carriers should be considered to be services in connection with inland carriers and not in connection with water carriers is difficult to accept in view of the facts in *Terminal Rate Increases—Puget Sound Ports*, cited above, 3 F.M.C. 21, and certain provisions in the Port's present terminal tariff. In the case cited, the Port had proposed to amend the definition of its "service charge" which it had initiated. This was a charge assessed against vessels for the performance of services "incidental to receiving and delivering freight. . . . " *Id.*, p. 25. The Port proposed to define the charge in greater detail and in so doing included as part of the service the following element: "5. Delivering cargo to consignees or connecting lines and taking receipts therefor." Also included in the proposed definition was the following: "9. Giving information to shippers and consignees regarding cargo, sailings and arrivals of vessels, etc." *Id.*, p. 26. Why did not the Port consider that those services were performed in connection with inland carriers and not common carriers by water? On the contrary, they proposed to assess the service charge against the vessel. Yet in this case the Port claims that the use of its computer and preparation of documents to aid in moving cargo from terminals to inland carriers is not connected with common carriers by water.

The proposed definition was found defective and unreasonable by the Commission for reasons unrelated to the specific elements specified above. *Id.*, p. 26. However, even today the tariff published by the Port of Seattle shows a "service and facilities charge" for services designed to assist the movement of cargo "[f]rom vessels to consignees, their agents or connecting carriers. . . . " (See Seattle Terminal Tariff No. 2-F, F.M.C.—T. No. 3, Item 80000, effective July 1, 1974.) Not only is such a charge not performed merely in connection with inland carriers, even though it refers specifically to "connecting carriers" but it is assessed against vessels. In yet another part of the Port's present tariff, furthermore, the Port provides a car loading and unloading service which includes "loading . . . cargo between wharf premises and railroad cars." (See Port's Tariff, Item 35050, effective July 1, 1977.) Why does the Port believe such services to be includable in its terminal tariff, yet contend that its consolidations service which also assists movement of cargo to railroad cars is not really a marine terminal service but one performed in connection with rail carriers? Do not the service and facilities charge and the car loading service have the same ultimate objective as the consolidation service, namely, to facilitate movement from vessel through terminals to inland carriers?

Although the Port may attempt to seek some distinction among these services because physical labor to move cargo may be involved as part of the service charge and the car loading charges, such distinction will not suffice. The Port does provide labor and equipment in performing its consolidation services. Human beings employed by the Port must feed its computer and make use of the computer printouts, select cargo for consolidation, and contact inland carriers, among other things. The Commission has held that one who furnishes equipment and labor to provide for easy transfer between railroad cars and place of rest on piers is furnishing a "terminal facility." *See Philippine Merchants Steamship Co., Inc. v. Cargill, Inc.*, cited above, 9 F.M.C. at p. 163; *Status of Carloaders and Unloaders*, cited above, 2 U.S.M.C. 761, 767. The point is that the terminal labor and equipment need not be only physical laborers pushing cargo around the piers and the equipment is not limited to lift trucks, or other mobile equipment used to move the cargo. In *Status of Carloaders and Unloaders*, the Commission held that terminal facilities constituted "all those arrangements, mechanical and engineering, which make an easy transfer of . . . goods at either end of a stage of transportation service." 2 U.S.M.C. at p. 767. The Commission further stated that "[f]acilities, when 'specifically applied to carriers, means everything necessary for the . . . safety and prompt transportation of freight'." *Id.*, p. 767. Certainly the Port's computer and personnel working with it are being used to assist in the transfer of cargo at one end of a stage of transportation. As I discuss below, the fact that the Port has improved its services by using modern equipment and technology does not mean that the Commission must discontinue the application of section 17.

Finally, the Port contends that cargoes involved in consolidation pass through terminals operated by the Port's lessees, a fact which supposedly means that the Port's service is separate and distinct from any marine terminal service. I have already shown how the Port's service is related to the delivering of property and that the Port is furnishing facilities to promote movement through marine terminals. However, the error of the argument is further illustrated by reference to other cases and to the Port's own tariff.

The fact is that the Port's consolidation services are intimately related to movement of cargo through terminals and furthermore that it makes no difference whether the cargo moved through marine terminals operated by the Port's lessees or by the Port itself. The entire service operates in contemplation of improving movement throughout the Port area, not merely a portion operated by the Port itself. Indeed, the close relationship of the Port and its lessees is shown by the fact that these lessees or other operators of the marine terminals owned by the Port have concurred in the Port's terminal tariff, i.e., they follow the Port's rules, regulations and charges almost entirely. (See Seattle Terminal Tariff No. 2-F, F.M.C.—T No. 3, 10th rev. p. 4, effective August 1, 1977, listing 11 lessee terminal operators in addition to the Port itself.) The Port's consolidation services benefit every terminal operator at the Port since they should attract more business through the Port. In a sense, the Port, with its consolidation services, acts in conjunction with its lessee terminal operators. It would be rather unrealistic and naive to separate or segment the Port into pieces and pretend that the Port acted alone without regard to its lessee terminal operators when arranging for consolidation and pick-up by inland carriers. Cf. *Investigation of Storage Practices*, cited above, 6 F.M.B. at p. 312. As noted above, the Commission has been careful not to permit regulated companies to segregate their activities so as to avoid regulation.

Numerous cases further illustrate that the Port cannot detach itself from its status as an other person subject to the Act merely because it is a lessor. Indeed, terminal leases have often been held to be subject to section 15 of the Act, which means that both the lessor as well as the lessee are considered to be persons subject to the Act. *See, e.g., Greater Baton Rouge Port Commission v. U.S.*, 287 F.2d 86 (5 Cir. 1961); *Agreement No. T-4; Term. Lease Agree., Long Beach, Calif.*, 8 F.M.C. 521, 527 (1965); *Agreement No. T-1768-Terminal Lease Agreement*, 9 F.M.C. 202 (1966); *Terminal Lease Agreement at Long Beach, California*, 11 F.M.C. 12 (1967); *Agreements Nos. T-1953* and *T-1953-A*, 11 F.M.C. 156 (1967). In *California v. United States*, cited above, 320 U.S. at p. 580, the Court found no trouble in stating that the State of California and the City of Oakland were "providing facilities for water-borne traffic" and were doing so "[w]hether the facilities are operated by the City directly or leased to another. . . . " *Id.*, at p. 580.

The Need to Avoid Reading Section 17 Narrowly

An unduly narrow reading of the broadly drafted language of section 17 is further shown to be unjustified in view of the statement of Representative Alexander on the floor of the House noted by the Court in *United States v. American Union Transport, Inc.*, cited above, in which he emphasized that the agency administering the Shipping Act must not only regulate common carriers by water but "must have supervision of all those incidental facilities connected with the main carriers." 327 U.S. at p. 451. It must be remembered that section 17 refers to regulations or practices not just "connected with" but "relating to" terminal activities and furthermore that such activities are not confined to "receiving" or "storing" property but to "delivering." Why, then, are activities designed to record inventories of stored cargo, locate such cargo, facilitate their movement off marine terminals in consolidated shipments by assisting delivery to inland carriers, even to the point of preparing documentation in order to facilitate movement off the terminals, not "related" to the delivery of property which had been stored at marine terminals? Furthermore, how can the congressional intent to promote facilitation of commerce by supervising facilities incidental to common carriage by water and to promote efficiencies of marine terminals be fulfilled if the Commission has no authority whatsoever over practices designed by an admitted terminal owner and operator such as the Port to facilitate the flow of ocean-borne cargo through the Port's premises? As the Supreme Court stated in *United States v. American Union Transport, Inc.*, cited above, jurisdiction over persons performing vital functions which are intimately related to practices contemplated by the Shipping Act "would seem essential to effectuate the policy of the Act and the absence of jurisdiction might well prevent giving full effect to that policy." *United States v. American Union Transport, Inc.*, cited above, 320 U.S. at p. 447.

It has long been recognized that there is a duty of terminal operators to provide adequate facilities and promote movement of cargo through their premises and that the Commission has a legitimate concern to insure that this duty is performed. *See Truck Loading and Unloading Rates at New York Harbor*, 13 F.M.C. 51, 55 (1969), *American Export Isbrandtsen Lines, Inc. v. F.M.C.* cited above, 444 F.2d at pp. 828, 829, and 389 F.2d 962, 968 (D.C. Cir. 1968). Furthermore, the Court in *American Union Transport, Inc.*, was especially persuaded that the Commission must be held to have had jurisdiction over independent freight forwarders in that case because such forwarders were in a position to engage in practices which the Shipping Act was attempting to eliminate. 320 U.S. at pp. 450–451. There is no evidence on this record, which was developed primarily to determine the question of the Commission's jurisdiction, that the Port has been or is engaging in predatory or discriminatory practices. However, the Port, by contending that the Commission has no jurisdiction over its consolidation services and by not publishing them in its tariff, is, as were the forwarders in *American Union Transport, Inc.*, in a position to engage in such practices. If it were to do so, furthermore, and the Commission were held to be without jurisdiction, persons suffering from such practices could not turn to the Commission for protection. Again, although the Port cannot be found on this record to have engaged in predatory or discriminatory practices, there is a long history well-known to this Commission, of excessive competitive zeal at West Coast ports which have led to a variety of unreasonable practices usually involving giveaways.[11] CAPA *et al.* have themselves contended that the very genesis of this proceeding was the institution of the Port's consolidation services performed without charge, although since 1974, the Port does charge for the service.

It is significant, furthermore, in view of the previous discussion regarding the extension of section 17 to ancillary, non-physical services that the Court in *American Union Transport, Inc.*, cited above, did not seem concerned that section 17 as well as section 1 of the Act would apply to persons (in that case, forwarders) who had no physical labor to perform in moving cargo and no contractual relationship with carriers. In other words, their activities, even if only in the nature of paper work, were held to be "in connection with a common carrier by water" as defined in section 1.[12] Nor, as we have seen, did indirect relationship to delivery of property convince the Court in *American Export Isbrandtsen Lines, Inc. v. F.M.C.*, cited above, 389 F.2d 962, that rules imposing penalties on terminal operators who detained trucks waiting to pick up cargo were not practices relating to "the handling of cargo." In that case, the terminal operators had argued that no such practices were involved because the rules only affected the settlement of accounts between the truckers and terminal operators. The Court refused, however, to read such a narrow meaning into the words "relating to . . . delivering of property" contained in section 17. *Id.*, p. 968.

The Significance of the Port's Performing its Services Before Release of Cargo to Inland Carriers

A final flaw in the Port's arguments concerns its disregard of the significance of the fact that virtually all facets of the consolidation services performed by the Port's personnel utilizing its computer including the preparation of pick-up orders and master bills of lading for delivery to inland carriers who come to the terminals to take possession of the cargo takes place while the cargo is still in the custody of the various marine terminals on the Port's premises operated by the Port or its lessees. The Port derides Hearing Counsel's contention that until the cargo is relinquished to an inland carrier, the Port's services still fall within the jurisdiction of the Shipping Act. The Port sees no significance to the time of

[11] *See, e.g., Investigation of Free Time Practices–Port of San Diego*, 9 F.M.C. 525, 549 (1966) and the cases cited in footnote 18; see also *Storage Practices at Longview Washington*, 6 F.M.B. 178 (1960), *Practices, etc. of San Francisco Bay Area Terminals*, 2 U.S.M.C. 558 (1941) affirmed *sub. nom. California v. United States*, 320 U.S. 524 (1944), *Investigation of Storage Practices*, 6 F.M.B. 301 (1961). All of these cases illustrate the concern of the Commission over excessive giveaway prctices among West Coast ports, such as free storage, noncompensatory demurrage, noncompensatory rentals on terminal leases, and the like.

[12] The forwarders had argued that they were merely shippers' agents, performed no accessorial services, and had no contractual relationship with carriers. See their arguments summarized in 90 L. Ed. at p. 773. The dissenting opinion in the case pointed out that the forwarders maintained no physical connection with common carriers at all, yet the majority found that their activities were performed "in connection with common carriers by water." 327 U.S. at p. 462.

transfer of cargo to inland carriers since it believes the service in question relates to inland dispatching and not ocean shipping. The Port errs.

It is elemental law that the obligations of a common carrier by water do not terminate merely because it has discharged cargo somewhere at a marine terminal. The carrier, through his agent or contractor, who is usually a marine terminal operator, must provide adequate terminal facilities for deposit of the goods and allow a reasonable period of time for consignees or their agents to pick up the goods at an accessible place. *Truck Loading and Unloading Rates at New York Harbor*, cited above, 13 F.M.C. at pp. 61–62; *American President Lines, Ltd. v. F.M.C.*, 317 F.2d 887, 888 (D.C. Cir. 1962), *The Boston Shipping Assoc., Inc. v. Port of Boston*, cited above, 10 F.M.C. at p. 415. *Terminal Rate Increases –Puget Sound Ports*, 3 U.S.M.C. 21, 23–24 (1948).[13] In effect, the terminal operator becomes the agent of the carrier in performing these obligations, 10 F.M.C. at p. 415; *Free Time Practices–Port of San Diego*, 9 F.M.C. 525 (1966). The carrier or his agent may furthermore be forced to become an involuntary bailee or warehouseman with reduced liability if the consignee fails to come for his cargo within a reasonable time. Cf. Am. Jur. 2d Carriers; §§ 396, 674, 681.

Until the cargo located on marine terminals is relinquished to inland carriers, the Commission has specifically held that its jurisdiction applies. *See Investigation of Storage Practices*, 6 F.M.B. 301, 314 (1961). In that case, a storage company known as "TOA" had created a plan with an ocean carrier and with the cooperation of the Port of Stockton had provided free warehousing to importers as an inducement to use the Port of Stockton.[14] While TOA offered free warehousing, the Port prepared inland bills of lading and provided labor to move cargo to inland carriers. Except for the free warehousing and labor, this joint operation bore some resemblance to Seattle's inasmuch as TOA claimed, as does Seattle, that it was not subject to the Act because ocean transportation had ended when TOA took possession of the goods in its warehouse, which it did after the 7-day free time period allowed by the carrier or port had expired. Nevertheless, because the goods had not yet been relinquished to inland cariers while they rested in TOA's warehouse, the Commission found TOA to be performing a terminal service in connection with common carriers by water. *Id.*, at p. 314. In this regard, the Commission plainly stated:

> The terminal character of the facilities furnished continues until the inland carrier takes possession. The Board has assumed jurisdiction up to this point. (Case citation omitted.) . . . The terminal aspect of handling property is not complete at the time goods are delivered by Stockton to the "lessee" of its assigned warehouse space. *Id.*, at p. 314.

In *G.C. Schaefer v. Encinal Terminals*, 2 U.S.M.C. 630 (1942), a case relied upon by the Port, the significance of the role of an inland carrier in taking possession of goods is vividly illustrated. The Port relies on this case as support for its argument that its consolidation services are separate and distinct from its terminal services and therefore are outside the scope of Shipping Act regulation.

[13] In a case cited by the Port itself, the Commission stated:

> Thus, the transportation service offered by a water carrier, when viewed as an obligation which attaches to common carriage, begins or ends at the place provided on a terminal for the receipt or delivery of property. *Portalatin Velasquez Maldonado v. Sea-Land Service, Inc.*, cited above, 10 F.M.C. at p. 370.

[14] As noted above, this has been a traditional device found among West Coast ports in the exercise of excessive competitive zeal and has been consistently held to be unlawful by the Commission.

Examination of the facts in that case, however, demonstrates the critical fact that the reason why the service offered by Encinal, which in other respects was a terminal operator subject to Shipping Act jurisdiction, was outside Shipping Act regulation, was that it amounted to a full-blown consolidation, delivery and distribution service which shortly thereafter became a Part IV freight forwarder service regulated by the Interstate Commerce Commission. Such separate service was in fact and shortly thereafter in law that of a common carrier (Part IV forwarders being common carriers, unlike Shipping Act forwarders, 49 U.S.C. 1002 (a)(5)); *Japan Line, Ltd. v. U.S.*, 393 F. Supp. 131 (N.D. Cal. 1975).

Encinal had been consolidating cargo brought to its premises by truck, rail, or discharged by vessels, and apparently had been assuming forwarder status. As was noted, this separate operation was on the verge of being regulated as common carriage, as the bill which became Part IV of the Interstate Commerce Act was pending. *Id.*, at p. 631. Of course, if a terminal operator wishes to commence a common carrier operation as an I.C.C.-Part IV forwarder and takes custody of goods somewhere on its premises, previous carriers, whether by ocean, rail, or truck, have relinquished custody of the goods which are no longer in marine terminals but in a common carrier's receiving station.

The same point regarding transfer of the goods to inland carriers is illustrated in a case cited by the Port, namely, *Portalatin Velasquez Maldonado v. Sea-Land Service, Inc.*, cited above, 10 F.M.C. 362. In that case, truckers, i.e., motor carriers who came to a port served by the water carrier to pick up cargo at the terminal were held not to be other persons subject to the Act. But the Commission took pains to explain that the obligations of the water carrier had ended when it provided a place on the terminal for delivery of the cargo. *Id.*, pp. 370, 371. In the instant case, no one is contending that the rail or motor carriers coming to the Port's marine terminals are subject to the Shipping Act. The contention is that the Port, which furnished computerized equipment and personnel operating such equipment for the purpose of facilitating transfer from terminals to the rail or motor carrier is an other person and is performing a terminal service under sections 1 and 17 of the Act.

Nor does anyone contend that the Port, in performing these services, intends to operate as a Part IV forwarder, i.e., as a common carrier.[15] The Port's services therefore are incidental services of marine terminal operators and continue as such until inland carriers take possession.

The Need to Keep Abreast of the Port's Technological Innovations

The instant case presents a situation calling for Commission adaptability to the world of modern technology. What the Port has done in essence is to make use of modern computerized technology to advance the art of providing terminal services. Instead of utilizing old-fashioned cargo checkers or having someone compile an inventory of cargo located at the Port's premises by hand, the Port records this information with its computer, utilizes the computer to locate and consolidate cargoes destined for common inland locations, and prints out pick-

[15] See paragraph 19, in the above findings of fact, in which the Port stipulated that "delivery to final destination is dependent on, and the responsibility of, the inland carrier service."

up orders and master bills of lading for inland carriers. Thus modern technology serves to expedite movement of cargo through the Port's premises and serves the fundamental objective of any marine terminal, i.e., to facilitate interchange of cargo from one mode of transportation to another. This employment of modern technology, however, should not cause the Commission to disregard the terminal nature of the operation nor to ignore the concern of the Congress that enacted the Shipping Act that terminal operators must not engage in certain types of prohibited activities.

The Commission has exhibited an awareness that it must adapt its regulatory policies to meet the changes introduced by modern technology and has met the challenges presented by such changes. The most salient example of this type of flexibility has been seen in the case of intermodalism and the filing of single-factor intermodal tariffs. When these tariffs began to come into use, the Commission quickly adapted itself to receive them and encouraged the employment of new techniques in the shipping industry. In *Disposition of Container Marine Lines*, 11 F.M.C. 476, 489 (1968), the Commission explained its flexible philosophy in language which is equally applicable to the present case as follows:

In fact the Federal Maritime Commission can and must play an important role in encouraging improved services for shippers. . . . [T]he Commission does not intend to create or permit impediments to the improvement of shipping services. . . . *[N]o regulatory agency can permit regulation to be outstripped by new techniques in the industry.* Progressive regulation is required in the interest of encouraging the modernization of shipping services. (Emphasis added.)

The Commission proceeded to quote pertinent language from the Supreme Court's decision in *American Trucking Assns., Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967), as follows:

. . . flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

Then the Commission summed up its position as follows:

It is indisputable, therefore, that the Federal Maritime Commission must assume a flexible posture and *must view broadly, when necessary, its regulatory purposes and governing laws and rules.* (Emphasis added.)

As both the Supreme Court in the *American Union Transport, Inc.*, case, cited above, and the Commission in *Disposition of Container Marine Lines*, recognized, an unduly narrow interpretation of broadly drafted statutory language would frustrate congressional purposes. (See the *American Union Transport, Inc.*, case, 327 U.S. at pp. 443, 447, 456; see also *Disposition of Container Marine Lines*, 11 F.M.C. at pp. 482–483.)[16]

1 therefore conclude that the Port's consolidation services are practices relating to or connected with the receiving, handling, storing, or delivering of property within the meaning of section 17 of the Act and that when the Port

[16] In the latter case the Commission demonstrated its concern that it not defeat congressional purposes, stating:

. . . [T]he Commission need be ever mindful of its responsibilities as a body to which Congress had delegated certain responsibilities. The exercise of that delegated authority was intended by Congress, and must be interpreted by us, to be performed in the most judicious manner in our quasi-judicial capacity and in our best discretion. The administration of the Commission's duties requires flexibility of action and purpose when necessary and possible.

performs such services, they relate to furnishing terminal facilities in connection with common carriers by water within the meaning of section 1 of the Act.

The Issue Regarding Tariff Publication

The Commission's issue (3) also questions whether the failure of the Port to indicate the availability of its consolidation services in its terminal tariff constitutes a violation of the Commission's General Order 15, 46 CFR 533, as well as section 17 of the Act. In view of the above finding regarding the nature of the services in question, it must follow that the Port has failed to comply with the General Order and section 17 by failure to publish the service in its terminal tariff. Numerous decisions of the Commission support this finding. *See, e.g., Baton Rouge Marine Contractors v. Cargill, Inc.*, cited above, 18 F.M.C. at p. 164; *Ballmill Lumber & Sales Corp. v. Port of N.Y. Authority*, 12 F.M.C. 29, 33 (1968); *Truck and Lighter Loading and Unloading*, cited above, 9 F.M.C. at p. 517; *Empire State H'W'Y Transp. Ass'n v. American Export Lines*, 5 F.M.B. 565, 590 (1959); *Transportation of Lumber Through Panama Canal*, 2 U.S.M.C. 143, 149 (1939).[17]

The Port argues that there is no violation of the Commission's General Order 15 because that regulation pertains to "port terminal facilities" which the Port argues to mean physical services performed on those physical facilities. This argument of course is consistent with the Port's contention that its consolidation service is an independent service consisting primarily of "computer assisted paperwork." I have already discussed the flaws in this contention. These flaws also undermine the Port's argument regarding General Order 15.

The Port quotes a portion of General Order 15, specifically 46 CFR 533.6(b), as follows:

> (b) These definitions shall apply to "port terminal facilities" which are defined as one or more structures comprising a terminal unit, and including, but not limited to wharves, warehouses, covered and/or open storage space, cold storage plants, grain elevators and/or bulk cargo loading and/or unloading structures, landings, and receiving stations, used for the transmission, care and convenience of cargo and/or passengers in the interchange of same between land and water carriers or between two water carriers.

The Port proceeds to cite other sections of the regulations such as 533.6(d), which sets forth definitions of "terminal services" such as "dockage," "wharfage," "free time," "loading and unloading," "usage," "checking," etc. The Port argues that these services deal only with physical terminal facilities and the providing of services on those terminals.

Even if the Port were correct that the regulation deals only with physical structures and direct services on those structures, one could argue at best that no violation of the regulation should be found because it had not contemplated a new service. If so, the solution would be to require the filing of the tariff under section 17 and a subsequent modification of the regulation in a separate rulemak-

[17] General Order 15, 46 CFR 533, finally became effective on July 14, 1967, after being affirmed by the Court of Appeals in *Alabama Great Southern Railway Co. v. F.M.C.*, 379 F.2d 100 (D.C. Cir 1967). See Notice of Date for Compliance, 32 Fed. Reg. 7214, May 13, 1967 Later cases thus held failure to publish terminal tariffs to be in violation of both the regulation and the statute, e.g., *Baton Rouge Marine Contractors v. Cargill*, cited above. Even before the regulation, however, failure to publish a terminal tariff was found to be an unreasonable practice under section 17 of the Act. (*See, e.g., Transportation of Lumber Through Panama Canal*, cited above.)

ing proceeding. A very similar event occurred in the case of the first intermodal tariff filed as a result of the Commission's decision in *Disposition of Container Marine Lines*, cited above, 11 F.M.C. 746. After that decision, the Commission codified the result in a rulemaking proceeding which amended its General Order 13. *See Filing of Through Rates and Through Routes*, (*General Order* 13, *Amendment* 4), 11 SRR 574 (1970).

However, the Port ignores certain language in the portions of the regulation it cites and disregards other portions completely which run contrary to its contentions. In section 533.6(b), quoted above, the Port ignores the fact that the regulation states that the definitions are "including, but not limited to" the structures set forth as examples. Furthermore, the same quoted portion states that these facilities are "used for the transmission, care and convenience of cargo . . . in the interchange of same between land and water carriers. . . ." The Port's consolidation services are, of course, offered precisely for the purpose of facilitating interchange of cargo between land and water carriers. But there is more. The definitions set forth in section 533.6(d), which the Port cites, also include such things as "usage" in which no physical service is provided by the terminal operators at all and "checking" which consists merely of "counting and checking cargo against appropriate documents. . . ."[18] What, after all, is the Port's consolidation service, if not a vastly improved advancement over simple checking in which the Port locates cargoes destined for common inland points using information from vessel manifests which has been fed into the Port's computer?

Even more fatal to the Port's contentions, however, is the fact that the Port completely ignores section 533.6(a), which clearly demonstrates that the definitions of terminal services set forth in the portions quoted by the Port were not intended to be all-inclusive. In other words, the regulation contemplated flexibility and adaptibility to the institution of new types of terminal services in the spirit of the Supreme Court's exhortations in *American Trucking Ass'ns., Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, cited above, 387 U.S. at p. 416. Thus, section 533.6(a) states in pertinent part:

> *Provided, however,* That other definitions of terminal services may be used if they are correlated by footnote or other appropriate method to the definitions set forth herein. Any additional services which are offered shall be listed and charges therefor shall be shown in terminal tariffs.

In summary, then the Port is furnishing a computer and personnel to facilitate interchange of cargo through terminals between vessels and inland carriers. Equipment and labor have been held to be terminal facilities since *Status of Carloaders and Unloaders*, cited above, 2 U.S.M.C. at p. 767, and the subject service relates to the delivery of property to inland carriers.[19] Even if the

[18] Section 533.6(d)(8) defines "usage" as follows:

> The use of terminal facility by any rail carrier, lighter operator, trucker, shipper, or consignee, their agents, servants, and/or employees, when they perform their own car, lighter or truck loading or unloading, or the use of said facilities for any other gainful purpose for which a charge is not otherwise specified.

If a terminal owner or operator can charge various people including consignees for using the terminal, merely because the terminal has been built and is available for use and this charge is considered a terminal service charge, why is not the Port's charge against consignees for its computer and personnel working with the computer also a terminal service charge?

[19] The fact that the consolidation service relates to the delivering of property and is therefore a marine terminal service may itself require a finding that such service is subject to Commission jurisdiction and that the person performing the service is furnishing terminal facilities. In promulgating its General Order 15, the Commission stated:

> If the function is of a marine terminal nature, no matter what the identity of the person performing such function, it is subject to Federal Maritime Commission jurisdiction. See G.O. 15 report of the Commission, Fike & Fischer SR, p. 325:53.

equipment and personnel of the Port could arguably be held not to be terminal facilities because they are not similar to warehouses or docks and are not located at piers, the Port is nevertheless furnishing such warehouses and docks both on its own and through its lessees and the consolidation service, again, relates to the delivery of cargo to inland carriers. Finally, General Order 15 is not limited to the physical structures or physical services set forth as examples, as section 533.6(a) clearly demonstrates, and even the General Order recognizes that something like "usage" can be considered to be a terminal service even though the terminal operator furnishes no service at all. (See also *Investigation of Wharfage Charges at Pac. Coast Port,* cited above, 8 F.M.C. 653, for a similar holding.)

I therefore conclude that the Port's failure to publish a description of its consolidation services together with the charges therefor in its terminal tariff constitutes a violation of General Order 15 and section 17 of the Act.

The Commission's issue (1) also questions the Port's practice of providing consolidation services "free of charge" and "only for inbound OCP shipments . . . ." Although the question of reasonableness of the practices has been deferred pending decision on the question of jurisdiction, it should be noted that the record shows that the Port has been charging for the service in question since the fall of 1974 and presently charges 1½ percent per inland invoice, effective as of May 1, 1977. Furthermore, the record shows that the service is offered both to OCP and non-OCP shipments, although it is used much more often with OCP shipments.

Future Proceedings on the Question of Reasonableness

As discussed above, the question of the reasonableness of the Port's consolidation practices has been deferred pending decision on the jurisdictional issue. Both CAPA *et al.* and Hearing Counsel recommend further proceedings and CAPA *et al.* request the Commission to prescribe just and reasonable regulations and practices relating to the Port's consolidation practices.

No evidence was presented to determine the question of reasonableness of the Port's consolidation practices at this time. As noted, the Port now charges for the service and provides the service both for OCP and non-OCP cargo, facts as to which the Commission's Order was not aware. No shippers have complained about discrimination in connection with the Port's consolidation practices. What little can be gleaned from the record developed for other reasons is that the consolidation service marks an improvement in terminal services which benefits consignees and others and makes the Port more attractive. However, CAPA *et al.* have alluded to the fact that at one time the Port charged nothing for the service and there is the possibility that the present charge may be too low or too high. The question is, if the Commission decides that it has jurisdiction, whether it should continue this formal litigation. I suggest several courses of action.

The original Order of Investigation and Hearing is now over seven years old. Conditions have changed since its issuance and there is even the possibility that other ports on the West Coast might be engaging in similar practices to protect their competitive positions, as I mentioned earlier. Nor have shippers complained. If the Commission simply remands the matter for further evidentiary trial-type hearings several months in the future or more, there is a danger that the proceeding will continue for several more years in addition to the more than seven years that have already elapsed. Furthermore, trial-type hearings involve expense and delay during the prehearing discovery and post-hearing phases as well as the hearing itself. Moreover, if the issue on remand becomes akin to a terminal rate case, something which should be avoided unless truly necessary, much complexity and delay are virtually inevitable. Terminal rate cases usually become extremely time-consuming and complex, involving cost studies, allocation formulas, and the like, as the Commission well knows from many previous terminal rate cases. *See, e.g., Truck Loading and Unloading Rates at New York Harbor,* cited above, 13 F.M.C. 51 (1969) and 17 F.M.C. 21 (1973), a case lasting eight years; *Terminal Rate Increases–Puget Sound Ports,* cited above, 3 U.S.M.C. 21; *Crown Steel Sales, Inc. v. Port of Chicago,* 12 F.M.C. 353 (1967); *Rates of Pacific Northwest Elevators Association,* 11 F.M.C. 369 (1968).

If jurisdiction over the consolidation service is found, the Commission may wish to consider less formal, cost-saving procedures in lieu of a remand for evidentiary hearings. For example, the Commission could employ a non-adjudicatory investigation under Rule 281, *et seq.*, 46 CFR 502.281, *et seq.*, or utilize the shortened procedure for rate cases under Rule 67(c), 46 CFR 502.67(c). Or the Commission could instruct the Port to submit information as was done in *Terminal Rate Increases–Puget Sound Ports,* cited above. Or the Commission could instruct its staff to undertake studies with the Port and make subsequent recommendations as to the need for future proceedings.

All the parties, of course, are free to make suggestions as to the proper procedure which the Commission should employ when they file their exceptions to this initial decision. Whatever method is chosen, however, the point I am making is that this proceeding is now very old and that continuation of formal litigation in the usual trial-type form may well lead to many more years of expensive litigation. Therefore, the parties and the Commission ought to consider these matters in recommending and planning future courses of action, assuming any further proceedings are necessary.

The Status of Issues (2) and (4)

As may be recalled, the other two issues framed in the Commission's Order of Investigation and Hearing raised no jurisdictional problems and, after full discovery was had by Hearing Counsel and the interveners, the parties agreed that these issues should be dismissed from the proceeding.

Issue (4) referred to the question whether the Port had failed to assess charges as prescribed by its terminal tariff. The Commission's Order stated the issue:

(4) Whether the Port has failed to bill for, or collect, applicable terminal charges which have occurred on cargo in amounts prescribed by its terminal tariff.

Hearing Counsel, who have the primary responsibility for developing the record in a Commission investigation, examined reports of Commission investigators and the Commission's staff recommendation which caused this isssue to be inserted into the proceeding. Hearing Counsel stated that the issue arose because of complaints that the Port had been allowing excessive free time *contrary to its tariff. However, reports of Commission field investigators failed* to find any evidence that the Port had engaged in such violations. Not having uncovered any evidence of violations, it was appropriate for Hearing Counsel to move to dismiss this issue from the proceeding. *See Philip Carey Manufacturing Co. v. NLRB*, 331 F.2d 720, 734 (6 Cir. 1964). No party objected to the motion. Accordingly, the issue was dismissed. (See Motion to Dismiss Issue (4) Granted, November 10, 1977.)

Issue (2) proved more troublesome. This issue referred to the failure of the Port to publish a drayage charge in its tariff and the question whether such a charge should be published in its terminal tariff. The Commission's Order stated the issue as follows:

(2) Whether the assessment by the Port of a drayage charge, as an element of its per carton fee for movement of cargo from piers to warehouses for sorting, segregating, and labeling prior to dispatch, should be included in its terminal tariff as a service.

As discussed previously, Hearing Counsel believed that this issue was amenable to dismissal as well as issue (4) and were instructed to file an appropriate motion to dismiss both issues. However, on March 23, 1977, they filed a motion only with respect to issue (4), stating that they were not prepared to move for dismissal of issue (2) because of outstanding matters requiring further clarification. They indicated that such motion would follow as soon as practicable. (See Hearing Counsel's Motion to Dismiss Issue No. 4 of the Commission's Order of Investigation, March 23, 1977.) Some time thereafter, Hearing Counsel apparently decided that the Port would be better able to compile the relevant facts and file the motion and reached agreement with the Port that the Port would file the motion on September 26, 1977. (See Procedure Established for Disposition of Proposed Stipulation and Motions to Dismiss Certain Issues, September 12, 1977, p. 2.) The motion was filed by the Port on September 26, 1977. Hearing Counsel and CAPA *et al.* replied to the motion, expressing no opposition.

Despite the lack of opposition to the Port's motion, I found that I could not rule on the motion. Although additional time had been granted to the Port to explain the pertinent facts, the Port's motion consisted of two pages, an attached affidavit of one and one-half pages, and three tariff pages. The motion stated that the issue related to adequacy of notice regarding drayage charges, that the Port was unaware of any confusion or prejudice to anyone, that in almost eight years of litigation in this case, Hearing Counsel had not discovered any basis for litigating the issue, and finally, that the issue was moot because the Port had amended its tariff to publish a drayage charge. The attached affidavit furnishes supporting information.

Hearing Counsel supported the motion. Hearing Counsel stated that the Port furnishes, among other things, a comprehensive terminal service at a "per carton rate," which, according to Hearing Counsel, includes an assessment for drayage services. Hearing Counsel agreed with the Port that its tariff had provided for separate quotation and billings for terminal services at the request of the vessel or cargo owner, although the Port did not break out and publish a separate drayage charge until February 1, 1977. Hearing Counsel found no complaints by shippers or other users of the Port's services and agreed that any possible ambiguity had been removed by publication of the separate drayage charge. Having already published the charge, Hearing Counsel saw no purpose in continuing to litigate the issue.

Nevertheless, because of the paucity of information furnished me and confusion arising out of the information furnished, I ruled that I could not rule on the matter, directing the Port to furnish clarifying information. (See Ruling on Motion to Dismiss Issue (2) Deferred Pending Receipt of Additional Information, November 10, 1977.) The essential problem arose from the fact that the Commission's Order referred to the possible need for publication of a drayage charge as an element of the Port's "per carton fee" in connection with movement of cargo from piers to warehouses. However, the drayage charge published in the Port's tariff (Item 60000) does not refer to its being a part of a "per carton fee" and the Port's brief explanations constantly referred to "per unit" storage charges, or "per unit rates (which includes per carton)." To add to the confusion, Hearing Counsel's reply referred to a "per carton rate." No "per carton fee" to which the Commission's Order referred or "per carton rate" appears in the Port's tariff. It was therefore impossible to determine whether the drayage charge now published in the Port's tariff had any relationship to the "per carton fee" to which the Commission's Order referred. The Port subsequently explained the situation as follows.

The Port's tariff provides that the Port may bill cargo owners on a per unit basis, if requested by the owner and certain other factors are known. If done in this way, the cargo owner receives a single "per unit" billing which covers various charges under the tariff. Most frequently, the unit involved in this type of billing is called a "carton," hence the reference to per carton billing. If the Port's customer, i.e., cargo owner, does not request a per unit billing, then the various tariff charges are billed separately without combining them. The per unit billing, however, is regarded as a more convenient method for the customer's record keeping.

Per unit rates are a billing method for storage charges and are based upon receipt of the cargo at the storage warehouse facility. Any movement of the cargo after receipt at a place of storage, whether called drayage or something else, is a part of the storage charges (except in one instance regarding structural steel, Item 60090 of the tariff). If there is any movement between facilities, i.e., apart from storage, such movement, i.e., drayage, is the responsibility of and for the account of the cargo and billing is separate from billing used in connection with storage.[20]

Drayage, apart from the storage charges, was performed by cartage companies working at the Port. The Port would, upon request, arrange for drayage, and pass on the charges of the drayage or cartage company. The Port did not publish this charge in its own tariff since it was merely considered a pass on of someone else's charge. However, after the Port amended its tariff effective February 1, 1977 (Item 60000), the Port now directly imposes a drayage charge where the cargo is loose and movement to a warehouse is necessary. The Port indicates that the drayage charge is separate from storage charges, whether such

[20] As discussed below, there is some confusion on this point

storage charges are billed on a per unit combined basis or by separate item by item basis, although the record is somewhat unclear.

Unfortunately, there is still some uncertainty caused by apparently conflicting statements in the Port's two affidavits, although these uncertainties do not appear to be serious enough to affect the outcome of this case. The problem essentially is that the limited record is not clear whether the per unit billing method includes the drayage charge and therefore, whether the drayage charge is "an element of its [i.e., the Port's] per carton fee for movement of cargo from piers to warehouses . . ." as the Commission's Order states. In the first affidavit filed by Mr. H. J. Levinger, Director of Marketing of the Port of Seattle, he stated that "when a unit price is requested and drayage is involved, all drayage costs and charges together with all other tariff items and factors are included in the quoted per unit price." Affidavit, September 23, 1977, p. 2. However, in the second affidavit Mr. Levinger states that "[a] per carton quotation or billing is a means of quoting and billing storage charges, and is therefore also based upon receipt of cargo at storage position." Affidavit, December 9, 1977, p. 2, paragraph 5. As noted, the Port has stated that storage does not include drayage from CFS or terminal to warehouse.

Whatever these statements purport to mean and perhaps they can be reconciled, the Port's tariff does not seem to be ambiguous. Item 10110 of the tariff seems to indicate that the per unit billing method will include all services including drayage which the Port now performs. The tariff item states:

At request of vessel or cargo owner, when all of the factors involving charges, i.e., weight, measurement, length or other, are known to the terminal operator, *the services herein contained* will be quoted and billed on a per unit basis as may be requested. (Emphasis added.)

Not only is the tariff provision unambiguous, but if the per unit method of billing is supposed to be a convenient method of informing cargo owners of all of their terminal charges in a single figure, as the Port claims, it would appear that drayage charges would be included in the single figure. However, whatever the situation is, the fact remains that the Port does now publish a charge ($2.00 per ton) in its tariff for a drayage service which it performs when loose cargo is removed from a CFS (container freight station) or terminal to a warehouse (i.e., storage) position. (Item 60000.) (Affidavit, December 9, 1977, paragraph 7.) The Port is therefore performing a drayage from CFS or terminal to warehouses and publishes its charge for the service. There is no evidence that the Port does not charge for this service when it is performed, whether it is included in the per unit method of billing combined with other terminal charges, or is separately stated and billed. Whatever method of billing is employed by the Port, the important fact is that each service it performs be specified and charges therefor be published in its tariff. Having published the drayage charge in its tariff, the Port cannot be found to be engaging in an unreasonable practice in violation of section 17 of the Act for failure to publish and there is no evidence that shippers have been confused or have suffered discrimination either before or after publication of the charge in the Port's tariff. Moreover, if, as it appears, the Port was not performing the drayage service prior to February 1, 1977, but was merely passing on charges of a cartage company, there would appear to be no reason why the Port would have been required to publish that other company's charges. With respect to the per unit or per carton system of billing, furthermore, it appears not only that no shipper suffered adversely but, on the contrary, received a convenient form of billing at his own request. There is, furthermore, no evidence that the Port departed from its published charges regardless of which billing method it employed.

As the Port has suggested in response to my own suggestions, if there is any remaining problem having to do with the Port's publication of its drayage charges, the matter should be dealt with in another proceeding with a fresh Commission mandate, or perhaps even better, on an informal staff level. (See the Port's Supplemental Memorandum Re Issue No. 2, December 9, 1977, p. 4; my Order dated November 10, 1977, p. 10, footnote 3, and the case cited therein.) The idea of informal staff discussions is especially appealing not only because the original Order of the Commission is ancient but the fact that the issue as framed in that Order does not even refer to the Commission's terminal-tariff regulation, General Order 15, 46 CFR 533. No member of the Commission's staff having expertise in the terminal area presented evidence as to his views of the propriety of the Port's tariff practices past or present. As stated, I cannot find on this sparse record that the Port's tariff is ambiguous or that anyone has suffered discrimination or unreasonable treatment. Under these circumstances it seems that formal proceedings and expensive litigation are unnecessary and that informal discussions between the staff and Port would be fruitful, if the Commission believes that the matter needs further attention or that the Port's tariff needs clarification.[21]

ULTIMATE CONCLUSIONS

The Port of Seattle offers a consolidation service in which its personnel use computerized equipment to locate cargoes, select them for inland consolidation and prepare relevant documents. The cargoes move through terminals operated by the Port or by its lessees. The service facilitates movement from vessel through the terminals to inland carriers and ultimately benefits consignees who enjoy lower inland rates because of consolidation.

The Port is an other person subject to the Act as defined in section 1 of the Shipping Act, 1916, since it furnishes terminal facilities in connection with common carriers by water. The consolidation service is a service performed in conjunction with its status as an other person subject to the Act. It is a service subject to section 17 of the Act since it relates to the delivering of property which has been transported by water carriers across the Pacific Ocean. In peforming the service, the Port is furnishing terminal facilities, i.e., labor and equipment, as well as a terminal service related to the receiving, handling, storing, and delivering of property. Even if the Port's computerized equipment and personnel working the equipment were not terminal facilities within the meaning of section 1 of the Act, the Port furnishes such facilities on its own and through its lessees

[21] It should be a simple matter for the Port to explain to the Commission in its exceptions whether its per unit billing (Item 10110) includes drayage charges (Item 60000). My belief, despite the confusion described, is that the unambiguous tariff rule regarding per unit billing (Item 10110) shows that drayage charges in Item 60000 will be included in the per unit computation. If, for some reason, drayage from CFS or terminal to warehouse is not included in the per unit billing method, then the tariff can easily be modified to explain such fact.

and the consolidation service relates to the delivering of property from the various terminal facilities and locations owned or operated by the Port.

The consolidation service serves the very purpose for which any terminal is established, i.e., to facilitate interchange of cargo from one phase of transportation to another. It is not necessary to constitute a terminal service for the Port to send laborers to the terminals to move cargo around with their hands or with fork lift trucks or other such equipment. Some terminal services are merely incidental or auxiliary to physical movement but serve the purpose of facilitating movement. Some terminal services, such as "usage" or "wharfage," do not even involve the Port's or terminal owner's furnishing any physical service at all.

The Commission's jurisdiction under section 17 extends to practices of terminal owners or operators relating to cargo stored on the premises until cargo is taken into custody by inland carriers. The terminal operator is in reality only performing the obligations of common carriers by water who must arrange a convenient location for consignees to take possession of their property. A terminal operator may convert his operations into those of common carriers, i.e., Part-IV freight forwarders under the Interstate Commerce Act, in which event this Commission's jurisdiction would terminate. The Port has not done this and does not purport to do this when performing its consolidation service.

The Commission should not read remedial statutes like section 17 of the Act narrowly lest the congressional pruposes underlying its enactment be frustrated. The Supreme Court has recognized that section 17 is a broad statute designed to implement remedial purposes and that the legislative history of section 1 indicates an intention to embrace various facets of terminal operations as links in the stream of transportation. More recently, the Commission has followed the exhortations of the Supreme Court in adapting to changes in technology. The instant case demonstrates the need for the Commission to continue its policy of adaptibility to such changes.

Having offered a terminal service without publishing it in its terminal tariff, the Port has been in violation of section 17 of the Act and the Commission's General Order 15. The latter regulation is flexible enough to embrace the Port's innovative service. Even if it were not, section 17 would require publication in the Port's terminal tariff.

There is no evidence that the Port has failed to bill for or collect applicable terminal charges published in its tariff by granting excessive free time or otherwise.

At one time the Port did not publish a drayage charge in connection with movement of cargo from piers or terminals to warehouses. It now does publish such a charge, as it should do since it is providing the service. The Port's tariff is not ambiguous although there is a little uncertainty in the record as to whether the drayage charge is included in the Port's method of billing on a "per unit" or "per carton" basis. There is no evidence that the Port departed from its published tariff charges whether it computed its billing on the "per unit" basis or an item by item basis. No evidence of discrimination or confusion stemming from the use of the "per unit" billing method or previous failure to publish a drayage charge (for a service the Port had not provided) appears on the record. If there is any further need to look into the matter of ambiguity in the Port's tariff in this particular regard, the Commission can direct its staff to consult with the Port in lieu of continuing expensive formal litigation.

Similarly, in the matter of the deferred question of reasonableness of the Port's service, the Commission ought to consider a number of less formal, quicker, and less costly procedures to employ rather than simply remand the question for further evidentiary hearings, if any further proceedings are still warranted, in view of the age of this case and the danger of embarking upon many more years of complex litigation needlessly. Consideration should be given therefore to informal fact-finding procedures, shortened procedures, staff consultations with the Port, or instructions to the Port to furnish relevant information.

(S) NORMAN D. KLINE
Administrative Law Judge

WASHINGTON, D.C.
March 9, 1978

FEDERAL MARITIME COMMISSION

DOCKET NO. 76–24

UNITED NATIONS

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

Tariff classification "PAPER ARTICLES N.O.S." found to more reasonably apply to shipment of tabulating cards.

William Levenstein for Complainant.
Renato C. Giallorenzi for Respondent.

REPORT

September 18, 1978

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

This proceeding comes before the Commission on Exceptions filed by the Complainant United Nations (U.N.) to the Initial Decision of Administrative Law Judge Charles E. Morgan (Presiding Officer). Replies to the Exceptions have been filed by the Respondent Flota Mercante Grancolombiana, S.A. (Flota).

FACTS

Complainant in this proceeding seeks reparation for a shipment of tabulating cards which moved from Brooklyn, New York, to Barranquilla, Colombia. Complainant alleged that Flota violated section 18(b) (3) of the Shipping Act, 1916, by its assessment of a rate higher than that properly applicable under its tariff.[1] The shipment occurred October 11, 1974 and the freight was pre-paid.

The goods in question were 1,900 boxes of tabulating cards or punched cards which measured 7⅜ inches in length and 3¼ inches in width, to which Flota applied the "Cards N.O.S." rate of $120 per ton W/M.

Complainant asserted that it was entitled to have its goods classified as "PAPER, Automatic Register, Cash Register, Computing Machine, or Ticker

* Commissioner Leslie Kanuk dissenting.

[1] At the time of the shipment, Flota was a member of the East Coast Colombia Conference and a party to that conference's Freight Tariff F.M.C. No. 1.

Tape," which carried a rate of $69 W/M. Rated under that classification, the overcharge claimed was $3,633.73. In the alternative, U.N. relied on the tariff classification for "PAPER ARTICLES: Boards, xxx Cardboard xxx Not Corrugated." This classification bears a rate of $80.75 W/M and would have resulted in an overcharge on the shipment of $3,947.25.

Discussion

The Presiding Officer rejected the specific tariff classifications relied upon, determining instead that the tabulating cards should have been rated as "Paper Articles N.O.S.", which bears a rate of $117.25 per ton W/M. On this basis, the Presiding Officer found that the shipment was overcharged $195.94 and awarded reparation in that amount.

The Presiding Officer held that because of their texture and the use for which they are intended, tabulating cards are not the type of material covered by either of the two tariff classifications relied upon by Complainant. Nor could he find tabulating cards specificially mentioned under any of the categories listed under those two "paper" classifications.

Moreover, the Presiding Officer determined that the tabulating cards were "something different" or more than paper, and cannot take the rate for "PAPER, Automatic Register, Cash Register, Computing Machine or Ticker Tape." Similarly, the Presiding Officer held that the cards are not the same as "PAPER ARTICLES: Boards, Cardboard, Not Corrugated," because the tabulating cards are not the same as cardboard.

In its Exceptions, Complainant reiterated its position that the tabulating cards should have been rated as either: "PAPER, Automatic Register, Cash Register, Computing Machines or Ticker Tapes;" or PAPER ARTICLES, Board, not Containers K.D. or Container Blanks: Cardboard Not Corrugated (except Linerboard)." It is argued that neither of these two tariff items are qualified in any way and that these tariff categories are sufficiently broad so as to include the goods shipped.

Flota, in its Reply to Exceptions, supports the Presiding Officer's Initial Decision, and argues that Complainant's suggested interpretation of the tariff classifications does not properly construe the meaning of the words used in these tariff descriptions. Further, the tariff provisions urged by U.N. could allegedly only cover the commodity if those tariff provisions were interpreted in a strained and unnatural manner.

Upon careful consideration of the record of this proceeding, including the arguments and contentions of the parties, we conclude that the Presiding Officer was correct in holding that the proper tariff classification for the commodity shipped was "Paper Articles N.O.S."

The Commission laid down its rule of reasonability in the interpretation of tariffs in *National Cable and Metal Co. v. American Hawaii S.S. Co.*, 2 U.S.M.C. 471, 473 (1941), where it was stated:

"In interpreting a tariff the terms used must be taken in the sense in which they are generally understood and accepted commercially, and neither carriers nor shippers should be permitted to use for their own purpose a strained and unnatural construction . . . . [N]either the intent of the framers nor the practice of the carriers controls, for the shipper can not be charged with knowledge of such intent nor with the carrier's canons of construction. A proper test is whether the articles may be reasonably identified by the tariff description."

In upholding the tariff classification of "Paper Articles N.O.S.," and the resulting overcharge of $195.94, the Presiding Officer properly determined that tabulating cards are not the type of materials covered by either of the two tariff classifications advanced by Complainant.

While a paper product, the tabulating cards in question are not "paper", as that term is generally understood. They are thicker and stronger than paper as evidenced by the fact that they are able to withstand the demands of a keypunching machine. Clearly, the tabulating cards in question are not of the same type of paper material used in connection with cash registers, adding machines and computers.

Likewise, the tabulating cards are not the type of material that could take a *cardboard* classification.[2] While tabulating cards and cardboard possess somewhat similar characteristics, cardboard is a thicker, stronger substance than the material out of which the tabulating cards were produced. Tabulating cards are a paper product, which although stronger than paper, are not as strong as cardboard, and not the same as cardboard.

While the distinction between paper articles, cardboard, and paper used in adding machines, computers, etc., may be one of degree, that distinction nevertheless becomes significant when considered in connection with tariff classifications. It is these differences which we must take into account in reaching decisions involving the interpretation of tariffs.

In our opinion "Paper Articles N.O.S." is the tariff classification that *most reasonably* covers the goods shipped. Other tariff categories would have to be read in such a manner so as to distort their meaning—as that meaning is generally understood in a reasonable commercial sense.

THEREFORE, IT IS ORDERED, That Flota shall pay reparation to U.N. in the amount of $195.94 with interest at the rate of six per cent per annum if not paid within 30 days of the date of this Report and Order.

FURTHER, IT IS ORDERED, That the complaint in this proceeding is dismissed and the proceeding discontinued.

Commissioner Leslie Kanuk dissents and makes the finding that the tariff classification "PAPER, Automatic Register, Cash Register, Computer Machine, or Ticker Tape," reasonably applies to the shipment of tabulating cards.

(S) JOSEPH C. POLKING
Assistant Secretary

[2] *Webster's New World Dictionary of American Language* (1970), defines "cardboard" as "a material made of paper pulp but thicker and stiffer than paper; pasteboard."

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-38

PUERTO RICO MARITIME SHIPPING AUTHORITY—
GENERAL INCREASE IN RATES

NOTICE

September 21, 1978

Notice is given that the time within which the Commission could determine to review the August 16, 1978, initial decision in this proceeding has expired with no such determination being made. Accordingly, review will not be undertaken.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

No. 75–38

PUERTO RICO MARITIME SHIPPING AUTHORITY—
GENERAL INCREASE IN RATES

Finalized on September 21, 1978

General rate increase of fifteen (15) percent found just and reasonable and thus lawful.

Amy Loeserman Klein of Galland, Kharasch, Calkins & Short for Puerto Rico Maritime Shipping Authority.

C. Douglass Miller and *John Robert Ewers*, Director of Commission's Bureau of Hearing Counsel, for Hearing Counsel.

INITIAL DECISION,[1] IN REOPENED AND REMANDED[2] PROCEEDING, OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

BACKGROUND

On August 21, 1975, the Puerto Rico Maritime Shipping Authority (PRMSA) filed Supplement No. 7 to its tariff FMC–F No. 1 increasing its ocean freight rates between the Atlantic and Gulf Coasts and Puerto Rico by fifteen (15) percent. Supplement No. 7 became and has been effective since September 1, 1975. On October 2, 1975, the Commission ordered (published in the *Federal Register* October 8, 1975, p. 47216) an investigation into the lawfulness of the increase, pursuant to sections 18(a) and 22 of the Shipping Act, 1916, and section 4 of the Intercoastal Shipping Act, 1933.

By Order served May 11, 1978, the Commission vacated the Initial Decision served herein on March 8, 1977, and reopened and remanded this proceeding to the Presiding Administrative Law Judge for further hearings as he deemed appropriate consistent with the Commission direction in the said May 11, 1978, Order (mimeo p. 14).

A prehearing conference was held June 6, 1978, pursuant to Notice served May 18, 1978, in the reopened and remanded proceeding. The official stenographic transcript thereof consists of pages 1 through 25. It was agreed by all present:

(1) PRMSA would present its written testimony on or before Monday, June 19, 1978.

[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).

[2] Proceeding reopened and remanded by Commission Order served May 11, 1978, granting PRMSA's Petition to Reopen thereby allowing PRMSA a further opportunity to meet its burden of proof, and justify the 15 percent rate increase (Order, mimeo p. 9).

(2) Hearing Counsel would present its written testimony on or before Monday, July 17, 1978.

(3) Parties would submit a status report on or before Monday, July 24, 1978.

(4) Should a hearing be necessary herein, hearing would commence Tuesday, August 22, 1978.

Subsequently, the parties saw no need for further evidentiary hearing in the matter or briefing, as indicated by a letter dated July 24, 1978, in which Hearing Counsel wrote, among other things:

> Counsel for PRMSA and Hearing Counsel have agreed that the written direct testimony of Robert A. Ellsworth, Hearing Counsel's witness and Mr. Kenneth W. Cabarle, PRMSA's witness should be admitted in evidence without cross-examination. Thus, no further evidentiary hearing is required. We respectfully request the Administrative Law Judge to admit the testimony of Mr. Cabarle and Mr. Ellsworth in evidence.

The additional testimony of Kenneth W. Cabarle (received June 26, 1978) is hereby marked as Exhibit No. 19, for identification. It consists of 6 pages. On the basis of the above request, Exhibit No. 19 for identification is received in evidendce as Exhibit No. 19. Mr. Cabarle also sponsored Exhibits Nos. 20 through 27 for identification which are received in evidence as Exhibits Nos. 20, 21, 22, 23, 24, 25, 26 and 27. It is noted that in a letter dated June 23, 1978, to Hearing Counsel, counsel for PRMSA wrote:

> . . . I am enclosing herewith two copies of Exhibits 19, 24, 25, 26 and 27 which should be substituted for the exhibits of the same numbers previously submitted by PRMSA with its Petition to Reopen the record. As explained at the prehearing conference (June 6, 1978), these new exhibits cover the same subject matter contained in the previous exhibits of the same number, but are based upon actual audited results for the fiscal year 1977.

The above substitutions are made as requested.

The testimony of Dr. Robert A. Ellsworth is marked as Exhibit No. 28 for identification and received in evidence as Exhibit No. 28.

From the official stenographic transcript of hearings, the exhibits received in evidence and all papers and requests filed in this proceeding, the Presiding Administrative Law Judge clearly and precisely finds the following *Facts*:

1. PRMSA, created by the Legislature of Puerto Rico Act No. 62, approved June 10, 1974 (Exh. 2, pp. 3 & 6), is a non-stock public corporation as well as a government instrumentality of the Commonwealth of Puerto Rico. PRMSA is the single successor to four (4) privately-owned common carriers, namely, SeaLand Service, Inc.,[3] Gulf-Puerto Rico Lines, Inc. (a wholly-owned subsidiary of Sea-Land Service, Inc.), Seatrain Lines, Inc.,[4] and Transamerican Trailer Transport, Inc.,[5] which had served Puerto Rico from the East and Gulf Coasts of the United States (Exh. 1, p. 5).

2. PRMSA commenced service in the Puerto Rico trade in October of 1974 (Exh. 7, p. 2). It commenced with three roll-on/roll-off vessels (the *PONCE DE LEON*, *ERIC K. HOLZER* and *LA FORTALEZA*) operated under long-term (20 year) Charter Party Agreements (Exh. 1, p. 7). (Charter Party Agreement for

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[3] PRMSA acquired the assets of Sea-Land (a subsidiary of R. J. Reynolds Industries, Exh. 9, p. 2) and Seatrain primarily by the issuance of six-year notes in the amount of $150 million payable in approximately equal monthly installments (Exh. 7, p. 2).

[4] Now, Seatrain is PRMSA's competitor in the North Atlantic with a fortnight sailing into San Juan. (Tr. 65).

[5] The stock of TTT of Puerto Rico was acquired for cash from a loan granted by the Government Development Bank of Puerto Rico (Exh. 7, p. 3).

each of the above named vessels is found in Exhs. 3, 4, and 5, respectively.) A fourth such vessel (*PUERTO RICO,* Exh. 6 for Charter Party Agreement) was obtained in January, 1975 (Exh. 1, p. 7). The operation of the vessels and services of PRMSA were basically handled by the Puerto Rico Marine Management Incorporated (PRMMI) (Tr. 91). Maritime Transportation Management, Int. (MTM), was a second management company, which had separate management and operation of PRMSA's roll-on/roll-off vessels and equipment during the period October 1974 through September 1975.

3. PRMSA was serving the East and Gulf Coast/Puerto Rico trade lanes with a fleet of eleven (11)[6] vessels (Exh. 8, p. 6), i.e., eight (8) containerships, all built originally in 1944 or 1945 (Exh. 7, p. 3). Approximately 73% of the fleet utilized by PRMSA in the Puerto Rico trade was composed of vessels more than 30 years old *(Ibid.)*, and three (3) trailerships built in late 1960 or early 1970. During peak periods PRMSA deployed a fourth trailership in the trade (Exh. 7, p. 2). These ships were supported by a fleet of rolling equipment (annual leases cost for rolling stock amounted to approximately $7 million) consisting of approximately 13,800 containers and 3,000 trailers *(Ibid.*, p. 4).

4. PRMSA Tariff No. 1—FMC–F No. 1 was filed with the Commission and became effective September 15, 1974 (Exh. 8, p. 4). The said tariff, with few exceptions, was published at the same level of rates as applied prior to September 15, 1974 *(Ibid.)*.

5. PRMSA's first full year of operation ended in September, 1975. On August 21, 1975, PRMSA filed Supplement No. 7 to its Tariff FMC–F No. 1, to be effective September 21, 1975, providing for an increase of fifteen (15) percent in ocean freight rates to and from Puerto Rico (Sections 5, 7, 8, 9, 10, 11, 12, 13 and 14), including matter under suspension in I & S Docket 75–18 (Supplement 5) and Rule 470 (Minimum Charge per Bill of Lading), Rule 315 (Return of Empty Pallets, etc.). Rule 240 (Part 2—Exclusive Use of Trailers), Rule 100 (Application of Rates and Charges on Refrigerated or Controlled Temperature Cargo from Puerto Rico and the Virgin Islands), Rule 80 (Application of Rates "Per Container" or "Per Trailer").

6. From the PRMSA data submitted as per 46 CFR 512.3(d)(1), with the August 21, 1975, Supplement No. 7 to PRMSA's tariff providing for the 15-percent increase herein, the Commission was persuaded that additional revenue is necessary if PRMSA is to continue the service it has been offering in the Puerto Rican trade, and the Commission permitted the 15-percent increase to go into effect September 21, 1975, without suspension (Order of Investigation herein served October 2, 1975, p. 2).

7. In this reopened and remanded proceeding audited actual figures of the operation of PRMSA are presented so that no projections are used. (June 6, 1978, Tr. 14).

8. PRMSA was not required in this reopened and remanded proceeding to present testimony on the issue of the tax exempt status of PRMSA *(Ibid.)*. PRMSA pays no significant taxes of any type as a consequence of its operation as an ocean common carrier (Exh. 1, p. 4.).

[6] In Aggregate terms, the PRMSA fleet is comprised of 12 vessels: Three (3) C4J Lift-on/Lift-off vessels, three (3) "Trans" Class Lift-on/Lift-off vessels, two (2) C4X Lift-on/Lift-off vessels, and four (4) "Ponce" class Roll-on/Roll-off vessels. Exh. 8, attachment V.

9. For the period June 30, 1975, through June 27, 1976, PRMSA in Exh. 20 Exhibit A shows a rate base of $156,754,000, comprised as follows:

Investment in Vessels	$ 63,837,000
Reserve for depreciation	3,571,000
Vessels—Net	60,266,000
Other Property and Equipment—Net	91,112,000
Working Capital	5,376,000
Total	$156,754,000

10. For the period June 30, 1975, through June 27, 1976, PRMSA in Exh. 20 Exhibit B shows total Net Income of $13,068,000:

Operating Revenue	$193,505,000
Vessel Operating Expense	99,207,000
Gross Profit	94,298,000
Deduct:	
Administrative and General Expense	20,118,000
Other Shipping Operations	46,467,000
Depreciation and Amortization	14,645,000
Total	81,230,000
Net Income (Loss) Before Provision for Federal Income Tax	13,068,000
Net Income (Loss)	13,068,000
Total Net Income (Loss)	13,068,000

11. PRMSA cannot finance essential assets out of its operating funds (Exh. 7, p. 6).

12. PRMSA as such does not operate anything. PRMSA basically sets up policies, guidance, works on the financing, and supervises the operation of PRMMI. Vessel or terminal operation, booking of cargo is all done by PRMMI (Tr. 91). PRMSA and PRMMI have a five-year contract with two renewal options. The management service contract which PRMSA holds with PRMMI requires the payment of an annual management fee (Tr. 26). As to the amount of payment, there are 3 elements—2 are determined by the number of revenue tons involved, the third component is basically a percentage of the savings attained in the rendering of the service. These are incentive payments. The personnel costs of PRMMI are paid for by PRMSA from PRMSA funds. The compensation paid to PRMMI for the purposes of their services is separate and apart (Tr. 27)—above and beyond what is paid out in salaries ($50 million payroll (Tr. 107)) to employees of PRMMI.

13. PRMSA's competition in the trade is:

Seatrain Gitmo who entered the trade during December, 1975. Also during December, 1975, Rico Lines announced plans to enter the trade. Interisland Intermodal Lines replaced Berwind Lines. Sea-Land Service on October 10, 1974, filed Tariff 231—FMC No. 27. On April 25, 1975, Sea-Land filed Freight Tariff 243—FMC-F No. 30. In addition, there are three other competitors, i.e., Puerto Rico Marine Lines, Trailer Marine Transport and Gatco (Gulf Atlantic Towing Co.) (Exh. 8, p. 12).

14. The Commission's Notice of Intent to Make an Environmental Assessment, as to this proceeding, was served October 28, 1975, and published October 31, 1975, in the *Federal Register*—page 50750, Vol. 40 No. 211. Notice of Environmental Negative Declaration was served September 8, 1976, and published September 13, 1976, in the *Federal Register*—page 28824, Vol. 41, No. 178 to the effect that the environmental issues relevant herein do not constitute a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321, *et seq.*

15. To date PRMSA has not been able to find an acceptable source of long-term financing (Exh. 7, p. 2).

ISSUES

(A) Whether PRMSA has sustained its burden of proof that the subject rate increase meets the standard of reasonableness prescribed by section 3 of the Intercoastal Shipping Act, 1933, and/or section 18(a) of the Shipping Act, 1916.

(B) Whether the rate increase implemented by PRMSA and in effect, without suspension by the Commission since September 21, 1975, is lawful under section 18(a) of the Shipping Act, 1916, and/or section 4 of the Intercoastal Shipping Act, 1933.

HOLDINGS

(A) PRMSA has sustained its burden of proof that the subject rate increase meets the standard of reasonableness prescribed by section 3 of the Intercoastal Shipping Act, 1933, and section 18(a) of the Shipping Act, 1916.

(B) The rate increase implemented by PRMSA and in effect, without suspension by the Commission, since September 21, 1975, is found just, reasonable and thus lawful under section 18(a) of the Shipping Act, 1916, and/or section 4 of the Intercoastal Shipping Act, 1933.

DISCUSSION, FINDINGS, CONCLUSIONS AND REASONS

The testimony of witness Cabarle, Vice President and Comptroller of Puerto Rico Marine Management, Inc. (PRMMI) (Exh. 9, p. 1), and the testimony of witness Ellsworth, Chief of the Office of Economic Analysis, Bureau of Industry Economics of this Commission (Exh. 28, p. 1), according to Hearing Counsel's July 24, 1978, letter to the Presiding Admistrative Law Judge indicates that Hearing Counsel met with PRMSA's counsel on July 14, 1978, and reviewed the testimony of these witnesses. The letter states in part, "There is no conflict between the prepared direct testimony of Mr. Ellsworth and that of Mr. Kenneth W. Cabarle, PRMSA's witness. Each recognizes that there are a number of valid methods of testing PRMSA's need for the subject rate increase. Regardless of the method employed, the result remains the same—the increase does not result in an unreasonable return to PRMSA."

Dr. Ellsworth gave several means of assessing the revenue requirements of such a company:

(1) As to examining the debt-coverage ratio, he says that, essentially, coverage ratios are designed to relate the fixed financial charges of a firm to its ability to service them. The ratios reflect the number of times the flow of earnings available to service these requirements cover fixed obligations (Exh. 28, p. 9). Dr. Ellsworth also says that the coverage ratio is used extensively in the analysis of municipally-owned utilities, entities which are relatively similar to PRMSA.

Forms of coverage ratio are:

(a) The times-interest-earned ratio (TIER) (*Ibid.*, p. 12).
The formula for TIER is as follows:

$$\frac{\text{pre-tax earnings \& interest payments}}{\text{interest payments}}$$

(b) Fixed-charge-coverage ratio is

$$\frac{\begin{array}{c}\text{net income before interest}\\ +\ \text{depreciation and amortization}\\ +\ \text{lease payments}\end{array}}{\text{interest} + \text{principal payments} + \text{lease payments}}$$

Dr. Ellsworth is of the opinion this is an excellent ratio to use, since the data are available (*Ibid.*, p. 16). He concludes that a reasonable coverage ratio for PRMSA is 1.25 and that as PRMSA's short term debt is converted, the zone of reasonableness may reach the 1.5 level (*Ibid.*, p. 18).

Dr. Ellsworth analysed PRMSA—submitted data for the fiscal years 1976–77 as follows:

(000's)	1976		1977	
Net Income Before Interest:	$13,068		$ 9,661	
Depreciation and Amortization:	14,645		17,142	
Lease Payments:	24,989		17,667	
Net Revenues:	52,702		44,480	
Interest on Bank Loan:	$ 2,231		$ 4,115	
Other Debt Repayment:	17,758		22,533	
Lease Payments:	24,989		17,677	
Fixed Charges:	$45,018		$44,325	
Net Revenues / Fixed Charges	$52,702 / $45,018	=1.17	$44,480 / $44,325	=1.00

Dr. Ellsworth states that, "The only negative aspect of utilization of the coverage ratio is that it must be recognized that this is only one tool of analysis." (Exh. 28, p. 21). He concluded that usage of the fixed-charge ratio at this time as a means of assessing PRMSA's revenue requirement is the best available tool (*Ibid.*, p. 37).

(2) The Comparable Earnings Test—one means of determining the fair rate of return that PRMSA should be permitted to earn on equity. Using this method of analysis, comparison is made with historic rates of return of various industries and conclusions made that PRMSA should earn the same average rate of return on equity as other U.S. industries, plus or minus certain adjustments for risk. Once having completed these calculations an allowed rate of return for PRMSA will have been computed that should be sufficient to attract capital and be

commensurate with rates of return being earned by other enterprises of similar risk (*Ibid.*, p. 22).

It was concluded by Dr. Ellsworth that, ". . . the fair rate of return on equity that PRMSA should be permitted to earn is 14 percent on equity . . . based on the fact that the average U.S. industry which competes in the capital markets earned approximately 12.5 percent on equity during the 1968–77 period, plus . . . conclusion that PRMSA require a 1.5 percent risk premium as a result principally of its high leveraged position." (*Ibid.*, p. 31)

(3) Fair Rate of Return on Rate Base. In calculating rate of return on rate base, PRMSA has submitted data under a variety of scenarios. The scenarios covered by the PRMSA data include rate of return both with and without the rate increase, in addition to both with and without capitalization of leases (*Ibid.*, p. 32).

(a) Hypothetical debt/equity ratio. Use of PRMSA's actual capital structure of 100 percent debt/0 percent equity and actual cost of debt would derive the following rate of return:

Fiscal Year 1977

Capitalization			Rate		Return
Debt	1.00	×	7.2	=	7.20
Equity	0.00	×	14.0	=	0.00
					7.20

This 7.2 percent rate of return would, in actuality, only cover PRMSA's embedded debt costs, much of which is short term and therefore unsound financing.

Dr. Ellsworth asserts that "the hypothetical capital structure is the only means feasible by which we can attempt to assess PRMSA's cost of capital using the conventional rate-of-return methodology." Using a capital structure comprised of 45 percent debt and 55 percent equity, and based upon the 14.0 percent return on equity, 12.5 percent which he deemed, the average rate of return that a company such as PRMSA should be entitled to, plus a 1.5 percent risk premium, Dr. Ellsworth developed (*Ibid.*, p. 34) a:

Composite Cost of Capital

Capitalization			Rate		Return
Debt	.45	×	7.2	=	3.24
Equity	.55	×	14.0	=	7.70
				Composite Cost	10.94

If capital structure of 60 percent debt/40 percent equity is used

Composite Cost of Capital

Capitalization			Rate		Return
Debt	.60	×	7.2	=	4.32
Equity	.40	×	14.0	=	5.60
				Composite Cost	9.92

Dr. Ellsworth applied (*Ibid.*, p. 35) the various scenarios presented by PRMSA—those in Exhibits Nos. 25, 27, 26 and 24 which show a rate of return on rate base of 5.01%, Negative, Negative and 5.16% respectively, wherefore he says, "It should be apparent then, that whichever scenario is utilized, including the use of the actual capital structure which produced a cost of capital of 7.2 percent, PRMSA will not have earned a rate of return on rate base in excess of the allowable rates, which were based upon the use of hypothetical and actual capital structures."

Witness Cabarle states that Exhibits 20 through 27 are all in the format of reports which must be filed annually with the Commission pursuant to its General Order 11. The exhibits were intended to provide the data necessary for a standard rate of return analysis; Exhibits 20–23 reflect the actual results of operations of PRMSA for the fiscal year 1976—based on *audited* financial statements; Exhibits 24–27 reflect the audited results of the 1977 fiscal year; Exhibits 21, 23, 25 and 27 were prepared under the assumption that certain leases would be capitalized in accordance with the provisions of Financial Accounting Standards Board Statement No. 13.

Witness Cabarle attached to each exhibit in G.O. 11 format a Rate of Return Analysis. In each case, it was assumed the required return to equity is 10%, and the ratio was computed without deduction for taxes.

PRMSA's witness Roseman, an economist, whose direct testimony is Exhibit No. 12, advanced the proposition that for a test of reasonableness of the rate increase under investigation the Commission break with its traditional test of reasonableness, that is, the rate of return on rate base method and judge the propriety of a rate increase by another indicator, namely the debt-coverage ratio.

Witness Roseman says that regulatory standards have not been very extensively developed in the agencies regulating the rates and charges of publicly-owned enterprise (Exh. 12, p. 10); that it is not possible to apply the standard rate-of-return-on-rate-base to PRMSA because there is no way to determine what would be a fair return on equity capital, since PRMSA does not raise equity capital in the money markets, as well as because there is no balancing of consumer and investor interest (*Ibid.*, p. 6).

A rate of return, of course, is not merely a mechanical computation from separate elements. *Bluefield Waterwork and Improvement Co. v. PSC of West Virginia*, 262 U.S. 679 (1923), and *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). Rate of Return is a percentage developed to be applied to a rate base to provide the amount necessary to cover debt interest, dividends on preferred stocks and earnings on common equity. The amount so determined is equivalent to net earnings from operation, or operating income. The rate of return is developed through a study of the cost of capital together with appraisal of other factors, which require judgment, such as, fixed costs, variable costs, incremental costs, commodity costs, etc.

Fortunately, the parties now have presented a record, inventory and accounting procedures that lend to simple, clear, distinctive identifying, tracing and explaining of the costs associated with this service, revealing the whole story of the project with competent explanation. Patently, accounting procedures are not and should not be accomplices of legerdemain, but exponents of true facts and a means of proving them in an orderly fashion establishing the truth of each and the total.

Under section 3 of the Intercoastal Shipping Act, 1933, the burden was upon PRMSA to prove the rates just and reasonable. The Presiding Administrative Law Judge finds and concludes for the reasons given herein, including those supplied by and adopted from the analysis presented, that PRMSA has met that burden.

The receipt in this reopened and remanded proceeding of PRMSA's additional documentary evidence and testimony based upon *audited* financial figures, and the presentation by Hearing Counsel of testimony analyzing the evidence, facilitated the analysis of the "pros and cons" as to ways and means of measuring PRMSA's revenue needs. The parties in this proceeding, as in *Transconex, Inc.–Proposed General Rate Increase in the Virgin Islands Domestic Offshore Trade–Docket No. 76–26,* 16 SRR 1625 (1976), cooperatively have made a record herein containing supporting and underlying records and accounts by which the accuracy and efficiency of the evidence was and may be tested as to its probativeness, reliableness and substantialness, for findings as to the lawfulness of the instant rate increase under section 18 of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933. Hearing Counsel and its technical staff has reviewed the testimony of PRMSA and presented Hearing Counsel's own testimony which in turn has been reviewed by PRMSA and its technical staff. As a result, the analysis and helpful data now in this record serves well the public interest. Further, interested persons can read it for the support it gives in this case. The parties are agreed there is no conflict between the testimony presented by PRMSA and Hearing Counsel.

All of the testimony is part of this record. All of this has been closely examined and weighed by the Presiding Administrative Law Judge. Need for the increase has been shown, and no computation made with respect to the increase shows it to be improper.

The record reflects satisfactorily the usage of (1) debt-coverage ratio test, (2) comparble earnings test and (3) fair rate of return on rate base test. Again, computation, made by any one of them with respect to the increase does not show the increase to be improper.

Witness Roseman says it is not possible to apply the standard rate of return on rate base to PRMSA because there is no way to determine what would be a fair return on equity capital; however Dr. Ellsworth suggests the comparable earnings test as one means of determining the fair rate of return to earn on equity. There is no indication that the debt coverage ratio or comparable earnings test or the *fair rate of return* on rate base should be used exclusively, although Dr. Ellsworth views as excellent and best available the fixed-charge-coverage ratio under the debt-coverage ratio. All are means of testing and analyzing.

The Presiding Administrative Law Judge is satisfied and does adopt the parties' recognition of the congruence of the testimony in this proceeding. He *finds* and *concludes,* for that reason and the application of judgment, that the rate increase is not unjust or unreasonable. The increased rates withstand the test of debt-coverage ratio, comparable earnings test and fair rate of return on rate base test. Thus, tested by several criteria, and proper analysis would dictate that more than one test might be applied, the increase here is found just and reasonable.

The Commission has held that the fair-return-on-fair-value standard is proper in determining rates in the domestic offshore trade, and that the prudent investment standard would be used to determine the fair value of property. *Pacific Coast/Puerto Rico General Increase in Rates*, Docket No. 903, 7 F.M.C. 525, 533 (1963). The prudent investment standard prevents an undue inflation of the rate base predicated upon monies which a carrier has not spent. *Alcoa S.S. Co., Inc., General Increase in Rates in the Atlantic Gulf Puerto Rico Trade*, Docket No. 1066, 9 F.M.C. 220, 236 (1966).

The Commission also has said, it has been usual ". . . to consider at least as an important factor, in proceedings relating to the rates of carriers with little capital investment in comparison with their total costs of operations, the 'operating ratio' of such carriers, i.e., the margin between revenue and expenses of operation." *Transconex, Inc.–General Increase in Rates in the U.S. South Atlantic/Puerto Rico-Virgin Islands Trades*, Docket No. 69–21, and *Consolidated Express, Inc.–General Increases in Rates in the U.S. North Atlantic/Puerto Rico Trade*, Docket No. 69–29, 14 F.M.C. 35, 44 (1970).

Thus it is seen that there are many criteria that can be used in the analysis for reasonableness and justness. As pointed out in *Bluefield* and *Hope, supra,* that a rate of return is not merely a mechanical computation from separate elements, the same applies here. For example, in the area of return on equity, witness Cabarle assumed a required return to equity of 10%, witness Ellsworth concluded PRMSA should be permitted to earn 14% on equity and an average rate of return of 12.5% that a company such as PRMSA should be entitled to, and witness Roseman says in part there is no way to determine what would be a fair return on equity capital, since PRMSA does not raise equity capital in the money markets; none of these are adopted herein for specific use henceforth automatically as requiring any percent as a return to equity.

The "novel question" of tax-exempt organization such as PRMSA and the appropriate rate of return as to such tax-exempt organizations is answered in this proceeding by the economic testimony and evidence presented and the testing thereof by criteria referred to above. Dr. Ellsworth in examining the "novel question" pointed out there are a number of organizations which are quite similar to PRMSA in certain respects (i.e., debt-financed, tax-exempt, and publicly owned)—municipally-owned utilities; Federal power agencies such as the Tennessee Valley Authority (TVA); the Bonneville Power Administration; and Rural Electric and Telephone Cooperatives (Exh. 28, p. 4). It appears at this time, the answer to the "novel question" of PRMSA's tax-exempt status, and how this affects rate of return analysis is to use several of the criteria that the Commission has used referred to above or those used herein to test for justness, reasonableness and lawfulness.

The Presiding Administrative Law Judge for the reasons given herein, *finds* and *concludes,* in addition to the findings and conclusions herein-before stated:

(1) PRMSA's rates for the Puerto Rican trade, as filed August 21, 1975, in its Supplement No. 7 to its tariff FMC–F No. 1 are just and reasonable.

Wherefore, it is ordered, that:

(A) PRMSA's increase in rates by its Supplement No. 7 to its tariff FMC-F No. 1, in effect since September 21, 1975, are just and reasonable under section 18(a) of the Shipping Act, 1916, and section 4 of the Intercoastal Shipping Act, 1933, and therefore are lawful.

(B) This proceeding be and hereby is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

WASHINGTON, D.C.
August 16, 1978.

FEDERAL MARITIME COMMISSION

DOCKET NOS. 73-22, 73-22 (SUB. NO. 1) AND
74-36 (SUB. NO. 1)

MATSON NAVIGATION CO.—PROPOSED CHANGES IN RATES
IN THE U.S. PACIFIC COAST-HAWAII TRADE;
PETITION FOR RECONSIDERATION OF DECISION
PARTIALLY ADOPTING INITIAL DECISION

ORDER ON RECONSIDERATION

September 29, 1978

The Military Sealift Command (MSC) on behalf of the Department of Defense has petitioned the Commission to reconsider its Decision and Order Partially Adopting Initial Decision, served June 30, 1978, in this proceeding. Respondent Matson Navigation Company (Matson) filed a Reply opposing the Petition.

These consolidated proceedings were instituted to determine the justness and reasonableness under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, of certain rate changes filed by Matson during the years 1973, 1974, and 1975 in the U.S. Pacific Coast/Hawaii Trade. An Initial Decision was issued in which Presiding Administrative Law Judge Seymour Glanzer found, among other things, that the issues of the justness and reasonableness of the rates had become moot. On Exceptions the Commission issued a Decision and Order substantially adopting the findings of the Presiding Officer "with the exception of that portion declaring moot the issues of justness and reasonableness of rates." It is this single phrase in the Decision and Order that we are now asked to reconsider.

MSC believes the Commission avoided deciding the mootness issue and now requests a determination as to that issue so that parties to rate increase proceedings will not be induced to pursue these matters if in the end "findings of unjustness and unreasonableness can be avoided merely by carriers filing further rate increases."

Matson on the other hand takes the position that because the proposed rates were found to be just and reasonable, discussion construing the Commission's statutory powers if the rates were found to be unjust and unreasonable is unnecessary.

It must first be stated that the Commission did decide the issue of mootness to the extent that it disagreed with the Presiding Officer's finding that the issue of the justness and reasonableness of the rates in question was moot *ab initio*. Beyond that, we agree with Matson that to decide the secondary issue of what remedy would be available if the rates were found to be unjust and unreasonable in this case, where the increase has not been found to be unreasonable, would render such a discussion mere dicta.

Petitions for reconsideration are not a proper vehicle to answer theoretical regulatory issues.[1]

IT IS THEREFORE ORDERED, That the relief requested in the "Petition for Reconsideration of Decision and Order Partially Adopting Initial Decision" filed by Military Sealift Command is denied except to the extent already incorporated in the Commission's Decision and Order served in this proceeding.

By the Commission.

(S) JOSEPH C. POLKING
Assistant Secretary

[1] Rule 261 (46 C.F.R. 502.261) clearly requires that Petitions for Reconsideration must "state concisely the alleged errors in the Commission decision or order." As posed in the context of this case MSC has not alleged any error in the Commission's decision warranting relief.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76–60

INTERMODAL DUAL RATE AGREEMENTS

DENIAL OF PETITION FOR RECONSIDERATION

September 29, 1978

Seatrain International, S.A. (Seatrain) has submitted a Petition for Reconsideration (Petition) of the Commission's Order of August 2, 1978, denying Seatrain's Petition for Declaratory Order.[1] Seatrain had requested a declaratory order concerning the legality of dual rate contracts as applied to intermodal movements and/or the inland segment thereof. In its August Order, the Commission denied the relief requested because: (1) the question Seatrain sought to have resolved by declaratory order was squarely raised in another proceeding in which Seatrain is a party;[2] (2) there were disputed factual issues; and (3) no compelling reason was offered for issuing a declaratory order in these circumstances.

In its Petition for Reconsideration, Seatrain asserts that a declaratory order concerning the legality of dual rate contracts in intermodal transport would "remove uncertainty" in the industry and would not depend upon any contested issues of fact. While conceding that such a declaratory ruling would leave unresolved "certain legal and factual issues concerning the tariff format and the possibility of impossibility of carriers maintaining a fixed dual rate spread," Seatrain argues that such issues could be resolved *after* the issuance of a declaratory order, presumably on a case by case basis.

Seatrain also expresses concern that, if the Commission denies its Petition for Declaratory Order, it will not have the benefit of the comments filed by other parties in response to Seatrain's request for declaratory relief. Several of these comments were filed by entities that already are parties to Docket No. 76–11, and many of these entities opposed Seatrain's request for a declaratory order.

The arguments advanced by Seatrain in its Petition for Reconsideration have already been fully considered by the Commission in its Order denying Seatrain's Petition for Declaratory Order. Seatrain's Petition for Reconsideration presents no matters of law or fact which would cause the Commission to reverse or alter any determinations made in its August 2, 1978, Order. The relief sought by Seatrain's present Petition will, accordingly, be denied.

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[1] Replies in opposition to the Seatrain Petition were received from the Commission's Bureau of Hearing Counsel, Sea-Land Service, Inc. and the Japan/Korea Atlantic and Gulf Freight Conference filing jointly with the Trans-Pacific Freight Conference of Japan/Korea. Having shown good cause for its delay, North European Conferences was permitted to late file a reply in opposition to the Seatrain Petition.

[2] Docket No. 76–11, *In Re Agreement Nos. 150 DR–7 and 3103 DR–7*. This case is presently pending decision by an Administrative Law Judge and involves some 1570 pages of transcript and 35 exhibits.

However, to alleviate Seatrain's concern and to further facilitate comment on the important issues raised in Docket No. 76-11, the Commission will entertain Petitions to Intervene in Docket No. 76-11, for the limited purpose of filing exceptions, or replies thereto, to the Initial Decision ultimately entered in that proceeding by the Administrative Law Judge. So limiting the scope of interventions should serve to avoid unduly delaying the proceedings.

THEREFORE, IT IS ORDERED, That the relief requested in the Petition for Reconsideration of Seatrain International, S.A., is denied, and that the Commission's Order of August 2, 1978 denying the Petition for Declaratory Order of Seatrain International, S.A., is affirmed.

By the Commission.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–33

AGREEMENT NO. 10044–3; MODIFICATION OF POOLING, SAILING, AND EQUAL ACCESS AGREEMENT—UNITED STATES GULF PORTS TO PORTS IN PERU

DISCONTINUANCE OF PROCEEDING

November 7, 1978

This proceeding was instituted to determine whether Agreement No. 10044–3, an equal access and pooling agreement between Compania Peruana de Vapores and Lykes Bros. Steamship Co., Inc., should be approved, disapproved or modified pursuant to section 15, Shipping Act, 1916.[1] On September 21, 1977 we approved Agreement No. 10044–3 *pendente lite* or until September 30, 1978, whichever came first.[2] Because the Agreement has now expired by its own terms, the issues raised by our Order of Investigation have been rendered moot.

THEREFORE, IT IS ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

[1] The proceedings have not advanced beyond the prehearing stage

[2] The Agreement expired by its own terms on September 30, 1978.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–34

AGREEMENT NO. 10041–4; MODIFICATION OF POOLING, SAILING, AND EQUAL ACCESS AGREEMENT— UNITED STATES ATLANTIC PORTS TO PORTS IN PERU

DISCONTINUANCE OF PROCEEDING

November 7, 1978

This proceeding was instituted to determine whether Agreement No. 10041–4, an equal access and pooling agreement between Compania Peruana de Vapores and Prudential Lines, Inc., should be approved, disapproved or modified pursuant to section 15, Shipping Act, 1916.[1] On September 21, 1977 we approved Agreement No. 10041–4 *pendente lite* or until September 30, 1978, whichever came first.[2] Because the Agreement has now expired by its own terms, the issues raised by our Order of Investigation have been rendered moot.

THEREFORE, IT IS ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

[1] The proceedings have not advanced beyond the prehearing stage.

[2] The Agreement expired by the its own terms on September 30, 1978.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–8

PUERTO RICAN FORWARDING CO., INC., ET AL.
POSSIBLE VIOLATIONS OF THE SHIPPING ACT, 1916,
AND THE INTERCOASTAL SHIPPING ACT, 1933

ORDER

November 8, 1978

By an Order of Investigation and Hearing dated March 31, 1975, this proceeding was instituted to determine whether Puerto Rican Forwarding Co., Inc., certain of its subsidiaries and certain carriers in the Puerto Rican trade were engaging in practices violative of Sections 15, 16 and 18 of the Shipping Act, 1916, and/or Section 2 of the Intercoastal Shipping Act, 1933. Named as respondents in this proceeding were Puerto Rican Forwarding Co., Inc. (PRF), European Container Service, Transmodal Associates, Inc., Seatrain Lines, Inc. and the Puerto Rico Maritime Shipping Authority (PRMSA). Prior to the hearings in this case, Respondent PRMSA entered into a settlement agreement with the Commission and was subsequently dismissed as a respondent in the case. Hearings were held as to the violations alleged to have been committed by the remaining respondents. An Initial Decision was issued by the presiding Administrative Law Judge on September 24, 1976. Pursuant to the special settlement procedures set forth at 46 CFR 505.5(c), Respondent PRF requested and received Commission permission to enter into settlement negotiations with the Commission's Office of General Counsel. On October 26, 1976, the Commission suspended further action in Docket No. 75–8 in order to permit Respondent PRF to explore the possibility of settlement.

Prior to commencement of settlement negotiations, PRF and other respondents participated in hearings before an Administrative Law Judge. The evidence, exhibits and stipulations entered in that hearing provide the factual basis upon which settlement has been concluded. As an express condition of settlement the respondent has consented to the entry of an Order directing it to cease and desist from practices enumerated below and has further consented to the entry of an Order requiring the submission of compliance reports in a manner set forth below.

THEREFORE, IT IS ORDERED:

That Puerto Rican Forwarding Company, Inc. (PRF), and its subsidiaries shall cease and desist from operating as a non-vessel-operating common carrier unless and until such time as it or they shall have filed appropriate tariffs with the Federal Maritime Commission.

That Respondent PRF shall cease and desist from application of the Freight All Kinds (FAK) rate to shipments consolidated by PRF which do not qualify for such a rate under the applicable carrier's tariff.

That Respondent PRF shall cease and desist from failing to submit a manifest to the ocean carrier of the contents of each container shipped by PRF under an FAK rate.

That Respondent PRF shall cease and desist for a period of three years from the date of this order from discarding, mutilating, disposing of or otherwise destroying such underlying documents as warehouse receipts, shippers' instructions or packing lists, delivery receipts, weight bills or other documentation which show or reflect the actual weight or measure of cargo received by Respondent and upon which the ocean freight rate is computed and assessed.

IT IS FURTHER ORDERED:

That Respondent Puerto Rican Forwarding Company, Inc. shall, upon reasonable notice, allow investigators or attorneys of the Federal Maritime Commission unimpeded access to the underlying documents required to be maintained by this Order, and shall allow the removal of such documents specifically requested by Commission investigators or attorneys for the purpose of duplication.

That within sixty (60) days after service upon it of this order, Respondent Puerto Rican Forwarding Company, Inc. shall file with the Commission under the oath and signature of a responsible officer a written report setting forth in detail the measures which have been taken to ensure the elimination of the practices which resulted in misratings and other operations which are the basis of the violations set forth in the Settlement Agreement which has been concluded with Respondent. Such a report shall also be submitted from time to time as the Commission may require.

IT IS FURTHER ORDERED: That this proceeding be, and hereby is, discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 359(I)

DURITE CORPORATION, LTD.

v.

SEA-LAND SERVICE, INC.

ORDER ON RECONSIDERATION

November 8, 1978

By Petition for Reconsideration, Respondent Sea-Land Service, Inc. (Sea-Land) asks the Commission to reconsider its decision of May 12, 1978, in this proceeding wherein the Commission found that Sea-Land had collected charges in excess of those provided in the applicable tariff on a shipment of woodworking machinery and awarded reparation to the Complainant, Durite Corporation, Ltd.

Sea-Land points out that as the shipment moved from Elizabeth, New Jersey, to Arecibo, Puerto Rico, it was an error to find Sea-Land in violation of section 18(b)(3) of the Shipping Act, 1916, which section applies only to transportation in the foreign commerce of the United States. The objection is well taken. The reference should have been to section 2 of the Intercoastal Shipping Act, 1933.*

Otherwise, Sea-Land's arguments are but a restatement of contentions already advanced by Sea-Land and fully considered, and rejected, by the Commission, in reaching its May 12, 1978, decision. Sea-Land has presented no new facts or arguments which would cause us to alter that decision.

Consequently, the Commission Report and Order served May 12, 1978, in this proceeding is amended to reflect the fact that Sea-Land violated section 2 of the Intercoastal Shipping Act, 1933, rather than section 18(b)(3) of the Shipping Act, 1916, by collecting freight charges in excess of those provided in the applicable tariff on a shipment of woodworking machinery carried for Complainant Durite Corporation, Ltd. from Elizabeth, New Jersey, to Arecibo, Puerto Rico. The Commission's decision is affirmed in all other respects.

It is so ordered.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

* Like section 18(b)(3) of the 1916 Act, section 2 of the 1933 Act directs common carriers by water to file with the Commission tariffs showing all their rates and charges for the transportation of property and prohibits them from charging, demanding, collecting, or receiving more than specified in such tariffs (46 U.S.C. 844).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 562

SCHENECTADY MIDLAND, LTD.

v.

GULF/UNITED KINGDOM CONFERENCE

ADOPTION OF INTITIAL DECISION

November 17, 1978

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

By application timely filed on February 7, 1978, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.92(a), and section 18(b)(3) of the Shipping Act, 1916, the Gulf/United Kingdom Conference requested authority to refund a portion of the freight charges collected for a shipment of paratertiary butyl phenol from Houston, Texas to Liverpool, England. The application was concurred in by the complainant-consignee, Schenectady Midland, Ltd., and by the participating ocean carrier, Sea-Land Service, Inc.

Administrative Law Judge Charles E. Morgan issued an Initial Decision March 15, 1978, granting permission to the ocean carrier, Sea-Land Service, Inc. to refund a portion of the charges collected. The Commission served a notice of its determination to review that decision.

Having now completed its review the Commission finds the ultimate conclusion reached by the Administrative Law Judge to be proper and fully supported by the evidence of record. Specifically convincing of the merits of the application is the notation appearing at the bottom of page 98 of the 8th Revised Gulf/ United Kingdom Tariff No. 38 (FMC-17) which provides: "Paratertiary Butyl Phenol deleted—Covered under Phenol page 99." The decision of the Administrative Law Judge is, therefore, adopted by the Commission and is made a part hereof.

It is so ordered.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 562

SCHENECTADY MIDLAND, LTD.

v.

GULF/UNITED KINGDOM CONFERENCE

Adopted November 17, 1978

Application for permission to refund $1,600.06 of freight charges granted.

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

By application timely filed on February 7, 1978, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a), and section 18(b)(3) of the Shipping Act, 1916 (the Act), the Gulf United Kingdom Conference seeks authority to refund a portion of the freight charges collected for a shipment of paratertiary butyl phenol from Houston, Texas, to Liverpool, England, bill of lading dated September 22, 1977. The application is concurred in by the complainant-consignee, Schenectady Midland, Ltd., and by the participating ocean carrier, Sea-Land Service, Inc.

The shipment consisted of 800 bags of the paratertiary butyl phenol on 22 pallets in a 40-foot container. Eighteen pallets with bags each measured 42 × 48 × 56 inches, and four pallets with bags each measured 42 × 48 × 33 inches. The weight of the shipment was 45,372 pounds, or about 20.2554 weight tons (ton of 2,240 pounds). The shipment had a cubic footage of 1,330 or 33.25 measurement tons.

On July 28, 1977, the Conference deleted the entry for paratertiary butyl phenol from page 98 of its tariff no. 38, FMC 17, which had provided a rate of $128.25 W, under the mistaken impression that this commodity was covered on page 99 of its tariff. But, the rate on page 99 on paratertiary butyl phenol applied "in drums," but not "in bags," and also the rate on page 99 was WM (ton of 2,240 pounds or ton of 40 cubic feet whichever produces the greater revenue), instead of W only.

Consequently since the shipment was made "in bags," it became necessary to charge the rate on chemicals N.O.S. of $126.25 WM. The shipment was made freight collect, and the complainant-consignee paid charges, at the chemicals rate on 33.25 measurement tons, of $4,197.81.

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).

Respondent is not aware of any other shipments of the same commodity moved during the same period via respondent at the rate applicable and charged herein.

The respondent Conference requests permission for the ocean carrier, Sea-Land, to refund a portion of the charges collected. Shortly after the shipment moved, the tariff was corrected on September 28, 1977, to reinstate the rate of $128.25 W on paratertiary butyl phenol on 10th revised page 99 of the Conference's tariff. Under this rate the corrected charges on 20.2554 weight tons are $2,597.75. The difference sought to be refunded is $1,600.06.

It is concluded and found that there was an error of an administrative or clerical nature in the conversion of the tariff item from its application to the butyl "in drums" only from its application including "in bags," and there was error in the designation of WM in place of W; that the authorization of a refund of a portion of the freight charges collected will not result in discrimination among shippers; that prior to applying for authority to refund a portion of the charges collected, the Conference filed a new tariff setting forth the corrected rate basis, on which the refund of a portion of the charges collected would be computed; and that the application was timely filed.

In accordance with section 18(b)(3) of the Act, permission is granted to the ocean carrier, Sea-Land, to refund a portion of the charges collected. The refund authorized is $1,600.06.

(S) CHARLES E. MORGAN
Administrative Law Judge

WASHINGTON, D.C.
March 15, 1978

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–5

AGREEMENT NO. 10066—COOPERATIVE WORKING ARRANGEMENT

Agreement No. 10066, an equal access agreement between Prudential Lines, Inc. and Flota Mercante Grancolombia, S.A., found subject to section 15 of the Shipping Act, 1916, and approved pursuant to that section, subject to certain modifications.

J. Alton Boyer and *William H. Fort*, for Prudential Lines.
Renato C. Giallorenzi, for Flota Mercante Grancolombiana, S.A.
Thomas E. Kimball and *Robert B. Yoshitomi*, for Westfal-Larsen and Co. A/S.
Donald J. Brunner and *C. Jonathan Benner*, for the Bureau of Hearing Counsel.

REPORT AND ORDER

November 17, 1978

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

This proceeding was instituted to determine whether Agreement No. 10066 (Agreement), an equal access agreement between Prudential Grace Lines Inc.** (PLI) and Flota Mercante Grancolombia, S.A. (Flota), should be approved, disapproved or modified pursuant to section 15 of the Shipping Act, 1916. Westfal-Larsen Line, A.S. (WL), a Norwegian-flag carrier, protested approval of this Agreement and was named petitioner in this proceeding.

In his Initial Decision, served January 16, 1975, Chief Administrative Law Judge John E. Cograve (Presiding Officer) conditionally approved Agreement No. 10066, except the equal access provision thereof which provision he found was not subject to section 15 of the Act. Exceptions to the Initial Decision were filed by PLI, WL and the Commission's Bureau of Hearing Counsel (Hearing Counsel). Flota filed replies to the exceptions. We heard oral argument on July 30, 1975.

FACTS

Agreement No. 10066 is an equal access agreement and, as submitted, is for an indefinite term. The primary purpose of this Agreement is to give its parties

* Commissioner Bakke concurs in the majority's finding on the jurisdictional issue. He will file a separate dissenting opinion to the majority's other findings.

** Now Delta Steamship Lines, Inc. See discussion *infra* page 33.

equal access to cargoes which, but for the Agreement, would be reserved by the parties' respective governments for carriage aboard national-flag vessels.

Specifically, Agreement No. 10066 provides that PLI and Flota:

(1) "manifest their wishes in collaborating mutually for a better service between the ports of the East Coast and the Pacific Coast of the United States of North America and Colombia." (Paragraph 1)[1]

(2) will "make all the necessary efforts so that commerce between the United States . . . East Coast and Pacific Coast and Columbia are served regularly, efficiently and continually, and will coordinate their services for this purpose."[2] (Paragraph 2)

(3) agree that Flota in United States East Coast and Pacific Coast ports and Prudential in ports in Colombia "will have free access to the total import and export cargo available" and that Flota and Prudential "will each use its best efforts to secure for the other . . . the benefits of its nation's decrees, legislation, and/or administrative rules and regulations regarding the reservation of cargo to its nation's Merchant Marine." (Paragraph 3).

(4) will commit themselves to obtaining from their respective governments approval of the Agreement. The character of "associate" for PLI in Colombia and for Flota in the United States attaches upon approval of the Agreement by both countries. (Paragraph 4)

(5) will "collaborate mutually in the transportation of cargo so that if one of them is not able to handle a shipment offered to it, will pass this offer to the other company." Flota will not ask its government to release a shipment without first offering it to PLI if Flota can't handle the shipment. (Paragraph 5)

PLI operates the only United States-flag ships in liner service between ports on the East and West Coasts of the United States and ports in Colombia. Since sometime prior to 1972 in the United States East Coast/Colombia trade, and the Fall of 1973, in the West Coast/Colombia trade, PLI has been accorded "associate" status by the Colombian Government.[3] This was accomplished in the United States East Coast/Colombia trade by Agreement No. 9833, which expired in May 1972, and since, then by unilateral extension of such status by the Colombian Government in response to PLI's request, made through Flota. In the United States West Coast/Colombia trade, associate status was obtained by unilateral action similarly requested.[4]

Flota is a Colombian corporation, 80 percent of whose stock is owned by the Colombian Coffee Growers Association and 20 percent by the Republic of Ecuador.[5] Flota owns and operates vessels in liner service between United States East and West Coast ports and Colombia. However, Flota does not maintain a service from the United States West Coast to Colombia's North Coast.

WL is a Norwegian company headquartered in Bergen, Norway. It owns and operates vessels in liner service in the North American West Coast/South American trade. WL's vessels are designed to carry mainly breakbulk type cargoes including lumber, woodpulp, and alkane.

In 1966, the Colombian Government instituted a program designed to develop and promote a national-flag merchant marine. On April 29, 1966, as part of this

[1] WL does not serve the United States East Coast/Colombia trade and, while expressing its desire that the full Agreement be disapproved, proffers no evidence as to this trade.

[2] There was considerable dispute among the parties as to the scope of this "coordination of service."

[3] This status gives PLI access to Colombian Government controlled cargoes equal to that of Colombian-flag vessels.

[4] Although the record reflects that the Colombian Government granted PLI "associate status" as a result of a request submitted through Flota, there is no persuasive evidence to support WL's allegation of an unfiled section 15 agreement between PLI and Flota based thereon.

[5] The Colombian Coffee Growers Association is a major shipper from the Colombian West Coast to the United States West Coast.

program, the Colombian Government issued Decree 994 which reserved a percentage of Colombia's import and export cargo for carriage by Colombian-flag vessels. Decree 1208, implementing Decree 994, followed on July 21, 1969. That decree reserved "no less than" 50 percent of Colombia's general import and export cargo to Colombian-flag vessels on trade routes served by those vessels.

In December of 1971, the Colombian Government issued Decree 2349 which authorizes governmental approval of pooling or other transportation agreements between Colombian-flag lines and foreign-flag lines and confers "associate" status on the foreign line. This in turn makes the foreign-flag line eligible to carry reserved cargo under Decree 1208. Decree 2349 further provides that any agreement approved thereunder must be based on equal or reciprocal treatment for Colombian shipowners. Thus, before a foreign-flag line can achieve "associate" status under Colombian law, it must be in a position to aid Colombian shipowners in obtaining "equal access" to cargo which would otherwise remain captive to that foreign line.

The decrees in question are all implemented in the Colombian import trade by a stamp system. The import license for a reserved commodity has a stamp placed on it indicating that it must move either on a Colombian-flag vessel, certain Ecuadorian-flag vessels or "associates" of a Colombian-flag vessel.[6] The Colombian consular officials in this country will not release a cargo whose import license is so stamped unless the cargo has been booked on a Colombian-flag vessle or an associate line or unless the consular officials have been notified that the "reservation" has been lifted or waived. Waivers can be obtained when a Colombian-flag vessel or "associate" is either unavailable or inadequate to carry the particular reserved cargo.[7]

For many years the United States has also maintained programs designed to develop and promote our merchant marine. Two such programs are pertinent to this proceeding. Public Law 664, the Cargo Preference Act of 1954, 68 Stat. 832, requires that at least 50 percent of the gross tonnage of certain United States Government generated cargoes be transported on privately owned United States-flag commercial vessels. This requirement generally applies to: (1) procurements by the United States for its own account; (2) equipment, material or commodities furnished for the account of a foreign nation by way of (a) grants; (b) loans or credits; and (c) guarantees of convertibility of foreign currencies.

Public Resolution 17 (PR–17), approved in 1934, embodies "the sense of Congress" that public agencies making loans to finance exports shall require that those exports be carried on United States-flag vessels. However, a waiver of the United States-flag requirement is permitted and may be granted by the Maritime Administration (Marad) to vessels of the recipient country. In granting waivers for PR–17 cargoes, Marad considers, among other things, whether United States-flag vessels are accorded parity of treatment in the carrying of cargoes controlled by the government of the recipient country. Thus, while Marad could

[6] Freely translated, the stamp reads: Goods covered by this import license must be transported only in Colombian-flag vessels, or the following Equadorian vessels: *Republica de Ecuador*, *Ciudad de Quito*, *Ciudad de Guayaquil* and *Ciudad de Cuenca*, or in those of lines associated with a Colombian enterprise. The Equadorian vessels named on the stamp are those owned by Flota.

[7] It is not clear from the record under exactly what circumstances a Colombian-flag vessel or "associate" is to be deemed "unavailable or inadequate".

insist that 100 percent of such cargoes move on United States-flag vessels, its policy is to allow the national-flag vessels of the recipient country to carry as much as 50 percent of PR-17 cargoes.

There are three major United States West Coast/Colombia trade routes served by two or more of the carrier parties to this proceeding. The first is the United States West Coast/Colombia North Coast, southbound trade. The main commodities moving in this trade are woodpulp, clay pipe, peas, vehicles, fertilizer and talc. The Colombian cargo reservation laws are not effected in this trade because Flota does not serve it.[8]

The second major trade route is the United States West Coast/Colombia West Coast trade southbound. The major commodities moving in this trade have been flour, woodpulp and alkane. At the time the record in this proceeding was closed, WL had ceased operating in this trade. The Colombian cargo reservation laws did not have a substantial impact on this trade until 1972 when more import licenses were stamped. PLI can identify about 4000 tons of cargo lost to Flota since 1972 but they cannot quantify the total amount.

The third major trade route is the Colombia West Coast/United States West Coast trade northbound. Coffee is the major commodity in this trade, accounting for approximately 90% of the cargo.

The Colombian cargo reservation laws have not been effected in this trade because the Coffee Growers Association, the majority owner of Flota, has a continuing need for service from Colombia's West Coast to coffee processors on the West Coast of the United States.

Discussion

Nature and Effect of the Agreement

Section 15 of the Shipping Act, 1916, requires the filing for approval of every agreement between two common carriers by water subject to the Shipping Act, 1916:

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

Section 15 also requires that the Commission shall:

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

An approved section 15 agreement is exempt from the antitrust laws of the United States. However, where an agreement submitted to the Commission for approval is established as violative of the antitrust laws, this alone will normally

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[8] While the Presiding Officer found that the clear language of the Decrees (1208 and 994) makes the reservation laws applicable only to trades served by Flota, there is evidence, offered by WL, that PLI had to seek a number of waivers before it was permitted to carry reserved cargo.

constitute substantial evidence that the agreement is contrary to the public interest, unless the proponents to the agreement can demonstrate by substantial evidence that the particular 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." *Federal Maritime Commission v. Svenska Amerika Linien*, 390 U.S. 238 at 243 (1968). *Canadian American Working Arrangement*, ____ F.M.C. ____ (1976), 16 SRR 733.

Agreement No. 10066 is clearly an agreement which must be filed for approval under section 15. This Agreement is a preferential, cooperative working arrangement within the meaning of section 15 in that: (1) it accords PLI the special privileges and advantages available under the cargo preference laws of Colombia; (2) each party to the Agreement must offer to the other cargo it cannot carry, with Flota additionally agreeing not to ask its Government to release cargo it cannot handle without that cargo being first offered to PLI; and (3) it permits the parties to "coordinate" their services in some unspecified manner. Futher, to the extent that the Agreement commits the carriage of Colombian cargo to the parties to the Agreement, and thereby restricting the availability of such cargo to other carriers, it effectively controls and regulates competition.

While the Colombian cargo reservation laws, in and of themselves are restrictive of competition in the United States foreign commerce, the amount of competitive restriction they create is limited by, and proportional to, the number of vessels available to take advantage of those laws.[9] Thus, since the implementation of Decree 1208 in 1970, the Colombian-flag fleet *alone* was unable to carry sufficient cargo under the Colombian decrees to cause serious economic harm to WL or PLI. However, when PLI enters into this Agreement with Flota, and PLI is extended the advantages of the Colombian cargo preference laws, the "fleet" sailing under those laws is increased, and the anticompetitive effects of those laws are exacerbated. As a result, the Agreement will have a further chilling effect on the competitive situation in United States/Colombia trade.

Although not all section 15 agreements are violative of the antitrust laws, there can be little doubt that Agreement No. 10066 between PLI and Flota represents at the very least a combination in restraint of trade violative of section 1 of the Sherman Act.

Although the Agreement between PLI and Flota is prompted by foreign legislation, this does not change its status with respect to the Sherman Act. An agreement or combination which is in restraint of, or has a substantial anticompetitive effect on, United States commerce, is nonetheless violative of the Sherman Act even though it may derive its impetus from foreign legislation.[10] In *Sisal, supra*, the defendants solicited the passage of laws which aided them in

[9] As discussed above, the United States also has cargo reservation laws which to a limited extent restrict competition for certain cargoes moving in the United States foreign commerce. However, as also noted above, United States cargo preference laws restrict competition on cargo only when the United States Government is directly involved in the financing of the goods under one of its aid programs. We think there is a significant and critical difference between the United States cargo preference laws and those of Columbia which apply to all general cargo.

[10] *United States v. Sisal Sales Corporation*, 274 U.S. 268 (1927), *Continental Ore Co., et al. v. Union Carbide and Carbon Corp., et al.*, 370 U.S. 690 (1962). Accord, American Bar Association, *Antitrust Developments, 1955–1968, A Supplement to the Report of the Attorney General's National Committee to Study the Antitrust Laws, March 31, 1955* (1968) at pages 45–52, and Pugate, *Foreign Commerce and the Antitrust Laws*, 2nd Ed. (1973) at pages 75–82.

carrying out a conspiracy to monopolize the sisal trade with the United States.[11] In reversing a lower court decision which dismissed the complaint the Supreme Court stated:

Here we have a contract, combination and conspiracy entered into by parties within the United States and made effective by acts done therein. The fundamental object was control of both importation and sale of sisal and complete monopoly of both internal and external trade and commerce therein. The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties. True the conspirators were aided by discriminating legislation but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws. *Id.*, at 276.

Similarly, in *Continental Ore Co., supra,* Electro Met of Canada, a wholly-owned subsidiary of defendant Union Carbide, was appointed the exclusive purchasing agent of vanadium for the Metals Controller of the Canadian Government. Continental Ore Co., the plaintiff, attempted to introduce evidence consisting of communications between the plaintiff and Electro Met of Canada tending to show that Electro Met, under the control and direction of defendent Union Carbide, was conspiring to monopolize the vanadium market. The lower court rejected this attempt, stating that Electro Met of Canada was an arm of the Canadian Government and efforts of the defendant to influence the Canadian Government through its agent were not within the purview of the Sherman Act. In reversing the lower court, the Supreme Court stated that the defendants were insulated from antitrust liability merely because the acts of an agent of a foreign government were involved because "the conspiracy was laid in the United States, [and] was effectuated both here and abroad." *Continental Ore Co., supra,* at 706. The Court continued stating that:

Respondents are afforded no defense from the fact that Electro Met of Canada, in carrying out the bare act of purchasing vanadium from respondents rather than Continental, was acting in a manner permitted by Canadian law. *Id.* at 706.

Agreement No. 10066 involved a party domiciled in the United States and made effective, in part, by acts done in the United States and whose purpose is to affect the foreign commerce of the United States. The Agreement is clearly one which unless exempted under section 15 of the Act would be subject to this nation's antitrust laws.[12]

Applicability of Noerr/Pennington Doctrine

The Presiding Officer found the equal access provision of Agreement No. 10066 not to be subject to Commission jurisdiction by reason of the *Noerr/Pennington* doctrine. *Eastern R.R. Conference v. Noerr Motor Freight,* 365 U.S. 127 (1961), and *United Mine Workers v. Pennington,* 381 U.S. 657 (1965). In this, we believe he erred.

The holdings in *Noerr* and *Pennington* are basically that a combination or association of two or more persons entered into for the purpose of soliciting, with unmistakable anticompetitive intent, a governmental action with respect to the

[11] Sisal is the fiber of the henequen plant, and is used to fabricate the twine for bailing our grain crops.

[12] It should be noted that the circumstances of this "Agreement" are unlike those involved in *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F.Supp. 1291 (D.C. Del. 1970), where the anticompetitive activity was *compelled* by foreign legislation. PLI was not compelled to become a party to this Agreement but entered into it of its own volition. The Colombian legislation here may have been an impetus for the Agreement, but the fact remains that PLI entered into the Agreement deliberately and voluntarily.

passage or enforcement of laws is not violative of the Sherman Act. The stated reasons for this holding are several.

First, the Supreme Court found such "political" activity to be "essentially dissimilar" from the types of activities normally held violative of the Sherman Act, *i.e.*, business activities. Second, the Court determined that while the dissimilarity of activity alone might not be dispositive, the question of the status of this activity with regard to the Sherman Act is conclusively answered when it is considered that a holding to the contrary would impair the ability of the people to collectively and freely petition the government and for their government to take action thereon. To hold otherwise, the Court explained, would give the Sherman Act regulatory effect over political activity and would impute to Congress an intent, in passing the Sherman Act, to invade the right of petition, an imputation not justified in light of the countervailing consideration discussed above. *Noerr Motor Freight, supra.*

The holding of *Noerr* and *Pennington* does not apply to the facts in this proceeding. First, the cargo preference laws of Colombia and the United States already exist, therefore no "solicitation" is necessary to encourage their enactment. In *Continental Co., supra,* the Supreme Court indicated that the Noerr/Pennington doctrine does not encompass the use or manipulation of existing legislation as an instrument to effectuate an anticompetitive contract. The Court there stated:

> Respondents were engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws. To subject them to liability under the Sherman Act for eliminating a competitor from the Canadian market by exercise of the discretionary power conferred upon Electro Met of Canada by the Canadian Government would effectuate the purposes of the Sherman Act, and would not remotely infringe upon any of the constitutionally protected freedoms spoken of in *Noerr. Continental Co., supra,* at 707.

Secondly, the agreement between PLI and Flota to secure for one another the benefits of their respective nation's decrees, legislation and rules governing the reservation of cargo cannot be characterized as "political" activity, in view of the fact that no form of political persuasion or advocacy is involved. It is apparent from PLI's previous dealings with Flota and the Colombian Government that no lobbying or pursuasion is necessary to have that government extend to PLI the benefits of the Colombian cargo preference laws once the Agreement is executed. The Colombian Government *will,* as a matter of course, extend the privileges of its preference laws to PLI on a contract basis upon approval of this Agreement.

Even assuming that Flota must actually lobby its government to secure for PLI the benefits of Colombia's cargo preference legislation, the lobbying of a foreign government is not an activity necessarily entitled to full constitutional protection. In *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.,* 331 F.Supp. 92 (C.D. Calif. 1971), *aff'd, per curiam,* 461 F.2d 1261 (9th Cir. 1972), *cert. den.,* 409 U.S. 950 (1972), the defendant had allegedly induced several foreign governments to enact legislation which, allegedly, ultimately resulted in the plaintiff losing valuable oil interests in the Persian Gulf. In passing on the defendant's motion to dismiss the complaint on various grounds, including the applicability of the *Noerr/Pennington* doctrine, the court explained:[13]

[13] The court granted the defendant's motion to dismiss the complaint on other grounds.

> Examination of the premises underlying *Noerr* indicates that the case's rationales do not readily fit into a foreign context, such as the facts of this case. One of the roots of the *Noerr* decision was a desire to avoid a construction of the antitrust laws that might trespass on the First Amendment right of petition. 365 U.S. at 138, 81 S. Ct. 523. The constitutional freedom "to petition the Government" carries limited if indeed any applicability to the petitioning of foreign governments. *Id.*, at 107.
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> * * *
>
> A second basis of *Noerr* is a concern with insuring that, "[i]n a representative democracy such as this," law-making organs retain access to the opinions of their constitutents, unhampered by collateral regulation. . . . The persuasion of Middle Eastern states alleged in the present case is a far cry from the political process with which *Noerr* was concerned.
>
> In sum, the interests asserted in this case are dissimilar to those that *Noerr* was concerned with safeguarding; therefore, the wholesale application of that exception to the Sherman Act appears inappropriate. *Id.*, at 108.

The rationale expressed in *Occidental Petroleum, supra,* is equally applicable in this proceeding.

Finally, PLI's efforts to secure for Flota the benefits of this nation's cargo preference laws will consist, so far as the record indicates, of responses to queries routinely made by the Maritime Administration. Before granting a waiver under PR-17, which would allow vessels of the recipient nation to carry reserved cargo, Marad solicits the views of United States-flag carriers serving the trade involved with respect to the feasibility of granting the waiver, particularly to determine whether United States-flag shipping is being accorded parity of treatment in the carriage of the recipient nations' government controlled cargo. Marad's decision to grant or deny waivers is not subject to advocacy or persuasion but rather is rendered solely on the basis of whether or not the recipient nation discriminates against United States-flag carriers.[14] Because there is no advocacy or persuasion involved in responding to Marad's inquiries, the response cannot be characterized as *Noerr/Pennington* type political activity.

Our holding that the equal access provision of the Agreement is subject to section 15 does not interfere with PLI's right to petition Marad or other agencies for more favorable treatment for Flota. Regardless of whether the equal access provision is ultimately approved or disapproved, PLI retains the right of any citizen to petition its Government to secure additional benefits on behalf of Flota.

In conclusion, we find that the Agreement before us is not an agreement to engage in political activity regardless of how the parties choose to phrase their respective promises. This is a commercial agreement, the execution of which, if approved by the Commission, does not depend on "solicitation" but rather is determined by legislation already in existence. The *Noerr/Pennington* doctrine simply does not apply.

Justification for Agreement

Having determined that Agreement No. 10066 is subject to the requirements of section 15 and contrary to the antitrust laws we must now decide whether the Agreement, as submitted, has been justified, in whole or in part, and accordingly whether it should be approved, disapproved or modified. The critical issue then becomes whether legitimate objectives for the Agreement outweigh its anticom-

[14] *See* the *Statement of Policy of Public Resolution 17–73rd Congress*, issued by the Maritime Administration. July 24, 1959, *Pike and Fischer Shipping Regulations*, section 501.

petitive effects. *F.M.C. et al. v. Aktiebolaget Svenska Amerika Linien, et al., supra.*

Recently, in its decision in Docket No. 73–72–*Agreement No. 10056–Pooling, Sailing and Equal Access to Cargo in the Argentina/U.S. Pacific Coast Trade,* 20 F.M.C. 255 (1977), the Commission modified its earlier policy that "international harmony" and "the avoidance of governmental conflict" alone secured important public benefits sufficient to overcome the anticompetitive effects of pooling/equal access agreements. Prior to that decision, the Commission had determined that "international harmony" is in the public interest and that the "avoidance of potential government confrontation" generally warrants Commission approval of a commercial arrangement that remedies discriminatory practices resulting from foreign legislation. *Agreement No. 9939–Pooling, Sailing and Equal Access to Government–Controlled Cargo Agreement,* 16 F.M.C. 293 (1973).

In *Agreement No. 10056, supra,* the Commission determined that proponents of a pooling and equal access agreement would be required to establish "more immediate [public] benefits" than just "international harmony" and the "avoidance of governmental" confrontation. As a result of this decision, if an agreement is to be justified on the basis of "international harmony", proponents must first establish "a clear likelihood that a specific type of official confrontation would be avoided, and particularize the negative effects this confrontation would have upon ocean shipping in the United States trade route in question."

We have given careful consideration to the rationale expressed in Docket No. 73–72 and have determined that the policy established there ignores the realities surrounding cargo preference laws, particularly in our South American trades, and imposes upon proponents of a commercial arrangement, negotiated in response to a given cargo preference law, an insurmountable and unrealistic burden of proof.[15]

The Commission and its predecessors have long recognized the aspirations of many nations to develop and maintain a merchant marine that is capable of carrying a substantial portion of its commerce. *E.g., West Coast Line, Inc. v. Grace Line, Inc.,* 3 F.M.B. 586 (1951), *Agreement No. 9939, supra.* The measures taken by these nations to assure that their respective national-flag vessels carry more of their imports and exports generally require that certain cargo be carried on a national-flag line or encourage shippers to use the national-flag line by imposing surcharges or additional custom duties on cargoes that are not carried by the preferred line. Whatever the means used, the effect is to secure for the preferred line or lines a larger share of the available cargo at the expense of other ocean carriers serving the trade. Because these measures affect the imports and exports of the United States–insofar as our trade with a given country is concerned–they in and of themselves, are a source of "inter-governmental conflict." This "conflict" can only be resolved either through a commer-

[15] Although a United States-flag carrier might *request* retaliatory action from this Commission, Marad or the Department of State, it would find it extremely difficult, if not impossible, to establish "a clear likelihood that a specific type of official confrontation would be avoided" by the approval of a commercial arrangement. This is so because in each instance the actions taken by the respective governments would be discretionary and could take many forms.

cial arrangement or resort to retaliatory measures such as those permitted under section 19 of the Merchant Marine Act, 1920.[16]

We believe that a commercial arrangement which avoids potential inter-governmental conflict is clearly preferable to disruptive retaliatory action. The avoidance of such potential "inter-governmental conflict" and the maintenance of international harmony is a legitimate public interest objective to be derived from the approval of a bilateral agreement.

Agreement No. 10066 is clearly such an arrangement. To the extent it serves to obviate "conflict" between the United States and Colombia by attempting to reconcile the policies of the two nations, it clearly yields important public benefits. Without this agreement, PLI might well seek retaliatory action from the Commission, the State Department, Marad, or others to counter the effects of the Colombian cargo preference laws.

The Agreement also serves the public interest by enhancing common carrier service capabilities in the United States/Colombia trade through the operations of PLI.[17]

However, a finding that certain benefits flow from an agreement, is not sufficient by itself to justify approval. We must also examine the detriments, if any, the Agreement has on other areas of the public interest which we are charged to protect, such as shipper service, and determine whether such detriments, warrant disapproval of the Agreement not withstanding the benefits that may flow from it.

Although WL argued that this Agreement was detrimental to shipper service and would force WL's withdrawal from the trade, the record does not support such a conclusion. In fact, the Agreement, as conditionally approved, will cause little direct harm to WL. This conclusion is based in large measure on the fact that the equal access provision does not apply in the United States West Coast/Colombian trades actively served by WL.[18] Flota does not serve the trade from the United States West Coast to the North Coast of Colombia, hence the cargo preference laws and equal access provision will not be applied in that trade. Furthermore, because of the coffee trade, the cargo preference laws and equal access provision will not be applied in the Colombian West Coast/United States West Coast trade. Also, because WL does not maintain a service from the North American West Coast to the Colombian West Coast, or between the United States Atlantic/Coast and Colombia the execution of the equal access provision in those trades will not effect WL. Thus, it can be seen that approval of the equal access provision will have little direct effect on WL's extant services.

Nor do we not find WL's experiences with equal access agreements in other trades to be sufficiently relevant to the situation. Specifically relied upon by WL is its so-called "Peruvian experience" which began early in 1973 when the

[16] In *Agreement No. 10056, supra*, we noted that whenever section 19 of the Merchant Marine Act, 1920, "has been invoked in the past, it has almost always resulted in a commercial arrangement" which has offset the restrictive measures imposed.

[17] The record indicates that subsequent to the enactment and enforcement of Colombia's cargo preference laws PLI suffered substantial loss of cargo, but that upon the unilateral extension of the benefits of the Colombian cargo preference laws to PLI, its declining situation with respect to Colombian cargo carriage first stabilized and then began to improve.

[18] Some evidence of record suggests that in the trade south from the United States West Coast to Colombia's North Coast the Colombian cargo preference laws are being enforced to PLI's advantage despite the absence of Colombian-flag vessel service. It was indicated that waivers were necessary to move twenty-two lots of cargo in this trade. It would appear, however, as PLI and Flota maintain that the imposition of the waiver requirements on these shipments were due to clerical error.

Commission approved Agreement No. 9939 between Prudential Grace Lines (PGL)—now PLI—and Compania Peruana Vapores (CPV), *Agreement No. 9939, supra*, covering the trade south from the United States West Coast to Peru. This agreement provided PGL with "associate" status under the Peruvian cargo preference law, which reserved about 50% of import cargoes to Peruvian-flag vessels and their "associates". Agreement No. 9939 also allowed for the pooling of revenues earned by the parties to the Agreement. WL alleges that as a direct result of approval of Agreement No. 9939 its carriage of cargo from North America to Peru declined precipitously and caused it to abandon one of its South American services.

Whatever the merits of WL's allegations with respect to its "Peruvian experience", we believe them irrelevant to the issue of the approval of Agreement No. 10066. Colombia's cargo preference laws are not effected in the trades actively served by WL. Agreement No. 10066 contains no cargo pooling provisions. There is evidence that Colombia may be more liberal in granting waivers to foreign-flag lines than was Peru. In summation, the two situations are not subject to the type of comparison that would be of probative value to the issue presented here.

The contention has also been advanced in this proceeding that the approval of this Agreement, to any extent, is contrary to the terms of the 1928 Treaty of Friendship, Commerce and Navigation between the United States and Norway, 27 Stat. 2135, Article 7 of which provides in relevant part:

> Between the Territories of the High Contracting Parties there shall be freedom of commerce and navigation. The nationals of each of the High Contracting Parties equally with those of the most favored nation, shall have liberty freely to come with their vessels and cargoes to all places, ports and waters of every land within the territorial limits of the other which are or may be open to foreign commerce and navigation.
>
> All articles which are or may be legally imported from foreign countries into ports of the United States or are or may be legally exported therefrom in vessels of the United States may likewise be imported into those ports or exported therefrom in Norwegian vessels, without being liable to any other or higher duties or charges whatsoever than if such articles were imported or exported in vessels of the United States; . . . .

The approval of the Agreement before us does not infringe on this Treaty. Our approval of this Agreement neither restricts the freedom of Norwegian-flag vessels and cargo, to come to all places, ports and waters of every land within the territorial limits of the United States, nor makes the exportation or importation of goods from or to United States ports on Norwegian-flag vessels in any way illegal, nor at all subjects such exportation or importation on Norwegian vessels to a higher duty than if carried on United States-flag vessels. All of the rights and obligations created by the Treaty between Norway and the United States have therefore been preserved and protected.

Modifications Required

Our finding that Agreement No. 10066 is in the public interest because it confers significant 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 anymore than is necessary to secure the purposes of the Shipping Act, 1916,[19] and the legitimate objectives of the Agreement itself. We have carefully reviewed the entire Agreement with this consideration in mind and find that certain provisions, i.e., coordination of sailings and cargo offering, exceed the legitimate objectives of the Agreement. Accordingly, the deletion of these provisions is being made a condition to the approval of the Agreement. We are also requiring as a condition to approval that a provision be added to the Agreement which allows for the admission of other "national-flag carriers." A discussion of each of the required modifications follows:

1. *Coordination of Sailings Provision*

The parties to the Agreement have a competitive advantage over WL by reason of the equal access provision. However, were this the only provision to the Agreement the parties would still, to some extent compete between themselves for Colombian reserved cargo and ostensibly at least, have little or no competitive advantage over WL with regard to trades where the Colombian decrees are not enforced. Approval of the coordination of services provision, however, would encourage the elimination of all competition between the parties to the Agreement by allowing them to arrange their sailings so as to eliminate competition among themselves for controlled and *non-controlled cargo*, optimizing their advantages over WL under the cargo preference laws. As a result, PLI and Flota would substantially improve their competitive positions over WL with respect to the non-controlled cargo. Furthermore, the language of the coordination of services provision is so broad that it could be used alone or in conjunction with the other provisions of the Agreement as a basis for a myriad of other anticompetitive activities.

Little specific evidence was proffered by the parties to the Agreement to justify the approval of the coordination of services provision. There is testimony in the record to the effect that beyond some unspecified plan for coordination of sailings, no action was contemplated under the provision. This prompted the Presiding Officer to reject the coordination of sailings provision, stating:

> After much contention between the parties over the meaning of "coordination of services", Flota and Prudential both insist that what is meant is "the coordination of sailings to insure that the frequency is so spread as to give coverage as needed by the trade." In the same breath it is offered that no coordination of sailings is presently contemplated. Indeed, in the United States West Coast to Colombia trade none is presently feasible given the itineraries of the parties. While this provision is explicitly made subject to section 15 jurisdiction, it is clear that no activity under it is contemplated in the foreseeably near future. The respondents have thus no concrete plans for the coordination of sailings with which to apprise the Commission of the impact of such coordination upon the trade. Such future authority to in some unspecified manner "coordinate sailings" should not be approved under section 15. Indeed respondents offer no justification for its approval.[20]

We agree.

This Commission has consistently held that it will not abdicate its responsibilities under the Shipping Act, 1916, by approving an agreement that is *not* so sufficiently precise so as to permit any interested party to ascertain how the agreement works without resorting to inquiries of the parties. As we explained in

[19] *Isbrandtsen Co. Inc. v. United States*, 211 F.2d 51 (D.C. Cir. 1954).

[20] The parties did not except to the Presiding Officer's finding that this provision should be deleted.

Agreement 9448–North Atlantic Outbound/European Trade, 10 F.M.C. 299, 307 (1967):

. . . great care must be taken when the agreements are approved to see that (1) the Commission knows precisely what it is approving, and (2) the agreements set forth clearly, and in sufficient detail to apprise the public, just what activities will be undertaken. . . . It would be contrary to the public interest to approve an agreement whose coverage is so vague that the public cannot ascertain the coverage by reading the agreement. The approval of such an agreement would deprive the public of the protection, afforded by statute, of the Commission's surveillance over conference activities. The blank check that would be afforded by the approval of this agreement would simply fail to protect the public interest and the flow of commerce in the manner contemplated by Congress in the enactment of section 15.

On the bases of the foregoing, we are requiring as a condition of approval of the Agreement that the parties delete that provision allowing for the coordination of services.

2. *Cargo Offering Provision*

We also find the Agreement's cargo offering provision to be unacceptable. As with the coordination of services provision, the cargo offering provision, when considered together with the equal access provision and the Colombian cargo preference laws tends to unjustifiably increase the anticompetitive effect of the equal access provision and those laws. If Flota cannot carry government controlled or noncontrolled cargo, it must, under the Agreement as submitted, offer the cargo to PLI. As a result, government controlled, as well as noncontrolled cargo, will not be available to WL until the parties have exercised their right of first refusal under the cargo offering provision. This provision further impairs WL's ability to compete in the trade and would allow for unwarranted and unjustified anticompetitive activity.

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. Therefore, in the absence of a showing that this anticompetitive provision is specifically required by a serious transportation need, is necessary to secure important public benefits or is in furtherance of a valid regulatory purpose, we find the cargo offering provision, contrary to the public interest. Approval of Agreement No. 10066 is therefore conditioned upon deletion of that provision.

3. *National-Flag Participation*

As we have indicated, the impetus for Agreement 10066 was a series of decrees issued by the Colombian Government which were designed to foster that country's merchant marine by reserving "not less than 50%" of Colombia's imports and export cargoes to Colombian-flag or "associate" vessels. A non-Colombian-flag carrier can achieve "associate" status only if it is in a position to "aid" Colombian-flag carriers in obtaining "equal access" to cargo that would otherwise not be available to Colombian-flag carriers. In the United States/Colombia trade, United States-flag carriers are in a position to aid Colombian-flag carriers in obtaining cargoes that are subject to the cargo preference laws of the United States and which are otherwise not generally available to Colombian-flag carriers. However, the "aid" which a United States-flag carrier may provide is dependent upon the parity of treatment afforded the United States-flag carriers in the carriage of Colombian controlled cargoes.

Because Agreement No. 10066 does not provide for the admission of other "national-flag carriers," a United States-flag carrier could be precluded from entering the trade.[21] This follows from the fact that such carrier would not have access to Colombia's controlled cargo and thus would not be in a position to "aid" Colombian-flag carriers in obtaining "equal access" to United States cargo that otherwise would not be available to Colombian-flag carriers. Indeed, if a new United States-flag entrant–in the United States/Colombia trade–advised Marad that is unable to carry Colombian controlled cargo, the privileges afforded the parties to Agreement No. 10066 could be affected, for Marad examines the "parity" afforded all United States-flag carriers in the trade, not just the "parity" afforded a signatory to a commercial arrangement.

Because the exclusion of other United States-flag carriers from this Agreement could be contrary to the public interest and could operate to the detriment of the commerce of the United States, we shall require, as a further condition of approval, that the Agreement be modified to provide for participation by other United States-flag lines who may enter the United States/Colombian trades.[22]

Term of the Agreement

We turn now to the duration of the approval granted herein. While the Agreement as submitted is for an indefinite term, we are requiring that it be limited to three years. Not only have proponents failed to justify an indefinite term, by limiting the term of the Agreement, the Commission and the parties will be able to reevaluate the need for the Agreement in view of the circumstances then existing in the United States/Colombia trade. Given the nature of the Agreement and the trade involved, we believe that the period prescribed 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 its approval.

Status of PLI

We now consider a matter that arose subsequent to the closing of the record in this proceeding. On May 9, 1978, Delta Steamship Line, Inc. (Delta) and PLI advised the Commission that Delta was acquiring PLI and would be taking over 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. 10066. On May 23, 1978, we gave 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 we would substitute Delta for PLI with respect to these agreements. No comments or protests to such notice were filed. Accordingly, as a further condition of

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[21] The Colombian decrees appear to afford all Colombian-flag vessels access to government controlled cargo. *See* footnote 6 *supra*.

[22] Our holding here is not inconsistent with our responsibilities under section 15 which requires that we give the same measure of protection to third-flag vessels (i.e., a vessel flying the flag other than that of United States or Colombia) that we do an United States-flag carrier. For as we said in *Agreement 9939—Pooling Sailing and Equal Access to Government Controlled Cargo Agreement*, 16 F.M.C. 293 at 305:

> This does not necessarily mean that the third-flag vessel always receives identical treatment [as compared to United States flag vessels] for that third flag vessel may be burdened by handicaps or impediments not burdening an American flag vessel. Thus, WL can not qualify to become an "associated" line of CPV, because it, WL, unlike PGL, cannot assist CPV in obtaining access to United States government controlled cargo, whereas PGL can do so.

approval, we shall require the Agreement to be modified by substituting Delta Steamship Lines, Inc. for PLI.

CONCLUSION

For all the foregoing reasons we believe that Agreement No. 10066, if modified as provided herein, is in the public interest, is in furtherance of the regulatory purposes of the Shipping Act, and is not a greater invasion of the prohibitions of the antitrust laws than necessary to further these regulatory purposes. Moreover, the extent of the anticompetitive activity being approved is not sufficient to outweigh these benefits and warrant 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. 10066 is approved pursuant to section 15 of the Shipping Act, 1916, on the condition that:

1. The preamble and paragraphs 3 and 4 be amended by deleting Prudential-Grace Lines and substituting therefore Delta Steamship Lines, Inc.

2. Paragraph 2, the coordination of services provision and paragraph 5, the cargo offering's provision, be deleted.

3. A new paragraph 2 be inserted as follows:

In the event that an additional United States-flag line(s) or Colombian-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.

4. Paragraph 6, the term provision, be deleted and replaced by a new paragraph, designated paragraph 5, reading as follows:

"The term of this Agreement shall be three years from ____________, 1978, the effective date of the Federal Maritime Commission's approval of this Agreement, provided, however, that either party may terminate the Agreement on 30 days' notice.

5. The Commission receive on or before *January 12, 1979*, a complete copy of Agreement No. 10066 modified in accordance with subparagraphs 1, 2, 3 and 4 herein 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 this proceeding be discontinued.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–61
MITSUI & CO. (U.S.A.), INC.

v.

SEA-LAND SERVICE, INC. AND
NIPPON YUSEN KAISHA (NYK LINE)

Respondents found to have properly classified and rated shipments of beef carcasses. Reparation denied.

REPORT

October 3, 1978

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

The proceeding is before the Commission on exceptions from Sea-Land Service, Inc. (Sea-Land) to the Initial Decision of Chief Administrative Law Judge John E. Cograve (Presiding Officer), in which he held that Respondents Sea-Land and Nippon Yusen Kaisha (NYK Line), both members of the Pacific Westbound Conference (PWC), had collected freight charges in excess of those provided in the applicable tariff in violation of section 18(b)(3) of the Shipping Act, 1916. Reparation in the amounts requested by Mitsui & Co. (U.S.A.), Inc. (Mitsui) was awarded.

The basis of the complaint is essentially as follows. Mitsui delivered to the Respondents, at various times, in containers for transportation from ports in California to ports in Japan, cargo described in the bills of lading as "chilled hanging beef carcasses." The bills of lading requested that the temperature within the containers be maintained within a range of 25°–28° Fahrenheit. Sea-Land and NYK Line charged the rate applicable to fresh beef carcasses which is higher than the rate provided for frozen carcasses.[1]

[1] Pacific Westbound Conference Local Freight Tariff No. 4 (FMC 12), Item 011 1000 32:
Meat of Bovine Animals
Including Beef & Veal
Carcasses, Halves
Quarters, Fresh
Refrigerated
Rule 74
The rate under this Item to Japan Base Ports was $272.50 W/T until March 31, 1976, when it was raised to $293.00 W/T. Item 011 1000 33:

Mitsui admits that the carcasses were chilled and not frozen when delivered to the carrier but argues that when kept at the temperatures requested the carcasses would freeze during transportation and, accordingly, should be assessed the rate for frozen beef. Mitsui further maintains that the accepted practice in the locality, is that beef cargo at less than 32° Fahrenheit "is considered 'frozen' *whether or not the beef is actually frozen. . . .*" (Emphasis added)

The Presiding Officer agreed with Mitsui that Respondents had improperly rated the shipments and awarded reparation. In his opinion beef carcasses maintained at 27° Fahrenheit could not be rated as "fresh."

Discussion and Conclusion

Both parties agree that (1) the beef carcasses, described as "chilled" in the bills of lading, were fresh when delivered to the carriers; (2) Mitsui had requested that the temperature within the containers be kept at an average of 27° Fahrenheit; and (3) when kept at that temperature, 46 percent of the water contained in the carcasses would be frozen. On these facts the parties draw diametrically different conclusions. Sea-Land's position is that the carcasses cannot be considered "frozen" when at best, only 46 percent of the water content would freeze during transportation, while Mitsui maintains that meat carcasses which are 46 percent frozen can no longer be considered "fresh."

We reject at the outset Mitsui's argument that "practice in the locality" would dictate that beef carried at less than 32° Fahrenheit be considered frozen "whether or not it is actually frozen." The tariff refers to "frozen" beef without any qualification. Tariffs are published for the benefit of the public at large and are not, unless otherwise specified, limited to a particular locality. Their meaning, therefore, cannot he restricted by an implied "practice in the locality."

The rate for fresh beef carcasses provides for refrigeration.[2] The question then is whether in requesting that the temperatures within the containers be maintained at an average of 27° Fahrenheit Mitsui wanted the carcasses to freeze during transportation or simply that they be kept "chilled" (which might have included a certain degree of freezing). It would appear that had Mitsui intended the carcasses to freeze, it would have asked for lower temperatures.[3] At the temperatures indicated in the bills of lading the beef carcasses could only partially freeze, leaving the major portions of the carcasses fresh. In our opinion, therefore, Respondents properly rated the shipments under Item 011 1000 32 of PWC's tariff as beef carcasses "Fresh Refrigerated." Consequently, the decision of the Presiding Officer must be reversed and reparation denied. NYK Line, which refunded $12,495.27 of the charges collected on the 45 shipments it

Meat of Bovine Animals
Including Beef & Veal
Carcasses, Halves
Quarters, Frozen
Rule 74

The rate under Item 33 to Japan Base Ports was $207.50 W/T until March 31, 1976, when it was raised to $223.00 W/T.

[2] To refrigerate means: to make or keep cool or cold, chill . . . to preserve by keeping cold or freezing. Webster's New World Dictionary of the American Language, Second College Edition (1970), at p. 1194.

[3] Mitsui's letter to Sea-Land, of August 13, 1973, referred to in the Initial Decision, discloses Mitsui's disappointment because "the meat arrived at Yokohama in a nearly frozen condition."

carried, is directed to file with the Commission within thirty days from the service of this Report, evidence showing that it has taken the steps necessary to collect from Mitsui the amount refunded.

The complaint is dismissed.

It is so Ordered.

*Commissioner Thomas F. Moakley, dissenting.**

I find no basis in either fact or law to sustain the Majority Report.

The opinion rests on a foundation of three facts with which, according to the opinion, "both parties agree." The first of the three is that

"the beef carcasses, described as 'chilled' in the bills of lading, were fresh when delivered to the carriers." (Report at 3).

This is simply wrong. Mitsui never agreed that the beef carcasses were fresh. The record of this proceeding reveals only one instance which could *conceivably* form the basis for this assertion. In its Reply Memorandum, Mitsui states

"the carcasses tendered to Sea-Land were described as 'chilled' rather than as 'frozen' because when the carcasses are delivered at dockside to the carrier they are not frozen."

This can in no way be construed to mean that Mitsui *agrees* that the carcasses were *"fresh"*.

Such reasoning effectively equates the definitions of the words "fresh" and "chilled" and arises from a blurring of the two separate but related temperature scales involved here.[4] The first scale, that used to describe the cargo when tendering it to the carrier, defines three temperature ranges (i.e., "fresh", "chilled" and "frozen"); the second scale, that which the tariff requires to define the cargo for rating purposes, admits to only two temperature ranges (i.e., "fresh" and "frozen"). Thus, the Majority Report errs by reasoning that where one extreme (frozen) of a three-range scale fails to adequately define the cargo relative to two other temperature ranges, that same word must, therefore, likewise fail to define the cargo relative to a single alternative on a two-range temperature scale. The Majority Report thus fails to effect the reconciliation of the two distinct continua of temperature ranges necessary to determine that range on the "fresh-frozen" scale that corresponds to the "chilled" range on the "fresh-chilled-frozen" scale.

On the basis of this factual inaccuracy, and in conjunction with the two other "agreed" facts, the Majority Report concludes that the cargo here in question was correctly rated under the "fresh" category. The source of the last of these three facts, that when kept at a temperature of 27°F. "46% of the water contained in the carcasses would be frozen" is Sea-Land's Exceptions to the Initial Decision. At page 3 of its Exceptions, Sea-Land states:

. . . perhaps the most definitive original research on the subject which is still valid and utilized today is found in *Brown's Cold Storage Temperature and Humidity Charts*, Second Edition, 1932. This document provides information that beef carcasses contain approximately 7% salt which goes to reducing the freezing temperature of the beef. The examples set out in *Brown's* provide the following: At 29°F. only 40% of the total water in the beef carcass is frozen. *At 27° F. only 46% of the total water contained in the beef carcass is frozen.* At 25°F. 57% of the total water is frozen, and at

* Commissioner Karl E. Bakke concurs in this dissent.

[4] Indeed, in reasoning as it does, the Majority Report appears to have become entrapped in the quagmire of the tariff ambiguities discussed herein.

5°F. 84% of the water content of the beef becomes frozen. Clearly, then, 27°F. is not sufficient to freeze beef. (Emphasis added).

Accepting Sea-Land's position that "27°F. is not sufficient to freeze beef", it seems clear that if "46% of the total water contained in the beef is frozen", it cannot be perfunctorily rated as "fresh" either.

Indeed, a letter attached to Mitsui's Reply to Exceptions from the OK Meat Packaging Co. states that "hanging beef *will freeze* when kept in a closed container at 27°F." (Emphasis added).

Even accepting *arguendo* the proposition that the beef was not, in fact, deep frozen, I find that the holding of the Majority Report requires reliance on a strained and unnatural construction, *Bratti v. Prudential*, 8 F.M.C. 375, 379 (1965), inconsistent with the purposes of the tariff, *National Van Lines, Inc. v. U.S.*, 426, F.2d 329, 336 (Ct. Cl., 1970), to reach the finding that it was properly rated as "fresh."

Premised on inaccurate facts and concluded with tortured logic, the Report totally ignores the most significant legal issue of this proceeding.

In its Reply to Exceptions, Mitsui correctly asserts that "if there is an ambiguity in the tariff, it must be decided against the Lines who drafted it." Certainly this statement, at the very least, requires that the ambiguity issue be addressed. Yet nowhere does the Report consider the possibility that the tariff may itself have been ambiguously constructed.

In its Exceptions, quoted above, Sea-Land, while asserting that 27°F. is insufficient to freeze beef, still fails, in fact, to show at what temperature the beef will be frozen. At 5°F., according to Sea-Land, the water in the beef carcasses is still only 84% frozen. Viewed in this light, Sea-Land's Exceptions serve only to heighten the complexity of the tariff ambiguity.

It would seem that in its effort to determine whether the carcasses were "fresh" or "frozen" the Majority failed to consider that the tariff against which these terms are defined may have been unclear as to their application. In concentrating its efforts on the cargo the question of the tariff was ignored.

The Report's failure to address this issue is all the more confusing since the text of the Report itself explicitly recognizes that "chilled" "might have included a certain degree of freezing." Indeed, the Report goes so far as to state that

"at the temperatures indicated in the bills of lading the beef carcasses *could* only *partially freeze*, leaving the major portion of the carcasses fresh." (Emphasis added).

When a cargo is partially defined by two distinct tariff items (frozen: 46%, fresh: 54%) and the tariff fails to clarify which item applies, consideration of the question of tariff ambiguity seems to be compelled.

Thus, assuming *arguendo* that Mitsui has failed to establish a record containing "sufficient facts to indicate with reasonable certainty" that the beef in question was indeed frozen, *Colgate Palmolive Company v. United Fruit Company*, Informal Docket No. 115 (I), Commission Order served September 30, 1970, quoted with approval in *Ocean Freight Consultants v. Royal Netherlands Steamship Company*, 17 F.M.C. 143, 144 (1973), the Majority Report fails to recognize that Mitsui must still prevail where there is an ambiguity in the tariff under which the cargo moved.

I find that by its very silence on the question of which temperature range defines the fresh rating classification as contrasted to the temperature range defining the frozen rating classification, the Conference has itself established a patent ambiguity in its tariff; the very ambiguity which gave rise to this proceeding, and since tariffs are subject to the rules of interpretation generally applicable to written instruments and those rules hold that a document is vulnerable against its maker, *Rubber Development Corp. v. Booth S.S. Co.*, 2 USMC 746, 748 (1945); *Cf. Great Northern Railway Company v. Merchants Elevator Company*, 259 U.S. 285, 291 (1922) (holding court jurisdiction without preliminary resort to the I.C.C.), it follows that proof of a tariff ambiguity entitles the complainant to the lower of the ambiguous rates, i.e., the "frozen" rate. *Bratti v. Prudential*, 8 F.M.C. 375, 379 (1965).

Therefore, Mitsui is not limited to proving that the beef carcasses were actually frozen. Rather, Mitsui has the benefit of established case law in support of the proposition that its burden of proof is sustained if it successfully establishes the existence of a patent ambiguity in the tariff itself.[5] The question, therefore, resolves itself to whether or not the record supports a finding that two or more of the competing provisions of The Pacific Westbound Conference tariff could reasonably be applied to the commodity shipped.

Even if the foregoing is not considered sufficient *per se* to establish the existence of a patent ambiguity in the tariff it is obvious from the record in this proceeding that the tariff descriptions, "fresh" and "frozen" as applied to hanging beef carcasses, are not susceptible to universally accepted definition.[6] In the past, the Commission has held that where respondents apply different rates to the same commodity, the tariff is ambiguous.[7]

In this Docket there are only two potentially applicable rates, neither of which address the temperature at which the cargo is to be transported.[8] Respondent, NYK Line, a party to the Pacific Westbound Conference tariff, chose to correct its billing to reflect the "frozen" beef rate. In so doing, NYK Line expressed its judgment that the "frozen beef rate should apply on cargo maintained at temperature of 32°F. or below."[9] It is, therefore, obvious that on its face the record clearly sustains a finding that different rates could be and, in fact, were applied to essentially the same cargo by the respondents. Consequently, a logical application of Commission precedent to the facts in the record, dictates that the tariff must be found ambiguous, and Mitsui must be awarded the lower "frozen" rate.

Thus, even without addressing the numerous instances of confusion as to the applicability of the terms "fresh" and "frozen" to the description "chilled",

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[5] I am not bothered by the fact that Mitsui failed to allege a tariff ambiguity. Mitsui felt as did the Presiding Officer and, upon reconsideration, did NYK Line, that the tariff was clear in its support of Mitsui's position. The issue was nevertheless noted in Mitsui's Reply to Exceptions. Under such circumstances it would be patently unfair to penalize Mitsui on the procedural grounds of failing to enter an alternative pleading as to tariff ambiguity. Furthermore, in an excercise of its administrative discretion, the Commission should *sua sponte* explore such issues which, in a given proceeding, it finds relevant to the equitable resolution of a matter before it.

[6] This was adequately demonstrated during the course of the Commission's discussion of the record in this proceeding.

[7] See for example, *Rubber Development Corp. v. Booth S.S. Co., Ltd.*, 2 USMC 746, 748, where it was held that the ambiguity of the tariff is demonstrated by the fact that respondents applied three different rates to the articles in question.

[8] Both items refer to Rule 74 of the tariff. As noted by the Presiding Officer (ID. pg. 2 Footnote 3) this rule sets out the general terms and conditions applicable to shipments of refrigerated cargo. The rule does not specify temperatures.

[9] See the Correction to B/L & F/L documents prepared by NYK Line.

the record of this proceeding and the weight of Commission precedent dictate that Mitsui must prevail.

The Commission, in its quest for knowledge relating to a precise temperature at which one specific product becomes frozen (in this instance meat), lost sight of its Congressionally mandated function to order enforced reasonable classifications, tariffs, regulations and practices on behalf of the shipping public.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 544

LEVEL EXPORT SALES CORPORATION

v.

SEA-LAND SERVICE, INC.

ORDER ON REVIEW

October 11, 1978

The proceeding is before the Commission on exceptions by Sea-Land Service, Inc. (Sea-Land) to the Initial Decision of Administrative Law Judge Seymour Glanzer denying Sea-Land permission to waive collection of a portion of the freight charges asssessed on 73 shipments of cotton denim. The shipments delivered in 55 containers were carried for Level Export Corporation from Portsmouth, Virginia, to Genoa, Leghorn and Naples, Italy at various times between February 2, 1977 and March 4, 1977.

Section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817(b)(3)), requires that applications for permission to waive collection of a portion of the freight charges be filed within 180 days from the date of shipment. On exceptions Sea-Land confirms that, as found in the Initial Decision, the shipments took place between February 2, 1977 and March 4, 1977. The application was filed on September 1, 1977, that is in excess of the 180 days provided in the statute. The Commission therefore has no authority to grant the relief requested and the application must be denied as late filed, without regard to its merits.

It is so ordered.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET No. 77-57

HILO COAST PROCESSING COMPANY

v.

MATSON NAVIGATION COMPANY

NOTICE

October 12, 1978

Notice is given that the time within which the Commission could determine to review the August 31, 1978 initial decision in this proceeding in the absence of exceptions has expired with no such determination being made. Accordingly, review will not be undertaken.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 77–57

HILO COAST PROCESSING COMPANY

v.

MATSON NAVIGATION COMPANY

Finalized on October 12, 1978

Request for reparation denied where tariff used in assessing charges on shipment of machinery was found to be appropriate and proper for the items shipped in RO/RO service, notwithstanding the fact that carrier mis-stated the applicable tariff and underestimated the charges in preliminary negotiation letter to shipper's representative.

David H.C. Lee, Esq., for complainant Hilo Coast Processing Company.
David F. Anderson, Esq., and *Peter P. Wilson, Esq.,* for respondent Matson Navigation Company.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

This proceeding commenced with the filing of a complaint on November 18, 1977, by the Hilo Coast Processing Company (Hilo or complainant) against the Matson Navigation Company (Matson or respondent), in which the complainant alleged that the respondent carrier assessed charges greater than those permitted under the applicable filed tariff, in violation of section 18 of the Shipping Act, 1916 (46 U.S.C. 817(a)). The subject shipment was comprised of 24 pieces of machinery (agricultural equipment) which was received by the respondent ocean carrier at its Oakland, California, terminal sometime between March 29, and April 6, 1977, was unloaded from Southern Pacific railroad cars, reloaded onto 13 Matson flatbed trailers, and transported from Oakland to Hilo, Hawaii, on one of Matson's "Roll-On/Roll-Off" (RO/RO) service vessels. After the filing of the Answer, counsel for both parties agreed that there were no factual matters at issue that required an oral hearing or cross-examination and that the case could be decided on the basis of filed written direct testimony,[2] exhibits and briefs.

[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).

[2] Complainant's direct testimony, served March 22, 1978, consists of the affidavits of Donald J. Martin, president of Hilo Coast; James E. Graybill, senior buyer, C. Breqer & Co., agents for Hilo; and Michael J. McMurtray, president of Transp. Analysis, Inc.,; together with exhibits attached thereto. Additionally, in the introduction to Complainant's Direct Testimony, complainant's counsel requested that the Commission take official notice of certain filed tariffs, rules, and definitions. That request is granted and copies of such documents are already in the record as exhibits attached to Complainant's Direct Testimony. Respondent's direct testimony, served April 14, 1978, consists of the affidavits of John S. Walter, manager of Matson's container operations, and Christopher A. Kane, Matson's manager of pricing, together with exhibits attached thereto.

The controversy centers upon which one of two Matson filed tariffs is the properly applicable tariff for this particular shipment of machinery. The respondent carrier contends that Matson's Freight Tariff No. 14–E, FMC–156, was applicable, and assessed the freight charges on that basis, including $13,236.92 in "overwidth" charges. The complainant claims that Matson's Freight Tariff No. 1–S, FMC–158 was applicable, which tariff had no provision for overwidth charges. The overwidth charges constitute the bulk of the disputed amount.

DISCUSSION

The dispute apparently had its genesis in a letter Matson sent in reply to an inquiry from the complainant's representative. After being given a thorough and fair description of the machinery to be shipped, the Matson letter[3] specifically stated that: "These units would move in our Ro-Ro service under Matson Tariff 1–S item 5 Cargo N.O.S." Charges were then estimated on each unit, and the total estimate then given was substantially lower than Matson ultimately billed and collected, using *not* the cited Tariff 1–S, but the higher Tariff 14–E. (Of the two tariffs, only 14–E provided for "overwidth" charges). Matson concedes that complainant Hilo "sought a rate quotation from Matson in a very professional manner, and that Matson, in writing, provided Hilo Coast Processing Company with an erroneous quotation."[4] If this were an ordinary civil contract matter, that Matson letter and the admission could be dispositive of the matter, but it is not—this is a question of lawfully filed tariffs and mandatory applicability (assuming no ambiguity). Although it may seem harsh and callous to say so, contract principles, equity and principles of ordinary, arms-length fair business dealings are uninvited strangers in a tariff proceeding; that is to say, they are totally irrelevant. Here, the shipper-consignee[5] did the best it could to fix a reasonable limit on its transportation costs before shipment, but the carrier blundered and misled the shipper to his detriment, so who pays? Why the shipper, of course.[6] Had the shipper been provided with a more accurate estimate instead of a "low ball," it might have shopped elsewhere for its freight transportation.

Except for the allegations in the Complaint and the arguments of counsel in briefs, the complainant has submitted no witness statements which offer the reasoning or rationale which lead to the conclusion that the lower-yielding tariff should have been used instead of the one upon which the carrier based its charges. This is surprising particularly since one of complainant's three witnesses for direct testimony was the president of a firm which is in the business of auditing freight charges made by carriers, and said witness[7] testified (by affidavit) that he had been contacted on behalf of the complainant to conduct an

[3] Douglas to Graybill, December 7, 1976.

[4] Testimony of Christopher A. Kane, at 9.

[5] The consignee (Hilo) negotiated for, arranged and paid for the subject transportation.

[6] "The shipper's knowledge of the lawful rate is conclusively presumed," *Kansas City Southern Ry. Co. v. Carl*, 227 U.S. 639 (1913). The same presumption is applicable to tariff rules and regulations. Neither mistake, inadvertence, contrary intention of the parties, hardship nor principles of equity permit a deviation from the rates, rules and regulations in the carrier's filed tariff. *Louisville & Nashville Ry. v. Maxwell*, 237 U.S. 94 (1915); *Boston & Maine RR v. Hooker*, 233 U.S. 97, 112 (1914); *U.S. v. Pan American Mail Line*, 69 Civ. 2381 (USDC, SD, N.Y., Sept. 11, 1972), 1973 AMC 404, *Kraft Foods v. Moore McCormack Lines*, 17 F.M.C. 320, 323 (1974).

[7] Michael J. McMurtray, president of Transportation Analysis, Inc.

audit of the transportation charges on the subject shipment—but we have not been offered the results or conclusions of that audit. Nevertheless, all the exhibits and documentation submitted with the pleadings and direct testimony, i.e., bill of lading, negotiation correspondence, applicable tariff pages, rates, rules and definitions, etc., establish an adequate picture of the items shipped and the nature of the dispute as to the appropriate tariff and proper charges.

Although the amount of overcharge alleged in the original Complaint was $14,374.70, by virtue of a voluntary refund to the complainant by Matson ($1,975.48) based on an admitted error by Matson in freight charges for two of the twenty-four pieces shipped, and an implicit recognition by counsel for complainant[8] that even if complainant's preferred tariff were utilized, the total overcharge would not be as great as originally stated in the Complaint, the net amount of alleged overcharge still in dispute has been reduced to $6,784.44.[9]

In order to determine whether Matson Tariff 14–E (as billed) or Matson Tariff 1–S (as claimed by complainant) was the applicable tariff for the assessment of proper freight charges, we find from an analysis of the tariffs, the tariff rules and their filed definitions, that the preliminary determination must be made as to whether the shipped machinery constituted "containerizable" or "non-containerizable" cargo. Both parties now agree that *if* the shipment (the remaining disputed portion) was "containerizable," then Matson Tariff 14–E was appropriately applied and the freight charges ultimately collected (after subsequent refund) by Matson was correct; conversely, both parties agree that if the subject shipment was "non-containerizable," then the complainant was overcharged $6,784.44 because Matson Tariff 1–S should have been applied. (See testimony of Matson witness Kane and Opening Brief of complainant Hilo, at 3, proposed finding 8.) The gist of complainant's argument is that some of the machinery was wider than the trailers on which they were shipped and therefore they did not come within the filed tariff definition of "containerizable cargo" as being "any piece or package which can be loaded *wholly within or on* a . . . container or trailer for which rates are published to Hawaii in M.N.C. Tariff No. 14–D . . . including . . . reissues thereof." (Rule 15, original page 10, Matson Freight Tariff No. 1–S, FMC–158, Matson Exh. "K".) Complainant would likewise argue that such overwidth machinery does not come within Matson's filed tariff definition of "container cargo," i.e., "that cargo which can safely be carried *in or on* a trailer or container not exceeding 45 feet in length or 8 feet in width." (Rule 1(x), 2d revised page 13, Matson Westbound Container Freight Tariff No. 14–E, FMC–156, Matson Exh. "A".) Twelve of the twenty-four pieces shipped had widths exceeding the 8-foot width of Matson's flatbed trailers (testimony of Matson witness J.S. Walter and Exh. "1" thereto, Matson Dock Receipt; see also Exh. "D" to testimony of Hilo witness Graybill). Page 2 of the Matson dock receipt lists the 13 flatbed trailers used by Matson for this shipment and dimensions of each "package" are set forth on the dock receipt.

I find the analysis of Matson witness Kane to be thorough and accurate with regard to whether the subject shipment was properly treated as "containerizable" and, accordingly, whether the remaining 22 disputed pieces of machinery

[8] Proposed Findings #8 & #11, Complainant's Opening Brief, and page 11 of same.

[9] *Ibid.*

were properly assessed under Matson Tariff 14–E, rather than Tariff 1–S. It was in the course of this same review that Mr. Kane discovered that, indeed, two of the thirteen trailers (and two of the 24 pieces) had been misrated, and he thereupon arranged for a Matson check to be drawn in favor of Hilo for $1,975.48 to rectify the error.

Cargoes moving to Hawaii in Matson's RO/RO service are rated under either one of two Matson tariffs—Matson Freight Tariff 1–S (FMC–158) or Matson Westbound Container Freight Tariff 14–E (a re-issue of 14–D) (FMC–156), depending upon whether or not the cargo is container cargo as defined in Matson's filed tariff rules and definitions. The two pertinent definitions ("container cargo" and "containerized cargo") are given *supra* with the citations to their filed tariff sources. For brevity I will not repeat the step-by-step analysis of Mr. Kane in his filed written direct testimony (pages 3–9).[10] Suffice it to say that I do not find any ambiguity in which tariff properly applied to the subject shipment; Matson Westbound Container Freight Tariff 14–E clearly applied. By operation of the filed tariff definitions, the subject shipment was container cargo and the fact that some of the machinery overlapped the sides of the flatbeds on which they rested I find to be immaterial and irrelevant. Overwidth charges were properly applied, and I see no relief for complainant in those portions of the filed definitions that stated "cargo which can be safely carried . . . *on* a trailer" (container cargo) or "any piece or package which can be loaded *wholly within or on* a . . . container or trailer" (containerizable cargo). The subject machinery was loaded wholly on the flatbeds and the portions extending over the sides were not otherwise supported by any other "outriggers" or other extension supports; hence, they were loaded wholly on, and supported wholly and solely by, the flatbeds on which they were placed. Carriage of overwidth cargoes is regularly and safely performed by Matson in just such a manner on standard 40-foot flatbed trailers only eight feet in width. The overwidth charge is a reasonable charge in recognition of the fact that overwidth loads, working in concert, eventually eliminate what would be another salable trailer position on the ocean-going vessel. The tariff exception for "lowboy" trailers (eliminating them from using Tariff 14–E) was inapplicable to this shipment.

Rule 260(b)(5) of Matson's Tariff 14–E (container cargo) provides for an additional charge for each linear foot or fraction thereof of overhang of the cargo beyond the trailer width. If, as complainant contends, the mere fact that a cargo overhangs the trailer bed was sufficient to disqualify that cargo from being "container cargo," then there would be no reason to have such an "overwidth" provision in the container cargo tariff (14–E).

I find that the proper total charges are as listed on page 11 of Mr. Kane's testimony, i.e., two trailers rated under Matson Tariff 1–S (for which refund was made) and eleven trailers rated under Matson Westbound Container Freight Tariff 14–E; a total of $6,626.55 for the former and $47,441.21 for the latter, including in both cases all wharfage and heavy lift charges, and in the case of the 14–E trailers the overwidth charges and unloading allowance. The grand total comes to $54,067.76.

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[10] Mr. Kane's testimony carefully tracked all the possible exceptions to Matson Tariff 14–E and showed how this particular cargo would not fit them. He also demonstrated that Matson Tariff 1–S could not possibly apply to this cargo and the way it was shipped, with the exception of the two trailerloads (out of 13) for which a refund was made.

Finally, that portion of the Complaint's "Wherefore" clause must be addressed which demands "costs" and "reasonable attorneys' fees." Such items are not recoverable in Commission reparation proceedings absent specific statutory authority. In this area we have the same limitation as other Federal administrative agencies. See, *e.g.*, *Fleishmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717–720 (1967); *Fitzgerald v. Civil Service Commission,* 407 F. Supp. 380 (USDC, D.C. 1975); *Ace Machinery Co. v. Hapag-Lloyd,* 16 SRR 1258, 1261 (1976); *Ibid,* 16 SRR 1531, 1534 (1976); see also *Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 240 (1975).

CONCLUSION

Having found that the amount ultimately collected by the carrier (after the partial refund) exactly corresponds to what the carrier was entitled to collect under the applicable filed tariffs, the complainant's request for reparation must be, and is, DENIED.

(S) THOMAS W. REILLY
Administrative Law Judge

WASHINGTON, D.C.
August 31, 1978

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 405(I)

PARAMOUNT EXPORT COMPANY

v.

SEA-LAND SERVICE, INC.

ORDER ON RECONSIDERATION

October 12, 1978

By Petition filed June 27, 1978, Respondent Sea-Land Service, Inc. (Sea-Land) asks the Commission to reconsider its Report served May 12, 1978, awarding reparation to Complainant Paramount Export Company.

Sea-Land's position is that no final action should be permitted until (1) either the consignor or the consignee submits a Shipper's Export Declaration Correction Form as provided in 15 U.S.C. 30.16, and (2) Complainant files with the Commission a verified statement in the form prescribed by section 502.304(a) of the Commission's Rules, 46 C.F.R. 502.30(a). Alternatively, Sea-Land proposes that the Commission "through its governmental contacts . . . ascertain whether the customs declaration filed with the exporting and importing nation accurately reflects the same amount of cargo which is the subject of this complaint."

Sea-Land apparently intends the Commission to institute an independent investigation of Complainant's compliance with custom regulations. Apart from the fact that the Bureau of Customs and not the Commission is charged with regulating export declarations, Petitioner states no reason, or offers no new evidence from which to conclude that the correction of the export declaration would serve any purpose. The export declaration and the corresponding ocean bill of lading prepared by the same ocean freight forwarder, presumably at the same time, reflect the same amounts of cargo being shipped. In reaching its May 12, 1978, decision the Commission had both documents before it, and concluded that the evidence of record supported the finding that the number of crates of plums found in the container was less than the number indicated in the shipping documents. Although it might further support the Commission's conclusion, additional evidence in the form of a corrected export declaration is unnecessary in this instance.

Petitioner also asks the Commission to provide guidelines on the burden of proof to be used by ocean carriers in informal dockets. The Commission's Rules provide no special standards of evidence for carriers. The Administrative

Procedure Act places the burden of proof on the proponent of a rule or order, 5 U.S.C. 556(d). This rule governs in informal as well as formal docketed proceedings.

Sea-Land has, however, correctly noted that the complaint lacks the verified statement prescribed by section 502.304(a) of the Rules.* Accordingly, the record will remain open for twenty (20) days from the service of this Order in order to allow Complainant to file the required statement. Should Complainant fail to file such statement, reparation shall be denied.

It is so ordered.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

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* The verification required by Appendix A to Part 502 of the Rules reads as follows:

VERIFICATION

State of ______________ , County of ________________ , ss: ________________ , being first duly sworn on oath deposes and says that he is ____

____

(The claimant, or if a firm, association or corporation, state the capacity of the affiant.) and is the person who signed the foregoing claim, that he has read the foregoing and that the facts set forth without qualification are true and that the facts stated therein upon information received from others, affiant believes to be true.

____

Subscribed and sworn before me, a notary public in and for the State of ________________ , County of ________________ , this ________ day of ________ , 19 ______ .

(SEAL)

____
(Notary Public)

FEDERAL MARITIME COMMISSION

DOCKET NO. 78–23

ROBERTS STEAMSHIP AGENCY, INC.

v.

THE BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS AND ATLANTIC AND GULF STEVEDORES, INC.

ORDER OF DISMISSAL

October 16, 1978

Administrative Law Judge Charles E. Morgan served an order of dismissal in this proceeding August 14, 1978. No appeal of the order was filed. We issued a notice of determination to review the order of dismissal.

The complaint in question alleges that respondents have reached an agreement for use of berths and wharves at the Port of New Orleans which agreement has not been submitted to or approved by the Commission in violation of section 15 of the Shipping Act, 1916. The arrangement is also alleged to be in violation of section 16 First and 17 of the Act.

We recognize that in a complaint proceeding we cannot require the parties to litigate against their wishes and for this reason we will not disturb the Administrative Law Judge's order of dismissal. The Commission, however, has an independent responsibility to examine alleged violations of the Shipping Act where circumstances warrant. We think the allegations here deserve further examination and, accordingly, they will be pursued for now at the Commission staff level. Further formal proceedings will ensue if warranted.

It is ordered that the complaint in this proceeding is dismissed.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 78–23

ROBERTS STEAMSHIP AGENCY, INC.

v.

THE BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS AND ATLANTIC AND GULF STEVEDORES, INC.

COMPLAINT DISMISSED

Finalized on October 16, 1978

By motion to dismiss dated June 21, 1978, respondent Board of Commissioners of the Port of New Orleans moves that the complaint in this proceeding be dismissed with prejudice. The other respondent joins in the motion, and the complainant does not oppose the motion. Because specific reasons for dismissal were not stated in the motion, it was directed that facts and reasons in support of the motion be submitted.

By letter dated July 26, 1978, the respondent Board of Commissioners of the Port of New Orleans states that at the same time that the complainant filed its complaint in No. 78–23, the complainant also filed a complaint and motions for a temporary restraining order and preliminary injunction in the U.S. District Court for the Eastern District of Louisiana. The complaint in District Court adverted to the same facts as those in No. 78–23, and sought injunctive relief pending the outcome of No. 78–23. The District Court denied the complainant's motion for a temporary restraining order. The complainant then moved that its District Court complaint be dismissed with prejudice, which motion was granted at a hearing in the District Court on June 16, 1978.

As a consequence of the dismissal with prejudice of the Federal court action, the complainant advised the respondents in the present proceeding, No. 78–23, that it would not oppose a motion to dismiss with prejudice in No. 78–23. The complainant chose not to pursue the complaint in No. 78–23, and to waive any right it might have to reassert its claim in the future.

By letter dated July 31, 1978, counsel for Atlantic & Gulf Stevedores, Inc., state substantially the same reasons as above in support of dismissal of the complaint.

Under the circumstances, the complainant will be considered in effect to have withdrawn its complaint. The motion to dismiss is granted and the subject complaint hereby is dismissed with prejudice.

(S) CHARLES E. MORGAN
Administrative Law Judge

August 14, 1978

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 534(I)

AQUINO SAILCLOTH, INC.

v.

UNITED STATES LINES, INC.

ORDER AWARDING REPARATION

October 17, 1978

The Commission by order served September 7, 1978, determined that claimant had not adequately substantiated its claim for overcharges in this proceeding. Claimant was provided additional opportunity to substantiate its claim.

The dispute concerns the proper measurement of the cargo which consisted of a mix of Dacron and Nylon Sailcloth. The measurements said to have been taken at the pier were 336 cu. ft. This was evidenced by the dock receipt and was entered on the rated bill of lading. The measurement said by claimant to be correct is 120 cu. ft. This was evidenced by the packing list said to cover the shipment. Claimant has now submitted additional evidence which shows the weight to measurement relation of similar shipments by claimant of mixes of the same commodities in question here. This evidence establishes that on other shipments of dacron and nylon sailcloth the average weight in pounds was 30.3 times the cube.

There is no dispute as to the weight of the shipment in question. The shipper's packing list, the bill of lading and the dock receipt all list the weight as 4046 lbs. If the cube suggested by claimant (120 cu. ft.) is accepted as accurate, the weight of the shipment in question would be 33.7 times the cube. If the cube recorded on the dock receipt (336 cu. ft.) is accepted, the weight would be only 12.0 times the cube. It is apparent then that, inasmuch as the weight of the shipment is undisputed, the 336 cube recorded on the dock receipt and used to rate the shipment would be completely out of line with the cube on similar shipments of the same commodities. The 120 cube advocated by claimant, on the other hand, is within reasonable bounds. An exact relation of the instant shipment to the other shipments could not be expected because of the different mixes of the two commodities on the several shipments. However, such exactness is not necessary because of the clear unreliability of the dock receipt figure.

On the basis of the foregoing, it is concluded that claimant has satisfactorily demonstrated that the shipment was misrated, and that it is entitled to reparation in the amount of $596.70. It is so ordered.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–45

AGREEMENT NO. 8005–7 BETWEEN MEMBERS OF THE NEW YORK TERMINAL CONFERENCE

ORDER ON RECONSIDERATION

November 2, 1978

Now before the Commission are petitions filed by the New York Terminal Conference (NYTC) and Sea-Land Service, Inc. (Sea-Land) seeking reconsideration of widely different aspects of the Commission's August 14, 1978, Report and Order disapproving Agreement No. 8005–7.[1]

Sea-Land objects to the August Report's affirmation of the basic principle that individual terminal operators have a right, within the limits of Shipping Act sections 15, 16 or 17, to establish their own prices and policies. NYTC requests the Commission to reverse its earlier decision and approve Agreement No. 9005–7 because application of the *Svenska* doctrine to the proposed extension of NYTC's authority to fix free time and demurrage rates is allegedly unreasonable.

Neither petition contains new arguments or information. The August Report addressed, and denied, the contentions presently advanced by NYTC and Sea-Land.

THEREFORE, IT IS ORDERED, That the relief requested by the "Petition for Reconsideration" of the New York Terminal Conference and the "Petition for Limited Reconsideration" of Sea-Land Service, Inc., is denied.

By Order of the Commission.

(S) FRANCIS C. HURNEY
Secretary

[1] Replies were filed by the Commission's Bureau of Hearing Counsel, Sea-Land, NYTC, the Maryland Port Administration and 12 North Atlantic freight conferences.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-49

UNITED STATES LINES, INC.; GENERAL INCREASE IN RATES IN THE U.S. MAINLAND/GUAM TRADE

DOCKET NO. 77-51

MATSON NAVIGATION COMPANY; GENERAL INCREASE IN RATES IN THE U.S. MAINLAND/GUAM TRADE

NOTICE

November 3, 1978

Notice is given that the time within which the Commission could determine to review the September 15, 1978, order of discontinuance in this proceeding has expired with no such determination being made. Accordingly, review will not be undertaken.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 77–49

UNITED STATES LINES, INC.; GENERAL INCREASE IN RATES IN THE U.S. MAINLAND/GUAM TRADE

MOTIONS TO DISMISS PROCEEDING GRANTED

Finalized on November 3, 1978

By Order of Investigation and Suspension[1] served September 28, 1977, the Federal Maritime Commission (the Commission) instituted an investigation to determine whether a proposed 5% general rate increase of United States Lines, Inc. (USL), on its ocean freight rates and charges for its service in the U.S. mainland—Guam trade would be unjust, unreasonable, or otherwise unlawful under section 18(a) of the Shipping Act, 1916, or section 4 of the Intercoastal Shipping Act, 1933. The USL investigation bore Docket No. 77–49.

By Order of Investigation served September 29, 1977, the Commission instituted a similar investigation to determine whether an identical 5% general rate increase proposed by the Matson Navigation Company (Matson) in the same trade (U.S. mainland—Guam) would be just and reasonable under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933. In this Matson Order (77–51), the Commission made the following observations:

> United States Lines, Inc. (USL) Matson's competitor in the trade, filed a similar 5 percent increase simultaneously with Matson. The Commission believes that USL may be earning an excessive rate of return and therefore has ordered the increase of USL suspended and investigated. That investigation may result in a Commission order prescribing the maximum rate level to be charged by USL. Historically, the rate levels maintained by USL and Matson have remained at parity for competitive reasons. Therefore, any order affecting the rate level of USL will probably affect Matson as well. Accordingly, we believe that the revenue requirements of Matson must be considered in determining the level of rates which will, in all probability, be charged by both carriers in the trade. (Matson Order of Investigation, Docket 77–51, at 2)

On motion of Matson, unopposed by the other parties to the proceeding, the two proceedings were ordered consolidated by the Chief Administrative Law Judge on November 28, 1977. The other parties to the proceeding were FMC Hearing Counsel and two intervenors, the Military Sealift Command (MSC) and the Government of Guam (Guam).[2]

[1] Although the Commission initially suspended the USL 5% rate increase, which had been scheduled to go into effect on September 29, 1977, the rate ultimately did go into effect on January 28, 1978. Matson's increase was not suspended.

[2] MSC's petition to intervene was granted on November 2, 1977; Guam's petition to intervene was granted May 12, 1978.

There have been two prehearing conferences[3] in this proceeding, as well as extensive discovery, including depositions, document production and interrogatories. The oral evidentiary hearing had been scheduled (after postponements) for September 18, 1978.

On August 14, 1978, respondent USL filed a Motion to Dismiss Investigation based upon USL's determination "to eliminate immediately the 5% rate increase, such reduction to be effective upon the grant of the motion to dismiss the investigation in Docket 77–49" (the USL investigation). The reasons for USL being willing to cancel the 5% rate increase were set forth in its motion and included, *inter alia,* the fact that dismissal of the proceeding "would also remove the necessity of possibly premature resolution of complex accounting and legal issues." All of the other parties to the proceeding concurred in the position that the dismissal should be granted ("conditioned upon the simultaneous withdrawal of the 5% rate increase"). Hearing Counsel, in their reply, concurred with the proviso that the dismissal "is not to be construed as an admission that the present rate level is proper and is without prejudice to the initiation of a proceeding testing the reasonableness of the rates and practices in the trade in the future" (citing *Dismissal of Atlantic/Gulf–Hawaii Portion of Investigation into Hawaiian Rates,* FMC No. 960, 5 SRR 583, 1965).

On August 29, 1978, respondent Matson filed a similar Motion to Dismiss Investigation contingent upon the roll-back of its 5% general rate increase, and provided that the Commission concurrently grants the similar motion of USL. No party opposed Matson's motion. It should be noted that Hearing Counsel's position, from early in the proceeding, was that Matson's proposed 5% increase was justified by Matson's need for additional revenue,[4] and that Guam, although initially opposing Matson's proposed 5% general rate increase, after extensive discovery of Matson's financial and operating data, concluded that it would not have any "affirmative evidence to present in support of the proposition that the Matson rate increase is unjust and unreasonable."[5] Matson gave as the basis for its decision to cancel the 5% increase and to move for dismissal of the investigation the following:

> It is Matson's understanding, based on the pleadings and proposed testimony and exhibits in this proceeding, that no party contends that Matson is not entitled to the proposed 5% rate increases. It follows, *a fortiori,* that no party could reasonably object to dismissal of the investigation of Matson's increases in Docket No. 77–51 concurrently with a roll back of the proposed increases.
>
> Matson has determined that it would be worse off, in terms of loss of revenue, if it attempted to operate with rates 5% higher than those of its competitor, United States Lines, than it would be if it rolls back the 5% increases. Hence, Matson has no choice but to roll back its rates if the similar motion of United States Lines is granted and United States Lines rolls back its rates. (Matson Motion to Dismiss, at 2)

The 5% general rate increases of both respondents constituted the essential subject matter of the two investigations ordered by the Commission. Upon the voluntary roll-back of those increases by both respondents, there no longer exists

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[3] December 13, 1977 and May 31, 1978, both in Washington, D.C.

[4] See Hearing Counsel letter to Judge Reilly, August 28, 1978.

[5] See Memorandum of the Government of Guam filed August 25, 1978. See also August 30, 1978, Memorandum of Military Sealift Command in which MSC expresses the view that "all of the evidence developed in the prehearing phase of these proceedings supports the conclusion that the increased rates are just and reasonable as to Matson."

the subject the Commission intended to investigate. Accordingly, it is appropriate and proper that the investigation be now ordered dismissed and discontinued, contingent upon the effectuation of the roll-backs by both respondents with all deliberate speed. Copies of the tariff pages effecting the cancellation of the said 5% general rate increases shall be served by both respondents upon all parties to this proceeding and the presiding Administrative Law Judge. Immediately upon such action being taken by the respondents, this consolidated proceeding will be deemed DISMISSED and the investigation discontinued. However, the proviso expressed by Hearing Counsel in its August 18, 1978, Reply to Motion to Dismiss is made a condition attached to the dismissal, i.e.:

The dismissal of this proceeding is not to be construed as an admission that the present rate level is proper and is without prejudice to the initiation of a proceeding testing the reasonableness of the rates and practices in this trade in the future.

(S) THOMAS W. REILLY
Administrative Law Judge

September 15, 1978

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-20

PUERTO RICO MARITIME SHIPPING AUTHORITY—
RATES ON GOVERNMENT CARGO

ORDER DENYING RECONSIDERATION

November 20, 1978

The Commission has before it three petitions seeking modification of the August 9, 1978, Report and Order (August Order) in the above-captioned matter.[1] The August Order directed the Puerto Rico Maritime Shipping Authority (PRMSA) to cancel certain tariff provisions for "Government Cargo" effective September 15, 1978, and to cease and desist from publishing tariff provisions which: (1) do not forbid government shipments from alternating between currently effective government and commercial rate items; and (2) do not require shipping documents which fully identify all items tendered as "Government Cargo" in terms of prevailing commercial tariff classifications.

Petitioners largely repeat contentions previously presented to the Commission and have provided no information warranting modification of our earlier decision.[2] The August Order will, however, be clarified to the following extent.

Ocean carriers may establish simplified or multiple commodity tariff classifications which provide for the shipment of numerous commodities at a uniform rate.[3] The mixing of commodities—under conditions which preclude shippers from simultaneously qualifying for more than one rate—is a sufficient transportation distinction to uphold the publication of such a classification. *The carrier must, however, make this classification available to all shipments which meet the transportation conditions stated in its tariff.* A failure to treat similarly situated shippers equally in this regard would violate Shipping Act sections 16 or 18(a), or both. Thus, a carrier publishing a "Government Cargo" classification with no

[1] The petitions are the: "Petition for Reconsideration or Clarification" of the Military Sealift Command (MSC), "Petition for Clarification of Decision" of PRMSA; and "Petition for Clarification" of the Commission's Bureau of Hearing Counsel (Hearing Counsel). Replies were submitted by MSC, Matson Navigation Company, United States Lines, Inc., and the Household Goods Forwarders Association of America, Inc. Related motions seeking a stay of the August Order's effective date were granted by a separate Commission order served September 18, 1978.

[2] MSC wishes to continue identifying its "Government Cargo" shipments under the "MILSTAMP" nomenclature code, rather than provide the more thorough descriptions necessary to accurately classify the commodities it ships under PRMSA's commercial tariff. Hearing Counsel, on the other hand, continues to oppose special classifications for "Government Cargo" and believes MSC should be restricted to the use of commercial commodity classifications. PRMSA generally supports MSC's requests, but is primarily concerned that PRMSA not be unfairly singled out among Puerto Rico trade carriers to impose more burdensome requirements upon MSC shipments. This concern should be alleviated by the Commission's continuation of its September 18, 1978, Stay Order until a final decision is entered in FMC Docket Nos 77-18 and 77-38.

[3] The uniform rate chosen must yield total revenues equivalent to those realized from the shipment of the same items at commercial commodity rates except to the extent the carrier can justify a differential based upon cost or other recognized rate making factors

limiting conditions beyond those prescribed by the August Order would be required to make that classification available to noncommercial shippers of mixed cargoes otherwise undistinguishable from eligible government shipments.[4] Conversely, a carrier publishing such an unrestricted "Government Cargo" classification must rate *all government shipments* under that classification.[5]

If a carrier intends for some government shippers to employ its commercial commodity descriptions, and those government shippers wish to do so, a "Government Cargo" tariff classification may be published which is expressly limited to a particular category of government shipments (*e.g.*, "U.S. Military Cargo".[6] Any changes in the shippers (or shipments) eligible to use a special "Government Cargo" type classification must be reflected in an amendment to the carrier's tariff.

A complete description of the items included in each "Government Cargo" shipment must be provided to the carrier *at the time of shipment*. This description must be sufficient to permit classification under the carrier's commercial tariff. If an adequate description is not furnished, the cargo is ineligible for the "Government Cargo" rate and must be rated under commercial tariff classifications (*e.g.*, "Cargo, N.O.S.").[7] Failure to rate an incompletely identified MSC shipment under commercial tariff classifications would subject the carrier to Shipping Act penalties.

It is the description provided at the time of shipment which determines the applicable commercial commodity classification for purposes of judging the *level* of a carrier's "Government Cargo" rates under Shipping Act section 18(a).[8] Carriers are expected to maintain complete and accurate records of the shipping documents tendered by government shippers and should periodically (*e.g.*, semi-annually) evaluate their "Government Cargo" rates to assure that they can be justified in terms of the commercial rates which would otherwise apply to the items being shipped.[9]

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[4] A "U S Government Cargo" classification fairly implies that only noncommercial commodities will be shipped Nonetheless, the publishing carrier would be prudent to specify whether commercial or noncommercial items qualify for the classification and to provide all other relevant information concerning the value of service of the commodities it intends to include If containers of mixed freight are permitted or required, or if a minimum number of containers must be tendered, these facts should also be included in the tariff

[5] It appears that PRMSA's "Government Cargo" classification was in fact limited to MSC shipments despite the broad language employed in PRMSA's tariff Failure to adhere to the exact terms of a tariff violates section 2 of the *Intercoastal Shipping Act, 1933* 46 U S C. 844.

[6] The second full sentence on page 11 of the August Order spoke to the need to preclude government shippers from alternating between *simultaneously effective* government and commercial classifications. It was not intended to require that all types of government shippers be included in the same tariff classification(s) It is necessary however that any shipper which does use a "Government Cargo" classification commit itself to that classification exclusively for all of its qualifying shipments until such time as a tariff amendment is implemented which eliminates that particular shipper's eligibility for the "Government Cargo" rate

[7] If MSC actually identifies a shipment as "Cargo, N O S.," it would qualify for the "Government Cargo" rate, but see note 8, *infra*.

[8] If a "Cargo, N O.S " description is furnished by MSC at the time of shipment, the carrier's commercial "Cargo, N O S," rate shall govern in a subsequent section 18(a) inquiry, regardless of whether a more accurate description is later furnished Deliberate manipulation of the commodity descriptions provided by government shippers for the purpose of obtaining lower commercial rates on certain shipments would not only violate Shipping Act section 16 initial paragraph, but would put steady upward pressure on the level of the "Government Cargo" rate PRMSA states that its commercial "Cargo, N O S " rate is almost double its "Government Cargo" rate. Petition for Clarification, at note 2.

[9] The August Order stated that MSC contracted for domestic offshore ocean transportation services at six month intervals and assumed that "Government Cargo" tariff items would have fixed expiration dates See notes 12 and 21. MSC now indicates that it never negotiated fixed time period contracts in domestic offshore commerce. This fact makes it all the more important that MSC provide carriers with a contemporary and complete description of the items it ships as "U S Military Cargo "

MSC contends it cannot describe its shipments in the manner contemplated by the August Order without "great difficulty and expense," and, if it were to do so, there would be no further need for a simplified "Military Cargo" tariff classification system.[10] MSC fails to recognize, however, the availability of any government cargo classification depends both upon the carrier's willingness to offer it and the carrier's ability to justify the level of rates it generates. Innovation and simplification in ocean carrier tariffs are to be encouraged, but only as long as the innovations conform to the Shipping Act—including P.L. 93-487. The United States Government has enjoyed no special status as a shipper since former section 6 of the Intercoastal Shipping Act was repealed on October 26, 1974. The August Order represents the Commission's attempt to leave MSC and PRMSA with a reasonable choice of tariff arrangements. If the simplified system permitted under P.L. 93-487 is not economical for MSC, then MSC need not use it.

THEREFORE, IT IS ORDERED, That the Commission's August 9, 1978, Report and Order is clarified to the extent indicated above; and

IT IS FURTHER ORDERED, That the relief requested by the petitions for reconsideration or clarification filed by the Puerto Rico Maritime Shipping Authority, Military Sealift Command and Bureau of Hearing Counsel is denied in all other respects; and

IT IS FURTHER ORDERED, That the Commission's Order of September 18, 1978, staying the August 9, 1978, Order in the instant proceeding remain in effect until further notice.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[10] MSC indicates that in many (but not all) instances, it can accurately identify its shipments using Uniform Freight Classification or National Motor Freight Classification descriptions, and has amended its procedures to do so in the Hawaii/Guam trades. Petition at 4–5. When this method does accurately identify each item shipped (or accurately identifies a mixed freight item such as "Freight All Kinds"), it may be employed in satisfaction of the August Order. When it does not, the carrier must rate the items under commercial tariff classifications.

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-13

OLD BEN COAL COMPANY

v.

SEA-LAND SERVICE, INC.

NOTICE

November 29, 1978

Notice is given that no exceptions have been filed to the October 11, 1978 initial decision in this proceeding and that the time within which the Commission could determine to review that decision 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. 78–13

Old Ben Coal Company

v.

Sea-Land Service, Inc.

Finalized on November 29, 1978

Complainant, a consignee of a shipment of coal mining equipment, alleges that respondent common carrier by water collected certain charges for reworking containers at the carrier's terminal and seeks to collect further demurrage charges. Complainant alleges that assessment of these charges is an unreasonable practice in violation of section 17 of the Shipping Act, 1916, because respondent was at fault in overloading containers, thereby necessitating the additional work. Respondent admits that it was at fault in loading the containers but not that it violated the law. Rather than continue to litigate, however, both parties have submitted a settlement agreement and seek its approval. Upon consideration of the evidence and arguments of the parties urging approval of the settlement agreement, it is held:

(1) The settlement agreement by which respondent would refund to complainant the full amount of the reworking charges and not attempt to collect demurrage charges, and in which each party would discontinue its claims against the other in order to terminate their controversy, is just and reasonable, does not violate law or policy, and comports with the strong policy of law which encourages settlements;

(2) Approval of the settlement agreement would avoid costly multiple litigation involving determination of complicated issues which would have to be decided by the Commission and the courts, at the parties' expense;

(3) Since the claims of both parties raise complicated legal issues which are not easily determined, the decision of the parties to discontinue litigation and of Sea-Land to return the money charged for the reworking services and discontinue pursuit of demurrage charges represents a prudent decision to terminate a controversy rather than to expend money in continued litigation whose outcome is uncertain, especially when Sea-Land admits that it was at fault in overloading containers;

(4) The settlement is approved and the complaint is dismissed.

Edmond J. Moriarty, for complainant Old Ben Coal Company.
B. Carlton Bailey, Jr., for respondent Sea-Land Service, Inc.
John Robert Ewers, Aaron W. Reese, and *Bruce Love,* for Bureau of Hearing Counsel.

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

This proceeding began with the filing of a complaint served by the Commission on April 25, 1978. Complainant Old Ben Coal Company alleged that

[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)

respondent Sea-Land Service, Inc., carried a total of 1,435.295 kilos (metric tons) of coal mining equipment from Antwerp, Belgium, to New Orleans, Louisiana, in March and April of 1978, ultimate destination being Benton, Illinois. When the containers loaded with this equipment arrived at Sea-Land's terminal in New Orleans, however, 44 of them, according to the complaint, were found to be overloaded and were reworked with the authorization of the consignee, Old Ben, so that they could be transported over the highways. On August 11, 1978, Old Ben paid Sea-Land the amount of $15,246.84, the alleged cost of the reworking service. Old Ben was also billed the amount of $22,575 for demurrage charges which had accrued while the containers were being reworked in New Orleans. Old Ben has not paid this charge.

The facts which gave rise to this controversy, as alleged in the complaint, are that Old Ben discovered, after it had paid the reworking charge, that the containers had been loaded in Europe in accordance with the instructions of Sea-Land's own agents. In other words, Old Ben states that the entire problem which ultimately necessitated additional reworking and demurrage charges at New Orleans was the fault of Sea-Land, not the consignee, Old Ben, nor the German shipper.

In the belief that it should not be held responsible for payment of the two charges, Old Ben asked Sea-Land to refund the $15,246.84 paid and to release it from payment of the demurrage charges. Sea-Land advised Old Ben to file a claim with the Commission. By letter dated April 13, 1977, Old Ben submitted an informal claim with the Commission. However, this claim could not be processed informally. Thereafter Old Ben filed a formal complaint which could not be served by the Commission because it failed to allege a violation of any specific provision of the Shipping Act, 1916 (the Act). Accordingly, the defective complaint had to be rejected. Finally, the present complaint was served.

As a result of the foregoing facts alleged in the complaint, Old Ben stated that Sea-Land Service, Inc., had subjected Old Ben to the payment of charges for services which were unjustly discriminatory and prejudicial in violation of section 17 of the Act, 46 U.S.C. 816, and, furthermore, that Sea-Land had provided false information which caused an increase of charges and resulted in Sea-Land's unjust enrichment.

In its answer, Sea-Land admitted the material facts as alleged but denied that it violated the law. Sea-Land stated that although it provided false information, it did not intentionally mislead Old Ben and believed that it was required to assess the charges in question in accordance with its tariffs, as required by law.

Hearing Counsel petitioned for leave to intervene, which petition was granted. Hearing Counsel stated that the case appeared to focus on questions of law since the parties seemed to be agreeing on the material facts and expressed concern that because the equities in the case seemingly favored Old Ben, care should be taken to ensure that proper consideration was given to principles of law which might govern despite the equities.

At the prehearing conference held on June 6, 1978, it became evident that there would be no dispute of material facts and that the parties would actively cooperate with Hearing Counsel in furnishing all relevant factual information and documentary materials for the purpose of reaching an agreed statement of facts, thereby obviating the need for a trial-type hearing. Furthermore, Old Ben recognized that its complaint did not relate to prejudice or discrimination but in reality, to the allegation that Sea-Land had engaged in an unreasonable practice relating to the receiving, handling, storing, or delivering of property in violation of the second paragraph of section 17 of the Act. Similarly, respondent recognized that it had been relying upon the defense that it had been required to follow its tariffs but had failed to specify that in the area of terminal services and tariffs, the Commission's General Order 15, 46 CFR 533, is pertinent. In the presence of all parties, both complainant and respondent amended their complaints to conform to the nature of the allegations and issues contained in the pleadings and, having been provided actual notice of the amendments, waived formal requirements of service of the amended pleadings.[2]

As amended, therefore, the complaint raises the question whether Sea-Land violated the second paragraph of section 17 of the Act by engaging in an unreasonable practice in receiving, handling, etc., of property. The answer raises the question whether Sea-Land was entitled to rely upon its tariffs when assessing the reworking and demurrage charges.

After the prehearing conference, both parties, with the active assistance of Hearing Counsel, uncovered, presented, and stipulated to all relevant facts, thereby obviating any need for a trial-type hearing. Furthermore, after a more complete factual record was developed, Old Ben and Sea-Land successfully negotiated a settlement of their controversy and, with the support of Hearing Counsel, have submitted it for approval. The only issue for decision, therefore, is whether the proffered settlement should be approved. I believe it should be. However, before addressing this question I make the following findings of fact which consist essentially of the parties' agreed statement of facts but with minor modifications based upon the underlying shipping documents, correspondence, and other relevant materials.

Findings of Fact

1. On November 20, 1975, Old Ben Coal Company (Old Ben) contracted to purchase certain equipment from Rheinstahl AG Umformtechnik and Bergbautechnik of Duisburg, West Germany. (Ex. 1.)

2. The purchase price of the equipment was $2,378,300. (Ex. 1, p. 6.)

3. The purchase contract provided that the "Price is to be understood f.o.b. Rotterdam/Antwerp, duty unpaid." (Ex. 1, p. 6.)

4. On January 30, 1976,[3] Sea-Land Service, Inc. (Sea-Land), prepared an analysis of transportation costs for delivery of the mining equipment to Benton, Illinois. Sea-Land prepared cost comparisons for two methods of transport:

   1. NOLA[4]-Rail/Truck.
   2. NOLA-Truck (Ex. 2.)

5. The cost analysis specified that the trucker involved in the NOLA-Truck proposal, Container Carrier Corp., "Will not accept over 43,000 lbs."

[2] See Report of Ruling Made at Prehearing Conference Including Amendments to Complaint and Answer, June 8, 1978.

[3] The agreed statement incorrectly shows this date as January 1, 1930. Exhibit 2 shows the correct date.

[4] "NOLA" means New Orleans, Louisiana. (Transcript of Hearing, p. 12.)

6. The equipment purchased by Old Ben was a new construction and there was some confusion as to weight and measurement and as to how the equipment would be split for shipment. (Ex. 3.)

7. Sea-Land's agent in Germany, Paul Guenther, prepared an interim loading pattern based upon available information. (Ex. 3.)

8. During the following four weeks new loading plans were exchanged between Sea-Land in Bremen and Bremerhaven and Sea-Land's agent, Paul Guenther in Bremen and Dusseldorf. (Ex. 3.)

9. In Mid-February, 1976, Sea-Land's agent saw the new prototype of the equipment and noted final weights and measurements of various parts. The agent, however, did not make a container loading test. (Ex. 3.)

10. Loading of containers commenced on March 24, 1976, at the shipper's plant under the supervision of an expert from Sea-Land Operations, Bremerhaven. (Ex. 3.)

11. Final loading plans were made on the spot, and it became necessary to strengthen container floors because it was apparent that the equipment being loaded was overweight. (Ex. 3.)

12. Five containers of the equipment were shipped on the Sea-Land vessel *VENTURE* from Antwerpen to New Orleans on March 29, 1976. (Ex. 4.)

13. Thirty-seven containers of the equipment were shipped on the Sea-Land vessel *CONSUMER* from Antwerpen to New Orleans on April 8, 1976. (Ex. 5.)

14. Thirty-five containers of the equipment were shipped on the Sea-Land vessel *PRODUCER* from Antwerpen to New Orleans on April 18, 1976. (Ex. 6.)

15. One container was shipped on Sea-Land vessel *ECONOMY* under bill of lading dated May 8, 1976. (Ex. 7.) The total number of containers loaded in Germany was therefore 78.

16. The bill of lading for each shipment (Ex. 4, 5, 6, 7) contained the following notations:

HOUSE/HOUSE SERVICE
SHIPPERS LOAD AND COUNT
FREIGHT PREPAID
SHIPPED ON BOARD

17. Sea-Land's Import Sales Manager in Chicago, William J. Kenwell, made all arrangements for the shipment of the equipment and coordinated the entire movement from the shipper's door to the consignee's mine site. Based upon information furnished by Sea-Land's German agent, Mr. Kenwell and a representative of Old Ben, Mr. James Rinehart, determined that the containers were being overloaded. Kenwell and Rinehart communicated this information to Sea-Land's representatives in Germany. When the first five containers reached New Orleans they were found to be overweight and Kenwell so notified Rinehart.[5] Kenwell requested authorization from Old Ben to rework the containers at cost. (Ex. 8.)

18. Old Ben responded by telex on May 24, 1976, authorizing Sea-Land to strip containers, correct weights to meet highway load limits, relieved Sea-Land of liability, and agreed to pay incurred costs. (Ex. 9.)

[5] The overweight problem arose because the containers exceeded the maximum permissible weight established by the State of Illinois. (Ex. 3, p. 2.)

19. After the first containers to reach New Orleans were found to be overweight, Kenwell, in an emphatic communication, again tried to impose weight and loading restrictions. Sea-Land's representatives in Germany did nothing to rectify the problem. (Ex. 8.)

20. Eventually 35 of the 78 containers loaded in Germany had to be reworked in New Orleans and 12 additional containers were required (Ex. 10.) Sea-Land then invoiced Old Ben for $15,246.84, the actual costs for labor, crane rental, and blocking and bracing materials. (Ex. 11.)

21. Old Ben paid Sea-Land, by check number 185100 dated August 11, 1976, the sum of $15,246.84. (Ex. 12.)

22. Old Ben invoiced the German shipper for the amount paid to Sea-Land. The shipper responded by advising Old Ben that Sea-Land's invoice should not be paid because the containers had been loaded in accordance with "prescription" of Sea-Land's agent, Paul Guenther. (Ex. 13.)

23. Old Ben, based upon the information received from the German shipper, commenced efforts to obtain a refund from Sea-Land. (Ex. 14.)

24. While Sea-Land was reworking the containers allowable free time was exceeded by 2 to 49 days. (Ex. 15.)

25. Sea-Land invoiced Old Ben in the amount of $22,575.00 for the accrued demurrage charges by invoices dated August 24, 1976. (Ex. 16.)

26. The demurrage charges were assessed pursuant to Rule 25B (Page 11 a) of the Continental/U.S. Gulf Freight Association Tariff (F.M.C. no. 2). (Ex. 17.)

27. The demurrage charges have not been paid. (Complaint, paragraph 1, page 3.)

28. Efforts by Old Ben to obtain a refund of the reworking charges and cancellation of the demurrage charges, first by correspondence with Sea-Land, and finally with FMC staff, failed. (Exs. 18 through 26.)

29. The complaint in this proceeding, which was received by the Office of the Commission's Secretary on April 24, 1978, was filed within the two-year period of limitation required by section 22 of the Act.

The Settlement and Mutual Release

The settlement and mutual release for which the parties are seeking approval as a means to end litigation and terminate the controversy is set forth below. As can be seen, it resembles a typical settlement and release. Old Ben and Sea-Land agree not to pursue any new claims against each other on account of anything relating to the shipments of coal mining equipment in question and state that the settlement "is in full accord and satisfaction of doubtful and disputed claims, and is not an admission of liability or violation of law by any party hereto." Sea-Land agrees to pay Old Ben the $15,246.84 which Old Ben had been seeking as reparation and not to seek collection of the disputed demurrage charges. The settlement will become effective only upon being approved by the Federal Maritime Commission.

For the sake of completeness the complete text of the settlement is set forth as follows:

SETTLEMENT AND MUTUAL RELEASE

IT IS HEREBY AGREED, by and between the undersigned, OLD BEN COAL COMPANY (Old Ben), Complainant in Federal Maritime Commission Docket No. 78-13, and SEA-LAND SERVICE, INC. (Sea-Land), Respondent, that Docket No. 78-13 shall be terminated by mutual agreement on the following terms and conditions:

1. Sea-Land shall pay to Old Ben the sum of $15,246.84 (but expressly without admission of liability, therefore).
2. Sea-Land will not receive, and Old Ben will not be required to pay, demurrage charges which it has demanded from Old Ben in connection with the shipment of coal mining equipment pursuant to Sea-Land bills of lading numbered 930 530951, 930 531196 and 930 531596.
3. Old Ben and/or any successor in interest will be barred from initiating any new claim against Sea-Land in connection with the shipment of coal mining equipment pursuant to Sea-Land bills of lading numbered 930 530951, 930 531196 and 930 531596 except for the enforcement of any of the provisions of this Agreement.
4. Sea-Land and/or any successor in interest will be barred from initiating any new claim against Old Ben in connection with the shipments of coal mining equipment pursuant to the above bills of lading except for the enforcement of any of the provisions of this Agreement.
5. It is understood and agreed that this Settlement and Mutual Release is in full accord and satisfaction of doubtful and disputed claims, and is not an admission of liability or violation of law by any party hereto.
6. This Agreement will become effective and binding on the parties only upon being approved by the Federal Maritime Commission.
7. This Settlement and Mutual Release constitutes the entire Agreement between the parties hereto.

IN WITNESS WHEREOF, the undersigned have executed this Settlement and Mutual Release this 19th day of September, 1978.

OLD BEN COAL COMPANY	SEA-LAND SERVICE, INC.
By /s/ Edmund J. Moriarty	By /s/ B. Carlton Bailey Jr.
Chief Counsel	General Attorney

DISCUSSION AND CONCLUSIONS

As noted above, the issue for decision is whether the proffered settlement should be approved. In determining this question, a brief look at applicable principles and policies of law would be helpful.

In a well-researched memorandum in support of the parties' request that their settlement be approved by the Commission, Hearing Counsel cite the well-settled principles of law that favor settlement and emphasize that the Commission has followed these long-accepted principles. Furthermore, Hearing Counsel cite recent proceedings before the Commission in which settlements have been approved which did not include admissions of violations of law but did permit complainants to receive monetary compensation in return for entering into the agreements to settle. Furthermore, in still other cases, settlements involving monetary considerations were approved even though departure from tariff provisions might have occurred. Hearing Counsel emphasize that this case involves an allegation that Sea-Land engaged in an unreasonable practice in violation of Section 17 of the Act and that inasmuch as Sea-Land has not denied that it was at fault in overloading the containers, several decisions of the Commission lend support to the allegation. Hearing Counsel urge approval of the settlement since, otherwise, Sea-Land might gain financial advantage as a result of its own fault.

On the basis of their analysis of Commission decisions approving settlements between carriers and shippers and their analysis of the facts in this case, Hearing Counsel conclude that the settlement does not constitute rebating or the use of unjust or unfair devices which would allow Old Ben to obtain transportation at rates below those published in tariffs. In other words, Hearing Counsel believe that the settlement itself is proper and does not itself violate any provision of law. I agree.

Applicable Principles of Law

It is well settled that the law and Commission policy encourage settlements and engage in every presumption which favors a finding that they are fair, correct, and valid. See, e.g., *Merck Sharp & Dohme v. Atlantic Lines*, 17 F.M.C. 244, 247 (1973), citing *General Discount Corp. v. Schram*, 47 F. Supp. 845 (E.D. Mich. 1942), and *Florida Trailer & Equipment Company v. Deal*, 284 F. 2d 567, 571 (5 Cir. 1960); *Levatino & Sons v. Prudential-Grace Lines*, 18 F.M.C. 82, 85, 112–114 (1974); *Robinson Lumber Company, Inc. v. Delta Steamship Lines, Inc.*, 18 SRR 744, 747 (ALJ) (FMC Notice of Determination Not to Review, August 28, 1978); *Com-Co Paper Stock Corp. v. Pacific Coast-Australasian Tariff Bureau*, 18 SRR 619, 623 (ALJ) (FMC determined not to review, July 27, 1978).

The Commission's rules of practice similarly encourage settlement as does the Administrative Procedure Act. See Rules 91 and 94, 46 CFR 502.91 and 502.94; 5 U.S.C. 544(c)(1).[6]

The general policy favoring settlements is summarized rather effectively in the following passage drawn from a recognized legal authority:

> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy. 15A American Jurisprudence, 2d Edition, pp. 777–778 (1976). (Footnote citations omitted.)

While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation. As the quotation cited notes, settlements must not contravene any law or public policy. For example, in some instances, a settlement between carriers or other persons subject to the Act might be meritorious but might require formal approval under section 15 of the Act. See, e.g.,

[6] The Administrative Procedure Act (APA) states in pertinent part:

> 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. 5 U.S.C. 554(c)(1)

The Commission's Rule 91 closely tracks this language. There is considerable discussion as to the merits of settlements which avoid expensive litigation in the legislative history to the APA, although the emphasis seemed to be on settlement with the agency rather than merely settlement among private parties. For a brief discussion of this subject, see my initial decision in *Heavy Lift Practices and Charges*, 17 SRR 505, 536–538 (1977).

Massachusetts Port Authority v. Container Marine Lines, 11 SRR 37, 40 (1969); *American Export Isbrandtsen Lines, Inc.*, 14 F.M.C. 82, 89 (1970); *Delaware River Port Authority v. Puerto Rico Maritime Shipping Authority*, 14 SRR 1509, 1510 (1975). In other cases, there is some authority to the effect that the settlement itself must not contravene the tariff policies embodied in section 18(b)(3) of the Act and similar tariff laws. See *Consolidated International Corp. v. Concordia Line*, 18 F.M.C. 180, 183 (1975); *Com-Co Paper Stock Corp. v. Pacific Coast-Australasian Tariff Bureau*, cited above, 18 SRR at p. 622; *Ketchikan Spruce Mills v. Coastwise Line*, 5 F.M.B. 661, 662 (1959); but compare *Plaza Provision Company and Pueblo Supermarkets, Inc. v. Maritime Service Corporation*, 17 F.M.C. 47 (1973). In other instances, a proffered settlement could conceivably constitute a secret, unjust, or discriminatory device to prefer a particular shipper or shippers assuming the entire complaint was not filed in good faith. (Cf. *Levatino & Sons v. Prudential-Grace Lines*, cited above, in which a settlement was attacked on these grounds, albeit without basis in fact.) In still other instances, a settlement might be invalidated if brought about by fraud, duress, undue influence, mistake, etc. See 15A American Jurisprudence, 2d Edition, p. 800.

If a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval. It is also recognized, however, that a judicial officer or reviewing tribunal may evaluate the merits of the settlement under certain criteria established in this field of law. Thus, a judicial officer, in reviewing a proffered settlement, may look to see if the settlement is fair, reasonable, and adequate, and may weigh the likelihood of a complainant's success if litigation were pursued and the adequacy of the terms of the settlement balanced against the estimated cost and complexity of continued litigation. This does not mean, however, that the approving officer must actually make findings of violations or of lack of violations. To do so would interfere with the willingness of the parties to discuss settlements in the first place. Thus, in *State of West Virginia v. Chas. Pfizer Co.*, 440 F. 2d 1079 (2 Cir. 1971), the Court of Appeals affirmed the approval of a settlement in an antitrust case in which defendants proposed to pay $100,000,000 in settlement of numerous claims arising out of alleged violations of the antitrust laws in the sale of antibiotics. The appellate court, in affirming the order of the lower court approving the settlement set forth certain guidelines for judges to follow in evaluating the merits of settlements, emphasizing the limited role of the judge. Thus, the Court of Appeals stated:

> Whether to approve the compromise involves an exercise of discretion. . . . Approval should be given if the settlement offered is fair, reasonable, and adequate. These terms are general and cannot be measured scientifically. The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement. This factor is sometimes referred to as the likelihood of success. The Supreme Court directs the judge to reach "an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated" and to "form an educated estimate of the complexity, expense, and likely duration of such litigation . . . and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise." (Citations omitted.) 440 F. 2d at p. 1085.

The Court proceeds to emphasize the policy of the law to encourage settlements, consider what would happen if the settlement were not approved and litigation were to continue, the need to avoid wasteful litigation, and the danger of discouraging settlements by making definitive judicial determinations on the ultimate issues involved, although tentative evaluations of legal positions might be permissible. 440 F. 2d at p. 1085.[7] In past decisions in which settlements have been approved, including those in which substantial amounts of money have been paid by respondents to complainants as part of settlement agreements the Commission has considered settlements to be meritorious if they served to avoid wasteful litigation and if it seemed to be more economical for respondents to make monetary payments as part of a settlement than to continue with lengthy, costly litigation. For example, in *Levatino & Sons v. Prudential-Grace Lines,* cited above, the Commission found that the settlements in two previous complaint cases[8] involving alleged discrimination against a number of fruit importers by a common carrier were perfectly lawful. The Commission found that the carrier had quite properly determined that it would be more prudent to pay the numerous complainants $81,000 rather than to seek vindication by costly litigation and possible court appeals. 18 F.M.C. at pp. 100–102; 112–114. In *Com-Co Paper Stock Corp. v. Pacific Coast-Australasian Tariff Bureau,* cited above, another settlement involving payment of $20,000 by respondents to settle a complaint alleging, among other things, discriminatory rates, the settlement was found to represent a prudent decision to terminate the case rather than undergo the lengthy and costly litigation that would ensue absent settlement. 18 SRR at p. 623. In *Robinson Lumber Company, Inc. v. Delta Steamship Lines;* Inc., cited above, we have another example of a settlement which was approved by which respondents agreed to make a monetary payment ($2,000) in settlement of numerous claims, some of which would not have been under the Commission's jurisdiction had litigation continued, again to avoid the greater costs of continued litigation. 18 SRR at p. 747.

A particularly significant example of a case in which the Commission approved a settlement involving payment of considerable sums of money despite the possibility that some departure from strict adherence to applicable tariffs would result is *Plaza Provision Company and Pueblo Supermarkets, Inc. v. Maritime Service Corporation,* 17 F.M.C. 47 (1973). In effect, that case concerned a settlement between carriers and shippers, many of whom had not paid demurrage bills on cargo delivered in Puerto Rico. The parties conceded that by their settlement they were seeking "to depart from the carriers' tariff rules and settle for 90 percent of the unpaid demurrage balances. . . ." 17 F.M.C. at 49. However, there were so many claims for unpaid demurrage extending over two years involving voluminous invoices and containers that the problem of

[7] It is not necessary for respondents to admit to violations of law for purposes of offering settlements and none of the Commission cases which I am citing in which settlements were approved involved admissions of violations of law. Indeed, Rule 91 of the Commission's rules, 46 CFR 502.91, specifically provides that if a party submits an offer of settlement, this shall be done "without prejudice to the rights of the parties" and further provides that evidence of such offers of settlement cannot be admitted into evidence over the objection of any party. *In Merck Sharp & Dohme v Atlantic Lines,* cited above, 17 F.M.C. at p. 247, the Commission specifically recognized that offers of settlement do not constitute admissions of violation but merely show a desire to terminate a controversy by paying an amount of money if necessary.

[8] The two cases were Docket No. 66–64, *All Chilean Fruit Corp. v. Grace Line, Inc.* and Docket No. 66–69, *Arthur Schwartz and Justamere Farms, Inc. v. Grace Line, Inc.*

proving what was exactly owed would have been enormous. Recognizing this problem and the policy of encouraging settlements as a means of putting controversies to rest while avoiding expensive litigation, the Commission approved the settlement, permitting the carriers to waive 10 percent of unpaid demurrage bills and to refund 10 percent of those bills that some shippers had paid in full.

Hearing Counsel correctly rely upon *Plaza Provision* to support their position that the settlement in this case should be approved. As in this case, *Plaza Provision* involved terminal charges, some of which were the result of the carriers' own fault. The Commission indicated that assessment of such charges would be improper under a statute (section 18(a) of the Shipping Act) which is comparable to section 17, second paragraph, with regard to the requirement that carriers observe "just and reasonable regulations and practices . . . relating to or connected with the receiving, handling, storing . . . or delivering of property." The settlement was approved, even though, because of the difficulty of proof, it was conceivable that some portions of the demurrage charges that were waived or refunded were reasonable and therefore normally required to be collected under the carriers' tariffs. The strong policy of encouraging settlements was therefore followed and was not allowed to be defeated by a too-rigid adherence to tariff law which, had such law been strictly observed, would have necessitated the continuation of enormously complicated and expensive litigation.

Still another example of a settlement between litigating parties in which a respondent paid $10,000 to a complainant and relinquished its claims seeking to collect charges under the tariff is that which terminated both Docket No. 75-48, *Sea-Land Service, Inc. v. City of Anchorage,* and Docket No. 76-4, *City of Anchorage v. Sea-Land Service, Inc.* These settlements were approved. See *Totem Ocean Trailer Express, Inc.,* Order Denying Request for Declaratory Order, October 2, 1978, note 1. The similarities between these settlements and the one proposed in this case are evident. In this case, as in those, a respondent agrees to pay money and to discontinue seeking to collect certain tariff charges in order to terminate controversy and avoid expensive litigation.

Approvability of the Present Settlement

I find the proffered settlement in this case to represent an example of prudent judgment on the part of the litigating parties to forego the costs and complexities of continued litigation in favor of settlement.

Under the terms of the settlement Old Ben would receive $15,246.84, which it had been asking as reparation and would be released from payment of the additional demurrage charges which Sea-Land had been seeking. Both Old Ben and Sea-Land would forego litigating claims against each other except for enforcement of the settlement agreement, if enforcement became necessary, and both parties expressed their views that the settlement and mutual release "is in full accord and satisfaction of doubtful and disputed claims, and is not an admission of liability or violation of law by any party hereto." Under the previous principles enunciated above, this settlement should be approved.[9]

[9] Alternatively, the complaint could be dismissed since it has been satisfied Rule 93 of the Commission's rules of practice, 46 CFR 502 93, provides that "[s]atisfied complaints will be dismissed in the discretion of the Commission." The rule further requires the

The basis of the complaint, as noted earlier, was the allegation that Sea-Land's assessment of reworking and demurrage charges constituted unreasonable practices because the additional charges were the result of Sea-Land's own fault. This claim appears to have merit under applicable law. The Commission has indicated in previous decisions that assessment of terminal charges by carriers might be or would be unreasonable when the charges resulted from carrier fault. See, *e.g., Uniform Rules and Regulations Governing Free Time on Import Containerized Cargo at the Port of New York*, 18 SRR 465, 469 (1978) (assessment of demurrage when carrier failed to provide equipment "could result in a practice violative of section 17"); *Plaza Provision Company and Pueblo Supermarkets, Inc. v. Maritime Service Corporation*, cited above, 17 F.M.C. at p. 51 ("the practice of billing for demurrage resulting from carrier fault . . . is unjust and unreasonable."); *Free Time and Demurrage Charges–New York*, 3 U.S.M.C. 89, 106–107 (no demurrage should be charged when carrier is unable to tender cargo for delivery); *Free Time and Demurrage Practices, at N.Y. Harbor*, 11 F.M.C. 238, 253 (1967) (same, but if free time had expired, carrier has option to charge non-penalty demurrage during longshoremen's strike); *Truck and Lighter Loading and Unloading*, 9 F.M.C. 505, 515 (1966), affirmed *sub nom. American Export-Isbrandtsen Lines, Inc. v. Federal Maritime Commission*, 389 F. 2d 962 (D.C. Cir. 1968) (terminal operator cannot absolve self from liability for detaining trucks when detention is caused by the terminal operator); *Joseph & Sibyl James v. South Atlantic & Caribbean Line, Inc.*, 14 F.M.C. 300 (carrier not allowed to assess storage charges when carrier failed to give proper arrival notice).

Had this case proceeded to full litigation, we might have heard defenses from Sea-Land and arguments regarding the question whether the cases cited are apposite or whether this particular transaction constituted a "practice" within the meaning of section 17 of the Act rather than a one-time occurrence. See, *e.g., Investigation of Practices of Stockton Elevators*, 8 F.M.C. 181, 200–201 (1964).[10] Or conceivably we might have heard arguments or taken further evidence regarding the legal effect of Old Ben's having agreed to pay for the reworking charges and receiving goods before it had learned that the containers were loaded in Europe under Sea-Land's supervision. Cf., *e.g., Southern Pacific Company v. Miller Abattoir Company*, 454 F. 2d 357, 359 (3 Cir. 1972).[11]

Numerous other interesting legal issues and arguments could have been raised if money were no object and the parties wished to expend it generously in wasteful litigation. For example, Sea-Land admittedly had no tariff on file to authorize its assessment of the reworking charges although it did have a tariff

parties to submit a statement showing how the complaint has been satisfied including the amount of reparation agreed upon and a statement that a like adjustment will be made with other persons similarly situated. The settlement and mutual release in effect comply with the rule and there is no evidence that there were other shippers or consignees who were similarly assessed terminal charges as a result of Sea-Land's fault.

[10] Hearing Counsel contend that since Sea-Land imposed demurrage on each container separately and believed that it would be required to assess demurrage under its tariff, Sea-Land's actions appear to constitute "practices" rather than one isolated instance. (Hearing Counsel's Memorandum, p. 9.) Hearing Counsel may be correct. I need not decide the question for purposes of ruling upon the settlement. However, the contention illustrates the point that a continuation of this litigation would involve resolution of numerous difficult legal issues.

[11] *In Southern Pacific*, the court cited the many cases which hold that one who accepts goods consigned to him is liable for all freight charges. However, in that case there was a tariff which applied. In this case, Sea-Land admittedly had no tariff on file covering assessment of the reworking charges.

applicable to the demurrage charges.[12] Therefore, the question arises as to whether Sea-Land could have successfully defended against a claim for reparation as to the reworking charges and whether Old Ben could have successfully defended against a Sea-Land suit for the demurrage charges. These questions have no simple answers, however. Even without a tariff, as Hearing Counsel notes, Sea-Land could have sought to retain the reasonable costs of the reworking charge, if the parties wished to litigate further what such reasonable costs would be. See *e.g.*, *Carton-Print, Inc. v. The Austasia Container Express Steamship Co.*, 17 SRR 571, 579 (FMC determination not to review, July 7, 1977), citing *J. G. Boswell Co. v. American-Hawaiian S.S. Co.*, 2 U.S.M.C. 95, 104–105 (1939). Moreover, had Sea-Land wished to pursue its demurrage claims under its tariff, it would have to file a complaint in a court against the shipper, Old Ben, since under section 22 of the Shipping Act, complaints can only be filed against a "common carrier by water, or other person subject to this Act" and such "other person" is not defined in section 1 of the Act to include shippers such as Old Ben. See 46 U.S.C. 821 and 801. This suit in a court could, in turn, lead to a defense by Old Ben that the demurrage charges constituted unjust and unreasonable practices in violation of section 17 of the Act, which defense in turn could lead to a referral of this question by the court to the Commission under the doctrine of primary jurisdiction. See, *e.g.*, *Marine Terminal v. Rederi. Transatlantic*, 400 U.S. 62, 68–69 (1970); *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U.S. 285, 295 n. 2 (1922); *Sacramento-Yolo Port District v. PCEC*, 8 SRR 20, 569 (N.D. Cal. 1970). If such referral took place and if the tariff provision embodying Sea-Land's demurrage practices were found to be unreasonable, the general principle requiring shippers and consignees to pay Sea-Land what the tariff provides could conceivably not be applicable.[13]

What I am attempting to demonstrate by the above discussion is not that Sea-Land has necessarily violated section 17 of the Act or that Sea-Land clearly has a valid claim for demurrage which a court would uphold but that the outcome of Old Ben's claim filed with the Commission and any Sea-Land action filed with a court is uncertain. As mentioned above, it is not necessary nor indeed advisable to make final determinations of the many legal issues when considering offers of settlement since, to do so, might discourage parties from even attempting to propose settlement. My objective is to demonstrate that disapproval of the settlement which the parties desire to implement would very likely perpetuate a series of complicated proceedings both before the Commission and the courts in

[12] See Continental/U.S. Gulf Freight Association Tariff (F.M.C. No. 2) Rule 25B, first revised page 11a

[13] Although the general rule of law is that carriers must collect what is specified in their tariffs, there are exceptions. For example, in *Joseph & Sibyl James v. South Atlantic & Caribbean Lines, Inc.*, cited above, in a domestic offshore trade, the carrier was not allowed to retain storage charges under its bill of lading (which by section 2 of the Intercoastal Shipping Act, 1933 must be included in the tariff) because the carrier had failed to provide adequate arrival notice. In *Plaza Provision Company v. Maritime Service*, cited above, carriers were not allowed to retain certain portions of demurrage charges under their tariffs because of their own fault. In *Southern Pacific Company v. Miller Abattoir Company*, cited above, the failure of the carrier to give proper notice of stoppage in transit under a shipping contract gave the consignee a right to counterclaim for damages against the carrier's assessment of additional charges under its tariff. In other exceptional cases, carriers have been denied rights to recovery under their tariffs when they have misled shippers regarding who has paid charges, have failed to advise shippers of cheaper routing, or have violated some other duty owed to shippers. See cases discussed in 83 American Law Reports 245, 260–261, 263, 267, and in 88 American Law Reports 2d 1375, 1377, 1387, 1395. See also cases cited in *Southern Pacific Company v. Miller Abattoir Company*, cited above, 454 F. 2d at p. 361 n 6. Finally, see *Free Time on Import Containerized Cargo at the Port of New York*, cited above, 18 SRR at p. 469 (assessment of demurrage under carrier's tariff when carrier has failed to provide equipment may result in a practice violative of section 17). Note especially that in *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915), in the quotation often cited by Mr. Justice Hughes regarding strict adherence to tariffs, he stated that shippers and carriers must abide by the tariff "unless it is found by the Commission to be unreasonable."

which numerous problematic legal issues would have to be determined at some expense to the parties. At the hearing held on September 19, 1978, all parties agreed that their settlement was offered in lieu of the painful and expensive alternative of carrying out litigation before the Commission and the courts and, furthermore, Sea-Land made clear that it had worked to develop the record and bring this case to a conclusion with the objective of reaching settlement. Therefore Sea-Land had not attempted to present facts or arguments as it would have done had it been necessary to present a full and complete defense, in other words, had litigation continued. (Tr. 34–40.)

It is clear that the parties have decided that their claims against each other should be dropped in the interest of avoiding costly and wasteful litigation. Clearly, too, Sea-Land feels the inequity of seeking to retain money for services which were the result of Sea-Land's fault in not exercising proper supervision over the loading of the containers in Europe. I see no purpose in compelling Sea-Land to pursue claims for demurrage in a court where the outcome is not certain or in forcing Old Ben to seek to prove a violation of law in this case and to raise defenses against Sea-Land's tariff claims in a court case. In other words, I agree with the parties that it is more prudent and reasonable for Sea-Land to refund to Old Ben the full sum of the reworking charges and to forego court action seeking demurrage charges in view of the alternatives of carrying on multiple litigation. From Sea-Land's point of view, furthermore, since it acknowledges its fault, the result is especially equitable, and it need not run the risk of an adverse finding of violations of law which could have additional adverse consequences as well as uncertain effects on its tariff. Finally, since there is no evidence that other shippers of mining equipment were also assessed reworking or demurrage charges because of Sea-Land's fault in loading containers, Sea-Land's refund of Old Ben's payment for the reworking services and waiver of demurrage charges in this particular instance would not mean that any competitor of Old Ben would suffer any disadvantage or unjust discrimination.[14]

Accordingly, I find that the settlement and agreement proffered by the parties are just and reasonable, do not violate any law or policy, and fully accord with the principles of law and Commission policy which strongly encourage settlements. Therefore, subject to whatever modifications the Commission may wish to make in the event that exceptions are filed or that the Commission decides to review this decision under Rule 227, 46 CFR 502.227, as amended (43 Fed. Reg. 33721), the settlement is approved and the complaint is dismissed.

(S) NORMAN D. KLINE
Administrative Law Judge

WASHINGTON, D.C.
October 11, 1978

[14] The fact that the parties have settled this particular controversy does not mean that the Commission is unable to take steps to improve Sea-Land's tariff regarding demurrage if the Commission believes that the particular tariff provision may be unreasonable. This tariff is not merely that of Sea-Land but also that of the members of the Continental/U.S. Gulf Freight Association and further controversies over demurrage may arise. Being an administrative agency, the Commission is free to choose any appropriate means of exploring this matter. It could, for instance, instruct its staff to begin discussions with the Association, initiate a rulemaking proceeding under section 17 of the Act, or an investigation. The Commission could take similar remedial action, if it chose, with regard to the fact that no tariff was on file governing the assessment of the reworking charges.

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-7

E. I. DU PONT DE NEMOURS AND COMPANY

v.

SEATRAIN INTERNATIONAL, S.A.

ORDER OF ADOPTION OF INITIAL DECISION

December 5, 1978

Pursuant to the Commission's Order on Review of August 22, 1978, Complainant E. I. du Pont de Nemours and Company has submitted into evidence bills of lading and packing lists which support the allegations of the complaint and show that Respondent Seatrain International, S.A. collected freight charges on Complainant's shipments, in excess of those provided in the Shipping Act, 1916.

In view of the foregoing, the Initial Decision of Administrative Law Judge William Beasley Harris, awarding reparation, is hereby adopted.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 78–7

E. I. du Pont de Nemours and Company

v.

Seatrain International, S.A.

Adopted December 5, 1978

Reparation of $22,970.82 awarded to complainant upon confession by respondent.

Don A. Boyd, William R. Rubbert and *Raymond Michael Ripple* for complainant.
Harvey M. Flitter, Vice President, Pricing and Regulatory Matters, Seatrain Lines, Inc., Container Division, for respondent.

INITIAL DECISION[1] OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

Oral testimony and cross-examination thereon was not resorted to in this complaint proceeding because the respondent in its answer to amended complaint[2] admitted under oath that as to the 23 shipments between April 2, 1976, and December 1, 1976, described as "Synthetic Fabric (not woven)," there is clear evidence that the commodities shipped under each and every bill of lading in question should have been described as "Fabric, Spun Bonded or Laced" under item 655.4524.565 in Seatrain's South Atlantic/Continent Freight Tariff No. E.S.A. 7, FMC No. 65, and that these commodities should have moved at the rate set forth in that item of up to/including $1.75 per pound, minimum 1,600 cft per container, at rate of $40.00–WM (increasing to $43.25–WM effective September 20, 1977). Respondent also admitted that due to that original incorrect description of the commodity, complainant, in violation of 46 U.S.C. §817, has been overcharged on the shipments set forth in Appendix A[3] to the complaint, in a total amount of $22,970.82.

[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).

[2] Paragraph II of complaint amended to show Seatrain International, S.A., as the respondent party. This was evidenced by the following correspondence: Letter dated April 20, 1978, from complainant stating ". . . I have been informed by Seatrain that the name of that carrier as it appears in the complaint . . . should more properly and completely be 'Seatrain International, S.A.' We have no objection to this minor correction." In a letter dated May 1, 1978, respondent stated *inter alia,* ". . . we are in complete agreement with Complainant's letter of April 20, 1978, with respect to amending Respondent's name to read Seatrain International, S.A. in lieu of Seatrain Lines, Inc. to conform therewith, our answer is styled accordingly."

[3] Appendix A refers to bills of lading from 5/28/76 through 11/27/76, thus within two (2) year statute of limitation of section 22 of the Shipping Act, 1916, as amended.

DISCUSSION

Where the respondent in a complaint proceeding for reparation acknowledges the claim to be correct in the trial of the matters, as here, the complainant is entitled to have a ruling against the respondent for the amount of reparation claimed. This is judgment upon confession. *Union Carbide Inter-America, Incorporated v. Venezuelan Line (Compania Anonima Venezolana de Navegacion),* Docket No. 75–58, 16 SRR 652 (1976).

Besides the confession, the respondent herein asks that ". . . the Complaint in the proceeding be granted. . . ."

The Presiding Administrative Law Judge upon consideration of the entire record in this proceeding, *finds and concludes*, in addition to the finding and conclusions hereinbefore stated:

1. Seatrain International, S.A., collected from E. I du Pont de Nemours and Company $22,970.82 more than properly was due for the services rendered in the transportation of complainant's freight, and in violation of section 18(b)(3) of the Shipping Act, 1916, as amended.

2. Seatrain International, S.A., admits the claim to be correct, entitling the complainant to judgment upon such confession.

Wherefore, it is ordered:

(A) E. I. du Pont de Nemours and Company be and hereby is awarded reparation in the amount of $22,970.82 from Seatrain International, S.A.

(B) This proceeding be and hereby is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

WASHINGTON, D.C.
May 9, 1978

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–52

FAR EAST CONFERENCE, PACIFIC WESTBOUND CONFERENCE JAPAN/KOREA-ATLANTIC AND GULF FREIGHT CONFERENCE AND TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN/KOREA ASSESSMENT OF INCHEON ARBITRARY UNITED STATES IMPORT/EXPORT TRADES

Commission inquiry into assessment of the "Incheon arbitrary" does not reveal any violation of the Shipping Act, 1916. Proceeding discontinued.

Edward D. Ransom, R. Frederick Fisher and *Richard C. Jones* for Respondents Pacific Westbound Conference and its member lines.

Charles F. Warren, George A. Quadrino and *John E. Ormond, Jr.* for Respondents Japan/Korea-Atlantic and Gulf Freight Conference and the Trans-Pacific Freight Conference of Japan/Korea, and their member lines.

Elkan Turk, Jr. for Respondents Far East Conference and its member lines.

John Robert Ewers, Paul J. Kaller and *Alan J. Jacobson* for the Bureau of Hearing Counsel.

REPORT AND ORDER

December 5, 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 arose out of the assessment by certain conferences[1] in the United States Far East trades of a higher rate for cargo moving to or from the Korean Port of Incheon than was assessed on cargo moving to or from the Korean Port of Busan.

Respondents arrived at their Incheon rates by taking their rate to Busan and adding thereto a fixed charge, known as the "Incheon arbitrary", to reflect the additional cost of transporting the cargo to and from Busan across the Korean peninsula from or to Incheon. Many carriers now call at Incheon by water without going through Busan but still assess the conference "arbitrary" charge. This situation led to concern that, in many cases, the "arbitrary" assessed bears no reasonable relationship to the extra cost to the carrier of calling at Incheon over calling at Busan.

[1] Far East Conference (FMC Agreement No. 17), Pacific Westbound Conference (FMC Agreement No. 57), Japan/Korea-Atlantic and Gulf Freight Conference (FMC Agreement No. 3103), and Trans-Pacific Freight Conference of Japan/Korea (FMC Agreement No. 150) and their member lines. These conferences and their member lines will hereinafter be referred to collectively as "Respondents"

An inquiry into the Incheon arbitrary was initiated by the Commission pursuant to section 21 of the Shipping Act, 1916. Detailed requests for information were issued to Respondents and to certain independent lines concerning the movement of cargo from and to Incheon and Busan. After receiving and considering the responses to its section 21 inquiries, the Commission issued an Order, dated October 12, 1977, directing Respondents to show cause why the Commission should not disapprove, as violative of section 15 of the Shipping Act, 1916, that portion of Respondents' respective conference agreements which allows for the setting of rates to and from the Port of Incheon, Korea. Respondents and the Commission's Bureau of Hearing Counsel filed affidavits of fact and memoranda of law in response to the Commission's Show Cause Order.[2]

DISCUSSION

There are two basic issues before the Commission in this case: (1) whether the evidence establishes that Respondents have violated the Shipping Act in assessing the Incheon arbitrary; and (2) if the evidence does establish a violation, whether the Commission should disapprove Respondents' conference agreements as to Incheon in order to remedy such violation.

The Order to Show Cause in this case referred only to the question whether conference rate-setting authority to and from the Port of Incheon warrants continued approval under section 15 of the Shipping Act in view of the assessment of the Incheon arbitrary. Respondents and Bureau of Hearing Counsel read this as precluding inquiry into possible violations of sections 16, 17 and 18(b)(5) of the Shipping Act, 1916. This interpretation overlooks the fact that section 15 requires disapproval of all agreements found to be "in violation of this Act," thus incorporating the standards applied in sections 16, 17 and 18(b)(5). Although an important distinction exists between a particular *implementation* of an agreement being violative of the Shipping Act, and the *agreement itself* being violative of the Shipping Act, it is well settled that an agreement can be disapproved under section 15, if necessary, in order to prevent an implementation violative of other sections of the Shipping Act.[3] It is therefore proper for the Commission to consider the full range of possible Shipping Act violations in this case.

Section 18(b)(5)

This section of the Shipping Act, 1916 provides that "[t]he Commission shall disapprove any rate or charge filed by a common carrier by water in the foregin commerce of the United States or conference of such carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States." The legislative history of section 18(b)(5)

[2] The Pacific Westbound Conference submitted the affidavit of Donovan D. Day, Jr., Chairman of the Pacific Westbound Conference; the Japan/Korea-Atlantic and Gulf Freight Conference and the Trans-Pacific Freight Conference of Japan/Korea filed a joint memorandum of law but no affidavits; and the Far East Conference submitted the affidavit of Gerald J. Flynn, Chairman of the Far East Conference, and the affidavit of Richard S. Patterson, holder of a Master's license. Hearing Counsel filed a reply to Respondents' memoranda and submitted the affidavit of Edward F. Hawkins, Chief of the Commission's Office of Tariffs and Intermodalism.

[3] *See, e.g., Iron and Steel Rates, Export-Import*, 9 F.M.C. 180, 193 (1965) (section (18(b)(5) violations)), and *Imposition of Surcharge by the Far East Conference at Searsport, Maine*, 9 F.M.C. 129, 132–133 (1965) (section 17 violations).

makes it clear that Congress did not intend the Federal Maritime Commission to have ratemaking powers over foreign commerce similar to those of the Interstate Commerce Commission over interstate commerce. Because the Commission has not been charged with fixing a reasonable rate of return for carriers in our foreign commerce the "unreasonably high" language "does not refer to the level of profit earned by a carrier."[4] The relationship between a particular carrier's incremental costs in serving Incheon and the arbitrary assessed by the conference of which it is a member is of marginal significance. The determinative issue is the impact of the rate or arbitrary upon the foreign commerce of the United States; this issue is not addressed in the Commission's section 21 inquiry or the responses thereto, nor is it addressed in the Show Cause Order or the responses thereto. Accordingly, there is no evidence of record that the Incheon arbitrary violates section 18(b)(5) of the Shipping Act.

Sections 17 and 16 First

Sections 17 and 16 First of the Shipping Act prohibit, respectively, " unjustly discriminatory" rates, and rates resulting in "undue and unreasonable preference or prejudice". The differences between "unjust discrimination" and "undue and unreasonable preference or prejudice" were discussed definitively by the Commission in *North Atlantic Mediterranean Freight Conference—Rates on Household Goods.*[5]:

"To constitute unjust discrimination, 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 unless the many relevant considerations render the different rates reasonable. Ordinarily, the shippers involved must be competitors."

A *prima facie* showing of a section 17 violation is made if it can be shown that different rates are charged for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions";[6] a competitive relationship between the similarly situated shippers need not be shown. In the case of the Incheon arbitrary, where carriage between two *different* ports and the United States is involved, a section 17 violation involving unjust discrimination between shippers can not exist.[7]

A violation of section 16 First of the Shipping Act arises when "shippers at A and B are competitive in a common market at C, the line hauls [length of routes] from A and B to C are the same and the same competitive influences apply to both. Section 16 First is thus designed to prohibit carrier *favoritism*. . . ."[8] The justification or defenses available to the carrier include competition from other

[4] *Iron and Steel Rates, supra* note 3, at 191. Surcharges, *i.e.*, temporary charges to account for specific exigencies, have received closer scrutiny than rates, such as the rate charged to Incheon. *See Imposition of Surcharge by the Far East Conference, supra* note 3.

[5] 11 F.M.C. 202, 213 (1967) *rev'd on other grounds sub. nom. American Export Isbrandtsen Lines, Inc. v. Federal Maritime Commission*, 409 F.2d 1258 (2d Cir. 1969).

[6] *North Atlantic Mediterranean Freight Conference, supra* note 5.

[7] Commissioner Bakke believes that the record in this case raises the possibility that the assessment of the Incheon arbitrary constitutes an unjust discrimination between ports, in violation of section 17 of the Shipping Act, 1916, but that the record is incomplete on this point, and does not support a finding that a section 17 violation has occurred.

[8] *Council of North Atlantic Shipping Associations v. American Mail Lines*, 21 F.M.C. 91, 17 SRR 781.840 (1977).

carriers, public convenience, relative cost of service, needs of shippers, impact on carrier profits, and other such factors.[9] The evidence gathered to date does not squarely address the question of competing shippers or the impact of the arbitrary upon them. It does address some factors that may tend to justify the rate differential between Busan and Incheon.[10] The evidence of record does not support a finding that the assessment of the Incheon arbitrary is violative of sections 17 or 16 First of the Shipping Act, 1916.

Section 15

The overall approvability of Respondents' conference agreements under the standards approved in *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*[11] was not addressed in the Commission's inquiry under section 21 of the Shipping Act. The facts relied upon to institute this show cause proceeding do not establish that Respondents' conference agreements are unapprovable under section 15 of the Shipping Act, and no facts rendering the agreements unapprovable have been developed during this proceeding.

The record in this case also does not support a finding that the assessment of the Incheon arbitrary is violative of sections 16, 17, or 18 of the Shipping Act. The questions of resorting to disapproval of Respondents' conference agreements pursuant to section 15 as a remedy to such violations therefore is not raised.

CONCLUSION

The evidence of record does not establish that the assessment of the Incheon arbitrary by Respondents is violative of the Shipping Act, 1916, and it does not appear that further investigation or action is warranted at this time.

THEREFORE, IT IS ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

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[9] *Id.*

[10] The responses received by the Commission to its section 21 Orders indicate at least two factors that tend to justify the assessment of the Incheon Arbitrary: (1) the average costs incurred by carriers actually providing overland service from Busan to Incheon were *greater* than the arbitraries assessed for this service; (2) some carriers indicated that the cost of serving Incheon by water is higher than the cost of serving Busan, due to significantly higher clerking costs, stevedoring differentials, barge operating differentials and other conditions peculiar to Incheon.

[11] 390 U.S. 238 (1968).

FEDERAL MARITIME COMMISSION

DOCKET NO. 74-30

SEA-LAND SERVICE, INC.-GENERAL INCREASE IN RATES IN THE U.S. WEST COAST/ PUERTO RICO TRADE

Proceeding to investigate the reasonableness of a rate increase in domestic offshore commerce discontinued following the carrier's discontinuance of the all-water service to which the rates applied.

Warren J. Price, Jr. for Sea-Land Service, Inc.
Dennis M. Barnes for Commonwealth of Puerto Rico.
John Robert Ewers and Bert Weinstein for Bureau of Hearing Council

REPORT AND ORDER

December 6, 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 instituted by the Commission on August 13, 1974, to determine the lawfulness, under section 18(a) of the Shipping Act, 1916, of a 15% general increase in rates proposed by Sea-Land Service, Inc. (Sea-Land) in the U.S. West Coast/Puerto Rico Trade.[1]

Upon completion of discovery, Sea-Land, Hearing Counsel, and Puerto Rico moved to discontinue the proceeding on the ground that, based on an analysis of available financial data, the rate increase was reasonable. Administrative Law Judge Seymour Glanzer (Presiding Officer) found the data to be an insufficient basis for a decision, and initially declined to rule on the motion. The parties subsequently submitted a Supplemental Motion to Discontinue presenting additional financial data. The Presiding officer issued an Initial Decision on July 6, 1976, wherein he suggested, but did not actually find, that the rate increase was reasonable. He discontinued the proceeding not pursuant to the motions, but on the ground of mootness, because the 1974 rates which were the subject of the investigation were superseded by a subsequent general revenue increase effective January 15, 1976.,

[1] The Commonwealth of Puerto Rico (Puerto Rico) had protested the rate increase because a previous Sea-Land rate increase was then pending Commission investigation. Docket No. 71-53, *Sea-Land Service, Inc.-General Increases in Rates in the U.S. Pacific/ Puerto Rico Trade*. Puerto Rico and the Commission's Bureau of Hearing Counsel (Hearing Counsel) were made parties to the instant proceeding.

Hearing Counsel filed Exceptions to the Initial Decision and argued that the proceeding should have been discontinued on its merits rather than for mootness. Hearing Counsel claimed a rate case is not mooted by subsequent tariffs and requested the Commission to rule that Sea-Land's rates were reasonable. No other exceptions (or replies) were filed.

DISCUSSION

The fact that the particular subject of a proceeding no longer exists does not necessarily preclude a decision on the case's merits; both this Commission and the Interstate Commerce Commission have ruled upon the reasonableness of rates no longer effective. *E.g., Rates on U.S. Government Cargoes,* 11 F.M.C. 263 (1967); *Bell Potato Chip Co. v. Aberdeen Truck Line,* 43 M.C.C. 337 (1944). Since the institution of this proceeding, however, Sea-Land has also cancelled the all-water service from the Pacific Coast to Puerto Rico for which the instant rates were filed, and has replaced it with a joint rail/water intermodal operation.[2] This fact, as well as certain gaps and inconsistencies in the economic data relied upon by the parties, renders it doubtful that any useful purpose would be served by a decision on the merits.[3]

THEREFORE, IT IS ORDERED, That the Exceptions of Hearing Counsel are denied;

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

[2] The service was terminated on February 1, 1978, subsequent to the filing of Hearing Counsel's Exceptions.

[3] Two additional Sea-Land rate increases were implemented between 1976 and the discontinuance of the all-water service, which further diminish the reliability of the record. Although the Commission clearly ordered that all Sea-Land tariff amendments and other changes be made a part of the investigation (Order of Investigation and Suspension, at 2), Hearing Counsel and Puerto Rico failed to demonstrate an interest in incorporating into the investigation the tariff amendment which preceded the Initial Decision.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-11

PACIFIC CRUISE CONFERENCE–
PETITION FOR DECLARATORY ORDER

Petition for Declaratory Order of Pacific Cruise Conference denied because: (1) a significant but not easily resolved fact is in dispute; (2) any dispute between the parties is appropriately resolved through arbitration; (3) the practice in controversy has been terminated and does not appear likely to recur; and (4) the factual pattern presented does not appear to be of sufficiently general application to warrant the issuance of a declaratory order.

Thomas E. Kimball and *Robert B. Yoshitomi* for Petitioner Pacific Cruise Conference and its member lines.

Arthur D. Bernstein, William Karas, and *Robert L. McGeorge,* together with *Michael Fox,* for Respondents Savers Travel Club, Inc. and Save-On Travel, Inc.

Paul S. Quinn for Intervenor American Society of Travel Agents, Inc.

John Robert Ewers and *John W. Angus, III* for the Bureau of Hearing Counsel.

REPORT AND ORDER

December 7, 1978

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

Pursuant to Part 502.68 of the Commission's Rules,[1] the Pacific Cruise Conference and its member lines (Petitioners) filed a Petition for Declaratory Order (Petition) seeking a ruling from the Commission as to the legality, under the Shipping Act, 1916 and/or Petitioners' conference agreement,[2] of certain practices of Savers Travel Club, Ltd. (the Club) and/or Save-On Travel, Inc. (the Agency).[3] The practices in question involve giving refunds or rebates (bonuses) by the Club to persons who buy passages on Petitioners' ocean cruises through the Agency.[4] Petitioners express concern that the Club and the Agency may not

[1] 46 C.F.R. 502.68

[2] *Pacific Cruise Conference Agreement*, FMC No 131.

[3] The Agency is authorized to sell Pacific Cruise Conference passages in accordance with an agency appointment agreement between it and the Conference. Paragraph 3 of the appointment agreement operates to prohibit the Agency from giving rebates or similar inducements.

[4] The Club operates as a travel promoter and publishes a magazine, *Easy Living*, that is provided to savings and loan institutions for distribution to the public. The magazine offered a cash "bonus," in the form of free traveler's checks provided by the savings and loan institution, to persons ordering Petitioners' cruise passages through the Club. The Club reimbursed the savings and loan institution for the travelers checks and channeled all the patronage obtained through the "bonus" program to the Agency, which obtained full fares for the cruise passages it sold.

be separate entities, *i.e.*, that the Club is being used as the *alter ego* of the Agency to enable it to give rebates that would be violative of the Agency's appointment agreement with Petitioners and would also cause Petitioners, as the Agency's principals, to be in violation of their conference agreement and the Shipping Act, 1916.

The American Society of Travel Agents (ASTA) filed a Petition to Intervene in this proceeding,[5] asserting that Commission approval of the practices in question would allow the Agency to obtain unfair advantage over competing travel agents, who may then be forced to start their own "separate" clubs to meet the competition of Save-On Travel. The Commission's Bureau of Hearing Counsel also was made party to this proceeding.

A crucial factual issue in this case is the nature and extent of the relationship between the Club and the Agency. Petitioners and ASTA contend that the Club is really the *alter ego* of the Agency. The Club and Agency deny this and maintain that they are completely separate and independent entities. The facts as presently articulated by the parties are inconclusive,[6] and a further evidentiary hearing would be required to resolve the disputed factual issue of the Club's relationship to the Agency.

Petitioners have made some effort to ascertain the nature and extent of their Agency's connection with the Saver's Travel Club, but they have not offered an explanation of why they have been unable to resolve this issue within the framework of their conference self-policing system.[7] Although they have not elicited all the facts from their Agency concerning its relationship with the Club, Petitioners would have the Commission issue a declaratory order in this case without first resolving this question. Declaratory orders generally are not well suited to situations where a major factual issue is in dispute and cannot easily be resolved by the Commission.

The purpose of a declaratory order is "to terminate a controversy or to remove uncertainty."[8] Any controversy or uncertainty surrounding the legality of the "bonus" program conducted by the Club and/or Agency has been substantially

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[5] The Petition to Intervene was filed pursuant to Part 502.72 of the Commission's Rules (46 C.F.R. 502.72). It appears that ASTA has a substantial interest in this proceeding and that its grounds for intervention are pertinent to the issues already presented and do not unduly broaden them. ASTA's Petition to Intervene therefore is granted.

ASTA also seeks to participate in discovery even though its Petition was filed after the date on which its discovery rights are presumed to be waived under Part 502.72(b) of the Commission's Rules (46 C.F.R. 502.72(b)). ASTA argues that there was good cause for this delay because a two week enlargement of time was granted for the filing of replies to the Pacific Cruise Conference's Petition, and that it needed to review these replies before filing its Petition to Intervene. This argument is without merit because a reply to a reply is prohibited by Part 502.74(a) of the Commission's Rules (46 C.F.R. 502.74(a)), and ASTA therefore had no need to consider the replies of other parties before filing its Petition to Intervene. To the extent that ASTA's Petition responds to replies, it has been disregarded. ASTA's request to participate in discovery in this proceeding is denied as untimely. ASTA's request is also moot in light of the fact that the Commission is terminating this proceeding.

[6] In support of the Club's supposed independence from the Agency, it is noted that the Club appears to be operating at a profit and appears not to have received any reimbursement from the Agency for "bonuses" paid by the Club. "Bonus" payments reportedly amounted to only 1.3% of the Club's net sales for the year ending April 30, 1976. There is apparently no written agreement between the Club and the Agency, although they do have an ongoing business relationship. In support of Petitioners' contention, it is noted that the same person serves as Vice-president/Manager of the Agency and is also responsible for travel and tour planning with the Club. The original shareholders and directors of the Agency have the same address as the original shareholders and directors of the Club. The Agency and Club have refused on grounds of "confidentiality" to honor Petitioners' informal requests for information as to the identity of the Club's current stockholders and directors, the Agency's current stockholders and directors, or any other connection between the Club and the Agency.

[7] Clause 8 of the Agency's agreement with Petitioners provides that the agreement may be cancelled by Petitioners if the Agency engages in prohibited or unethical conduct (such as rebating). A system of arbitration prior to such cancellation is prescribed by Rule E-7 of Petitioners' conference agreement. Petitioners make no indication that they have attempted to utilize this mechanism.

[8] 46 C.F.R. 502.68

reduced by the action of a travel agency self-regulatory body.[9] The Agency has agreed to discontinue the "bonus" program and to pay a fine to the self-regulatory body. The Club has in fact discontinued the "bonus" program,[10] and the Commission has not received any complaints of similar cash "bonus" plans by other travel clubs and/or agencies.

The issuance of a declaratory order in this proceeding is neither necessary nor appropriate, for the following reasons: (1) There is a significant but not easily resolved fact still in dispute in this case; (2) Any dispute between Petitioners and the Agency is appropriately resolved by arbitration as provided in their conference and agency agreements; (3) The practice in controversy here has been terminated and does not appear likely to recur; and (4) The Commission has no reason to believe that the factual pattern here is of sufficiently general application to warrant the issuance of a declaratory order.

THEREFORE, IT IS ORDERED, That the Petition to Intervene of the American Society of Travel Agents is granted, except that the request of the American Society of Travel Agents to participate in discovery proceedings is denied as untimely and moot; and

IT IS FURTHER ORDERED, That the Petition for Declaratory Order of the Pacific Cruise Conference is denied.

(S) FRANCIS C. HURNEY
Secretary

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[9] "Decision of Robert L. Park, Travel Agent Commissioner [In re] Save-On Travel, Inc., Complaint of Director, Office of Enforcement, Air Transport Association, Docket 77-236C, Agency Code 84332," dated March 29, 1978.

[10] In the summer, 1978 edition of *Easy Living*, at page 27, the Club published a letter from its executive director, stating that: "Recently, the regulatory authorities of the travel industry deemed that the Club's Cash Bonus Plan was not permissible under its rules. Consequently, the Club is now obligated to discontinue the Cash Bonus Plan."

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–72

AGREEMENT NO. 10056—POOLING, SAILING AND EQUAL ACCESS TO Government CARGO (ARGENTINA/U.S. PACIFIC COAST TRADE)

ORDER

December 7, 1978

On November 16, 1978, Delta Steamship Lines, Inc. and Empresa Lineas Maritimas Argentinas, S.A., filed a notice of withdrawing Agreement No. 10056 and Delta's November, 1977 Petition for Reconsideration in the above-captioned proceeding.

THEREFORE, IT IS ORDERED, That this proceeding is terminated; and

IT IS FURTHER ORDERED, That the voluntary withdrawal of Agreement No. 10056 is without prejudice to any new agreement the parties may submit for Approval.

By order of the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 76–43

MATSON NAVIGATION COMPANY–PROPOSED RATE INCREASES IN THE UNITED STATES PACIFIC COAST/HAWAII DOMESTIC OFFSHORE TRADE

Rate increases are unjust and unreasonable within the meaning of section 18(a) of the Shipping Act, 1916.

David F. Anderson, Peter P. Wilson and *George D. Rives* for Matson Navigation Company.
Ronald Y. Amemiya and *William W. Milks* for the State of Hawaii.
Dudley J. Clapp, Jr., Milton J. Stickles, Jr., and *Terrance A McGinnis* for Military Sealift Command.
John Robert Ewers, C. Douglas Miller, John C. Cunningham and *Alan J. Jacobson* for Bureau of Hearing Counsel.

REPORT AND ORDER

December 12, 1978

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 August 5, 1976, to determine the lawfulness of a 3.5% general rate increase on all cargos (except eastbound bulk sugar and molasses) filed by Matson Navigation Company (Matson) in the U.S. Pacific Coast/Hawaii trade. The rates under investigation became effective August 2, 1976, but were superseded by two subsequent Matson rate increases which took effect in 1977 and 1978, respectively.[1]

Administrative Law Judge Stanley M. Levy (Presiding Officer) served an Initial Decision July 21, 1978, holding that the 1976 increase was reasonable and lawful. The Presiding Officer found that with the 3.5% increase Matson would collect net revenues of $8,986,000, and that with these net revenues Matson would realize a rate of return of 12.71% on rate base and 13.92% on equity.[2] It

[1] The 2.0% July 31, 1977, increase and 2.5% March 4, 1978, increase were not joined in the instant investigation. A carrier's implementation of subsequent rate changes does not necessarily render a rate investigation moot. *See* Docket No. 75–57–*Matson Nav. Co.–Proposed Rate Increases*–Order on Appeal, served January 14, 1977, 16 S.R.R. 1701. Cf. Docket No. 73–22, 73–22 (Sub. No. 1) 74–36 (Sub. No. 1)–*Matson Nav. Co.–Changes in Rates*, Decision and Order Partially Adopting Initial Decision, served June 30, 1978.

[2] These conclusions were based upon the finding thet Matson had a rate base of $70,637,000, imbedded debt rate of 8.6% and a debt/equity ratio of 22.8% debt and 77.2% equity.

[3] A 15% return on equity was also found to be consistent with that permitted regulated airlines by the Civil Aeronautics Board, based upon the presumption that the airline and shipping industries have equivalent risk characteristics.

was also determined that although the average U.S. industry earns a 12% return on equity, Matson, because it is a highly leveraged firm with varying earnings and because the cost of capital has increased in recent years, was entitled to earn a potential 15% return on equity.[3] Exceptions to the Intitial Decision were filed by the Military Sealift Command (MSC) and the Commission's Bureau of Hearing Counsel (Hearing Counsel).

Position of the Parties

Hearing Counsel argues that Matson's maximum rate of return on equity should be 13% because the company's operations involve only slightly greater risks than the average U.S. enterprise; that is, Matson is not as highly leveraged as it appears, its earnings vary at a consistently high level, it enjoys a virtual monopoly in the trade, and its operations do not compare to those of commercial airlines.

Military Sealift Command argues that because the Presiding Officer used an erroneous income tax figure in his calculations Matson's actual return on rate base was 12.79% and its actual return on equity was 14.03%. MSC also argues for a lower maximum rate of return for basically the same reasons as Hearing Counsel, but recommends a direct roll-back of the rates presently in effect based upon that portion of the past increase it deems unreasonable.

In reply, Matson basically defends the Initial Decision. However, it does provide an explanation of the figure used for after tax net income which had not been explained in the Initial Decision.[4] Matson also argues that the Commission lacks authority to devise any remedy for unreasonably high rates.

Discussion

Methodology

The methodology used by the Presiding Officer in determining Matson's rates of return is correct in most respects. However, there are two minor points which require adjustment.

First, although the after-tax net income figure used in the Initial Decision which varied from that submitted by Matson (Exhibit No. 64), was correct, the Presiding Officer neglected to describe how it was computed. During the course of the proceedings the parties agreed that an allocated portion of Matson's deferred income tax account be deducted from the service rate base. The deduction of deferred taxes from Matson's rate base lowered its service debt to total debt ratio, which in turn lowered the apportioned interest deduction allocated to the service, increasing net revenues, and causing the income tax figure for the service to be slightly increased.[5]

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[4] Finding of Fact No. 10 cites Exhibit 64 as a basis for finding $8,980,000 in after tax net income, but the exhibit indicates $9,031,000 for this entry. The use of the figure stated in the exhibit would result in higher rates of return than those found by the Presiding Officer.

[5] The service rate base was reduced $5,044,000 in deferred taxes allocated to the service, yielding a net adjusted rate base for the service of $70,637,000. Matson's total debt and equity is $104,313,000. Applying the debt ratio of 22.8% to these figures we arrive at service and a total debt figures of $16,105,000 and $23,783,000, respectively. Taking the ratio of service debt to total debt (67.7%) and applying this to the total corporate interest expense of $2,092,000, Ex. 60, Sch. VI, we arrive at a service interest expense of $1,174,000. Net taxable income is then increased to $14,884,000 increasing taxes to $7,377,000 and decreasing net after tax income to $8,980,000. *I.D.* at 5. *It should be noted that total capital for debt/equity ratio purposes does not include deferred tax credits as the* service rate base has been reduced by an allocated portion of deferred taxes. This is logically consistent.

The second adjustment involves the findings as to Matson's rates of return on rate base and on equity. The Commission has previously held that an allocated portion of deferred taxes based upon the ratio of service rate base to total capital should be deducted from the rate base.[6] Left open for decision in this case is the question of what should be included in total capital in making this computation. Although not excepted to by any party, the Commission concludes that deferred investment tax credits should not be included in total capital in allocating a deferred tax deduction if no portion of these deferred credits is deducted from the rate base.[7] Deferred investment tax credits of $4,579,000 have therefore been excluded from Matson's total capital for purposes of computing the allocated deferred tax deduction in this case, and has resulted in an ultimate determination that Matson's rates of return on rate base and equity are 12.75% and 13.98%, respectively.[8]

Reasonable Rate of Return

The standard for judging a carrier's maximum permissible rate of return begins with the presumption that regulated industries are entitled to a return on equity capital which equals the average return earned by other U.S. industries, with deviations from this standard for risk "premiums" and "discounts", being assessed in light of how each regulated company's risk factors compare to the average firm.[9] There is unanimous agreement in this proceeding that the average return for U.S. industries is 12%. The real issue presented is how Matson compares to that average firm in terms of its risk characteristics.

The weight of the evidence indicates that if Matson's risks are greater than the average U.S. industry, they are only slightly so. Hearing Counsel's recommended 1% risk premium is therefore the position best supported by the record.[10]

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[6] Docket No. 73-22, 73-22 (Sub No. 1), 74-36 (Sub No. 1)-*Matson Nav. Co -Proposed Changes in Rates, supra*, mimeo at 7, 8 n. 6.

[7] This adjustment only changes the portion of deferred taxes deducted, and does not answer the question of whether investment tax credits should likewise be deducted from the rate base They were not deducted in this instance. This matter has not heretofore been litigated or discussed and perhaps is more appropriately the subject of a *rulemaking proceeding*.

[8] The rates of return are computed as follows·

$$\frac{\$\,75{,}681{,}000\text{ (rate base)}}{\$112{,}088{,}000\text{ (total capital)}} = 67\ 52\%$$

$7,775,000 (deferred taxes) × 67.52% = $5,250,000 (allocation)

$75,681,000−$5,250,000 = $70,431,000 (adjusted rate base)

$16,301,000	(net income, Ex. 64)
−7,379,000	(Income taxes, for computation procedure see n. 10)
+ $56,000	(profits of related companies, Ex. 64)
$ 8,978,000	NET INCOME

$$\frac{\$\,8{,}978{,}000\text{ (net income)}}{\$70{,}431{,}000\text{ (adjusted Rate Base)}} = 12.75\%\text{ Return on Rate Base}$$

$$\frac{.1275 - .228 \times 086}{772} = 13.98\%\text{ Return on Equity}$$

The rate of return on equity can be computed with the formula $Re = (Rt - (D/C)Rd)/(E/C)$, where the rate of return on rate base (Rt) is known (12 75% = 1275), the imbedded debt cost rate (Rd) is known (8.6% = .086), the debt ratio (D/C) is known (22.8% = .228) and the equity ratio (E/C) is known (77.2% = .772). No party excepted to the finding as to the debt rate and the debt/equity ratio. I.D. at 17-18.

[9] Such a methodology fulfills the basic requirements of *Bluefield Waterworks and Improvement Company v. Public Service Commission of West Virginia*, 252 U.S. 679 (1923) and *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) in that Matson will be allowed to earn a return on rate base equal to that generally being made on investments in other enterprises having corresponding risks and which also generates enough revenue to allow it to maintain its credit and attract capital.

[10] Ex. 55, pp. 13-29.

Under present economic and financial conditions a carrier with Matson's financial structure and risk characteristics, will be allowed a maximum rate of return on equity of 13%.[11]

Numerous factors are involved in assessing the risk characteristics of an enterprise. It was argued that Matson is a highly "leveraged" firm indicating more risk to equity holders. As used in the Initial Decision "leverage" apparently refers to "business leverage", or the relative amount of costs that must be met prior to realizing net revenues, as opposed to "financial leverage" indicating the relative amount of debt financing of the firm. Matson's higher "business leverage", however, must be offset by the fact that its ratio of debt to equity is lower than average.[12]

Similarly, while Matson does show a greater degree of earnings variations than average, indicating more risk, these variations occur at a consistently high level of earnings.[13] The relatively high cost of money today should not affect Matson's relative risk because this factor applies to all U.S. firms more or less equally and because Matson does not seek capital on the money market.[14] Finally, the subjective element of Matson's comparative market position must be given some weight in any risk analysis in recognition of the major role this fact plays in the real world of investment decisions.[15] Matson has been the dominant carrier in the Hawaiian trade for many years and, except for limited competition from United States Lines and three barge carriers presently enjoys a virtual monopoly.[16]

The weight of evidence in this case indicates that the 1976 3.5% rate increase has resulted in Matson realizing an excess of return on equity of .98%, which means that the maximum permissible rate increase would have been 2.8%.[17]

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[11] This was the maximum lawful rate of return determined in Docket No. 75-57—*Matson Navigation Company-Proposed Rate Increases*, Decision and Order Partially Adopting Initial Decision, served simultaneously herewith, which covered an overlapping test period of calendar year 1976.

[12] Ex. 55, pp. 14-16. The Presiding Officer distorts the meaning of the debt/equity ratio test of comparative financial leverage as used by Dr. Ellsworth in Ex. 55. In ex. 57 at 786 Dr. Ellsworth states that he did not include vessel leases in calculating debt as the statistics given by *Forbes* did not. To include the leases in Matson's debt and compare the resulting ratio to other industries where this is not done is an invalid comparison. See Appendix I for a graphic depiction of the effect of the debt/equity ratio on the rate of return on equity.

[13] Ex. 22. It should be noted that the figure for return on equity for 1975 is given as 7.64% when the Commission in Docket 73-22, *supra*, found it to be 9.02% indicating that these figures may unduly favor Matson. Even so in the past 19 years Matson's return on equity has fallen below 8% only six years, 1959-1961 and 1970-1972, when Matson faced serious competition. Recent years have been very good to Matson as since 1973 its rate of return (using in part Commission figures) has been steadily rising; 1973-8.79%, 1974-8.72%, 1975-9.02%, 1976-12.58%, and in this test year-13.98%. Matson's 19-year average is 9.02%. See Appendix II for a computation of Matson's earnings variations for 1973-1977, which indicates less variation than the average firm as presented by Matson in Exhibit 24.

[14] Ex. 55, pp. 27-28.

[15] Ex. 55, pp. 22-27. It could be argued that the subjective criteria of risk are the ultimate decision factors in the investment market and should dominate rate of return considerations. The Commission, however, prefers to employ a more balanced approach between subjective and objective criteria for assessing risk. A one-dimensional approach, whether statistical or intuitive, runs the risk of extreme findings that could contravene other valid evidence of record.

[16] Ex. 55, pp. 23-24. United States Lines' service to Hawaii is strictly a one-way westbound service offered as part of its Far East service (Tr. 65) and carries only 10% of containerized cargo in the Hawaiian trade. Ex. 7, p. 29. Barge competition consists of Hawaiian Marine Lines' regular service from Portland and Seattle (Ex. 8, p. 4), Sause Brothers Ocean Towing Company's service from the South Oregon coast (Ex. 7, p. 15-16), and Dillingham Corporation's private contract operation from the Pacific Northwest (Tr. 57), all of which combined represents only a small portion of the Hawaiian trade tonnage. Matson carries 85% of all container cargo and 90% of all cargo of all types moved by ocean cargo ships in the Pacific Coast/Hawaii trade (Ex. 55, p. 24).

[17] The excess return on equity of .98% when applied to the rate base equity of $54,372,732 ($70,431,000 rate base × 77.2% equity ratio) yields $532,852.77 in net after tax excess profits. Applying Matson's effective tax rate of 45.3% ($7,379,000 income taxes divided by $16,301,000 net income) yields gross excess revenues collected of $974,136.69 ($532,852 divided by .547). This is 20% of gross revenues derived from the increase of $4,836,000 (Ex. 60) or a .7% excess increase.

THEREFORE, IT IS ORDERED, That the general rate increase instituted by the Matson Navigation Company between August 2, 1976, and July 31, 1977, was unreasonable to the extent it exceeded 2.8%; and

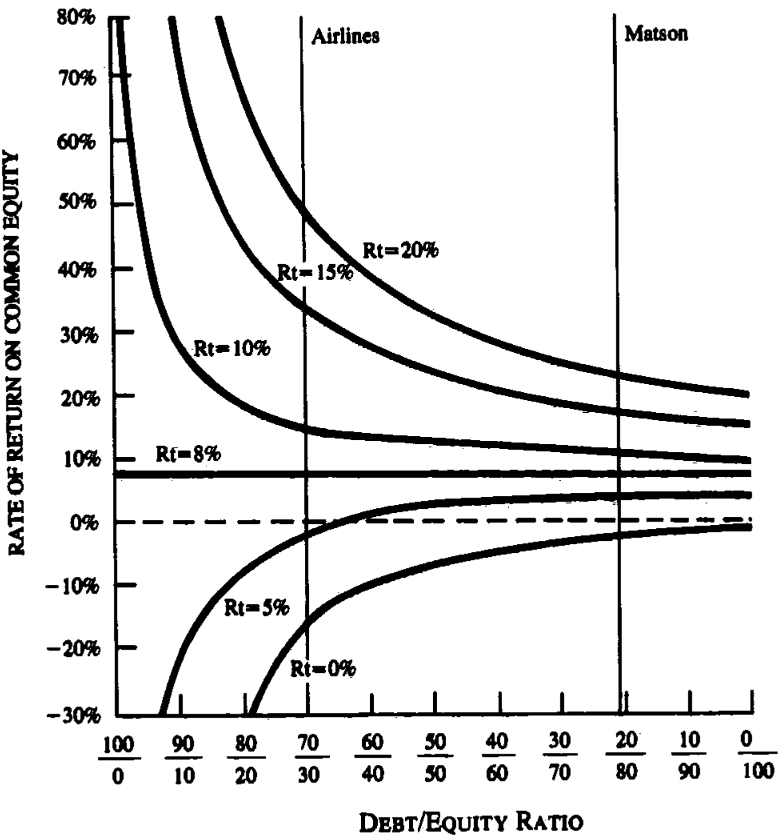
IT IS FURTHER ORDERED, That this proceeding be discontinued.

(S) FRANCIS C. HURNEY
Secretary

APPENDIX I

EFFECTS OF DIFFERENT DEBT/EQUITY RATIOS ON THE RATE OF RETURN ON EQUITY

Assuming Imbedded Debt Rate of 8% and Returns on Rate Base (Rt) of 0%, 5%, 8%, 10%, 15% and 20%



Example 1—Carrier A earning 10% on Rate Base (Rt=10%) with a debt/equity ratio of 20/80 will have a 10.5% return on equity but Carrier B with the same earnings at a debt/equity ratio of 80/20 will have an 18% return.

Example 2—Carrier A earning 5% on Rate Base (Rt=5%) with a debt/equity ratio of 20/80 will have a 4.25% return on equity but Carrier B with the same earnings at a debt/equity ratio of 80/20 will have a −7% return.

APPENDIX II

COMPUTATION OF VARIABILITY IN RATES OF RETURN ON COMMON EQUITY MATSON NAVIGATION COMPANY—1973 TO 1977

Year	Return on Common Equity
1973	8.79%
1974	8.72%
1975	9.02%
1976	12.94%
1977	13.98%

Risk Measures:

Average Rate of Return on Common Equity—10.69%
Coefficient of Variation—.21

Source: For 1973 and 1974 see Ex. 22; for 1975 see Appendix A of Decision and Order in Docket Nos. 73-22, 73-22 (Sub. No. 1) and 74-36 (Sub. No. 1), served June 30, 1978; for 1976 see Decision and Order in Docket No. 75-57, served simultaneously herewith; for 1977 see *supra* at 6. (Test year of 8/1/76-7/31/77)

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–57

MATSON NAVIGATION COMPANY—PROPOSED RATE INCREASES IN THE UNITED STATES PACIFIC COAST/HAWAII DOMESTIC OFFSHORE TRADE

General rate increase is just and reasonable within the meaning of section 18(a) of the Shipping Act, 1916.

The substituted service offered by Matson between Los Angeles and Oakland does not violate sections 16 First or 18(a) of the Shipping Act, 1916, or section 2, Intercoastal Shipping Act, 1933.

The rate on animal feed does not result in any undue or unreasonable prejudice or disadvantage within the meaning of sections 16 First and 18(a) of the Shipping Act, 1916.

David F. Anderson, Peter P. Wilson, David Ainsworth, and *George D. Rives* for Matson Navigation Company.

Ronald Y. Amemiya, William W. Milks and *Richard S. Sasaki* for The State of Hawaii.

Robert D. Raven, James J. Garrett, Charles R. Farrar, Jr., and *James P. Bennett* for Pineapple Growers Association of Hawaii.

Robert E. Freer, Jr., Kenneth A. Strassner and *Michael A. Nemeroff* for Kimberly-Clark Corporation.

Arthur B. Reinwald for Hawaii Meat Company, Limited.

Dudley J. Clapp, Jr., Milton J. Stickles, Jr., and *Robert H. Swennes, II,* for Military Sealift Command.

John Robert Ewers, C. Douglass Miller and *John Cunningham* for Bureau of Hearing Counsel.

REPORT AND ORDER PARTIALLY ADOPTING INITIAL DECISION

December 12, 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 instituted by the Commission on December 3, 1975, to determine the lawfulness of the Matson Navigation Company's (Matson) "multi-tier" general rate increase in the Pacific Coast/Hawaii trade (1975 increase). The simultaneously filed increases ranged from 2% to 15% and averaged 5.4% on the commodities which were affected.

The investigation was originally limited to Matson's general revenue level and whether the 15% increase on westbound animal feed was prejudicial. There was subsequently included in the investigation, issues concerning the lawfulness of

Matson's substituted service from Los Angeles to Oakland and its rate differentials between Pacific Northwest and California ports.[1] Although the "multi-tier" rates were superseded by subsequent general rate increases, the Commission ruled that the investigation was not moot because the commodity rate issues and important questions of methodology remained to be decided.[2]

Administrative Law Judge Stanley M. Levy (Presiding Officer) rendered an Initital Decision on July 21, 1978, wherein both the general and commodity rate increases were declared lawful.[3] The Presiding Officer found that the increased revenues produced a rate of return on rate base of 10.08% and on equity of 10.51%, and that under present conditions a carrier with Matson's risk factors should be allowed to earn as much as 15%–16% on equity. The substituted service was found lawful because Matson had filed a tariff explaining that the existing practice applied only to trailer cargo and no party had objected. On July 30, 1976, Matson cancelled its reduced rates on *paper products* from the Pacific Northwest which led the Presiding Officer to conclude that California and Northwest rates were generally in parity.

Exceptions to the Initial Decision were filed by the Commission's Bureau of Hearing Counsel (Hearing Counsel) and the Military Sealift Command (MSC).

POSITION OF THE PARTIES

Hearing Counsel does not contend that Matson's rate of return is unreasonable, but alleges several errors in the methodology used to reach that determination, including the treatment of certain rate base and income account items, the maximum rate of return permitted and the repeated revision of Matson's test year revenues. Hearing Counsel also excepts to the finding that Matson's overall rate structure is reasonable, and claims that none of the east/west differentials were justified, and that Matson continues to publish rates on *lumber and building materials* which favor Pacific Northwest ports.

MSC alleges that Matson's rate of return is actually 17.49% because the revenue data employed (both projected and actual) greatly understated the carrier's test period revenues. Because 17.49% is allegedly an excessive rate, MSC urges the Commission to order a rollback of Matson's *present rates* to compensate for the previous windfall.[4]

In reply, Matson essentially defends the Presiding Officer's findings and claims that the revised test year submissions were the most reliable evidence available of its rate of return on rate base and equity. Matson's only response to Hearing Counsel's allegations that a preferential rate differential continues to exist on lumber and building materials shipped from Pacific Northwest ports is

[1] The Order of Investigation and Suspension discussed rate differentials between northern and southern ports on the Pacific Coast and made Kimberly-Clark Corporation (which had specifically protested the differential on paper products), a complainant in the proceeding. The original Order did not, however, specifically subject the differentials to investigation, an oversight which was subsequently remedied by the Commission in its "Order Denying Motion to Sever Certain Issues and Clarifying Scope of Proceeding," served April 26, 1976.

[2] Order on Appeal, served January 14, 1977; 16 S.R.R. 1701. Matson implemented general rate increases on August 2, 1976, July 31, 1977 and March 4, 1978.

[3] The Initial Decision merely incorporated by reference the Commission's decision denying a subsequent complaint proceeding involving the same Matson animal feed rates; Docket No. 77-45—*Hawaii Meat Co., Ltd. v. Matson Navigation Company*, 18 S.R.R. 479, 734 (1978).

[4] MSC also excepts to the approval of Matson's overall rate structure.

that Commission policy precludes resolution of commodity rate issues in general revenue investigations.

DISCUSSION

Several revisions in the Initial Decision's treatment of the general revenue issues are necessary.

Matson was permitted to repeatedly submit revised exhibits as to its revenues, expenses, and rate base incorporating actual operating results, determined as the proceeding continued, into the original test year. The effect of the procedure was not to improve the record—which eventually became voluminous and confused—but to extend the proceeding. The test year projections submitted by the carrier with its initial tariff filing must be the starting point of any rate of return analysis, and should be amended only in unusual circumstances. The original figures were the basis for the carrier's decision to increase its rates. To allow revisions in this data contravenes the Commission's policy of expediting general revenue inquiries and hinders effective participation by persons opposed to rate increase. Subsequent figures reflect, in part, discretionary operational changes and are subject to *post hoc* rationalizations and ensuing evidentiary disputes based thereon. The instant decision, therefore, will be based on the initial figures contained in Matson's Exhibit 34.

The rate base and income account adjustments to the Exhibit 34 data proposed by Hearing Counsel are also appropriate.[5] Taking these adjustments into consideration,[6] the rate of return on rate base computes to 11.91% and the rate of return on equity 12.94%.[7] Although higher than that found by the Presiding Officer or calculated by Hearing Counsel, the 12.94% figure is nonetheless within the maximum rate of return on equity Matson could earn for the period without generating unreasonably high profits within the meaning of Shipping Act section 18(a).

Calculation of a reasonable rate of return on equity for a regulated carrier begins with the proposition that such carrier is entitled to a return equal to the average U.S. industry with deviations from this standard for risk "premiums" and "discounts", assessed in light of how the carrier's risk factors compare to the average firm.[8] The evidence in this case indicates that the average rate of

[5] Hearing Counsel proposed two deductions from the original Matson rate base (Exhibit 34); $188,000 for two assets claimed as part of the service, but not projected to be used during the test year and $4,691,694 of Matson's deferred income tax account, the latter agreed to by Matson The income account was increased by $585,000. This amount consisted of $25,000 profits of related companies, $393,000 in expenses for vessels not projected for use in the service, $10,000 depreciation for these vessels, $144,000 overestimate in administrative and general expenses (reduced from the $148,000 proposed adjustments as it was computed on a larger rate base than actually used herein) and $13,000 in excess entertainment and solicitation expenses.

[6] Matson, in its Reply to Exceptions, not only conceded the Allocated Deferred Taxes alleged by Hearing Counsel, but included $1,384,000 in the account for Matson Terminals, Inc. It then recomputed the allocation to $6,448,000. However, with the adjusted rate base used herein the correct allocation is $5,576,000

[7] Rate Base—$66,163,000; Net Income—$7,791,000. Return on Rate Base—$7,791,000/$66,163,000 = 11 91% Return on Equity—(.1191 − .244 × .0872)/.756 = 12.94%.

The rate of return on equity can be computed with the formula Re = (Rt − (D/C)Rd)/ (E/C) where the return on rate base (Rt) is known (11.91% = .1191), the imbedded debt cost rate (Rd) is known (8 72% = 872), the debt ratio (D/C) is known (24.4% = .244) and the equity ratio (E/C) is known (75.6% = 756). No party excepted to the findings as to the debt rate and the debt/equity ratio

[8] Such a methodology clearly fulfills the basic requirements of *Bluefield Waterworks and Impovement Company v. Public Service Commission of West Virginia*, 262 U.S. 679 (1923) and *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S 591 (1944), in that Matson will be allowed to earn a return on rate base equal to that generally being made on investments in other enterprises having corresponding risks and at the same time generate enough revenue to maintain its credit and attract capital.

return on equity for U.S. firms is 12%.[9] Matson, however, will be allowed a risk premium of 1% because, while the objective standards of earnings variations and comparative leverage indicate a high risk enterprise, these considerations must be tempered by the subjective factors of a history of high-level earnings and Matson's traditionally dominant market position.[10]

The conclusion that the substituted service practice of Matson from Los Angeles to Oakland of trailer cargo is lawful was not excepted to, and, as no error appears on the record in this regard, that portion of the Initial Decision is adopted.

The chronic shortage of eastbound cargoes has previously led the Commission to approve east/west rate differentials in Matson's rates.[11] A prior holddown on canned pineapple eastbound and the present increase in animal feed westbound were specifically upheld in recent decisions.[12] Nothing in the record of this proceeding warrants a different result.

A different situation is presented by rate differentials between Pacific Northwest and California ports on certain westbound commodities. While Matson did in fact cancel its tariff items creating the differential on paper products, the record clearly discloses that Matson retains the Northwest/California differentials on lumber and building materials.[13]

Rate differentials are not *per se* unlawful; only "undue or unreasonable prejudice" is prohibited. In order for a rate differential to violate section 16 First there must generally be a preliminary showing that a particular person, locality, or description of cargo has been subjected to a competitive disadvantage that results in actual injury.[14] Even then, valid transportation factors such as cost of service, carrier competition, traffic volume, distance covered, comparative advantages of location, and frequency of service may exist which justify the practice.[15]

No shippers of lumber or building material products, or competing carriers, were parties to the instant proceeding and there was little development of the record regarding the competitive effects of the ifferentials on these commodities. Under such circumstances, we believe the most prudent course is to discontinue the proceeding without a finding as to the lawfulness of the remaining north/south differentials and invite interested shippers or carriers to remedy any injury they may be experiencing by filing a section 22 complaint.[16]

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[9] I.D. at 7; Exhibit 23, p. 35; Dr. Ellsworth in Exhibit 28, pp. 15–16 found the average to be 11.0–11.5% but it is felt that too much weight was given the First National City Bank index (10.8%) over Standard and Poor's (12.31%), Moody's (12.82%) and Fortune 500 (11.81–12.00%). Furthermore, there was an upward trend in the 1965–74 decade and a test year of 1976 should indicate the higher end of the scale.

[10] Exhibit 28 at 21–37. No evidence of any future potential threat to Matson's dominant position was adduced, and the Commission has no reason to believe that the earnings variations Matson suffered between 1969 and 1971 are likely to reoccur in the foreseeable future.

[11] Docket No. 71–18—*Matson Navigation Company,* 16 F.M.C. 96, 102 (1973); Docket No. 73–22 (Sub. No. 1) and 74–36 (Sub No. 1)—*Matson Navigation Company—Increased Rates,* 18 S.R.R. 649, 657 (1978).

[12] Docket No. 73–22; *etc.* —*Matson Nav. Co., supra,* 18 S.R.R. at 657 (as to canned pineapple) and Docket No. 77–45—*Hawaii Meat Co., Ltd. v. Matson Nav. Co., supra* (as to animal feed).

[13] Tr. at 54; Matson Tariff No. 30, FMC-F No. 149.

[14] *North Atlantic Mediterranean Freight Conference,* 11 F.M.C. 202 (1967).

[15] *Discounting Contract/Noncontract Rates,* 12 F.M.C. 20 (1968).

[16] There are certain situations where a competitive relationship need not be shown if the carrier's obligation to render a particular service is "absolute" and not dependent on commodity characteristics or transportation factors. *Valley Evaporating Co. v. Grace*

THEREFORE, IT IS ORDERED, That the Initial Decision served in this proceeding is adopted, as modified and clarified herein, and made a part hereof.

IT IS FURTHER ORDERED, That this proceeding be discontinued.

(S) FRANCIS C. HURNEY
Secretary

Lines, Inc., 14 F.M.C. 16 (1970). The Commission has also held that an ocean carrier may not selectively reduce its rates solely to mee local competition from a particular port unless the economic viability of its operations is threatened—at economic viability of it operations is threatened—at least in situations where the viability of the local competitor's operations is threatened by the reduction *Rates from Jacksonville, Florida to Puerto Rico*, 10 F.M.C. 376 (1967). The record in this case is insufficient to determine if thes principles are applicable to the situation presented herein.

FEDERAL MARITIME COMMISSION

No. 75–57

MATSON NAVIGATION COMPANY—PROPOSED RATE INCREASES IN THE UNITED STATES PACIFIC COAST/HAWAII DOMESTIC OFFSHORE TRADE

Partially Adopted December 12, 1978

Rate increases are just and reasonable within the meaning of section 18(a) of the Shipping Act, 1916, and sections 3 and 4 of the Intercoastal Shipping Act, 1933.

There is no rate differential between the Pacific Northwest and California to Hawaii and Matson is not in violation of sections 16, First and 18(a) of the Shipping Act, 1916.

The substituted service now offered by Matson between Los Angeles and Oakland as set forth in Rule 263 of Tariff No. 14–E is not in violation of sections 16, First and 18(a) of the Shipping Act, 1916, and section 2, Intercoastal Shipping Act, 1933.

The rate on animal feed does not result in any undue or unreasonable prejudice or disadvantage and is not in violation of sections 16, First and 18 of the Shipping Act, 1916, and section 4 of the Intercoastal Shipping Act, 1933.

David F. Anderson, Peter P. Wilson, David Ainsworth and *George D. Rives* for respondent Matson Navigation Company.

Ronald Y. Amemiya, William W. Wilks and *Richard S. Sasaki* for The State of Hawaii.

Robert D. Raven, James J. Garrett, Charles R. Farrar, Jr., and *James P. Bennett* for Pineapple Growers Association of Hawaii.

James P. Bennett for Pineapple Growers Association of Hawaii.

Robert B. Freer, Jr., Kenneth A. Strassner and *Michael A. Nemeroff* for Kimberly-Clark Corporation.

Arthur B. Reinwald for Hawaii Meat Company, Limited.

Dudley J. Clapp, Jr., Milton J. Stickles, Jr., and *Robert H. Swennes, II,* for Military Sealift Command.

John Robert Ewers, C. Douglass Miller and *John Cunningham* for Bureau of Hearing Counsel.

INITIAL DECISION[1] OF STANLEY M. LEVY, ADMINISTRATIVE LAW JUDGE

On October 16, 1975, Matson Navigation Company (Matson) published multi-tier general rate increases in its Pacific Coast/Hawaii tariffs. The increases varied in percent from 2 to 15 and averaged 5.4% for all commodities which took the increases. The only significant holddowns were westbound chilled cargoes, and eastbound canned pineapple, bulk sugar and bulk molasses.[2] The increases

[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).

[2] Bulk sugar is carried under a Sugar Freighting Agreement filed as Matson's Tariff No. 12–D which contains clauses escalating rates and charges in accordance with the movement of all principal cost components. Bulk molasses is carried pursuant to a Molasses Freighting Agreement which became effective as a new tariff (Matson Tariff No. 23–A) on January 1, 1976.

Also involved in this proceeding are mid-1976 changes resulting in cancellation of paper products rates in items 5, 35 and 40 of Matson's Tariff No. 30 (which left the higher level of rates in Tariff 14–E applicable to those products when shipped from the Pacific were intended to yield approximately $6,101,761 to Matson on an annualized basis.[3]

As a consequence of Matson's filing, the Commission by Order of Investigation served December 3, 1975, instituted this proceeding. The State of Hawaii (Hawaii or State), Kimberly-Clark Corporation (Kimberly-Clark) and Hunt-Wesson Foods, Inc. (Hunt-Wesson), were named complainants in the Commission's Order of Investigation and Suspension. Subsequently, Military Sealift Command (MSC), Boise Cascade Corporation (Boise), Hawaiian Meat Company, Ltd. (Hawaiian Meat), the Pineapple Growers Association of Hawaii (PGAH), Longview Fibre Company (Longview) and Georgia Pacific Corporation (Georgia Pacific) were granted leave to intervene.

Hearings in the proceedings were held in Washington, D.C., beginning on June 1, 1976. The record in this proceeding consists of 1,604 pages of transcript and 104 exhibits.

On the opening day of the hearing Matson announced that in the near future it intended to file a further general rate increase.[4] It in fact did file a 3½% across-the-board general increase which became effective on August 2, 1976, and was made the subject of a separate investigation in Docket No. 76-43. Thus, the rates under investigation are no longer in effect and the question is presented as to whether this proceeding is moot, except as to matter of principle.

Unlike Part I of the Interstate Commerce Act and certain other federal[5] and state regulatory statutes, the Shipping Acts contain no provision for a refund to shippers in the event that general rate increases are determined to be excessive. This Commission's powers under section 18(a) of the Shipping Act, 1916, and section 4 of the Intercoastal Shipping Act, 1933, are limited to adjustments having prospective effect.

It seems probable that in enacting section 4 of the Intercoastal Shipping Act, 1933, Congress assumed that general rate increase investigations would be concluded before it became necessary for carriers to file further increases. Neither the present high rate of inflation nor exhaustive investigations were envisioned by Congress. Whatever the reasons, or the subsequent developments, Congress has not yet seen fit to conform the Intercoastal Shipping Act, 1933, to Part I of the Interstate Commerce Act or the Natural Gas Act.

Nevertheless, the principles involved in this proceeding will be determined whether or not refunds would or would not be available in the circumstances.

Pursuant to section 3 of the Intercoastal Shipping Act, 1933 (46 U.S.C. § 845), Matson has the burden of proving that under prudent and efficient management, the proposed general rate increases will not result in unreasonable or excessive earnings.

1. What is the fair rate of return for Matson?

Northwest) and cancellation of most less-than-containerload rates on specific commodities in favor of Cargo NOS rates. On an annualized basis, the paper products charges are expected to increase Matson's revenues by $700,000 (Tr. 47) and the LCL commodity rate charges by $500,000 (Tr. 48).

[3] Ex. 1, p. 1.

[4] Tr. 56.

[5] Part I of the Commerce Act gives the ICC power to require refunds by railroads (see 49 U.S.C. § 15(7)). Perhaps the nearest analogy would be Section 4 of the Natural Gas Act (15 U.S.C. § 717(c)). Section 4 of the Natural Gas Act, which was enacted subsequent to the Intercoastal Shipping Act, is similarly worded except that it grants the Federal Power Commission authority to order refunds.

Matson contends that its fair rate of return is 16% on common equity, and 14.4% on rate base.

2. What rates of return on equity and rate base will the proposed rates yield for the Constructive Year 1976?

Matson estimates that its rate of return on common equity will be 10.51% and its return on rate base (for both The Service and The Trade) will be 10.08%.

3. Should rate base be determined at the beginning of the test year 1976 or on an average of mid-year basis?

Matson believes that rate base should be calculated as at the beginning of the year.

4. Should deferred income taxes be deducted from rate base?

Matson contends that deferred income taxes are not reflected in rate base, but that in any event, there should be no deduction from rate base.

5. Has Matson presented a reasonable cargo forecast for the Constructive Year 1976?

Matson maintains that its forecast is reasonable.

6. Is Matson's multi-tiered schedule of increases, ranging from 2% to 15%, a reasonable and lawful method of deriving the needed additional revenue?

Matson believes the affirmative.

7. Was the holddown on eastbound canned pineapple justified?

Matson believes the affirmative.

8. Do Matson's rates for eastbound cargoes impose an undue burden on westbound shippers?

Matson's position is that eastbound rates are lawful and not a burden.

9. Was Matson justified in cancelling the paper products items in its Tariff No. 30 so as to put the Northwest paper products shippers in rate parity with Kimberly-Clark Corporation and other California shippers of the same products?

Matson believes it was justified.

FINDINGS OF FACT

1. For the calendar year 1975 Matson actually realized net income after taxes of $5,460,000 in its Pacific Coast/Hawaii service. Its rate base for The Service for that year was $75,539,000. Corresponding rates of return were 7.2% on rate base and 6.71% on common equity. Embedded cost of debt was 8.6%.[6]

2. The proposed increases varied in percent from 2 to 15% and averaged 5.4% for all commodities which took the increases.[7]

3. Commodity rates were not increased on westbound chilled cargoes and eastbound canned pineapple.[8]

4. Matson carries eastbound bulk molasses under a new Tariff 23-A which became effective January 1, 1976.[9] This new tariff increases Matson's revenues to the extent of $690,000 per annum over what they would have been under the old tariff.[10]

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[6] Ex. 32.

[7] Ex. 1, p. 1.

[8] Ex. 2, p. 3.

[9] Tr. 49.

[10] Tr. 924–25.

5. The escalation clauses in Matson's Sugar Freighting Agreement filed as Tariff 12–D have resulted in substantial increases in both per ton rate and on-berth charges since January 1, 1974.[11]

6. Matson's earnings at the pre-tax level are $3,743,000 per annum higher with the carriage of bulk sugar and molasses than they would be if the same level of westbound service were maintained without the carriage of those cargoes.[12]

8. The multi-tier form of Matson's proposed general increases makes Matson's rate structure more cost oriented.[14]

9. Cancellation of Items 5, 35 and 40 in Matson's Tariff No. 30 places Los Angeles shippers on rate parity with the Pacific Northwest shippers.[15]

10. Matson's cargo forecast for the Constructive Year 1976[16] is a reasonable approximation of what Matson's carriage will be.[17]

11. Matson's operations and fleet scheduling are conducted efficiently.[18]

12. For the Constructive Year 1976 after giving effect to the proposed rate increases Matson will have after-tax net income of $7,472,000 for The Service, a rate base of $74,131,000 and rates of return of 10.08% on rate base and 10.51% on common equity. Embedded cost of debt will be 8.72%[19]

13. Matson has constructed its rate base properly as at the beginning of the year as required by General Order 11 (46 CFR § 512 7(b)(1)).[20]

14. Giving effect to elimination from equity of Matson's loan to A&B, Matson's capital structure consists of $24,474,000 or 24.4% debt and $75,877,000 or 75.6% common equity.[21]

15. Matson's embedded debt cost is 8.7%.[22]

16. Matson experienced greater variation in earnings per share than 875 (83%) of 1,054 companies studied and 52 of 61 industries studied. Matson's return on common equity varied more than that of 894 (89%) of 1,008 companies studied, 55 of 60 industries studied, 114, or 67%, of 171 trucking companies studied, and 7 of 12 airlines studied.[23] Matson's return on total capital, or rate base varied more than that of 900 of 994 companies studied, 58 of 60 industries studied, and 8 of 14 airlines studied.[24]

17. The more than 1,000 industrial enterprises studied averaged 12% and the 171 trucking companies averaged 14 to 15% on common equity 1959–1973; the

[11] Tr. 924–25.

[12] Exs. 40 and 41.

[13] Ex. 11.

[14] Ex. 1, p. 2.

[15] Tr. 47.

[16] Ex. 15.

[17] Tr. 278.

[18] Ex. 17, pp. 6–12.

[19] Ex. 42.

[20] Ex. 31, p. 7.

[21] Tr. 1214–17.

[22] Ex. 23, Sch. 30.

[23] Ex. 23, pp. 11, 14–17.

[24] Ex. 23, pp. 12, 16.

CAB has allowed the airlines 16.75% on common equity; and regulatory commissions in 1974 and 1975 allowed electric utilities between 12 and 15% on common equity.[25]

18. Interest rates and the cost of common equity are substantially higher than they were on the average during the past 15 years.[26]

DISCUSSION

In preparing its testimony and exhibits, Matson has followed its practice in past cases of showing both the results of operations for "The Trade" (i.e., results under FMC tariffs only) and for "The Service" (total results from Pacific Coast/Hawaii operations including those under ICC tariffs and mail contracts). All of Matson's exhibits for the Constructive Year 1976 indicate, however, that Matson's revenues for The Trade now comprise more than 95% of its revenue for The Service.

Annual reports of carriers to the Commission pursuant to General Order 11 are not required to be broken down into The Trade and The Service if The Trade revenue constitutes more than 95% of The Service revenue (46 CFR § 512.6(c)). Matson now files its GO 11 reports for "The Service" only. Matson believes that if this procedure is adopted (i.e., so long as the 95% test is met) it will eliminate much needless time and work in making the numerous allocations reflected on Schedule XI of the various income statements.

The expert witness for the State of Hawaii, Nathan Simat, agreed that in determining whether rate of return requirements are being met reliance should be placed on The Service column.[27] Matson's financial witness, Craig Wallace, testified that Matson believes The Service column would be the appropriate basis for the decision in this proceeding.[28] No contrary view was expressed by any witness or even by counsel.

Upon due consideration it is concluded that it is appropriate to use The Service as the basis for decision in this proceeding because, as reflected on Ex. 42, Matson projects the same rate of return on rate base for The Service and The Trade for the Constructive Year 1976.

Matson published, effective June 1, 1976, Rule 263 (Substituted Service—Roll-on/Roll-off Service)[29] in its Westbound Container Freight Tariff No. 14–E in response to the concern expressed by the Commission at p. 2 of the Order of Investigation with respect to Matson's Los Angeles to Oakland transshipping practices. It provides in essence that when cargo is of such a nature that it must be carried on a trailer Matson will accept the loaded trailer at Los Angeles Harbor and transport it at Matson's expense to the Port of Oakland for loading to one of Matson's ro/ro vessels. This did not involve a change in operations but rather merely the publication of a specific tariff rule to cover existing practices.[30] No

[25] Ex. 23, pp. 34–37.

[26] Ex. 23, pp. 31, 32.

[27] Tr. 1438.

[28] Tr. 875.

[29] Ex. 11.

[30] Tr. 198–9.

one voiced any opposition to Rule 263, or Matson's transshipping practices under it, and it would appear that this matter is no longer an issue in the proceeding.

This Commission has recognized that projections of costs and other financial data for the future cannot be reduced to an exact science and that all that is required is that "the results obtained represent reasonably close and reliable approximations," Alcoa Steamship Company—General Increase in Rates in the Atlantic/Gulf-Puerto Rico Trade, 9 F.M.C. 220, 231 (1966); Sea-Land Service, Inc. Increase in Rates in the U.S. Pacific Coast/Puerto Rico Trade, 15 F.M.C. 4, 10 (1971).

Exhibit 42 shows that, after giving effect to the proposed general increases for the full year, and to the specific increases for the appropriate fractional year, Matson will have after-tax net earnings in The Service of $7,472,000 and rates of return of 10.08% on rate base and 10.51% on common equity for the adjusted Constructive Year 1976. Unless otherwise stated, these are the key figures which are relied upon herein in the determination of the reasonableness of the proposed rates.

Exhibits 46–50 deal with Matson's actual results of operations for the first four months of 1976. This data confirms the basic soundness of Exhibit 42 and that it is a reasonable approximation of Matson's results of operations for the Constructive Test Year 1976. The important exhibit in this group is No. 46 which compares Matson's actual results of operations for the first four months in The Service with the first four months of operations as included (but not shown separately in Exhibit 42.

Exhibit 46 shows that Matson actually realized a net income of $818,000 in The Service for the first four months as compared to $482,000 it had projected for the first four months, as a part of the overall constructive 1976 projection. The first four months as projected (shown in the column entitled "Exhibit") exclude the proposed general rate increases inasmuch as they were suspended until April 8 (paper products and automobiles until May 2) and thus not reflected in the actual results for the first four months. The actual results would not reflect any significant amount of cargo that moved subject to the increases because only a few voyages that commenced after April 8 would have terminated on or before April 30 so as to be included in the data. Hence, the "Actual" and "Exhibit" columns on Exhibit 46 are on a comparable basis.

Exhibit 46 shows the difference between the projected and actual results for the first four months to be $336,000 in terms of net income. This difference is accountd for by the one voyage of the *PROGRESS* which was scheduled to terminate in 1975 but which, because of a casualty, slipped over into early 1976. The voyage results for that voyage were $650,000 pre-tax or approximately $325,000 after-tax.[31] This means that in terms of the bottom line results Matson's projections for 1976 were very close to what actually happened after removing the distortion of the slopover voyage of the *PROGRESS*. Thus, Exhibit 46 confirms the basic soundness of at least the first four months of Matson's projection for the year 1976 in Exhibit 42.

[31] Tr. 1585.

Hearing Counsel contends that Matson should have used average or midyear rate base rather than beginning of the year rate base as required by General Order 11 (46 CFR § 512.7(b)(1)).

It is Matson's position that the method of constructing rate base required by General Order 11 for annual reports and general rate increase filings should be used by the Commission in determining the reasonableness of rates under investigation. It contends that it would make little sense for the Commission to require rate base to be constructed in one manner to determine whether general increases should be suspended or investigated and another method for purposes of any investigation.

The Commission in *Matson Navigation Company–Changes in Rates in the U.S. Pacific Coast-Hawaii Trade,* Docket Nos. 73–22, 73–22 (Sub. No. 1) and 74–36 (Sub. No. 1), June 30, 1978, mimeo p. 4, with regard to depreciated rate base stated that although "Matson should be permitted to rely on the Commissions regulations [*i.e.*, depreciated rate base be calculated as of the beginning of the year rather than an average of mid-year] it would commence a rulemaking proceeding to focus on this question of whether mid-year or average rate base may be a more appropriate basis for measuring rate of return."

In accordance with that ruling of the Commission the rate base for purposes of decision herein is determined on the basis of beginning of the year depreciated value.

The ultimate issue for decision is whether the subject general rate increases are just, reasonable and otherwise lawful within the meaning of section 18(a) of the Shipping Act, 1916, and sections 3 and 4 of the Intercoastal Shipping Act, 1933. The respondent is required by law to sustain the burden of proving that its proposed increases are consistent with the standards established in the cited statutes. Section 3, Intercoastal Shipping Act, 1933, 46 U.S.C. 845; *Commonwealth of Puerto Rico v. FMC,* 468 F. 2d 872 (D.C. Cir. 1972); *Transconex, Inc.–Gen. Increase in Rates in the U.S. South Atlantic/Puerto Rico-Virgin Islands Trades,* 17 F.M.C. 95 (1973); *Pacific Islands Transport Line–Gen. Rate Increases bet. Pacific Coast and Hawaii and Pago Pago,* 18 F.M.C. 215, 221 (1975).

Computation of fair return on equity is governed by the standards developed by regulatory commissions and courts, and particularly the decisions in *Bluefield Waterworks and Improvement Company v. Public Service Commission of West Virginia,* 262 U.S. 679, 692–93 (1923), and *Federal Power Commission v. Hope Natural Gas Co.,* 320 U.S. 591, 603 (1944). *Bluefield* established that a utility should be permitted to earn a return on rate base equal to that generally being made on investments in other enterprises having corresponding risks. *Hope* makes clear that the return should be sufficient to provide such a comparable return to the equity owner *and* assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.[32]

In general rate increase cases, following the guiding principles set forth in *Hope* and *Bluefield,* in determining what is a reasonable rate of return the Commis-

[32] Ex. 23, pp 2, 3.

sion[33] in *Alcoa Steamship Co., Inc.–Gen. Increase in Rates . . . Puerto Rico Trade,* 9 F.M.C. 220 (1966), at page 238, said:

> Consistent with all of our precedents, we adopt as the measure of a reasonable rate of return that amount which is required to meet all allowable expenses of providing service, including the cost of acquiring or retaining the capital needed to provide service. The level of earnings needed to pay interest on respondent's notes and to pay dividends adequate to give stockholders a return comparable with other investments having a comparable risk should be allowed.

In *Matson Navigation Company, supra,* decided June 30, 1978, the Commission pointed out:

> As with most general rate increases which have recently come before the Commission, there is a great deal of testimony and argument in this record which deals with this issue of a proper return on the equity portion of the pertinent rate base. Matson's position is that a fair return on its equity in the test years in question would be approximately 16 percent. The State of Hawaii and Hearing Counsel, on the other hand, take the common position that a fair return on equity would be approximately 11.3 percent.
>
> Matson's return on equity for each of the test years in question is well below 10 percent. Without reaching a decision on the specific return which may have been appropriate for these test years, we find that any return on equity capital for a carrier similar to Matson which is below 10 percent cannot be found to be unreasonably high, either for the test years in question or for the foreseeable future. [Footnotes deleted.] Mimeo, p. 10.

The instant proceeding closely tracks *Matson Navigation Company* and the Commission language with minor variations is equally applicable herein.

The issue of rates in the instant proceeding focuses on the results of Matson's operations for the Constructive Year 1976 after giving effect to the proposed rate increases. This reflects a rate of return of 10.08 percent on rate base and 10.51 percent on common equity.

The evidence as to rate of return consists of the testimony and exhibits of Herman G. Roseman, on behalf of Matson;[34] the testimony and exhibits of Nathan S. Simat, on behalf of the state of Hawaii;[35] and the testimony and exhibits of Robert A. Ellsworth, on behalf of Hearing Counsel.[36]

Both Mr. Roseman and Mr. Simat presented testimony and exhibits in Docket Nos. 73–22 and 73–22 (Sub. No. 1) (consolidated) substantially similar to their respective testimony and exhibits in this case.[37] To save duplication herein of cross-examination on rate of return in those cases, their testimony and exhibits on rate of return in those cases were incorporated by reference herein.[38]

Matson, as a wholly-owned subsidiary of Alexander & Baldwin, does not directly seek equity capital in the market.[39] Therefore, evaluation of Matson's cost of equity requires, in compliance with the *Bluefield* and *Hope* criteria, consideration of elements of comparative risk.

The comparison must evaluate whether the earnings will be sufficient to attract capital, for a firm whose return is the same as that of "other enterprises

[33] *See also Atlantic-Gulf/Puerto Rico General Increases in Rates and Charges*, 7 F.M.C 87 (1962); *Gen. Increases in Rates–Pacific Coast/Hawaii, Atlantic Coast/Hawaii*, 7 F.M.C. 260, 290 (1962)

[34] Exs. 23, 24 and 25.

[35] Exs. 26 and 27.

[36] Exs. 28 and 29.

[37] Considered and decided by the Commission June 30, 1978

[38] Tr. 686–87; 855–56.

[39] Ex 23, p. 3

having corresponding risks" does not necessarily thereby earn enough to attract capital. This is particularly significant in this proceeding in view of the substantial increase in the cost of money as of the close of the record.[40] Further, when the comparison is with regulated enterprises, the proper comparison is between the return Matson is given the opportunity to earn and the return the comparison companies were given the opportunity to earn.[41]

The evidence establishes the proposed rates at issue herein would produce revenues sufficient to provide for The Service a return on rate base of 10.08 percent (for The Trade 10.08 percent) and a return on common equity of 10.51 percent on the basis of Constructive Year 1976 conditions.[42] These rates of return are not an unreasonable rate of return, as Mr. Roseman's testimony supports a reasonable return of as much as 14.2 percent on rate base, composed of an 8.7 percent embedded debt cost and a 16 percent return on common equity.[43] The foregoing testimony followed the requirements set forth by the Court in *Hope* and *Bluefield* and was based on an analysis of Matson's risk due to earnings variability, its financial and business risks, a review of the comparative risks and earnings of other companies and general trends in the cost of money. While there may be a disagreement with Mr. Roseman's conclusion that a 16 percent return on equity was not unreasonable, the return of 10.51 percent on equity would be more difficult to attack as unreasonable.

Mr. Roseman concluded that the fair rate of return for Matson could be as high as 14.4 percent,[44] a level well in excess of the rate of return that would be provided by the rates at issue herein. The evidence also shows that not even Mr. Simat's proposed rate of return of 10.5 percent nor Mr. Ellsworth's proposed 11.2 percent would be exceeded by the proposed rates.

The Commission in its recent determination, without setting forth the specific return which would be appropriate, indicated that a 10 percent return was in the zone of reasonableness on equity capital for a carrier similar to Matson. An overall return of 10.08 on rate base and 10.51 on common equity is not at such variance with the principles recently enunciated by the Commission as to be found to be unreasonably high.

In addition to the foregoing there remains for disposition two other matters.

Insofar as there is to be determined in this proceeding pursuant to sections 16, First and 18 of the Shipping Act, 1916, whether Matson's proposed increases on animal feed are likely to result in an undue or unreasonable prejudice or disadvantage against the local Hawaiian egg, poultry and cattle industry or an undue or unreasonable preference or advantage to shippers of eggs, poultry and cattle originating within the continental United States there is incorporated by reference herein and made part of this Initial Decision the Initial Decision, served May 10, 1978, in Docket No. 77-45, *Hawaii Meat Company, Limited v. Matson Navigation Company*.

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[40] Ex. 23, pp. 4, 5.

[41] Ex. 23, p. 5.

[42] Ex. 42.

[43] Ex. C-23, Sch. 30.

[44] Based on debt ratio of 22.7% and equity ratio of 77.3% (Ex. 35, Sch. VII). Giving effect to elimination from equity of Matson's loan to A&B (Tr. 1214-17), the debt-equity ratios become 24.4% and 75.6%, respectively, and the fair rate of return becomes 14.2%.

There is also to be determined in this proceeding whether there is any undue or unreasonable preference between Los Angeles shippers and shippers from the Pacific Northwest in violation of sections 16, First and 18(a) of the Shipping Act, 1916.

Matson cancelled Items 5, 35 and 40 in its Tariff No. 30. This action places Los Angeles shippers on rate parity with the Pacific Northwest shippers.[45] Paper product rates in Matson's Tariff No. 14-E are applicable to both California and Pacific Northwest shippers. There is no evidence that the paper product rates in Tariff No. 14-E are unreasonably high in relationship with other rates in the tariff.

There is now no rate differential between the Pacific Northwest and California to Hawaii and Matson is not in violation of sections 16, First and 18(a) of the Shipping Act, 1916.

CONCLUSION

Accordingly, it is found and concluded that:

Respondent's rates under investigation in this proceeding are just, reasonable and lawful under section 18(a) of the Shipping Act, 1916, and under sections 3 and 4 of the Intercoastal Shipping Act, 1933.

There is no rate differential between the Pacific Northwest and California to Hawaii and Matson is not in violation of sections 16, First and 18(a) of the Shipping Act, 1916.

The substituted service now offered by Matson between Los Angeles and Oakland as set forth in Rule 263 of Tariff No. 14–E is not in violation of sections 16, First and 18(a) of the Shipping Act, 1916, and section 2, Intercoastal Shipping Act, 1933.

The rate on animal feed does not result in any undue or unreasonable prejudice or disadvantage and is not in violation of sections 16, First and 18 of the Shipping Act, 1916, and section 4 of the Intercoastal Shipping Act, 1933.

(S) STANLEY M. LEVY
Administrative Law Judge

WASHINGTON, D.C.
July 21, 1978

[45] Tr. 47.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–19

AGREEMENT NO. 10235—CONSOLIDATED FORWARDERS INTERMODAL CORPORATION

An agreement between independent ocean freight forwarders to form and operate a common carrier service subject to the Shipping Act is a cooperative working arrangement within the meaning of Shipping Act section 15. Commission jurisdiction is not defeated by the use of a corporate form of organization for the new service.

A cooperative working arrangement between persons subject to the Shipping Act to form and operate a freight consolidation service is sufficiently related to the parties' Shipping Act operations to be within the Commission's section 15 jurisdiction, even though freight consolidation is not an activity which is independently subject to the Shipping Act. CONFICO is ordered to cease and desist from conducting any consolidation activities in the absence of an approved agreement.

Further administrative proceedings concerning the approvability of Agrement No. 10235 are stayed to permit an appeal of the jurisdictional issue.

Gerald H. Ullman, for Consolidated Forwarders Intermodal Corporation.

John Robert Ewers, C. Douglass Miller, for Bureau of Hearing Counsel.

Janice M. Reece, for Antitrust Division, U.S. Department of Justice.

Raymond P. deMember, for International Association of NVOCCS and Boston Consolidation Service, Inc.

Charles F. Warren, George A. Quadrino, John E. Ormand, Jr., for members of the Trans-Pacific Freight Conference of Japan/Korea and Japan/Korea-Atlantic & Gulf Freight Conference.

Seymour H. Kligler, David R. Kay, for the members of the Associated Latin American Freight Conference.

Stanley O. Sher, John R. Attanasio, for the members of the North Atlantic Mediterranean Freight Conference and five related conferences.

Howard A. Levy and *Patricia E. Byrne*, for the members of the North Atlantic United Kingdom Freight Conference and nine related conferences.

Edward D. Ransom, for members of the Pacific Westbound Conference and the Far East Conference.

John R. Mahoney, Wade S. Hooker, Jr., for members of the Atlantic & Gulf-Indonesia Conference and the Atlantic and Gulf-Singapore, Malaya and Thailand Conference.

Alan F. Wohlstetter and *Richard V. Merrill* for Express Forwarding and Storage Co., Inc.

INTERIM REPORT AND ORDER

December 13, 1978

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

The Commission has before it seven appeals[1] from the May 25, 1978 "Order of Dismissal" (Dismissal Order) entered by Administrative Law Judge Stanley M. Levy (Presiding Officer) in the above-captioned matter. Replies to these appeals were filed by the United States Department of Justice and the shareholders of Consolidated Forwarders Intermodal Corporation (CONFICO), the Proponents of the Agreement. Oral argument was conducted before the Commission on September 14, 1978.

BACKGROUND

Agreement No. 10235 is an arrangement between some 50 independent ocean freight forwarders licensed by the Commission and subject to Shipping Act regulation under 46 U.S.C. 801 and 841b.[2] This agreement was executed and submitted for approval after the Commission rejected a nonvessel operating common carrier (NVO) tariff tendered by CONFICO in late 1975.[3]

CONFICO's origins go back to 1967 when 39 ocean forwarders entered into Agreement No. 9646 for the purpose of creating the Forwarders Intermodal Container Conference.[4] This "conference" was authorized to organize a corporation for the purpose of performing the functions of consolidating and "arranging for the movement" of cargo in foreign commerce. Such a corporation (Forwarders Intermodal Corporation of FICO) was chartered by the State of New York on March 28, 1967—prior to the Commission's approval of Agreement No. 9646—for the limited purpose of:

> [E]ngag[ing] in the business of consolidating, unitizing, containerizing, distributing and transporting freight and shipments in export and import commerce; . . . engag[ing] in the business of carrying goods by surface, ocean, and air, warehousing, packing, chartering, a break-bulk operation and freight consolidation; [and] to purchase, lease, operate and otherwise use such facilities and properties, both real and personal as may be necessary or desirable in connection with the aforesaid purposes.

FICO was authorized to issue 300,000 shares of common stock with a par value of 10 cents per share.[5] On May 23, 1967, FICO's shareholders mutually agreed

[1] The parties filing appeals (Protestants) were the Commission's Bureau of Hearing Counsel (Hearing Counsel); a group of 17 steamship conferences serving Europe and U.S. Atlantic and Gulf Coast ports (NAC/MED Group); Boston Consolidation Service, Inc., and the International Association of NVOCCS, filing jointly; the Associated Latin American Freight Conferences, excluding member lines Flota Mercante Grancolombiana, S.A. and Seatrain International, S.A.; the Pacific Coast European Conference; the Trans-Pacific Freight Conference of Japan/Korea and the Japan/Korea-Atlantic & Gulf Freight Conference, filing jointly; and, Express Forwarding & Storage Co., Inc.

[2] It is unclear how many shareholders CONFICO has or whether they are all licensed freight forwarders. The Agreement as filed lists 52 shareholders, only 48 of which were then or are now licensed forwarders. It appears from the Commission's tariff files that three of the Proponents are themselves nonvessel operating common carriers as well as independent ocean freight forwarders.

[3] Agreement No. 10235 was executed on March 24, 1976 and filed April 23, 1976. The instant proceeding was commenced on May 23, 1977 to determine whether the Agreement is a true and complete copy of the understanding between the Proponents, whether Proponents have implemented Agreement No. 10235 (or any other agreement) without prior approval, and whether Agreement No. 10235 should be approved.

[4] As approved by the Commission on September 26, 1967, Agreement No. 9646 listed only 39 members, but Proponents now claim there were 49 original members (Feste Affidavit, at 1). This is one of several relevant factual inconsistencies left unresolved by the Order of Dismissal. Although the Commission fully appreciates the difficulties encountered by the Presiding Officer in developing an accurate record (see Dismissal Order at 4–6), and is concerned with the lack of directness and cooperation demonstrated by the parties, the fact remains that our Order of Investigation contemplated a complete compilation of the history, nature and scope of the proposed agreement before the proceeding was terminated. This does not mean the Commission is mandating protracted evidentiary proceedings in all instances; an Administrative Law Judge should proceed promptly to decision when convinced that all relevant facts have been uncovered. In the present case, however, the record fails to support the Presiding Officer's finding that the CONFICO shareholders are *not* engaged in an ongoing cooperative working arrangement.

[5] CONFICO's April 1976 application for approval of Agreement No. 10235 reported that some 170,000 shares had been issued to the 52 members listed therein.

to restrict ownership in the corporation to licensed freight forwarders and forego any sale transfer, assignment, pledge, encumbrance or disposal of shares held by themselves without first offering them to the corporation at the original purchase price.[6] Any licensed freight forwarder could become a FICO shareholder by buying shares at a price set by the Board of Directors. The Board of Directors presently consists of seven members elected by the shareholders, each of whom is also an officer and director of a Proponent.[7]

On or about October 25, 1968, FICO merged with a similar corporation owned by ten other ocean freight forwarders known as Confreight, Inc.[8] The name of the surviving company was changed to Consolidated Forwarders Intermodal Corporation.[9] It appears that CONFICO operates under the same Certificate of Incorporation, By-Laws, and Shareholders Agreement as did FICO.[10]

Effective August 11, 1970, Proponents cancelled Agreement No. 9646 and the CONFICO NVO tariff, but continued to maintain the CONFICO organization. Through CONFICO, Proponents have acted as an agent for steamship lines and as a consolidator of ocean freight at various times up to and including part of 1978. CONFICO prepared and filed a second NVO tariff with the Commission in 1975. This tariff was rejected because Proponents had no approved agreement on file covering the proposed NVO operation.

Since 1975, Proponents have argued that the Commission lacks section 15 jurisdiction over their ownership and management of CONFICO.[11] Shortly after the date specified for the comencement of hearings in this proceeding, Proponents submitted a "Motion to Dismiss" accompanied by allegations of fact. Although some Protestants complained generally about the adequacy of the record, they chose not to challenge Proponents' factual allegations for purposes of resolving the "Motion to Dismiss." The Presiding Officer then proceeded to rule that Agreement No. 10235 did not fall within one of the seven categories enumerated by section 15 and granted Proponents' motion.

The Dismissal Order concludes that the ownership and management of CONFICO by its shareholders does not involve an "ongoing arrangement" between Proponents. Agreement No. 10235 is equated with a one-time or passive acquisition of stock (or similar tangible asset). Emphasis was given to the fact that individual Proponents will receive no special treatment in any of

[6] *See* Shareholders Agreement attached to Proponents' November 29, 1977 "Motion to Dismiss", and Article 3 of Agreement Nos. 9645, 9646 and 10235. The common stock of FICO was to contain a printed notice informing potential purchasers of the first refusal right created by the Shareholders Agreement. FICO's Certificate of Incorporation contains a provision precluding shareholder preemptive rights in any FICO shares or other securities.

[7] *See* Exhibit AA, Items A.2-4; and Exhibit BB, Item 6 attached to Proponents' "Motion to Dismiss." Article III, section 2, of FICO's By-Laws provides that there shall be at least three directors and that directors need not be shareholders.

[8] Confreight, Inc., operated under FMC Agreement No. 9645, the International Container Group Agreement. Agreement No. 9645 closely resembled Agreement No. 9646 and was also approved by the Commission on September 27, 1967. FICO and Confreight both operated as NVO's under FMC tariffs until shortly before their merger. Agreement No. 9645 and the Confreight NVO tariff were cancelled on October 16, 1968, and August 30, 1968, respectively.

[9] Authority to modify Agreement No. 9646 through the addition of new members was neither requested nor granted at the time of the Confreight merger or any time thereafter.

[10] Several provisions of Agreement No. 9646 conflicted with CONFICO's Certificate of Incorporation and By-Laws (*e.g.*, Articles 3, 6, and 10). Most of these provisions do not appear in Agreement No. 10235, but counsel for Proponents has asserted that: "What we are trying to do today [with regard to commercial operations] is exactly the same as what we tried to do in 1967. . . ." Transcript of Oral Argument at 55.

[11] Section 15 of the Shipping Act, 1916, 46 U.S.C. 814.

their dealings with CONFICO,[12] and that CONFICO has conducted an insubstantial volume of business to date. The Commission's decision in *Customs Forwarders, Inc., (Agreement No. FF 71-7),* 17 F.M.C. 302 (1974), asserting jurisdiction over and approving a similar arrangement to form a corporation which would operate as an ICC Part IV Freight Forwarder, was distinguished on the ground that Customs Forwarders was limited to performing services exclusively for its shareholders.[13] Although the existence of some 50 freight forwarders with a financial stake in offering business to CONFICO was recognized as a competitive advantage, the Presiding Officer concluded that such an advantage was not *anticompetitive* and, therefore, could not alone "control, regulate, prevent, or destroy competition" within the meaning of section 15.

POSITION OF THE PARTIES

Protestants argue that the Dismissal Order should be vacated for the following reasons:

(1) Agreement No. 10235 does not concern a discrete, one-time action, but involves instead a constant interaction between otherwise independent entities which warrants continuous Commission supervision. The organization and operation of a consolidation/NVO business is no less an ongoing activity when conducted under the arms length formalities of corporation law than when conducted under a detailed partnership agreement.

(2) The Commission's *Customs Forwarders, Inc.*, decision, *supra*, is controlling. That case did *not* involve any exclusive dealing arrangement between the incorporating parties and Customs Forwarders, Inc.

(3) An agreement need not be anticompetitive to be subject to section 15. It is sufficient that it affect competition. The instant joint venture affects competition between the various Proponents and also between the Proponents and third parties—even though it also creates a new competitor in the NVO market.

(4) The Proponents can "pool traffic" through their use of CONFICO and thereby receive a competitive advantage over other freight forwarders who lack access to an affiliated consolidation/NVO service. By patronizing CONFICO, Proponents can control the level of freight forwarder brokerage they receive on NVO shipments and can direct cargo to vessel operating carriers of their choice.

(5) Sharing CONFICO's profits (if any) will reduce the cost to Proponents of obtaining consolidation and NVO services and constitutes a "special advantage" over non-participating forwarders within the meaning of section 15.

(6) Through their common ownership of CONFICO, Proponents are "pooling or apportioning earnings and losses" and "fixing or regulating rates" within the meaning of section 15.

(7) An agreement among existing NVO's to form and operate a new NVO service is subject to section 15 even if an identical agreement among independent

[12] There appears to be no undertaking by Proponents to deal exclusively with CONFICO regarding either consolidation or NVO services, and CONFICO seems willing to serve all licensed forwarders without discrimination. No attempt was made, however, to ascertain how the allegedly valuable "neutrality" of the CONFICO consolidation/NVO service was to be accomplished vis-a-vis each of the 50 Proponents as well as those freight forwarder customers of CONFICO which are not CONFICO shareholders.

[13] *Star Shipping A/S, (Agreement No. 9955-1),* 18 F.M.C. 426 (1975) was also distinguished by the Presiding Officer on the grounds that the parties were committed to certain exclusive or restrictive arrangements with the new corporation created by their agreement.

freight forwarders is not. Certain of the Proponents compete with each other and would compete with CONFICO as NVO's.

Proponents assert that the Order of Dismissal is correct in all significant respects. The Department of Justice takes a more limited view and argues only that joint ventures of this type are beyond the Commission's jurisdiction because they resemble corporate mergers or stock acquisitions and involve no "continuing obligations between the parties" within the meaning of *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726 (1975).

Discussion

Agreement No. 10235 is indistinguishable from the *Customs Forwarders* agreement.[14] It is clearly subject to Shipping Act jurisdiction without regard to whether CONFICO proves to be a profitable or sizable enterprise.

Proponents have come together for private commercial reasons[15] to share the costs of forming and operating a business organization which will serve the ocean shipping industry in the New York City area (and perhaps other North Atlantic ports) by providing cargo consolidation and NVO services to the public at large. Membership in CONFICO itself, however, is limited to independent ocean freight forwarders, the price of membership (share acquisition) is controlled by the Board of Directors, members may act through CONFICO to discuss any topic (including freight forwarder fees and compensation) with any person subject to the Shipping Act, and all shareholders may be bound to ancillary section 15 agreements by the vote of a majority.[16] By exercising their voting rights as shareholders, Proponents may control the price they (and other CONFICO customers) pay for consolidation services and the amount they receive as freight forwarder compensation—to the extent they patronize CONFICO.[17]

The concertedly financed corporation CONFICO would compete with other NVO's and consolidators. Its Proponents would compete with other freight forwarders who do not possess affiliated consolidation or NVO operations. Although nothing presently indicates that CONFICO or the Proponents will (or will not) prove to be superior competitors by virtue of Agreement NO. 10235, it is undisputed that the arrangement provides them with a "competitive advantage." The presence of such a competitive advantage was the stated basis for the Commission's jurisdictional rulings in *Customs Forwarders, Inc.*, 17 F.M.C. at

[14] There were no exclusive dealing arrangements or convenants not to compete in Agreement No. 71-7. The ICC Part IV service to be offered by Customs Forwarders, Inc., was available to all shippers. That the parties to Agreement No. 71-7 wished to obtain and operate an affiliated inland (or "intermodal") transportation service and the present Proponents plan to operate a service offering foreign transportation by water is of no relevance whatsoever.

[15] *See* Proponents' "Reply to Appeals" at 16–17.

[16] Agreement No. 10235 provides for CONFICO shareholders to meet and discuss matters of mutual concern to themselves and other persons subject to the Shipping Act, and allows a majority of the Proponents to authorize the corporation to enter into agreements concerning such matters (subject to Commission approval). A vote of the majority binds *all* shareholders to accept the terms of ancillary section 15 agreements, an arrangement which is inconsistent with ordinary principles of shareholder responsibility.

[17] The proposed CONFICO tariff would pay 6½% of the tariff rate to freight forwarders as brokerage compensation. Although there are other NVO's which offer larger amounts (especially in recent months), a spot check of FMC tariffs reveals that 6½% is above the industry average.

305–307, 313, and *Star Shipping A/S*, 18 F.M.C. at 453–458, but a further exposition of those rulings can be readily provided.[18]

A joint venture is *not* the same thing as a merger or acquisition of stock. This critical fact is evident from the Supreme Court's decision in *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964), the decision which also establishes that joint ventures should be analyzed under the same antitrust laws applicable to mergers.[19] The *Seatrain* exclusion[20] of one-time acquisitions from section 15 is based upon the absence of a need for continuing Commission oversight, not upon any conflict with section 7 of the Clayton Act.[21] See *Star Shipping, A/S, supra,* at 427–429, 453. It is precisely because it is a joint venture that Agreement No. 10235 is both a "cooperative working arrangement" and an agreement "controlling, regulating or preventing competition." All 50 Proponents have survived the formation of CONFICO, will continue to compete as separate and independent entities, and will be continually obligated to make decisions concerning their joint management of CONFICO—decisions which will also relate to the management of their own businesses.

Proponents' jurisdictional argument hinges upon the contention that the organization of CONFICO (or subsequent purchase of its shares) involves its shareholders in no continuing activities or obligations. Proponents' decision to conduct their joint venture through the medium of corporate democracy does not, however, mask the ongoing nature of Agreement No. 10235. A closely held corporation cannot be operated without the active participation of its shareholders. Management decisions must be made daily. The establishment of CONFICO's policies under the Agreement presents a constant need and opportunity for cooperation between Proponents which warrants Commission supervision. The possibility that most of the Proponents will do no more than examine materials prepared by management and vote at shareholder meetings merely glosses over the fact that Proponents' elected representatives—CONFICO's Board of Directors—will frequently be engaged in detailed discussions, planning sessions and agreements concerning competitively significant matters. The powers delegated to the Board of Directors must be attributed to CONFICO's shareholders under the circumstances.

In *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261 (1968), the Commission was reversed for taking too narrow a view of the "cooperative working arrangement" category of section 15 agreements. The Supreme Court characterized the language of section 15 as "expansive" and noted that it specifically refers to *every* agreement between persons subject to the Shipping Act. *Id.*, at 273–275. The policy, recognized in other situations, of strictly construing exemptions from the antitrust laws, is inapplicable in the case of cooperative working arrangements; legislative history indicates that *all* [on-

[18] In *Star* and *Customs*, the Commission concentrated its discussion on the agreements' respective capabilities for "controlling, regulating or preventing competition" and "giving special privileges or advantages." In the absence of further information concerning the implementation of the "neutrality" feature attributed to Custom Forwarders and CONFICO, it appears that no true "special advantage" would be conferred upon Proponents or their proposed joint venture vis-a-vis other similarly situated persons.

[19] The *Penn-Olin* court expressly recognized the distinction between joint ventures and mergers. 387 U.S. at 170, 173–174.

[20] *Federal Maritime Commission v. Seatrain Lines, Inc., supra. See also American Mail Line, Ltd. v. Federal Maritime Commission*, 503 F.2d 157 (D.C. Cir. 1974), *cert. den.*, 419 U.S. 1070 (1974), *reh. den.* 421 U.S. 1017 (1975).

[21] 15 U.S.C. 18.

going] agreements dealing with water transportation matters are to be submitted for Commission approval.[22] As indicated above, Agreement NO. 10235 is such an agreement.

The joint venture proposed by Agreement No. 10235 was organized to further the existing line of business engaged in by the proponents—ocean freight forwarding and common carriage by water in foreign commerce. Courts and commentators have removed all doubts that joint ventures tend to lessen or "control" competition between the parties.[23] Agreement No. 10235, therefore, is also a matter which falls within the fourth category of agreements listed in section 15.

CONFICO's NVO and consolidation services both require section 15 approval. Although freight consolidation is not itself a function regulated by the Shipping Act, it is sufficiently related to Proponents' Shipping Act activities for section 15 jurisdiction to attach. Agreements among ocean carriers or freight forwarders to concertedly finance, undertake, or control such related services can directly affect the parties' participation in that segment of the ocean shipping industry which is primarily entrusted to Commission regulation and should be filed for approval.[24]

Freight forwarders and nonvessel operating carriers are essentially service rather than manufacturing or equipment operating organizations. Whatever investment they do make in plant and equipment (other than office facilities) is apt to be for the purpose of performing cargo packing, consolidation or storage services for their shipper clients. By combining to provide a consolidation service perceived by themselves as dependable and adequate for their needs, Proponents are sharing what may be the major capital expenditure (or cost item) associated with a sizeable freight forwarding/NVO business. This sharing of costs is intended to improve Proponents' ability to compete with nonparties, may reduce the likelihood of Proponents individually entering the consolidation business in the same area, and might also have the effect of raising entry barriers to potential competitors. A freight consolidation business could also be employed to unduly prefer or prejudice shippers, carriers or other persons that deal with Proponents in a Shipping Act capacity.[25]

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[22] *Id.*, at 273–277. The difference between the filing and approval of section 15 agreements, and the procedure established by section 35 of the Shipping Act (46 U.S.C. 833a) for exempting *de minimus* or routine agreements from section 15 requirements was cited as evidence of this broad Congressional intent. *See also, Federal Maritime Commission v. Pacific Maritime Association*, 435 U.S. 40, 53–55 (1978), wherein the Commission was described as the "public arbiter of competition in the shipping industry."

[23] The Supreme Court stated in *Penn-Olin*,

> . . . [T]he formation of a joint venture and purchase by the organizers of its stock would substantially lessen competition—indeed foreclose it—as between them, both being engaged in commerce. This would be true whether they were in actual or potential competition with each other and even though the new corporation was formed to create a wholly new enterprise. Realistically, the parents would not compete with their progeny. 378 U.S. at 168.

Accord, Northern Natural Gas Company v. Federal Power Commission, 399 F.2d 953, 972 (D.C. Cir. 1968); Brodley, *Oligopoly Power Under the Sherman and Clayton Acts*, 19 Stan. L. Rev., 285, 333–334 (1967); Pitofsky, *Joint Ventures Under the Antitrust Laws*, 82 Harv. L. Rev. 1007, 1030–1038 (1969), and cases cited therein.

[24] Section 15 encompasses every ongoing arrangement between Shipping Act persons. The burden is upon the parties to demonstrate that the subject matter of their agreement bears no reasonable relationship to ocean shipping in the foreign commerce of the United States. In the instant case, any activity which would be authorized under CONFICO's Certificate of Incorporation is likely to be so closely connected with Proponents' freight forwarding interests as to require prior section 15 approval.

[25] The minutes of CONFICO's special directors meeting of June 4, 1975, describe a discussion to "commence an NVOCC operation *in conjunction with the Seatrain service.*" Attachment to Exhibit CC, Feste Affidavit (emphasis supplied). Seatrain International, S.A., is a vessel operating common carrier subject to Shipping Act regulation. CONFICO once performed freight deconsolidation services solely for American Export Lines, Inc., another such carrier.

To the extent Proponents are now performing consolidation services through the vehicle of CONFICO they shall be directed to cease and desist from such unauthorized implementation of Agreement No. 10235[26] The resumption of evidentiary proceedings will be stayed for 60 days to enable interested parties an opportunity to appeal the Commission's final ruling on the jurisdictional issues raised by Proponents' "Motion to Dismiss."

THEREFORE, IT IS ORDERED, That the Order of Dismissal entered in Docket No. 77-19 on May 25, 1978 is vacated and the Order of Investigation remanded to the Presiding Officer for such further proceedings as are necessary to resolve the issues designated therein; and

IT IS FURTHER ORDERED, That Consolidated Forwarders Intermodal Corporation cease and desist from operating as a consolidator or deconsolidator of import or export shipments or otherwise implementing Agreement No. 10235 until such time as the parties to Agreement No. 10235 obtain Commission approval of said Agreement; and

IT IS FURTHER ORDERED, That, the Presiding Officer refrain from reopening Docket NO. 77-19 for sixty (60) days from the service date of this Interim Order, and if an appeal is taken from this Interim Order, shall further stay the reopening of Docket No. 77-19 until such time as the appeal is finally disposed of by the United States Court of Appeals.

(S) FRANCIS C. HURNEY
Secretary

[26] Counsel for Proponents advised the Commission at oral argument that CONFICO had ceased the consolidation services it had been performing at the time the Feste Affidavit was submitted.

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 computing 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 equipnent 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 16½" 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 connection 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.[1]

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

[1] 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

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[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 administer 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

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[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

[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. 522.6(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

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[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 Agreement—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

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[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 Atlantlic 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. (nearby 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.[3] 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

[3] 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-

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[3] No party now wishes to collect reparations or impose penalties for past conduct, and it is generally agreed that no evidence o[f] 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 o[f] 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[e] additional complaint proceedings at any time. Such matters will not be consolidated with Docket Nos. 71–70 and 73–13, however, an[d] may be held in abeyance until a final decision is reached in that proceeding. Any petition for rulemaking should describe the regulatio[n] 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,

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[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

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[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 an maintenance of the Port, with the view of preventing collisions and fires, policing the harbor and dock areas, aiding in th 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 Ser vice 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—Burn 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, an 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 Harbc 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 an 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 herei contained, however, shall be construed as obligating this COMMISSION to render such services, or as making it liable for th 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 revise teriff 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 th 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

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 provisions, 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 occasions, 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 unlawlful 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

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[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 elminate 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 Pickett 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 carrier [sic] under sections 16 and 17 of the Act from our jurisdiction 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

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[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]

[1] These Orders were issued to obtain information available to the Commission only through Baltic and essential to the Commission' inquiry into Baltic's practices in the foreign commerce of the United States. The inquiry was prompted by information indicating to th 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 contro of Baltic outside the United States, the production of such documents is barred by the laws of the country(ies) in which suc 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' Order of April 17, 1978 (April Order). In its Answer to the Show Cause order, Baltic indicated that its "conditional" foreign la 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 aserting 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 deted 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 Montship 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 of 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 *Malpracties—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.[19]

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.

[19] 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 I 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 pany 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.

[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 argreement 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

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 GulfSingapore, 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]

[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

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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 objectives 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 Januray 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 in 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 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

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[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:

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[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-

[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.

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[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[1]

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.

[1] 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, responding 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 tri-nation 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

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[6] Petition, at 4. This would not constitute compliance with paragraph (A)(3)(e), which calls for tariff item number *and* tarif authority. "Tariff authority" means the authority contained in a *specific tariff commodity item*, not just the number of a tariff containin 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.

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* 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 I, 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 testifed 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 minilandbridge (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 projected 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 relativc 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.

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[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 thereafter. 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[40] 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.

[40] 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 the any rebate over $10 per $100 of revenue would be discouraged. Since there has, to my knowledge, never been a policing or monitorin- of pooling agreements by the Commission to see if the facts confirm that it has not been economical to rebate in view of cas 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.

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 perties 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 overtonnaging 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 (*Investigation 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

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(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 consolidation 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.

[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 condemued 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

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-26

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE
E. L. MOBLEY, INC.

Licensee found to have violated Commission regulations governing activities of independent ocean freight forwarders but permitted to retain license subject to certain conditions.

Edward T. Brennan, Alan F. Wohlstetter and *Edward A. Ryan* for respondent.
John Robert Ewers, Joseph B. Slunt and *John W. Angus* as Hearing Counsel.

REPORT AND PARTIAL ADOPTION OF INITIAL DECISION

March 12, 1979

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

The Commission instituted this proceeding by Order served June 28, 1977, pursuant to sections 22 and 44(d), Shipping Act, 1916 (46 U.S.C. 821 and 841b) to determine whether the freight forwarder license of E. L. Mobley, Inc. should be suspended or revoked.

The proceeding came before the Commission on exceptions to the Initial Decision of Administrative Law Judge, John E. Cograve in which he concluded that E. L. Mobley, Inc. (Licensee), had violated: (1) section 510.23(h) of the Commission's Rules (46 C.F.R. 510.23(h)) by the actions of its qualifying officer, Mr. E. L. Mobley, in forging the signature of another freight forwarder on a fabricated letterhead for purposes of securing the release of freight money held under a letter of credit in a freight forwarding transaction; and (2) section 510.23(f)) of the Commission's Rules (46 C.F.R. 510.23(f)), the so-called payover rule, by failing to refund overpayments of freight charges to shippers and by failing to pay over to carriers freight money obtained from shippers within the time limits prescribed. The Presiding Officer found the act of falsification of a record by Mr. Mobley to be a "momentary lapse of judgment" and an "isolated instance," and the corporate violations of the payover rule to be not willful and that steps had already been taken to ensure they would not reoccur; thus he found that Mr. Mobley continued to be fit to be the qualifying officer of E. L. Mobley, Inc. and that the license of E. L. Mobley, Inc. should not be suspended or revoked.

POSITION OF THE PARTIES

In its Exceptions to the Initial Decision, to which the Licensee has replied, the Commission's Bureau of Hearing Counsel (Hearing Counsel) challenged the finding of fitness made by the Presiding Officer. However, in light of the fact that the forgery was the personal act of Mr. Mobley and not the corporation, and that another individual has since been named as the authorized qualifying officer, Hearing Counsel takes the position that the corporate license should not be suspended or revoked so long as Mr. Mobley is prohibited from participating in the day-to-day management of the business for a period of 60 to 90 days.

In support of its position, Hearing Counsel argues that Mr. Mobley cannot be expected to realize the impact of his clearly unlawful acts absent a finding that his conduct renders him unfit to serve as qualifying officer of E. L. Mobley, Inc., at least for some period of time. Several Commission decisions are cited as authority for the proposition that section 44, Shipping Act, 1916, and the Commission's regulations impose a "high standard" not only in assessing a forwarder's technical abilities but his moral character and integrity, as well.[1] Hearing Counsel is of the view that, because an act of forgery involves fraud and moral turpitude, mere assurances that such incidents will not reoccur are insufficient to support a finding of present and continued fitness, within the meaning of section 44 of the Act.

In reply to Hearing Counsel's Exceptions, E. L. Mobley, Inc. readily admits the seriousness of the forgery incident but argues that the record of the case fully supports the Presiding Officer's ultimate findings. It explains that Mr. Mobley is aware of the seriousness of his acts and the possible consequences and is determined to prevent any reoccurrences of them. The cases cited by Hearing Counsel are distinguished and other authorities are cited for the proposition that suspension or revocation of the corporate license is warranted only in situations of a continuing pattern of illegal conduct or premeditated schemes to evade regulation.[2] The Licensee contends that the record indicates no such scheme or pattern, but rather, a 13 year unblemished record of service, and therefore punitive actions against Mr. Mobley are unwarranted.[3] It is also argued that because the Presiding Officer's findings are based on substantial evidence of good character and the observed demeanor of Mr. Mobley and the witnesses testifying on his behalf, the finding of fitness cannot be overturned.[4]

[1] *Harry Kaufman, Independent Ocean Freight Forwarder*, 16 F.M.C. 256, 271 (1973); *Independent Ocean Freight Forwarder License Application, James J. Boyle & Co.*, 10 F.M.C. 121, 127 (1966); *Dixie Forwarding Co., Inc., Application for License*, 8 F.M.C. 109 (1964).

[2] *Independent Ocean Freight Forwarder Application-Alvarez Shipping Co., Inc.*, 16 F.M.C. 78, 81 (1973); *Independent Ocean Freight Forwarder-Lasco Packing Co., Inc.*, 16 S.R.R. 1023, 1029 (1976).

[3] Although it is true that the record does not reveal a scheme to evade regulation, Hearing Counsel correctly points out that the forgery incident was the culmination of a long series of events. Additionally, the violations of the payover rule involved 42 violations. I.D. at 9.

[4] In its Reply to Exceptions, Licensee argues that because this proceeding is analogous to criminal sentencing in court, the trial judge's decision should not be disturbed on appeal "except on a plain showing of abuse." Alternatively, it is contended that, because the decision of the Presiding Officer rests in part on the credibility of witnesses, including Mr. Mobley's, it should be affirmed unless "clearly erroneous." These arguments overlook the fact that an initial decision is only a recommendation without the force of law until adopted by the Commission. *Dixie Forwarding Co., Inc., Application for License, supra* at 112. Also, the decision of the Commission in this case is not based upon a disagreement with the Presiding Officer as to the credibility of the witnesses but rather a policy decision as to what sanctions are necessary, for deterrence purposes, to insure future compliance with Commission regulations by other licensees as well as the respondent in this case.

Discussion And Conclusions

The underlying findings of fact contained in the Initial Decision are not in dispute, and are therefore adopted and incorporated herein by reference. The issue presented on exception is whether Presiding Officer was correct in his ultimate findings that Mr. E. L. Mobley possesses the required degree of fitness to continue as the qualifying officer of an independent freight forwarder and that no penalty should be imposed for the violation found. While we concur in the Presiding Officer's finding that the individual acts of Mr. E. L. Mobley and the nature of the violations of the payover rule do not warrant the suspension or revocation of the corporate freight forwarder license, we do not agree with his conclusion that no sanctions or remedial actions are warranted.

An act of forgery in a freight forwarding transaction is an act of moral turpitude and an egregious violation of the Commission's regulations which directly reflects upon a licensee's fitness to conduct such business. This is true even if the offending official—whether an employee, officer, director or, in certain circumstances, a shareholder of a corporate licensee—is intimately involved in the actual freight forwarding operations of the corporation. Administrative sanctions should not, however, be blindly or automatically imposed and even in cases where the violation is clear, evidence of mitigation will be considered in tailoring the sanctions to the facts of the specific case.[5] Section 44 and its regulations are based on an underlying remedial public interest purpose[6] and the sanctions imposed must serve such a purpose and not be punitive in character.[7] While significant evidence of mitigation has been presented in this case, we do not believe that it warrants the total result recommended by the Presiding Officer.

Accordingly, we have determined to allow E. L. Mobley, Inc., to retain its corporate license on the condition that Mr. E. L. Mobley step down as a qualifying officer and not participate in the management or operation of the business in any manner whatsoever nor receive any salary or other compensation for managerial or operational services for a period of six months. We do not believe that the 60 to 90 day period suggested by Hearing Counsel is adequate. It is our opinion that the six month period prescribed is more appropriate. Furthermore, to ensure full compliance with such ruling, an additional condition on the corporate license will be imposed requiring the other qualifying officer, Mr. Richard E. Mobley, on behalf of the corporate licensee, to certify monthly that Mr. E. L. Mobley has not participated in the management or operation of the business of the corporation directly or indirectly, nor financially benefitted therefrom as a result of any form of managerial or operational services during the term.

Similarly, while we agree that the violations of the payover rule as presented herein do not warrant suspension or revocation of the corporate license, they do reflect systemic defects in the freight forwarding operations of the Licensee that

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[5] *Cf. Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 130 (1962); *Independent Ocean Freight Forwarder License Application-Guy G. Sorrentino*, 15 F.M.C. 127, 139 (1972).

[6] *Dixie Forwarding Co., Inc., Application for License, supra* at 117–118.

[7] *Gilbertville Trucking Co. v. United States, supra* at 129–130.

require some type of remedial actions being imposed to ensure future compliance. A reasonable and previously recognized response to such circumstances[8] is to require the corporate licensee to submit monthly financial accounting as to its full compliance with the payover rule for a period of one year.

THEREFORE, IT IS ORDERED, That E. L. Mobley, Inc. retain its corporate license as an independent ocean freight forwarder subject to the following conditions:

1. That Mr. E. L. Mobley not participate in the management or operation of the business of the Licensee in any respect whatsoever nor derive any salary or other compensation for managerial or operational services for a period of six months from the date of this Order;

2. That until the condition in paragraph (1) above is met, the qualifying officer of E. L. Mobley, Inc. file with the Secretary of the Commission on a monthly basis, an affidavit attesting to the fact that the above stated condition has been fully complied with by the Licensee and by E. L. Mobley personally;

3. That for a period of one year from the date of this Order the Licensee file with the Secretary of the Commission on a monthly basis and in affidavit form, a monthly financial accounting as to its compliance with the requirements of 46 C.F.R. 510.23(f).

Finally, It is Ordered, That, except to the extent modified herein, the Initial Decision issued in this proceeding, is adopted.

(S) FRANCIS C. HURNEY
Secretary

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[8] *Dixie Forwarding Co., Inc., Application for Freight Forwarding License*, 8 F.M.C. 167 (1964).

FEDERAL MARITIME COMMISSION

No. 77–26

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE
E. L. MOBLEY, INC.

Partially Adopted on March 12, 1979

Applicant found fit, willing and able to properly carry on the business of forwarding and to conform to the provisions of the Shipping Act, 1916, and the requirements, rules and regulations of the Commission.

Edward T. Brennan, Alan F. Wohlstetter and *Edward A. Ryan* for respondent.
John Robert Ewers, Joseph B. Slunt and *John W. Angus* as Hearing Counsel.

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

The Commission by order dated July 1, 1977, instituted this proceeding to determine whether the independent ocean freight forwarding license of E. L. Mobley, Inc., should be suspended or revoked for certain alleged violations of the Shipping Act and the Commission's regulations. On September 17, 1977, after postponement of previously scheduled prehearing conferences, counsel for respondent informed me that he was requesting the Commission's permission "to negotiate the penalties to be imposed upon respondent for the alleged violations" set out in the Commission's order.[2] Counsel requested that I stay the proceedings before me to avoid the expenditure of time and effort and money which might in the end prove useless. Hearing Counsel supported respondent in his request and I stayed the proceeding pending Commission action upon request.

On May 18, 1978, the Commission in ruling upon respondent's request pointed out that respondent was seeking to settle "all issues raised in the Order of Investigation including . . . respondent's 'fitness' to continue operating as an independent ocean freight forwarder and the matter of revocation or suspension." The Commission went on to say that while the Commission was agreeable to a negotiated settlement of the monetary penalties that might attach to respondent's past violations of the Act,

> The impact of the allegations raised in the June 28th Order [of Investigation] on the Respondent's continued fitness to be licensed as a freight forwarder does not, however, lend itself to negotiation or settlement.

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[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).

[2] General Order 30 (46 CFR §§505.1 et seq.) sets forth the procedures for the collection and compromise of civil penalties.

Consequently, while leaving respondent free to "commence negotiations with the Office of General Counsel . . . for any monetary claims . . . " the Commission denied respondent's request and ordered the hearing on the question of the revocation or suspension of respondent's license for lack of fitness to commence no later than June 30, 1978, because of the lapse of time since the proceeding was initiated.

Hearing was held on June 7, 1978. Additionally, a compliance check of respondent's operations was conducted by two investigators assigned to the Commission's Savannah, Georgia, office. This check was conducted between June 20 and June 26, 1978. The evidentiary record was then closed. A briefing schedule was set.

FINDINGS OF FACT

On April 26, 1965, Mr. E. L. Mobley was issued an independent freight forwarder license, FMC No. 1064. Subsequently, on January 20, 1972, the license was transferred from a sole proprietorship to a corporation named E. L. Mobley, Inc., and license No. 1064-R was issued. E. L. Mobley is President, Treasurer, and a Director of E. L. Mobley, Inc., and in 1976 owned 66⅔ percent of the outstanding shares of the corporation. Mr. Mobley conducts, manages and supervises the operations of E. L. Mobley, Inc., and has done so throughout the years 1972 to the present.

Mrs. Virginia J. Mobley, wife of E. L. Mobley, was Vice President, Secretary, and a Director of the corporation and in 1976 owned 33⅓ percent of the outstanding shares of the corporation. Mrs. Mobley is no longer Vice President of the corporation and the position is now occupied by Richard A. Mobley. From January 1972 to February 1978, Mr. and Mrs. Mobley were the only officers and shareholders of E. L. Mobley, Inc.

Some time prior to March 24, 1976, Blue Ridge Carpet Mills of Ellijay, Georgia, negotiated an agreement with Haji Ali Bin Ahmed Bukanan and Sons of Bahrain for the sale of some carpeting—the exact amount is not relevant to any issue in the case. On March 24, 1976, The British Bank of the Middle East, State of Bahrain, issued a letter of credit with Blue Ridge as beneficiary and the Citizens and Southern National Bank, Altanta, Georgia, as the advising bank. The purpose of the letter of credit was to fund the sale and shipment of the carpeting. The letter of credit was numbered BAH #761092 and was due to expire on July 24, 1976. By letter dated April 7, 1976, Citizens and Southern advised Blue Ridge that the letter of credit has been opened. Copies of the letter of credit were enclosed. In a letter dated April 7, 1976, (not a part of the record), Blue Ridge requested Haji Ali Bin to make certain amendments to the letter of credit. On May 1, 1976, Haji Ali Bin acknowledged the request for the amendments and informed Blue Ridge that they had been made.

On May 11, 1976, E. L. Mobley received a letter from Norman E. Gibbs, Executive Vice President and General Manager of Blue Ridge in which Gibbs told Mobley he was forwarding, among other things, the British Mid East letter of credit. In the letter Gibbs asked Mobley whether he "saw any problems" in the papers enclosed—however apparently through oversight a portion of the letter of credit to fund the Blue Ridge shipment was not enclosed. This error was discovered by Blue Ridge, and on May 14, 1976, Mobley received a letter from Blue Ridge supplying the missing pages of the letter of credit. The portions of the letter of credit which had previously been omitted in Gibbs' letter of May 11, 1976, contained the restrictive clause which gave rise to the episode here in issue. Some time in the period between May 14, 1976, and May 20, 1976, Mobley became aware of the restrictive clause which provided:

> Note No. 2:—The credit amount represents the FOB value of the goods. You are permitted to make excess drawings to cover ocean freight against the actual signed receipt of Charleston Overseas Forwarders Inc., P.O. Box 550, Charleston, South Carolina, 29401, which must accompany the documents.[3]

On the page of the letter of credit containing the restrictive clauses appears the notation "To be amended per N. Gibbs" and on the cover letter forwarding the missing pages appears the notation:

5/20/76	N Gibbs asking for amendment to L/C. He expects to have in time to ship on
10:30	Velocity ETD Charleston 6/21/78 (Rate $90.00 + 20%)

The notations were the result of a phone call made by Mobley to Gibbs on May 20, 1976, in which Mobley brought to Gibbs' attention the clause requiring the "actual signed receipt" of Charleston Forwarders. Mobley told him that the clause would create a problem because Charleston was no longer a licensed freight forwarder.[4] Mr. Mobley suggested that the letter be amended to delete the requirement of a receipt from Charleston Forwarders. It was Mobley's recollection that Gibbs told him the needed amendment would be made in time to ship the cargo aboard the "Velocity" on June 21, 1976.

As this point there appears to have been some confusion as to which amendment Gibbs and Mobley, respectively, were talking about. On the basis of what transpired later it seems that Mobley was referring to an amendment in the Charleston clause and Gibbs was alluding to previously requested amendments concerning "samples" and shipment of the cargo in two equal lots. In any event an amendment to the letter of credit was issued on May 30, 1976, which provided:

> The above mentioned letter of credit is amended as follows:
>
> 1) Partial shipments not allowed
>
> 2) Note 3 of Documentary Credit to read—Goods must include six color cards of Nu Rugged Floor: and invoices must so certify
>
> 3) Delete No. 4 of Document Credit.[5]

On June 9, 1976, the Citizens and Southern National Bank advised Gibbs that the amendment had been issued and sent the amendment to Gibbs on that date. The amendment was received by Mobley on June 18, 1976. Mr. Mobley did not at that time check the amendment to the letter of credit. The standard office procedure at that time would have been for one of the "export girls" to place the

[3] Two other conditions were contained in the letter of credit. Notes 3 and 4 specified that "six sets of shipment samples" must accompany the shipment and that the shipment was to "be effected in two equal lots."

[4] On February 27, 1976, Charleston Overseas Forwarders, Inc., changed its name to International Forwarders Inc., and as of that date Charleston was no longer a licensed forwarder.

[5] Note 4 provided that shipment must "be effected in two equal lots."

amendment in the pre-existing file until "legalization" of the documents and certain other things had been done.[6]

On June 24, 1976, the documents, including the amended credit were sent to New York for legalization and on June 26, 1976, the vessel with the carpet aboard left Charleston for Bahrain.

On July 6, 1976, Mobley received the letter of credit from New York. It was not until four days later, on July 10, 1976, that Mobley first became aware that the Charleston clause had not been deleted from the letter of credit. On that day, a Saturday, Mobley, created a letterhead bearing the name Charleston Overseas Forwarders, Inc., by photocopying an advertisement onto blank stationery. On this stationery, Mobley executed two receipts, one a copy of the other, for freight monies from Blue Ridge Carpet Mills, and signed the name of Charleston's President, A. N. Manucy, to the receipt. The amount of the receipt was $5,085,00. At the time the receipt was created by Mobley he was without authority of any kind to use the name of A. N. Manucy.

One of the letters was mailed to the Citizens and Southern National Bank of Georgia and the other was sent to Blue Ridge Carpet Mills. The purpose for the creation of the receipt was to secure the release of the $5,085.00 in freight money to Blue Ridge from the Citizens and Southern Bank. This was subsequently done on the basis of the bogus Charleston receipt prepared by Mobley.

On December 10, 1976, Commission investigator George B. Harry began a routine compliance check of E. L. Mobley, Inc. The compliance check revealed a number of violations of the Commission's so-called payover rule (46 CFR 510.23(f)).[7]

During the compliance check, a random examination of the files disclosed 10 instances out of 23 shipments checked in which Mobley had failed to pay over to the carrier the freight money within the period required by the payover rule. On six of the ten shipments payment was made within 7 to 20 days of receipt from the shipper and on the remaining 4 payment was made 20 days or longer after receipt.

The compliance check further revealed two instances of where the shipper had overpaid Mobley, the overpayment had not been refunded to the shipper. Both instances involved shipments by Coronet Carpets. Transportation Manager John F. Barnes, Jr., testified on behalf of Mobley. When questioned about the two instances (involving a total $3,068.43) Mr. Barnes said he had lodged no complaint about the incidents and that Coronet "always owe him (Mobley) more money than he owes us at any given time."

Mobley testified that he did not know how the two instances occurred but could only assume that it was due to an error on the part of one of his employees. His best guess was that because the company also did some export business with Coronet that the overpayment somehow got posted to the "wrong card" or otherwise improperly comingled. The money was promptly repaid when the incidents were brought to his attention.

[6] "Legalization" merely refers to the processing of the document by the U.S. Arab Chamber of Commerce and the Saudi Arabian Consul.

[7] The payover rule requires the forwarder to pay over to the ocean going common carrier all sums advanced to the forwarder within seven days of the receipt of the funds or within five days of the departure of the vessel whichever is later. The time limits exclude Saturdays, Sundays and legal holidays.

Pursuant to arrangements made at or shortly before the hearing two Commission investigators conducted a more complete compliance check of E. L. Mobley, Inc., between June 20, 1978 and June 26, 1978. The investigators reviewed some 255 shipments, 124 of which were collect shipments and were only partially reviewed. The remaining 131 shipments were reviewed in full and on 32 of these, respondent failed to pay the carrier freight money within the time required by the Commission's payover rule. On 99 shipments payments to the carrier were made within 7 days of receipt from the shipper; on 19 shipments payments were made within 7–20 days; and on 13 shipments payments were made over 20 days of receipt of the money from the shipper.

In conducting this compliance check Commission investigator Harry stated that he and his colleague looked at "twice, maybe three times the number of shipments that we normally review," and that the results of this compliance check when compared to other licensees they had checked showed that Mobley's compliance with the payover rule was "much more satisfactory than most investigations that I (Harry) have done." (Ex. 8, pages 28–29, 38–39).

Mobley testified that in order to prevent the recurrences, or at the very least minimize future payover violations, he had extensively revamped office procedures. The steps taken include the hiring of additional employees, conversion to a computerized bookkeeping system, and the retention of a new CPA firm.

Mr. Charles L. Clow, Chief of the Office of Freight Forwarders, testified that since April 26, 1965, when Mobley was first licensed, there has not been a single complaint lodged against Mobley for late payments or failure to remit funds.

The foregoing constitutes the evidence of record relevant to the violations alleged in the Commission's order instituting this proceeding. The testimony of the character witnesses will be discussed later when the question of "fitness" is taken up.

DISCUSSION AND CONCLUSIONS

The Commission's jurisdiction over ocean freight forwarders is provided for in section 44 of the Shipping Act, 1916. The section establishes a program of licensing which is designed to insure that shippers and carriers are guaranteed services from forwarders who maintain high standards of responsibility, integrity and moral character as well as technical ability. Dixie Forwarding, Inc. Application for License, 8 F.M.C. 109, 116 (1964), Fabio A. Ruiz d/b/a Far Express Co., 15 F.M.C. 242 (1972). In administering the licensing program established by Congress the Commission shall issue a license,

> . . . if it is found by the Commission that the applicant is fit, willing and able properly to carry on the business of forwarding and to conform to the provision of [the Shipping] Act and the requirements, rules, and regulations of the Commission issued thereunder . . . . (46 U.S.C. §841b(b))

In determining the fitness of a licensee to retain his license consideration may be given to any past violations committed by the licensee. Lesco Packing Co. Inc., 16 SRR 1023 (1976).

It is alleged that E. L. Mobley, Inc., violated section 510.23(h) of the Commission's rules governing the conduct of licensed freight forwarders. That rule provides:

(h) No licensee shall file, or assist in the filing of any affidavit, letter of indemnity, or other paper or document, with respect to a shipment handled, or to be handled by such licensee, which he has reason to believe is false or fraudulent.

Clearly when E. L. Mobley fabricated the Charleston Overseas, Inc., letterhead and signed A. N. Manucy's name to the receipt appearing under that letterhead, he violated section 510.23(h). Mobley has admitted this violation. It is equally clear that Mobley has on some 42 occasions violated section 510.23(f), the so-called payover rule. Mobley does not quarrel with this either. Concerning the payover rule violations, Hearing Counsel is of the view that "These violations do not seem to indicate such a lack of fitness [as] to warrant a revocation or suspension of the license."

Hearing Counsel, however, takes a different stand on the violation involving the "fraudulent receipt." Calling it an act of "commission rather than omission," Hearing Counsel goes on to say:

> Standing alone and absent the unique factors which have been educed through this investigation and hearing, we would urge that this action would indicate such a lack of the requisite fitness as to warrant revocation of the corporation license. We do not do so for the following reasons. . . .

The reasons given by Hearing Counsel are: (1) that while Mobley's actions are attributable to the corporation, they were "clearly of his own doing, and as such bear more upon his own fitness . . . than upon the corporation's fitness"; (2) Mobley was first licensed in 1965 and in his 13 years as a licensee, with the exceptions of the violations here, has had a clean record; (3) that while Mobley might have handled the Blue Ridge shipment differently "it is apparent that he was 'caught in a jam' and chose an incorrect means to extricate himself"; (4) that it is unlikely that personal gain was Mobley's motive for his action; and (5) that there are others who depend upon the license of E. L. Mobley, Inc., for their livelihood.

All this together with the testimony of the many witnesses and affidavits presented in Mobley's behalf lead Hearing Counsel to conclude:

> In spite of these facts, and the contrition of Mr. Mobley, the Commission has a duty to ensure that actions such as those which violate Rule 510.23(h) do not occur in the future. While Hearing Counsel do not urge that Respondent's license should be revoked, we suggest a suspension is in order. First, we wish to emphasize that this suspension is not purely punitive. Our recommendation is urged solely as a result of the actions of Elton Mobley, which reflect adversely upon his fitness as the qualifying officer for a freight forwarder license. *We do not believe a revocation of license is necessary to ensure that he does not repeat those actions, or commit other violations in the future. Rather, we urge that the remedial effect of a suspension would be sufficient to assure his future compliance with the rules and regulations of the Commission, and laws of the United States.*[8] (Emphasis is mine.)

I find myself in disagreement with Hearing Counsel's recommendation which appears to me somewhat inconsistent in its premises. But before dealing with the specific recommendation a review of relevant Commission precedent is in order.

Hearing Counsel begins with the obvious proposition that the power to revoke or suspend a license is remedial in nature. *Application of Guy G. Sorrentino,* 15 F.M.C. 127, 128 (1972); *Federal Highway Administration v. Safeway Trails*

[8] Hearing Counsel, however, would not urge that the corporate license of E. L. Mobley, Inc., be suspended "if there were another individual within the corporation who could qualify for licensing." By letter dated September 27, 1978, Mr. Charles L. Clow, Chief, Office of Freight Forwarders, advised Mr. Richard E. Mobley, Vice President of E. L. Mobley, Inc., that he had been approved as a qualifying officer. Official notice is taken of this fact. Consequently I conceive Hearing Counsel's recommendation would now be that only Elton Mobley's license be suspended.

Inc., 113 MCC 815, 831 (1971). In other words, while there will always be an element of punishment, in any suspension or revocation, the real purpose underlying the imposition of those sanctions is the protection of the public by insuring that actions injurious to the public do not reoccur. In dealing with remedies of the Interstate Commerce Act, the Supreme Court in *Gilbertville Trucking Co. v. U.S.*, 371 U.S. 115 (1962), said at page 130:

> [The] duty is to give "complete and efficacious effect to the prohibitions of the statute" with as little injury as possible to the interests of the private parties or the general public.

Generally, the sanction of revocation (or the denial of an initial license) has been invoked only when the conduct of the licensee has been such that the Commission has been convinced that it could not rely on the honesty and integrity of the licensee, or applicant, to the extent necessary to insure future conduct within the confines of the statutes and regulations. For example a license was denied in Lesco Packing Inc., 16 SRR 1023 (1976), where the applicant had pleaded guilty to criminal violations, made false statements to an FMC investigator, had export privileges revoked by the Department of Commerce because of export control law violations, had engaged in an ongoing scheme for him to operate without a license, falsely obtained "grandfather rights," had one FMC license revoked and another application denied and was generally uncooperative during the Commission's investigation. Clearly not a course of past conduct which would instill confidence as to future actions under the law. *See also, e.g., International Freight Services, Ltd.*, 16 SRR 989 (I.D. adopted by Commission August 26, 1976);*Alvarez Shipping Co. Inc.*, 16 F.M.C. 78 (1973). Where, however, even though the Acts are intentionally done they do not involve "elements of fraud or moral turpitude" denial or revocation of a license is not warranted. *Fabio A. Ruiz dba Far Express Co.*, 15 F.M.C. 242 (1972); Air-Mar Shipping Inc., 14 SRR 1250 (1974).

Finally the Commission itself in *Application of Carlos H. Cabeza*, 8 F.M.C. 130 (1964), said at page 131:

> . . . The determination of the fitness, willingness, and ability of the applicant must be by application of the Commission's sound discretion. It is well recognized that discretion may not be exercised in an arbitrary or capricious manner and in licensing or refusal to license consideration must be given to constitutional and lawful safeguards of individuals and their right to make a living. *Archer v. SEC*, 133 Fed. 2d 795, cert. denied 319 U.S. 767.

Suspension though a lesser sanction should still be governed by the same principle, the balancing of injury to the private interest against the protection of that segment of the public dealing with the licensee. Which brings me to Hearing Counsel's specific recommendation. As noted earlier, Hearing Counsel urge "that the remedial effect of a suspension would be sufficient to insure [Mobley's] future compliance with the rules and regulations of the Commission . . . " I could agree with this reasoning if (1) there was something in Mobley's current operation which could only be corrected by ceasing operations for some period; or (2) Hearing Counsel had some other problem with Mobley's fitness which could be cured by a suspension. However, Hearing Counsel does not really question Mobley's fitness at least not in any way I can discern.

In *Sorrentino, supra*, at page 136, the Commission concluded that a finding of "fitness" was nothing more or less than a determination that the licensee "can be relied upon and trusted to carry on the profession of freight forwarder in an honorable and responsible fashion . . . ." The Commission went on to say that in making that determination "we should look to all the circumstances of the [licensee's] case as they presently exist and not only on the part of the overall conduct and business operation which failed to meet the required standards."

On the question of Mr. Mobley's honesty, integrity and responsibility the record before me removes any doubt on my part that Mr. Mobley can be relied on in the future to carry on the profession of freight forwarding in an honorable and responsible fashion. Some examples of testimony of witnesses who appeared on behalf of Mr. Mobley should give an indication of the high regard he enjoys in Savannah.

John L. Karr, a Vice President of Atlas N Tell International of Dalton, Georgia, was previously with West Point Pepperill and before that with World Carpets. He has been in the export business most of his business career and has known Elton Mobley since 1972. Roughly speaking, he would estimate that the companies he has worked for handled anywhere from $150,000 to $250,000 in billings per year through Elton Mobley's office, both at Savannah and other ports. Mr. Karr testified (Tr. 41):

Q. Mr. Karr, based upon your relationship with Mr. Mobley, would you state what kind of reputation he has for integrity, efficiency, and honesty in the business community.

A. In the business community, quite well known, quite well respected, in the export community, and in the carpet industry, in which I am involved, his name is one of the premier or first on the list.

Mr. Karr on occasion has used other freight forwarders but he switched completely over to Mobley's services because of "personalized service, going the extra step in all instances . . . " (Tr. 42). Mr. Karr has sent clerical help from his office down to Mobley's office for a training period. "Our confidence level was so high in Mr. Mobley and his organization that we sent people down to be trained and to be taken under his wing for short periods of time to be indoctrinated." (Tr. 42). Mr. Karr further testified that a suspension or revocation of Mr. Mobley's license would have a severe adverse impact on his business.

Frank Jones is Assistant Vice President and Transportation Director of Southwire Company of Carrollton, Georgia, a company with eight or nine separate manufacturing facilities and about 45 redistribution facilities. The company employs 3200 people at Carrollton, Georgia. Mr. Jones estimated that the Carrollton company paid $2,000,000 last year on export ocean freight.

Mr. Jones has known Elton Mobley for 14 years and has utilized his services over the years. Mr. Jones testified (Tr. 50):

Q. Now, based upon your relationship with Mr. Mobley's company and your knowledge of him and your knowledge of the business during the time you have known him, what has been your experience with him as far as integrity, honesty, and efficiency of operation?

A. I think in every way he has been beyond reproach. We have found him to be completely above-board, honest, and worthy of our doing business with.

As far as comparing Mr. Mobley's operation to that of other freight forwarders, Mr. Jones states (Tr. 51):

A. We have found his operation is superior and other operations have not been—we have not been as comfortable with other operations as we have been with his.

Mr. Jones testified that every person in his international section has been down to Mr. Mobley's office for indoctrination and orientation more than once. Mr.

Jones testified that the loss of license by Mr. Mobley would have a very negative effect on his business.

Mr. Jones further testified (Tr. 54):

> We have not at Southwire Company that I know of found any reason to complain about E. L. Mobley or any of his staff doing the job we have asked them to do. They have never indicated in any way they would do anything that had even a shade of illegality attached to it, and we have never asked them to do so.
>
> Frankly, I do not think he would do it. In my opinion, he would not do it even if we asked him to do something that was not exactly right. So, I think that we must say in all fairness that this broker and freight forwarder had done such a job for us that we would not be willing under any circumstances to exchange his services for any other brokerage or freight forwarding firm that we have knowledge of. We are just that positive that he is ethical to the extent that he would not wrongly do anything that he should not do. Given a set of circumstances, in order to get the job done, I suspect that any of us might do what has occurred in this instance that we are hearing now. I am very high on him. We intend to continue doing business with him and his staff down there. We have no reservations about him whatsoever.

Several witnesses noted that Mobley has conducted a valuable training program for exporters seeking to familiarize their employees with the intricate export regulations. The witnesses all attested to E. L. Mobley, Inc.'s unblemished reputation in the shipping community for honesty, integrity and efficiency. All of these witnesses appearing on behalf of E. L. Mobley did so at their own expense.

The testimony of these witnesses who appeared at the oral hearing is buttressed by the sworn affidavits of seven additional individuals on behalf of exports using the services of E. L. Mobley, Inc. The remarks of Mr. J. K. Ebberwein, which are typical of the comments of all affiants, illustrate the high regard with which Mr. Mobley is held in the community. Mr. Ebberwein states:

> To the best of my knowledge there has never been any question about Mr. Mobley's good character or reputation in the community. He has been active in maritime affairs and succeeded me as President of the Independent Freight Forwarders and Custom House Brokers Association of Savannah. In addition to being active in the maritime community, Mr. Mobley has also been noted and recognized for his dedication and service to his church.

In addition to the above testimony, E. L. Mobley personally testified and accepted responsibility for the violations. With regard to the violations of the "pay-over rule," he has already taken several remedial steps to insure that they would not recur (or would be minimized) including the changeover to a computerized bookkeeping system, the hiring of additional employees and the retention of a more active CPA firm.

With regard to the violations of the "false statement rule," Mr. Mobley discussed in detail the circumstances which resulted in his unfortunate decision to sign the name of Mr. Manucy. He sincerely regrets that he took such action. He made clear that his momentary lapse of judgment was an isolated instance and that he would never even consider taking similar action again.

Having observed Mr. Mobley on the witness stand I have no reservation concerning his assurances that an incident such as the false receipt will not occur again. Concerning the payover rule violations I am equally sure that the overhaul in office procedures should go a long way toward eliminating future violations. In short I conclude that E. L. Mobley is fit to continue the practice of his profession as a freight forwarder licensed by the Commission.

Finally, it is my further conclusion after balancing the potential harm to the public against the loss to Mr. Mobley, that no useful purpose would be served by the suspension of his license. Indeed, accepting Hearing Counsel's recommendation would be to ground a suspension on the notion that it is needed to prevent future violations on Mr. Mobley's part. Presumably by bringing home to him the seriousness of his acts. I can find no such need. The record here convinces me that Mr. Mobley is more than aware of the seriousness of his actions and is equally determined to prevent any reoccurrence of them.

Under the terms of the Commission's order, I do not feel called upon to make any recommendations as to monetary penalties.

ULTIMATE CONCLUSIONS

1. E. L. Mobley, Inc., through the actions of Elton Mobley has violated Rule 502.23(h).
2. E. L. Mobley, Inc., has violated Rule 502.23(f).
3. Elton L. Mobley is fit to carry on the business of an independent ocean freight forwarder.
4. The independent ocean freight forwarders license of E. L. Mobley, Inc., should not be suspended or revoked.

The proceeding should be discontinued.

(S) JOHN E. COGRAVE
Administrative Law Judge

WASHINGTON, D.C.
November 6, 1978

FEDERAL MARITIME COMMISSION

DOCKET NO. 78–3

ORGANIC CHEMICALS (GLIDDEN-DURKEE)
DIVISION OF SCM CORP.

v.

FARRELL LINES, INC.

SETTLEMENT AND DISMISSAL OF COMPLAINT

March 14, 1979

The Commission, by order served January 25, 1979, in this proceeding enunciated conditions under which it would permit settlement of claims arising under section 18(b)(3) of the Shipping Act, 1916. It was determined that the proposed settlement which had been submitted to the Administrative Law Judge in this proceeding met all but one of these conditions. The parties were afforded 30 days to meet the final conditions by submitting an affidavit setting forth the reasons for the settlement and attesting that the settlement is a *bona fide* attempt by the parties to terminate their controversy and not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Shipping Act, 1916.

The parties to this proceeding have now timely submitted an affidavit which meets the final condition. Accordingly, the October 26, 1978, order of the Administrative Law Judge denying the Joint Motion for Approval of the Settlement is vacated. Settlement under the terms agreed by the parties is permitted and the complaint in this proceeding is dismissed with prejudice.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

[DOCKET 78-57; GENERAL ORDER 41]

SUBCHAPTER B—REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES
PART 544—Financial Responsibility for Water Pollution Outer Continental Shelf

March 19. 1979

ACTION: Final Rule

SUMMARY: The Federal Maritime Commission is hereby issuing regulations affecting persons who own and operate vessels carrying oil from offshore facilities above the Outer Continental Shelf. The Outer Continental Shelf Lands Act Amendments of 1978 (P.L. 95-372) imposes upon such vessel owners and operators a new liability for damages and removal costs resulting from discharges of oil. Vessel operators are required to demonstrate that they are financially able to meet such potential liability, up to certain limits, before their vessels may lawfully engage in any segment of the transportation of oil from an offshore facility above the Outer Continental Shelf. These regulations set forth the manner by which financial responsibility can be demonstrated to the Commission in accordance with the new law, and provide for the issuance of Certificates of Financial Responsibility which must be carried aboard vessels and presented to officials of the U.S. Coast Guard, or its designees, upon request.

DATES: March 20, 1979

SUPPLEMENTARY INFORMATION:

On January 3, 1979 (44 *Fed. Reg.* 915), the Commission proposed the issuance of regulations (a new Part 544 to Title 46 of the Code of Federal Regulations) to implement the vessel certification and financial responsibility provisions of the Outer Continental Shelf Lands Act Amendments of 1978 (OCSLAA). Comments from the public were invited with respect to those proposed regulations.

Comments were received from (1) LeBoeuf, Lamb, Leiby & MacRae, which serves as General Counsel in the United States for the Underwriters at Lloyd's (Lloyd's); (2) the American Institute of Marine Underwriters (AIMU), the member insurance companies which are said to write over 90 percent of the marine insurance business written in the United States; (3) the American Institute of Merchant Shipping (AIMS), an association of 26 companies owning or operating United States flag oceangoing vessels; (4) the American Institute of Certified Public Accountants (AICPA); (5) the Offshore Operators Committee (Operators Committee), an organization of 70 companies engaged in oil and gas exploration and production in the Gulf of Mexico and Atlantic offshore area; (6) Continental Oil Company, North American Production Operations (Continental Oil); and (7) Exxon Company, U.S.A. (Exxon).

Continental Oil asserted that the Commission has an obligation to avoid the "expensive and unnecessary duplication of coverage" which will be the result of the Commission maintaining three separate sets of regulations requiring evidence of financial responsibility for water pollution: 46 CFR 542 revised, implementing section 311(p)(1) of the Federal Water Pollution Control Act; 46 CFR 543, implementing section 240(c) of the Trans-Alaska Pipeline Authorization Act; and the instant regulations, 46 CFR 544, implementing section 305(a)(1) of the OCSLAA.

Because those three sets of regulations are mandated by three separate statutes, each with its own unrelated liabilities, defenses, conditions and exclusions, there are no areas of duplication other than those which have been eliminated in these final regulations.

Section 544.1—Scope

Comments concerning this section were submitted by AIMS, the Operators Committee, Continental Oil and Exxon. Generally, their comments are that the proposed language of that section, if taken alone, is too broad and could be misread as applying to all vessel operations involving the movement of any oil from offshore facilities, including fuel oil. More descriptive language, such as that used by the Commission in section 544.3(d) of the proposed regulations, i.e., "oil that has been produced by an offshore facility," is suggested.

In order to avoid a misunderstanding of the "Scope," we will adopt new language designed to make it clear that the regulations apply only to vessels carrying Outer Continental Shelf-produced oil which has not yet been brought ashore. Exxon, the Operators Committee and AIMS, however, would have the Commission further amend the scope of the regulations so as to exclude even vessels which carry Outer Continental Shelf-produced oil (1) loaded as a result of containment and removal operations after an oil spill; (2) carried in small amounts on an occasional basis for purposes of laboratory analysis; (3) mixed with drilling mud and being transported on an occasional basis for proper disposal; and (4) loaded due to failure of a facility's pipeline system. (This last exclusion was suggested only by AIMS.)

As to the first of the above numbered suggestions, the Commission finds merit in further clarifying the "Scope" by specifically excluding from these financial responsibility regulations, vessels which carry Outer Continental Shelf-produced oil solely as a result of spill containment and removal operations. It was not our intent to make such vessels subject to these regulations because vessels engaged in cleanup activities do not fall within the OCSLAA's definition of vessel.[1] Moreover, as Exxon correctly points out, the number of vessels immediately available for cleanup work should not be limited to vessels which have obtained OCSLAA Certificates from the Commission.[2]

The second suggested amendment to the "Scope" is the exemption of vessels carrying Outer Continental Shelf-produced oil in small amounts for purposes of laboratory analysis. The "small" amounts suggested by Exxon and the Operators Committee are 110 gallons per container, with no more than two containers (220 gallons) suggested by the Operators Committee and without limit in the case of Exxon's comments. The fact that those comments are not supported by any reference to the statute or legislative history whereby the Commission would be authorized to provide such exemption is, we think, controlling. The Commission has already addressed a similar question involving "small" amounts of oil carried by vessels subject to the Federal Water Pollution Control Act. In that instance, the Commission determined that it had no authority to exempt the carriage of even one barrel of oil. The Commission likewise finds no statutory basis for the exemption under this Act.

The third suggested amendment to the "Scope" is the exemption of vessels carrying Outer Continental Shelf-produced oil mixed with drilling mud being transported for proper disposal. Again, the comments failed to point out anything in the OCSLAA or legislative history which would authorize the Commission to provide such an exemption. To the contrary, one of the clear purposes of the law is to balance development of the Outer Continental Shelf with protection of the environment by assuring reimbursement to parties damaged by oil spills in connection with all activities on the Outer Continental Shelf. The pollution damages that could result from vessels carrying, in bulk, thousands of pounds of Outer Continental Shelf-produced oil mixed with drilling mud do not appear to be capable of exclusion from these regulations.

The fourth and last suggested amendment to the "Scope" is the exemption of vessels carrying Outer Continental Shelf-produced oil as the result of a failure of a pipeline system. Again, the Commission is without authority under the law to exempt such vessels from these regulations

After considering the four above discussed comments, the Commission has decided to amend and clarify the proposed wording of section 544.1 by adopting the following language:

(a) These regulations (Part 544 of Title 46 of the Code of Federal Regulations) implement the vessel financial responsibility requirements of the Outer Continental Shelf Lands Act Amendments of 1978. These regulations apply to all vessels engaged in any segment of the transportation of oil produced from an offshore facility on the Outer Continental Shelf when such vessels are operating in the waters above submerged lands seaward from the coastline of a State or the waters above the Outer Continental Shelf.

(b) Vessels having on board Outer Continental Shelf-produced oil after that oil has been brought ashore, or loaded as a result of removal operations after an oil spill, do not thereby become subject to the regulations in this Part.

[1] The key phrase in the OCSLAA's definition of "vessel" found in section 301(5) is " . . . and which is transporting oil *directly from an offshore facility.*" (Emphasis added.)

[2] It also should be noted that vessels used in cleanup work, if they exceed 300 gross tons, already would be in possession of Certificates issued by the Commission under the Federal Water Pollution Control Act requirements, 46 CFR 542 revised

Section 544.2(d)—Cargo

Continental Oil asserts that the Commission's proposed definition of "cargo," i.e., " 'cargo' means oil carried on board a vessel for purposes of transportation, in any quantity and under any conditions," should be amended to mean only Outer Continental Shelf-produced oil in order to comport with the OCSLAA.

First, no amendment is necessary because the word "cargo" is used only in the insurance, bond and guaranty Forms FMC-193 through 195, and then only in direct connection with the words "Outer Continental Shelf-produced oil."

Second, nothing in these regulations should be construed as meaning that only those pollution incidents involving Outer Continental Shelf-produced oil are covered by the herein required evidence of financial responsibility. We are unable to find anything in the OCSLAA or its legislative history that would exclude liability for economic loss resulting from, for example, spills of fuel or bunker oil, provided that the vessel causing the spill was subject to the OCSLAA. The carriage of Outer Continental Shelf-produced oil is merely one prerequisite to the possible applicability of these regulations as set forth in the "Scope." (See also, the discussion of section 544.2(n)—Oil.)

The definition of "cargo" in these final regulations will remain as proposed.

Section 544.2(h)—Damages

The definition of "damages" in the proposed regulations reads, in pertinent part, as follows: "'Damages' means economic loss arising directly or *indirectly* from oil pollution, including . . . *reasonable costs associated with preparation and presentation of natural resource damage claims*." (Emphasis added.)

Lloyd's, AIMS and Continental Oil take exception to the Commission's use of the word "indirectly," as underlined above, alleging that it could be construed as having a broader meaning than the actual wording used in the OCSLAA: ". . . economic loss, *arising out of* or directly resulting from oil pollution. . . " (Emphasis added.) It is possible that the proposed words "directly or indirectly" could be held to have a broader meaning than the words in the statute—"arising out of or directly." The wording of the statute will be used in the final definition.

Lloyd's also takes exception to the other above underlined wording in the proposed definition concerning certain "preparation and presentation" costs. While Lloyd's is correct in pointing out that such wording is not included in section 303(a) of the OCSLAA, we inserted that wording in the proposed definition because of the clear legislative history underlying section 303(a) of the statute:

"In addition, it is intended that reasonable costs associated with the preparation and presentation of natural resource damage claims are intended to be recoverable as part of each claim." (Conference Report No. 95-1091, accompanying S.9, at page 131.)

Accordingly, the contested "preparation and presentation" wording will remain a part of the definition of "damages" in the final regulations.

Finally with respect to the Commission's proposed definition of "damages," Continental Oil asserts that the definition must be amended to include certain issues involving contributory negligence of the claimant, damages resulting from willful actions of a claimant, claimant's responsibilities to mitigate damages, claims for loss of oil and gas reserves still in the ground, and claims for loss of tax revenue. We see no basis for enlarging the definition beyond that clearly set forth in the statute and the legislative history.

Section 544.2(l)—Insurer

Lloyd's suggests that the proposed definition of "insurer" be expanded to specifically state that "domestic, foreign and alien" insurance companies, rather than just "insurance companies," could be found acceptable to the Commission; and that the words "associations of insurers" be expanded to read "associations of individual insurers."

The proposed definition is almost a verbatim rendition of the Commission's definition of "insurer" in existing Parts 542 revised (FWPCA) and 543 (TAPAA) of this title (the inconsequential difference of one word is not pertinent to Lloyd's comment). Moreover, as in the case of Parts 542 revised and 543, the proposed definition in fact includes "domestic, foreign and alien" insurers, as well as associations of "individual" insurers. No change, therefore, will be adopted at this time.

Section 544.2(n)—Oil

The proposed definition of "oil" reads as follows: "'Oil' means petroleum, including crude oil or any fraction or residue therefrom, whether or not carried on board a vessel." Continental Oil objects to that definition because it is not limited to Outer Continental Shelf-produced oil, and states that the definition must be so limited in order to fulfill the intent of the OCSLAA.

As discussed above in connection with the definition of "cargo," we disagree with Continental Oil's assertion. The OCSLAA and its legislative history point to the intention of Congress to include oil spills involving more than just Outer Continental Shelf-produced oil (e.g., bunker oil), provided, of course, that, in the case of a vessel, the vessel was carrying Outer Continental Shelf-produced oil and was operating in a manner which made it subject to the "Scope" of these regulations, i.e., the scope of Title III of the OCSLLA.

It would have been stated or implied somewhere in the statute or legislative history that economic loss resulting only from spills of Outer Continental Shelf-produced oil was covered by the OCSLAA, if that were the case. Instead, Congress chose to use obviously broad definitions of "oil" and "oil pollution" in the statute and, in section 101(12) of the statute, found that "funds must be made available to pay for the prompt removal of *any* oil spilled or discharged as a result of activities on the Outer Continental Shelf. . . ." (Emphasis added.) Similarly, in section 102(8) of the statute, entitled "Purposes," Congress used the words "and oil spilled." It did not limit it just to Outer Continental Shelf-produced oil.

In section 301(22) of the OCSLAA, removal costs are defined to include, among other costs, costs incurred under subsections (c), (d) or (1) of section 311 of the Federal Water Pollution Control Act. That Act, without question, concerns costs resulting from spills of any and all types of oil including, of course, bunker and other fuel oils. In short, we come to the inescapable conclusion that "oil" as defined in the OCSLAA and, therefore, in these regulations cannot be limited to Outer Continental Shelf-produced oil. No change to the proposed definition will be made.

Section 544.2(o)—Oil Pollution

The definition of "Oil Pollution" in the proposed regulations begins as follows: "'Oil pollution' means: (i) the presence of oil, either in an unlawful quantity or which has been discharged at an unlawful rate." Continental Oil, although recognizing that the phrase was taken directly from the OCSLAA's definition of "oil pollution," requests the Commission to define the words "unlawful quantity" and "unlawful rate."

The Commission believes that the words in question refer primarily to section 311(b)(3) of the Federal Water Pollution Control Act which makes provision for the determination of the amounts of oil which, when discharged into the navigable waters of the United States or the Contiguous Zone, among other waters, would be considered unlawful. This does not come within the authority delegated to this Commission. Rather, it comes within the jurisdiction of the Environmental Protection Agency and is addressed in its regulations in Part 110 of Title 40 of the Code of Federal Regulations.

Section 544.2(s)—Person

The Commission's definition of "person" includes a "joint venture," as does the statutory definition. The word "person" is used in these regulations and in the statute in connection with, among other things, the definitions of vessel owner and operator. A vessel owner or operator, therefore, can be a joint venture.

Continental Oil suggests that a vessel owner which is a joint venture be allowed to demonstrate financial responsibility in proportion to each party's respective ownership of a vessel. We must reject that suggestion because, first, it would be impractical as the parties to the joint ventures are jointly and severally liable for the obligations of the venture, notwithstanding the financial responsibility requirement. Second, the same end can be reached by the vessel owner parties to a joint venture under the proposed regulations. Third, we do not believe that adoption of the suggestion would be in accord with the intent of the OCSLAA.

Section 544.2(y)—Vessel

Exxon and AIMS suggest that the proposed definition of "vessel" be amended to make it clear that a vessel is not a "vessel" within the meaning of the regulations unless, in addition to other criteria, it is carrying Outer Continental Shelf-produced oil.

As noted above in connection with the clarification we adopted involving the "Scope" of the regulations, we do not wish to make these regulations appear broader in scope than the underlying statute.[3] Accordingly, the words "Outer

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[3] In the Joint Explanatory Statement of the Committee on Conference (Conference Report No. 95–1091, accompanying S.9, at page 128) the following is noted:

> The Senate bill includes within the scope of the oilspill title, a 'vessel' transporting OCS oil, whether in the waters above the OCS or in the navigable waters. The House amendment is limited to the waters above the OCS. The conference report provides for the scope to be for vessels operating in all 'offshore waters,' that is in the waters above the OCS and above the submerged lands.

Continental Shelf-produced" will appear between the words "of" and "oil" in the final definition of "vessel."

Section 544.3—General

Continental Oil suggests that paragraph (a) of the section should restate the exceptions and defenses to liability which section 304 of the OCSLAA provides to vessel owners and operators and that the "third party" defense should be discussed.

We see no justification in restating in the regulations what the OCSLAA states, unless vital to an understanding of the regulations. That is not the case here. Nor do we wish to add a lengthy section to these regulations without good cause. No change, therefore, will be made to section 544.3(a).

Section 544.5—Time to Apply

Lloyd's, the Operators Committee, Continental Oil and Exxon are concerned that vessel operators, through no fault of their own, will not have time to file applications, fees and evidence of financial responsibility in time for the Commission to process the paperwork and issue Certificates by March 17, 1979, the date set forth in the proposed regulations.

The Commission is aware that time constraints did not permit issuance of these regulations in sufficient time to allow for full compliance by the effective date of March 17, 1979. However, the clock with respect to liability cannot be stayed. Nevertheless, the Commission and its staff will endeavor administratively to assist vessel operators, if any, who will be transporting Outer Continetal Shelf-produced oil on or immediately after the March 17, 1979, effective date.

The staffs of this Commission and the Coast Guard have devised a procedure to satisfy the statute and avoid the latter's enforcement of section 305(a)(2) of the OCSLAA (i.e., denial of entry into the navigable waters of the United States and detention) in emergency cases where vessel operators are not in possession of Certificates, through no fault of their own, on March 17, 1979. Specifically, if in such cases the vessel operators have at least submitted acceptable evidence of financial responsibility to the Commission in accordance with Part 544, the Commission's Office of Water Pollution Responsibility and the Coast Guard can expand the existing joint enforcement program, which concerns two other oil pollution laws, to encompass the OCSLAA as well. By that means, the Office of Water Pollution Responsibility is able to respond immediately to telephonic enforcement inquiries from Coast Guard field officials and confirm that a particular vessel is at least covered by evidence of financial responsibility, thus avoiding enforcement action by the Coast Guard due to the fact that a Certificate is not on board.

The joint Coast Guard/Commission telephonic enforcement program is in effect 7 days per week, 8:30 a.m. to 5:00 p.m., except national holidays.

Therefore, vessel operators who expect to load Outer Continental Shelf-produced oil and who otherwise will be subject to these regulations should immediately arrange for their underwriters to submit evidence of financial responsibility to the Commission. Application forms and the required amount of fees may be submitted as soon as possible thereafter so that Certificates can be issued.

There are a number of vessel operators who currently are covered by self-insurance for purposes of Part 542 revised of this Title 46, CFR, but who, in their previous submissions, have failed to demonstrate sufficient working capital and net worth to cover the added amounts of working capital and net worth required by these Part 544 regulations. In those cases, if the vessel operators will be subject to Part 544, revised statements of net worth and working capital should be submitted immediately by the appropriate financial officers of the companies. In cases where such self-insurers report on a consolidated financial basis, and thus are required to have an independent Certified Public Accountant audit the schedules of working capital and net worth, we will temporarily waive that requirement. Such schedules, therefore, will be accepted from the appropriate financial officers of the companies, without audit by an independent Certified Public Accountant. Those unaudited schedules must be replaced by audited schedules at the time the next annual financial statements fall due, i.e., 120 days after the close of the self-insurer's fiscal year. We will allow guarantors the same latitude in order not to discriminate against vessel operators who will be subject to Part 544 on March 17, 1979, and who are now covered by guaranties under Part 542 revised.

Rather than amend the "Time to Apply" section of the regulations, the Commission's staff is hereby directed to compensate for the statutory time constraints imposed upon applicants by means of expanding the existing joint enforcement program with the Coast Guard to encompass these OCSLAA requirements as well. To better reflect this decision, however, the Commission will amend a related provision of the regulations (paragraph (d) of section 544.3—General) by deleting the phrase "Before March 17, 1979," and changing the words "shall have submitted" to "shall submit as soon as possible."

Moreover, for the above mentioned reasons, we find good cause to make these regulations effective upon publication in the *Federal Register* rather than after the usual 30-day period.

Section 544.6—Applications, General Instruction

Paragraph (b) of this section provides that only vessel operators may apply for Certificates. Continental Oil comments that, "Because of the duplicate liability of 'owner or operator,' this should be amended to protect the owner if the owner and operator are not the same." Unfortunately Continental Oil provided no explanation to its comments. Therefore, we are not able to discern any reason for changing paragraph (b).

Paragraph (c) of this section provides that the application form shall be signed by an authorized official of the applicant, whose title shall be shown in the space provided on the application. Otherwise, a written statement proving authority to sign shall be required. Continental Oil recommends that "a general corporate policy statement should be adequate to prove authority in the person who signs the application." If the "general corporate policy statement" so authorizes a corporate official, then the regulations are broad enough to accommodate this comment. Therefore, no change will be made.

Paragraph (d) of this section provides that if, prior to the issuance of a Certificate, the applicant becomes aware of a change in any of the facts contained in the application or supporting documentation, the applicant shall notify the Commission in writing within 5 days of becoming aware of the change. Continental Oil suggests that 5 days be changed to 15 days.

The reason for paragraph (d) is to encourage applicants to correct, promptly, any misstatements on the application so that the Commission will not issue an incorrect Certificate. Incorrect Certificates result in the necessity for applicants to pay $20 recertification fees and may lead to detention of the involved vessels. Accordingly, we see no justification for the suggested change.

Section 544.7—Renewal of Certificates

This section requires certificants to apply for a new Certificate at least 21 days, but no earlier than 90 days, prior to the expiration date of the existing Certificate. Such applications are required to be made in writing, but not by submitting a new application Form FMC-192, unless the Certificant for some reason wishes to submit a new form rather than a letter. Continental Oil asserts that 21 days may not be sufficient and suggests that an expired Certificate and a copy of the renewal application "should be adequate to protect the owner or operator while awaiting such renewal Certificate."

We are of the opinion that the time period provided, i.e., 21 to 90 days, is more than sufficient time to obtain a renewal Certificate from the Commission. Moreover, we would have great difficulty in requesting the Coast Guard to accept an expired Certificate just because it was accompanied by what purports to be a copy of a renewal application. The Commission and the various enforcement agencies (in this case, the Coast Guard) have or can quickly enter into flexible arrangements whereby vessel operators need never fear *unjustified* vessel detentions under any of the Commission's vessel certification regulations. No change will be made to section 544.7.

Section 544.8(b)(3)—Self Insurance

The AICPA, Exxon and Continental Oil submitted comments with respect to proposed section 544.8(b)(3)(i).

All of the AICPA's comments are concerned with technical clarification of section 544.8(b)(3)(i) and will be adopted by the Commission in the final regulations. For example, "statement of income" will be expanded to read "statement of income, retained earnings and changes in financial position," which description is technically more correct. Similarly, "certified by an independent Certified Public Accountant" will be changed to read "audited by an independent Certified Public Accountant."

The comments made by Exxon and Continental Oil with respect to section 544.8(b)(3)(i) are concerned with the substance of that section, except for Exxon's suggestion that the term "balance sheet" be changed to "statement of financial position" in order to avoid confusion over terminology.[4]

Both Exxon and Continental Oil take exception to the provision in section 544.8(b)(3)(i) which requires that, in the case of a corporate self-insurer, only the Treasurer may certify to the accuracy of certain "additional" financial information. The same provision appears in section 544.8(b)(3)(ii).

[4] The chance that confusion would result from use of the term "balance sheet" seems remote. In any case, the changes in terminology made as a result of comments submitted by AICPA should avoid any such confusion.

The assertion is made that other appropriate officials of a corporation should be allowed to so certify. We agree with that position and will change the relevant portion of sections 544.8(b)(3)(i) and 544.8(b)(3)(ii) to read "Treasurer (or equivalent official)." That change will make section 544.8(b)(3)(i) coincide with its counterpart provision in Part 542 revised of Title 46, CFR.

The change does not apply to cases where self-insurers submit consolidated financial statements. In such cases, section 544.8(b)(3)(i) requires that the supplemental financial information be audited by an independent Certified Public Accountant. Exxon would have the Commission delete that requirement and allow an appropriate official of the self-insurer to submit the information without an audit by an independent Certified Public Accountant.

The Commission rejects Exxon's suggestion as being contrary to the long-held policy of not accepting annual financial data from self-insurers unless the data has been audited by an independent Certified Public Accountant. While we will accept certain financial data from, for example, a corporate Treasurer or equivalent official, such data is always based upon financial statements of a single company audited by an independent Certified Public Accountant. In the case of consolidated financial statements, the Certified Public Accountant does not break out and audit the financial position of the self-insuring company alone. Therefore, except for the temporary period discussed above under "Time to Apply," we will continue to require audit by an independent Certified Public Accountant in connection with the supplemental financial data accompanying consolidated statements.

Continental Oil asserts that section 544.8(b)(3)(ii) could present a problem for "smaller" companies. That section requires the submission of a semi-annual affidavit from a self-insurer whose net worth is not at least ten times the amount required to qualify as a self-insurer. The affidavit must state only that working capital and net worth have not fallen below the amount required to qualify as a self-insurer.

Since the same requirement appears in Part 542 revised of Title 46, CFR, and Continental Oil did not explain the nature of the problem it referred to, we will not eliminate the requirement.

Exxon and Continental Oil take exception to the time limits in section 544.8(b)(3)(iv). Those time limits (i.e., three months after the close of a self-insurer's fiscal year for annual financial statements and one month after the close of such year for semi-annual affidavits) govern the submission of the financial reports specified in sections 544.8(b)(3)(i) and 544.8(b)(3)(ii). The time limits are the same as in Part 542 revised of Title 46, CFR.

Both Exxon and Continental Oil assert that the time limits should be changed to four months for annual statements and two months for semi-annual affidavits. Neither party requested such expanded time limits in connection with Part 542 revised of Title 46, which is a much more comprehensive set of regulations enacted just last year and which set the standard for these regulations. If the Commission were to expand the time limits in these regulations, a self-insurer subject to both Part 542 revised and this Part 544 would still be governed by the shorter time limits in Part 542 revised, thus gaining no benefit from the change in these regulations. Further, section 544.8(b)(3)(iv) provides for the granting of extensions of the time limits in cases of necessity, and such extensions would provide more time than is being requested here.

Accordingly, no change will be made to section 544.8(b)(3)(iv).

Section 544.8(b)(5)—Other Methods

This section prohibits an applicant from choosing any method of demonstrating financial responsibility not specified in the regulations (i.e., Insurance Form FMC-193, Surety Bond Form FMC-194, Guaranty Form FMC-195 or self-insurance), and prohibits any modifications to such methods.

Continental Oil asserts that the Commission "could severely hamper operations by smaller companies," which is contrary to the intent of the OCSLAA, unless other methods, modifications of the methods and combinations of the methods are permitted to protect the interests of small companies.

First, acceptable combinations of the specified methods already are allowed by section 544.8(b). Second, "other" methods are not allowed because the OCSLAA, in section 305(a)(1), specifies the methods which the Commission may accept, and those methods are allowed by the regulations. Third, if the Commission were to permit "modifications" to the methods, it would, in effect, be allowing any method any party wished to establish, which was not intended by the OCSLAA.

Obviously, there would be no reason for Congress to mandate regulations governing the permitted methods if such regulations could be disregarded under the guise of "modifications." The permitted methods have been designed to comport as precisely as possible with the requirements of the underlying law. Accordingly, no change will be made.

Section 544.8(c)—Forms—General

This section provides, in pertinent part, that, "If more than one insurer, guarantor, or surety joins in executing an insurance, guaranty, or surety bond form, such action shall constitute joint and several liability on the part of such joint underwriters."

Continental Oil asserts its belief that no underwriter would agree to be *both* jointly and severally liable and (as required by the OCSLAA) subject to direct suit by a damaged party.[5] It correctly points out, however, that while the OCSLAA requires underwriters to be subject to direct suit, the law makes no mention of a joint and several liability requirement on the part of underwriters.

Lloyd's also commented upon the proposed joint and several liability provision stating that the concept was not contained in the OCSLAA and was objectionable from an insurer's point of view because it is contrary to normal underwriting practices. Lloyd's explained that the concept was incompatible with underwriting insurance in layers and with pooling arrangements whereby co-signing insurers are liable only for their respective shares of such insurance. While Lloyd's has joined in underwritings submitted to the Commission on a joint and several liability basis under Part 542 revised, it recommends that the

[5] Continental Oil's contention is incorrect, as evidenced by the submission of jointly executed insurance forms to the Commission under Part 542 revised of Title 46, CFR. Those insurance forms contain both joint and several liability and direct suit provisions.

joint and several liability provision in these Part 544 regulations be deleted in order to encourage greater insurance capacity for purposes of OCSLAA risks.

We believe that the last mentioned point should be given substantial weight. Unlike the Part 542 revised regulations, no United States insurer has confirmed that it will underwrite vessel risks under the OCSLAA, and Congress obviously was concerned with the matter, as evidenced by section 305(d) of the statute. That section requires a study to determine, among other things, "whether adequate private oil pollution insurance protection is available."

In order not to impede the underwriting industry's willingness to write OCSLAA pollution coverage, and because there is no specific requirement in the law for joint and several liability on the part of underwriters, that proposed provision will be deleted from section 544.8(c), with respect to insurers and surety companies, and from the insurance and surety bond forms which are appended to and made part of the regulations in Part 544.

Accordingly, if more than one insurer or surety company joins in executing an Insurance Form FMC-193 or Surety Bond From FMC-194, each insurer or surety company will be liable only to the limits of its agreed coverage *as stated on the insurance or bond form*. No such form will be fully acceptable, of course, unless, in the aggregate, either 100 percent coverage is indicated or no individual percentages or layers are indicated. In the latter case, each insurer or surety will be presumed to be jointly and severally liable for the total amount of the risk, unless it can show the contrary.

We wish to emphasize that by deleting the contested provision we do not intend any change in our definition of "insurer" for purposes of these or any of the Commission's other water pollution regulations. Insurance entities such as the Underwriters at Lloyd's are considered to be single insurers for the limited purposes of liability under such regulations. That is, nothing contained herein should be construed as meaning, for example, that a claimant must proceed against each "underwriter" of each "syndicate" participating in a "Lloyd's" undertaking as a result of the deleted provision.

We also wish to note that the provision was not deleted with respect to guarantors. They are, in effect, self-insurers on behalf of (and, in some cases, in union with) vessel operators, and usually are closely affiliated companies. We see no justification in permitting a situation where artificial corporate shields could insulate vessel operators from compensating claimants up to the full amount of the financial responsibility required by the OCSLAA.

Section 544.9—Issuance of Certificates

Paragraph (d) of this section requires a certificant to notify the Commission in writing within five days after becoming aware ofa change in the facts contained in the application or supporting documentation which lead to the issuance of a Certificate. Examples of such changes include vessel name changes or a change of address.

Paragraph (e) of this section requires a certificant to complete the reverse side of a voided Certificate and return it to the Commission within 10 days after the Certificate becomes void. The usual reason for a Certificate becoming void is cessation of the operator's responsibility for the vessel named on the Certificate.

Continental Oil asserts that the respective 5 and 10 day time limits in paragraphs (d) and (e) are too short and should be tripled to 15 and 30 days. In view of the fact that the proposed 5 and 10 day time limits are not key elements of the regulations, we have no objection to granting more time. Because, however, updating of information should be done as promptly as possible we will double rather than triple the paragraph (d) time limits and make it 10 days. The paragraph (e) time limit will be tripled to 30 days as requested.

Section 544.11 —Denial or Revocation of Certificates

Paragraph (b) of this section identified four situations where denial or revocation of a Certificate shall be imediate and without prior notice. For example, a Certificate is automatically voided when the certificant sells the vessel named thereon to a new operator. Similarly, denial of issuance of a Certificate occurs automatically in a case where an applicant sells the vessel for which the applicant had submitted an application in expectation of operating the vessel.

Continental Oil asserts that such immediate revocation or denial is patently outside due process. We disagree. The regulations do not in all cases, provide for *immediate* revocation or denial. We would refer Continental Oil to the last sentence in paragraph (b) which requires the Commission to advise the applicant or certificant in writing of the reason for an intended denial or revocation in any case where such action is necessary to avoid an inappropriate denial or revocation. No change will be made to paragraph (b).

Paragraph (c) of this section concerns a situation where the Commission has written to a certificant warning it that its Certificate will be revoked because it failed to submit required financial statements or affidavits. In such case, the intended revocation would become effective 10 days after the date of the warning letter, unless the certificant demonstrated prior to revocation, that the financial statements or affidavits had been timely filed.

Continental Oil recommends that the 10 day time limit be lengthened to 20 days.

We again point out that a self-insurer subject to regulations in this part would almost certainly be a self-insurer under the existing Part 542 revised regulations as well. Since the Part 542 revised regulations also contain the 10 day time limit, nothing would be gained by extending the time limit in these regulations, i.e., the 10 day time limit would still apply to the certificant under Part 542 revised.

If a self-insurer cannot readily demonstrate its ability to meet its statutory liability, it should not be permitted to maintain its status as a self-insurer. To that end, the Commission must ensure that it can determine the financial condition of each self-insurer, insofar as the built-in delays of the self-insurance reporting method permit, at least annually. If a self-insurer cannot, in a timely fashion, meet its reporting requirement, especially in view of the 45-day time extensions available under the regulations, it should not be necessary for the Commission to solicit compliance. No change, therefore, will be made to paragraph (c).

Paragraph (d) of this section provides that in certain cases an applicant or certificant may request a hearing to show that an intended denial or revocation is unwarranted. Continental Oil endorses that provision but believes that paragraph (b) must be amended to allow for it. We would again refer Continental Oil to the last sentence in paragraph (b) whereby *the Commission must, in certain cases*, give written notice of its intention to deny or revoke. Such written notice is the "intended denial or revocation" mentioned in paragraph (d) and is the catalyst for the request for a hearing provided for in paragraph (d). No amendment is necessary.

Section 544.12—Fees

Paragraph (e) of this section establishes a $20 certification fee "for each Certificate issued." Continental Oil is unable to determine whether that $20 fee would apply in a case where an applicant paid its $100 application fee and was applying for only one Certificate. The answer is affirmative.

Section 544.13—Enforcement

Paragraph (a) of this section establishes a civil penalty of not more than $10,000 for failure to comply with these Part 544 regulations, and provides that such penalty "may be assessed and compromised by the Federal Maritime Commission pursuant to the provisions of section 312(a) of the Act."

Continental Oil asserts that in order to satisfy both the statute and constitutional due process, paragraph (a) must be amended to note that section 312(a) of the statute requires the giving of notice and opportunity for a hearing before a penalty is assessed.

While Continental Oil's assertion is incorrect, we have no objection to amending paragraph (a) as requested and will do so.

Section 544.14—Service of Process

This section requires each applicant and underwriter to designate a United States agent for service of process on the application, insurance, bond or guaranty form it submits. Each designation must be acknowledged in writing by the designated agent unless that agent has furnished the Commission with a "master" concurrence. A "master" concurrence is an agreement to act as agent for service of process for any applicant or underwriter who designates such agent, provided that such applicant or underwriter meets certain conditions. An insurance adjusting firm, for example, may furnish a "master" concurrence to act as agent for any vessel operator insured by a particular insurer.

Continental Oil asserts that no United States company should have to designate an agent for service of process. Companies domiciled in the United States may appoint themselves as agent, as is stated on Part IV of the application form. No change will be made in this section of the regulations.

We urge all United States agents for service of process who have "master" concurrences on file with the Commission for purposes of Part 542 revised and/or Part 543 of this title, to either revise those documents to incorporate this Part 544 or file separate "master" concurrences for that purpose.

Insurance Form FMC-193

Lloyd's and AIMU submitted comments with respect to this Form.

Lloyd's noted correctly, that in certain cases the OCSLAA places unlimited liability on a *vessel owner and operator*. It then goes on to state, however, that insurers are also subject to the unlimited liability and thus will not be inclined to write OCSLAA insurance coverage under these regulations because knowledge of the total risk exposure is an essential basis for any underwriting.

We do not believe that either the statute or the terms of proposed insurance Form FMC-193 impose such unlimited liability on the *insurer* as well as the owner and operator. We can find nothing in the statute which would lead us to such an interpretation of mandatory unlimited liability on the part of an underwriter.[6] Nor is there anything in the language of Insurance Form FMC-193 which would place such unlimited liability on the insurers who execute that form. To the contrary, in two places on the first page of that form the insurer's liability is limited, specifically, to $300 per gross ton or $250,000, whichever is greater, per incident. That specifically limited amount of liability in the insurance form is based on the wording in section 305(a)(1) of the OCSLAA which cannot be read as requiring financial responsibility in an amount greater than $300 per gross ton or $250,000, whichever is greater, despite the fact that the *vessel owner or operator* can become liable for a greater amount in certain situations. No amendment to the insurance form is necessary.

The comment submitted by the AIMU recommends an amendment to the proposed wording in the third paragraph of the insurance form, which now reads in part as follows:

"The insurer shall be entitled to invoke only the rights and defenses permitted by Title III of the Act to the vessel *operator* and the defense that the incident was caused by the willful misconduct of the vessel *operator*." (Emphasis added.)

The AIMU refers to the fact that section 305(c) of the OCSLAA makes available to an underwriter not only the rights and defenses permitted by the statute to the vessel operator, but the rights and defenses permitted to the vessel *owner* as well. The intent of the OCSLAA is the same, the AIMU points out, with respect to the defense that an incident was caused by the willful misconduct of the vessel owner; not just the vessel operator.

The AIMU also points to the fact that the operator may include the owner as an assured on the underlying insurance policy, frequently at the urging of the owner. Thus, in a case where a claim is asserted directly against an underwriter, it is important that the underwriter not be denied the right to invoke the defense that the incident was caused by the willful misconduct of the *owner*.

The position taken by the AIMU is correct (even if an owner was not named on any underlying insurance policy). It was not our intent to limit the defenses available to underwriters under the statute. This can be seen from a reading of section 544.8(d) of the regulations which is meant to govern the insurance, bond and guaranty forms, and which purposely makes no mention of owners or operators. It should be obvious, moreover, that because under the OCSLAA any liability incurred by a vessel owner is also the liability of the vessel operator, equitably, any defense available to the owner also would be available to the operator—and, therefore, to the underwriter in a case of direct action against the underwriter.

[6] We assume Lloyd's is not referring to an underwriter's default under section 307(j)(5) of the OCSLAA whereby a "defendant" may lose the right to limit liability. We do not, in any case, read that section as meaning that an underwriter could be subjected to unlimited liability.

The reason why we did not specifically mention vessel owners in the above quoted language of the insurance form is based on our intention not to burden underwriters with the *requirement*[7] to name the often uninsured vessel owners on the forms. (See item number four under the "Supplementary Information" section in our January 3, 1979, Notice of Proposed Rulemaking.) Thus, only the assured operators need be named on the forms and the language of the forms is geared to the assured operators as applicants for Certificates. It would make for awkward construction and confusing reading to suddenly mention in the forms the role of some unnamed and perhaps uninsured owners with respect to defenses, while having remained silent in the forms concerning the role of such owners with respect to liability and other matters. By expanding the content of the forms in order to address such other matters (e.g., the inability of an owner to add or delete vessels) the forms would become unduly long and complex.

We agree with the position of the AIMU concerning the intent of the OCSLAA, but we do not believe it is desirable or necessary to amend the forms in order to protect that position. Since this matter of available defenses is important to all underwriters, the correct construction of the forms as to defenses will be specifically ordered below.

NOW, THEREFORE, IT IS ORDERED, That, effective upon publication in the *Federal Register*, Subchapter B of Chapter IV of Title 46 of the Code of Federal Regulations is amended by the addition of a new Part 544, as set forth below; and

IT IS FURTHER ORDERED, That the insurance, bond and guaranty forms appended hereto shall be construed as entitling underwriters to invoke the rights and defenses permitted by Title III of the Outer Continental Shelf Lands Act Amendments of 1978 to both vessel owners and vessel operators, as well as the defense that an incident was caused by the willful misconduct of the vessel owners or vessel operators, whether or not owners are named as joint assureds on such forms or on any underlying insurance policies; and

IT IS FURTHER ORDERED, That the provision in section 544.8(b)(3)(i) which requires supplemental schedules to be audited by independent Certified Public Accountants is temporarily waived. Such supplemental schedules shall be acceptable if prepared by an appropriate financial officer of the self-insurer or guarantor. The hereby ordered waiver shall be applicable only to those persons who on the date of this Order are approved self-insurers or guarantors under Part 542 revised of Title 46 of the Code of Federal Regulations. This waiver shall terminate without further notice at the time new financial statements are due in accordance with section 544.8(b)(3)(iv).

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

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[7] Underwriters are free, of course, to name both owners and operators as assureds on the insurance, bond and guaranty forms. By doing so, however, an underwriter would remain at risk with respect to the named owner even after the named operator was relieved of its operator status. Such risk would continue under the form until the date the owner sold the involved vessel (assuming an incident had not occurred prior to sale) or the date the risk was terminated pursuant to all of the terms of the form, whichever date occurred first.

PART 544—FINANCIAL RESPONSIBILITY FOR OIL POLLUTION—OUTER CONTINENTAL SHELF

AUTHORITY: This Part 544 is issued under section 305(a)(1) of the Outer Continental Shelf Lands Act Amendments of 1978 and sections 1–201 and 1–203 of Executive Order 12123 of February 26, 1979.

§544.1 *Scope*

(a) These regulations (Part 544 of Title 46 of the Code of Federal Regulations) implement the vessel financial responsibility requirements of the Outer Continental Shelf Lands Act Amendments of 1978. These regulations apply to all vessels engaged in any segment of the transportation of oil produced from an offshore facility on the Outer Continental Shelf when such vessels are operating in the waters above submerged lands seaward from the coastline of a State or the waters above the Outer Continental Shelf.

(b) Vessels having on board Outer Continental Shelf-produced oil after that oil has been brought ashore, or loaded as a result of removal operations after an oil spill, do not thereby become subject to the regulations in this Part.

§544.2 *Definitions*

For purposes of this Part, the following terms shall have the indicated meanings:

(a) "Act" means the Outer Continental Shelf Lands Act Amendments of 1978 (Public Law 95–372).

(b) "Applicant" means any vessel operator, as defined in paragraph (p) of this section, who has applied for a Certificate or for the renewal of a Certificate.

(c) "Application" means Application for Certificate of Financial Responsibility (Outer Continental Shelf), Form FMC–192.

(d) "Cargo" means oil carried on board a vessel for purposes of transportation, in any quantity and under any conditions.

(e) "Certificant" means any operator, as defined in paragraph (p) of this section, who has been issued a Certificate.

(f) "Certificate" means a Certificate of Financial Responsibility (Outer Continental Shelf) issued by the Federal Maritime Commission pursuant to the regulations in this Part.

(g) "Commission" means the Federal Maritime Commission.

(h) "Damages" means economic loss arising out of or directly resulting from oil pollution, including injury to, or destruction of, real or personal property; loss of use of real or personal property; injury to, or destruction of, natural resources; loss of use of natural resources; loss of profits or impairment of earning capacity due to injury to, or destruction of, real or personal property or natural resources; loss of tax revenue for a period of one year due to injury to real or personal property; and reasonable costs associated with preparation and presentation of natural resource damage claims. Removal costs are not included in this definition.

(i) "Discharge" means any emission, intentional or unintentional, and includes, but is not limited to, spilling, leaking, pumping, pouring, emptying, or dumping.

(j) "Financial responsibility" means proof of financial ability to satisfy claims for damages and removal costs as required by section 305(a)(1) of the Act.

(k) "Incident" means any occurrence or series of related occurrences, involving one or more vessels, which causes or poses an imminent threat of oil pollution from any source. For purposes of these regulations, an "imminent" threat, as used in the Act, is synonymous with a "substantial" threat, as used in section 311 of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1321).

(l) "Insurer" means one or more acceptable insurance companies, corporations or associations of insurers, shipowners' protection and indemnity associations, or other persons acceptable to the Commission.

(m) "Offshore facility" includes any oil refinery, drilling rig, drilling structure, oil storage or transfer terminal, or pipeline, or any appurtenance related to any of the foregoing, which is used to drill for, produce, store, handle, transfer, process, or transport oil produced from the Outer Continental Shelf, and is located on the Outer Continental Shelf, except that a vessel or a deepwater port (as the term "deepwater port" is defined in section 3(10) of the Deepwater Port Act of 1974 (33 U.S.C. 1502)) is not included in this definition.

(n) "Oil" means petroleum, including crude oil or any fraction or residue therefrom, whether or not carried on board a vessel.

(o) "Oil pollution" means:

(1) the presence of oil, either in an unlawful quantity or which has been discharged at an unlawful rate (i) in or on the waters above submerged lands seaward from the coastline of a State, or on the adjacent shoreline of such State or (ii) on the waters of the contiguous zone established by the United States under Article 24 of the Convention on the Territorial Sea and the Contiguous Zone (15 UST 1606); or

(2) the presence of oil in or on the waters of the high seas outside the territorial limits of the United States (i) when discharged in connection with activities conducted under the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.) or (ii) causing injury to or loss of natural resources belonging to, appertaining to, or under the exclusive management authority of, the United States; or

(3) the presence of oil in or on the territorial sea, navigable or internal waters, or adjacent shoreline of a foreign country, in a case where damages are recoverable by a foreign claimant under Title III of the Act.

(p) "Operator" or "vessel operator" means a demise charterer or any other person responsible for the operation of a vessel, including a person who both owns and is responsible for the operation of a vessel.

(q) "Outer Continental Shelf" means all submerged lands lying seaward and outside of the area of lands beneath navigable waters (as the term "lands beneath navigable waters" is defined in section 1301 of the Submerged Lands Act (43 U.S.C. 1301)), and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control.

(r) "Owner" or "vessel owner" means any person holding legal or equitable title to a vessel. In a case where a Certificate of Registry or equivalent document has been issued, the owner shall be deemed to be the person or persons whose name or names appear thereon as owner; *provided, however*, that where a Certificate of Registry has been issued in the name of the President or Secretary of an incorporated company pursuant to 46 U.S.C. 15, such incorporated company will be deemed to be the owner; and *provided, further*, that this definition does not include a person who, without participating in the management or operation of a vessel, holds indicia of ownership primarily to protect a security interest in that vessel.

(s) "Person" includes, but is not limited to, an individual, a governmental entity, a firm, a corporation, an association, a partnership, a joint-stock company, a joint venture, a consortium, a business trust, or an unincorporated organization.

(t) "Public vessel" means a vessel, not engaged in commerce, the operator of which is the Government of the United States or a State or political subdivision thereof, or the government of a foreign entity.

(u) "Remove," "removing," or "removal" means (1) the physical removal of oil from the water and shorelines; (2) the taking of such other actions as may be necessary to prevent, minimize or mitigate damage to the public health or welfare (including, but not limited to, fish, shellfish, wildlife and public or private property, shorelines and beaches), resulting from a discharge or substantial threat of a discharge of oil; (3) the restoration or replacement of natural resources damaged or destroyed as the result of a discharge of oil in violation of section 311(b) of the Federal Water Pollution Control Act; (4) reasonable measures taken, after an incident has occurred, to prevent, minimize, or mitigate oil pollution from such incident; and (5) measures of similar or related nature under section 5 of the Intervention of the High Seas Act (33 U.S.C. 1474).

(v) "Submerged lands seaward from the coastline of a State" means the area of "lands beneath navigable waters" as described in section 2(a) of the Submerged Lands Act (43 U.S.C. 1301(a)(2)). Generally, that area can be described as all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coastline of a State, and to the boundary line of each such State where in any case such boundary extends seaward (or into the Gulf of Mexico) beyond three geographical miles.

(w) "Underwriter" means an insurer, a surety company, a guarantor, or any other person, other than the operator, who provides evidence of financial responsibility for an operator.

(x) "United States" or "State" means any place under jurisdiction of the United States, including, but not limited to, the States, the District of Columbia, the Commonwealth of Puerto Rico, the Canal Zone, Guam, American Samoa, the United States Virgin Islands, the Trust Territory of the Pacific Islands and the Commonwealth of the Northern Mariana Islands.

(y) "Vessel" means every description and size of watercraft or other artificial contrivance, other than a public vessel, which is operating in the waters above the Outer Continental Shelf or in the waters above submerged lands seaward from the coastline of a State, and which is engaged in any segment of the transportation of Outer Continental Shelf-produced oil from an offshore facility, including carrying, lightering, transshipping, or storing such oil.

§544.3 *General*

(a) The regulations in this Part set forth the procedures whereby an owner and operator of a vessel subject to these regulations can demonstrate that each is financially able to meet liability for removal costs and damages in the amount of $300 per gross ton of such vessel, of $250,000, whichever is greater. That amount represents the maximum amount of liability under section 304 of the Act in a case where the owner and operator of a particular vessel are entitled to limit their liability. Owners and operators are jointly, severally and strictly liable.

(b) Upon the satisfactory demonstration of financial responsibility in accordance with the regulations of this Part, the Commission shall issue Certificates which are to be carried aboard the vessels named on such Certificates. The carriage of a valid Certificate will indicate to the United States Coast Guard that the vessel named thereon is in compliance with the financial responsibility provisions of the Act. Failure to carry a valid Certificate subjects a vessel to enforcement action by the Coast Guard and also subjects the vessel owner and operator to penalty procedures by the Commission.

(c) Where a vessel is operated by its owner, or the owner is responsible for its operation, the owner shall be considered to be the operator and shall file the application for a Certificate. In all other cases, the vessel operator shall file the application.

(d) The operator of each vessel subject to the regulations in this Part shall submit as soon as possible to the Commission a properly completed Application Form FMC-192, acceptable evidence of financial responsibility and application and certification fees. Otherwise, such vessel operator shall not permit such vessel to have on board, for any purpose, oil that has been produced by an offshore facility, unless that oil has previously been brought ashore at a United States or foreign location.

(e) The gross tonnage of a vessel subject to these regulations shall be presumed to be that indicated in the vessel's Certificate of Registry, or, in the absence thereof, other marine documents acceptable to the Commission. If a vessel has more than one gross tonnage, the higher tonnage shall apply.

§544.4 *Where to Apply and Obtain Forms*

(a) Applications for Certificates (Form FMC-192), together with fees and evidence of financial responsibility, shall be filed with the Commission at the following address:

Office of Water Pollution Responsibility
Federal Maritime Commission
Washington, D.C. 20573

(b) Regulations concerning application forms are set forth in sections 544.5 and 544.6. Regulations concerning fees are set forth in section 544.12, and regulations concerning evidence of financial responsibility are set forth in section 544.8. Forms may be obtained from the Commission's Office in Washington, D.C. and from the Commission District Offices at New York, New York; New Orleans, Louisiana; Miami, Florida; San Francisco, California; Chicago, Illinois; Savannah, Georgia; San Pedro, California and Hato Rey, Puerto Rico. All requests for assistance, including telephone inquiries, in completing applications should be directed to the Commission's Office of Water Pollution Responsibility in Washington, D.C.

§544.5 *Time to Apply*

A completed application, fees and evidence of financial responsibility shall be filed as soon as possible before March 17, 1979. After that date, filings shall be made at least 21 days prior to the date the Certificate is required. Applications will be processed in the order in which they are filed.

§544.6 *Applications, General Instructions*

(a) All applications and supporting documents shall be in English. All monetary terms shall be in United States currency.

(b) Only vessel operators, as defined in paragraph (p) of section 544.2, may apply for a Certificate.

(c) The application shall be signed by an authorized official of the applicant, whose title shall be shown on the application. A written statement proving authority to sign shall be required where the signer is not disclosed on the application as an individual (sole proprietor) applicant, a partner in a partnership applicant, or a director or officer of a corporate applicant.

(d) If, prior to the issuance of a Certificate, the applicant becomes aware of a change in any of the facts contained in the application or supporting documentation, the applicant shall notify the Commission in writing, within five (5) days.

§544.7 *Renewal of Certificates*

Applications for renewal Certificates shall be made in writing at least 21 days, but no earlier than 90 days, prior to the expiration dates of the existing

Certificates. Each application shall be accompanied by appropriate recertification (renewal) fees, shall identify any item of information which has changed since the original application was filed, and shall set forth the correct information in full.

§544.8 *Establishing Financial Responsibility*

(a) *General*—In addition to filing Form FMC-192 and appropriate fees, each vessel operator subject to the regulations in this Part shall demonstrate that it is able to satisfy liability under Title III of the Act, in an amount not less than $300 per gross ton or $250,000, whichever is greater. The evidence of financial responsibility required by these regulations shall cover the vessel owners as well as the vessel operators, jointly and severally. The amount of evidence of financial responsibility required by the regulations in the Part is separate from and in addition to the amount, if any, required of an applicant pursuant to Parts 540, 542 and 543 of this title.

(b) *Methods*—An applicant shall establish evidence of financial responsibility by any one of, or by any acceptable combination of, the following methods:

- Insurance;
- Surety Bond;
- Self-Insurance;
- Guaranty.

(1) *Insurance*—Insurance may be established by filing with the Commission an Insurance Form FMC-193 executed by an insurer which is acceptable to the Commission for purposes of the regulations in this Part;

(2) *Surety Bond*—An applicant may file with the Commission a Surety Bond Form FMC-194, executed by the applicant and by a surety company which is located in the United States and which is acceptable to the Commission for purposes of the regulations in this Part. To be acceptable, surety companies must, at a minimum, be certified by the United States Department of the Treasury with respect to the issuance of Federal bonds in the penal sum of the bonds to be issued under these regulations;

(3) *Self-Insurance*—A vessel operator may qualify as a self-insurer by maintaining, in the United States, working capital and net worth, each in the amount of $300 per gross ton of the largest vessel to be self-insured or $250,000, whichever is greater. For the purposes of this subparagraph, "working capital" is defined as the amount of current assets located in the United States, less *all* current liabilities; and "net worth" is defined as the amount of all assets located in the United States, less *all* liabilities. The amounts of working capital and net worth required by the subparagraph are in addition to the amount of working capital and net worth, if any, required by Part 540 (Security for the Protection of the Public), Part 542 (Financial Responsibility for Water Pollution) and Part 543 (Oil Pollution Cleanup—Alaska Pipeline) of this title. Maintenance of the required working capital and net worth shall be demonstrated by submitting with the initial application the items specified in subdivision (i) of this subparagraph for the applicant's last fiscal year preceding the date of application. Thereafter, for each of the applicant's fiscal years, the applicant/certificant shall submit the items specified in subdivisions (i) and (ii) of this subparagraph and shall be

subject to the provisions of subdivisions (iii), (iv), (v) and (vi) of this subparagraph:

(i) *Initial and Annual Submissions*—An applicant/certificant shall submit, for its most recent fiscal year, a non-consolidated balance sheet and related statement of income, retained earnings and changes in financial position for the year then ended audited by an independent Certified Public Accountant. Those financial statements shall be accompanied by an additional statement from the applicant's/certificant's Treasurer (or equivalent official) certifying to both the amount of current assets and the amount of total assets, included in the accompanying balance sheet, which are located in the United States and acceptable for purposes of this Part, e.g., not pledged for purposes of Part 540, Part 542 or Part 543. If the balance sheet and related statement of income, retained earnings and changes in financial position cannot be submitted in non-consolidated form, consolidated statements may be submitted if accompanied by supplemental schedules prepared by the applicant/certificant and audited by an independent Certified Public Accountant, which present the amount by which (A) the applicant's/certificant's total assets, located in the United States and acceptable for purposes of this Part, exceed its total liabilities, and (B) the applicant's/certificant's current assets, located in the United States and acceptable for purposes of this Part, exceed its current liabilities. Such additional statement audited by the Certified Public Accountant must specifically name the applicant/certificant, must indicate that the amounts so presented relate only to the applicant/certificant, apart from any other entity, and must identify the consolidated financial statement to which it applies;

(ii) *Semi-Annual Submissions*—When the applicant's/certificant's demonstrated net worth is not at least ten times the required amount, an affidavit shall be filed by the applicant's/certificant's corporate Treasurer (or equivalent official) covering the first six months of the applicant's/certificant's fiscal year. Such affidavits shall state that neither the working capital nor the net worth have, during the first six months, fallen below the required amounts;

(iii) *Additional Submissions*—If an applicant's/certificant's annual and semi-annual submissions of financial data under Parts 540, 542 or 543 demonstrate amounts large enough to meet the requirements of this Part as well, separate annual and semi-annual submissions for purposes of this Part shall not be necessary. Additional financial information, however, shall be submitted upon request of the Commission. All applicants/certificants who choose self-insurance shall notify the Commission within five days of the date such persons know, or have reason to believe, that the amounts of working capital or net worth have fallen below the amounts required by this subparagraph;

(iv) *Time for Submissions*—All required annual financial statements shall be received by the Commission within three calendar months after the close of the applicant's/certificant's fiscal year, and all six-month affidavits within one calendar month after close of the applicable six-month period. Upon written request, the Commission may grant a reasonable extension of the time limits for filing financial statements/affidavits, provided that the request sets forth good and sufficient reason to justify the requested extension and is received

15 days before the statements/affidavits are due. The Commission will not consider a request for an extension of more than 45 days;

(v) *Failure to Submit*—Failure to timely file any statement, data, of affidavit required by this subparagraph (3) shall cause the revocation of the Certificate;

(vi) *Waivers of Submissions*—For good cause shown in writing by the applicant/certificant, the Commission may waive the working capital requirement in cases where the applicant/certificant is an economically regulated public utility, a municipal or higher-level governmental entity, or an entity which operates solely as a charitable, non-profitmaking organization. The Commission will consider good cause to have been shown in those cases when the applicant/certificant demonstrates in writing that the grant of such waiver would benefit at least a local public interest without resulting in undue risk to the environment *and* without resulting in undue risk that the applicant's/certificant's limits of liability could not be met. In addition, for good cause shown in writing by an applicant/certificant, the Commission may waive the working capital requirement in any case where it can be demonstrated that working capital is not a significant factor in the applicant's/certificant's financial condition. An applicant's/certificant's net worth in relation to the amount of its exposure under the Act, as well as a history of stable operations will be major elements in such demonstration;

(4) *Guaranty*—A vessel operator may file with the Commission a Guaranty Form FMC-195 executed by a guarantor acceptable to the Commission for purposes of the regulations in this Part. A guarantor shall be subject to and must fully comply with all of the self-insurance provisions of subparagraph (3) of this paragraph (b). In addition, the amounts of working capital and net worth required to be demonstrated by an acceptable guarantor shall be no less than the aggregate amounts underwritten as a guarantor and self-insurer pursuant to these regulations and the regulations of Part 540, Part 542 and 543 of this title;

(5) *Other Methods*—An applicant may not choose any other method of demonstrating financial responsibility, nor any modifications of any of the foregoing methods:

(c) *Forms—General*—The Commission's Application Form FMC-192, Insurance Form FMC-193, Surety Bond Form FMC-194 and Guaranty Form FMC-195, as appended to this Part, are hereby incorporated into this Part. If more than one guarantor joins in executing a guaranty form, such action shall constitute joint and several liability on the part of such joint guarantors. Each form submitted to the Commission pursuant to these regulations shall set forth in full the correct name of the vessel operator to whom Certificates are to be issued.

(d) *Direct Action*—Forms FMC-193 through FMC-195 shall permit a claimant to commence an action for removal cost and damage claims authorized by section 303 of the Act directly against the underwriter. Such forms shall also provide that in the event such action is brought directly against the underwriter, such underwriter shall be entitled to invoke only those rights and defenses permitted by section 305(c) of the Act.

(e) *Public Access to Data*—Financial data filed by applicants, certificants, and underwriters shall be public information to the extent required by the Freedom of Information Act and permitted by the Privacy Act.

§544.9 *Issuance of Certificates*

(a) After acceptable evidence of financial responsibility has been provided and appropriate fees have been paid, a separate Certificate for each vessel listed on completed applications shall be issued by the Commission. Such Certificates will be issued only to vessel operators, as defined in paragraph (p) of section 544.2 and shall be effective for not more than three years from the date of issue.

(b) The original Certificate shall be carried on the vessel named on the Certificate. However, a legible copy (certified as accurate by a notary public or other person authorized to take oaths) may be carried in lieu of the original Certificate if the vessel is an unmanned barge which (1) does not require a Certificate of Inspection from the United States Coast Guard, (2) is owned and operated by United States entities and (3) does not have a facility which the vessel operator believes would offer suitable protection for the original Certificate issued by the Commission. If a copy is carried aboard such barge, the original shall be retained at a location in the United States and shall be kept readily accessible for inspection by U.S. Government officials.

(c) Erasures or other alterations on a Certificate or copy is prohibited (even if made by government authorities) and automatically voids such Certificate or copy.

(d) If at any time after a Certificate has been issued a certificant becomes aware of a change in any of the facts contained in the application or supporting documentation, the Certificant shall notify the Commission in writing within ten (10) days of becoming aware of the change.

(e) If for any reason, including a vessel's demise or transfer to a new operator, a certificant ceases to be the vessel's operator, as defined in paragraph (p) of section 544.2, the certificant shall, within thirty (30) days, complete the reverse side of that vessel's original Certificate and return it to the Commission. Such Certificate and any copy thereof is automatically void (whether or not returned to the Commission), and its use is prohibited. Where such voided Certificate cannot be returned because it has been lost or destroyed, the certificant shall, as soon as possible, submit the following information to the Commission in writing:

(1) The number of the Certificate and the name of the vessel;

(2) The date and reason why the certificant ceased to be operator of the vessel;

(3) The location of the vessel on the date the certificant ceased to be the operator;

(4) The name and mailing address of the person to whom the vessel was returned, sold or transferred; and

(5) The reason why the Certificate cannot be returned.

§544.10 *Operator's Responsibility for Identification*

Except in the case of unmanned barges, operators who are not also the owners of certificated vessels shall carry on board such vessels the original or legible copy of the demise charter-party or any other written document which demonstrates that such operators are, in fact, the operators designated on the Certificates. Such documents shall be presented for examination to U.S. Government officials upon request.

§544.11 *Denial or Revocation of Certificates*

(a) A certificate shall be denied or revoked for any of the following reasons:

(1) Making any willfully false statement to the Commission in connection with an application for an initial Certificate or a request for a renewal Certificate or the retention of an existing Certificate;

(2) Failure of an applicant or certificant to establish or maintain acceptable evidence of financial responsibility as required by the regulations in this Part;

(3) Failure to comply with or respond to lawful inquiries, regulations, or orders of the Commission pertaining to activities subject to this Part;

(4) Failure to timely file the statements of affidavits required by subdivisions (i), (ii), or (iii) of subparagraph (3) of paragraph (b) of section 544.8 of these regulations; or

(5) Cancellation or termination of any insurance form, surety bond or guaranty issued by an underwriter pursuant to these regulations, unless acceptable substitute evidence of financial responsibility has been submitted to the Commission.

(b) Denial or revocation of a Certificate shall be immediate and without prior notice in a case where the applicant or certificant (1) is no longer the operator of the vessel in question , (2) fails to furnish acceptable evidence of financial responsibility in support of an application, (3) permits the cancellation or termination of the insurance form, surety bond or guaranty upon which the continued validity of the Certificate was based, or where (4) the Certificate no longer reflects current information, as would occur in the case of a name change or other change. In any other case, prior to the denial or revocation of a Certificate, the Commission shall advise the applicant or certificant, in writing, of its intention to deny or revoke the Certificate, and shall state the reason therefor.

c) If the reason for an intended revocation is failure to file the required financial statements or affidavits, the revocation shall be effective ten (10) days after the date of the notice of intention to revoke, unless the certificant shall, prior to revocation, demonstrate that the required statements were timely filed.

(d) If the intended denial or revocation is based upon one of the reasons in subparagraphs 544.11(a)(1) or (3), the applicant or certificant may request, in writing, a hearing to show that the applicant or certificant is in compliance with the provisions of the regulations in this Part, and, if such request is received within 30 days after the date of the notification of intention to deny or revoke, such hearings shall be granted by the Commission. Hearings pursuant to these regulations shall be conducted in accordance with the Commission's Rules of Practice and Procedure (46 CFR Part 502).

§544.12 *Fees*

(a) This section establishes the application fee which shall be imposed by the Commission for processing Application Form FMC-192 and also establishes the certification fee which shall be imposed for the issuance or renewal of Certificates.

(b) No Certificate shall be issued unless the application and/or certification fees set forth in paragraphs (d) and (e) of this section have been paid.

(c) Fees shall be paid by check, draft or postal money order in United States currency, and be made payable to the Federal Maritime Commission.

(d) Each applicant who submits Application Form FMC-192 for the first time shall pay an initial, non-refundable application fee of $100. Applications for additional Certificates, or to amend or renew existing Certificates, shall not require new application fees. However, once an Application Form FMC-192 is withdrawn or denied for any reason, and the same applicant, holding no valid Certificates, wishes to reapply for a Certificate (covering the same or new vessel), a new application form and application fee of $100 shall be required.

(e) Applicants shall pay a $20 fee for each Certificate issued. Applicants shall submit such certification fee for each vessel listed in, or later added to, an application. The $20 certification fee shall be required to renew or to reissue a Certificate for any reason, including, but not limited to, a name change or a lost Certificate.

(f) Certification fees shall be refunded, upon receipt of a written request, if the application is withdrawn or denied prior to issuance of the Certificates. Overpayments in the application fees and/or the certification fees will be refunded on request only if the refund is $10 or more. However, any overpayments not refunded will be credited for a period of three years from the date of receipt of the monies by the Commission, for the applicant's possible future use in connection with the regulations in this Part.

§544.13 *Enforcement*

(a) Any operator of a vessel subject to the regulations in this Part who fails to comply with such regulations shall be subject to a civil penalty of not more than $10,000 for each such failure to comply, in accordance with section 312(a) of the Act. Such penalties may be assessed and compromised by the Federal Maritime Commission pursuant to the provisions of section 312(a) of the Act. No penalty shall be assessed until notice and an opportunity for hearing on the alleged violation have been given.

(b) The Secretary of the Department in which the Coast Guard is operating may (1) deny entry to any port or place in the United States or the navigable waters of the United States and (2) detain at the port or place in the United States from which it is about to depart for any other port or place in the United States, any vessel subject to the regulations in this Part, which, upon request, does not produce a valid Certificate.

§544.14 *Service of Process*

When executing the forms required by the regulations in this Part, each applicant and underwriter shall designate thereon a person in the United States as its agent for service of process for the purposes of Title III of the Act and of the regulations in this Part. Each designation shall be acknowledged in writing by the designee unless the designee, pursuant to these regulations, has already furnished the Commission with a master concurrence showing that it has agreed in advance to act as the United States agent for service of process for the applicant or underwriter in question.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–8

EUROPEAN TRADE SPECIALISTS, INC., AND
KUNZLE & TASIN

v.

PRUDENTIAL-GRACE LINES, INC., AND
THE HIPAGE CO., INC.

Prudential-Grace Lines, Inc. found to have violated section 18(b)(3) of the Shipping Act, 1916. The Hipage Company, Inc., found not to have violated section 17 of the Shipping Act, 1916. Reparations granted.

William L. Borden for complainants.
John B. King, Jr., for respondent The Hipage Company, Inc.
John J. Purcell for respondent Prudential-Grace Lines, Inc.

REPORT AND ORDER

March 20, 1979

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

PROCEEDINGS

This proceeding arose by complaint of European Trade Specialists, Inc. (European), on behalf of itself as shipper and on behalf of its consignee Kunzle & Tasin (K & T), alleging violations by Prudential-Grace Lines, Inc. (Prudential) and by The Hipage Company (Hipage), an independent ocean freight forwarder, of various sections of the Shipping Act, 1916 (46 U.S.C. 801, *et seq.*). In his Initial Decision, issued July 9, 1975, Chief Administrative Law Judge John E. Cograve (Presiding Officer) concluded that no violations of the Shipping Act had been shown on the record. The Commission affirmed this decision in all respects except for the alleged violation of section 18(b)(3) (46 U.S.C. 817(b)(3)) by Prudential and the alleged violation of section 17 (46 U.S.C. 816) by Hipage, and remanded it to the Presiding Officer for further proceedings.[1] In his Initial Decision on Remand, served November 2, 1977, the Presiding Officer again

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[1] Report and Order on Remand, served May 28, 1976, 16 S.R.R. 1031 (1976).

found that neither of the Respondents had violated any provision of the Shipping Act. Exceptions to this decision have been filed by Complainants, to which Respondents have replied.

FACTS

The underlying facts of the complaint in this proceeding are set forth in the Commission's Report and Order on Remand and are incorporated herein by reference.[2] For a further elucidation of the facts of this case, the analysis of the nature of "Roto-Pads" contained in the Initial Decision at 6 (footnotes omitted) and titled "Further Findings of Fact—Section 18(b)(3) Issue" is attached as an Appendix hereto and made a part of this Report.[3]

INITIAL DECISION

In the instant case the Order on Remand required the Presiding Officer to determine the proper tariff rate to be applied to the Complainant's commodity. Appropriate consideration was to be given to tariff Item No. 1198 (Pads, Scouring, or material therefor), Item No. 0101 (Abrasives, Viz. . . . . Cloth, NOT in Belt Form and Rolls (Not Pads, Scouring, or Materials Therefor)), the Cargo, N.O.S. classification, or any other tariff classification which may be properly considered.

The Presiding Officer, after making a preliminary analysis of the nature of "Roto-Pads," found on the basis of official notice that the commodity shipped was not "abrasive cloth," and that Prudential's Tariff Item No. 0101 was therefore inapplicable. He also found that Item No. 1198 did not apply because the commodity shipped was not "scouring pads." Accordingly, the "Cargo, N.O.S." rating was held to be the applicable classification.

No specific delineation was made of what Hipage's obligations were under the circumstances of this case. The Presiding Officer found that Hipage did obtain from European additional information necessary to prepare the bill of lading after Lavino Shipping Company had questioned the classification of Roto-Pads as abrasive cloth. He also held that even if it had not, this fact alone would not constitute a violation of section 17 because no continuing practice of Hipage was proven. The Presiding Officer also found no violation of sections 510.23(c), (e) and (j) of the Commission's regulations (46 C.F.R. 510.23(c), (e) and (j)).

POSITIONS OF THE PARTIES

In its Exceptions, European alleges that the Presiding Officer erred in: (a) finding that the commodity shipped was not "abrasive cloth"; (b) excluding

[2] The original complaint alleged numerous Shipping Act violations by both Respondents arising out of a shipment of 1,009 cartons of "Roto-Pads." The shipment was assesed a "Cargo, N.O.S." rate by Prudential after European had been led to believe by International Great Lakes Shipping Company, a wholly-owned subsidiary of Lavino Shipping Company (Prudential's agent), that the lower rate for "Abrasive Cloth" would be applied. As a consequence, European's shipping costs were thirteen times greater than originally expected. Hipage, after having received shipping documents from European indicating the application of an "Abrasive Cloth" classification, allegedly failed to notify European of Prudential's reclassification of the commodity as "Cargo, N.O.S." European claimed it did not learn of the problem until after the commodity was shipped.

[3] The specific matters that the Commission directed to be determined at the remand hearings were: (a) the true nature of the commodity shipped and the tariff rate which must be applied, and (b) the actions that the freight forwarder was obliged to take to notify the shipper of any confusion and whether or not it did so.

relevant evidence and including improper evidence under the guise of official notice; (c) taking official notice of his own personal experiences; (d) misstating one issue as lack of notice of improper description rather than improper rating; (e) finding that the freight forwarder did notify the shipper of the rate change; (f) requiring the shipper to prove its claim by more than a preponderance of evidence; and, (g) not finding the freight forwarder in violation of section 17 due to its alleged violation of sections 510.23(c), (e), and (j) of the Commission's regulations.[4]

Prudential's response to the first three exceptions is that the commodity shipped was not cloth, the Complainant submitted no probative evidence that it was cloth, and, Complainant's own witness admitted that the description the freight forwarder submitted to the carrier indicated it was not cloth. In its reply to the remaining four exceptions Hipage takes the position that: (a) European did not meet its burden of proof on the notice issue; (b) the testimony and observed demeanor of the witnesses warranted the Presiding Officer finding that notice was in fact given; and (c) even if notice was not given, it was not a violation of section 17 as a matter of law because it was an isolated act.

DISCUSSION AND CONCLUSIONS

Section 18(b)(3)

In determining the proper tariff rate to be applied to the cargo in this proceeding, an objective inquiry into the true nature of the commodity and whether it can be included under a specific tariff item according to the reasonable construction of the tarrif language is required. *National Cable & Metal Co. v. Am. Hawaiian*, 2 U.S.M.C. 474 (1941). While ambiguities should be construed against the carrier, the terms must be given meaning in the sense that they are understood commercially. *Raymond International Inc. v. Venezuelan Line*, 6 F.M.B. 189 (1961). Additionally, the Presiding Officer is correct in noting that if no specific commercial meaning has been engrafted onto a term, that term must be construed according to its ordinary meaning. *Nix v. Hedden*, 149 U.S. 304 (1893).

The commodity here is described as discs made of synthetic material impregnated with abrasives, designed to be used for scrubbing and polishing industrial or institutional floors and marketed under the trade name "Roto-Pads." The Presiding Officer found that Item No. 1198 did not apply and this finding has not been contested. Additionally, no party has proffered that any other item not already considered should apply. The issue is now confined to whether Item No. 0101 or Cargo, N.O.S. is the proper classification.

The parenthetical exclusion in Item No. 0101, *i.e.*, "Not Pads, Scouring or Materials Therefor," corresponds to the description of Item No. 1198. It follows, therefore, that the parenthetical exclusion in Item No. 0101 is met upon a finding that Item No. 1198 covering "Pads, Scouring, or material therefor" does not apply. The commodity is clearly in disc form and hence the non-parenthetical exclusion *i.e.*, not belt or roll form, is met. The material is clearly an abrasive of

[4] European alleged that Hipage violated 46 C.F.R. 510.23(c), (e) and (j) by: continuing to involve itself in the transaction without clarifying the classification problem, withholding information concerning the dispute, and not itemizing the ocean freight charges on its invoice to European, as required by Commission's rules.

some sort reducing the entire controversy to the question of whether it can objectively be described as cloth.

The Presiding Officer found that the material was indeed a fabric consisting of bonded synthetic fibers, either nylon or polyester, and that as such it fell within the dictionary definition of cloth. No evidence of any particular commercial meaning of the word "cloth" was proffered. Therefore, we can conclude that the material in question is in fact "cloth" unless clear evidence exists that the "ordinary meaning" of the word is more restrictive than the dictionary meaning and would not include the commodity in question.

There have been instances where it has been found that the "ordinary" or "common" meaning of a term is not consistent with the dictionary meaning and the former should be used for judicial purposes. *Himala International v. Fern Line*, 3 U.S.M.C. 53 (1948), *Nix v. Hedda, supra*. However, these cases are rare and involve factual situations where the common usage of a term is at great variance with the technical definition. The adjudicative body deciding the issue is in effect taking official notice of facts of such notoriety that they amount to an objective certainty and are virtually indisputable. *See,* Annotation 18 ALR 2d 552. The common meaning of words is something of which courts are bound to take judicial notice, dictionary meanings not being admitted as evidence but only as aids to the memory and understanding of the court. *Nix v. Hedden, supra* at 307. However, the taking of judicial official notice is to be exercised with great caution, care being taken that the requisite notoriety exists, with every reasonable doubt on the subject being "resolved promptly in the negative", *Brown v. Piper*, 91 U.S. 37, 43 (1875).

The record here contains evidence proffered by Complainants as to the ordinary meaning of the term "cloth." Three witnesses testified that the material at issue fell within their general understanding of the word "cloth." (Tr. at 25, 184; Ex. at 1-R). No direct evidence was submitted that the material in question was not cloth. Respondents merely argued that the *descriptions* of the article proffered to the carrier did not indicate that the material was cloth. In finding that the common meaning of cloth did not include the commodity in question, the Presiding Officer relied on his individual experience in purchasing a similar product for his domestic use.

In reviewing the record, we find that, while considerable weight must be given the factual findings of the Presiding Officer, official notice taken to arrive at the restrictive construction of the tarrif term in question contravenes the weight of the record evidence. Based on the evidence of record, which includes a sample of the commodity (Ex. 1), the Commission is of the opinion that the commodity at issue does in fact come within the ordinary meaning of the term "cloth," or more precisely "abrasive cloth." Accordingly, we conclude that the commodity in question should have been rated under Item No. 0101 and not the Cargo, N.O.S. classification.

Because the bill of lading description and the good faith of the carrier are irrelevant to this finding of misclassification, we find that Respondent Prudential violated section 18(b)(3). *Union Carbide Inter-America v. Venezuelan Line*, 17 F.M.C. 181 (1973). Complainant having paid freight charges in the amount of $2,738.70 and the proper charges being $206.25, we find that Complainant is entitled to reparations in the amount of $2,532.45 from Respondent Prudential, plus interest, at the rate of 6 percent per annum in the amount of $1,038.30.[5]

Section 17

Even assuming, without deciding, that European was not notified of the classification and rating problem we cannot say that such conduct by Hipage amounts to a violation of section 17. Unless its normal *practice* was not to so notify the shipper, such adverse treatment cannot be found to violate the section as a matter of law. *Investigation of Certain Practices of Stockton Elevators*, 8 F.M.C. 181, 200 (1964). We therefore, need not reach the issue of whether in this case the shipper was so notified.

Similarly, because any violation of section 510.23 of the Commission's regulations must be considered in terms of section 17 by operation of the language of the Order on Remand, without a showing of continuing violations of these regulations no section 17 violation can be found.

THEREFORE, IT IS ORDERED, That Complainants, European Trade Specialists, Inc. and Kunzle & Tasin, are granted reparations from Respondent, Prudential-Grace Lines, Inc., in the amount of $2,532.45 plus interest in the amount of $1,038.30; and

IT IS FURTHER ORDERED, That these proceedings be discontinued.

(S) FRANCIS C. HURNEY
Secretary

[5] Interest is computed from April 1, 1972 to February 1, 1979. *See, U.S. Borax & Chem. Corp. v. Pac. Coast European Conf.*, 11 F.M.C. 451, 470 n. 28 (1968).

APPENDIX

Further Findings of Fact—Section 18(b)(3) Issue

Complainants admit that the product in issue is accurately described as "Roto-Pad Abrasive Floor Maintenance Pads." A "Roto-Pad" consists of synthetic fibers, either nylon or polyester, which are chemically bonded to form a fabric or as Complainants would have it, a "cloth" and impregnated with an abrasive. Roto-Pads are in the shape of circles or discs and are designed for use primarily on floor maintenance machines. These machines are in common parlance variously referred to a "polishers," "waxers" or "scrubbers."

"Roto-Pad" is a trade name personally coined by Mr. Bruce A. Meade, President of European Trade Specialists. Mr. Meade felt that, "To some extent it describes that they rotate and that they are a pad in that sense." The pads are also known commercially as "discs," but Mr. Meade thought that "Roto Discs" didn't sound very good. When asked why he didn't call the articles "Roto Cloth," Mr. Meade responded, "For the same reason you find cloth is difficult to pronounce, the 'th' sound in most other languages does not exist and is extremely hard to pronounce."

There were five types of Roto-Pads in the shipment in issue. Three types (Fine Polish, Spray Buff, and Red Spray) were designed for polishing, or "spray cleaning" and polishing. Two types (Thickline and Blue Spray) were designed according to Complainants for "wet scrubbing." Complainants' sales literature contains the claim of an "EXTRA BONUS" which is obtained by telling the purchasers of Roto-Pads to "punch out the center and [he will] have an excellent scouring pad for those hard to get at places."

FEDERAL MARITIME COMMISSION

DOCKET No. 77-18

SEATRAIN GITMO, INC.—
RATES ON GOVERNMENT CARGO

Domestic offshore carrier's classification system for rating government cargo found to violate Shipping Act section 18(a) and the purposes of P.L. 93-487 insofar as it permits government shippers to choose between "Government Cargo" rates and individual commercial commodity rates, and to employ shipping documents which do not reveal the contents of each shipment in terms readily convertible to commercial cargo classifications.

Neal M. Mayer and *Paul D. Coleman* for Seatrain Gitmo, Inc.

Dudley J. Clapp, Jr., Milton J. Stickles, Jr. and *E. Duncan Hamner, Jr.* for Military Sealift Command.

John Robert Ewers and *C. Douglass Miller* for Bureau of Hearing Counsel.

REPORT AND ORDER

March 21, 1979

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

On November 20, 1978, Seatrain Gitmo, Inc. (Seatrain), was ordered to show cause why those portions of its tariff FMC-F No. 1 providing for the carriage of government cargo from U.S. Atlantic Coast ports to Puerto Rico do not violate section 18(a) of the Shipping Act, 1916 (46 U.S.C. 817(a)) because of their failure to:

(1) forbid qualifying government shippers from employing any other simultaneously effective tariff provisions; and

(2) require the use of shipping documents which fully identify all items tendered for transportation.

Seatrain's tariff classifications for "Government Cargo, N.O.S.," "Government Cargo, Refrigerated," and "Government Cargo, Vehicles," are the same as those of Puerto Rico Maritime Shipping Authority (PRMSA) which were recently found unreasonable in FMC Docket No. 75-20.[1]

On December 22, 1978, Seatrain advised the Commission that it had no objection to the entry of an order invalidating the subject tariff provisions unless and until they are modified to conform to the requirements imposed by the Commission's *PRMSA* opinion. Seatrain's present "Government Cargo" classi-

[1] *Puerto Rico Maritime Shipping Authority–Rates on Government Cargo*, 18 S.R.R. 830, 1265 (1978). Hereafter referred to as the "*PRMSA* opinion."

fications were defended only by the Military Sealift Command (MSC), an intervenor herein.

MSC contends that, as a practical matter, it is unnecessary for Seatrain to modify its tariff because PRMSA is the dominant government carrier in the trade and other carriers cannot implement government cargo rates which are not "competitive" with PRMSA's.[2] The best that can be said of this "competitive rates" argument is that Seatrain may have to increase its sailings if it is to carry an appreciably greater share of MSC's cargo, something Seatrain may do at any time without authority from the Commission.

MSC also claims that in some instances it is unable to furnish a complete description of the items it ships, and proposes that the Commission therefore not require the contents of "Government Cargo" containers to be specifically identified prior to shipment.[3] MSC would leave the collection of information concerning the composition of government shipments to individual rate investigation proceedings.

This proposal is rejected for the reasons stated in the Commission's *PRMSA* opinion, *supra*. If, as MSC states, ocean carriers cannot be reasonably expected to physically inspect the contents of every "Government Cargo" container tendered for shipment, it is especially critical that government shippers routinely furnish this information so that carriers can keep their "Government Cargo" rates properly adjusted in relation to their commercial rates for similar commodities. This obligation is no greater than that required of commercial shippers who wish to avoid "Cargo, N.O.S." rates, and the time constraints recently placed upon domestic offshore commerce rate investigations by P.L. 95–475 make it all the more important that the contents of current MSC shipments be readily available to carriers offering special "Government Cargo" tariff classifications and to the Commission alike.[4]

Finally, MSC requests the Commission to abandon the approach taken in Docket No.75–20 for determining the reasonableness of "Government Cargo" rates. MSC believes it unnecessary to compare "Government Cargo" rates with the carrier's commercial rates for the commodities which actually comprise government shipments over a representative time span. Instead, MSC would examine "Government Cargo" rates in isolation and have the Commission accept any rate which covers the carrier's "fully allocated costs plus an appropriate share of a reasonable return"—essentially the basis upon which MSC negotiated domestic offshore rates prior to the adoption of P.L. 93–487.[5] Past experience has proven this approach unacceptable.

The legislative history of P.L. 93–487 indicates that MSC has been able to

[2] MSC notes that during 1977 PRMSA offered almost four times as many sailings as its closest competitor. From this fact, MSC would apparently have the Commission conclude that Seatrain will be compelled by competitive circumstances to match, rather than undercut, PRMSA's "Government Cargo" rates—a proposition which is both illogical and unsubstantiated. Seatrain's rates have recently been lower than PRMSA's. Moreover, the Commission stayed its Docket No. 75-20 Order in response to PRMSA's unchallenged contention that the application of government cargo tariff requirements to PRMSA alone would place PRMSA at a competitive *disadvantage* in attracting MSC cargo.

[3] Most MSC shipments in the Puerto Rican trade are containerized.

[4] Beginning January 16, 1979, the Commission must complete rate investigations in 180 days. Section 4, P.L. 95-475, 92 Stat. 1495.

[5] 88 Stat. 1463 (1974). This statute repealed former section 6 and amended section 5 of the Intercoastal Shipping Act (46 U.S.C. 846 and 845b) which had exempted government and charitable shipments from section 18(a) and related Shipping Act considerations.

induce domestic offshore carriers to carry its cargo at rates significantly lower than those available to commercial shippers of similar items. Although these rates varied periodically and were not necessarily below carrier costs, they tended to produce a rate structure wherein commercial shippers furnished a greater share of the carrier's revenue needs than would otherwise have been the case. It was this element of unjustified "subsidization" which Congress intended to preclude. *See Department of Defense v. Matson Navigation Company*, 17 S.R.R. 1, 5–6 (1977).

Comparison of commodity rates is a valid and accepted approach to determining the reasonableness of rates. *See Youngstown Sheet and Tube Co. v. United States*, 295 U.S. 476 (1935). All commodities would have equal rates were it not for differing handling characteristics, carrier costs and other transportation factors which warrant a price differential. "Government Cargo" is a composite of many individual commodities which traditionally appear in carriers' tariffs. To assure that rates assessed government shippers are not improperly based solely upon the identity of the shipper, a carrier publishing "Government Cargo" rates must demonstrate that any differences in the amount of revenues realized from carrying "Government Cargo" and the same quantity of commercially rated commodities are justified in terms of recognized transportation factors. Government rates which cannot be so justified are unreasonable within the meaning of Shipping Act section 18(a). Because the "Government Cargo" commodity classifications in Seatrain's tariff FMC No. F–1 do not contain the minimum provisions necessary to assure reasonable comparability between "Government Cargo" rates and the commodity rates which would otherwise apply, their use is unlawful. The type of "Government Cargo" tariff classification which would satisfy section 18(a) is further discussed in the *PRMSA* opinion and in *Sea-Land Service, Inc.–Rates on Military Cargo*, FMC Docket No. 77–38 (served simultaneously herewith), which are incorporated herein by reference.

THEREFORE, IT IS ORDERED, That, pursuant to section 18(a) of the Shipping Act, 1916, the following pages of Seatrain Gitmo, Inc.'s Tariff FMC-F No. 1, as amended or revised through the date of this Order, are cancelled effective May 1, 1979:

1st Revised Pages 86 through 93
Second Revised Pages 320 and 321
Original Pages 322 and 323

and;

IT IS FURTHER ORDERED, That, effective May 1, 1979, Seatrain Gitmo, Inc., cease and desist from publishing, filing, or operating under any tariff in the Puerto Rican trade which includes government cargo commodity descriptions which do not: (1) forbid qualifying government shipments from employing other simultaneously effective rate items in the tariff; and (2) require the use of shipping documents which fully identify the items tendered for transportation in terms which would allow the items to be accurately classified and rated under Seatrain Gitmo's commercial tariff (*i.e.*, at non "Government Cargo" rates).

(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

ORDER ON RECONSIDERATION

March 22, 1979

On December 19, 1978, the Commission served its Report in this consolidated proceeding. A Petition for Reconsideration and Motion for Stay of that decision was filed by "Container Leasing Companies and Intervenor Shippers."[1] Replies to the Petition for Reconsideration were filed by Continental North Atlantic Westbound Freight Conference, North Atlantic Westbound Freight Association, Scandinavia Baltic/U.S. North Atlantic Westbound Freight Conference, Continental/U.S. Gulf Freight Association, Pacific Westbound Conference, Far East Conference, Pacific Coast River Plate Brazil Conference, Pacific Coast European Conference, North Europe-U.S. Pacific Freight Conference and the Commission's Bureau of Hearing Counsel.

The only issue before the Commission in this proceeding was whether the concerted activity which resulted in the publication and filing of the subject tariff rules was taken without prior Commission approval in violation of section 15 of the Shipping Act, 1916, (46 U.S.C. 814).[2] We held it was not, concluding that the tariff rules were routine implementations of the authority granted the conferences by their previously approved conference agreements. Petitioners now argue that we: (1) did not understand the case; (2) committed several factual errors; and (3) reached an incorrect legal conclusion. We disagree.

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[1] The designated petitioners are: Interpool Limited, ITEL Container Corporation, Trans-Ocean Leasing Corporation, A.J. Hollander & Co., Inc., and Inn Keepers Supply Co. Of these, only A. J. Hollander & Co., Inc. and Inn Keepers Supply Co. were granted leave to intervene in this proceeding (Order served July 16, 1976). They are, consequently, the only petitioners which have standing for this petition and shall be hereafter referred to as "petitioners."

Petitioners also filed a Motion to Strike and to Add Shipper Parties. As part of this motion, Petitioners request that Mack Trucks, Inc., Southern Tier Hide and Tallow, Inc. and Samsonite Corporation be added to their Petition for Reconsideration. The North Atlantic Conferences filed in opposition. Though Southern Tier Hide and Tallow, Inc. and Samsonite Corporation may have standing as parties to this proceeding, we cannot add them to the petition under these circumstances. If they wish to join in the petition, they must, by themselves, assert their desire to do so. A party cannot simply move to add another party, or a third party, to its pleading. Petitioners' motion will, therefore, be denied.

[2] Order to Show Cause, served June 24, 1976 at 8; Order Consolidating Proceeding, served July 16, 1976.

This case was based upon the facts set forth in the Order to Show Cause which initiated Docket No. 76–36. Parties were given the opportunity: (1) to request an evidentiary hearing, if they felt one was required, and (2) to submit affidavits of fact along with their memoranda of law.[3] None chose to pursue either course. It is now too late for Petitioners to attempt to controvert the factual description of the neutral container system contained in our Report.

Petitioners have not offered any new facts or law which are material to the basic issue of this proceeding and which would alter our decision. We are, accordingly, denying their Petition for Reconsideration.

THEREFORE, IT IS ORDERED, That the Petition for Reconsideration and Motion for Stay and Motion to Strike and to Add Shipper Parties filed by A.J. Hollander & Co., Inc. and Inn Keepers Supply Co. are denied and the Commission's Report of December 19, 1978 is affirmed.

By the Commission.*

(S) Francis C. Hurney
Secretary

[3] Order to Show Cause, at 9; *See also*, Order Consolidating Proceedings, *supra*.

*Commissioner Kanuk concurs in the denial of the "Motion to Strike and to Add Shipper Parties", but would grant the Petition for Reconsideration.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-13

FIRST INTERNATIONAL DEVELOPMENT CORPORATION

v.

SHIP'S OVERSEAS SERVICES, INC.

Ship's Overseas Services, Inc., found to have acted as nonvessel operating common carrier by water in arranging transportation of a shipment of pipe from Houston, Texas, to Benghazi, Libya.

Ship's Overseas Services, Inc.'s failure to file a tariff covering such transportation found to violate section 18(b) (1), Shipping Act, 1916.

Michael A. McManus, Jr., for Complainant First International Development Corporation.

W.B. Ewers for Respondent Ship's Overseas Services, Inc.

REPORT AND ORDER REMANDING PROCEEDING

March 23, 1979

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

By complaint filed May 7, 1977, First International Development Corporation (FIDCO) alleges that Ship's Overseas Services, Inc. (SOS) violated sections 14 Fourth, 16, 17 and 18, Shipping Act, 1916 (46 U.S.C. 812(4), 815, 816 and 817), and requests the Commission to order SOS to cease and desist from said alleged violations and to pay reparation in the amount of $553,481.71, plus whatever other punitive damages the Commission may determine to be lawful.

On May 2, 1978, Administrative Law Judge William Beasley Harris (Presiding Officer) issued an Initial Decision denying reparation and dismissing the complaint for lack of jurisdiction. Complainant filed Exceptions to the Initial Decision to which Respondent replied. Subsequently, by Order dated August 15, 1978, the Commission remanded the proceeding to the Presiding Officer for consideration of a reply brief which although timely filed had not been included in the record due to clerical oversight. On August 23, 1978, the Presiding Officer served a supplemental decision reasserting the findings and conclusions reached in his Initial Decision. The proceeding came before the Commission on Complainant's Exceptions and Respondent's Reply to Exceptions.

FACTS

In February, 1975, FIDCO, a domestic corporation engaged in international trade, received from the Oasis Oil Company of Libya, Inc. (Oasis), a purchase order for steel pipe FOB Spain. The pipe was subsequently rejected by Oasis because it did not bear the stamp of approval of the American Petroleum Institute. FIDCO then purchased steel pipe from Gulf Consolidated International, Inc. (Gulf) for delivery FAS or FOB Houston, Texas, for shipment to Benghazi, Libya. The purchase order was to expire and Oasis insisted that transportation be arranged before payment was made. Due to congestion at the port of Benghazi, arranging transportation of the pipe was difficult, and FIDCO asked Charles Ragan, a full-time employee of Gulf and a former broker, for assistance.

Ragan requested SOS to arrange for the shipment of approximately 600 tons of pipe. SOS booked 101 tons on the "*Drucilla U*," a vessel owned by the Uiterwyck Shipping Lines (Uiterwyck), a member of the Gulf Mediterranean Ports Conference (Conference). SOS advised FIDCO of the booking and billed FIDCO $23,115.14 for freight charges.[1] The pipe was assessed at a rate of $227.50 per metric ton, which was based on the Conference tariff rate of $125.00 per ton, plus a 4% war risk surcharge and a 75% port congestion surcharge. After receiving payment and depositing the money in its acocunt, SOS informed FIDCO that the shipment had not and would not depart on the "*Drucilla U*."[2]

SOS subsequently chartered the "*Northcliff Hall*" from March Chartering, Ltd. (March). The charter contract, incorporated in a liner booking note, provided for the transportation of 541 tons of pipe at the fixed amount of $87,500.00. At SOS's request FIDCO executed a similar liner booking note which provided for a rate of $227.50 per ton.[3] SOS was aware at the time that the situation in Libyan ports had improved and that the port congestion surcharge no longer applied.

The shipment did not leave on the "*Northcliff Hall*," apparently because of damage to the vessel. SOS did not advise FIDCO of the "*Northcliff Hall*"'s failure to perform until booked space on the Uiterwyck vessel "*AnnLee U*" at the Conference rate of $125.00 plus a 4% war risk surcharge. It then asked FIDCO to sign an "amendment" to the liner booking note, as an understanding and agreement that the "*AnnLee U*" would perform in lieu of the "*Northcliff Hall*."[4] Due to the improved situation in Libyan ports, SOS was, in the words of SOS's Vice President, R.C. Fettig:

> . . . elated because the 75% charge was now being dropped and . . . . it was going to be a very nice contract.[5]

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[1] Throughout the discussions over the shipment of the pipe to Benghazi, SOS communicated with FIDCO through Ragan only, never directly.

[2] When asked in what capacity SOS had "billed" FIDCO, Ronald C. Fettig, Vice President of SOS explained that "it was a very unusual incident as an accommodation."

[3] In the first liner booking note, March, the agent for the owner of the vessel appears as "Carrier" whereas SOS is listed as "Merchant"; on the second liner booking note, SOS is named as "Carrier" and FIDCO as "Merchant."

[4] SOS presented the amendment as "an extension" of the liner booking note previously executed by FIDCO to cover the carriage of pipe aboard the "*Northcliff Hall*."

[5] The reference, apparently, is to the Conference tariff which contained the 75% port congestion surcharge. The booking on the "*Northcliff Hall*" provided a fixed charge, specifically excluding demurrage, dispatch and detention charges.

The pipe was shipped to Libya aboard the *"AnnLee U."* SOS billed freight to FIDCO at the rate of $227.50 per ton, for a total of $123,101.38, less the $23,115.14 collected earlier for the aborted shipment on the *"Drucilla U."* Uiterwyck charged SOS the Conference tariff rate of $125 a ton plus the 4% war risk surcharge but not the 75% port congestion surcharge, for a total amount of $69,616.67 or $53,484.71 less than SOS collected from FIDCO. Upon learning of this discrepency, FIDCO requested a partial refund from SOS. SOS indicated that some arrangement could be made if FIDCO would permit SOS to share in the profit FIDCO made from the sale of the pipe. No agreement was reached and FIDCO subsequently sought relief from the Commission.

Discussion and Conclusions

The complaint alleges that the charges paid by FIDCO were assessed under rates which were (1) unfiled; (2) unduly or unreasonably prejudicial and disadvantageous; and (3) unreasonable, in violation of section 14 Fourth, 16, 17, and 18 of the Act.

The Presiding Officer dismissed the proceeding for lack of jurisdiction on the ground that FIDCO had failed to prove that SOS is a common carrier by water subject to the Act. In the Presiding Officer's opinion, SOS did not satisfy the "holding out" test for common carriage, because it provided a transportation service on a single occasion.

Consequently, the preliminary issue to be determined in this proceeding is whether SOS in arranging for the shipment of FIDCO's cargo from Houston to Benghazi was engaged as a "common carrier by water" within the meaning of section 1 of the Act.[6]

In the absence of an express definition of the term "common carrier" in the Act, the Commission has long held that the carrier to be regulated is the common carrier at common law, that is, a carrier "who by a course of business holds himself out to accept goods from whomever offered to the extent of his ability to carry." *Transportation by Southeastern Terminals & S.S. Co.*, 2 U.S.M.C. 795, 797 (1946). In *Tariff Filing Practices, Etc. of Containerships, Inc.*, 9 F.M.C. 56, 65 (1965), the Commission set forth the criteria to be applied to a determination of a carrier's status:

> the variety and type of cargo carried, the number of shippers, type of solicitation utilized, regularity of service and port coverage, responsibility of the carrier towards the cargo, issuance of bills of lading or other standardized contracts of carriage, and method of establishing and charging rates.

The Commission, however, pointed out that the determination of a carrier's status cannot be made with reference to any *particular* aspect of the carriage. Likewise, "The absence of one or more of these factors does not render the carrier noncommon." *Tariff Filing Practices, Etc. of Containerships, Inc., supra,* at 65.

The Commission has also determined that ownership or control of the means of

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[6] Section 1 defines a common carrier by water in foreign commerce to mean:

> . . . a *common* carrier, except ferry-boats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions, and a foreign country, whether in the import or export trade: *Provided*, That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce." 46 U.S.C. 801.

transportation is not essential to common carrier status.[7] In this regard the Commission has recognized the non-vessel operating common carrier by water (NVOCC), which has been defined as:

. . . a person who holds himself out by the establishment and maintenance of tariffs, by advertisement and solicitation, and otherwise, to provide transportation for hire by water in interstate or foreign commerce as defined in the Shipping Act, 1916; assumes responsibility or has liability imposed by law for the safe water transportation of the shipments and arranges in his own name with underlying water carriers for the performance of such transportation.[8]

SOS denies that it acted as a common carrier by water subject to regulation under the Shipping Act. SOS contends that: (1) it does not advertise its services or hold itself out in any manner to provide transportation for the general public; (2) the carriage on the *"AnnLee U"* was an extension of the contract on the *"Northcliff Hall,"* which was a "private" or "contract" carriage and, therefore, a so-called "tramp" operation; and (3) it agreed to arrange transportation, not for FIDCO, but for Gulf.[9] SOS admits, however, that: (1) since 1970 it has been paying Charles Ragan for "steering business" to it;[10] and (2) it shipped the pipe in its own name and assumed responsibility for the water movement and safe delivery of the cargo to its destination. SOS concedes that it has no tariff on file with the Commission.

A carrier may "hold itself out" to the general public by *indirect* solicitation.[11] Notwithstanding SOS's insistence that it never advertised or held itself out in any manner, we find that the "steering" of business to SOS for which Ragan received payments over the years constitutes such "holding out" to the general public.[12]

Nor is there any validity to SOS's contention that the transaction involved a "private" or "contract" carriage, *i.e.*, a "tramp" operation. SOS's argument implies that a nonvessel operating carrier cannot be held to be a common carrier if it moves cargo on so-called "tramp" vessels.[13] The status of an NVOCC is not determined by the type of the underlying carrier's operations.

The Act does not recognize "contract" carriage as such. *Tariff Filing Practices, Etc. of Containerships, Inc., supra,* at 64–65. Nor can a carrier avoid common carrier status by insisting on a transportation agreement with each shipper. *Investigation of Tariff Filing Practices,* 7 F.M.C. 305, 321 (1962). SOS

[7] *Agreement 6210,* 2 U.S.M.C. 166 (1939).

[8] *Pacific Coast European Conference v. Southern Pacific Marine Transport, Inc.*, 16 S.R.R. 863 (I.D., 1976). *See also Possible Violations of Section 18(a) of the Shipping Act, 1916,* 16 S.R.R. 425 (I.D., 1975); *Determination of Common Carrier Status,* 6 F.M.B. 245 (1961); *Puget Sound Tug & Barge v. Foss Launch & Tug Co.*, 7 F.M.C. 43 (1962); *Bernard Ullman Co., Inc. v. Puerto Rican Express Co.*, 3 F.M.B. 771 (1952).

[9] SOS's argument that it agreed to deal with Gulf but not with FIDCO is not persuasive. SOS knew that Gulf had sold the pipe FOB Houston and that FIDCO was the shipper.

[10] Ragan received an undetermined amount of money in 1975. In 1977, he was paid $15,000.00 for past services and in contemplation of future business he would bring to SOS.

[11] *Puget Sound Tug and Barge Co. v. Foss Launch & Tug Co., supra,* note 8, at 48. *Transportation—U.S. Pacific Coast and Hawaii,* 3 U.S.M.C. 190, 196 (1950).

[12] Prior to the shipment of 541 tons of pipe, FIDCO was unknown to SOS and was, with respect to SOS, a member of the general public. SOS's contention that the service to FIDCO was performed on a single occasion and was a "single shot" is irrelevant. While the subject of this proceeding is indeed the transaction between FIDCO and SOS, and not a general investigation of SOS's activities, the record does indicate that SOS is in the shipping business and admittedly handles shipments for various customers. This implies that SOS directly or indirectly holds itself out to offer transportation services for the shipping public in general.

[13] The argument, if valid, would in this instance be self-defeating as SOS would be considered a common carrier because of the common carrier status of the underlying vessel operating carrier.

stated that it initially acted as "broker",[14] but later, after the booking on the "*Drucilla U*," acted as a "principal" in arranging the charter of the "*Northcliff Hall*."[15]

The status of a carrier is determined not by its own declarations, or for that matter by the status of the underlying water carrier whose services it utilizes, but by the nature of operations. *Bernard Ulmann & Co., Inc. v. Puerto Rican Express Co., supra,* at 775; *Tariff Filing Practices Etc. of Containerships, Inc., supra,* at 64; *Possible Violation of Section 18 (a) of the Shipping Act, supra,* at 434. The record shows: that SOS held itself out by indirect solicitation to perform transportation services for the general public; that it shipped FIDCO's cargo in its own name; and, that it assumed responsibility for the safe ocean transportation and delivery of the shipment to its destination. In view of the foregoing, we conclude that in arranging the transportation of the shipment of pipe from Houston to Benghazi, SOS acted as a non-vessel operating common carrier by water subject to the Shipping Act, 1916, and that SOS's failure to file with the Commission a tariff covering such transportation violated section 18(b)(1) of that Act.

FIDCO has not pressed, and appears to have abandoned allegations of violations of section 14 Fourth, 16 and 17 of the Act and none is found on this record.

There remains the question of FIDCO's request for reparation. Although SOS's violation of section 18(b)(1) provides FIDCO a basis to seek reparation,[16] we are unable on this record to reach a conclusion as to whether FIDCO has in fact been injured by reason of the section 18(b)(1) violation and, if so injured, the extent of such injury. The proceeding is therefore remanded to the Presiding Officer for a determination of these matters and the amounts of reparation, if any to be awarded FIDCO.

It is so ordered.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

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[14] Section 510.21(f) of the Commission's General Order 4 contains the following defintion:

The term "ocean freight broker" means any person who is *engaged by a carrier* to sell or offer for sale transportation and who holds himself out by solicitation or advertisement as one who negotiates between shipper and carrier for the purchase, sale, condition and terms of transportation. 46 C.F.R. 510.21(f). (Emphasis added).

SOS, in this instance, was not engaged by a carrier but represented the shipper in quest for cargo space. The term "broker" therefore does not accurately reflect SOS's involvement in this matter.

[15] As mentioned in Note 3, *supra*, in the liner booking note dated August 14, 1975, March appears as "Carrier" whereas SOS is listed as "Merchant." SOS had no beneficial or other interest in the shipment.

[16] Section 22 of the Act provides that the Commission ". . . may direct the payment . . . of full reparation to the complainant for the injury caused by such violation." 46 U.S.C. 821.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–80

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

ORDER DENYING RECONSIDERATION

March 23, 1979

The Commission now has before it in this proceeding a "Petition for Reconsideration" of the Ports of Baton Rouge, Beaumont, Lake Charles, and Port Arthur (Petitioners); and separate replies in opposition filed by Sea-Land Service, Inc., and the Commission's Bureau of Hearing Counsel.

Petitioners request that the Commission vacate its January 2, 1979, Order discontinuing without prejudice an investigation into alleged diversionary activities at certain United States Gulf Coast ports and that the proceeding be reopened.* No new matters of fact or law were raised by Petitioners and the Petition contained no information indicating that the discontinuance of Docket No. 73–80 was an abuse of discretion or otherwise unlawful. Accordingly, reconsideration shall be denied.

THEREFORE, IT IS ORDERED, That the "Petition for Reconsideration" of the Ports of Baton Rouge, Beaumont, Lake Charles, and Port Arthur is denied.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

*Petitioners would be satisfied to have the proceeding continue either as an adjudication or as a rulemaking.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–38

SEA-LAND SERVICE, INC.—RATES ON GOVERNMENT CARGO

Domestic offshore carrier's classification system for rating government cargo found to violate Shipping Act section 18(a) and the purposes of P.L. 93–487 insofar as it permits government shippers to choose between "Government Cargo" rates and individual commercial commodity rates, and to employ shipping documents which do not reveal the contents of each shipment in terms readily convertible to commercial cargo classifications.

Gerald A. Malia for Sea-Land Service, Inc.

Dudley J. Clapp, Jr., Milton J. Stickles, Jr. and *E. Duncan Hamner, Jr.*, for Military Sealift Command.

John Robert Ewers, C. Douglass Miller and *Charles C. Hunter* for Bureau of Hearing Counsel.

REPORT AND ORDER

March 26, 1979

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

On November 20, 1978, Sea-Land Service, Inc. (Sea-Land), was ordered to show cause why those portions of its tariffs FMC–F No. 34, FMC–F No. 36 and FMC–F No. 37 providing for the carriage of government cargo from U.S. Atlantic Coast ports to Puerto Rico do not violate section 18(a) of the Shipping Act, 1916 (46 U.S.C. 817(a)) because of their failure to:

(1) forbid qualifying government shippers from employing any other simultaneously effective tariff classifications; and

(2) require the use of shipping documents which fully identify all items tendered for transportation.

Sea-Land's tariff classifications for "Government Cargo, N.O.S.," "Government Cargo, Refrigerated" and "Government Cargo, Vehicles," are the same as those published by Puerto Rico Maritime Shipping Authority (PRMSA) which were found unreasonable in FMC Docket No. 75-20.[1]

The Military Sealift Command (MSC), which intervened as a respondent herein, and Sea-Land both responded to the Commission's order and argue that Sea-Land's tariffs do not violate section 18(a). The Commission's Bureau of Hearing Counsel (Hearing Counsel) replied in opposition to the memoranda and affidavits submitted by Respondents. No party sought to establish facts in a

[1] *Puerto Rico Maritime Shipping Authority—Rates on Government Cargo*, 18 S.R.R. 830, 1265 (1978). Hereafter referred to as the "*PRMSA* opinion."

further, evidentiary hearing.[2] Because this proceeding concerns material which appeared in Sea-Land's tariffs for the first time in June, 1977, the burden of proof is on the publishing carrier to establish their reasonableness. *See Commonwealth of Puerto Rico v. Federal Maritime Commission*, 468 F.2d 872 (D.C. Cir. 1972).

DISCUSSION

Sea-Land contends that its tariff already includes an adequate proscription against alternating between "Government Cargo" rates and commercial commodity rates, but immediately confesses that this proscription does not prevent government shippers from using a Government Bill of Lading to obtain commercial rates for items which would otherwise be rated as "Government Cargo."[3] This was precisely the practice rejected in the Commission's *PRMSA* opinion. 18 S.R.R. at 837. Contrary to Sea-Land's assertion, section 531.5(b)(8)(x) of the Commission's tariff regulations does not allow carriers to apply different rates to the *same shipment*. That section is exclusively concerned with rates which vary with the quantity of goods shipped.

Differences in quantity have long been considered a legitimate basis for assessing different rates; different quantities of the same commodity may each constitute a reasonable "commodity classification" in a carrier's tariff. Once the quantity tendered for shipment is determined, there is only one rate which can be applied. Similarly, a reasonable "Government Cargo" classification must, among other things, require the shipper to use the "Government Cargo" classification exclusively for all shipments of qualifying commodities.[4] "Project rate cargo" is another class of cargo wherein all qualifying commodity items (items used in a specific not-for-resale manufacturing, resource exploitation, public utility or public service project) may be shipped only under the project rate. Although each commodity included in a project rate shipment does not have to be identified in the shipping documents, precautionary measures similar in purpose and effect to those required for "Government Cargo" shipments are imposed by section 531.6(m) of the Commission's Rules.

Sea-Land's primary objection to the requirement that "Government Cargo" shipments be identified and justified in terms of comparable commercial commodities is that this practice will create burdensome paperwork for shippers and carriers and the expense of performing this paperwork will have an inflationary impact upon the national economy. Sea-Land fails entirely to describe the nature

[2] Sea-Land did claim it had been deprived of the right to be heard in some general sense by the Commission's November 20, 1978 "Order Restructuring Proceeding," but failed to move for an evidentiary hearing in accordance with the November 20th Order. The only factual matter with which Sea-Land seemingly takes issue is the assertion that it carries cargo under the government cargo commodity classifications in question. Although the amount of such carriage is relatively small, the affidavits of Raymond P. Ebeling and Dominick P. Nizzare plainly establish that Sea-Land carried MSC cargo under the subject tariffs.

Sea-Land has not been improperly prejudiced by the *PRMSA* decision. The *PRMSA* opinion did announce certain principles by which government cargo rates would be judged, but Sea-Land was not bound by that decision. The reasonableness of Sea-Land's government cargo tariffs are the subject of the present hearing. An administrative agency has discretion to announce general standards in individual adjudicatory proceedings rather than by notice and comment rule making. *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 202–203 (1947).

[3] Sea-Land's "Government Cargo" rates apply to shipments accompanied by a "shipping order" rather than a bill of lading.

[4] The tariff must clearly identify the shippers (*e.g.*, MSC) eligible to use the "Government Cargo" classification at any particular time. A shipper so identified may use no other commodity classification in the carrier's tariff unless the "Government Cargo" classification is first modified to delete that shipper. Such tariff additions and deletions must be promptly made upon the request of the shipper—provided the shipper is otherwise eligible to use the "Government Cargo" classification.

and extent of this paperwork burden or to quantify the additional expenses associated with it.

Customary shipping industry practices, the legislative history of P.L. 93-487,[5] and the affidavits submitted herein establish that Sea-Land and MSC already maintain records of their shipments, costs and related matters, and periodically evaluate these records for the purpose of making pricing or purchasing decisions. It is presumed that compliance with the *PRMSA* requirements will entail some paperwork relating to "Government Cargo" which neither Sea-Land nor MSC currently performs, but there is nothing to indicate that the burden associated with this paperwork is substantially different from that required for other commodity shipments. This is especially true for Sea-Land, which need only: (1) inspect the shipping documents and apply one of two rates;[6] and (2) retain these documents and review them periodically for the purpose of comparing its "Government Cargo" rates with the applicable commercial commodity rates. The effort required to perform these tasks is proportional to the amount of "Government Cargo" carried, and Sea-Land handles a relatively small number of government shipments in the Puerto Rico trade. MSC may be initially inconvenienced by the need to develop an efficient system for identifying its shipments in commercial tariff terminology, but, as far as the record indicates, it can accomplish this task without incurring expenses disproportionate to those incurred by other large shippers of multiple commodities.

MSC contends that, as a practical matter, it is unnecessary for Sea-Land to modify its tariff because PRMSA is the dominant government carrier in the trade and other carriers cannot implement government cargo rates which are not "competitive" with PRMSA's.[7] The best that can be said of this "competitive rates" argument is that Sea-Land may have to increase its sailings if it is to carry an appreciably greater share of MSC's cargo, something Sea-Land may do at any time without authority from the Commission.

MSC also claims that in some instances it is unable to furnish a complete description of the items it ships, and proposes that the Commission therefore not require the contents of "Government Cargo" containers to be specifically identified prior to shipment.[8] MSC would leave the collection of information concerning the composition of government shipments to individual rate investigation proceedings.

[5] 88 *Stat.* 1463 (1974). This statute repealed former section 6 and amended section 5 of the Intercoastal Shipping Act (46 U.S.C. 846 and 845b) which had exempted government and charitable shipments from section 18(a) and related Shipping Act considerations.

[6] Either the "Government Cargo" rate or the appropriate commercial commodity rate (*e.g.*, "Cargo, N.O.S.") would be applied, depending on whether MSC properly identified its shipment. *See PRMSA* opinion, at 1268. MSC faults this approach for being inconsistent with the "no alternation of rates" requirement. Allowing a limited form of rate alternation pursuant to the express terms of the "Government Cargo" commodity classification may be contradictory in theory, but is preferable to requiring the carrier to turn away unidentified government shipments.

The legitimate "Government Cargo" classification contemplated by the *PRMSA* opinion must provide that when a full description of a container's contents does not appear on the shipping documents, the carrier shall, in its sole discretion, either inspect the container and apply the correct commercial commodity rate or forego inspection and apply a commercial "Cargo, N.O.S." rate.

[7] MSC notes that during 1977 PRMSA offered almost four times as many sailings as its closest competitor. From this fact, MSC would apparently have the Commission conclude that Sea-Land will be compelled by competitive circumstances to match, rather than undercut, PRMSA's "Government Cargo" rates—a proposition which is both illogical and unsubstantiated. The rates of Seatrain Gitmo, Inc., have recently been lower than PRMSA's in the subject trade. Moreover, the Commission stayed its Docket No. 75-20 Order in response to PRMSA's unchallenged contention that the application of government cargo tariff requirements to PRMSA alone would place PRMSA at a competitive *disadvantage* in attracting MSC cargo.

[8] Most MSC shipments in the Puerto Rican trade are containerized.

This proposal is rejected for the reasons stated in the Commission's *PRMSA* opinion, *surpa*. If, as MSC states, ocean carriers cannot be reasonably expected to physically inspect the contents of every "Government Cargo" container tendered for shipment, it is especially critical that government shippers routinely furnish full commodity descriptions so that carriers can keep their "Government Cargo" rates properly adjusted in relation to their commercial rates for similar commodities. This obligation is no greater than that required of commercial shippers who wish to avoid "Cargo, N.O.S." rates, and the time contraints recently placed upon domestic offshore commerce rate investigations by P.L. 95–475 make it all the more important that the contents of current MSC shipments be readily available to carriers offering special "Government Cargo" tariff classifications and to the Commission alike.[9]

Finally, MSC requests the Commission to abandon the approach taken in Docket No. 75–20 for determining the reasonableness of "Government Cargo" rates. MSC believes it unnecessary to compare "Government Cargo" rates with the carrier's commercial rates for the commodities which actually comprise government shipments over a representative time span. Instead, MSC would examine "Government Cargo" rates in isolation and have the Commission accept any rate which covers the carrier's "fully allocated costs plus an appropriate share of a reasonable return"—essentially the basis upon which MSC negotiated domestic offshore rates prior to the adoption of P.L. 93–487. Past experience has proven this approach unacceptable.

The legislative history of P.L. 93–487 indicates that MSC has been able to induce domestic offshore carriers to carry government shipments at rates significantly lower than those available to commercial shippers of similar items. Although these rates varied periodically and were not necessarily below carrier costs, they tended to produce a rate structure wherein commercial shippers furnished a greater share of the carrier's revenue needs than would otherwise have been the case. It was this element of unjustified "subsidization" which Congress intended to preclude. *See Department of Defense v. Matson Navigation Company*, 17 S.R.R. 1, 5-6 (1977).

Comparison of commodity rates is a valid and accepted aproach to determining the reasonableness of rates. *See Youngstown Sheet and Tube Co. v. United States*, 295 U.S. 476 (1935). All commodities would have equal rates were it not for differing handling characteristics, carrier costs and other transportation factors which warrant a price differential. "Government Cargo" is a composite of many individual commodities which traditionally appear in carriers' tariffs. To assure that rates assessed government shippers are not improperly based solely upon the identity of the shipper, a carrier publishing "Government Cargo" rates must demonstrate that any differences in the amount of revenues realized from carrying "Government Cargo" and the same quantity of commercially rated commodities are justified in terms of recognized transportation factors. Government rates which cannot be so justified are unreasonable within the meaning of Shipping Act section 18(a). Because the "Government Cargo"

[9] Beginning January 16, 1979, the Commission must complete rate investigations in 180 days. Section 4, P.L. 95–475, 92 Stat. 1495.

commodity classifications in Sea-Land's Tariffs FMC No. F-34, 36 and 37 do not contain the minimum provisions necessary to assure reasonable comparability between "Government Cargo" rates and the commodity rates which would otherwise apply, their use is unlawful.

The type of "Government Cargo" tariff classification which would satisfy section 18(a) is further discussed in the *PRMSA* opinion, which is incorporated herein by reference.

THEREFORE, IT IS ORDERED, That, pursuant to section 18(a) of the Shipping Act, 1916, the pages of Sea-Land Service, Inc's Tariffs FMC-F No. 34, FMC-F No. 36 and FMC-F No. 37 listed in the attached Appendix, as amended or revised through the date of this Order, are cancelled effective May 1, 1979, and;

IT IS FURTHER ORDERED, That, effective May 1, 1979, Sea-Land Service, Inc., cease and desist from publishing, filing, or operating under any tariff in the Puerto Rican trade which includes government cargo commodity descriptions which do not: (1) forbid qualifying government shipments from employing other simultaneously effective rate items in the tariff; and (2) require the use of shipping documents which fully identify the items tendered for transportation in terms which would allow the items to be accurately classified and rated under Sea-Land, Inc.'s commercial tariff provisions (*i.e.*, at non "Government Cargo" rates).

(S) FRANCIS C. HURNEY
Secretary

APPENDIX

SEA-LAND SERVICE, INC.

Tariff FMC-F No. 34

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Tariff FMC-F No. 36

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Tariff FMC-F No. 37

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FEDERAL MARITIME COMMISSION

DOCKET NO. 77-4

AGREEMENT NOS. 9902-3, ET AL.
(MODIFICATION OF EURO-PACIFIC JOINT SERVICE)

Cooperative working arrangement whereby established ocean carriers operate under a common trade name, cross charter vessel space, pool operating costs and revenues, and agree on pricing decisions is anticompetitive and will be disapproved unless adequately justified by its proponents.

Joint service agreement to provide up to 7200 TEU's of containership space per quarter in each direction between U.S. Pacific Coast and Europe is approved upon the condition that one of three parties be deleted and the remaining two parties maintain separate marketing arrangements.

Joint service agreement which permits two carriers to operate an efficient, beneficial transportation service, while committing less tonnage to the trade than if the parties independently operated containerships, meets the standards for section 15 approval under the Commission's *Svenska* doctrine.

Interim amendment to joint service agreement which adds a third carrier to a two carrier service and increases the container capacity of the service is disapproved because the third carrier's participation was not shown to be necessary to achieve the public benefits relied upon to justify the agreement.

Edward Schmeltzer, Edward J. Sheppard and *George Weiner* for Hapag-Lloyd, A.G., Compagnie Generale Maritime, and Intercontinental Transport (ICT), B.V.

Russell T. Weil, James P. Moore, Mary Lou Montgomery and *Elizabeth Ritvo* for United States Lines, Inc.

Paul J. McElligott, Robert T. Devoy and *John A. Douglas* for Sea-Land Service, Inc.

John Robert Ewers, Paul J. Kaller and *Alan J. Jacobson* for the Bureau of Hearing Counsel.

REPORT AND ORDER

March 29, 1979

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

The Commission has before it Agreement No. 9902-8 (Amendment No. 8) and Agreement No. 9902-5 (Amendment No. 5), both of which relate to the expansion, modernization and continuation of the Euro-Pacific Joint Service (Joint Service) by common carriers serving the U.S. Pacific Coast/Continental Europe, United Kingdom and Scandinavia trades.[1] The Proponents of these agreements are Hapag-Lloyd, A.G. (Hapag-Lloyd); Compagnie Generale Maritime (French Line); and Intercontinental Transport, B.V. (ICT). Protests

[1] The Joint Service also calls at wayports in Mexico, Central America, the East Coast of South America and the West Indies, but carries no United States cargo in these trades.

objecting to the approval of each agreement were filed by United States Lines, Inc. (USL), and Sea-Land Service, Inc. (Sea-Land).

BACKGROUND

On March 21, 1977, the Commission ordered an investigation into the approvability of what was then designated Agreement No. 9902–6, under section 15 of the Shipping Act, 1916 (46 U.S.C. 814). This Agreement proposed that the Joint Service continue until December 31, 1982. Proponents were to operate eight new containerships with a ten-day frequency of service in the trade, cross charter vessel space to each other, and pool revenues and costs (with the exception of marketing expenses).[2] The average capacity of the eight containerships would have been 1,000 twenty-foot container equivalent units (TEU's).[3]

Also on March 21, 1977, the Commission approved Agreement No. 9902–5 (Amendment No. 5), a temporary continuation of Agreement No. 9902–3 (Amendment No. 3), pending completion of the present investigation. Amendment Nos. 3 and 5 together represented an interim measure whereby ICT was permitted to join the Joint Service and alterations were made in the composition of Euro-Pacific's fleet. Six 650 TEU containerships operating on a ten-day frequency of call were substituted for combination container/breakbulk vessels.[4] The Commission's approval of this interim arrangement was appealed to the United States Court of Appeals.[5] The Court remanded the matter and expressly directed the Commission to consider the antitrust implications of ICT's participation in the Joint Service. *United States Lines, Inc. v. Federal Maritime Commission*, 584 F.2d 519 (D.C. Cir. 1978).

The investigation into the long-term approvability of the expanded Joint Service generated 80 exhibits, over 1,100 pages of transcript, various motions to compel discovery, and ancillary litigation in the United States District Court to enforce Commission subpoenas.[6] The result of this evidentiary inquiry was a settlement between Proponents, the two protesting carriers (Protestants) and the Commission's Bureau of Hearing Counsel (Hearing Counsel). On January 8, 1978, Amendment No. 6 was replaced by Amendment No. 8. This amendment removed restrictions on the number and type of vessels operated by the Joint Service in return for a limitation on the number of TEU's to be carried on each voyage. The pooling, cross charter, separate marketing, and termination provisions remained the same.[7]

[2] Proponents would all use the Euro-Pacific trade name, but the Joint Service would be separately marketed by agents of Hapag-Lloyd and joint agents of ICT and French Line. Vessel space would be allocated 50% to Hapag-Lloyd and 50% to French Line/ICT.

[3] One TEU equals approximately 1,100 cubic feet.

[4] Prior to October 15, 1976, the Joint Service consisted of only Hapag-Lloyd and French Line. They operated ten combination breakbulk/container vessels with an average capacity of 310 TEU's and 450,000 cubic feet of breakbulk cargo space. Container operations were expanded and ICT was included as a participating carrier pursuant to the Commission's September 29, 1977, order conditionally approving Agreement No. 9902–3. As finally approved, Amendment No. 3 was identical to Amendment No. 5 and covered the period of October 15, 1976, to March 21, 1977.

[5] Amendment Nos. 3 and 5 were both appealed but the expiration of Amendment No. 3 and simultaneous approval of Amendment No. 5 on March 21, 1977, operated to consolidate the relevant issues within the context of Amendment No. 5.

[6] *United States Lines, Inc. v. Boyce Luckett*, Case No. C–77–1507 WHO (N.D. Calif.), Order of Enforcement entered September 27, 1977.

[7] Revenues and non-marketing expenses are to be divided 50% to Hapag-Lloyd, 30% to French Line and 20% to ICT. For marketing purposes, vessel space is equally divided between Hapag-Lloyd on the one hand and French Line/ICT on the other. Should one of the two marketing entities require more than the 50% allocated to it, that entity may charter additional space from the other.

Fifty "stipulated" findings of fact were presented to Administrative Law Judge William Beasley Harris by the Proponents.[8] On October 24, 1978, an Initial Decision was issued conditionally approving Amendment No. 8.[9] No exceptions were taken from the Initial Decision, but on November 27, 1978, the Commission undertook to review the decision on its own motion. The Commission's Office of Environmental Analysis served a Final Energy and Environmental Impact Statement (FEIS) on December 5, 1978.

Under Amendment No. 8, the Joint Service would carry up to 800 TEU's every ten days in each direction (averaged quarterly). The 800 TEU limitation includes all loaded containers handled at a given port, including transshipment cargo. Assuming nine voyages per quarter, the Joint Service would carry no more than 7,200 TEU's in each direction per quarter. Proponents currently propose to operate six 1,500 TEU containerships in the trade. The FEIS concluded that approval of Amendment No. 8 would result in less fuel consumption per TEU carried than either the continued operation of the Joint Service's six 650 TEU containerships, or the separate operation of a 1,500 TEU containership service by more than one of the Proponents.[10] Because of its potential for fuel conservation, approval of Amendment No. 8 was found to be the environmentally preferable course of action.

Discussion

A. *Applicable Standards*

The parties' concurrence concerning the approvability of Amendment No. 8 does not relieve the Commission from the responsibility of independently evaluating the matter under section 15 standards—particularly with regard to the antitrust implications of approval. *United States Lines, Inc. v. Federal Maritime Commission, supra.* This evaluation may begin with the consideration of Proponents' proposed findings of fact, all but one of which are supported by the record and are adopted, with minor modifications, as findings of the Comission.[11] These findings, as complemented by the further findings and conclusions contained in the following discussion, support the conclusion that the purposes of the Shipping Act would be served by continuing the Joint Service as a larger, fully containerized operation limited to 7,200 TEU's per quarter. The Proponents have not, however, demonstrated the necessity for ICT's participation in the Joint

[8] Only 42 of these proposed findings were actually agreed upon by the parties. USL objected to the relevancy of Finding No. 13 and Finding Nos. 15 through 20. Hearing Counsel disagreed with Finding No. 44. The Initial Decision did not specifically discuss most of the proposed findings, but did sustain USL's relevancy objection.

[9] On November 16, 1979, Proponents submitted a "Second Revised" version of Amendment No.8 which complied with the Administrative Law Judge's conditions of approval. This version of Amendment No.8 is attached as Appendix "B" hereto.

[10] Over a five year period almost 2,000,000 barrels of Bunker C fuel (or its equivalent) could be conserved. The use of larger vessels would also increase the air pollutants emitted in United States ports by a total of 94 tons annually, but the additional amounts emitted in each port of call would have only a minimal effect on local air quality.

[11] The exception is Finding 49—which concludes that a four and one-half year term is necessary for the expanded Joint Service. The record discloses no necessary connection between the capital investment required to furnish the proposed 7,200 TEU's per quarter service and the length of the Agreement. The remaining findings of fact, as adopted by the Commission, are attached as Appendix "A" hereto. USL's objection to the relevancy of Finding 13 and Findings 15-20 is denied. These six findings concern economic benefits resulting from the operation of larger containerships in an all-water Euro-Pacific service. Agreement No.8 does not commit Proponents to a particular type of container fleet, but does allow them the flexibility to operate whatever vessels they find to be economically efficient. The disputed findings are therefore relevant to Proponents' assertions that the modified Joint Service will provide a reliable, useful all-water service to the shipping public.

Service. Agreement No. 9909–8 shall therefore be disapproved unless modified to delete ICT as a party.

The arrangement proposed by Amendment No. 8 plainly lessens competition within the criteria suggested in the Supreme Court's *Penn-Olin* decision.[12] The Proponents are engaged in identical lines of commerce, presently compete in other United States trades, have historically competed in the Pacific Coast/Europe trade, will operate their own vessels under the Agreement, and are individually capable of providing viable containership service between the Pacific Coast and Europe. Under these circumstances, Proponents' decision to limit their participation in the market, pool revenues and expenses and concertedly establish rates and practices, is better viewed—for Shipping Act purposes—as a violation of section 1 of the Sherman Act (15 U.S.C. 1) than as a legitimate adjunct of a joint venture. Regardless of whether Agreement No. 8 would be found a restraint of trade by a court of law, it is sufficiently anticompetitive to fall within the Commission's *Svenska* doctrine.[13] Proponents must therefore produce evidence demonstrating the Agreement's practical effects upon competition and that these effects are necessary to meet a serious transportation need, secure an important public benefit or achieve a valid regulatory purpose.

B. *Effects of Agreement No. 9902–8*

Euro-Pacific will compete in the Pacific Coast/Europe market for containerized liner cargo (the market).[14] Current, comprehensive statistics concerning that market's composition are not part of the record, but reasonable estimates and projections can be made from the information the parties did provide.

The market consists of three segments: (1) the direct all-water services offered by Johnson Scanstar (11,400 TEU's per quarter), Euro-Pacific (5,850 TEU's per quarter) and Hoegh Line (1,760 TEU's per quarter);[15] (2) the indirect all-water service of USL (14,400 TEU's per quarter);[16] and (3) the minilandbridge services of USL, Sea-Land, Seatrain International, American Export Line, Lykes Bros. Steamship Co., Inc., Balt-Atlantic Line, and Balt-Gulf Line (60,000 plus TEU's per quarter).[17] Other things being equal, approval of Amendment No. 8 would leave Euro-Pacific with 35% of the trade's potential direct service capacity, 21% of its potential all-water capacity and 8% of its potential total capacity.

The minibridge segment of the market has experienced much faster growth than the other two segments, but all-water service still carries the most cargo and is likely to continue to do so. When large specialized vessels such as cellular containerships are employed, all-water service is fully competitive with mini-

[12] *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964).

[13] *Federal Maritime Commission v. Svenska Amerika Linien*, 390 U.S. 238 (1968). *See also United States Lines, Inc. v. Federal Maritime Commission, supra*, at 529.

[14] Rapid containerization of the trade during the 1970's resulted in the withdrawal of a number of liner services and a trebling of the total cargo share carried by non-liner vessels. The present demand for liner service is almost entirely limited to container cargo.

[15] Capacity figures represent *potential* capacity only. Both Johnson Scanstar and Euro-Pacific carry Canadian and certain other cargoes on their vessels so that less than maximum capacity is actually available to the instant trade.

[16] USL's practical capacity is considerably less than its potential capacity because its ships call at Pacific Coast ports loaded with as much Far East trade cargo as they can obtain and "top off" with European trade cargo which has been or will be transshipped to or from other USL vessels at Atlantic Coast ports.

[17] The practical capacity of the minibridge carriers is considerably less than their potential capacity because they primarily operate in Atlantic and Gulf/Europe trades and "top off" with minibridge cargo loaded at Atlantic or Gulf Coast ports.

bridge service[18] and there are cargoes such as refrigerated and heavy lift items which are not susceptible to minibridge carriage. If Amendment No. 8 were approved, tonnage devoted to all-water direct service would increase by 13%. The Joint Service would have the annual capacity to carry 249,216 long tons to Johnson Scanstar's 370,975 and Hoegh Line's 67,114.

Based upon actual 1976 eastbound carryings, about 75% of the trade's liner tonnage moved on direct all-water vessels, 22% by minibridge and 3% by all-water transshipment service. Even the most conservative projections for 1979 and 1980 indicate that the expanded Joint Service would obtain 25% or more of the market's total tonnage.

An arrangement which provides for the concerted acquisition of such a substantial market share may be approved only if it is necessary to achieve substantial Shipping Act objectives. In this instance, there are legitimate Shipping Act objectives which justify the Agreement's anticompetitive effects.

Direct all-water service is important to the ocean borne commerce of the United States. The Euro-Pacific service in particular is strongly supported by shippers and Pacific Coast ports. It has achieved high container space utilization during the eight years it has been in operation. Despite its popularity, changing economic conditions have rendered even Euro-Pacific's present 650 TEU service unprofitable. Larger, more specialized vessels are critical to the Joint Service's continuation. Larger vessels would meet an expressed transportation need for additional heavy lift and refrigerated cargo space and would conserve fuel by virtue of their greater operating efficiency.

These benefits could be achieved to some degree if only one of the three Proponents were to furnish a fully competitive container service.[19] Yet, containership operation is a capital intensive business. Vessels of appropriate size cost $20,000,000 or more and a fleet of at least six such vessels is necessary to offer ten day service on the 21,000 mile trade route in question. No single carrier presently offers frequent containership service between the Pacific Coast and Europe.[20]

Protestants alleged that a frequent 1,500 TEU service by Proponents would seriously overtonnage the trade and Hearing Exhibit No. 74 supports this contention. When overtonnaging exists, malpractices naturally follow as carriers are pressured to lower prices and then to rebate or otherwise discriminate between shippers in order to attract sufficient cargo to recover at least some of their fixed costs. This type of competition creates an unstable environment which is detrimental to commerce and economically wasteful. Excess capacity generally forces one or more competitors out of the trade after experiencing substantial losses. The Commission cannot compel a single carrier to limit its container

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[18] Speed is the usual advantage of minibridge service, but for some routings, all-water direct service is faster than minibridge.

[19] A "fully competitive" container service is one featuring modern, 1,000 TEU or larger vessels on a seven to ten day frequency. See Finding Nos. 13-20. It is possible Hapag-Lloyd would institute a 1,500 TEU service if the Euro-Pacific arrangement terminated. French Line and ICT would probably not independently enter the market with a fully competitive container service and would certainly not compete head-on with both Johnson Scanstar and Hapag-Lloyd. Even if one accepts Proponents' predictions that there will be modest market growth and that the all-water carriers will succeed in recapturing some minibridge and transshipment cargo, it is plain that insufficient container cargo would be available to accommodate three fully competitive services at necessary utilization levels. If French Line and ICT did not withdraw from the trade, they would operate a minibridge service, an infrequent all-water service or both.

[20] Johnson Scanstar is a joint venture of three carriers with nine vessels averaging 950 TEU's. Hoegh Line offers only a 21 day service with 440 TEU vessels.

capacity, and competitive pressures make it difficult, if not impossible, for a capacity limitation to be voluntarily imposed.

The pooling of resources and spreading of risks are necessary to create a stable, reliable, and efficient all-water containership service in the Pacific Coast/Europe trade. A rationalized service of the type proposed by Amendment No. 8 best serves the overall needs of the shipping public by reasonably limiting the competitive disruptions associated with the introduction of improved containership technology. Although the market may be unable to absorb an increase in Euro-Pacific's capacity from 650 to 1,500 TEU's, the 800 TEU limitation imposed by the instant Agreement should prevent the Joint Service from causing overtonnaging (Hearing Exhibit No. 74). Amendment No. 8, therefore, will not only provide an effective competitor for Johnson Scanstar, but will also avoid detrimental commercial effects which would occur if even one of the Proponents offered a fully competitive containership service on its own.

C. *Conditions of Approval*

Proponents have not proven that the rationalized container service they proposed cannot be provided without ICT's participation. The Joint Service was begun by Hapag-Lloyd and French Line. It operated throughout 1974, 1975, and most of 1976 with only these two members. The fact that ICT's corporate predecessors maintained a regular national flag line presence in the trade only emphasizes the absence of evidence establishing why ICT must now belong to the Joint Service. ICT is a subsidiary of Brostroem Shipping Company, A.B., a large and respected owner/operator of ocean carriers, including containerships. Even if ICT were temporarily to cease all-water service in the trade, it would remain a potential competitor of considerable stature.

It is not enough that ICT would economically benefit from membership in a fully competitive containership joint service; participation must be necessary to achieve public interest objectives as well. As far as the present record shows, Amendment No. 8 will achieve its legitimate transportation objectives with only Hapag-Lloyd and French Line as members. ICT's participation is not necessary to secure these objectives and the omission of this third party should not cause disruptive overtonnaging or cause ICT to disappear as a competitive force in the trade.

For this reason, and because Proponents also failed to justify the further reduction in competition represented by the Agreement's proposed joint marketing arrangement between ICT and French Line, Amendment No. 8 is unapprovable unless modified to delete ICT from membership in the Joint Service.[21]

A final matter requires attention. Amendment No. 9902–8 has already been twice revised by the parties and will not be approved unless further modifications are made. As a further condition of approval, Proponents shall be required to present a clarified version of the modified joint service arrangement designated "FMC Agreement No. 9902–9" which more closely conforms to Proponents' representations in the present proceeding, provides more frequent and detailed reporting requirements and plainly indicates that the Joint Service is not exempt from the Commission's tariff regulations pertaining to bills of lading.

[21] This action is without prejudice to Proponents later submitting a properly justified amendment adding ICT to the Joint Service.

Commission oversight of the Joint Service's activities will be more effective if these activities are reported quarterly rather than semi-annually and if per voyage carryings as well as total carryings are reported. Section 536.5(d) (8) of the Commission's regulations requires *prior* filing of any bill of lading used by an ocean carrier. Proponents have shown no basis for waiving this requirement in the case of the Joint Service.

The proposed separate marketing arrangement between Hapag-Lloyd and French Line is an important public interest factor weighing in favor of Agreement No. 9902-8's approval. Even with this pro-competitive feature, however, the Joint Service does not perform as a true rate making body on those occasions when it publishes its own (*i.e.*, non-conference) tariff, and the limited self-policing arrangement proposed by Agreement No. 9902-8 does not, under these particular circumstances, constitute a valid regulatory purpose under the Commission's *Svenska* test. Accordingly, Article 11 of Amendment No. 8 may be deleted if the parties so desire.[22]

D. *Agreement No. 9902-5*

Practically speaking, the Commission's disposition of Agreement No. 9902-8 eliminates the need to analyze separately Euro-Pacific's present 650 TEU operation under Agreement No. 9902-5. Although the smaller vessels command a smaller market share and therefore have a lesser competitive impact, Proponents' failure to present evidence justifying ICT's participation in the Joint Service is as fatal to the unconditional approval of Agreement No. 9902-5 as it is to Agreement No. 9902-8. Any further *pendente lite* extension of the 650 TEU service would also be conditioned upon the deletion of ICT.

The parties will be allowed sixty days as a reasonable winding down period.

THEREFORE, IT IS ORDERED, That, pursuant to the mandate of the United States Court of Appeals in *United States Lines v. Federal Maritime Commission*, 584 F.2d 519 (D.C. Cir. 1978), the Commission's March 21, 1977, Order approving Agreement No. 9902-5 shall be vacated effective May 31, 1979; and

IT IS FURTHER ORDERED, That Agreement No. 9902-5 shall be dismissed on May 31, 1979; and

IT IS FURTHER ORDERED, That Agreement No. 9902-8 is disapproved pursuant to section 15 of the Shipping Act, 1916, effective May 31, 1979, unless the Proponents actually deliver to the Commission's offices in Washington, D.C., on or before May 30, 1979, a modified version of that agreement designated "FMC Agreement No. 9902-9", signed by both parties thereto, which contains the following provisions:

> This Agreement was first entered into by and between Hapag-Lloyd Aktiengesellschaft and Compagnie Generale Maritime (hereinafter referred to as the parties) on September 1, 1970 and has been amended from time to time. This amendment (No. 9) supersedes and cancels all previous amendments to Agreement No. 9902.
>
> The parties, both of which are common carriers by water in the foreign commerce of the United States, agree that, in the trade between ports on the Pacific Coast of the United States and ports in the United Kingdom, Scandinavia and Continental Europe, including wayports in Mexico, Central America, the East Coast of South America and the West Indies, they will jointly establish and

[22] Two-party rate making bodies are exempt from neutral body self-policing requirements under Part 528 of the Commission's Rules. 46 C.F.R. 528.6.

maintain a direct all-water containership cargo service, with limited passenger accommodations, to be known as the "Euro-Pacific Joint Service," subject to the following terms and conditions:

1. The parties may each maintain membership in any freight conference or rate agreement already established and approved or that may be established and approved under the Shipping Act, 1916, in the trade covered hereby; *provided, however,* that in any such conference or rate agreement in which the parties individually or as a joint service are members, the votes of the parties or joint service shall not exceed, and the parties or service shall not exercise in total, a greater number of votes than that which may be accorded a single member of such conference or rate agreement. The parties may develop joint positions regarding votes and memberships in such bodies.

2. In any trades or traffic within the scope of this Agreement where rates, charges and practices are not prescribed by any conference of which both parties are members, the Joint Service shall establish and maintain its own rates, charges and practices covering such trades or traffic. The Joint Service shall file a tariff containing such rates, rules and regulations with the Federal Maritime Commission in accordance with section 18(b) of the Shipping Act, 1916.

3. The parties shall cooperate to supply tonnage for the Joint Service as their owned or chartered vessels are available. There shall be no automatic interchange of empty cargo containers and/or related equipment among the parties; *provided, however,* that the parties may interchange such empty containers and/or equipment between themselves as circumstances and conditions may require and permit, said interchange to be subject to mutually acceptable terms and conditions.

4. The parties shall contribute to and share in any and all deposits, costs, expenses, profits, and losses incurred by and derived from the Joint Service in the following proportions: Hapag-Lloyd Aktiengesellschaft ____ percent; Compagnie Generale Maritime, ____ percent.

5. Whether operating under a conference tariff or under their own tariff, the parties shall not employ any bill of lading not previously filed with the Federal Maritime Commission Pursuant to 46 C.F.R. 536 (5) (d) (8) or otherwise inconsistent with the Commission's tariff filing regulations.

6. Compagnie Generale Maritime and Hapag-Lloyd shall apppoint separate agents to represent their marketing interests, with the agents of each to be allocated ____ percent and ____ percent, respectively, of the space available on each sailing; *provided, however,* that on any such sailings the parties may charter from each other space in addition to that allocated to the respective agents. The parties may employ other agents on terms to be discussed among them.

7. The parties will jointly study the effect of structural changes in shipping services with respect to this specific trade and the possibilities of developing new or rebuilt types of vessels for use by the Joint Service.

8. The parties will rationalize the operation of the Joint Service with a view to promoting and developing the trade covered by this Agreement. In so doing, the parties may operate such containerships (or other substitute vessels on an emergency basis) as may be necessary; *provided, however,* that such ships will operate on approximately a ten-day frequency and will not carry cargo in containers in excess of 800 twenty-foot container equivalent units (TEU's) (averaged quarterly) every ten days in each direction between ports on the Pacific Coast of the United States and ports in the United Kingdom, Scandinavia and Continental Europe. This limitation shall apply to any such containers *both* loaded *and* discharged at the ports described in this Article, regardless of the ultimate destination or origin of such containers. The limitations expressed in this Article 8 shall remain in effect for the term of this Agreement, as set forth in Article ____ hereof.

9. The parties will submit quarterly Euro-Pacific operating reports to the Federal Maritime Commission concerning the Joint Service's activities in United States trades only which include: the dates, ports of call, and vessel employed for each Euro-Pacific voyage undertaken in each direction, the total number of loaded containers (expressed in TEU's) carried on each such voyage, and the average number of TEU's per sailing carried quarterly in each direction.

10. The parties may discuss and preliminarily agree upon arrangements for enlarging the scope and/or the membership of this Agreement. No such change shall become effective until it is approved by the Federal Maritime Commission.

* * *

[Final Article.] This Agreement shall become effective on the date following approval by the Federal Maritime Commission, and shall remain effective until December 31, 1982. This Agreement may, however, be terminated by mutual agreement of the parties at any time, or, as to any one participant, upon two years' advance notice to the remaining party. Copies of any such notice or mutual agreement to terminate this Agreement shall be promptly furnished to the Federal Maritime Commission.

Proponents shall determine the shares specified in Articles 4 and 6 of the Agreement and insert the correct figures in the blanks provided, may include such articles numbered 11, 12, or 13 as are consistent with Amendment No. 8 (second revised) and this Report, and shall insert the appropriate article number in the last sentence of Article 8; and

IT IS FURTHER ORDERED, That upon full and timely compliance with the conditions set forth in the above ordering clause, Agreement No. 9902-9 shall be approved.

(S) FRANCIS C. HURNEY
Secretary

APPENDIX "A"

FINDINGS OF FACT

1. Proponents (or their predecessor companies) have a long history of service in the liner trade between the U.S. Pacific Coast and Europe. Hapag-Lloyd has served that trade since 1899, CGM since 1921 and ICT since 1920.

2. In January of 1971, Hapag-Lloyd and CGM submitted for FMC approval Agreement No. 9902, authorizing those parties to establish a joint cargo service between Pacific Coast ports and ports in Europe. Agreement No. 9902 was approved by the Commission on March 16, 1971.

3. On March 17, 1971, Hapag-Lloyd, CGM and Holland-America Line submitted for FMC approval Amendment 1 to Agreement No. 9902, authorizing participation by Holland-America Line in the Euro-Pacific service, pursuant to the terms of Amendment 1. Agreement No. 9902-1 was approved by the Commission for a three year period on June 17, 1971.

4. Amendment 2 to Agreement No. 9902, which was approved by the Commission on March 21, 1974, extended approval of the Agreement for an additional three-year period, to March 21, 1977.

5. Pursuant to Article 8 of Agreement No. 9902 (as amended through Amendment 2), Euro-Pacific operated a fleet of conventional vessels in its service. The number and capacity of these vessels varied, but as of the beginning of 1976, Euro-Pacific was operating a fleet of ten conventional vessels, on a weekly frequency, with average container capacity of about 310 TEU's and average additional breakbulk capacity of approximately 450,000 cubic feet.

6. From the beginning of 1976 to the present, only Euro-Pacific and Johnson Scanstar (JSS) were offering a frequent (ten-day or less frequency), direct all-water liner service in this trade. JSS utilizes nine cellularized container vessels, ranging in size from 800 to 1,200 TEU's, to offer a weekly frequency of service. USL offers an indirect all-water service in the trade, utilizing vessels in its Far East service to move shipments between the Pacific and Atlantic Coasts, and vessels in its trans-Atlantic service to move the same shipments between the U.S. Atlantic Coast and Europe. Sea-Land also offered a weekly indirect all-water service, using vessels (with an average capacity of 543 35-foot containers, or 950 TEU's) in its "intercoastal service" to move shipments between Pacific and Atlantic ports, and its trans-Atlantic vessels to move the same shipments between the U.S. Atlantic Coast and Europe. The Sea-Land service was discontinued early in 1978. In October of 1977, Hoegh Lines instituted a direct all-water service, on approximately a three-week frequency, utilizing vessels having a container capacity of approximately 440 TEU's. In June of 1978, Vaasa Line, which had been operating a conventional vessel direct service on a monthly frequency, ceased operations.

7. In 1976, eight carriers were offering minilandbridge service in the Pacific Coast/European trade. These were American Export Lines, Seatrain, Sea-Land, USL, Lykes, Balt-Atlantic, Great Lakes and European Lines, and Balt-Gulf. With the exception of the last-named, all of these minibridge carriers offered weekly service. Apart from Great Lakes and European Lines, all of these minibridge operators continue to offer service at the same frequency.

8. Non-liner operators have made increasingly greater inroads into the Trade Route 26 market. In the period from 1970 to 1977, the non-liner share of total traffic via direct all-water movements has increased from 35.07 percent of the total to 52.35 percent.

9. Pacific Coast/European liner trade has become increasingly containerized; the annual rate of increase in containerized cargo movements during the years 1970 through 1974 averaged 23.69 percent, with yearly growth tapering off. By 1974, almost 60 percent of the commercial liner cargo in that trade was carried in containers, and the trend toward a high degree of containerization in this trade has continued.

10. Due to developments in the trade, including the length of this trade route (21,000 nautical miles roundtrip) increasing containerization of liner service and inroads made by non-liner operators into the Trade Route 26 market, at least 15 liner carriers have withdrawn from the Pacific Coast/European trade since the mid-1960's.

11. The conventional vessels operated by Euro-Pacific were not suitable to meet the needs of the trade because shippers prefer container service for their general liner cargoes. These hybrid vessels, designed as breakbulk ships and later modified to accommodate a limited number of containers, were inherently inefficient for use in this trade. That is, to carry a large number of containers, certain amounts of breakbulk cargo had to be carried in the holds for stability purposes. However, the loading of breakbulk cargo slowed the process of loading containers, and, therefore, it was more costly to load containers on the Euro-Pacific combination ships than to load containers on cellularized ships. Thus, despite adequate utilization, these ships could not be employed in a viable container operation in a trade that had become highly containerized.

12. Pursuant to FMC approval, *pendente lite*, of Amendment 3 to Agreement No. 9902, Euro-Pacific was authorized to operate a fleet of six, 650-TEU average capacity containerships, on a ten-day frequency, covering the following itinerary: Long Beach, Oakland, Vancouver, Seattle, Portland, Oakland, Long Beach, Liverpool, LeHavre, Antwerp, Rotterdam, Hamburg, Bremerhaven, Greenock, Liverpool, and return to Long Beach. Since this fleet was fully phased into service (the first such vessel calling in April of 1976, Tr. at 289) in the last quarter of 1976 and through 1977, utilization of these ships has been at very favorable levels, averaging 85 percent westbound and 84 percent eastbound.

13. These 650-TEU ships are also inefficient for use in this trade. Despite favorable utilization factors, in the first half of 1977 Euro-Pacific experienced a loss. To try to establish its service on an economically viable basis, Euro-Pacific must therefore replace its present container fleet with suitable vessels.

14. The two carriers (JSS and USL) still offering frequent all-water service in this trade operate on a weekly frequency, as do all but one of the minibridge services in this trade. Thus, it is necessary that a sufficient number of replacement vessels be employed to allow Euro-Pacific to offer, at a minimum, a ten-day frequency of service (intervals other than seven or ten days would result in operational disadvantages in vessel scheduling) in order to offer a competitive service comparable to that which Euro-Pacific has historically operated in this trade.

15. There are significant economies of scale inherent in the operation of cellularized container vessels in liner services, *i.e.*, vessel operating cost per unit of cargo does not increase in proportion to increases in vessel carrying capacity. Such economies can result from the technology inherent in containerized operations, *e.g.*, Euro-Pacific needed to operate ten conventional vessels to maintain weekly service, but could cover the same itinerary in a weekly service with only eight containerships. Further, as a general proposition, in full containership operation the operating cost per unit (here, a twenty-foot container equivalent unit) of cargo carried decreases as the carrying capacity of the containership increases.

16. Such economies of scale depend not only on the size of a vessel, but also upon the amount of time spent in port, *i.e.*, economies in operating cost at sea are offset to the extent a larger vessel spends greater amounts of time in port to load and discharge greater amounts of cargo. Determining appropriate vessel size to take advantage of economies of scale in containerized operations therefore depends upon the relationship between time at sea and time in port.

17. Time in port is a function of cargo handling rates, which are largely determined by the complexity of the itinerary, *i.e.*, the more complex the itinerary the more restowing of cargo is necessary for stability and safety purposes, thus extending port time. This factor is, however, ameliorated on a long trade route where time at sea (and the economies there achieved with larger vessels) is a larger proportion of round voyage time than is time in port, and the economies of scale obtainable with larger vessels operating at sea outweigh the negative effect of increased port time.

18. Thus, on shorter routes where port time is a greater proportion of round voyage time, smaller vessels covering a simple itinerary will be relatively more efficient. Conversely, on a long trade route, where time at sea is a much greater proportion of round voyage time than port time involved with even a complex itinerary, larger containerships are necessary for efficient operation.

19. The application of these principles dictates that Euro-Pacific's operation of small (650-TEU average capacity) containerships on this long trade route (21,000 nautical miles on a round voyage) covering a complex itinerary cannot be an efficient service under the best of operational circumstances. Given: (a) the great length of the Pacific Coast/European trade; (b) the complex itinerary which must be followed for proper port coverage; and (c) the fact that, even with larger vessels, port time will not increase substantially over that of the present Euro-Pacific fleet, Euro-Pacific's replacement of its small, 650-TEU ships with larger vessels should result in a more efficient service.

20. The six replacement ships proposed to be employed in the Euro-Pacific service will have a capacity of between 1,400 and 1,500 TEU's (depending upon the installation of onboard container cranes). Although only 800 TEU's of this capacity will be employed in the U.S. Pacific Coast/European trade, the economies of scale obtainable with these larger vessels on this long trade route and complex itinerary will apply to all the containers carried aboard these ships.

21. The phasing-in of Euro-Pacific's proposed replacement fleet will not be completed until early 1979. The export capacity of vessels employed in direct, all-water liner service in this trade in 1975 totalled 706,132 long tons, of which

335,157 long tons consisted of breakbulk capacity employed by Euro-Pacific. The impact of Euro-Pacific's deployment of six, 650-TEU vessels in late 1976 reduced total direct, all-water liner export capacity to 665,372 long tons in 1976, and, notwithstanding the entry of Heogh Lines into this trade in October of 1977 with vessels having a weekly export container capacity of approximately 150 TEU's, direct all-water export capacity further declined to 559,870 long tons in 1977. Direct, all-water liner export capacity will increase to 610,205 long tons for 1978. By 1979, with Euro-Pacific's proposed fleet replacement, direct, all-water liner export capacity will total 687,305 long tons. These data for direct, all water liner export capacity are detailed in Attachment A.

22. The levels of import and export cargo moving via direct all-water liner and non-liner services between the U.S. Pacific Coast and Europe (Trade Route 26) for the years 1967 through 1977 are set out in Attachment B.

23. The levels of import and export liner cargo moving via minibridge and all-water transshipment liner services for 1975, 1976 and the first quarter of 1977 between the U.S. Pacific Coast and Europe (Trade Route 26) are set out in Attachment C.

24. In November of 1977, the U.S. Maritime Administration published a study entitled "A Long-Term Forecast of U.S. Waterborne Foreign Trade, 1976-2000" (hereinafter referred to as "MarAd Forecast"). This study was utilized by Witness Ellsworth in his testimony and is an updated version of that utilized by Witness Simat. The MarAd Forecast shows that the average overall growth rate of waterborne (liner, non-liner and tanker) imports and exports on Trade Route 26 (*i.e.*, the U.S. Pacific Coast/European trade) will be 4.77 percent annually for the years between 1975 and 1980.

25. Between 1971 and 1975, the Far Western states comprising the U.S. side of Trade Route 26 have experienced greater than overall U.S. growth in population (twice the rate for the U.S. overall), effective buying income (10.8 percent greater than overall U.S.) and retail sales (8.8 percent greater than the nation as a whole). U.S. Commerce Department forecasts predict continuation of the growth trend for Far West economic indicators such as population and personal income.

26. The volume of those commodities which comprise the 20 leading export commodities moving on Trade Route 26 did, in the overall U.S. to Europe trade, increase at the rate of 13.06 percent annually between 1971 and 1975, while, during that same period, the volume of all U.S./Europe waterborne commerce increased at a rate of only 8.42 percent yearly.

27. Economic activity, as reflected by Gross National Product (GNP) has historically had a close relationship to foreign trade and, concomitantly, to levels of waterborne foreign commerce. This relationship serves as the basis for the MarAd Forecast. The MarAd Forecast is predicted upon aggregate data projecting overall economic activity for the United States, and does not reflect that a particular region may experience a greater economic growth rate than the nation as a whole.

28. The MarAd Forecast does not distinguish between liner and non-liner movements. Analysis of data for direct all-water liner movements for the years 1967-1976 shows that liner traffic moving via direct, all-water service on Trade

Route 26 declined from 1,550,453 long tons in 1967 to 1,122,500 long tons in 1976, an annual decrease of 3.5 percent (data for 1967-1969 include all commodities; data for 1970-1977 exclude commodities 321 (coal, coke and briquets) and 332 (petroleum products)). These data do not, however, include liner cargoes moving via minibridge and all-water transshipping service, which, in 1976, carried an additional 350,393 long tons of liner cargo (eastbound 204,179 long tons and westbound 146,214 long tons). Thus, in 1976, total liner cargo on Trade Route 26 (including minibridge and transshipment) was 1,472,893 long tons, a decrease from 1967 of approximately .05 percent annually.

29. During the 11-year period 1967-1977, direct all-water liner movements on Trade Route 26 were at their highest levels in 1970, 1,880,459 long tons, and reached their lowest level in 1975, at 1,063,864 long tons. Since 1975, however, direct all-water liner traffic increased to 1,122,500 long tons in 1976 and to 1,506,527 long tons in 1977, and the liner share (vis-a-vis non-liner movements) of total all-water traffic has also increased from 39.28 and 35.4 percent in 1975 and 1976, respectively, to 47.65 percent in 1977.

30. The Euro-Pacific partners cannot continue the service in its present form, using the inefficient fleet of ships currently employed. In the event Amendment 8 is not approved, the three Proponents would not individually operate the ships they would contribute under the terms of Amendment 8, *i.e.*, no one of the Proponents would contribute more than three ships, allowing for service only every three weeks, which, with vessels designed only for containerized liner service, would be non-competitive in this trade where virtually every all-water and indirect service has a weekly frequency.

31. In the event Amendment 8 is not approved, only three alternative means of service are open to the Proponents individually:

(a) one or more of the Proponents would obtain fleets of the six-to-eight vessels necessary to offer a competitive frequency of service, of a capacity necessary for efficient operation in this trade, in view of the economies of scale related to containerized operations;

(b) one or more of the Proponents would discontinue direct, all-water service and instead offer minilandbridge, service; or

(c) one or more of the Proponents would continue direct all-water service comparable to that proposed in Amendment 8, and one or more of the other Proponents would offer minilandbridge service.

32. Approval of Amendment 8 will allow for continuation of the rationalized Euro-Pacific service, reduce the amount of capacity which would be placed in the trade absent approval, permit the use of energy efficient vessels, and maintain the proponent carriers in the market as providers of frequent, direct, all-water service.

33. Many shippers in this trade rely on Euro-Pacific's frequent, direct all-water service and support approval of the subject Agreement because the proposed container service: (a) will ensure continuation of the Euro-Pacific direct service, with its established regularity and reliability and ability to issue onboard bills of lading; (b) will continue to be a competitive factor vis-a-vis the only other frequent direct, all-water liner service and the several minibridge carriers in the trade; (c) will continue and improve a direct all-water service found useful and

necessary by shippers of out-size, heavy-lift and refrigerated cargoes (the latter by virtue of increased reefer capacity from 39 reefer plugs per vessel to more than 100 per vessel), which cannot in many instances be accommodated by mini-bridge services; and (d) may help hold down long term rate levels in the trade by using more efficient vessels.

34. The ports of Long Beach, Oakland, Portland and Seattle support approval of the subject agreement, because approval will: (a) maintain utilization of container terminal facilities in which these ports (and the communities they serve) have made substantial investments; (b) make available more efficient direct all-water service for the shipping public using these ports; (c) result in employment of more modern tonnage, supplying the lift capability for many commodities (such as autos, perishables and refrigerated goods, and volatile chemicals) that do not accommodate themselves to minilandbridge movement; and (d) maintain a competitive balance in the liner trades and offer shippers a choice of routing from various gateways.

35. Holland-America Line entered the U.S. Pacific Coast/European trade in 1920, and shortly thereafter formed the "North Pacific Coast Line" joint service with Royal Mail Lines; Furness Withy joined this service in 1964. Both Royal Mail and Furness Withy withdrew from the trade in 1970. Holland-America Line thereupon operated its own service in this trade for a short time in 1970-1971, but, because it could offer only one sailing per month, sought to join the rationalized Euro-Pacific service of Hapag-Lloyd and CGM. The Commission approved Holland-America Line's participation on June 17, 1971.

36. Holland-America Line was originally formed as a Dutch company in 1873, under the name Nederlandsch-Amerikaansche Stoomvaart-Maatschappij N.V., to which the name Holland Amerika Lijn was added in 1898. The title of the company was formally shortened in 1973 to Holland Amerika Lijn. In 1974, the Dutch company known as Holland Amerika Lijn Holding N.V. was formed, which subsequently acquired more than 99 percent of the shares of Holland Amerika Lijn. Holland Amerika Lijn Holding N.V. on December 31, 1974 transferred to Brostroem Holland B.V. (a Dutch company wholly-owned by the Brostroem Shipping Company A.B. of Gothenburg, Sweden) its shares of Holland Amerika Lijn, in return for the assets of Holland Amerika Lijn except for those related to the transport of goods by sea.

37. Holland Amerika Lijn on December 30, 1974 changed its name to Intercontinental Transport (ICT) B.V. Except for certain vessels sold prior to that date two chartered vessels for each of the Euro-Pacific and Combi-Line services, the same vessels owned by Holland-America Line have been operated by ICT. ICT has, as a Dutch successor company to that founded in 1873, continued to operate in the field of transport of goods by sea.

38. Holland-America Line suspended its service in the U.S. Pacific Coast/European trade in late 1973 (a voyage of one of its vessels being completed in early 1974), because its conventional vessels could not profitably serve the trade in view of the demand for container space and because it was not possible to charter other suitable vessels at acceptable rates.

39. Following the above-described reorganization of Holland-America Line into ICT at the beginning of 1975, ICT wished to reinstitute its service in this

trade. ICT did not wish to institute a minilandbridge service, being of the view that direct, all-water service was the optimal means to serve this trade. An independent ICT container service, with the number of ships for a competitive weekly or ten-day frequency, of the capacity necessary for efficient operation in this trade, would have required a large capital investment and could have resulted in overtonnaging in the trade. ICT therefore concluded that its reentry into this trade was best undertaken in the context of a rationalized service, with its former Euro-Pacific partners, whose views on modernizing to a frequent, direct, all-water full container service in this trade coincided with those of ICT.

40. Since its inception (and per the terms of Agreement No. 9902 as originally approved), the marketing of the Euro-Pacific service has been undertaken on a joint basis, *i.e.*, agents are appointed to represent the joint service, not the respective parties thereto.

41. CGM and ICT are members of services in other trades, which services are direct competitors of services operated by Hapag-Lloyd. Each of these services has established its respective marketing organizations and each carrier and/or service in which they participate seeks to maintain its own marketing identity.

42. CGM and ICT therefore wish to continue to market their services in this trade on a joint basis, but, because of the overlapping scope of services already marketed separately as between CGM and ICT (or services of which they are members) and Hapag-Lloyd, to maintain their separate identities, CGM and ICT, on the one hand, and Hapag-Lloyd, on the other, desire to undertake separately the marketing of their services in the context of Euro-Pacific.

43. The organizations representing Hapag-Lloyd, on the one hand, and ICT and CGM, on the other, will (independently from each other) be able to market the services offered by these parties.

44. Separate marketing will allow for a degree of competition between Hapag-Lloyd and CGM and ICT, as well as among Proponents' respective marketing organizations and other carriers in the trade, by allowing each respective organization to develop its own marketing identity.

45. Proponents' continuation, under the terms of the subject Agreement, of the pooling of revenues and expenses derived or incurred in the Euro-Pacific service creates a disincentive for the principals to engage in malpractices upon implementation of separate marketing arrangements.

46. Article 6 of Agreement No. 9902–8 provides for an allocation to the respective marketing organizations of one-half the space available on each sailing, with necessary adjustments to such allocations being made by the principals, thus enabling all of the principals to oversee the activities of both marketing agents to ensure that these organizations also do not engage in malpractices.

47. Article 1 of Agreement No. 9902, as revised by Amendment 8, incorporates a provision to allow each Proponent individual conference membership, but with combined voting rights equivalent to those which may be accorded single conference members.

48. Article 3 of Agreement No. 9902, as revised by Amendment 8, permits Proponents to interchange among themselves empty containers and related equipment, as is necessary for the operation of a rationalized service.

49. Not adopted.

50. Revision of Article 11(d) of Agreement No. 9902, as set out in Amendment 8, is necessary to rectify an apparent inconsistency between that provision and Article 11(b) of the Agreement.

ATTACHMENT A

DIRECT, ALL-WATER LINER EXPORT CAPACITY U.S. PACIFIC COAST/EUROPE TRADE 1975–1979

Year	Carriers	Carrier Capacity (Long Tons)	Export Trade Capacity (Long Tons)
1975	Johnson ScanStar[a]	370,975	
	Euro-Pacific[b]	335,157	706,132
1976	Johnson ScanStar[a]	370,975	
	Euro-Pacific[c]	294,397	665,372
1977	Johnson ScanStar[a]	370,975	
	Euro-Pacific[d]	172,116	
	Hoegh Line[e]	16,179	559,870
1978	Johnson ScanStar[a]	370,975	
	Euro-Pacific[d]	172,116	
	Hoegh Line[f]	67,114	610,205
1979	Johnson ScanStar[a]	370,975	
	Euro-Pacific[d]	249,216	
	Hoegh Line[f]	67,114	687,305

[a] Source: Ex. 75 (workpapers of Dr. Ellsworth) at 1.

[b] Source: Ex. 1, Att. 1, page 1 of 4. Mr. Simat here computed Euro-Pacific's 1975 export *and* import capacity to be 670,314 long tons. Since the above table deals only with export capacity, we have here halved the figure developed by Mr. Simat.

[c] Source: Through approximately three quarters of 1976, Euro-Pacific employed the same breakbulk fleet as in 1975. During the final quarter of that year, Euro-Pacific employed its current fleet of 650-TEU vessels. Thus, in deriving Euro-Pacific capacity for that year, we here used three quarters of the 1975 capacity (.75 × 335,157 = 251,368) and one quarter of Euro-Pacific's present capacity of 172,116 long tons (.25 × 172,116 = 43,029), as derived by Doctor Ellsworth, Ex. 74 at 5. This total was 251,368 + 43,029 = 294,397 long tons.

[d] Source: Euro-Pacific's present capacity as derived by Doctor Ellsworth, Ex. 74 at 5.

[e] Source: At page 4 of his testimony (Ex. 74 at 4), Doctor Ellsworth computes Hoegh Line's capacity to be approximately 150 TEU's per week, and, in his workpapers (Ex. 75 at 3), computes Hoegh's annual capacity to be 67,114 long tons. However, as noted at page 4 of Doctor Ellsworth's testimony (Ex. 74 at 4), Hoegh did not begin operating until the last quarter (October) of 1977. Thus, in the above table, we have included only one quarter Hoegh's annual capacity for 1977.

[f] Source: Ex. 75 at 3.

ATTACHMENT B

TRADE ROUTE 26—COMMERCIAL DRY CARGO IMPORTS AND EXPORTS FOR CALENDAR YEARS, 1967—1977[a] (IN LONG TONS)

	Liner	Non-Liner	Total	Liner As Percent of Total
1967:				
Imports	604,887	173,000	777,887	77.77
Exports	945,566	765,469	1,711,035	55.26
Total	1,550,453	938,469	2,488.922	62.29
1968:				
Imports	632,933	240,980	873,913	72.42
Exports	805,410	874,687	1,680,097	47.94
Total	1,438,343	1,115,667	2,554,010	56.32
1969:				
Imports	725,442	339,043	1,064,485	68.15
Exports	1,078,511	1,134,932	2,213,443	48.73
Total	1,803,953	1,473,975	3,277,928	55.03
1970:				
Imports	664,227	290,496	954,723	69.57
Exports	1,216,232	725,196	1,941,428	62.65
Total	1,880,459	1,015,692	2,896,151	64.93
1971:				
Imports	655,941	264,140	920,081	71.29
Exports	762,239	770,066	1,532,305	49.74
Total	1,418,180	1,034,206	2,452,386	57.76
1972:				
Imports	669,185	548,262	1,217,447	54.97
Exports	676,187	947,330	1,623,517	41.65
Total	1,345,372	1,495,592	2,840,964	47.36
1973:				
Imports	671,578	579,660	1,251,238	53.67
Exports	756,486	1,137,105	1,893,591	39.95
Total	1,428,064	1,716,765	3,144,829	45.41
1974:				
Imports	664,302	865,952	1,530,254	43.41
Exports	681,642	920,166	1,601,808	42.55
Total	1,345,944	1,786,118	3,132,062	42.97
1975:				
Imports	452,444	366,431	818,875	55.25
Exports	611,420	1,277,807	1,889,227	32.36
Total	1,063,864	1,644,238	2,708,102	39.28
1976:				
Imports	452,774	481,316	934,090	48.47
Exports	669,726	1,566,651	2,236,377	29.95
Total	1,122,500	2,047,967	3,170,467	35.40
1977:[b]				
Imports	695,386	500,796	1,196,182	58.13
Exports	811,141	1,154,203	1,965,344	41.52
Total	1,506,527	1,654,999	3,161,526	47.65

[a] 1967–1969 includes all commodities; 1970–1977 excludes commodities 321-coal, coke and briquets; and 332-petroleum products.

[b] Preliminary data.

ATTACHMENT C

MINIBRIDGE AND ALL-WATER TRANSSHIPPING CARGO MOVEMENT— U.S. WEST COAST TO NORTHERN EUROPE (1975-1977)

Year	Direction	Number of Carriers[b]	Minibridge	All-Water Transshipped	Total
1977 (1st Quarter)[a]	Eastbound	7	54,369	2,987	70,034
1976		7	181,815	22,364	204,179
1975		5	92,748	21,738	114,486
1977 (1st Quarter)[a]	Westbound	7	24,261	4,745	38,668
1976		7	100,301	45,913	146,214
1975		5	64,940	36,215	101,154

[a] Components do not sum to total because one carrier could not separate minibridge and all-water transshipment cargoes and therefore reported a total only.

[b] The carriers in 1975 were as follows: (1) American Export Lines, (2) Lykes Bros., (3) Sea-Land, (4) Seatrain, (5) United States Lines. The 1976 and 1977 data include the five carriers listed above plus Baltic Atlantic Line and Baltic Shipping Company.

APPENDIX "B"

AGREEMENT NO. 9902

(Restatement as Revised Through
Agreement No. 9902-8 (2d Revised)

JOINT SERVICE AGREEMENT

BETWEEN

COMPAGNIE GENERALE MARITIME

(FRENCH LINE)

AND

HAPAG-LLOYD AKTIENGESELLSCHAFT

AND

INTERCONTINENTAL TRANSPORT (ICT) B.V.

This Agreement was entered into by and between the parties on September 1, 1970. The undersigned, common carriers by water in the foreign commerce of the United States (hereafter referred to as the parties), agree that, in the trade between ports on the Pacific Coast of the United States and ports in the United Kingdom, Scandinavia and Continental Europe, including wayports in Mexico, Central America, the East Coast of South America and the West Indies, they will establish and maintain a joint cargo service, with limited passenger accommodations, to be called Euro-Pacific.

1. The parties hereto each may maintain membership in any freight conference already established and approved or that may be established and approved under the United States Shipping Act in the trade covered hereby, *provided, however,* that such membership would not be inconsistent with the terms of this Article 1. In any conference in which the parties individually or as a joint service are members, the votes of the parties or joint service shall not exceed and the parties or service shall not exercise in total a greater number of votes than that which may be accorded a single member of such conference. The parties may develop joint positions regarding conference votes and membership.

2. In the case of any trades or traffic within the scope of this Agreement where the rates, charges and practices are not prescribed by any conference of which the parties to this Agreement are members, the new service shall establish and maintain its own rates, charges and practices covering such trades or traffic. The joint service shall file a tariff containing such rates, rules and regulations with the Federal Maritime Commission in accordance with the provisions of Section 18(b) of the Shipping Act, 1916, as amended.

3. The parties shall cooperate to supply tonnage for this joint service as their owned or chartered vessels are available. There shall be no automatic interchange of empty cargo containers and/or related equipment among the parties, provided,

however, that the parties, between or among them, may interchange such empty containers and/or equipment as circumstances and conditions may require and permit, said interchange to be subject to mutually acceptable terms and conditions.

4. The parties shall contribute to and share in any and all deposits, costs, expenses, profits, and losses incurred by and derived from this joint service in the following proportions: Hapag-Lloyd Aktiengesellschaft, 50 percent; Compagnie Generale Maritime, 30 percent; Intercontinental Transport (ICT) B.V., 20 percent.

5. Copies of all bills of lading used by the parties under the joint service will be furnished promptly to the Federal Maritime Commission.

6. The parties will employ agents on terms to be discussed among them. Compagnie Generale Maritime and Intercontinental Transport (ICT) B.V. may appoint agents to represent their marketing and other interests, and Hapag-Lloyd may appoint separate agents to represent its marketing and other interests, in which event the respective agents shall each be allocated one-half of the space available on each sailing, provided that on any such sailings the parties may charter from each other space in addition to that allocated to the respective agents.

7. The parties will study jointly the effect of the structural change in shipping services with respect to this specific trade and the possibilities to develop a new or rebuilt type of vessel for a profitable operation.

8. The parties will rationalize their services with a view to promoting and developing the trade covered by this Agreement. In so doing, the parties may operate such containerships (or other substitute vessels on an emergency basis) as may be necessary, *provided, however*, that such ships will operate on approximately a ten-day frequency and will not carry cargo in containers in excess of 800 twenty-foot container equivalent units (TEU's) (averaged quarterly) every ten days in each direction between ports on the Pacific Coast of the United States and ports in the United Kingdom, Scandinavia and Continental Europe. This limitation shall apply to any such containers *both* loaded *and* discharged at the ports described in this Article, regardless of the ultimate destination or origin of such containers. The limitations expressed in this Article 8 shall remain in effect for the term of this Agreement, as set forth in Article 13 hereof.

Euro-Pacific will submit to the Commission semi-annual reports stating: (a) the number of sailings, the number of loaded containers (expressed in TEU's) and the average number of TEU's per sailing carried quarterly in each direction; and (b) in each direction and by month, the number of sailings, together with the aggregate number by which loaded TEU's carried in each month either exceeded or fell below the average 800-TEU-per-sailing level.

9. The parties may decide to enlarge the scope and/or the membership of this Agreement after mutual consultation and acceptance. No such change shall become effective until approval by the Federal Maritime Commission.

10. In any event of implementation of the rate-making powers conferred on the parties under Article 2 hereof, the self-policing provisions of Article 11 shall apply. In the event of any other dispute between or among the parties under this Agreement, if the matter cannot be resolved between or among the parties

themselves such dispute shall be referred to arbitration in London, before a panel of three arbitrators, each side to the dispute appointing one arbitrator and (unless the foregoing results in the appointment of three arbitrators) the third arbitrator being selected by the two previously appointed, or, if those two fail to arrive at agreement, then the third arbitrator to be appointed by the President of the Chamber of Commerce of London. Provided all sides to the dispute agree, a single arbitrator, similarly appointed by the President of the Chamber of Commerce of London, may act in place of the three-man arbitration panel. In any case submitted to arbitration under these provisions, the decision of any two such arbitrators (or of the single arbitrator) shall be final and binding.

11. Wherever the parties have undertaken joint rate-making pursuant to Article 2 of this Agreement, any malpractice or breach of any rate-making provision of the Agreement, the joint tariff, or the rules and regulations thereunder, will be subject to self-policing as hereinafter described.

a) Each separate event of breach shall carry a maximum penalty of $10,000. Failure to comply with a final disciplinary adjudication, as set forth in this Article, and to pay the penalties assessed when due, shall constitute a separate breach of the Agreement.

b) If any party to the Agreement has reasonable grounds to believe a breach has occurred on the part of any other party, the first party shall, in the first instance, communicate the fact to the suspected party and to the third party. In the event the matter cannot be resolved amicably by such informal means, and in any case where requested by the accused party, the matter shall be referred to arbitration as set forth in the following sub-paragraphs.

c) Arbitration of a self-policing accusation shall be referred to an arbitration panel in London, the accused party and the remaining parties each appointing one arbitrator and the two so appointed selecting the third arbitrator, or, if those two fail to arrive at agreement, then the third to be appointed by the President of the Chamber of Commerce of London. Provided both sides to the dispute agree, a single arbitrator, similarly appointed by the President of the Chamber of Commerce of London, may act in place of the three-man arbitration panel. In any case submitted to arbitration under these provisions, the arbitrator(s) shall have the authority to adjudicate the allegations of breach and, within the limits of sub-paragraph (a) above, to assess penalties on any breach found.

d) At least 30 days before submission of the matter to the arbitrator(s), the accused party shall be furnished a written statement of the charge against it, sufficient to apprise it of the nature of the charge and to enable it to frame an adequate defense. The accused line shall at the same time be furnished with all evidence then developed, intended to be offered in support of the charge. In the event additional evidence is thereafter developed, the accused party, after being furnished with such additional material, shall be afforded a delay of the arbitration proceeding for an additional period of not to exceed 15 days, within which to prepare a defense to the new material.

e) All evidence presented to the arbitrator(s), by either side, shall also be furnished to the other side of the dispute. At the arbitration proceeding, each side shall have the opportunity to present counter-evidence and rebuttal, and to offer matters in explanation, mitigation, extenuation and/or aggravation of the offense charged.

f) The arbitrator(s) shall consider only the material so presented in reaching the decision as to breach and as to penalties to be assessed (if any). The decision of any two of the three-man arbitration panel (or of the single arbitrator, if applicable) shall be final and binding.

12. The parties shall establish and maintain at Hapag-Lloyd A.G., Ballindamm 25, Hamburg, Germany, an office from which the operations of the joint service will be directed.

13. This Agreement shall become effective on the day following approval by the Federal Maritime Commission, and shall remain effective for four years and six months following such date or until December 31, 1982, whichever is earlier. This Agreement may, however, be terminated by mutual agreement of the parties hereto at any time, or, as to any one or more participants, upon two years' advance notice by such party or parties to the remaining party or parties. Copies of any such notice or mutual agreement to terminate this Agreement shall be furnished to the Federal Maritime Commission promptly.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-37

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE
SERGIO E. VASQUEZ

NOTICE

March 30, 1979

Notice is given that no appeal has been filed to the February 14, 1979 order of dismissal 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

No. 77–37

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE
SERGIO E. VASQUEZ

ORDER DISMISSING PROCEEDING

Finalized on March 30, 1979

The sole issue established by the Commission's Order of Investigation and Hearing was whether or not respondent Sergio E. Vasquez has the requisite independence under sections 1 and 44 of the Shipping Act, 1916, to continue to operate as a licensed IOFF. No violations of the Shipping Act, 1916, or the Commission's Rules and Regulations were alleged. On January 26, 1979, Hearing Counsel filed a Motion to Dismiss Proceeding. As set forth in the motion (to which no reply has been filed), the following facts have generated Hearing Counsel's request:

By notice published in the *Federal Register* on July 28, 1978 (43 F.R. 32776) the Commission amended General Order 4 (46 CFR 510.5) regarding licensed independent ocean freight forwarders (IOFF). This amendment, *inter alia*, increased the amount of the surety bond required for IOFF's to $30,000, and further provided that existing licensees were required to file the increased bond on or before December 1, 1978, otherwise the license issued to the IOFF would be revoked in accordance with Rule 510.9 (46 CFR 510.9). As of December 1, 1978, the Commission failed to receive the required surety bond from Respondent Sergio E. Vasquez.

Thereafter, by notice published in the *Federal Register* on January 3, 1979 (44 F.R. 953, 954), the Commission notified all licensed IOFF's, including Respondent Vasquez, who failed to furnish a valid surety bond, that their licenses were revoked effective December 2, 1978, in accordance with Rule 510.5 and that such licenses must be returned to the Commission.

In view of the fact that respondent Sergio Vasquez' license has already been revoked by the Commission, it appears that no valid regulatory purpose or public interest would be served by continuing with this proceeding. Accordingly, the proceeding is hereby *DISMISSED* as moot.

(S) THOMAS W. REILLY
Administrative Law Judge

February 14, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-32

PACIFIC WESTBOUND CONFERENCE—
EQUALIZATION RULES AND PRACTICES

Pacific Westbound Conference Agreement No. 57, which provides for absorption of "rail or coastal steamer freights or other charges", does allow the absorption of motor carrier freight rates as "other charges". *Intermodal Service to Portland, Oregon,* (17 F.M.C. 105, 119 (1973)).

Rule 16 of Pacific Westbound Conference Tariff No. 3, which provides for port equalization, is not *per se* violative of sections 15, 16, or 17 of the Shipping Act, 1916 or section 205 of the Merchant Marine Act of 1936. *Stockton Port District v. Pacific Westbound Conference,* 9 F.M.C. 12, 20 (1965).

Rule 16 of Pacific Westbound Conference Tariff No. 3 does not prohibit cargo being equalized from moving on ICC-exempt carriers.

Further hearing is required to determine whether or not the equalization and absorption practices of the Pacific Westbound Conference, as applied to Portland, violate sections 15, 16 or 17 of the Shipping Act, 1916 or section 205 of the Merchant Marine Act of 1936.

Norman E. Sutherland for Petitioner Port of Portland.

R. Frederick Fisher and *Richard C. Jones* for Respondent Pacific Westbound Conference and member lines.

Joseph F. Kelly, Jr.,[1] for Intervenor Massachusetts Port Authority.

Martin A. Hecksher for Intervenor Delaware River Port Authority.

C.C. Guidry and *G.B. Perry,* respectively, for Intervenors Board of Commissioners of the Port of New Orleans and New Orleans Traffic and Transportation Bureau, Inc.

John Robert Ewers, Alan J.Jacobson and *Don Blumenthal* for the Bureau of Hearing Counsel.

REPORT AND ORDER OF FURTHER INVESTIGATION AND HEARING

March 30, 1979

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

PROCEEDING

This proceeding was commenced by an Order of Investigation and Hearing (Order) issued by the Commission pursuant to sections 15, 16, 17 and 22 of the Shipping Act, 1916 (46 U.S.C. 814, 815, 816 and 821), on September 11, 1978. The purpose of the proceeding is to investigate further the repeated complaints of the Port of Portland, Oregon (Portland) that the equalization and absorption

[1] Effective February 2, 1979, Joseph F. Kelly and his firm withdrew from this case. Douglas B. MacDonald and Barbara Gard have been substituted as attorneys of record for the Massachusetts Port Authority (Massport).

practices of the Pacific Westbound Conference and its member lines (PWC) constitute an unlawful diversion away from Portland of cargo which is "naturally tributary" to Portland, in violation of sections 15, 16, and 17 of the Shipping Act, 1916, and contrary to the policy of section 205 of the Merchant Marine Act of 1936 (46 U.S.C. 115).[2]

The order designated the following four issues for examination:

(1) Whether Article 3 of the PWC's basic Agreement No. 57 permits equalization and absorption of motor carrier inland freight rates and charges;

(2) Whether PWC's equalization and absorption practices, as they affect Portland, are unlawful and detrimental to the commerce of the United States and the general public interest, or unduly prejudicial or unjustly discriminatory to Portland or to businesses and individuals which depend on Portland's economic viability pursuant to section 205 of the Merchant Marine Act, 1936, and sections 15, 16 and 17 of the Shipping Act, 1916;

(3) Whether PWC Freight Tariff No. 3, Rule 16, violates section 205 of the Merchant Marine Act of 1936, and sections 15, 16 and 17 of the Shipping Act, 1916 by permitting equalization and absorption of cargo away from Portland where direct service is adequate to handle such cargo; and

(4) Whether PWC Freight Tariff No. 3, Rule 16 permits cargo being equalized and absorbed to move on ICC-exempt carriers.

With respect to the concept of "naturally tributary" cargo, the Order stated that the Commission would adhere to the principles recently articulated in *Council of North Atlantic Shipping Associations v. American Mail Lines, Ltd. (CONASA)*, (21 F.M.C., ____ 18 S.R.R. 774 (1978)) and *Board of Commissioners of the Port of New Orleans v. Seatrain International, S.A.*, (21 F.M.C. ____, 18 S.R.R. 763 (1978)).

The proceeding was limited to the submission of affidavits of fact and memoranda of law relative to the four designated issues, and the Commission's Bureau of Hearing Counsel (Hearing Counsel) was designated a party. Petitions to intervene were received from the United States Department of Transportation (DOT), the Massachusetts Port Authority, the Delaware River Port Authority, and the Port of New Orleans. Intervention was granted to these parties on a limited basis, to allow filing of legal memoranda in reply to the opening submissions of PWC, Portland and Hearing Counsel. Memoranda were received from all intervenors except DOT.

In accordance with the procedural schedule set forth in the Order, PWC, Portland and Hearing Counsel filed opening and reply memoranda and affidavits.[3] After the filing of these memoranda and affidavits, the following motions were made: (1) Portland moved to strike the entirety of PWC's reply on the ground that the matters in it should have been raised in PWC's opening

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[2] Between 1975 and 1978, Portland's objections to PWC's equalization and absorption practices were aired in a direct exchange of views and information between Portland and PWC. The progress of these discussions was monitored by the Commission. By April 1978, it had become apparent that disputed legal and factual issues surrounding PWC's equalization and absorption practices as they affect Portland had not been resolved. Consequently, on April 14, 1978, the Commission issued an order, pursuant to section 21 of the Shipping Act, 1916 (46 U.S.C. 820), requiring both PWC and Portland to file with the Commission certain relevant information concerning PWC's practices and their impact on Portland. This information was made part of the record in the present proceeding by the Commission's Order of Investigation and Hearing. That Order also incorporated into the record in this proceeding documents summarizing the earlier exchange of views and information between Portland and PWC.

[3] PWC did not present evidence with its opening memorandum, arguing that it is incumbent upon Portland first to allege what area it considers to be "naturally tributary" to it, so that PWC can frame a response. Portland presented some limited information with its opening memorandum (in the form of an affidavit, with appendices, from Milton A. Mowat, Portland's Traffic and Regulatory Affairs Manager), but did not address the "naturally tributary" issue in any detail. Portland contanded that PWC should have the burden of proving its practices to be legal. Although PWC still objected to Portland's failure to define its "naturally tributary zone," it came forward in its reply memorandum with affidavits and documentary evidence intended to show that its practices are not illegal under the standards of the CONASA case.

memorandum; (2) Portland requested extensive "discovery" from PWC (even though none had been authorized by the Order); and (3) Hearing Counsel requested that the Commission dispose of certain issues without further delay and set other issues for hearing before an Administrative Law Judge.

The submission of affidavits of fact and memoranda of law by PWC and Portland, pursuant to the Commission's Order, has not resulted in a fully developed record. As a result, the Commission can, at present, resolve only part of the issues designated for decision in the Order of Investigation and Hearing. Further hearing will be required to resolve the remaining issues.

DISCUSSION

A. *Does PWC's basic Agreement No. 57 Permit the Absorption of Inland Motor Carrier Freight Charges by PWC?*

Portland argues that the following language from Article 3 of PWC's agreement authorizes PWC members to absorb rail and coastal steamer charges, but not motor carrier charges:

> "[there shall be] no absorption at loading or discharging ports of rail or coastal steamer freights or other charges . . . except as may be agreed to."

PWC and Hearing Counsel argue that the language, "or other charges" clearly includes, *ejusdem generis,* motor carrier freight rates.

In *Intermodal Service to Portland, Oregon,* (17 F.M.C. 106, 119 (1973)), the Commission held that language indistinguishable from that contained in Article 3 of the PWC agreement *does* encompass motor carrier freight charges. Portland has offered no good reason of law or policy for the Commission to deviate from this interpretation of the "or other charges" language, and this interpretation appears to reflect the intent of the parties to the PWC agreement as well as the understanding of the Commission.

Because the interpretation of Article 3 of PWC's agreement involves no outstanding factual questions, and is controlled by the reasoning of the *Intermodal Service to Portland* case, no further hearing on the issue is required. Article 3 does allow absorption of motor carrier charges as agreed to by the PWC parties.

B. *Do PWC's Equalization and Absorption Practices, as Applied to Portland, Violate Sections 15, 16, or 17 of the Shipping Act, 1916 or Section 205 of the Merchant Marine Act of 1936?*

Portland argues that any absorption of inland freight charges on cargo which would otherwise move most cheaply to Portland (as opposed to any other port) constitutes a diversion of Portland's naturally tributary cargo,[4] and that such diversion is illegal *per se* unless it can be shown that Portland's facilities or service are inadequate. To support this argument, Portland relies upon *Intermodal Service to Portland, Oregon, supra,* and ignores the fact that this case was substantially expanded in the Commission's CONASA decision.

[4] Portland was required by the Commission's section 21 Order to describe in detail the area it believed to be "naturally tributary" to it. Portland did not describe any specific area but asserted that any cargo as to which Portland was the basis for an equalization to a "more distant" port is naturally tributary to Portland.

In CONASA, the Commission set forth the following general principles, specifically designating them as guidelines to be considered in future cases involving alleged diversions of cargo from a port:[5]

1. Certain cargo may be naturally tributary to a port, but any "naturally tributary zone" surrounding a port is constantly changing. In a particular case, this zone is determined by consideration of: (a) the flow of traffic through the port prior to the conduct in question, including points of cargo origin or destination; (b) relevant inland transportation rates; (c) natural or geographical transportation patterns and efficiencies; and (d) shipper needs and cargo characteristics

2. A carrier or port may not *unreasonably* divert cargo which is naturally tributary to another port. When diversion of naturally tributary cargo occurs, the reasonableness of the practice must be determined. The reasonableness of the particular practice is determined by consideration of: (a) the quantity and quality of cargo being diverted (is there substantial injury?); (b) the cost to the carrier of providing direct service to the port; (c) any operational difficulties or other transportation factors that bear upon the carrier's ability to provide direct service (*e.g.*, lack of cargo volume, inadequate facilities); (d) the competitive conditions existing in the trade; and (e) the fairness of the diversionary method or methods employed (*e.g.*, absorption, solicitation).

A comparison of the existing record in this case (which includes responses to the Commission's section 21 order which preceded its CONASA decision) with the CONASA guidelines leads to the conclusion that the record does not address the CONASA guidelines in sufficient depth to warrant a Commission decision on the diversion issue at this time.[6] Evidence relevant to some of the CONASA factors is contained in the responses to the Commission's section 21 order.[7] PWC's reply memorandum and affidavits address several of the CONASA factors,[8] but they do not pretend to be exhaustive. Neither Hearing Counsel nor Portland have had an opportunity to respond to PWC's information, and the Commission has no basis for concluding that all of PWC's information is beyond dispute. Other relevant documents are scattered throughout the record,[9] but the record as a whole simply will not support a conclusive finding as to the legality or illegality of PWC's practices. Consequently, a further hearing is required.

C. *Does Rule 16 of PWC's Tariff No. 3[10] Violate Sections 15, 16 and 17 of the Shipplng Act, 1916 and Section 205 of the Merchant Marine Act of 1936 by*

[5] 21 F.M.C. ——, 18 S.R.R., at 779. Intervenor Massport takes the position that the CONASA guidelines cannot properly apply to this case because the CONASA case was an adjudicatory proceeding, and not a rulemaking. As a corollary to this argument, Massport asserts that the CONASA analysis (which involved minibridge movements) is inapplicable here because "the considerations applicable to such a radical variance from historical shipping patterns as minibridge must necessarily differ considerably from the considerations applicable to localized competition between adjacent ports through absorption."

The Commission's analysis in CONASA is not limited, in logic or fact, to minibridge cases, but represents a refinement in the methodology that the Commission will apply generally to all cases of cargo diversion and absorption of inland transportation costs. This methodology is no less applicable to "small diversions" (*i.e.*, those involving adjacent ports in the same range) than it is to "big diversions" (*i.e.*, minibridge movements).

[6] The Commission has also determined that environmental issues may be involved in this case, and has directed that an environmental assessment be made by its Office of Environmental Analysis.

[7] The responses (which constitute exhibits 36-68 in this proceeding), provide a partial description of PWC's equalization, in 1977, of all cargo for which Portland was the port to which the lowest inland rates applied. This description is directly pertinent to the quantity and quality of cargo being diverted (CONASA factor 2(a)), and sheds some light on the normal flow of traffic through Portland absent any equalization (factor 1(a)). The section 21 responses do not indicate the *amount* of equalization paid or the relevant inland transportation rates (factor (1)(b)).

[8] PWC's reply discusses shipper needs (factor 1(d)), the cost to carriers of providing direct service (factor 2(b)), operational difficulties in serving Portland (factor 2(c)), competitive conditions in the trade (factor 2(d)), and the fairness of its methods (factor 2(e)).

[9] *See, e.g.*, Portland's equalization list (exhibit 22), PWC's equalization statistics (exhibit 29), and PWC equalization reports (exhibit 31, placed in record by Portland).

[10] The Commission's inquiry also includes PWC Local and Overland Freight Tariff No. 11 (FMC-19), page 69, Rule 13.3.3 (effective January 1, 1979). This tariff supersedes and cancels PWC Local and Overland Freight Tariff No. 3 (FMC-13). Rule 16 of

Permitting Equalization Away From Portland Where Direct Service is Adequate to Handle Such Cargo?

Equalization, as such, is not illegal[11] and a tariff that allows for equalization therefore is not *per se* illegal. It is only the *application* of the tariff in a particular manner that can be illegal. The legality of PWC's Tariff No. 3 apart from its application does not present a separate legal issue in this case. Additionally, the question of adequacy of Portland's service is only *one* of the factors to be considered under the CONASA guidelines, and is not dispositive by itself of the legality of an equalization. For the foregoing reasons, the Commission concludes that PWC's Rule 16, Tariff No. 3, does not, in and of itself, violate sections 15, 16 or 17 of the Shipping Act, 1916, or contravene section 205 of the Merchant Marine Act of 1936. The question of the legal *application* of the Rule still remains within Issue (B), *supra*. If an illegal implementation of PWC's tariff were proved, then modification of the tariff to prohibit such implementation could be required.

D. *Does PWC's Rule 16, Tariff No. 3*[12] *Permit Cargo Being Equalized to Move on ICC-Exempt Carriers?*

PWC's equalization rule provides for the payment of equalization as follows:

> Equalization is the absorption by the ocean carrier of the difference between the shipper's cost of delivery to the ship's tackle at dock and port at which the lowest applicable common carrier or contract carrier rates, excluding rates on any time basis apply and cost of delivery to ship's tackle at terminal dock and port of equalizing line. Shipper's cost for inland transportation is to be an amount that is not in excess of the cost computed at the lowest applicable common carrier or contract carrier rates.

Portland argues that this provision should be read to restrict shippers of equalized cargo to the use of "common or contract carriers" as defined by the Interstate Commerce Commission (ICC). Put another way, Portland's contention is that PWC's tariff forbids the use of ICC-exempt carriers for equalized shipments. Portland furnishes no persuasive reason for imposing such a limitation, and cites no Commission precedent for such an interpretation.

PWC's equalization rule clearly refers to "applicable common carrier or contract carrier *rates*" (emphasis supplied) for the purpose of setting the amount of equalization to be paid, and *not* for the purpose of restricting shippers to ICC regulated carriers.[13] The latter purpose represents poor transportation policy by arbitrarily restricting the use of inland transportation resources by shippers in foreign commerce. It is therefore the Commission's conclusion that PWC's equalization rule does authorize the use of ICC exempt carriers for the transport of equalized cargo.

which contained the equalization provisions referred to by Portland and PWC in their memoranda. Rule 13.3.3 of PWC Tariff No. 11 contains language indistinguishable from that contained in Rule 16 of PWC Tariff No. 3. Therefore, the original investigation of this language applies equally to PWC's present Rule 13.3.3 of its Tariff No. 11.

[11] *See* CONASA, 18 S.R.R. at 779, *Port of New Orleans*, 18 S.R.R. at 770-772, *Stockton Port District v. Pacific Westbound Conference*, 9 F.M.C. 12, 20 (1965), and *Beaumont Port Commission v. Seatrain Lines, Inc.*, 2 U.S.M.C. 500, 504 (1941).

[12] The Commission's inquiry also includes PWC's Rule 13.3.3, Tariff No. 11 (FMC-19). *See* Note 10, *supra*.

[13] If the tariff is interpreted as referring *only* to *ICC* rates rather than the lowest applicable common or contract carrier rates, applications of the tariff Rule to ICC-exempt shipments could result in rebates to shippers who carry their own goods to port in violation of section 16 Second of the Shipping Act, 1916. Therefore, neither the *type* of carrier used nor the *amount* of equalization to be paid is necessarily governed by ICC definitions or rates.

CONCLUSIONS

It is concluded as a matter of law that: (1) Article 3 of PWC's Agreement No. 57 does permit equalization and absorption of motor carrier inland freight rates and charges; (2) PWC freight tariff No. 11, Rule 13, (and PWC freight tariff No. 3, Rule 16), are not violative of section 205 of the Merchant Marine Act, 1936 or sections 15, 16 or 17 of the Shipping Act, 1916, on their face; and (3) PWC Freight Tariff No. 11, Rule 13 (and PWC Freight Tariff No. 3, Rule 16) do permit cargo being equalized and absorbed to move on ICC-exempt carriers.

It is further concluded that the lawfulness, under section 205 of the Merchant Marine Act, 1936 and sections 15, 16 and 17 of the Shipping Act, 1916, of PWC's equalization and absorption practices as they affect Portland, cannot be determined conclusively from the present record. For these reasons, a further hearing will be ordered. In the interest of avoiding excessive delay of this proceeding, the scope of the additional evidence to be taken will be limited so as to fit with the pertinent data already received.

THEREFORE, IT IS ORDERED, That the motion of the Port of Portland to strike the reply of the Pacific Westbound Conference, and the request of the Port of Portland for discovery, are denied; and

IT IS FURTHER ORDERED, That the request of the Bureau of Hearing Counsel for a further hearing is granted to the extent set forth below; and

IT IS FURTHER ORDERED, That to determine the legality, under section 205 of the Merchant Marine Act of 1936 and sections 15, 16 and 17 of the Shipping Act, 1916, of the Pacific Westbound Conference's equalization and absorption practices as they affect the Port of Portland, a further hearing shall be held before an Administrative Law Judge of the Commission; and

IT IS FURTHER ORDERED, That the Commission's Bureau of Hearing Counsel shall be a party to the hearing before the Administrative Law Judge; and

IT IS FURTHER ORDERED, That the issues to be considered at the hearing before the Administrative Law Judge shall be restricted to the following:

(1) Whether and to what extent the equalization and absorption practices of the Pacific Westbound Conference cause cargo which would ordinarily move through the Port of Portland to move through ports other than Portland?

(2) Does the diversion of cargo described in issue (1), if any, cause *significant* economic harm to the Port and the local economy of Portland?; and

(3) If the equalization and absorption practices of the Pacific Westbound Conference do cause significant economic harm to Portland, are they nonetheless reasonable and justified?; and

IT IS FURTHER ORDERED, That the additional evidence to be gathered in the proceeding before the Administrative Law Judge shall be limited to the following, unless the Administrative Law Judge finds compelling reasons to go beyond this limitation:

A. For the years 1977[14] and 1978, the information described in the first ordering paragraph of the Commission's April 14, 1978 section 21 order, but only as to the ten most important cargo commodities (in terms of gross revenue to the Port of Portland) carried by the Pacific Westbound Conference in 1978;

[14] For the year 1977, this information may be extracted from previous section 21 order responses once the ten most important commodities of 1978 have been determined.

B. For the years 1977 and 1978, as to the ten commodities described in paragraph A, the amount of equilization paid by the Pacific Westbound Conference and the basis for such equalization payments[15]; and

C. Affidavits or, if considered necessary by the Administrative Law Judge, depositions, concerning the following matters, but only to the extent that these affidavits or depositions relate to the ten commodities described in paragraph A, and then only to the extent that they relate to shipments occurring in 1977 or 1978:

1. Natural, geographical or economic conditions of inland transportation which favor or impede movements through the Port of Portland;
2. The ability of the Port of Portland to meet the needs of shippers, such as timeliness of shipments and special cargo handling facilities;
3. The extent to which equalization payments, as opposed to other factors, induced shippers to move their cargo through a port other than Portland;
4. The extent, if any, to which Portland's ability to meet shipper demand was limited by the level of port calls of members of the Pacific Westbound Conference;
5. The amount of net revenue lost by the Port of Portland as a result of cargo diversion caused by equalization payments, and the effect of such loss on the local economy of Portland; and
6. The methods and scope of cargo solicitation employed by Portland, Seattle, Los Angeles-Long Beach and the Pacific Westbound Conference, to the extent considered relevant by the Administrative Law Judge.

D. Affidavits or, if considered necessary by the Administrative Law Judge, depositions concerning the following matters, but only to the extent that they address time periods after December 31, 1976:

1. The cost to member lines, or the Pacific Westbound Conference as a whole, of providing direct service to Portland with various amounts of frequency;
2. Operational difficulties or other transportation factors bearing upon the ability of the Pacific Westbound Conference to provide increased direct service to Portland;
3. Competitive conditions of carriers in the westbound trade affecting the ability of the Pacific Westbound Conference to increase its direct service to Portland; and
4. The economic feasibility to the Pacific Westbound Conference of serving Portland via feeder vessels to other ports; and

E. Interrogatories, and answers thereto, and discovery of documents, as allowed by the Administrative Law Judge, but only to the extent relevant to the issues described in paragraphs A through D above; and

IT IS FURTHER ORDERED, That the participation of intervenors in this further hearing shall be limited to the submission of memoranda of law at the close of the taking of evidence before the Administrative Law Judge, and the filing of exceptions, or replies thereto, to any initial decision of the Administrative Law Judge.

(S) FRANCIS C. HURNEY
Secretary

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[15] The purpose of this paragraph is to obtain the most detailed information possible with respect to the *amount* of equalization paid and applicable inland rates without causing undue burden to the parties or undue expansion of the record. Accordingly, the Administrative Law Judge may alter the scope of this inquiry to balance the need for detailed information against the interest in arriving at a manageable record.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 390(I)

CUMMINS ENGINE CO.

v.

UNITED STATES LINES

INFORMAL DOCKET NO. 391(I)

CUMMINS ENGINE CO.

v.

AMERICAN PRESIDENT LINES

INFORMAL DOCKET NO. 392(I)

CUMMINS ENGINE CO.

v.

MAERSK LINES, LTD.

ORDER ON RECONSIDERATION

April 5, 1979

These three proceedings are before the Commission on Petition for Reconsideration (Petition) filed by Cummins Engine Co. (Cummins), requesting the Commission to reconsider its decision and the decision of the Settlement Officer denying reparation. The complaints filed in these proceedings allege freight overcharges in violation of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817(b)(3)), by United States Lines, American President Lines, and Maersk Lines, Ltd. (collectively referred to as Respondents). The Japan/Korea-Atlantic and Gulf Freight Conference (Conference), whose tariff is the subject of the controversy, was granted leave to intervene.

At the request of Cummins and with the consent of Respondents, the proceedings were conducted under Subpart S of the Commission's Rules of Practice and

Procedure (Rules) which gives the parties no right of appeal.[1] Having waived such right by requesting the Subpart S procedure, Cummins, now faced with an adverse decision, seeks to circumvent the Rules by filing exceptions under another guise, *i.e.*, petition for reconsideration. The Petition offers no new evidence or arguments not already considered and will be denied.

This denial would normally obviate any further discussion of the matter. However, in view of the different decision reached on the merits by the Settlement Officer in *Cummins Engine Co. v. United States, Inc.*, Informal Docket No. 330(I), a proceeding involving the same issue, some clarification of the Commission's policy in this regard is appropriate.[2]

The facts in this proceeding are as set forth in the decision of the Settlement Officer. The question raised is whether there existed an ambiguity in the Conference's tariff which, according to established principles, should be resolved in favor of the shipper. Cummins contends that in the absence of any other qualification, the tariff commodity description "Cylinder Block Assemblies With or Without Crankshaft," is broad enough to cover all parts and pieces that "either attach to, or, are fitted into the cylinder block and ultimately result in the completed cylinder block assembly." The Conference maintains that the description encompasses only the cylinder block, the main bearing caps, and the crankshaft, if attached to the cylinder block.

In Informal Docket No. 330(I) the award of reparation was based upon the finding that the failure to specify in the tariff what component parts constitute a "cylinder block assembly" caused an ambiguity in the tariff which had to be resolved in favor of the shipper. The Settlement Officer in these proceedings distinguished that decision on the basis of the record in Docket No. 330(I) which was not as fully developed as the record here. In his opinion had the defenses presented in the instant proceedings been raised in the former proceeding, the result in Informal Docket No. 330(I) would probably have been different.[4]

The evidence introduced by the Conference in the instant proceedings clearly establishes that, although there is a question of whether other potential shippers of the same commodities could have been misled, Cummins, at least, was fully apprised beforehand of the tariff classification and rates the Conference would apply.[5] While such knowledge by one shipper would not of itself generally make an ambiguous tariff unambiguous, it does serve to put the matter into proepr perspective. The Conference's repeated refusals to establish the commodity description Cummins had persistently requested and Cummins' continuous use of Conference vessels notwithstanding, implies consent on Cummins' part to the rates expected to be charged. Indeed, not only had Cummins requested the Conference to file the now disputed tariff description "cylinder block assembly," but in reply to the Conference's expressed concern over the nature of the commodity so described, Cummins itself explained that a cylinder block assem-

[1] Subpart S—Informal Procedure for Adjudication of Small Claims, 46 C.F.R. 502.301, 502.304.

[2] Decision of the Settlement Officer served March 3, 1976, adopted by the Commission on November 17, 1976.

[4] The reference is to correspondence between Cummins and the Conference which shows that since 1966 Cummins has repeatedly requested and the Conference consistently denied the establishment of a generic commodity description which would encompass all *pieces and parts that go into a diesel engine*.

[5] No complaint alleging tariff ambiguity was received from any other shipper.

bly consisted basically of the cylinder block and the main bearing caps and capscrews and that other miscellaneous parts "such as dowels, buckings and pipe plugs . . . make up less than one-half of one percent by weight, volume or value of the total cylinder block."[6] It appears, therefore, that Cummins not only knew what was in fact meant by the tariff but had itself contributed to whatever ambiguity it now contends exists.

Permitting an award of reparations to Cummins under these circumstances would not be warranted.

The Petition for Reconsideration is therefore denied.

It is so ordered.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[6] Letter of March 11, 1968, to the Conference from R.O. Christian, Cummins' Corporate Transportation Manager. Cummins argues that since that time its purchases from Japanese suppliers have increased "and had they been involved at that time, would have been included by Mr. Christian". The fact is, however, that they were not.

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-10

UNION CAMP CORPORATION, ET AL.—
POSSIBLE VIOLATION OF SECTIONS 15,
16, 18 AND 44 OF THE SHIPPING ACT, 1916 AND
COMMISSION GENERAL ORDER NO. 4

ORDER OF DISCONTINUANCE

April 6, 1979

On April 20, 1978, the Commission served its order of Investigation and Hearing in this proceeding. The action arose from activities in 1972, 1973, and 1975, involving volume contracts between Union Camp Corporation and Open Bulk Carriers, Ltd. for the carriage of linerboard and wood pulp from U.S. South Atlantic ports to ports in Europe. The Order cited possible violation of the Shipping Act, 1916 and of 46 CFR 510.23(a).

On August 24, 1977, the Government filed Civil Action No. CV477-193 in the U.S. District Court for the Southern District of Georgia seeking civil penalties for claimed violations of the Shipping Act of 1916. On April 24, 1978, the Government filed a Motion for Stay Pending Federal Maritime Commission Hearing and Investigation seeking determination of issues by the FMC in this proceeding rather than by the District Court.

The Commission's Order of Investigation and Hearing in this proceeding issued in accordance with the Government's motion in the District Court contained the following qualifying language:

IT IS FURTHER ORDERED, That this order shall become effective upon the District Court's entry of a stay of its proceedings pending the Commission's hearing and investigation.

On January 19, 1979,following argument and briefing, Judge Alexander A. Lawrence, Senior Judge of the U.S. District Court, entered his Order on Government's Motion for Stay and Ebberwein's Motion to Dismiss. In addition to ruling on other matters, Judge Lawrence denied the Government's motion to stay the District court proceeding.

Inasmuch as the Commission's Order of Investigation and Hearing in this proceeding was conditioned upon the stay of the District Court proceedings, and such stay has been denied, no further proceedings are contemplated in this matter. Accordingly, the motion of Hearing Counsel for discontinuance is granted.

By 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.

ORDER ON RECONSIDERATION

April 12, 1979

Caribe Trailer Services, Inc. (Caribe) has filed a Petition for Reconsideration (Petition) of the Commission's January 3, 1979, Report and Order (Order) discontinuing this proceeding.[1] In the Order, the Commission found that the corporate affiliation which constituted the central issue to be resolved in the proceeding ceased to exist on January 15, 1976, that the Management Services Contract which was the subject of the Commission's investigative proceeding ceased to exist on or about June 30, 1978, and that no further investigation or Commission action was warranted under the circumstances.

In its Petition, Caribe objects to the Order on three basic grounds: (1) that there was no adequate basis in the record for the Commission's findings that the corporate affiliation between Puerto Rico Marine Management (PRMMI) and Sea-Land Service, Inc. (Sea-Land) had ended and that the Management Services Contract had ceased to exist; (2) that there was insufficient consideration given, during the proceeding and in the Order, to public interest and antitrust issues; and (3) that section 15 of the Shipping Act, 1916 and due process considerations preclude the Commission from terminating its investigation without first making a ruling or expressing an opinion as to the applicability of section 15 to the Management Services Contract. Responses in opposition to the Petition were received from the Commission's Bureau of Hearing Counsel, the Puerto Rico Maritime Shipping Authority (PRMSA), and Sea-Land Service, Inc./Gulf Puerto Rico Lines, Inc.

DISCUSSION

1. *The Commission's Findings*

a. *End of Corporate Affiliation*

In its Order, the Commission found that, "[o]n January 15, 1976, the corpo-

[1] This proceeding was a Commission investigation instituted pursuant to sections 15 and 22 of the Shipping Act, 1916 (46 U.S.C. 814 and 821). The primary purpose of the proceeding was to determine whether a Management Services Contract between the Puerto Rico Maritime Shipping Authority and Puerto Rico Marine Management, Inc. is subject to section 15 of the Shipping Act, 1916, by reason of the Puerto Rico Marine Management, Inc.'s corporate affiliation with Sea-Land Service, Inc., and, if so, whether the agreement should be approved, disapproved or modified.

rate relationship which represents the central issue in this proceeding ceased to exist." as a result of the sale of PRMMI to TKM Corporation, a company unrelated to Sea-Land. This finding is supported by competent evidence[2] of record.[3] Caribe availed itself of numerous opportunities to comment on this evidence,[4] but did not come forward with any information contradicting it. Similarly, Caribe's Petition voices numerous objections[5] to the Commission's consideration of evidence demonstrating the sale of PRMMI to TKM, but offers no new evidence to refute the evidence of record. Despite several opportunities, and most recently in its Petition, Caribe raised no serious issues of law or fact that would warrant reconsideration of the Commission's finding that PRMMI is no longer a corporate affiliate of Sea-Land.

b. *Termination of the Management Services Contract*

The Commission also has found that, "[o]n or about June 30, 1978, the Management Services Contract that constituted the subject of this investigation ceased to exist. In a well-publicized action, PRMSA paid its outstanding obligations under the Management Services Contract and terminated the Contract." These findings were facts within the general knowledge of the Commission as an expert body, and were a proper subject of official notice under the Commission's Rules of Practice and Procedure.[6] By announcing the extra-record factual basis for its findings, the Commission made it clear that it was taking official notice of these matters in its final Order.[7] Caribe was afforded an opportunity to show that these facts do not exist through the use of the Commission's Rules for Reconsideration of Proceedings.[8] Caribe filed its Petition, but failed to allege or prove any facts contradicting the Commission's official notice. In view of the fact that Caribe did not allege that the Commission's official notice as to the termination of the Management Services Contract was *factually* incorrect, but complained only that it was based upon "hearsay," Caribe's objection to the official notice is without substance.

2. *Public Interest and Antitrust Issues*

The gravamen of this portion of Caribe's complaint is that the Commission did not address the alleged antitrust violations surrounding the unfiled agreement(s) under investigation in the proceeding. Since no determination has been made that

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[2] *See* Exhibit A to PRMSA's January 21, 1976, Motion to Discontinue (Stock Purchase Agreement), and Exhibits A and B to Hearing Counsel's February 5, 1976, Reply to PRMSA's Motion (Ancillary Agreement, and Affidavit of Charles F. Benbow).

[3] Commission Rule 169 (46 C.F.R. Part 169) provides:

> The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision.

[4] *See* Caribe's February 5, 1976 Answer to PRMSA's Motion to Dismiss, Caribe's February 8, 1976 letter to the Administrative Law Judge, Caribe's "First Amended Reply" of February 12, 1976 and its "Second Amended Reply" of February 26, 1976.

[5] Caribe argues that the Administrative Law Judge should have reopened the proceeding to admit evidence of the sale to TKM, and that "[t]he only reason why the Judge did not re-open the proceedings and properly admit the affidavit was that the affidavit was known by all parties to be fraudulent and presented for the purposes of discontinuing a federal proceeding and that it would not stand the scrutiny of a hearing." *In light of the fact that Caribe can articulate no plausable basis for its suspicions of fraud*, a further hearing to allow Caribe to air those suspicions is not warranted.

Caribe refers, at pages 5-6 of its Petition, to "ex parte" communications between Hearing Counsel and counsel for Sea-Land. Since neither Hearing Counsel nor Sea-Land's counsel are persons "*participating in*" the Commission's decision in this case, communications between them are not "ex parte." within the meaning of the Commission's Rules. *See* 46 C.F.R. Part 502.11, formerly codified at 46 C.F.R. Part 502.170.

[6] Rule 226 (46 C.F.R. Part 502.226).

[7] The Commission may take official notice of facts at any stage of a proceeding, including its final decision. *See Attorney General's Manual on the Administrative Procedure Act* (1947), p. 80.

[8] Rule 261 (46 C.F.R. Part 502.261).

an agreement was ever *subject to* section 15 of the Shipping Act, 1916, it is clearly premature and inappropriate for the Commission to determine whether such an agreement would be *approvable* under the standards of that section. Analysis of public interest issues, including antitrust considerations, should be undertaken only after jurisdiction to engage in such analysis has been found.[9]

3. *Termination of the Proceeding*

Caribe's final contention is that the Commission is legally required to pass on the question of whether the PRMSA-PRMMI Management Services Contract was subject to section 15 of the Shipping Act.

Caribe apparently believes that the Commission must address this question even though: (1) there is no longer any legal theory under which both parties could be found to be persons subject to the Shipping Act; (2) the agreement no longer exists; and (3) there is no evidence of fraud by either party in attempting to avoid the Shipping Act. Caribe acknowledges that the Commission has in the past discontinued proceedings under similar circumstances,[10] but argues that so long as there is a possibility that a past violation of the Shipping Act might be discovered, the Commission cannot discontinue the proceeding. In view of the three factors mentioned above, the Commission concludes that further proceedings in this case would serve no important regulatory purpose, and would be wasteful of the time and resources of the Commission and the parties. Under such circumstances, the Commission is empowered to terminate the proceedings.

THEREFORE, IT IS ORDERED, That the Petition for Reconsideration of Caribe Trailer Services, Inc. is denied, and the Commission's Report and Order of January 3, 1979, is affirmed.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[9] If violations of the antitrust laws have occurred, Caribe is free to seek damages through judicial proceedings.

[10] *See Kerr Steamship Co. v. Isthmian Steamship Co.*, 2 U.S.M.C. 93 (1939); *Port Commission of the City of Beaumont v. Seatrain Lines, Inc.*, 3 F.M.B. 581 (1951); and *Agreement No. 9431, Hong Kong Tonnage Agreement*, 10 F.M.C. 134 (1966).

FEDERAL MARITIME COMMISSION

DOCKET NO. 76–10

JOY MANUFACTURING CO.

v.

LYKES BROS. STEAMSHIP CO., INC.

NOTICE

April 13, 1979

Notice is given that no exceptions were filed to the March 7, 1979 initial decision on remand in this proceeding and the 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

No. 76-10

Joy Manufacturing Co.

v.

Lykes Bros. Steamship Co., Inc.

Finalized on April 13, 1979

Applicable freight charges on numerous shipments determined to total $194,375.38. Overcharges and undercharges determined. Net undercharges are $6,145.87.

William Levenstein for complainant.
Edward S. Bagley for respondent.

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

The factual background is stated in the initial decision served March 17, 1977, and in the Commission's decision served January 16, 1979. These decisions resolved certain primary legal issues, but left the proceeding open so that the parties could submit verified statements containing their computations of the applicable charges, the overcharges, and the undercharges on the articles shipped covered by the 23 bills of lading herein. The parties were given until February 5, 1979, to submit such statements, and the matter was remanded to the Administrative Law Judge for determination of the applicable charges.

Certain letters (with attachments) dated December 27, 1978 (Bagley for respondent), January 12, 1979 (Bagley for respondent), January 31, 1979 (Levenstein for complainant), February 6, 1979 (Bagley for resondent), and February 14, 1979 (Levenstein for complainant) have supplemented the previous record.

Rule 502 of the Rules of Practice and Procedure (46 CFR 502.252) provides that when the Commission finds that reparation is due, but that the amount cannot be ascertained upon the record before it, reparation statements shall be prepared in accordance with Appendix II(4) of the rules. This appendix calls for details of the shipments. Among other things the reparation form requires that the reparation statement include the rates charged, the amounts of the charges paid, as well as the applicable rate and applicable charges, along with weights and measurements and other necessary details.

[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.

The statements filed by the parties do not jibe in numerous respects, and lack various details. Nevertheless, the Administrative Law Judge with the aid of these statements, and the exhibits of record, has determined below the actual charges collected, the applicable rates, applicable charges, undercharges, and overcharges.

First below is a determination of the charges paid on the shipments.

In Mr. Bagley's letter dated December 27, 1978, the first attachment purports in its second column to show the amounts of freight paid. For example, for bill of lading #120, Dolly Turman, April 5, 1974, respondent shows $8,368.31 as freight paid. This apparently omits bunker fuel surcharge of $934.39 and tollage of $27.70. Total charges paid apparently were $9,330.40 on bill of lading #120. Similarly other computations of Bagley fail to state the total applicable charges.

For bill of lading #123, Dolly Turman, April 5, 1974, respondent on December 27, 1978, shows $31,066.61, to which must be added bunker fuel surcharge $3,468.85, heavy lift charge of $2,169.33, and tollage of $38.80. Total charges paid apparently were $36,743.59.

For bill of lading #124, Dolly Turman, April 5, 1974, freight charges paid were $3,706.81, plus bunker fuel surcharge of $413.90, heavy lift $176.08, and tollage $9.44. Total charges paid apparently were $4,306.23.

For bill of lading #125, Dolly Turman, April 5, 1974, freight charges paid were $4,731.17 plus bunker fuel surcharge of $528.28, heavy lift $464.23 and tollage $11.61. Total charges paid apparently were $5,735.20

For bill of lading #126, Dolly Turman, April 5, 1974, freight charges paid were $487.20 plus bunker fuel surcharge of $54.40 and tollage of $0.59. Total charges paid apparently were $542.19.

For bill of lading #132, Dolly Turman, April 5, 1974, freight charges paid were $4,495.18, plus bunker fuel surcharge of $501.93 and tollage of $2.48. Total charges paid apparently were $4,999.59.

For bill of lading #133, Dolly Turman, April 5, 1974, freight charges paid were $18,205.29, plus bunker fuel surcharge $2,032.78 and tollage $18.82. Total charges paid apparently were $20,256.89.

For bill of lading #58, Gulf Shipper, April 12, 1974, freight charges paid were $6,841.19, plus bunker fuel surcharge $763.88 and tollage $22.65. Total charges paid apparently were $7,627.72.

For bill of lading #59, Gulf Shipper, April 12, 1974, freight charges paid were $5,016.64, plus bunker fuel surcharge of $560.15 and tollage of $7.88. Total charges paid apparently were $5,584.67.

For bill of lading #73, Gulf Shipper, April 12, 1974, freight charges paid were $6,769.69, plus bunker fuel surcharge $755.89 and tollage $22.41. Total charges paid apparently were $7,547.99.

For bill of lading #164, Thompson Lykes, April 25, 1974, freight charges paid were $407.27, plus bunker fuel surcharge $45.48 and tollage $0.86. Total charges paid apparently were $453.61.

For bill of lading #93, Thompson Lykes, April 25, 1974, freight charges paid were $15,601.82, plus bunker fuel surcharge $1,742.08, heavy lift charge $549.12, and tollage $15.81. Total charges paid apparently were $17,908.83.

For bill of lading #94, Christopher Lykes (as per bill of lading, also referred to by the parties as Sheldon Lykes), May 3, 1974, freight charges paid were $299.06, plus bunker fuel surcharge $33.39 and tollage $0.99. Total charges paid apparently were $333.44.

For bill of lading #136, Mayo Lykes, April 24, 1974, freight charges paid were $20,043.71, plus heavy lift $158.18 and bunker fuel surcharges $2,238.05. Total charges paid apparently were $22,439.94.

For bill of lading #141, Solon Turman, July 30, 1974, freight charges paid were $14,843.83, plus heavy lift $312.83, bunker fuel surcharge $1,657.44, tollage $25.33 and 15 percent port detention surcharge applicable on and after May 31, 1974, of $2,273.50 based on the freight charges plus heavy lift charges. Total charges paid apparently were $19,112.93.

For bill of lading #119, Sheldon Lykes, July 2, 1974, freight charges paid were $224.57, 15% detention surcharge of $33.69, bunker fuel surcharge of $25.08 and tollage of $0.38. Total charges paid apparently were $283.72.

For bill of lading #73, Solon Turman, August 6, 1974, freight charges paid were $190.31, plus 15% detention charge of $28.55 and bunker fuel surcharge of $21.25. Total charges paid apparently were $240.11.

For bill of lading #133, Charlotte Lykes, September 3, 1974, freight charges paid were $13, 964.93, plus heavy lift $831.41, 15% detention $2,219.45, and bunker fuel surcharge of $1,559.31. Total charges paid apparently were $18,575.10.

For bill of lading #45, Christopher Lykes, September 14, 1974, freight charges paid were $1,933.58, plus 15% detention $290.04, bunker fuel surcharge $215.90 and tollage $2.40. Total charges paid apparently were $2,441.92.

For bill of lading #33, Adabelle Lykes, October 14, 1974, freight charges paid were $379.88, plus 15% detention $56.98, bunker fuel surcharge $42.42 and tollage $1.68. Total charges paid apparently were $480.96.

For bill of lading #8, Aimee Lykes, October 24, 1975, freight charges paid were $863.20, plus 15% detention $129.48 and bunker fuel surcharge $96.38. Total charges paid apparently were $1,089.96.

For bill of lading #40, Gulf Shipper, November 22, 1974, freight charges paid were $1,355.03, plus 25% detention $338.76 and bunker fuel surcharge $151.30. Total charges paid apparently were $1,845.09. (The Mombasa detention charge was increased from 15 to 25% effective November 10, 1974.)

For bill of lading #83, Gulf Merchant, December 13, 1974, freight charges paid were $256.65, plus 25% detention $64.16, bunker fuel surcharge $28.66, and tollage $0.77. Total charges paid apparently were $350.24.

The above completes the determination of total freight and miscellaneous charges paid.

Secondly, an attempt will be made to determine the applicable charges on the various shipments.

On bill of lading #120, Dolly Turman, April 5, 1974, using item 1875 of the tariff and the rate of $92 W (including $25 per ton Capetown to Mombasa differential), the applicable freight charges on 123,120 pounds (ton of 2,240 pounds) are $5,056.71, plus bunker fuel $934.39 and tollage of $27.70, or a grand total of $6,018.80. This shipment was overcharged $3,311.60.

All references to applicable rates herein will include the $25 per ton Capetown-Mombasa differential.

On bill of lading #123, Dolly Turman, April 5, 1974, for the vibrating screen, using item 2140 of the tariff and the rate of $152.25, the applicable freight charges on 310 cubic feet are $1,179.94. For pumps, using item 2115 and the rate of $152.25,[2] the applicable freight charges on 127[3] cubic feet are $483.39. For the flotation machine and other related pieces, using item 2140 and the rate of $152.25, the applicable freight charges on 5,040 cubic feet are $19,183.50. These pieces being packed 24,400 lbs. to a package were subject to heavy lift charges of $14.35 per 40 cubic feet, or $1,808.10. For more flotation machines and pieces, the applicable freight charges on 1993 cubic feet are $7,585.86. Four packages each weighing 15,600 lbs. were subject to heavy lift charges of $7.25 per 40 cubic feet, or $361.23. For V-Belt drive guards, using item 2140 and the N.O.S. rate of $175.50, the applicable freight charges on 387.58+ cubic feet, rounded to 388 cubic feet, are $1,702.35. For a jaw crusher, using item 2140 and the crushing machine rate of $152.25, the applicable freight charges on 20 cubic feet are $76.13. For the rod mill, using item 2140 and the $152.25 rate, the applicable charges on 27 cubic feet are $102.77. On the automatic sampler mechanism, using item 2140 at the N.O.S. rate of $175.50, the applicable charges on 36 cubic feet are $157.95. On the flotation machinery using item 2140 at the $152.25 rate, the applicable charges on 227 cubic feet are $864.02. On the total cubic feet of 8163 in bill of lading 123, the bunker fuel charge at $17 per ton is $3,469.28. The total applicable charges on bill of lading #123 are $36,974.52, plus tollage of $38.80, or a grand total of $37,013.32. On bill of lading #123, these shipments were undercharged $269.73.

On bill of lading #124, Dolly Turman, April 5, 1974, for the whale back apron feeder, using item 2140 and the rate of $152.25, the applicable charges on 370 cubic feet are $1,408.31. Heavy lift charges on 18,400 lbs. at $8.90 per 40 tons as freighted on 370 cubic feet are $82.33. On the jaw crusher, item 2140 and the rate of $152.25, the applicable charges on 21,000 lbs. are $1,427.34. Heavy lift charges on 21,000 lbs. at $10 per ton as freighted are $93.75. On the chain cases, item 2140, N.O.S. rate of $175.50, the applicable charges on 68 cubic feet are $298.35. On the drive guard, same N.O.S. rate, the applicable charges on 144 cubic feet are $631.80. On the hydraulic jack and parts, same N.O.S. rate, the applicable charges on 945 lbs. are $74.04. Bunker fuel charges on 21,945 pounds at $17 per ton as freighted are $166.55, and on 582 cubic feet as freighted are $247.35. Tollage was $9.44. The grand total of applicable charges on bill of lading #124 was $4,439.26. The undercharges on bill of lading #124 were $133.03.

On bill of lading #125, Dolly Turman, April 5, 1974, both parties agree that the applicable charges, including $11.61 tollage total $6,457.78. It is so found. Undercharges on this bill of lading are $722.49.

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[2] Contract, rather than non-contract rates are used since Joy was a contract shipper.

[3] Based on 76 inches × 45 inches × 64 inches, rounded to nearest cubic foot.

On bill of lading #126, Dolly Turman, April 5, 1974, both parties are in agreement except for a $3 error in addition. It is found that the total applicable charges are $616.59. Undercharges are $74.40.

On bill of lading #132, Dolly Turman, April 5, 1974, on the crane girder, item #2115, rate of $175.50, the applicable charges on 1,875,820 cubic inches, or 1086 cubic feet, are $4,764.83. Since the pieces were about 59 feet long, extra length charges at $5.30 per 40 cubic feet were $143.90 and heavy lift charges on 9,132 lbs. at $4.50 per ton as freighted on 1086 cubic feet were $122.18. On the hoist and trolley, item 2140, rate of $152.25, the applicable charges on 86,833 cubic inches, or 50 cubic feet, are $190.31. On the conductor bar assembly, item 2140, N.O.S. rate of $175.50, the applicable charges on 13 cubic feet are $57.04. On the bridge drive-motor and gear box, item 2380, rate of $174.50, the applicable charges on 19 cubic feet are $82.89. Bunker fuel charges on 1168 cubic feet at $17 a ton are $496.40. Please note that while the total cubic feet listed on the bill of lading is 1181, the attached packing list for Exhibit #6 shows a total of only 1168 cubic feet. Tollage is $2.48. The total applicable charges on bill of lading 132 are $5,860.03. Undercharges on bill of lading #132 are $860.44.

On bill of lading #133, Dolly Turman, April 5, 1974, on the motor feeder, item 2140, rate of $152.25 on feeders, the applicable charges on 25 cubic feet are $95.16. On softener piping, item 2140, N.O.S. rate of $175.50, the applicable charges on 48 cubic feet (47.5 rounded to 48) are $210.60. On iron pipe and fittings, item 1875, rate of $107.75 the applicable charges on 25 cubic feet are $67.34. On iron pipe and valves on 78 cubic feet, item 1875, rate of $145.75, the applicable charges on 78 cubic feet are $284.21. On iron pipe (laterals), item 1875, rate of $107.75, the applicable charges on 17 cubic feet are $45.79. On P/E solution tank, item 625, rate of $182.75, the applicable charges on 17 cubic feet are $77.67. On steel drums anthralift for filters, item 2140 filters, rate of $152.25, the applicable charges on 864 cubic feet are $3,288.60. On sand for filters, item 625, N.O.S. rate of $182.75, the applicable charges on 360 cubic feet are $1,644.75. On gravel for filters, item 1655, rate of $109.50, the applicable charges on 20,784 lbs. are $1,016.00. On filter tanks, item 625, N.O.S. rate of $182.75, the applicable charges on 2005 cubic feet are $9,160.34. On resin, item 3070, rate of $77, the applicable charges on 180 cubic feet are $346.50. On gravel, item 1655, rate of $109.50, the applicable charges on 2132 lbs. are $104.22. On gravel, same item, and rate, the applicable charges on 1932 lbs. are $94.44. On softener tank, item 625, rate of $182.75, the applicable charges on 362 cubic feet are $1,653.89. On brine tank, same item and rate, the applicable charges on 134 cubic feet are $612.21. Bunker fuel charges on 4115 cubic feet at $17 per ton are $1,748.88, and on 24,848 lbs. are $188.58. Tollage was $19.48. The total applicable charges on bill of lading 133 are $20,658.66. Undercharges are $401.77 on bill of lading #133.

On bill of lading #58, Gulf Shipper, April 12, 1974, the parties are agreed that the total applicable charges are $7,627.72. It is so found. There are no overcharges and no undercharges on this bill of lading.

On bill of lading #59, Gulf Shipper, April 12, 1974, the parties are agreed that the total applicable charges are $6,350.76. It is so found. Undercharges on this bill of lading are $766.09.

On bill of lading #73, Gulf Shipper, April 12, 1974, the parties are agreed that total applicable charges are $7,547.99. It is so found. There are no overcharges and no undercharges on this bill of lading.

On bill of lading #164, Thompson Lykes, April 25, 1974, on electric motors, item 2380, rate of $174.50, the applicable charges on 95,256 cubic inches each in 2 boxes, or 110 cubic feet are $479.88 plus bunker fuel charges of $46.75 and tollage of $0.86, or total applicable charges of $527.49. Undercharges on bill of lading #164 are $73.88.

On bill of lading #93, Thompson Lykes, April 25, 1974, on filtrate receiver tanks, item 2140, N.O.S. rate of $175.50, the applicable charges on 164 cubic feet are $719.55. On flotation machines, item 2140, rate of $152.25, the applicable charges on 1665 cubic feet are $6,337.41. Heavy lift charges on 2 packages each of 15,600 lbs. at $7.25 per 40 cubic feet are $301.78. On flotation machine parts, same item, same rate, the applicable charges on 1665 cubic feet are $6,337.41, and heavy lift charges are $301.78. On dual cell drive guards, item 2140, N.O.S. rate of $175.50, the applicable charges on 294 cubic feet (each crate has a different measurement) are $1,289.92. On the lab sample splitter, item 2140, N.O.S. rate of $175.50, the applicable charges on 30 cubic feet are $131.63. On air compressors, item 2140, rate of $152.25, the applicable charges on 282 cubic feet are $1,073.36. Bunker fuel charges on 5100 cubic feet at $17 per 40 cubic feet are $2,167.50. Tollage was $15.81. Total applicable charges on bill of lading #93 are $18,676.15. Undercharges on bill of lading #93 are $767.32.

On bill of lading #94, Sheldon Lykes (or Christopher Lykes on bill of lading), May 3, 1974, the parties are agreed that the total applicable charges are $333.44. It is so found. There are no overcharges and no undercharges on bill of lading #94.

On bill of lading #136, Mayo Lykes, May 5, 1974, the parties are nearly in agreement that the total applicable charges are the same. The complainant computes charges of $24,602.62, and adding tollage makes its total $24,619.29. The respondent computes charges of $24,607.58 plus tollage of $16.67, or a grand total of $24,624.25. The parties apparently agree on the applicable rates but differ in computations of cubic feet, for example 518 cubic feet of motors (complainant) and 519 cubic feet in total of motors (respondent). As noted in the decision of the Commission, "all cargo shall be measured on the overall measurements of the individual packages." The respondent computed charges by individual packages and their measurements, whereas the complainant, apparently for convenience totalled similar packages. Therefore it is found that the charges as computed by respondent are correct for bill of lading #136. The total applicable charges for this bill of lading, including tollage are found to be $24,624.25. Undercharges on bill of lading #136 are $2,184.31.

On bill of lading #141, Solon Turman, July 30, 1974, the parties are in substantial agreement, that is, the complainant shows total applicable charges of $21,029.14 (includes correction from $29.98 to $34.26 of complainant's third listing), whereas the respondent shows total applicable charges of $20,904.29.

The difference between the parties is accounted for by the lower rates shown applicable by the respondent for splice plates, item 1875, rate of $106.75, for floor plates, same item and rate, and for threaded rods, item 1875, rate of $92.00. Accordingly, it is found that the total applicable charges on bill of lading #141 are $20,904.29. Undercharges on bill of lading #141 are $1,791.36.

On bill of lading #119, Sheldon Lykes, July 2, 1974, the complainant's computations appear correct. (The respondent divides the first box on the packing list into two items at two rates, but consistency calls for one rate for each box or package.) Complainant's total applicable charges of $321.46 are accepted. (These include bunker fuel of $25.08 not listed by complainant.) Undercharges on bill of lading #119 are $37.74.

On bill of lading #73, Solon Turman, August 6, 1974, on electrical equipment, item 2140, N.O.S. rate of $175.50, the basic applicable charges on 49 cubic feet are $214.99 plus 15% detention $32.25, bunker fuel $20.83 and tollage $0.26. Total applicable charges on bill of lading #73 are 268.33. Undercharges on bill of lading #73 are $28.22.

On bill of lading #133,Charlotte Lykes, September 3, 1974, complainant's third item lists 51,180 pounds, which apparently should be 49,310 pounds. Thus complainant added $195.57 too much to this calculation. The respondent consistently has calculated charges on individual packages, rather than by totalling various packages. Accordingly, the calculations of the respondent are accepted for bill of lading #133. Total applicable charges on this bill of lading including tollage are $19,629.32. Undercharges on bill of lading #133 are $1,054.22.

On bill of lading #45, Christopher Lykes, September 14, 1974, respondent's calculations are accepted. Total applicable charges on this bill of lading are $2,672.84. Undercharges on bill of lading #45 are $230.92.

On bill of lading #33 Adabelle Lykes, October 14, 1974, respondent's calculations are accepted. Total applicable charges on this bill of lading are $480.95. Overcharges on this bill of lading are one cent.

On bill of lading #8, Aimee Lykes, October 24, 1974, respondent's calculations are accepted. Total applicable charges on this bill of lading are $1,143.48. Undercharges on bill of lading #8 are $54.42.

On bill of lading #40, Gulf Shipper, November 22, 1974, respondent's calculations are accepted. Total applicable charges on this bill of lading, including tollage are $1,852.23. Undercharges on bill of lading #40 are $7.14.

On bill of lading #83, Gulf Merchant, December 13, 1974, the parties' calculations agree when tollage of $0.77 is included. Accordingly, it is found that the total applicable charges on this bill of lading are $350.24. On bill of lading #83 there are no overcharges and no undercharges.

The total overcharges on the various bills were $3,311.61. The total undercharges on the various bills of lading were $9,457.48. Net undercharges, considering offsetting overcharges, are $6,145.87. Stated otherwise, total charges paid were $188,229.51, and total applicable charges were $194,375.38. Net undercharges are $6,145.87.

(S) CHARLES E. MORGAN
Administrative Law Judge

WASHINGTON, D.C.
March 5, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–41

AGREEMENT NOS. 8200, 8200–1, 8200–2, AND 8200–3
BETWEEN THE PACIFIC WESTBOUND CONFERENCE
AND THE FAR EAST CONFERENCE

Interconference ratemaking agreement is found not justified and is disapproved pursuant to section 15 of the Shipping Act, 1916.

Elkan Turk, Jr. for Far East Conference and its member lines.
Edward D. Ransom for Pacific Westbound Conference and its member lines.
Michael B. Crutcher and *Jonathan Blank* for the Port of Seattle.
Samuel H. Moerman and *Paul M. Donovan* for Port Authority of New York and New Jersey.
Gary E.Koecheler for Maryland Port Administration.
John Robert Ewers, C. Douglass Miller and *L. Malleson Longstreet* for Bureau of Hearing Counsel.

REPORT AND ORDER

April 18, 1979

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

This proceeding was initiated by the Commission on September 13, 1974, to determine whether Agreement Nos. 8200, 8200–1, 8200–2, and 8200–3 (collectively, the Agreement) between the member lines of the Pacific Westbound Conference (PWC) and the member lines of the Far East Conference (FEC)[1] should be approved, disapproved, or modified pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. 814). The Agreement, as initially approved by the Commission in 1952, authorized the conferences to establish rates, rules, and regulations applicable to the port-to-port transportation of certain cargo from U.S. Pacific, Atlantic, and Gulf Coast ports to destinations in the Far East.[2] A

*Commissioner Karl E. Bakke's dissenting opinion will follow.

[1] The FEC member lines are: Barber-Blue Sea Line; Galleon Shipping Corporation; Japan Line, Ltd.; Kawasaki Kisen Kaisha, *Ltd.*; Maritime Company of the Philippines, Inc.; Mitsui O.S.K. Lines, Ltd.; Moller-Maersk Line, A.P.; Nippon Yusen Kaisha; United *States Lines*, Inc.; Waterman Steamship Corporation; and Yamashita-Shinnihon Steamship Co., Ltd. The PWC membership consists of the eleven FEC carriers as well as the following ten lines: American President Lines, Ltd.; The East Asiatic Co., *Ltd.*; Knutsen Line; Korea Marine Transport Co., Ltd.; Phoenix Container Lines (1976) Ltd.; Scindia Steam Navigation *Ltd.*; Sea-Land Service, Inc.; *Seatrain Pacific Services*, S.A.; Showa Line, *Ltd.*; and Zim Container Service.

[2] The Agreement expressly proscribes inter-conference discussion and agreement on PWC overland rates, although as a practical matter, information supplied by FEC lines pursuant to the Agreement is utilized by the PWC lines in setting their overland rates. Certain bulk commodity items are also exempted *from the Agreement.*

subsequent amendment to the Agreement[3] established the joint ratemaking procedures currently employed by the proponent lines in implementing the original agreement. Agreement 8200-3, which is before the Commission at this time, would extend the Agreement, as amended, indefinitely.

By its September 13, 1974, Order the Commission commenced an investigation into whether continuation of the Agreement was necessitated by legitimate transportation objectives, and also approved the Agreement *pendente lite* to preserve the status quo. Participating parties were the proponent lines, the Commission's Bureau of Hearing Counsel (Hearing Counsel), and three port authorities: the Port Authority of New York and New Jersey (NY/NJ), the Maryland Port Administration (Maryland), and the Port of Seattle (Seattle), which were granted leave to intervene. Administrative Law Judge William Beasley Harris (Presiding Officer) issued an Initial Decision on December 1, 1975, approving the Agreement until further order of the Commission, with minor modifications.[4] The approval was based on the alleged public benefits in stabilizing and maintaining the Far East trade from West and East Coast ports, and in avoiding destructive rate competition. The Presiding Officer also attached importance to the long history of the Agreement and its series of previous short-term approvals. Seattle filed exceptions to which all other parties except Maryland replied. Oral argument was heard by the Commission on April 7, 1976.

THE AGREEMENT

The Agreement requires the PWC and FEC member lines to meet regularly and authorizes the two conferences to agree to create or modify rates, tariff rules or regulations relating to the assessment of rates or the computation of charges. Decisions are reached by a separate vote of the membership of each conference; quorum and voting requirements for each conference are governed by the respective conference agreements. The Agreement also authorizes the formation of joint committees which may discuss rates and other matters and offer recommendations to the conferences. The conferences are required under the Agreement to exchange information with each other, *i.e.*, "copies of their respective tariffs, circulars, memoranda[5] and minutes." Each conference is also required, upon receipt of requests by shippers for tariff reductions, or for the establishment of rates for new tariff items, to furnish to the other conference detailed information concerning the shippers' request.[6] A decision to effect a tariff change requires notification to the other conference, and a tariff reduction entitles the

[3] Agreement No. 8200-2, approved October 16, 1968.

[4] The Presiding Officer imposed the following conditions: (1) the Agreement be modified to reflect that PWC overland rates are based in part on information obtained from FEC pursuant to Agreement No. 8200-2; (2) the Agreement reflect that each conference relays to the other information it receives from shippers requesting rate reductions; (3) the Commission be provided with a copy of each conference's annual cargo statistics; and (4) both conferences maintain records of interconference oral, telex and teletype communications regarding proposed rate actions.

[5] The term "memoranda" is not defined in the Agreement or explained by the record, and consequently, the scope of this provision is unclear.

[6] The information required to be furnished is:

1. Nature of cargo and use.
2. Export packaging.
3. Weight and measurement per package and cubic feet per 2,000 lbs.
4. Invoice value at shipping point.
5. Point of origin.

corresponding conference to make a similar or lesser reduction. A tariff increase entitles the corresponding conference to make a greater or lesser increase, or none at all; the initiating conference may then further adjust or rescind its action to correspond with the action of the other conference.

When one conference establishes a rate or when both conferences agree on commodity rates for a new tariff item,[7] the Agreement requires that the initial difference by which the FEC rate may exceed the PWC rate shall not exceed $6.00 per revenue ton, nor shall it be less than the accessorial charges assessed the commodity by the PWC member lines. On established commodity rates, where the FEC rate exceeds the PWC rate by less than the PWC accessorial charges, PWC may adjust its rate to reflect a differential of not more than the accessorial charges; where the FEC rate exceeds the PWC by more than $6.00 per revenue ton, FEC may adjust its rates to achieve a differential of not less than $6.00. The rate differential provisions do not apply to the relationship between PWC overland rates and either PWC local rates or FEC rates.

When it is not practicable to schedule a meeting, the conferences are authorized by the Agreement to confer on rates, rules, and regulations by any means of communication, provided that final action taken pursuant to such discussions be recorded and filed with the Commission within 30 days. The Agreement also preserves the right of each conference to take independent action. When a conference determines that conditions affecting its operations require an immediate change in its tariffs, it may do so, providing that the corresponding conference is given 48 to 72-hour advance notice.[8]

POSITION OF THE PARTIES

PWC, FEC, and NY/NJ (collectively, Proponents), all favor approval of the Agreement for essentially the same reasons.[9] Proponents contend that very little justification is required for approval because this is an extension of a long-standing, previously approved agreement. They allege that the Agreement, in authorizing price-fixing and requiring inter-conference exchange of information, is necessary to prevent all-out rate competition between PWC and FEC. Its fundamental benefit, Proponents claim, is that it serves as a stabilizing influence for the North American/Far East trade.[10] The exchange of information allegedly allows more intelligent ratemaking, ensures accuracy of shipper information, prevents "whipsawing" tactics of shippers, and allows the conferences to be more informed of and therefore more responsive to shippers' needs. Proponents also contend that the prescribed rate spread between PWC and FEC allows FEC

6. Estimated annual tonnage.
7. Period of movement.
8. Reason for tariff change, including foreign competition, if any
9. Manner in and date upon which the rate matter will be considered, *i.e.*, if at a conference meeting, the scheduled date of the meeting.
10. Any committee recommendations with respect to the request.
11. Any other data of an informative nature relative to the request.

[7] Except for open rates and certain bulk commodity items which are specifically excluded from coverage by the Agreement.

[8] 48 hours if notice is given by telegram, and 72 hours if given by air mail.

[9] These parties occasionally presented slightly differing viewpoints, but none of the differences is relevant to the Commission's disposition of this proceeding. Maryland filed no briefs in this proceeding.

[10] This is alleged to be particularly important because of the recent advent and growth of containerization, which involves increased capital investment and provides numerous opportunities for hidden rate competition in the form of differences in complex and specialized tariff rules.

to compete effectively without there being a parity of rates, or such a large differential in rates that destructive rate competition would result.

Seattle vigorously protests the specific rate differentials chosen by the PWC and FEC, claiming that the $6.00 maximum spread is too little. Seattle argues that the FEC rates should be substantially higher than PWC rates, as West Coast ports and shippers should benefit from lower costs reflecting their relative proximity to the Far East, and the rates should more accurately reflect the disparity in costs of services for eastern versus western ports and shippers.[11] Seattle's exceptions all refer to its conclusions regarding the rate differentials.[12]

Hearing Counsel argues that the Agreement's benefits are overrated by Proponents, but nonetheless concludes that the orderly exchange of information and the establishment of a rational differential between PWC and FEC rates justify the Agreement's allegedly limited anticompetitive effects.

DISCUSSION

Upon review of the entire record the Commission concludes, for the reasons set forth below, that the Agreement fails to achieve legitimate commercial objectives that would justify its anticompetitive effects. The Agreement will therefore be disapproved.

Because the Agreement calls for the fixing of prices, it constitutes a *per se* violation of section 1 of the Sherman Antitrust Act (15 U.S.C. 1). An agreement which violates the antitrust laws is approvable only if it 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. *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 243 (1968). None of the Agreement's alleged benefits is substantial enough to warrant approval under these standards.

Proponents argue that the long history of short-term approvals granted this Agreement merits the Agreement a more relaxed standard for justification at this time. However, the Commission has previously found that a

> 'history of prior approvals,' no matter how long, may be an indication of nothing more or less than a failure to scrutinize operations under the particular agreement, which failure may or may not have been justified in the particular case . . . . Moreover, a prior approval under sec. 15, no matter how long ago granted, may not be converted into a vested right of continued approval simply because the parties to the agreement desire continued approval. *Investigation of Passenger Steamship Conferences Regarding Travel Agents*, 10 F.M.C. 27, 34, n. 6 (1966), *aff'd sub nom. Svenska, supra.*

Each extension must stand alone and be judged in light of present circumstances. Recent developments in the trades covered by the Agreement make a thorough review of its justification particularly appropriate.[13]

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[11] Seattle has not shown, however, how it or any other West Coast interests have suffered as a result of the $6.00 maximum differential, nor has it proposed a modification. As to those provisions of the Agreement to which Seattle has no objection, it recommends a one-year approval requiring periodic Commission review as opposed to an unlimited extension as sought by the Agreement's proponents.

[12] Specifically, Seattle argues that the Presiding Officer:

1. Improperly allocated the burden of justification for continuation of the existing rate differentials;
2. Erroneously concluded that the record contained insufficient information to require modification;
3. Failed to evaluate the anticompetitive effect of the differential provisions;
4. Failed to find that the West Coast ports and shippers are discriminated against as a result of the differentials;
5. Erroneously made the Agreement presumptively approvable; and
6. Failed to find that changed transportation circumstances require modification of the Agreement.

[13] *See, infra*, at 15.

Proponents argue that the proposed inter-conference information confers an important public benefit. The exchange of information concerning the details of the shippers' requests undoubtedly furnishes the carriers with useful market data. What is desirable to the conferences, however, is not necessarily a need, benefit or purpose which satisfies the *Svenska* requirements. The repeated contentions in the record that these "open channels" and the rate differentials prevent the inter-conference competition from deteriorating into a rate war are neither self-evident nor supported by the record. References to a rate war in the trade prior to World War II do not compensate for the absence of convincing evidence of such a possibility in the trade at present, or, if such circumstances did exist, that this Agreement provides a remedy.[14]

On the other hand, there are several indications that destructive rate practices between the conferences are not likely to occur. The Agreement specifically does not apply to the relationship between PWC overland rates and FEC rates, yet the midwestern-source cargo, to which PWC overland rates are most likely to apply, is the most probable source of competition between the two conferences. Moreover, in recent years,[15] there has been a dramatic increase in intermodal transportation in the trade, particularly minilandbridge carriage westbound from East Coast ports.[16] The difference in inland areas served by the conferences and the exclusion from the Agreement of overland rates, open rates and certain bulk commodities greatly diminish any stabilizing effect the Agreement may have upon the trade generally.

Proponents' contention that the rate differential provisions are necessary to the stability of the trade is particularly unpersuasive. The differential regulations, as are all the provisions of the Agreement, are subordinate to the conferences' right to independent action. Also, they are merely permissive in nature; the conferences are under no obligation to meet or respond at all to each other's rate adjustment. It is apparent from a reading of the Agreement that the $6.00 per revenue ton maximum spread is mandatory only for "new" commodity items. FEC counsel confirmed at oral argument that after a rate has been in effect for as little as one day, the commodity item is no longer "new."[17] The continued existence of any particular differential, therefore, is not mandated, and the differential provisions are at best merely a guideline.[18]

[14] We also note that Agreement No. 10135, the FEC and PWC Discussion Agreement, already permits the member lines of those conferences to discuss, consider, and agree upon recommendations to the conferences regarding several items of mutual interest; Agreement No. 10135 overlaps considerably the subject matter in the instant Agreement. Agreement No. 10135-6, which would extend Agreement No. 10135 indefinitely, was conditionally approved by the Commission by order served March 23, 1979, subject to the deletion of its provisions authorizing rate discussions.

[15] The instant record was compiled in 1975.

[16] An FEC application for intermodal ratemaking authority was denied in *Agreement No. 17-34 Application of the Far East Conference for Intermodal Authority*, ____ F.M.C. ____, 18 S.R.R. 1685 (1979), and that conference, therefore, offers only port-to-port service. PWC has offered overland/OCP rates from Pacific ports to the Far East since 1923, and was granted intermodal ratemaking authority in 1976. *Agreement No. 57-96—Pacific Westbound Conference Extension of Authority for Intermodal Services*, 19 F.M.C. 289, 16 S.R.R. 159 (1975). PWC published a minibridge tariff effective February 1, 1977, and PWC minibridge cargo comprises an increasingly substantial portion of U.S./Far East trade. *See North Pacific Trade Study—A Staff Report*, F.M.C., at 4, 5 and 18. A PWC interior intermodal (microbridge) tariff was filed on May 18, 1978, but was voluntarily cancelled before it took effect. Agreement No. 57-96, however, authorized individual PWC member lines to publish independent microbridge tariffs, and a few have done so, offering service from Denver, Chicago, Minneapolis/St. Paul, Kansas City/St. Louis, and Milwaukee. The microbridge service has yet to achieve the same level of commercial acceptance with shippers as has minibridge service.

[17] *See*, Oral Argument Transcript, at 36, 38.

[18] When FEC Chairman Flynn was asked, "In your opinion, is a rate spread really necessary? I mean, is a provision like the $6.00 provision actually necessary?", he testified: "I think it acts as a barometer to some degree as to the levels of future pricings with regard to both Conferences. As to its abstract necessity, I have mixed emotions, frankly, personally" (Transcript, at 500).

That the differential provisions are of less than crucial importance to the stability of the trade is further evidenced by the record. Exhibit 23, entitled "PWC/FEC Rate Spreads on Commodities Moving in Substantial Quantities by Each Conference," shows that in 1974, 46 of the commodities listed in that Exhibit had differentials exceeding $6.00, while only 41 had spreads at or below the "maximum." Even more significant is the fact that the spreads had been increasing dramatically each year. We cannot concur either with Proponents' contention that the differentials are necessary to structure a balanced relationship between the conferences, or with Seattle's argument that the $6.00 "maximum" has had a significantly detrimental and discriminatory effect on West Coast shippers and ports.

The relative stability in the Far East trade from 1965 to 1968 further belies the exaggerated threats of instability absent approval of this Agreement. This period followed the Commission's order that the conferences cease operation of their unfiled agreements implementing the original Agreement No. 8200,[19] and preceded approval of Agreement No. 8200-2, under which the conferences currently operate. There was in those years no instability or "rate war" in the trade, even absent an agreement authorizing differentials and establishing inter-conference communications.[20]

FEC and PWC membership has changed since the record was closed on August 20, 1975. Every member of FEC is now a member of PWC. Moreover, the record indicates, as common sense would suggest, that a carrier with dual membership will, in voting in one conference, take into consideration its company policy and the effect of its vote on its company's trade from the opposite coast.[21] The prediction of a rate war between two conferences in which the membership of one is completely subsumed by the other requires a degree of conjecture not appropriate in application of the *Svenska* criteria.

In conclusion, the Commission finds that the commercial objectives offered in justification for the Agreement are largely theoretical and are too meager to justify its anticompetitive potential, particularly in light of the recent growth of intermodalism, the decline in all-water transport from East Coast ports, and the overlapping membership of the conferences. The Proponents have not met their burden of showing that 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.[22]

THEREFORE, IT IS ORDERED, That Agreement No. 8200, 8200-1, 8200-2 and 8200-3 are disapproved; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

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[19] *Joint Agreement Between Member Lines of the Far East Conference and the Member Lines of the Pacific Westbound Conference* 8 F.M.C. 553 (1965)

[20] Proponents counter that the reason for this period of stability was that the lines were "exercising diligence and not taking random and wild-eyed actions" because they were planning and negotiating a future inter-conference agreement at the time (Transcript, FEC witness Flynn, at 508–511) This Commission is not persuaded that the proposed *per se* violation of the antitrust laws can be justified by the conferences' bald assertion that the Agreement is the conferences' only protection against their own threats of irresponsible business behavior

[21] *See, e g.*, Exhibit 21 at 3, testimony of PWC witness John E Teubner, at 121

[22] Because the Agreement is disapproved in its entirety, it is unnecessary to address Seattle's specific exceptions to portions of the Agreement approved by the Presiding Officer

Commissioner Karl E. Bakke, dissenting: For the reasons stated hereafter, I disagree with the conclusion of the majority that proponents have not met their burden of justifying approval of this Agreement under the standards of section 15.

The majority decision is premised on a rigid, mechanistic application of the *Svenska* standards:

"Because the Agreement calls for the fixing of prices, it constitutes a *per se* violation of section 1 of the Sherman Antitrust Act (15 U.S.C. 1). An agreement which violates the antitrust laws is approvable only if it 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. *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238, 243 (1968). None of the Agreement's alleged benefits is substantial enough to warrant approval under these standards."[1]

"Substantial" is an equivocal word in any context, but particularly so in making factual determinations where the burden of persuasion (justification) requirement is flexible, varying as a direct function of the degree of anticompetitive effect. The commission has long recognized that in considering an agreement under the *Svenska* standards, the scope and depth of proof required may vary from case to case in relation to the degree of invasion of the antitrust laws. See *Agreement No. 8760-5—Modification of the West Coast United States and Canada/India, Pakistan, Burma & Ceylon Rate Agreement,* 17 F.M.C. 61 (1973), and *Agreement No. 57-96—Pacific Westbound Conference Extension of Authority for Intermodal Services,* 16 SRR 159, 19 F.M.C. 289 (1975). Indeed, the D.C. Circuit Court of Appeals is of the same view. In *U.S. Lines v. FMC,* F.2d (D.C. Cir., 1978), it expressly held that the extent of justification required for approval of an agreement under section 15 depends upon the severity of the anticompetitive impact of the agreement, not merely upon whether the agreement is or is not a *per se* violation of the antitrust laws:

"But the fact that a given practice is considered under a rule of reason, rather than as a *per se* violation, does not mean that the dangers to competition in any particular circumstances are necessarily lower: clearly, certain practices which are not *per se* violations may, depending upon the facts of the particular case, restrict competition more severely than would *per se* restraints." (Slip opinion, p. 16, n. 31.)

The facts of record in this case clearly demonstrate that even though the Agreement provides for concerted action on rates and the fixing of rate differentials, there are provisions that significantly diminish the present and potential anticompetitive impact of the Agreement on rate structures in the trades involved. The authority to agree on rates and rate differentials is permissive only. All activity under the Agreement is subject to the right of each conference to take independent action. Furthermore, the Agreement affects only a portion of the cargo carried by the conferences; it does not apply to open rate cargo (including most commodities moving in bulk), nor to overland cargo carried by PWC. Under these circumstances, it seems to me that the quantum mark of justification required for approval under *Svenska* is somewhere at the lower end of the dipstick, well immersed in the facts of record concerning benefits to be derived from approval.

[1] Report and Order, p. 9.

In this connection, the majority opinion also fails to give any weight to the fact that this Agreement has received prior Commission approvals over a substantial number of years. The statement that "each extension must stand alone and be judged in the light of present circumstances"[2] appears to be squarely at odds with recently stated Commission policy regarding the proper weight to be given a history of prior Commission approval. In Agreement No. 9929-3—*Pendente Lite Extension of Combi Line Non-Lash Service*, Order on Remand served March 15, 1979, the Commission stated:[3]

> "Absent information indicating that a previously approved section 15 arrangement with a demonstrated record of commercial acceptance is unfair to competing carriers, ports or shippers, the arrangement's continuation for a further reasonable period of time is a matter which should ordinarily result in section 15 approval."

This is an eminently sensible position to which violence should not—and need not—be done in this case.[4] The continued past approval of this Agreement and the lack of any substantial evidence that it has operated in a manner inconsistent with the standards of section 15, coupled with absence of any protest concerning anticompetitive effect, should weigh strongly in favor of continued approval of the Agreement.

I further disagree with the rather cavalier dismissal by the majority of the pre-World War II rate war as some indication of what could now happen in the trade absent continued approval of this Agreement. The Agreement has been in force since 1952, with one brief hiatus from 1965 to 1968. Completely writing off pre-agreement history of rate war conditions in these trades places the proponents in the difficult position of trying to prove a negative.

The fact that pre-agreement rate war conditions in these important Far East trades have been avoided during a lengthy period of operations under Agreement Nos. 8200, 8200-1 and 8200-2 is a relevent factor weighing in favor of continued approval of the Agreement. It is not necessary that the proponents of this Agreement, given its rather limited anticompetitive effects, prove that absent approval of the Agreement the trades involved would "deteriorate into a rate war." In my view, it is sufficient to show, as has been done, that the Agreement will continue to be a healthy stabilizing influence on the rate structures of the important trades covered by these conferences.[5]

In conclusion, it is my view that the record clearly dictates a finding that the orderly exchange of information and the maintenance of a rational relationship between the rate structures of these two competitive conferences is in the public

[2] Report and Order, p. 10

[3] Slip Opinion, p. 10.

[4] Despite the fact that the agreement has been approved and in effect since 1952 (with one brief hiatus from 1965 to 1968), and Agreement 8200-2 has been approved by various orders of the Commission since October 16, 1968, and the further fact that a full evidentiary hearing and investigation into the continued approvability of Agreement 8200-2 was begun in this proceeding on September 13, 1974, no party has urged that the Agreement should be disapproved under the standards of section 15. (The limited arguments of the Port of Seattle with respect to the $6.00 differential between FEC and PWC initial rates were properly rejected by the ALJ.)

[5] The implication in Footnote 14 on page 11 of the Report and Order, that conditional approval of Agreement No. 10135-6 on March 23, 1979, grants authority which overlaps authority contained in Agreement 8200-2 is incorrect. The exchange and discussion of information and recommendations concerning "general technological improvements, increased efficiences in service, fuel conservation, environmental studies and upgrading of the neutral body system" permitted by Agreement 10135-6 is substantially different from the rate discussion and agreement authority covered by Agreement 8200-2.

interest. This is particularly true at the present time, in light of the changing competitive relationships between the conference trades arising from the recent and continuing growth of intermodalism.

Accordingly, I would approve extension of the Agreement for a further two year period, subject to the modifications recommended in the Initial Decision.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET No. 71–29

BATON ROUGE MARINE CONTRACTORS, INC.

v.

CARGILL, INCORPORATED

Cargill, Incorporated's charge to stevedores found to be reasonable within the meaning of section 17 of the Shipping Act, 1916.

Edward S. Bagley for Complainant Baton Rouge Marine Contractors, Inc.
Edward J. Sheppard, Edward Schmeltzer and *Victor Anderson* for Respondent Cargill, Incorporated.
John Robert Ewers, C. Douglass Miller and *Patricia Byrne* for Hearing Counsel.

REPORT AND ORDER

April 19, 1979

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

PROCEEDINGS

This proceeding arose as a result of a complaint filed by Baton Rouge Marine Contractors, Inc. (BARMA), alleging that Cargill, Incorporated (Cargill) had violated and continued to violate sections 15, 16, and 17, Shipping Act, 1916 (the Act) (46 U.S.C. 814, 815 and 816), by unilaterally modifying a lease agreement between Cargill and the Greater Baton Rouge Port Commission (Port), which agreement had previously been approved by the Commission. BARMA contended that the modification resulted in the imposition of unlawful charges and conditions upon stevedoring companies conducting business at the marine grain elevator at Port Allen, Louisiana, and was not filed with the Commission as required by section 15.

In a Report and Order served January 3, 1975, in *Baton Rouge Marine Contractors v. Cargill, Inc.*, 18 F.M.C. 140 (1975), the Commission found that Cargill's imposition of charges and conditions did not constitute an unfiled modification of the lease agreement between Cargill and the Port. While the Commission did not find a violation of section 16, it did find that certain charges and conditions imposed by Cargill on stevedores were not reasonably related to the economic or commercial benefit derived by those stevedores from their use of

* Commissioner Leslie Kanuk will issue a separate opinion.

the facilities and services provided by Cargill and thus constituted unjust and unreasonable practices in violation of section 17. The Commission remanded the proceedings for a determination of a proper allocation formula based on the actual benefits derived by stevedoring companies from their use of Cargill's terminal facilities and the appropriate charge against stevedores based thereon.

On February 12, 1976, the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's decision. *Cargill, Inc. v. Federal Maritime Commission,* 530 F.2d 1062 (D.C. Cir.), *cert. denied,* 429 U.S. 868 (1976).

On November 30, 1977, Administrative Law Judge William Beasley Harris (Presiding Officer) served a "Supplemental Decision on Remand" (Remand Decision I), in response to the Commission's 1975 Report, in which he concluded that the record was inadequate to resolve the issues raised by that Report. The Presiding Officer accordingly recommended that the proceeding be reopened, and in the alternative, suggested other dispositions of the proceeding.

BARMA and Cargill excepted to the Presiding Officer's recommended reopening. The Commission's Bureau of Hearing Counsel (Hearing Counsel), though opposed to reopening, took the position that "the very deficiencies which caused the Commission to remand this proceeding for further hearing still exist."[1]

On April 4, 1978, the Commission again remanded the proceeding, noting that if the Presiding Officer deemed the record inadequate, then the Presiding Officer should have "*sua sponte* reopened the proceeding rather than issue his Supplemental Decision."[2] The Presiding Officer has now served a second "Supplemental Decision on Remand," (Remand Decision II), in which he concludes that Cargill has failed to present a proper allocation of the services and benefits to stevedores based on actual use which would justify a charge against stevedores other than as found in the Commission's 1975 Report.

BARMA, Cargill, and Hearing Counsel have filed Exceptions to the Presiding Officer's Remand Decision II and Replies to Exceptions.

THE REMAND DECISION II

In his Remand Decision II, the Presiding Officer found that Cargill had failed to justify its ten cent per ton charge against stevedores.[3] He concluded that except to the extent found lawful by the Commission, Cargill had failed to establish that stevedores derive actual benefits from their use of Cargill's services and facilities. Accordingly, he found that Cargill's charge could not be justified by allocating a percentage of the cost of those services and facilities to stevedores.[4]

[1] Alternatively, Hearing Counsel urged the Commission to consider the prevailing service and facilities charges in *the area* as a measure of benefit and find Cargill's charge not to be in violation of section 17.

[2] At the hearings held in response to the Commission's 1975 Report and remand, only Cargill presented evidence. At the second remand hearing, held in response to the Commission's April 4, 1978 Order of Remand, Cargill advised that its cost analysis (a Freas-type study) had been fully presented to the extent that such was available (Cargill had not done a full-scale Freas study). Because the Presiding Officer believed he was constrained by the Commission's 1975 Report, he would not permit Cargill to introduce any further evidence intended to justify Cargill's service and facilities charge on a "value of service" or "prevailing practice in the area" basis. The Presiding Officer did, however, accept Cargill's offer of proof and closed the record.

[3] On August 15, 1977, Cargill increased its service and facilities charge to stevedores from 8 cents to ten cents per ton.

[4] As used in this Report, the term "stevedore" refers to that entity which contracts to load grain vessels. It should not be confused with the stevedores' employees, the longshoreworkers, who actually perform the loading operations.

The Presiding Officer also determined that the charge against stevedores was not justified on a "cost of service basis" (a Freas type study), or on a "value of service" or prevailing practice in the area basis, as proposed by Cargill and Hearing Counsel.

The Presiding Officer found that productivity is presently the "major factor in determining the worth or value of an elevator to a stevedore."[5] He also found that of the nine grain elevators on the Mississippi River in Louisiana, Cargill's Baton Rouge facility ranks third—along with five others—in terms of productivity.[6] Cargill's elevator at Baton Rouge can deliver on the average 1000 to 1100 tons of grain per hour and can reach a peak of 1500 tons per hour. This throughput is surpassed only by Cargill's elevator at Reserve, Louisiana (1700 to 1900 tons per hour) and the Bunge Corporation's elevator at Destrehan, Louisiana (on the average, 1200 to 1300 tons per hour). The Public Grain Elevator at New Orleans delivers grain on the average of 600 tons per hour and is the least productive. The Presiding Officer also determined that, although the productivity of the elevators varies, all are similarly constructed and charge stevedores at least ten cents per ton of grain loaded, as a service and facilities charge.

Stevedores operating at Louisiana elevators were found to have one major cost—the wages of the longshoreworkers hired to load a vessel. In this regard, the Presiding Officer noted that, under the existing labor contract with the International Longshoremen's Association (ILA), Rogers Terminal Shipping Corporation (Rogers),[7] and every other Mississippi River grain stevedore is required to pay each longshoreworker hired a six-hour minimum guarantee each time the longshoreworker is employed except at the public elevator at New Orleans and Cargill's Baton Rouge elevator where the minimum guarantee is four hours. The ILA contract further provides that one gang will be assigned to each spout. The Presiding Officer found that at Baton Rouge the basic gang consists of five men, [8] while at the other elevators on the Mississippi River in Louisiana, the basic gang consists of eight men.[9]

In the remand proceedings before the Presiding Officer, Cargill argued that its services and facilities charge had been justified on a "cost of service basis" through the testimony of Messrs. Linnekin, Mabrey, and Graving. Cargill also contended that this testimony justified its service and facilities charge on a "prevailing practice in the area basis" and on a "value of service to the stevedore basis." Hearing Counsel agreed that Cargill's charge is reasonable because of the benefits derived by the stevedores from the use of the facilities and because Cargill's charges are consistent with the prevailing practice in the area.[10] The

[5] Productivity is defined as the amount of grain per hour that an elevator can deliver to the stevedore for loading aboard a vessel.

[6] The other elevators competing with Cargill at Baton Rouge are: St. Charles Grain Elevator Company, Destrehan, La.; Farmers Export Company, Ama, La.; Continental Grain Company, Westwego, La.; Mississippi River Grain Elevator, Inc., Myrtle Grove, La.; Cargill, Inc., Reserve, La.; The Public Grain Elevator of New Orleans, Inc., New Orleans, La.; and The Bunge Corporation, Destrehan, La.

[7] Rogers is a wholly-owned subsidiary of Cargill and operates as a general cargo and grain stevedore/steamship agent with operative offices at Baton Rouge, Louisiana.

[8] Stevedores pay $121 per hour for one gang and $191 per hour for two gangs at Baton Rouge.

[9] At the other elevators, stevedores pay $163 per stevedoring gang.

[10] Hearing Counsel took this same position on exception to the Remand Decision I. However, on exception to the Remand Decision II, Hearing Counsel suggests that the Commission issue section 21 orders to the other elevators in the area to determine their ratemaking practices before adopting "the prevailing practice in the area basis" as the standard for measuring Cargill's charges.

Presiding Officer rejected Cargill and Hearing Counsel's argument on the ground that the evidence and the theories relied upon by those parties did not conform to the Commission's remand directive in its 1975 Report. Thus, he explained in his Remand Decision II:

There is lacking valid testimony as to the regulatory reasonableness or public interest as well as conformity with the Commission's directive in its January 3, 1975 Order herein that the allocation of services and facilities benefits to stevedores be based on actual use as outlined therein. It is very interesting to note that there are no facts as to the actual use of services and facilities pointed out or stressed by Cargill, only theories are expounded. The grounds for the ten cents charge not having conformed to the Commission's directive nor having applied the facts of the case to them or acceptable or valid regulatory tests, at least, should be and are regarded as unsatisfactory, if not arbitrary and without support under the facts and circumstances of this case. (Remand Decision II, at 14).

Accordingly, the Presiding Officer in his Remand Decision II found that Cargill had failed to justify a charge against stevedores other than as approved by the Commission in its 1975 Report. The Presiding Officer accordingly directed Cargill to supply to the Commission within 30 days of his decision, complete annual records as to the charges imposed on the stevedores, "so as to aid the Managing Director and the Commission in assessing the charges." He also directed Cargill to "suggest to the Managing Director and the Commission how the charges should be collected as well as management and reporting procedures covering the sum collected." (Remand Decision II at p. 24).

Positions Of The Parties[11]

Hearing Counsel

Hearing Counsel argues that Mr. Linnekin's studies and testimony contain the same deficiencies as found by the Commission in its 1975 Report. However, Hearing Counsel submits that a Freas type study need not be applied to Cargill's Baton Rouge operations. In support of this position, Hearing Counsel points out that both the Court of Appeals, in its decision on review of the Commission's 1975 Report in this proceeding, and the Commission, in its decision in *Crown Steel Sales, Inc. v. Chicago Marine Terminal Association,* 12 F.M.C. 353, 374, found that a Freas type study allocating cost and benefits is academic because the costs are passed on to the consumer in any event.

Hearing Counsel notes that the Commission has, in the past, recognized that costs are but one factor in determining the reasonableness of ocean freight rates. *In the Matter of Discounting Contract/Noncontract Rates Pursuant to the Provisions of Item 375 Note 2, of the India, Pakistan, Ceylon and Burma Outward Freight Conference Tariff No. 10,* 12 F.M.C. 20, 23. Hearing Counsel therefore agrees with Cargill that the Commission should measure the reasonableness of Cargill's charges on the basis that it is less than the prevailing charge in the area for comparable services and facilities. However, although Hearing Counsel in its exceptions to the Remand Decision I urged the Commission to find Cargill's charge reasonable based on a prevailing practice basis, it now submits that the record is inadequate to support such a finding. Hearing Counsel therefore suggests the following alternatives:

[11] Exceptions to the Remand Decision I are not separately discussed here; however, those exceptions are essentially similar to those that have been filed to the Remand Decision II.

1. The Commission hold this case in abeyance and institute a Commission investigation to establish alternative standards for determining the reasonableness of service and facilities charges;

2. The Commission reopen the proceeding for the limited purpose of taking evidence on Cargill's "dominant elevator" theory; and

3. The Commission hold the case in abeyance and direct section 21 orders to other elevators in order to determine whether the "dominant elevator" theory or an alternative theory of rate making is appropriate.

Hearing Counsel favors the third alternative because it would possibly require the least amount of time.

Hearing Counsel submits that Cargill has failed to establish that a stevedore's productivity (*i.e.* a stevedore's profit) varies with the elevator's investment cost and facilities. It notes that productivity is affected by the type and grade of the grain being delivered and by conditions in the headhouse. Additionally, Hearing Counsel points out, that while Cargill produced evidence which indicates that Rogers makes a profit at all of the Mississippi elevators and that productivity is tied to profits, Cargill's evidence further indicates that stevedoring charges do not vary with the productivity of each elevator. Hearing Counsel notes that in fact Rogers charges more at Cargill's Baton Rouge facility than it does at any other elevator including those that are allegedly more productive.

Hearing Counsel dismisses Mr. Linnekin's 95%-45% allocation as being arbitrary and in complete disregard of the Commission's 1975 Report.

Finally, Hearing Counsel submits that the Presiding Officer properly "resisted" BARMA's "secondary boycott" allegation by refusing to accept its amended complaint. Hearing Counsel argues that BARMA's secondary boycott claim is derived from the alleged section 15 and 16 violations raised by BARMA in its original complaint in this proceeding and relates to BARMA's initial proposed findings of fact. Therefore, Hearing Counsel submits that the Commission has already considered and disposed of BARMA's secondary boycott claim.

BARMA

BARMA continues to insist that the Commission never addressed the secondary boycott issue raised in its original complaint. BARMA argues that: (1) the Commission erred in denying its Petition for Reconsideration and in denying BARMA's appeal from the Presiding Officer's dismissal of BARMA's supplemental and amended complaint (see the Commission's Order of November 2, 1977); and (2) the Commission's Office of the Secretary erred in not accepting a further amended and supplemental complaint which allegedly raised the secondary boycott issue.

BARMA also excepts to the Presiding Officer's finding that Cargill may assess some charge against stevedores, based upon services and facilities which the Commission found in its 1975 Report, to be properly attributable to stevedores. BARMA argues that the Commission's finding that Cargill could assess a charge, based in part on the cost of utilities and overhead, was dependent on Cargill establishing that *other* costs associated with the elevator were properly attributable to stevedores. BARMA agrees with the Presiding Officer's finding that Cargill has failed to justify the allocation of any other elevator cost to stevedores, other than as found reasonable by the Commission. BARMA therefore concludes that there should *not* be *any* charges assessed against stevedores at Cargill's Baton Rouge facility.[12]

BARMA maintains that the facts and theories relied upon by Cargill (and presumably Hearing Counsel) in this remand proceeding to support Cargill's service and facilities charge are the same facts and theories relied upon and rejected by the Commission in the original 1972 proceeding.[13] BARMA argues that the prevailing practice—dominant carrier theory—cannot be applied here, for that theory requires a dominant force and competition between the entities in the service area. This requirement has allegedly not been met here because there is not a dominant elevator on the Mississippi and the only competition on the Mississippi is between the stevedores and not the elevators.

Finally, BARMA submits that Cargill has failed to justify its charges on any theory and has in fact ignored the 1975 decision, which BARMA submits, is *res judicata*. BARMA points out that Mr. Linnekin admitted that he did not follow the Commission's 1975 decision in reducing his allocations to stevedores. BARMA views the Commission's 1975 Report and the Court of Appeals decision affirming that Report as holding that the charges to stevedores can *only* be based upon benefits derived from actual use. Furthermore, BARMA submits that, in any event, Cargill's own evidence indicates that elevator efficiency (productivity) is *not* a conclusive factor in determining the worth or profitability to a stevedore because Rogers charges more for its stevedoring services at Cargill's Baton Rouge elevator than it does at Farmer's Export, although the average productivity of the two elevators is the same. BARMA also cites Mr. Mabrey's testimony that productivity is contingent not only upon the speed of the conveyor belts but also the conditions in the headhouse.

BARMA concludes that a charge against stevedores is in violation of the Commission's rules and past precedent and notes that even Mr. Linnekin testified that but for Cargill's lease, he would have preferred to allocate the cost of the shipping gallery and wharf to the vessel as has previously been done in the port industry.

Finally, BARMA states that this litigation has gone on long enough, and should not now be postponed as suggested by Hearing Counsel.

CARGILL

Cargill takes the position that the Presiding Officer erred in failing to consider factors other than the costs of services and facilities in determining the reasonableness of its charge. Cargill argues that even if it had not justified its charges on a cost of service basis, a point it does not concede, there is evidence in the record and other available evidence, which Cargill was not permitted to produce, which establishes the reasonableness of Cargill's service and facilities charge on a prevailing practice in the area basis. Cargill submits that the Commission has recognized other factors including the "value of service" and the "prevailing

[12] In the alternative, BARMA asserts that if a charge is made against stevedores based on the utilities and overhead allocations approved by the Commission, such a charge would only amount to seven-tenths of a cent per ton based upon 1976 crop figures.

[13] BARMA notes that in the original proceeding, Cargill presented testimony to show that other elevators on the Mississippi had instituted a services and facilities charge against stevedores and that these charges were generally equivalent to the charges and facilities at Cargill's Baton Rouge elevator. BARMA also points out that Hearing Counsel, in the original proceeding, contested Cargill's prevailing practice theory on several grounds including relevancy and lack of evidence with respect to the similarity between the other elevators on the Mississippi and Cargill's Baton Rouge facility.

practice in the area," as proper standards to measure the reasonableness of terminal rates. *Investigation of Ocean Rate Structures,* 12 F.M.C. 34, 56-57 (1968); *Crown Steel Sales v. Port of Chicago Marine Terminal Assn.,* 12 F.M.C. 353, 375 (1967); and *Evans Cooperage, Inc. v. Board of Commissioners of the Port of New Orleans,* 6 F.M.B. 415 (1961). In Cargill's view, the record in this proceeding clearly establishes the reasonableness of its service and facilities charge.

Cargill argues that the Presiding Officer in his Remand Decision II found all the necessary facts to support a finding that its charge was reasonable on a "value of service" or "prevailing practice in the area" basis, yet improperly failed to so find. Thus, Cargill cites the Presiding Officer's findings that productivity is now the major factor in determining the worth or value of an elevator to a stevedore; that elevators on the Mississippi vary as to productivity, yet all of these elevators charge a ten cents per ton service and facilities charge to stevedores for comparable services; and that the stevedores' per hour revenue increases with the number of tons of grain loaded because the hourly wages of longshoreworkers are fixed.

Cargill maintains that BARMA is barred by the doctrine of *res judicata* and doctrine of the "law of the case" from attempting to relitigate, through the guise of its supplemental and amended complaints, issues which have previously been considered by the Commission and the Court of Appeals. Cargill likewise argues that the doctrine of *res judicata* bars BARMA from now urging the Commission to find that Cargill may not assess *any* charge against stevedores.

Discussion

The threshold issue presented for our consideration is whether the Commission intended, by its 1975 Report, to limit Cargill's proof on remand to cost allocations developed through a Freas type study, based upon benefits realized by stevedores from their actual use of Cargill's facilities. If the Commission did not intend to so limit Cargill's proof, we must then determine if the evidence Cargill has presented on remand is nevertheless adequate to support a finding that its charge to stevedores is reasonable within the meaning of section 17 of the Act. For the reasons set forth herein, we conclude that the Commission did not intend to limit Cargill's proof and that Cargill has proved, through the evidence presented, the reasonableness of its charges to stevedores within the meaning of section 17.

In its 1975 Report, the Commission found Cargill's charges, as assessed against stevedores, unreasonable within the meaning of section 17, and directed that the proceeding be remanded to determine the proper charge to be assessed against stevedores. The Court of Appeals, in affirming the Commission's ultimate holding and its application of the "actual use" analysis of the section 17 standard, noted the finding of the Supreme Court in *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission,* 390 U.S. 261, 19 L.Ed. 2nd 1090 (1968), that:

> . . . [E]ven though the benefits received are clearly substantial the proper inquiry under section 17 is, in a word, whether the charge levied is reasonably related to the service rendered.[14]

[14] *Cargill, Inc. v. Federal Maritime Commission,* 530 F.2d 1062, at 1068 (1976).

Thus, although the Commission's 1975 Report found that Cargill's charges were unreasonable based upon Cargill's evidence of "actual use," we do not believe that actual use is the only basis which may be used to determine if a charge is reasonably related to the service rendered for the purpose of section 17.[15] Such conclusion is not inconsistent with our 1975 Report nor with the Court of Appeals decision on review of that Report.[16] While the Commission's 1975 Report may have anticipated that Cargill on remand would supplement its evidence of "actual use," the Commission could not have intended to abrogate the Congressionally enacted standards of section 17 as interpreted by the Supreme Court in *Volkswagenwerk, supra*. Indeed, the Commission and its predecessors have previously recognized that costs are but one factor in determining the reasonableness of terminal rates[17] and carrier rates[18] under section 17.

The Commission therefore did not intend, by its 1975 Report, to limit Cargill's proof on remand to a cost allocation developed through a Freas type study based upon the benefits realized by stevedores through their actual use of Cargill's services and facilities. Having so found, we must now determine if Cargill has demonstrated, by any recognized standard, that its charge is reasonably related to the services rendered. *Volkswagenwerk, supra*. The resolution of this issue turns, in part, on a specific finding made by the Commission in its 1975 Report, which must be clarified in view of the uncontroverted evidence developed on remand.

In its 1975 Report, the Commission found that stevedores do not benefit from their use of the shipping gallery to the same extent as do the cargo and the vessel. The Commission explained that:

> [I]t can be argued that the speed and efficiency of the shipping gallery *works to the detriment of stevedores, providing shorter working hours by fewer men and therefore less revenues to the stevedores*. 18 F.M.C. at 162. (Emphasis added).

Upon reflection we find that argument wanting. While the speed and efficiency of the shipping gallery may work to the detriment of the longshoreworkers—an interest not in issue in this proceeding—the record on remand clearly establishes that stevedoring companies do derive benefits from the expeditious and efficient operation of the shipping gallery by reducing their major cost, the hourly wages of the longshoreworkers hired to load the vessels. Cargill established, through the uncontroverted testimony of Mr. Mabrey, that the productivity of the elevator—in terms of delivery capability—is the major, if not the sole, factor in determining the value of an elevator to a stevedore. This is due to the fact that stevedores generally charge their customers a flat rate per ton

[15] That the Commission limited its analysis to actual use in its 1975 Report is consistent with Cargill's proof, for the Commission advised that it would "examine *only* the factors which were used [the benefits derived by stevedores for the use of Cargill's facilities for which it contends it should be reimbursed] to determine the charge as to the reasonableness of each such factor." 18 F.M.C. at 161 (emphasis added).

[16] Indeed, the court itself noted, in response to the arguments of the Departent of Justice, that the Commission's 1975 Report suggested that the Commission would approve Cargill's charge on grounds other than actual use. *Cargill, Inc., supra*, 1065-1066, 1071.

[17] *Crown Steel Sales, Inc., et al. v. Port of Chicago Marine Terminal Association, et al.*, 12 F.M.C. 352, 372, 375 (1967), local practice; *Evans Cooperage, Inc. v. Board of Commissioners of the Port of New Orleans*, 6 F.M.B., 415, 419 (1961), prevailing practice; *Terminal Rate Structure–California Ports*, 3 F.M.B. 57, 59 (1948), value of service and other factors which must be considered in determining the level of rates.

[18] *E.g., Atlantic Refining Company v. Ellerman and Bucknall Steamship Company, Ltd.*, 1 U.S.S.B. 242, 252 (1932), value of service.

for each ton of grain loaded, and have one major cost, the wages of the longshoreworkers hired to load the vessel.[19]

Thus, the record developed on remand supports the finding that to the extent the shipping gallery provides the principal means by which stevedores may minimize their costs while increasing revenues, it serves to benefit rather than harm them. The shipping gallery provides the stevedoring company a method by which it may relatively quickly and easily earn its flat rate per ton loaded, while simultaneously minimizing its major cost, wages. Because the productivity of the shipping gallery relates directly to the productivity of the stevedores, we find that stevedores derive benefits from their actual use of that facility and that a portion of the cost of the shipping gallery is properly attributable to them.[20]

In reaching the above conclusion, we are aware that there is evidence of record that Rogers charges more at Cargill's Baton Rouge facility than it does at equally productive elevators. We believe, however, that this anomaly is attributable to the competitive nuances of rate setting in the stevedoring industry, generally, a matter beyond the scope of this proceeding. Thus, Mr. James F. Carrier testified at the original hearings in this proceeding that prior to the utilization of the shipping gallery, when the grain was carried by hand to the vessel, stevedoring rates per ton loaded produced a profit to the stevedores of approximately 75 cents per ton, but that after the construction of the shipping gallery, stevedores reduced their per ton rate to a level which, at least at the time the testimony was taken, yielded a profit of only approximately two cents per ton.[21] While we might speculate as to the basis for Rogers' drastic rate reduction and proportionate reduction of profits, we need not do so here in view of the fact that the uncontroverted evidence developed on remand establishes that the speed and efficiency of the shipping gallery does reduce the stevedores' major cost, labor, with a resultant increase in revenue.

We shall now direct our attention to the grain dock-wharf. The Commission in its 1975 Report, concluded that Cargill's charge, insofar as the charge was based upon the allocations of the cost of the grain dock-wharf, was an unreasonable practice within the meaning of section 17.[22] On remand, although Cargill, through the testimony of Mr. Linnekin, indicates that it modified the allocation of the cost of the grain dock-wharf, Mr. Linnekin nevertheless assigned 95% of that cost—as opposed to 100% in the original hearing—to the stevedoring function. While the testimony and other evidence on this point is not totally clear, Mr.

[19] Because the stevedores charge a flat rate per ton loaded, it now appears that the speed and efficiency of the shipping gallery do not benefit cargo.

[20] As we have heretofore explained, section 17 requires that we measure the reasonableness of terminal rates by determining if the "charge levied is reasonably related to the service rendered." In this proceeding, we have found that Cargill's charge is reasonably related to the service rendered because of the prevailing practice in the area and because of the value of the service provided stevedores. Accordingly, given the fact that Freas type cost allocations are not the product of immutable equations, we shall not quantify with precision the specific percentage of shipping gallery costs that are attributable to stevedoring companies, particularly since this exercise would serve no useful purpose in this proceeding. In any event, as noted by the Court of Appeals, it makes "no difference in the long run whether the cost of the grain elevator is charged to the stevedore rather than the vessel . . . [for] the stevedore's charge will be borne by the ultimate beneficiary of the services, the consumer, regardless of whether the stevedore is employed by and paid in the first instance by the vessel or shipper." *Cargill, Inc., supra*, at 1068.

[21] In the remand proceeding, while Mr. Mabrey testified that Rogers makes a profit on all its stevedoring transactions, he did not indicate Rogers' actual per ton profit.

[22] The Commission found that to the extent the grain dock-wharf allocation included the "use of the barge unloading facility, the pile clusters, the dust collection system, and the spouts, to the extent assessable against cargo or vessel, [it constitutes] an unreasonable practice under section 17." *Baton Rouge Marine Contractors, supra*, at 163.

Linnekin seems to have made this allocation by applying his "judgment"[23] to the entire costs involved in the construction of the grain dock-wharf, except for the cost of the barge unloading facilities situated on the wharf.[24]

While the cost of the grain dock-wharf is one factor to be considered in determining the reasonableness of Cargill's charge to stevedores, there are other factors which must be evaluated in determining the reasonableness of Cargill's *total* charge for the use of its services and facilities. For this reason, and because Mr. Linnekin considered cost associated with unloading operations, we shall only consider Mr. Linnekin's "judgment" with respect to the benefits derived by stevedores from their use of the grain dock-wharf.

We turn then to an examination of the benefits derived by stevedores from their use of the grain dock-wharf. The grain dock-wharf houses the supports for the spouts that are used to load the holds of the vessel. The five spouts, which are at the river end of the shipping gallery, and which are supported by the grain dock-wharf, are extended, withdrawn, and moved from hold to hold by a Cargill employee at the direction of the stevedoring company's employees. Accordingly, at least to the extent the grain dock-wharf provides support for the spouts, it provides actual benefits to stevedores. Further, and as found by the Commission in its 1975 Report, the grain dock-wharf provides benefits to stevedores by providing ingress and egress for their employees during loading operations. Finally, because the wharf pilings provide the physical support for the grain dock wharf, which in turn supports the facilities discussed above, we find that the stevedores derive benefits from those pilings. Therefore, because the grain dock-wharf, like the shipping gallery, serves to increase the productivity of the stevedoring companies, we find that the stevedoring companies derive benefits from their use and dependency on the grain dock-wharf and that a portion of the cost of the grain dock-wharf is therefore properly allocable to them.[25]

The final matter to be considered is the liaison cost associated with Cargill's service and facilities charge to the stevedoring companies. Mr. Lloyd Graving testified that Cargill employed a "spoutman" who, at the direction of the stevedoring company's employees, raises and lowers the spouts to the holds of the vessel, moves the spouts from hold to hold, and increases and decreases the flow of grain. This activity relates directly to the stevedores' loading responsibility and contributes to their productivity, for the "spoutman" makes it possible for the stevedore to utilize the speed and efficiency of the shipping gallery and quickly and efficiently load the vessel. Accordingly, we find the cost of the "spoutman" to be properly attributable to stevedores.

[23] As the Court of Appeals noted in *Cargill, supra*, note 13 at 1069, the Freas Formula is not an immutable equation but, "[R]ather it is a set of principles which when combined with the *judgment* of a trained analyst, provides a reasonable assessment of cost and a fair and reasonable allocation of those costs." (Emphasis added).

[24] Except to the extent it relates to the barge unloading facilities, the record on remand is not sufficiently clear to allow us to determine with specificity those elements of the grain dock-wharf which were not considered by Mr. Linnekin on remand. Likewise, the record does not detail all the elements of the grain dock-wharf Mr. Linnekin did consider in making his allocations. The record does indicate that he considered the "pilings that the wharf is on," the "portion of the dock on which barges are moored during unloading operations," and "the walkways used by the personnel of Cargill who unload the barges." Based on Mr. Linnekin's testimony and other evidence in this proceeding, it also appears that Mr. Linnekin took into consideration the loading spouts that are supported by the wharf for they provide the means by which the stevedoring companies actually load the vessel. Mr. Linnekin also testified that he considered the "walkways used by personnel of Cargill who unload the barges." We believe that these are the same walkways which the Commission found in its 1975 Report to be beneficial to the stevedores by providing a means of ingress and egress during loading operations.

[25] As with the shipping gallery (see footnote 20, *supra*), we do not believe it necessary to quantify the specific percentage of the grain dock-wharf costs that are attributable to the stevedoring companies.

We also find the cost of a second Cargill employee, who is engaged in liaison activities, to be properly allocable to the stevedore. This Cargill employee relays messages to and from the stevedore, responds to inquiries regarding vessels scheduled to call at the elevator, and provides the stevedore with information relating to specific operations and conditions. It appears from the record evidence on remand that the allocation of 10% of this employee's salary to the stevedoring function is commensurate with the services provided.

Having found that stevedores derive benefits from the use of Cargill's services and facilities, for which they may be charged, we must now determine whether Cargill's present charge to stevedores of ten cents per ton is unjust or unreasonable within the meaning of section 17 of the Act. For the reasons stated below, we conclude that the record is insufficient to support a finding that Cargill's charge to stevedores is violative of section 17.

As we have heretofore indicated, costs are but one factor in measuring the reasonableness of terminal rates. Where, as here, costs and benefits are identifiable but not readily allocable, the Commission must consider other rate making factors to measure the reasonableness of the rates in issue. The services and facilities provided by Cargill to the stevedore relate directly to stevedore's productivity and hence profitability, for the stevedoring companies charge their customers on a "ton loaded basis." It follows, therefore, that Cargill's services and facilities are of "value" to the stevedore to the extent these facilities and services provide the means by which stevedoring revenue is earned while minimizing the stevedore's principle cost, *i.e.*, the wages of the longshoreworkers hired to load the vessel.

While the services and facilities in issue in this proceeding have not been allocated to stevedores in past Commission proceedings, the "rate making process at individual ports, whether or not based upon the Freas Formula, must be varied to recognize local differences in practices, procedures and objectives." *Crown Steel Sales, supra,* at 372. In this proceeding, the record clearly establishes that the local practice and custom in the area is to assess a charge against the stevedores for the services and facilities provided.

Indeed, the record on remand reveals that all of the grain elevators on the Mississippi River assess a ten cents per ton service and facilities charge against stevedores. This not only supports our finding that a charge against stevedores is an established local practice, but also militates in favor of Cargill's charge being reasonably related to the value and benefits derived by the stevedores from their use of Cargill's services and facilities. The record on remand establishes that these elevators, which compete for grain sales, are generally similarly constructed and provide the stevedoring companies the same measure of benefit and value as provided by Cargill's Baton Rouge facility. Each of the competing elevators provides the stevedores, albeit in varying degrees, the means with which they may quickly and efficiently load the vessel, thus earning their charges while minimizing their costs.

We therefore find that when the value of this service is considered in connection with the benefits derived by stevedoring companies and the local custom and practice in the area, Cargill's charge of ten cents per ton to those companies is reasonably related to the services provided and therefore is not unjust or unreasonable within the meaning of section 17 of the Shipping Act, 1916.

In reaching our decision, we have considered the entire record developed in this proceeding. Though we deem it unnecessary to expressly address each matter raised on exception, we nevertheless believe it appropriate to briefly discuss two issues raised by BARMA's exceptions. First, BARMA argues that the Presiding Officer failed to find that Cargill may not assess *any* charges against stevedores including charges for the cost of water, toilets, telephones and utilities. BARMA's argument squarely contradicts the Commission's 1975 Report, the Court of Appeals decision, and our Order of November 2, 1977, denying Hearing Counsel's Motion to Enforce. In its 1975 Report, the Commission clearly found that the "allocation to stevedores of $933 per year for water, toilets, telephones and utilities does not appear to be so unreasonable as to justify disapproval," pursuant to section 17. *Baton Rouge Marine Contractors, Inc., supra,* at 163. Furthermore, as noted in our November 2, 1977, Order and as specifically recognized by the Court of Appeals, the Commission found in its 1975 Report that certain of Cargill's allocations to stevedores were *not* unreasonable within the meaning of section 17 and that the Commission's 1975 Report should not be construed to prohibit Cargill from "filing the tariff carrying charges consistent with section 17 and the Commission's rulings thereon." *Cargill, supra,* at 1070. BARMA's exception to the contrary is therefore denied.

Also rejected is BARMA's exception that the Commission, the Presiding Officer, and the Office of the Secretary have all erroneously failed to give consideration to the "secondary boycott issue" raised in BARMA's original and amended complaints. BARMA's "secondary boycott" allegation was first raised in BARMA's original complaint and was subsumed with BARMA's allegations of sections 15 and 16 violations. The matter was investigated by the Commission in its initial consideration of the sections 15 and 16 allegations in this proceeding. This same "secondary boycott" allegation was again rejected by the Commission on November 2, 1977, when it denied BARMA's Petition for Reconsideration.

Having found Cargill's charge to stevedoring companies to be reasonabaly related to the services rendered and not shown to be unjust or unreasonable within the meaning of section 17 of the Shipping Act, 1916 (46 U.S.C. 816),

It is Ordered that this proceeding be discontinued.

Commissioner Leslie Kanuk, concurring and dissenting in part. Upon review of the Report and Order, I am compelled to dissent in part. As noted by the majority, the Commission has considered certain aspects of this case previously and has had its decision affirmed by the Court of Appeals for the District of Columbia Circuit. *Cargill, Inc. v. Federal Maritime Com'n,* 174 U.S.App.D.C. 210 (1976), 530 F.2d 1062 (1976), cert. denied, 429 U.S. 868 (1976). For reasons not adequately articulated, the Commission has now stepped away from the approach affirmed by the Court in 1976.

I concur in the majority's rejection of BARMA's argument that *no* charges may be assessed against stevedores. Moreover, I do not except to the majority's rejection of the secondary boycott issue raised in BARMA's pleadings. I agree with the majority that the stevedore can potentially realize certain financial benefits from the operation of the grain elevator. My difference of opinion is based on the fact that the record in this proceeding does not document that such a financial benefit actually exists, and therefore whether a user charge is actually warranted, and what would be a fair and reasonable charge if such a benefit does in fact exist.

The Commission earlier determined that the assessment of terminal charges which did not accurately reflect actual user benefits represented an unreasonable practice under section 17 of the Shipping Act, 1916, 46 U.S.C. 816. This position was upheld by the Court of Appeals.

The record in this proceeding contains no exposition of the relative benefits accruing to stevedores and other segments of the distribution channel. We have before us no indication from the record that increased efficiencies at this elevator have actually resulted in increased profits to the stevedore. The record reveals no comparison of relative benefits between vessels, stevedores, and other beneficiaries of this facility. The majority report relies heavily on what it views to be an "established local practice" (Report at 27) as support for the assessment of charges against stevedores.

It previously has been a bedrock position of this agency that charges such as those assessed here must reflect actual use. See *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261 (1968); *Pacific Northwest Tidewater Elevators Association*, 11 F.M.C. 369, 388 (1968). The question before us in section 17 cases is "whether the charge levied is reasonably related to the services rendered." *Volkswagenwerk, supra*, at 390 U.S. 282. If approaches other than actual use are employed, the results still must bear a reasonable relationship to those which would have been achieved by comparing the value of service rendered to the charge assessed. "Actual use" is not a magical concept; it is merely a sound, common-sense method of testing rate practices against the requirements of section 17. It has the further advantage of having passed muster before the Court of Appeals in the District of Columbia Circuit.

The earlier Commission Report and the Court of Appeals decision establish that the allocation of charges among the various users of the Cargill facility is important. In a portion of the Court's decision not fully quoted by the majority, it was stated that:

> One can make the economic argument that there is no difference in the long run whether the cost of the grain elevator is charged to the stevedore rather than the vessel, because the charges will be passed on to the party, usually the vessel, employing the stevedore to load and trim the vessel. In the long run, the stevedore's charge will be borne by the ultimate beneficiary of the services, the consumer, regardless of whether the stevedore is employed by and paid in the first instance by the vessel or the shipper. *But at least in the short run, different consequences will attach to differences in the immediate incidence of the charges, depending on the documents negotiated and entered into by the parties prior to the imposition of the new charges. Moreover, the separation out and identification of the various charges may have a kind of psychological spillover effect on the behavior of the various parties, which the Commission can properly take into account.* [Emphasis supplied.] *Cargill, Inc. v. Federal Maritime Com'n*, 174 U.S.App.D.C. 210, 216-217 (1976); 530 F.2d 1062, 1068-1069 (1976).[1]

[1] The majority report abbreviates this passage in a manner which obscures its import. See Fn. 20, page 20. The critical language is that underscored above.

Furthermore, the Court upheld our prior determination that the costs attendant upon efficient grain elevator operations are more directly related to the activities of such beneficiaries as shippers, consignees, and vessel operators, and less related to those of stevedores. Our earlier finding that the efficiency of this type of grain facility is of less importance to stevedores than other interests was not dependent on whether longshoremen receive hourly wages or stevedore charges are computed on a per-unit volume rate. The majority's attempt to part with this earlier conclusion is undermined by the fact that this record contains absolutely no evidence that BARMA's stevedoring operation has experienced an actual increase in profit margin as a result of grain elevator efficiencies.

Finally, whatever the benefits enjoyed by stevedores at this elevator, the Commission has failed to conduct any comparative analysis of the relative benefits inuring to the several users of the facility. This comparison was at the heart of the Commission's earlier approach and is essential to a determination that "the charge levied is reasonably related to the service rendered."

I fear that the majority has placed undue reliance on stevedore charges at other elevators on the Lower Mississippi. Absent some evidentiary showing of similarity of costs and benefits, the charges at other facilities tell us little of the reasonableness of Cargill's charges at Baton Rouge. Charges at other grain installations are not irrelevant to our inquiry here, but they acquire significance only when some demonstrable basis of comparison is developed on the administrative record.[2] Our task is to determine that the costs of a *particular* facility are being allocated among its users in a manner consistent with the "just and reasonable practices" language of section 17.

(S) FRANCIS C. HURNEY
Secretary

[2] Whatever the significance of rate practices at competing elevators, it tells us nothing about the *allocation* of charges at the Baton Rouge facility. It is a specious argument to cite the existence of these charges as evidence of Cargill's charge "being reasonably related to the value and benefits derived by the stevedores from their use of Cargill's services and facilities." Majority Report at 27.

FEDERAL MARITIME COMMISSION

No. 78–54

PUERTO RICO MARITIME SHIPPING AUTHORITY

v.

SEA-LAND SERVICE, INC.

MOTION TO WITHDRAW COMPLAINT GRANTED; PROCEEDING DISMISSED

Finalized April 20, 1979

Puerto Rico Maritime Shipping Authority (PRMSA) has filed a motion seeking permission to withdraw its complaint. In support of this motion PRMSA says:

1. On December 6, 1978, PRMSA filed a complaint against Sea-Land Service, Inc, (Sea-Land) on the basis of two Sea-Land tariff rules (Rule No. 340 and new Rule No. 350, Tariff Nos. 270, FMC-F No. 36 (1st Rev. pp.71-74) and 271, FMC-F No. 37 (1st Rev. pp. 40-44)), providing for a reduction of Sea-Land's tariff rates by 2.5 percent for shippers who stated "Insurance Not Required" on bills of lading prior to shipment. PRMSA complained that Sea-Land's "insurance discount" rules violated Sections 16, First and 18(a) of the Shipping Act, 1916. PRMSA requested the Commission find Sea-Land in violation of these sections of the Shipping Act, order Sea-Land to cease and desist from applying the insurance discount rules, and that Sea-Land pay PRMSA reparation for such violations.
2. On March 5, 1979, Sea-Land filed revised Rule No. 340 and Rule No. 350, Tariff Nos. 270, FMC-F No. 36 (2nd Rev. pp. 71-74) and 271, FMC-F No. 37 (2nd Rev. pp. 40-44) for effect April 5, 1979. PRMSA was notified of these tariff revisions by a letter dated March 6, 1979 from Sea-Land's counsel to the Presiding Administrative Law Judge.
3. As a result of Sea-Land's decision to revise its tariff so as to eliminate the insurance discount rule, PRMSA has determined that it has no interest in using its resources and those of the Commission to pursue this matter.

Since, as the Commission has recognized on several occasions, there is no way to compel a complainant to prosecute his cause, the motion of PRMSA is granted and the case is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

March 16, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 78–54

PUERTO RICO MARITIME SHIPPING AUTHORITY

v.

SEA-LAND SERVICE, INC.

NOTICE

April 20, 1979

Notice is given that no appeal has been filed to the March 16, 1979 order of dismissal in this proceeding, 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

TITLE 46–SHIPPING

Chapter IV–Federal Maritime Commission

[GENERAL ORDER NOS. 13 AND 38; DOCKET NO. 78–30]

April 27, 1979

Part 531—Filing of Freight and Passenger Rates, Fares, and Charges in the Domestic Offshore Trade, Publication and Posting; and
Part 536—Filing of Tariffs by Common Carriers by Water in the Foreign Commerce of the United States and by Conferences of Such Carriers

ACTION: Reconsideration of Final Rule

SUMMARY: Upon reconsideration, the Commission has amended two newly created tariff filing provisions by requiring all ocean carriers to: (1) publish in their tariffs that shippers may file overcharge claims within two years of the date *the cause of action accrues;* and (2) respond only to *written* overcharge claims, by advising claimants of the tariff provisions *actually applied* by the carriers (changes underscored).

DATES: Effective as to both new and existing tariffs July 15, 1979.

SUPPLEMENTARY INFORMATION:

This proceeding was instituted by Notice of Proposed Rulemaking published September 5, 1978, in the *Federal Register* (43 Fed. Reg. 39399) to amend the Commission's tariff filing regulations. By order served January 31, 1979, the Commission adopted rules which required ocean carriers to: (1) indicate in their tariffs that shippers may file overcharge claims with the Commission up to two years of the date the vessel sails or the date the disputed charges are paid, whichever is later; and (2) acknowledge overcharge claims within twenty days by written notice to the shipper of the governing tariff provisions and its rights under the Shipping Act, 1916 (46 U.S.C. 801, *et seq.*).[1] Several parties[2] have petitioned for reconsideration of certain portions of the final rules pursuant to Rule

[1] The rules required that the tariffs 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 the receipt by written notice to the claimant of all governing tariff provisions and claimant's rights under the Shipping Act.

[2] Latin American/Pacific Coast Steamship Conference; Pacific Coast European Conference; Pacific Coast River Plate Brazil Conference; Associated Latin American Freight Conference and its Member Conferences; American West African Freight Conferences; Australia-Eastern U.S.A. Shipping Conference; Marseilles North Atlantic U.S.A. Freight Conference; Med-Gulf Conference; North Atlantic Mediterranean Freight 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; and Sea-Land Service, Inc. (Petitioners).

261 of the Commission's *Rules of Practice and Procedure* (46 C.F.R. 502.261). All Petitioners but Sea-Land also requested a stay of the effective date of the rule pending reconsideration.[3] By order dated March 23, 1979, the Commission stayed the effective date of the rules until further order.

Petitioners' objections[4] to the first rule focus on the time period in which shippers may file complaints. Petitioners argue that by allowing the two years to run from the date the shippers make payment on the disputed charges, the rule encourages shippers to delay paying their bills and rewards delinquent shippers with additional time in which they may file overcharge claims. Petitioners also allege that the Commission's action in defining the statute of limitations was not properly noticed in the Notice of Proposed Rulemaking; was not the purpose of this rulemaking proceeding; and is not within the Commission's jurisdiction.

Because the Commission does not wish to encourage late shipper payments, this rule shall be amended so that the statute of limitations is stated in terms of the statute, *i.e.*, "within two years of the date the cause of action accrues."[5] It is unnecessary, therefore, to address the arguments that our previous action in this regard was improperly noticed and was outside the purpose of the rulemaking and the Commission's jurisdiction.[6]

Objections to the twenty-day notification period are that it is too brief; that it is unclear when the twenty days begin to run; and that it is unclear which "claimant's rights" are referred to in that rule. Petitioners are especially critical of the requirement that the carrier must cite to the complaining shipper all governing tariff provisions, and that the carrier is bound in future litigation to the provisions it cites. The "binding" requirement, argue Petitioners, is unfair and extremely burdensome to the carriers, does not serve a stated purpose of the rulemaking, and was not properly noticed in the Notice of Proposed Rulemaking. It is also alleged that, by binding a carrier to an erroneously cited tariff provision rather than simply applying the correct tariff regardless of what was cited by the carrier, the rule violates section 18(b) of the Shipping Act, 1916 (46 U.S.C. 817).

Upon reconsideration, the rule will be amended to permit the carriers to notify claimant-shippers of "tariff provisions actually applied," rather than of "all governing tariff provisions." Notification by the carrier of the provisions it actually relied upon should serve to initiate productive communications between shipper and carrier which may avoid adjudicatory proceedings, while not proving burdensome to the carrier. While we are not mandating that carriers be bound by their notification, we expect that once the carrier has stated which tariff provisions it applied in assessing the disputed charge, it will generally not alter that explanation in future litigation.

The rule will also be amended to make it clear that carriers need acknowledge only claims for freight rate adjustments filed in writing.[7]

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[3] North European Conferences filed a reply supporting the Petition for Reconsideration and Stay of Australia-Eastern U.S.A. Shipping Conference, *et al*.

[4] The arguments advanced by Petitioners occasionally differed, but they will be discussed collectively for the purpose of this summary. All Petitioners' arguments have been considered and, except as specifically noted, granted to the extent they are consistent with the rule and denied in all other respects.

[5] This tracks the language of section 22 of the Shipping Act, 1916 (46 U.S.C. 821).

[6] We note, however, that the Notice of Proposed Rulemaking stated that a purpose of the rulemaking was "clarifying the statute of limitations."

[7] The twenty-day period will begin to run upon receipt of the written claim.

The twenty-day time period was fully considered previously when it was enlarged from the original ten-day proposal. We note that the period is particularly undemanding in light of the instant amendments to the rule made herein. The time period shall remain at twenty days.[8]

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), sections 531.5(b) (8) (xvi), 531.5(b) (9), 536.5(d) (20), and 536.5 (e) of 46 C.F.R. are amended as follows:

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 with the carrier and shall further advise that such claims may also be filed with the Federal Maritime Commission. At a minimum, tariffs shall contain 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 of the Shipping Act, 1916 (46 U.S.C. 821). Such claims must be filed within two years of the date the cause of action accrues.

(B) Claims for freight rate adjustments filed in writing shall be acknowledged by the carrier within twenty days of receipt by written notice to the claimant of the tariff provisions actually applied and claimant's rights under the Shipping Act, 1916.

531.5(b) (9). Additional rules which affect the application of the tariff shall follow immediately 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 with the carrier and shall further advise that such claims may also be filed with the Federal Maritime Commission. At a minimum, tariffs shall contain the following provisions:

(i) Claims seeking the refund of freight overcharges may he filed in the form of a complaint with the Federal Maritime Commission, Washington, D.C. 20573, pursuant to section 22 of the Shipping Act, 1916 (46 U.S.C. 821). Such claims must be filed within two years of the date the cause of action accrues.

(ii) Claims for freight rate adjustments filed in writing will be acknowledged by the carrier within twenty days of receipt by written notice to the claimant of the tariff provisions actually applied and claimant's rights under the Shipping Act, 1916.

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 531.5(b) (9), and sections 536.5(d) (20) and 531.5(e) shall take effect on July 15, 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 order of the Commission.

(S) FRANCIS C. HURNEY
Secretary

[8] We have also clarified that the "claimant's rights" refers again to the shipper's right to file an overcharge claim with the Commission as explained in the first rule.

FEDERAL MARITIME COMMISSION

Docket No. 75–57

Matson Navigation Company—Proposed Rate Increases in the United States Pacific Coast/Hawaii Domestic Offshore Trade

Docket No. 76–43

Matson Navigation Company—Proposed Rate Increases in the United States Pacific Coast/Hawaii Domestic Offshore Trade

ORDER ON RECONSIDERATION

April 27, 1979

Matson Navigation Company (Matson) and the Military Sealift Command (MSC) have petitioned the Commission to reconsider its decisions in Docket Nos. 75–57 and 76–43, served simultaneously on December 12, 1978. MSC seeks reconsideration of Docket No. 76–43 only on the issue of what remedy is to be applied in that case. Matson's petition as well as the replies of the Commission's Bureau of Hearing Counsel and MSC in Docket No. 75–57 have been incorporated by reference into the respective submissions of the parties in Docket No. 76–43. The Commission has consolidated these cases for purposes of reconsideration and the discussion of the issues raised in Docket No. 76–43 will therefore dispose of the issues raised by Matson in Docket No. 75–57 as well.

Docket Nos. 75–57 and 76–43 were instituted to determine the justness and reasonableness of rate changes filed by Matson during 1975 and 1976 in the U.S. Pacific Coast/Hawaii trade.[1] The Commission concluded that a 13% rate of return on equity was the maximum reasonable rate of return for a carrier in Matson's situation. This conclusion was based on the findings that the average rate of return of all U.S. industries during the relevant period of time was approximately 12% and that the peculiar risk characteristics of Matson's operation warranted an additional 1% "risk premium" above the national average.

In Docket No. 75–57 it was determined that the added revenues resulting from the rate increases did not cause the rate of return to exceed the 13% maximum. In

[1] Docket No. 75–57 involved a variable or "multi-tiered" increase which averaged 5.4% for all of Matson's rates. This increase took effect April 7, 1976 for most rate items and May 1, 1976 on the balance of effected items. The Initial Decision was served July 21, 1978. Docket No. 76–43 involved an across-the-board increase of 3.5% effective August 2, 1976. The Initial Decision in this case was also served July 21, 1978.

Docket No. 76–43, however, the Commission found Matson to have exceeded the reasonable maximum rate of return by .98%. This finding resulted, in part, from the recomputation of Matson's rate base by increasing the portion of its deferred income tax reserves deducted from the rate base.[2,3] The increased deduction was accomplished by excluding investment tax credits from Matson's total capital figure in calculating the service-rate-base-to-total-capital ratio.[4] With the rate base thus decreased, the rate of return found by the Commission exceeded that found by the Presiding Officer. Upon finding that the rate increase was excessive, the Commission discontinued the proceeding.[5]

POSITION OF THE PARTIES

Matson's Petitions

Matson advances two primary arguments. The first, raised only in Docket No. 76–43, is that the exclusion of the investment tax credits from total capital in calculating the deferred tax deduction violates section 203(e) of the Revenue Act of 1964,[6] which prohibits Federal agencies from reducing the stated cost of service of regulated industries by taking account of the investment tax credits inuring to the benefit of the regulated enterprise. The second argument, advanced in both cases, is that the evidence of record entitles Matson to a 15% rate of return on equity as opposed to the 13% allowed by the Commission. Numerous contentions are presented in support of these two major arguments.[7]

MSC argues that the Commission's rate of return determinations were correct. With regard to the treatment of the investment tax credits, MSC argues that section 203(e) deals only with the stated cost of service of the carrier and not the treatment of the resulting accumulated fund in the carrier's rate base; that only the computation of the deferred tax deduction is at issue and not the investment tax credit itself; that there are fundamental distinctions between the two which warrant different treatment in this case. MSC defends the finding that a 13% return on equity is the reasonable maximum in this case and states that Matson's

[2] Deferred income tax reserves are the aggregate amount of tax savings accruing to Matson under the accelerated depreciation provisions of the Internal Revenue Code. *See* footnote 13, *infra*.

[3] The Presiding Officer found Matson's rate of return on equity to be 13.92%, which was modified by the Commission to 13.98% due to this adjustment. Without the adjustment Matson's excess revenues would have been $903,949.96 (.92% excess return on equity of $54,531,764 with an effective tax rate of 44.5%) as compared with that found by the Commission of $974,136.69 (.98% excess return on equity of $54,372,732 with an effective tax rate of 45.3%) for a total difference of $70,186.73.

[4] The service-rate-base-to-total-capital ratio is used to determine the proportion of the deferred income tax reserves which are deducted from the service rate base. *See* footnote 13, *infra*.

[5] At the time of the Commission's decision, the subject rates had been superseded by two subsequent rate increases. This decision predated the effective date of P.L. 95–475, which conferred on the Commission the power to order direct refunds of excess revenues under such circumstances. 46 U.S.C. 845.

[6] 78 Stat. 33, P.L. 88–272, note following 16 U.S.C.A. 38.

[7] Matson argues that it was erroneous to exclude investment tax credits from total capital not only because such action contravenes section 203(e), but also because tax credits are not conceptually different from deferred taxes (other than repayment) and that there is no relation between their inclusion in total capital and their deduction from rate base. Matson also alleges that the 13% return on equity is inadequate because the U.S. average is greater than 12%. Finally Matson contends that it is entitled to more than a 1% risk premium in view of the fact that: (1) variations on earnings, the only valid test of risk, are greater than average on earnings per share, return on total capital, return on equity, and in comparison with the trucking and airline industries; (2) its financial leverage, including leases, and business leverage are greater than average; (3) earnings variations are not at a high level and, even if at a high level show more risk than average; (4) the high cost of money indicates a higher than 12% national average return on equity and old investors are entitled to the same consideration as investors of new capital; and (5) the disruptive competition faced by Matson in 1969 more accurately reflects competitive conditions in the trade than does Matson's 1970-1976 experience.

assertion to the contrary merely reargues matters already fully considered in the proceeding. MSC nevertheless addresses each of Matson's allegations.[8]

Hearing Counsel states that the Commission's 13% rate of return ceiling for Matson was justified based upon legitimate subjective factors such as Matson's market dominance, as well as the objective statistical risk analysis submitted by Matson at the hearings.

MSC's Petition

MSC faults the Commission for not providing a remedy for Matson's collection of excessive rate increases under the superseded tariffs. MSC urges that not only should Matson be forced to divest itself of the excess revenues and use these funds for the benefit of the shipping public,[9] but that its present rates should be rolled back to the extent they are based on the past unlawful levels. Alternatively, MSC argues that if the Commission has decided not to take corrective action in this regard both the Administrative Procedure Act and the Commission's Rules require that it state its reasons for such a decision.[10]

Matson's reply to MSC's petition argues that the Commission's only source of "reparation authority" is section 22 of the Shipping Act, 1916 (46 U.S.C. 821) and the Commission has no general equitable powers to devise remedies not specifically provided in its enabling statutes. Matson also submits that a rollback of present rates below a reasonable level because of past profits enjoyed by the regulated company would be a violation of due process. Finally, Matson argues that inflation has eliminated any excess profits which may have resulted from past rates and any subsequent increases are determined only on current analysis and not on stale data of past experience.

Hearing Counsel essentially agrees with MSC's petition, but recognizes there are several problems inherent in the proposals which warrant further proceedings should the Commission elect to act affirmatively in this regard.

Discussion

A. *The Treatment of Investment Tax Credits*

The issue concerning section 203(e) of the Revenue Act of 1964 is essentially one of statutory interpretation.[11] It is clear that in enacting the investment tax credit (16 U.S.C. 38), Congress intended that regulated industries enjoy the

[8] MSC submits that the higher than 12% average return on equity allegation is not supported by evidence of record, the statistical earnings variation is not the sole or even most recognized test of risk measurement; vessel leases exist on only 2 of Matson's 12 vessels and are offset by fully depreciated vessels in the fleet; high variations in earnings of Matson are due to extremely high past earnings; if Appendix II of the Report and Order overstates recent returns, this reduces the co-efficient of variation and if the variations are understated, this would indicate better recent returns trends than found.

[9] MSC cites *Bebchick v. Public Utilities Comm.*, 318 F.2d 187 (D.C. Cir. 1963), *cert. den.* 373 U.S. 913 (1963).

[10] MSC cites 5 U.S.C 557(c) and 46 C.F.R. 502.225, respectively.

[11] Section 203(e) provides:

TREATMENT OF INVESTMENT CREDIT BY FEDERAL REGULATORY AGENCIES.—It was the intent of the Congress in providing an investment credit under section 38 of the Internal Revenue Code of 1954, and it is the intent of the Congress in repealing the reduction in basis required by section 48(g) of such Code, to provide an incentive for modernization and growth of private industry (including that portion thereof which is regulated). Accordingly, Congress does not intend that any agency or instrumentality of the United States having jurisdiction with respect to a taxpayer shall, without the consent of the taxpayer, use—

(1) in the case of public utility property (as defined in section 46 (c) (3) (B) of the Internal Revenue Code of 1954), more than a proportionate part (determined with reference to the average useful life of the property with respect to which the credit was allowed) of the credit against tax allowed for any taxable year by section 38 of such Code, or

(2) in the case of any other property, any credit against tax allowed by section 38 of such Code,

to reduce such taxpayer's Federal income taxes for the purpose of establishing the cost of service of the taxpayer or to accomplish a similar result by any other method.

direct benefit of reduced taxes derived therefrom. It also clearly allowed such regulated industries to enjoy a secondary benefit in that Federal regulatory agencies are not permitted to reflect this savings when computing the cost of service of the regulated company for regulatory purposes.[12] However, a third level benefit is enjoyed by regulated companies in that, like deferred taxes, this tax break provision results in a significant accrual of funds that the company can utilize to earn a return.

The third level benefit of realizing a rate of return on investment tax credits may or may not be mandated by section 203(e) although the provision only speaks to the treatment of these funds in cost of service calculations and not rate base calculations. However, if, as is the case in present FMC practice, the carrier is allowed to realize a rate of return on these funds and is not required to deduct a portion of them from its rate base, it should not be allowed to reap a fourth level benefit by including such funds in its total capital figure for purposes of decreasing the deferred tax deduction from rate base.[13] Conversely, if it is not entitled to earn a return on these funds and must deduct a portion of them from the service rate base, fairness would dictate that it be included in total capital for purposes of such calculations.[14]

There is no reasonable basis for concluding that Congress intended to make this fourth level benefit available to regulated companies. Indeed, Matson relies entirely on its interpretation of the concluding phrase of section 203(e) for this proposition. There are no reported cases on this narrow tax question and a review of the legislative history of the Revenue Act of 1964 reveals that Congress did not consider the third level benefit described above, much less contemplate the further extension now urged by Matson.

Both the House and Senate Reports on section 203(e) describe its purpose as follows:

(c) (iii) *Treatment of investment credit by Federal regulatory agencies.*—Your Committee has added a provision to the bill making it clear that it was the intent of Congress in providing an investment credit last year, and that it is the intent of Congress this year in repealing the reduction in basis required with respect to investment credit assets, to provide an incentive for the modernization and growth of private industry, including regulated industries.

As a result, the bill specifies in two paragraphs the intent of Congress as to the treatment of the investment credit by Federal regulatory agencies. It states in the case of public utility property that these regulatory agencies are not, without the taxpayer's consent, for the purpose of establishing the cost of service of the taxpayer, to treat more than a proportionate part of an investment credit (determined with reference to the useful life of the property) as reducing the taxpayer's Federal income tax liabilities. Nor are they to accomplish a similar result by any other method. Public utility property for this purpose includes property of electric, gas, water, telephone, and telegraph public utilities which under present law is eligible for what in effect amounts to a credit of 3 per cent.

The bill also provides restriction for Federal regulatory agencies in the case of other regulated companies—such as natural gas pipelines, railroads, airlines, truck and bus operators, and other

[12] The Commission promptly recognized the mandate of section 203(e) and has consistently followed its directives in the administration of the Intercoastal Shipping Act, 1933. *See*, General Counsel's Legal Opinion dated August 13, 1964.

[13] In Docket No. 73–22, *et al.*—*Matson Nav. Co.–Increased Rates*, 18 S.R.R. 649, 654, n. 6 (1968), the Commission determined that the deferred tax deduction from rate base should be the same portion of the total deferred tax reserve that the rate base is in relation to total capital. If the carrier is allowed to overstate its total capital, this decreases the relative percentage ratio of total capital represented by the rate base. This in turn will decrease the deferred tax deduction from rate base as this same percentage ratio is applied to the deferred tax credit fund to compute the deduction from rate base.

[14] This is precisely the analysis Matson advanced in arguing that deferred taxes should be included in total capital in computing the deduction from rate base.

types of public carriers—which receive an investment credit of 7 percent of the investment in qualified property. It provides that Federal regulatory agencies are not, without the taxpayer's consent, for purposes of establishing the cost of service of the taxpayer, to treat any investment credit allowed him as reducing his Federal income taxes. Nor are the agencies to accomplish a similar result by any other method.

As indicated above in the case of the public utility property Congress is merely directing the Federal regulatory agencies not to "flow" the benefits of the investment credit "through" to the customers over any period shorter than the useful lives of the property involved. In the case of the other property Congress is directing the Federal regulatory agencies not to "flow" this benefit "through" at any time. This difference in treatment is attributable to the fact that Congress provided what in effect is a 3-percent credit for the public utility property rather than 7-percent credit because last year it was recognized that in their case part of the benefit from the investment credit would be likely to be passed on eventually to the customers in lower rates." H. Rept. 749, 88th Cong., 2nd Sess. 34-35 reprinted in 1964 U.S. Code Cong. & Ad. News 1346-1347.[15]

This language indicates that Congress was concerned with the practice of certain agencies to require the disclosure of current investment tax credits and reduce the reported income tax of the regulated company and thereby reducing the total costs of operation and the corresponding revenue needs. This would lead to lower rates than if no tax credit was calculated into the costs of the company and was characterized as the "flow through" method of regulatory tax accounting.[16] The agencies were also prohibited from treating the credit as a form of income to the carrier, increasing the reported revenues thereby, and accomplishing a "similar result by another method."

The situation presented in this case does not involve Matson's costs or revenues, neither does it involve income tax computation. It involves the computation of the actual investment of the carrier in the regulated service. While a significant issue would be presented as to whether Congress intended carriers to earn a rate of return on the accumulated fund resulting from the accrued credits over time, this issue is not now presented.[17] Rather, the question is whether the Commission must consider these funds as part of an ocean carrier's total capital for purposes of computation of the rate base in matters collateral to the treatent of the investment tax credits *per se*. In order to answer this question in the affirmative there must be evidence of a legislative intent not only to prohibit regulatory agencies from "flowing through" the benefit of the tax credit to ratepayers in cost and revenue calculations but also to require agencies to affirmatively "flow through" all possible benefits of the tax credit to the regulated company. An intent that beneficial treatment be given to both cost and revenue calculations and also to the computation of the company's actual investment in the regulated enterprise is not fairly discernible from section 203(e) or from its legislative history.

[15] The Senate Report is virtually identical. S. Rep. 830, 88th Cong., 2nd Sess. 44-45 reprinted in 1964 U.S. Code Cong. & Ad. News 1716-1717.

[16] For a full discussion of the distinctions between the "normalization" versus "flow through" methods of tax accounting as to deferred taxes, *see*, *Public Systems v. Federal Regulatory Energy Commission*, _____ F.2d _____, Case Nos. 76-1609 and 76-1830, slip opinion at 4-6 (D.C. Cir., Feb. 16, 1979); *Alabama-Tennessee Natural Gas Co. v. F.P.C.*, 359 F.2d 318, 326-27 (C.A. 5, 1966); Dockets Nos. 73–22, et al.—*Matson Navigation Co.–Increased Rates*, 17 S.R.R. 145, 161 (I.D., 1977). For the comparative effects of these methods on rate levels, *see generally*, E. Brigham and J. Pappas, *Liberalized Depreciation and the Cost of Capital* (1970, MSU Public Utilities Studies). Because the fundamental issue involved with both tax accounting issues is virtually identical, *i.e.*, the reporting of taxes actually paid by carriers as opposed to a hypothetical calculation not considering specialized tax advantages, these discussions are, to a large extent, equally applicable to both tax provisions.

[17] This issue may indeed be dealt with in future proceedings. Docket No. 76–43—*Matson Navigation Co.–Rate Increases*, Report and Order, at 6 n. 7, 18 SRR 1351, 1353 n. 7 (1978).

There remains the question of how investment tax credits should be handled as a policy matter. The Commission's Report and Order in Docket No. 76–43, *supra,* expressed no opinion as to the ultimate treatment of the investment tax credits in the rate base. The Commission did, however, hold that, due to the similarity of these funds to deferred taxes—it is provided by the ratepayers and not the carrier—if the carrier is to be allowed to earn a return on these funds by not deducting them from the rate base, it should not be allowed to treat them as carrier provided capital for purposes of other rate base deduction calculations. Matson has advanced no valid reason for reversing this policy, and accordingly, this part of Matson's Petition will be denied.

B. *The Rate of Return on Equity*

Matson has not shown any clear error of fact or law in the Commission's imposition of a 13% rate of return ceiling. The decisions in Docket Nos. 75–57 and 76–43 clearly comply with the applicable legal standards enunciated by the Supreme Court.[18] Matson's contentions constitute reargument of matters already fully considered and rejected by the Commission, [19] and, accordingly, this portion of Matson's Petition will also be denied.

C. *Remedies*

The Commission found the Docket No. 76–43 rate increase to be unreasonable, but discontinued that proceeding without determining what remedy, if any, would be invoked to compensate shippers for the excess revenues retained by Matson.

The remedial actions proposed by MSC—the "Bebchick Remedy" and a rollback of present rate levels,[20] are unprecedented in the administration of the Shipping Act but do appear to have a valid foundation in the law. Before any remedy is applied, however, it is necessary to examine the carrier's *present* circumstances to ensure that the approach taken meets the various regulatory purposes of the Shipping Act and would not unduly penalize the carrier for overestimating its revenue needs.[21] The administrative burden that would be imposed on the carrier and on the Commission must be offset by some tangible, legitimate benefit accruing to those shippers which paid the unreasonable rates when they were in effect.

In weighing these factors in the present proceeding, the Commission has concluded that the fundamental deficiency in the remedies proposed by MSC is that there is no way to ensure that those who actually paid the rates will reap the

[18] *Permian Basin Area Rate Cases,* 390 U.S. 747, 791-792 (1968); *see also, American Public Gas Ass'n v. Federal Power Comm.,* 567 F.2d 1016, 1029-1030 (D.C. Cir. 1977).

[19] For the first time in its Petition for Reconsideration Matson contests the finding that U.S. industries realized an average 12% return on equity during the relevant time period. This finding was based on the uncontroverted testimony of Dr. Ellsworth (Ex. 55), to which Matson did not take exception.

[20] The "Bebchick Remedy" was first enunciated in *Bebchick v. Public Utilities Comm., supra,* and cited with approval by the Commission in *Alaska Steamship Co.–General Incr. in Rates,* 3 S.R.R. 1014, 1016 (1964). It essentially forces a carrier to disgorge excess revenues derived from unjust and unreasonable general rate increases and to pay those revenues over to the shipping public in some appropriate manner.

On the theory that the subsequent rate levels are based in part on a prior unlawful rate increase, the proposed rollback of rates is argued as being within the scope of section 4 of the Intercoastal Shipping Act, 1933 notwithstanding the fact that the subject rates are no longer in effect. *See, contra, Sea-Land Service, Inc –Gen. Incr. in Rates,* 14 S.R.R. 1569, 1570 (1975); *Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trade,* 11 F.M.C. 168 (1967).

[21] *Cf., Gilbertville Trucking Co. v. United States,* 371 U.S. 115, 130 (1962). Consideration must be given to the fact that violations of section 18(a) of the Shipping Act, 1916 (46 U.S.C. 817(a)) and section 4 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 845a) do not require proof of any form of scienter or unlawful intent.

benefit of these procedures.[22] Only if there were no feasible alternative and these difficulties could be solved efficiently, might the Commission consider such methods. However, in this case the remedies proposed by MSC cannot be implemented with reasonable efficiency[23] and the Commission has determined that a feasible alternative, and one more solidly founded on direct statutory authority, does exist.

The Commission finds that, in the circumstances presented by this case, the determination that the subject general rate increase was unjust and unreasonable gives rise to a cause of action under section 22 of the Shipping Act, 1916 by any shipper who actually paid these tariffed rates when they were in effect. While the rate increase was unreasonable *from the date it became effective* (*see Gillen's Sons Lighterage v. American Stevedores*, 12 F.M.C. 325, 339 (1969)), the two-year limit on filing of reparation claims did not begin to run until the Commission found the rates to be unjust and unreasonable. (*See Crown Coast Front Co. v. U.S.*, 386 U.S. 503 (1967)). The cause of action under section 22 therefore did not accrue until the Commission's final determination. This cause of action is distinct from any cause of action the shipper may have had at the time the freight rates were paid and is not dependent upon a particular defect in the carrier's *rate structure*.[24] The essential elements of this cause of action are: (a) the carrier instituted an across-the-board uniform increase in rates;[25] (b) the shipper actually paid the increased rates while they were in effect; and, (c) the increase was subsequently found to be unjust and unreasonable in a Commission-instituted investigation. In such a case, the Commission's decision is itself evidence in support of any action that may hereafter be instituted by shippers.

THEREFORE, IT IS ORDERED, That the Petitions for Reconsideration of Matson Navigation Company are denied; and

IT IS FURTHER ORDERED, That the Petition for Reconsideration of Military Sealift Command is granted to the extent that it is consistent with this Order and denied in all other respects; and

IT IS FURTHER ORDERED, That these proceedings are discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[22] This problem was specifically noted as to the Bebchick Remedy in the cases of *Moss v. CAB*, 521 F.2d 298 (D.C. Cir. 1975), *cert. den.* 424 U.S. 966, *reh. den.* 425 U.S. 966 (1976) and *Dem. Cen. Comm. of D.C. v. Wash. Metro. Area Transit Comm.*, 436 F.2d 233 (D.C. Cir. 1970). As to the rollback proposal, this same problem undermines the validity of the application of this procedure as it relates to the Commission's discretionary power to apply a remedy in addition to the potential legal obstacles stated in footnote 16.

[23] In order to comply with the standards stated in *Moss v. CAB*, *supra*, extensive further hearings would be required.

[24] Shippers could have maintained reparations claims under section 18(a) at the time the freight charges were paid on the theory that the *specific transportation factors* affecting a particular commodity rate were such that the rate charged was unjust or unreasonable.

[25] Because each commodity bore the general rate increase by the same percentage proportion, the extent to which it was found to be excessive applies equally to all commodities that took the increase. The contrary would be true, however, if this case involved a multi-tiered general increase in rates designed to bring the comparative levels of commodity rates into line with their individual transportation factors.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–4

AGREEMENT NOS. 9902–3, ET AL.
(MODIFICATION OF EURO-PACIFIC JOINT SERVICE)

ORDER ON RECONSIDERATION

May 22, 1979

The Proponents of Agreement No. 9902–8 have petitioned the Commission for partial reconsideration of its March 29, 1979, decision conditionally approving that agreement.[1] Proponents seek a modification in the Commission's order that would approve Agreement No. 9902–8 under conditions allowing ICT to participate in the Euro-Pacific Joint Service and including the combined ICT/French Line marketing arrangement originally proposed. Alternatively, the Commission is requested to defer the effective date of French Line's separate marketing operations until September 30, 1979. The Commission's Bureau of Hearing Counsel submitted a "Reply to Petition" indicating general agreement with the relief sought by Proponents.

The Petition offers no basis for altering the Commission's original determination that ICT's participation in the Euro-Pacific Joint Service was not justified on the record by legitimate transportation conditions. The record citations mentioned by Proponents fall far short of establishing that ICT's participation is essential to the commencement and continued viability of the Joint Service. Neither have the Proponents demonstrated that the record justifies joint marketing of the container cargo space allocated to Hapag-Lloyd and CGM under present Agreement No. 9902–8.[2]

The uncontroverted affidavit of Euro-Pacific's General Manager does establish, however, that French Line cannot develop an effective marketing capability independent of ICT and Hapag-Lloyd by May 31, 1979. New sales representatives must be retained and standard procedures must be established in several different and widely separated locations. Accordingly, the Euro-Pacific Joint Service will be permitted to continue using its present marketing arrangements until September 30, 1979.

THEREFORE, IT IS ORDERED, That the "Petition for Reconsideration" of Hapag-Lloyd Aktiengesellschaft, Compagnie General Maritime and Interconti-

[1] The Proponents are Hapag-Lloyd Aktiengesellschaft (Hapag-Lloyd); Compagnie Generale Maritime (French Line); and Intercontinental Transport, B.V. (ICT), all of which are common carriers by water in the foreign commerce of the United States.

[2] Indeed, Proponents argued that the independant marketing of Hapag's allocated share was a pro-competitive feature supporting approval of the Agreement.

nental Transport, B.V., is granted to the limited extent indicated above, and denied in all other respects; and

IT IS FURTHER ORDERED, That the Commission's March 29, 1979, Report and Order is amended by including a new further ordering clause between the third and fourth such clauses which states that:

> The Proponents may, in their discretion, include a second Proviso clause in Article 6 of their amended Agreement that provides for the Joint Service to operate with its existing marketing arrangements until September 30, 1979.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79–8

AGREEMENT NO. 10285–
SINGAPORE/U.S. ATLANTIC & GULF RATE AGREEMENT

DISCONTINUANCE OF PROCEEDING

May 2, 1979

This proceeding was initiated to determine the approvability under the Shipping Act, 1916, of Agreement No. 10285. Hearing Counsel have now requested that the proceeding be discontinued on the ground that Agreement No. 10285 has been withdrawn by the parties.

By telex dated April 6, 1979, the Straits New York Conference informed the Commission of its withdrawal of Agreement No. 10285 and its request for section 15 approval of the Agreement. On this basis, Hearing Counsel urge discontinuance since there is no longer an agreement requiring section 15 approval, and any issues related thereto are now moot. We agree.

Therefore, it is ordered that proceedings in this matter are hereby discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-41

TRAILER MARINE TRANSPORT CORPORATION—
PROPOSED REDUCED AND INITIAL THROUGH RATES AND PROVISIONS
BETWEEN U.S. ATLANTIC AND GULF PORTS IN THE U.S.
VIRGIN ISLANDS

NOTICE

May 16, 1979

Notice is given that no exceptions were filed to the April 5, 1979, initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, the initial decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 78–41

TRAILER MARINE TRANSPORT CORPORATION—PROPOSED REDUCED AND INITIAL THROUGH RATES AND PROVISIONS BETWEEN U.S. ATLANTIC AND GULF PORTS IN THE U.S. VIRGIN ISLANDS

Finalized on May 16, 1979

Respondent carrier has instituted a new service between South Atlantic and Gulf ports and the U.S. Virgin Islands. This new service features reduced rates on 20-foot containers, a single bill of lading, simplified billing, and greater vessel efficiency. Only one party protested the new rates, a carrier operating between Puerto Rico and the Islands, alleging that the new rates are noncompensatory, designed to attract certain high density cargo, and will endanger the carrier's continued existence. The other parties, namely, the Commission's Bureau of Hearing Counsel and the Government of the Virgin Islands, support the new rates. The evidence of record shows the following:

(1) The new reduced rates are compensatory on a fully distributed cost basis and are thus just and reasonable within the meaning of section 18(a) of the Shipping Act, 1916, and section 4 of the Intercoastal Shipping Act, 1933;

(2) The protesting carrier has failed to furnish any evidence in support of its allegations; moreover, the record shows that the new rates are aimed at attracting cargo from a different carrier and are not predatory;

(3) There is no evidence that the new rates will harm or unduly prefer any shipper nor that any shipper will be unreasonably forced to use the carrier's higher rates on 40-foot containers; indeed, the record shows no complaints from any shipper regarding the respondent's rate structure.

A carrier has the right to meet existing competition within certain limits. Respondent has exercised this right and has not exceeded permissible limits in so doing.

The fully distributed cost standard is an acceptable measure of the compensatoriness of a carrier's rates although different measures are evolving which may prove superior. In any event, cost finding is not an exact science and all that is required is that the method produce a reasonable approximation of costs.

William F. Roush and *Donald C. O'Malley*, for respondent.

Rudolph Francis and *Jose F. Beauchamp*, for intervenor International Marine Transport Services, Inc.

William L. Blum, for intervenor Government of the Virgin Islands.

John Robert Ewers, *C. Douglass Miller*, and *Bruce Love*, for Bureau of Hearing Counsel.

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

This proceeding is an investigation begun by the Commission under its Order of Investigation and Hearing, served October 20, 1978. The investigation seeks

[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.

to determine the lawfulness of new through service initiated by respondent Trailer Marine Transport Corporation (TMT) between certain ports on the U.S. Atlantic and Gulf coasts and the U.S. Virgin Islands. This new service was reflected in a tariff (FMC-F No. 2) published by TMT which established reduced rates becoming effective October 15, 16, and 30, 1978. This tariff (later superseded by tariff FMC-F No. 5 which made no substantive changes in rates) established two separate columns of trailerload minimum weight rates stated in cents per hundred pounds. One column set forth rates for trailers not exceeding 20 feet in length, the other set forth rates for trailers exceeding 20 feet in length.

The filing of TMT's new tariff generated a protest which was filed by a carrier known as International Marine Transport Services, Inc. (IMTS) which carries trailers and wheeled vehicles between San Juan, Puerto Rico, and the U.S. Virgin Islands. IMTS claimed that TMT's new rates are unjust and unreasonable, noncompensatory, and represent destructive competition which would cause IMTS irreparable harm. Furthermore, IMTS claimed that the new reduced through rates offered by TMT in conjunction with a subsidiary or an affiliated carrier known as Interisland Intermodal Lines, Inc. (IIL) involved selected major moving commodities carried by IMTS and essential to its survival, were geared to attract high density cargo, and were drastically lower for the smaller trailers.

In reply to the protest, TMT contended that its new reduced rates were designed to be competitive with a carrier known as Tropical Shipping and Construction Co., Ltd. (Tropical), a carrier which operates a direct service between Florida ports and the U.S. Virgin Islands and that TMT's rates on the smaller 20-foot containers are compensatory.

The Commission stated that suspension of the new through reduced rates designed to meet the competition of another carrier's through service would not be warranted since establishment of higher rates than those of the existing dominant carrier in a particular trade area would place the new carrier in a noncompetitive position. However, the Commission believed that certain conditions appeared to necessitate investigation because of the different rates applying to the 20 and 40-foot containers at the higher rates, and the concern that the lower rates on the 20-foot containers might be noncompensatory. Therefore, the Commission wishes to determine two specific issues: (1) Whether there are any circumstances under which shippers would be required to accept a 40-foot container with its attendant higher rates; and (2) Whether TMT's rates applying to containers not exceeding 20 feet are designed to recover total costs attributable to the carriage of cargo in such containers. (See Order, p.3).[2] The Commission ordered these issues to be determined under section 18(a) of the Shipping Act, 1916, and section 4 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 817, 845a)[3] on an expedited basis. TMT was given approximately 60 days to submit

[2] Although the Commission did not specifically frame such an issue, its Order cited IMTS's contention that TMT's lower rates on 20-foot containers are designed to attract high-density cargo involving certain selected commodities essential to the survival of IMTS. This matter may be subsumed under the general issue of the justness and reasonableness of TMT's new rates arising under sections 18(a) of the Shipping Act, 1916, and section 4 of the Intercoastal Shipping Act, 1933. I will deal with the contention in the body of the decision.

[3] Section 18(a) of the Shipping Act, 1916, requires that "every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges . . . and just and reasonable regulations and practices relating thereto. . . ." Section 4 of the Intercoastal Shipping Act, 1933, authorizes the Commission to "determine, prescribe, and order enforced a just and reasonable maximum or minimum, or maximum and minimum rate, fare, or charge, or a just and reasonable classification, tariff, regulation or practice . . . ."

its direct testimony and exhibits in support of its rate changes. Hearing Counsel and intervenors were given 30 days to furnish comparable information supporting their positions. The parties were ordered generally to provide access to underlying material supporting the testimony and exhibits. Following these steps, a prehearing conference was to be convened by the presiding judge for the purpose of limiting issues and fashioning appropriate procedures to resolve them. The Commission ordered the record to be closed no later than February 20, 1979, an initial decision to be issued by the presiding judge on or before April 23, 1979, and the Commission's decision to be served on or before June 25, 1979. (See Order, p. 4).[4]

As instructed by the Commission, respondent TMT submitted its testimony and exhibits on November 22, 1978, and Hearing Counsel did likewise on December 22, 1978. IMTS, which has become an intervenor on November 29, 1978 (see Intervention Granted, that date) submitted nothing. Another intervenor, the Government of the Virgin Islands (the V.I. Government) was granted intervention on January 4, 1979, submitted written testimony after that date, which, while not opposing TMT's new rates, expressed the Government's concern over possible withdrawal of carriers serving the U.S. Virgin Islands.

A prehearing conference was held on January 10, 1979, attended by TMT and Hearing Counsel and four persons who gave testimony in order to amplify the record and avoid the necessity of conducting further trial-type hearings. (See Report of Rulings Made at Prehearing Conference and Other Matters, January 15, 1979). No one appeared for protestant-intervenor IMTS nor for the Government. However, the V.I. Government had advised me before the conference that it would not attend but merely wished to submit a statement. Some time after the conference, on February 2, 1979, IMTS, which, as noted, submitted nothing and did not appear at the conference, contacted me by telephone in the person of Mr. Rudolph Francis, President, who inquired as to the status of the case. Mr. Francis acknowledged that IMTS had failed to comply with the Commission's instructions and indicated that IMTS was busily engaged in reorganization under Chapter XI of the Federal Bankruptcy Act. He made no request and did not comment on the merits of the case and was advised that I planned to issue an initial decision, as to which, according to the Commission's rules, IMTS could file exceptions.[5]

At the prehearing conference the evidentiary record was virtually completed. The written testimony of three witnesses (Mr. O'Malley of TMT; Messrs. Farmer and Stilling of the Commission's staff) was admitted as exhibits 1, 2, and 3, respectively. At a later date the written testimony of Ms. Judith A. Weiss, the V.I. Government witness, was admitted as exhibit No. 4. In addition, oral testimony of Messrs. O'Malley, Farmer, Stilling, and Mr. Norman Lee, of the Commission's staff, was taken to supplement the written testimony. The four exhibits and the oral testimony essentially constitute the complete factual record

[4] As the Commission's Order notes (Order, p. 3, footnote), this procedure closely follows the new procedures established for expedited decisions in rate cases mandated by the enactment of P.L. 95-475 for general rate increases or decreases occurring after the present case. See Docket No. 78–47, General Order No. 16, Amdt. 28, 44 Fed. Reg. 9593, February 14, 1979.

[5] I also advised Mr. Francis that although the rules permitted IMTS to file exceptions to the Initial Decision, the failure of IMTS to comply with various procedural orders might place IMTS in a difficult position before the Commission if IMTS did file anything after the Initial Decision.

in this case. A summary of factual findings follows with specific record references since the parties were not required to file briefs.

FINDINGS OF FACT

History of the Trade and Types of Services Provided

The Atlantic and Gulf-U.S. Virgin Islands trade has been characterized by instability with respect to the comings and goings of carriers. Between 1971 and 1976, for example, such carriers as Alcoa, Amerind, Atlantic, Berwind, Trailer Ship Lines, Wallenius, West India, and others were in and out of the trade. As with other trades regulated by this Commission, carriers may enter without the need to obtain certificates or other forms of license. Furthermore, unlike most domestic offshore trades, the U.S. Virgin Islands are exempt from cabotage legislation (the so-called Jones Act, section 27, Merchant Marine Act, 1920, 46 U.S.C. 883) (Ex. 4, p.2). This means that carriers operating vessels registered under the laws of foreign nations may serve the trade.

Respondent TMT and its corporate affiliate IIL[6] have been involved in the U.S. Virgin Islands trade for about two years. Prior to the establishment of TMT's new through, single factor rates, there were two different methods of shipping between U.S. Atlantic and Gulf ports and the U.S. Virgin Islands. The first method involved a direct service between the port of Palm Beach, Florida, and the Islands, which service was and is being offererd by Tropical Shipping and Construction Co., Ltd., mentioned above. Tropical's tariff publishes rates on both 20 and 40-foot containers per weight or measurement ton subject to a minimum of 850 cu. ft. or 30,000 lbs., whichever produces the greater revenue. (Ex. 1).

The second method of shipping involves a combination of rates in which two carriers link up at San Juan, Puerto Rico, where containers are transshipped from one vessel to a feeder vessel operating between San Juan and the U.S. Virgin Islands. Six carriers participated in this type of service. Puerto Rico Maritime Shipping Authority (PRMSA), Sea-Land Service, Inc. (Sea-Land), Seatrain Gitmo (Seatrain), and TMT would carry from the U.S. mainland to San Juan for linkage with feeder vessels operated by IMTS or IIL. This combination-of-rates method was somewhat cumbersome because one carrier published rates per cubic foot and the other, per hundredweight, and some conversion would be necessary for the shipper to determine the through cost. (Ex. 1, Tr. 24). Moreover, other charges were added on. (Ex. 1). TMT's new tariff simplifies matters by publishing a single through rate, although still utilizing IIL's feeder service between San Juan and the Islands. Furthermore, TMT's tariff now offers rates on 20-foot containers, whereas previously a shipper utilizing TMT's service would be paying 40-foot container rates even if he shipped only a 20-foot container. (Tr. 24-25).[7]

TMT's New Tariff

TMT's new tariff not only simplifies matters by establishing single factor through rates but also causes a reduction in rates because it offers rates based on

[6] Both TMT and IIL are owned by the Crowley Maritime Corporation. (Ex. 3, p. 2).

[7] The record shows, however, that the vast majority of cargo in the trade (nearly 75%), at least from February through October 1978, moved via 35 or 40-foot containers. (Ex. 1, "Exhibit A").

movement by 20-foot containers which are lower than the pre-existing 40-foot rates utilized by itself and other combination-of-rates carriers. The TMT tariff (FMC-F No. 5) which superseded the initial through rate tariff (FMC-F No. 2) placed under investigation, offers these lower 20-foot container rates subject to various minima (usually 40,000 lbs. but sometimes 12,000 or 20,000 lbs.).[8]

TMT's tariff, which now publishes through rates on 20-foot containers, is essentially a trailerload tariff patterned after that of Tropical with respect to rates and commodities applicable to the 20-foot containers. (Ex. 1; Tr. 21, 25, 28). Both tariffs are also basically trailerload tariffs. (Tr. 28, 30). However, Tropical's tariff does provide for a less-than-trailerload (LTL) service. (Tr. 31). TMT can service shippers offering LTL shipments who can use consolidating non-vessel operating common carriers (NVO's), which carriers can utilize the freight-all-kinds (FAK) rate in the TMT tariff. (Tr. 29, 30; Tariff FMC-F No. 5, page 221, "Freight All Kinds"). In attempting to pattern its tariff after that of Tropical, however, TMT erred somewhat by publishing minimum weights amounting to 40,000 lbs., rather than 30,000 lbs. which Tropical publishes in its Virgin Islands Tariff. (Tr. 26).

The Purpose and Impact of TMT's New Tariff

In publishing its new tariff, TMT is seeking to attract cargo in competition with Tropical which, as noted, offers a through service from the port of Palm Beach, Florida, in the Miami area. Evidence of record indicates that cargo originating in this area moving to the U.S. Virgin Islands is substantial. After excluding cargo originating in Puerto Rico, which amounts to 45 percent of the total volume in the trade, fully 47 percent of the remainder of 55 percent originates in the Miami, Florida area served by Tropical. (Ex. 1, "Exhibit B").

Since the primary aim of TMT is to compete for cargo moving via Tropical's direct service out of the Miami area, whatever success TMT has will most probably come at the expense of Tropical, not protestant-intervenor IMTS, which could not carry cargo lifted by Tropical at Palm Beach, Florida, since IMTS does not offer a direct service from the Miami area to the U.S. Virgin Islands. As Mr. Thomas J. Stilling, an economist with the Commission, testified, TMT's new service out of Miami will provide the majority of the competition for Tropical. (Ex. 3). Tropical, however, did not intervene or protest TMT's new rates although realizing that this new service could have a direct impact on Tropical's business in the Miami area.[9] However, Tropical believes that its direct service is based upon quality and dependability and can withstand TMT's competition. (Ex. 3, p. 4). Not only is Tropical's service direct, i.e., without transshipment, in contrast to TMT's, but it moves cargo to the Islands in 74 hours rather than 5 or 6 days which TMT requires. Furthermore, interviews with

[8] TMT's tariff FMC-F No. 5, while not introduced as an exhibit, was made available to me and the parties and is officially noticeable under the Commission's rules. (Rule 226, 46 CFR 502.226). The tariff, plus revisions, shows that the rates applicable to 20-foot containers are almost always subject to a minimum of 40,000 lbs. Tariff FMC-F No. 5 replaced the earlier FMC-F No. 2, in order to conform to the requirements of the Commission's General Order 38, 46 CFR 531, as amended, effective January 1, 1979. (Tr. 20). No substantive changes were made in rates when republishing the tariff. (Tr. 20).

[9] See Ex. 3, p. 5 (Stilling). The V.I. Government, however, contends that Tropical's absence from the proceeding may merely indicate its unfamiliarity with Commission procedures and desire to avoid costly and lengthy litigation. (Ex. 4, p. 2). It could also mean that Tropical believes that the possible loss of business to TMT is so small as to be outweighed by costs of litigation. As I find elsewhere, however, we need not speculate since the record shows that Tropical has good reason to believe that its business can resist TMT's competition.

shippers on the Islands conducted by the Commission's Office of Economic Analysis indicate a high level of satisfaction with Tropical's service. (Ex. 3). TMT is also at a disadvantage compared to Tropical since TMT's minimum on 20-foot containers is usually 40,000 lbs. whereas Tropical's is only 30,000 lbs., as noted above.

TMT does offer its new service out of the ports of Jacksonville, Florida, and Lake Charles, Louisiana, as well as out of Miami, Florida. It is possible, therefore, that TMT will attract cargo from all of these ports that might have moved via PRMSA or Sea-Land, which operate out of South Atlantic or Gulf ports and feed cargo to IMTS at San Juan, Puerto Rico. It is also admitted by TMT that TMT's new 20-foot rates with minima of 40,000 lbs. are especially attractive to high-density cargo such as beer, which can meet the 40,000-lbs. minimum in a 20-foot container. (Tr. 23, 56). However, it is impossible to measure competitive impact on IMTS, which had claimed that it would suffer severely from TMT's new service on the grounds that TMT's 20-foot container rates would attract high-density cargo from IMTS to TMT and could result in termination of IMTS's service between Puerto Rico and the Islands. The reason for this situation is that IMTS has provided no evidence to support its contentions. The record thererfore does not show exactly what or how much IMTS is carrying, from exactly where, or how much in connection with what carriers operating from the mainland.[10] I cannot find therefore that the bulk of IMTS's cargo consists of high-density items. Furthermore, I cannot determine how much diversion of cargo will occur away from PRMSA or Sea-Land to TMT. As Mr. Stilling testified, "IMTS has not provided any information to indicate the amount of cargo that TMT may divert from IMTS. Lacking such information it is impossible to examine the impact of TMT's new service on IMTS. The majority of cargo carried by IMTS originates in areas not served by TMT. If IMTS can provide information of the amount of their cargo originating in areas served by TMT then a review of the impact on IMTS from a diversion of cargo can be undertaken." (Ex. 3, p.8). But IMTS has not provided such information. Furthermore, at the prehearing conference, it was impossible to elicit meaningful testimony from any of the witnesses who testified which would lend support to IMTS's contentions. In fact, the testimony confirmed the fact that TMT was aiming to attract cargo from Tropical, not IMTS, and that no one had any idea how much IMTS cargo originated in Atlantic and Gulf port areas served by TMT. (Tr. 51). For example, it is impossible to determine how much cargo TMT may divert from PRMSA which operates out of New Orleans, which cargo would be fed to IMTS at San Juan. Also, TMT operates out of Lake Charles, Louisiana, but we have no evidence regarding the relative advantages of using TMT's service out of Lake Charles as compared to PRMSA's service out of New Orleans. There is no evidence, furthermore, about shippers' preferences or cost advantages between the two ports which would enable anyone to predict that there would be diversion to TMT. The same problem applies to any other ports which are served by PRMSA or Sea-Land as compared to the ports served by TMT (Jacksonville and Miami, Florida, and Lake Charles, Louisiana). In short,

[10] The record does show that from February through October 1978, IMTS moved 3,474 35 or 40-foot containers received from PRMSA, Sea-Land, or Seatrain, according to one of TMT's exhibits. (Ex. 1, "Exhibit A").

the failure of IMTS to provide any evidence in support of its contentions, despite the Commission's instructions and the requirement that the record be closed by February 20, 1979, has resulted in a failure of IMTS to prove its contentions regarding substantial diversion of cargo from IMTS to TMT, not to mention the alleged adverse impact of TMT's new service on IMTS's financial viability.[11]

The Concerns of the Government of the Virgin Islands

The Government of the Virgin Islands intervened in this proceeding out of concern that if TMT's new through rates were found to be unjust and unreasonable with the result that the competitive balance of carriers serving the Islands would be upset, the V.I. Government would seek appropriate relief. However, if the rates are found to be just and reasonable, the V.I. Government supports the introduction of TMT's new service at reduced rates. The V.I. Government's witness testified that the effect of TMT's new rates is to add competition in the Virgin Islands trade and therefore believes that the new rates will benefit the interests of the shipping public and the business community on the Islands. (Ex. 4). The V.I. Government believes that Tropical is in a strong position to resist TMT's competition and also feels that the addition of another carrier offering direct service from Florida to the Islands, namely, Ace Shipping Co., Inc. under a tariff effective September 21, 1978, will act as a force to keep TMT's rates down. The V.I. Government agrees that IMTS has not presented any information to indicate that TMT will divert significant amounts of cargo. Furthermore, the V.I. Government believes that IMTS which, as noted, is undergoing reorganization under bankruptcy law, has problems which stem from undercapitalization at its inception. The V.I. Government explains also that when IMTS entered the trade, the V.I. Government welcomed the additional service and that IMTS was given additional assistance by the Virgin Islands Industrial Development Commission which granted IMTS the maximum tax benefits available under applicable law. (Ex. 4, p. 5). Nevertheless, as the V.I. Government states, IMTS has not prospered. Most, if not all of these events and difficulties occurred before TMT published its new tariff. Therefore, in large measure, IMTS would have to contend that TMT's new rates should be found unreasonable even though IMTS has been experiencing financial difficulties apparently unrelated to these rates.[12]

Shippers' Required Use of 40-Foot Containers

The Commission is concerned that a shipper might be required to use a 40-foot container at higher rates under TMT's tariff although presumably desiring to use

[11] At the prehearing conference an attempt was made to flesh out the contentions of IMTS with further evidence but it was virtually impossible to sustain these contentions absent the evidence which IMTS should have submitted. (Tr. 51-59).

[12] The V.I. Government expressed some disagreement with witness Stilling with regard to his testimony that if any carrier achieved a monopoly in the Virgin Islands trade, it is not clear that such an event would have an adverse impact on the Islands because such carrier could be subject to Commission regulation. The V.I. Government believes that competition, not regulation, is the effective means to keep rates down and cites the fact that when the Crowley Maritime Corporation acquired IIL, IIL's initial rates were higher than those of the carrier (Berwind) which it succeeded and have since increased. TMT states, however, that the increases have not been as high as the V.I. Government stated and that Commission investigations found IIL's rates to have been just and reasonable. (It should be noted that I am unaware of any Commission investigation or formal findings as to IIL's rates, nor, I am advised, is Hearing Counsel. It is unnecessary to resolve this debate as to the relative merits of competition vis-a-vis regulation in this proceeding. In point of fact, there is no evidence that any carrier is achieving a monopoly in the trade especially since, as the Government itself notes, another carrier (Ace Shipping Co., Inc.) has entered the trade with a direct service and the fact that entry into this domestic trade is open to foreign carriers such as Tropical, which utilizes ships under Panamanian registry. (Ex. 4, p. 2). It is not even clear that IIL will achieve a monopoly in the shuttle trade between Puerto Rico and the Islands since IMTS, the other shuttle carrier, is only undergoing reorganization, not termination, as far as this record shows.

only a 20-foot container. As the Commission recognized, one would not expect a shipper to select a 40-foot container and pay more under such circumstances. (Order, p. 3). TMT admits that there may be times when a shipper might have to use a 40-foot container. If TMT did not have a 20-foot container available, the shipper would either have to wait until such was available or use a 40-foot container. (Or if another carrier had a 20-foot container available (such as Tropical) the Shipper could select that carrier). TMT cites the fact that shippers are expected to pay on the basis of the size of container used and cites the example of PRMSA's tariff FMC-F No. 1, applicable at New Orleans, where shippers must pay higher freight on cargo that could have been loaded into 35-foot containers at lower cost but for the fact that PRMSA has no 35-foot containers available at that port. (Ex. 1, p. 4).

TMT explains why it did not publish an alternation rule in its tariff. Under such a rule, if a shipper desired a 20-foot container and none was available, the carrier could give the shipper a 40-foot container at the lower 20-foot container rates. TMT explains that had it adopted such a rule, this would have undercut carriers such as Sea-Land and PRMSA which handle 35 and 40-foot containers in combination with IMTS, a situation which TMT believes "would have led to the demise of the combination rate structure . . . ." (Ex. 1, p. 4). As TMT explained and as shown in previous findings, TMT's new tariff is aimed at providing competition against Tropical's 20-foot container rates, not at diverting cargo from Tropical's 40-foot containers or Sea-Land's or PRMSA's 35 or 40-foot container services. (Indeed, TMT's rates on 40-foot containers have not been reduced from its previous combination-of-rates service).

In point of fact, the problem of a shipper's having to use a 40-foot container rather than a 20-foot container which was unavailable is purely theoretical. First, the unrefuted testimony is that there is no shortage of 20-foot containers and that there are numerous 20-foot containers available on a moment's notice. (Tr. 34, O'Malley). Second, at the time of the prehearing conference (January 10, 1979) TMT had not yet gotten into 20-foot container movements and all of its carriage was still in 40-foot containers. (Tr. 61, O'Malley). Third, TMT's unrefuted testimony is that it does not expect a big transfer from 40 to 20-foot containers since the cargo that could be converted to the 20-foot container size economically would be limited to some of the heavier, denser cargo such as canned goods or beverages. (Tr. 61). Furthermore, it is apparently the nature of the trade for the vast majority of cargo (almost 75%) to move in 35 or 40-foot containers (Ex. 1, "Exhibit A") and TMT expects that there will be a continuing need for 40-foot container service. (Tr. 61).[13]

Compensatoriness of TMT's Reduced Rates on 20-Foot Containers

The second major concern of the Commission is whether TMT's reduced rates on 20-foot containers would be compensatory, i.e., whether they would recover total costs of carriage.

[13] The reason for the Commission's apparent concern that a shipper might be forced to use a 40-foot container at higher rates rather than a 20-foot container might be the fact that the Commission erroneously believed that "virtually all of the cargo in the . . . trade is presently moving in 20-foot containers." (Order, p. 3). If so, it is reasonable to be concerned that there might be a drain on the number of available 20-foot containers once a new 20-foot service was inaugurated and with resulting shortages. A more valid inquiry might have been the question whether TMT's two-tiered rate structure with 40,000 lb. minimum weight requirements for 20-foot containers would place any shippers at an undue or unreasonable disadvantage because of the nature of their cargo. However, as I discuss below, there is no shipper testimony and no evidence that TMT's rate structure or minimum weight requirements will in fact cause harm to any particular shipper.

One of TMT's reasons for instituting the new 20-foot through service at lower rates was to improve utilization (Tr. 60). This could be done if more revenue could be obtained for a 40-foot slot on a TMT vessel. If TMT can place two 20-foot containers into a 40-foot slot as it intends to do, it is possible for it to derive greater revenue for the same space than if only one 40-foot container were to fill that slot. For example, two 20-foot containerloads of beer or beverages, which are commodities which TMT believes will be attracted to the 20-foot container because of their density, will give TMT $1,920 in revenue as compared to only $1,440 in revenue if only one 40-foot containerload of beer or beverages is placed into the same slot and charged at the minimum weight.[14] But aside from the question of improved utilization, other evidence of record shows that the rates should, with some possible exceptions, more than recover total costs of carriage.

Mr. Thomas L. Farmer, Jr., a staff accountant in the Commission's Office of Financial Analysis was presented as Hearing Counsel's witness and analyzed TMT's costs and revenue. Mr. Farmer reviewed TMT's opening testimony in this area and modified it to some extent but concluded ultimately that with one exception of no great significance, TMT's reduced rates would recover fully distributed costs. Fully distributed costs, as defined by Mr. Farmer, closely resemble the standard enunciated utilized by the Commission in General Order 29, 46 CFR 549.3 (regulations governing the level of military rates). This definition covers all direct and indirect costs, i.e., vessel expenses, non-vessel operating expenses, depreciation, amortization expense, and administrative and general expense. (Ex. 2, p. 2; Tr. 36). Interest expense is not included since that is not considered as an expense under Commission General Order 11. (Id.).

To test whether TMT's reduced rates would recover such costs, Mr. Farmer made three separate analyses in which he compared revenue derived from the lowest-rated commodity, revenue from an average of all rates, and revenue from the highest-rated commodity and matched each of these figures with fully distributed costs. The conclusion reached was that revenue on an average-rate basis and for the highest-rated item more than recovered fully distributed costs. Revenue for the lowest-rated item (rice, at $1.09 per hundredweight, minimum 40,000 lbs.) failed to meet all costs but easily met direct costs and made a contribution of $127 toward indirect costs such as administrative and general expense. On revenue derived from an average of all rates in the tariff, Mr. Farmer testified that TMT would exceed fully distributed costs by $273. (Ex. 2, p. 3). For the highest-rated commodity, of course, the margin over such costs would be much greater. As Mr. Farmer explained, it is unrealistic to expect that the only item which will move in the new service will be rice and there is no evidence regarding typical cargo mix. Therefore, he used the method of calculating revenue from an average of all tariff rates. (Ex. 2, p. 3). As mentioned earlier, in fact, TMT had not yet carried any cargo under its 20-foot container rates, at least at the time of the prehearing conference. Furthermore, as also discussed earlier,

[14] TMT's rates on beer and beverages are $2.40 per hundredweight, minimum 40,000 lbs., for a 20-foot container, and $3.20 per hundredweight, minimum 45,000 lbs., for a 40-foot container. (See TMT tariff FMC-F No. 5, 1st rev. page 219, effective December 11, 1978). If TMT can move two 20-foot containers and charge at the minimum weights, its revenue will amount to $1,920 for the 40-foot slot. But if TMT moved only one 40-foot container and charges at the minimum weight, its revenue for the same slot would be only $1,440.

the new 20-foot rates might not be attractive to all commodities because of density factors.[15]

Mr. Farmer's cost data set forth in his testimony are derived partly from TMT's opening statement and testimony which gave only vessel and non-vessel operating costs as experienced by TMT for the first nine months of 1978. Mr. Farmer, in order to reach a fully distributed cost level, added administrative and general expense plus depreciation and amortization from information contained in General Order 11 statements submitted to the Commission by TMT and IIL for 1977. Mr. Mark Morrison, Controller, Caribbean Division of Crowley Maritime Corporation, the parent company, furnished additional information. Mr. Farmer conducted several procedures to satisfy himself of the reliability of the data involved and also has become familiar with the manner in which TMT keeps its books through on-site inspection in another proceeding. (Tr. 38-39; 49).[16]

In addition to the cost and revenue analysis presented by Mr. Farmer, the record contains another test of the rates in question conducted on the basis of an incremental or "added-traffic" theory propounded by TMT. Under this theory, TMT and IIL are utilizing vessels between the mainland, Puerto Rico, and the U.S. Virgin Islands anyway for the carriage of other cargo. Therefore, the theory runs, any cargo carried under the new 20-foot container rates need only recover direct costs attributable to its carriage so as not to burden other rate payers. In other words, if TMT and IIL can fill otherwise empty slots on vessels moving anyway, if the added cargo pays for its direct costs of handling, no one is harmed. The evidence which TMT presented under this theory shows direct handling costs for two 20-foot containers filling a 40-foot slot to be $548.66. Revenue derived even under the lowest-rated item (rice), as noted above, is far above this cost figure, amounting to $1,520.

Discussion and Conclusions

TMT sumamrizes its prepared testimony by stating that it has only met existing competition, that it is not pursuing a predatory policy or attempting to establish a monopoly in the subject trade or engage in destructive or unfair competition. TMT states furthermore that it has simplified a confusing pricing system by establishing a through rate structure which, among other things, provides single carrier responsibility, a single bill of lading, single payment of freight charges, and simplified rates at a competitive level, which rates are also compensatory. Furthermore, states TMT, no shipper would be likely to utilize a higher-rated 40-foot container unless his shipment was too large to fit into a 20-foot container and he could realize a savings by using a 40-foot unit. TMT concludes by stating

[15] It is possible that TMT's new rates may recover fully distributed costs even on rice and that its other rates are even more compensatory than Mr. Farmer's exhibits show. TMT's vessels serve both the Puerto Rican and Virgin Islands trade. If they carry cargo in both trades simultaneously, it would be necessary to allocate certain costs between the trades. See General Order 11, 46 CFR 512.7(c) (2); 512.7(c) (3); 512.7(c) (4). It is not clear from the record if any allocation problem existed although Mr. Farmer did not believe that there was such a problem. (Tr. 43-48). However, even if there should have been an allocation under G.O. 11 formulae and it were performed, the result would be to reduce TMT's costs for the Virgin Islands trade and provide even more proof that TMT's rates were fully compensatory, perhaps even on rice.

[16] The specific cost and revenue figures are shown on Ex. 2, "Exhibit A" which was requested by TMT to be held confidential because it reveals TMT's costs in some detail. Since the conclusions as to the compensatoriness of TMT's rates are supported by the data shown on the confidential exhibit which can be checked by the Commission and are not disputed, I see no reason to disclose them in my decision in case such disclosure could harm TMT competitively. See Rule 167, 46 CFR 502.167

that it has been working diligently with a good reliable service at rate levels which will allow it to place fine equipment into service while holding transportation costs to a minimum.

There is essentially no dispute with TMT on the part of the active participants in this proceeding. Hearing Counsel and the Commission's staff believe that TMT's new rates are generally compensatory, i.e., that they will recover fully distributed costs, and that TMT's direct competitor, Tropical, will not be placed at a disadvantage since Tropical offers faster delivery and has a lower minimum weight requirement. Hearing Counsel concludes that the new service is beneficial to the interests of shippers and urges that it be approved. (See Prehearing Statement of Hearing Counsel, January 9, 1979, pp. 3, 4). The V.I. Government essentially agrees with Hearing Counsel that the new service will be beneficial to the Islands and that Tropical should be able to withstand TMT's new competition. The V.I. Government's concern arose over remarks that if a carrier achieved a monopoly in the trade, such an event would not necessarily have adverse consequences on the Islands. However, the V.I. Government does not charge that any carrier is achieving a monopoly and in fact states that another direct-service carrier has begun service.

The only party that has protested TMT's new service and rates is IMTS, a carrier operating between Puerto Rico and the Virgin Islands. IMTS had alleged that TMT's rates would not recover costs and would have a severely adverse effect on IMTS's ability to remain in the trade. However, IMTS, contrary to the Commission's Order, has provided no evidence in support of these claims.

The record in this case, as discussed above, firmly supports the conclusion that TMT's new service for 20-foot containers is just and reasonable, that the rates for such service are compensatory, and that they are designed to meet competition and not for predatory purposes. There is, furthermore, absolutely no evidence that the new two-columned rate structure for 20 and 40-foot containers is causing shippers disadvantage or harm.

As Hearing Counsel correctly states, it is a cardinal regulatory principle that a common carrier may compete for traffic. Furthermore, such competition is not rendered unlawful merely because the carrier has reduced its rates and succeeded in diverting some traffic from other carriers. *Agreement No. 9955–1*, 18 F.M.C. 426, 486-487 (1975), citing *Agreement-Gulf Mediterranean Ports Conference*, 8 F.M.C. 703, 709 (1965) and *I.C.C. v. New York, N.H. & H.R. Co.*, 372 U.S. 744, 759 (1963). As the Court said in the last case cited, ". . . something more than . . . hard competition must be shown before a particular rate can be deemed unfair or destructive . . . ."

There are, of course, limitations on this right of carriers. A carrier cannot violate prescribed standards of law in the name of competition. For example, it cannot treat shippers unfairly or unjustly discriminate among them or prejudice ports or establish rates which are so low as to be unreasonable under recognized standards or compensatoriness, or establish them for predatory or destructive purposes as regards other carriers. See *Rates from Jacksonville, Florida to Puerto Rico*, 10 F.M.C. 376, 380-381, 385 (1967); *Reduction in Rates–Pac. Coast-Hawaii*, 8 F.M.C. 258, 263; *Investigation of Overland/OCP Rates and Absorptions*, 12 F.M.C. 184, 206 (1969), affirmed under the name of *Port of New York*

Authority v. Federal Maritime Commission, 429 F. 2d 663 (5 Cir. 1970). It is not even necessarily unlawful for a carrier to do more than merely meet competition, for example, by fixing rates lower than its competitor, if there is valid reason for doing so, such as the carrier's inherent service disadvantage necessitating lower rates. *Rates from Jacksonville, Florida to Puerto Rico,* cited above, 10 F.M.C. at 380; *Agreement No. 9955-1,* cited above, 18 F.M.C. at 481.

Although generally a carrier's rates must meet fully distributed costs or something akin to that standard to be considered compensatory, not every rate in a carrier's tariff is required to meet that standard. It has been recognized that some commodities might not be able to move if forced to recover all costs and that there is discretion on the part of carrier's management to fix rates between direct costs and fully distributed costs. See, e.g., *Investigation of Increased Rates on Sugar/Puerto Rico Trade,* 7 F.M.C. 404, 411-412 (1962); *Rates of Aleutian Marine Transport, Inc.,* 7 F.M.C. 592, 596 (1963); *Matson Navigation Company–Reduced Rates on Flour,* 10 F.M.C. 145, 148-149, 153 (1966); *Inv. of Increased Rates, Atlantic/Gulf Puerto Rico Trade,* 8 F.M.C. 94 (1964); *Gulf Westbound Intercoastal Soya 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);[17] Locklin, *Economics of Transportation* (6th Ed. 1966), Chapters 8 and 9. The Commission has even relaxed its requirements that rates generally meet fully distributed costs in the case of carriers which are only starting a new service and are forced to meet existing carriers' competition. See *Reduction in Rates–Pac. Coast-Hawaii,* cited above, 8 F.M.C. at 263-264. In determining a carrier's costs and reasonableness of its rates, furthermore, exactitude is not required. All that is necessary is to make a reasonable approximation using appropriate methodology. *Sea-Land Service, Inc.–Increases in Rates in the U.S. Pacific Coast/ Puerto Rico Trade,* 15 F.M.C. 4, 9-10 (1971); *Rates on U.S. Government Cargoes,* 11 F.M.C. 263, 279 (1967);[18] *Investigation of Increased Sugar Rate,* 9 F.M.C. 326, 330 (1966); *Alcoa Steamship Co., Inc.–General Increase in Rates,* 9 F.M.C. 220, 231 (1966); *Increased Rates on Sugar, 1962.* 7 F.M.C. 404, 411 (1962); *Rates of Pacific Northwest Elevators Association,* 11 F.M.C. 327, 401 (1968).

As the above cases illustrate, the usual test of compensatoriness of a rate has been that it recovers fully distributed costs with some exceptions noted above. A slight variation of this standard which the Commission employs to establish compensatoriness of rates is that used in the bidding by American carriers for the transportation of military cargo. See G.O. 29, 46 CFR 549.3; *Regulations Governing Level of Military Rates,* 13 SRR 411, 414-415 (1972). This standard was enunciated in order to ensure that military rates would be maintained at a sufficiently compensatory level so as to protect the financial soundness of the bidding carriers and also avoid unduly burdening non-military rate payers. 13 SRR at 413-414. This does not mean, however, that the Commission is forever

[17] It should be recognized that although these cases constitute Commission precedent, they arose during the old breakbulk days of ocean technology. That is not to say that the principles have no value; however, the measure of direct costs has changed in the container age. See *Hawaiian Trade Study: An Economic Analysis* (F.M.C. Staff October 1978), p. 180.

[18] In this cited case the Commission stated: "Granted that the studies are not as accurate or complete as might be, there is no justifiable reason not to accept them as a fair and honest attempt by the lines to come up with a meaningful story." (Case citations omitted).

wedded to the fully distributed cost standard under its previous definitions or variations.[19] Hearing Counsel states also that the Commission's staff favors a slightly different standard based on long-run marginal costs (LRMC), a standard which gives consideration to elements of demand and excess capacity as well as costs. However, the staff has not yet developed the capability of applying such new standard and believes that the fully distributed cost standard, which approximates LRMC, is acceptable under the circumstances. (See Prehearing Statement of Hearing Counsel, January 9, 1979, pp. 5, 6; cf. *Hawaiian Trade Study, An Economic Analysis* (F.M.C. Staff, October 1978) pp. 179-190).

As discussed above, evidence in this record shows that TMT published its new reduced rates on 20-foot containers to compete with Tropical, whose tariff TMT attempted to copy as regards Tropical's 20-foot container rates. The record shows, however, that TMT did not quite reduce its rates far enough because of its oversight in publishing a higher minimum quantity requirement than Tropical's (40,000 lbs. as against 30,000 lbs.). Furthermore, the record shows that Tropical should be able to withstand this new competition from TMT since TMT suffers from inherent disadvantages regarding time in transit in comparison with Tropical's direct, faster service. Furthermore, TMT's rates on its 40-foot container service are still higher than those published by Tropical. (Ex. 3, p. 3). There is also no evidence that TMT's initiation of service with 20-foot containers is designed to harm protestant IMTS. The record shows rather that TMT is seeking to attract some of the 20-foot container business from Tropical, which business IMTS is not attracting anyway. Although some diversion of cargo from IMTS to TMT could occur, this would happen, if at all, if TMT could attract shippers from using the services of PRMSA or Sea-Land operating out of South Atlantic and Gulf ports since PRMSA and Sea-Land feed cargo to IMTS at San Juan, Puerto Rico. It is, however, totally speculative as to how much diversion could occur in this fashion since IMTS has furnished no evidence to support any of its contentions. The Commission has often said that it cannot base decisions on conjecture or speculation but needs facts. See *Agreement 9955-1*, cited above, 18 F.M.C. at 470; *Alcoa S.S. Co. Inc. v. Cia. Anonima Venezolana*, 7 F.M.C. 345, 361 (1962).[20] Furthermore, even when a party has been found to have the burden of justifying its practices, the Commission has not required the party to prove negatives, i.e., a party does not have to go forward with evidence to show that it will not violate specific provisions of law when no evidence has been presented indicating that it might be violating law.See *Agreement No. 9955-1*, cited above, 18 F.M.C. at 429.

The evidence presented by Hearing Counsel and the Commission's staff shows that TMT's rates should recover fully distributed costs on the basis of a reasonable method of analysis. Even if the rate on rice, the lowest in the tariff, may not recover all such cost, that rate recovers far more than direct costs and, con-

[19] As the Commission stated in Docket No. 78-21, G.O. 11, Amdt. 4, *Average Value of Rate Base*, served January 29, 1979, "The Commission feels that historical acceptance of a particular method does not necessary (sic) preclude the evolvement of a better method." Id., p. 4.

[20] The Commission made remarks in this cited case which bear repeating as regards IMTS's expression of fear of TMT's competition without supporting evidence, stating:

> . . . [S]omething more than a fear of increased competition is necessary to justify a finding that an agreement is unjustly discriminatory or unfair as between carriers, contrary to the public interest, or otherwise merits disapproval under section 15 of the Act. 7 F.M.C. at 361.

sequently, under the case law cited above is not necessarily unlawful. Cf. also *Rates, Hong Kong-United States Trade*, 11 F.M.C. 168, 174 (1967).[21]

There is moreover, no evidence to support IMTS's allegations that TMT's new 20-foot container rates unduly prefer any shippers, place any shippers at a disadvantage, or are designed to divert cargo from IMTS. The only evidence relevant to IMTS's allegations is the admitted fact that the 20-foot container rates are more attractive to higher density cargo. However, IMTS has failed to produce any evidence showing its reliance on high density cargo, which it alleges will be diverted to TMT. Also, the Commission's staff has not identified any shipper who complains about these rates. On the contrary, the staff witness (Stilling) testified that shippers were satisfied with the service provided by Tropical, whose tariff TMT has copied as regards the 20-foot container rate section.[22] Moreover, TMT's witness O'Malley testified that no shipper had yet complained about the minimum weight requirements (40,000 lbs. usually) which were fixed with Tropical's tariff and experience with shippers in the trade in mind. (Tr. 28). Mr. O'Malley granted that with experience some modification in the minimum weight requirements might be made if warranted. (Tr. 28). As noted earlier, shippers of small loads can be accommodated by consolidators who would utilize TMT's FAK rates. In short, there simply is no evidence to support a finding that the rates in question are unjustly discriminatory or unduly preferential or prejudicial. Absent such evidence, which it was incumbent upon the party making such allegations to submit, there is no basis on the record to find the rates to be unlawful on such grounds. See *Agreement No 9955–1*, cited above, 18 F.M.C. at 429, 469-482.[23]

Finally, there is no evidence that shippers will be unreasonably forced to use 40-foot containers at higher rates rather than 20-foot containers at lower rates. The record shows no shortage of 20-foot containers as well as the fact that shippers may select other carriers if they cannot utilize TMT's new service economically. Furthermore, there is no expectation that there will be a large transfer of demand from 40 to 20-foot containers. Although the 20-foot containers rates are more attractive for high density cargo, there is no evidence that shippers have complained or will complain about the particular minimum weight requirements applicable to the 20-foot rates.

[21] TMT has, as noted earlier, furnished evidence in support of their new rates based upon incremental cost, also called the "added traffic" theory. Under this theory, rates can be found reasonable if they merely recover direct or incremental costs rather than fully distributed costs under certain circumstances, such as when the cargo moves in a back haul on vessels which must move anyway and which would move empty but for the low, incremental rates which could attract something Since the record shows that the rates in question are justified on the basis of the regular fully distributed cost basis, it is not necessary to discuss TMT's alternative theory at any length However, it should be noted that the added traffic theory is applied only under exceptional circumstances, e g , in back haul movements of empty vessels where outside competition requires low incremental rates in order that anything move at all Otherwise each rate should share in recovery of all costs of a round voyage, not merely the direct, incremental costs on a back haul See discussion in *Coal from Southern Mines to Tampa and Sutton, Fla* 318 I.C C 371, 385-392 (1962) There is insufficient evidence on this record to find that the new reduced rates apply to back haul or added-traffic cargo within the meaning of this exceptional doctrine Indeed TMT has fixed the rates at levels far above incremental costs, a fact which in itself suggests that TMT does not believe that outside competition requires its new rates to plummet to low incremental levels in order to attract cargo for its new service

[22] The staff's interviews with shippers seem to have focused on the question of their satisfaction with Tropical's quality of service and their feelings about possible carrier monopoly in the trade (Ex 3, pp 4, 7). Nevertheless, if there had been any problem regarding the minimum weight requirements or unavailability of service for smaller shippers, the shippers apparently did not mention such problems

[23] These cited pages are enlightening. In the cited case, various parties alleged that the carrier's rates were discriminatory and preferential because of volume discounts, attraction to high-rated commodities or lack of attraction for commodities which could not be stowed in sufficient quantity to fill a container However absolutely no shipper complained or testified that the shipper was prevented from using the carrier's service and the parties' allegations rested on theories, not proven facts, in the trade involved The Commission refused to find the rates unlawful on such a record

Events Occurring After Mr. Farmer's Testimony Regarding His Employment

Some time after Mr. Farmer, Hearing Counsel's staff accountant witness, had completed his analysis and testified, an event occurred which made it necessary to clarify his status. Until this matter could be clarified, I deferred issuing this decision, which, even with the temporary delay occasioned by this problem, is being served well within the time period ordered by the Commission, i.e., April 23, 1979.

The evidentiary hearing in which Mr. Farmer concluded his testimony occurred on January 10, 1979. On March 9, 1979, Hearing Counsel served a motion in the form of a letter in which Hearing Counsel called my attention to the fact that Mr. Farmer had been offered employment with the Crowley Maritime Corporation, which owns respondent TMT, and had accepted the offer. Hearing Counsel explained, however, that Mr. Farmer had completed his written and oral testimony in this case more than one month before the offer was made, that he had immediately notified his supervisor when the offer was made and was removed from further participation in the case, a procedure suggested by the Memorandum of Attorney General Regarding Conflict of Interest Provisions of P.L. 87-849 (28 Fed. Reg. 985, Feb. 1, 1963). Thus, Hearing Counsel states that Mr. Farmer had in no way acted improperly and had no control over the situation in which the offer was made. Hearing Counsel asked for a ruling that Mr. Farmer's testimony was in no way influenced or rendered unreliable by these subsequent events and that his testimony remain in the record for all purposes. Hearing Counsel took pains to explain in the motion that any other party could reply within 15 days after date of service of the motion under Rule 74, 46 CFR 502.74, and attached Mr. Farmer's affidavit setting forth the relevant facts in detail. Only one reply was filed, by the Virgin Islands Government, which by letter dated March 14, 1979, stated that it had reviewed the affidavit and did not believe that Mr. Farmer's contracts with the Crowley Corporation had influenced his testimony. Therefore, it had no objection to Hearing Counsel's motion.

Mr. Farmer's affidavit fully explains the facts surrounding the offer of employment and demonstrates convincingly that he acted properly at all times and could in no way have been influenced by the offer of employment when testifying in this case. The critical fact remains that Mr. Farmer had completed his written and oral testimony in this case on January 10, 1979, whereas he was not even contacted by Crowley until more than a month thereafter, on February 14, or 15, 1979. Furthermore, Mr. Farmer immediately notified his immediate supervisor of the offer and upon conducting discussions with Crowley regarding possible employment, discontinued any contact with Commission matters involving Crowley on the instruction of his supervisor, on or about February 21, 1979. Thereafter Mr. Farmer continued discussions with Crowley without discussing Commission proceedings in any way. In addition to his supervisor Mr. Farmer contacted the Commission's Ethics Officer and informed the Bureau of Hearing Counsel and attorneys handling Crowley proceedings that he was no longer free to participate in proceedings involving Crowley, even before he had accepted Crowley's offer of employment. Mr. Farmer's and Hearing Counsel's statements that his analysis of Crowley financial data was in no way influenced by the subsequent offer of employment are fully supported by the detailed factual recitation contained in the affidavit. There is absolutely no evidence or reason to doubt the credibility or integrity of Mr. Farmer who acted in every way as an honest person should when confronted with a difficult situation over which he had no control. I therefore grant Hearing Counsel's request and find that Mr. Farmer's evidence should remain in the record and be considered on its merits without regard to these subsequent ancillary events which patently could have had no effect on his testimony.

ULTIMATE CONCLUSIONS

TMT has begun a new service publishing reduced rates for 20-foot containers. These rates are basically patterned after the tariff of a competing carrier, Tropical Shipping and Construction Company, Ltd., which operates a faster, direct service between Florida and the Virgin Islands. The new service offers a single bill of lading, simplified rates, and greater efficiency. Both Hearing Counsel and the Government of the Virgin Islands believe the new reduced rates to be beneficial and urge their approval by the Commission. The Commission's staff has presented evidence showing that the rates will be compensatory on a fully distributed cost basis and that they will not endanger the continued operations of Tropical which can withstand this new competition. The only party which has protested these new rates, International Marine Transport Services, Inc. (IMTS), has failed to present any evidence for the record, despite the Commission's instructions, which would support its allegations that the new rates are noncompensatory and harmful to the continued existence of IMTS. On the contrary, the record shows that the new rates are primarily aimed at attracting cargo from Tropical, not IMTS. Whatever effect these rates would have on IMTS, which operates between Puerto Rico and the Virgin Islands and is fed cargo from other carriers operating from the mainland, is entirely speculative.

Although it is admitted that the new rates are especially attractive to high density cargo, there is no evidence from shippers or anyone else that TMT's rate structure will harm or unduly prefer any shipper any more than there is evidence that Tropical's similar tariff has harmed or unduly preferred any shipper.

In short, this record shows that TMT is attempting to meet, not eliminate competition, that it is publishing reduced rates which are fully compensatory, and that there will be benefits for shippers as a result of its new service and rates. There is furthermore no probative evidence showing harm to any shipper or competing carrier. Accordingly, I find TMT's new rates to be just and reasonable within the meaning of section 18(a) of the Shipping Act, 1916, and section 4 of the Intercoastal Shipping Act, 1933.

(S) NORMAN D. KLINE
Administrative Law Judge

WASHINGTON, D.C.
March 30, 1979

FEDERAL MARITIME COMMISSION

[46 C.F.R. 547; DOCKET NO. 75-6]

POLICY AND PROCEDURES FOR ENVIRONMENTAL PROTECTION

May 22, 1979

ACTION: Discontinuance of Proceeding

SUMMARY: The Commission has determined that this proceeding, initiated by notice of proposed rulemaking of March 24, 1975 (40 F.R. 13005) should be discontinued and superseded by a new proposed rulemaking designated as Docket No. 79-51.

DATES: Effective upon publication.

SUPPLEMENTARY INFORMATION: None

By the Commission

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 78–37

RENE D. LYON CO., INC.

v.

AMERICAN PRESIDENT LINES, LTD.

NOTICE

May 22, 1979

Notice is given that no exceptions have been filed to the April 16, 1979, initial decision in this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the initial decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 78–37

Rene D. Lyon Co., Inc.

v.

American President Lines, Ltd.

Finalized on May 22, 1979

Shipments of artifical flowers, Xmas light sets and other like merchandise from origins in the Far East consigned to the Port of San Diego, Calif., found to have been properly delivered to respondent's container yard or container freight station at Chula Vista, Calif., and the subsequent drayage of said merchandise from Chula Vista, after customs clearance, to the Tenth Avenue Terminal in San Diego found to have been at the request of complainant's customs house broker. Complaint dismissed.

David N. Nissenberg for complainant.

J. Donald Kenny for respondent.

INITIAL DECISION[1,2] OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE

The shortened procedure was followed. The record consists of the complainant's opening memorandum of facts and arguments dated February 6, 1979, the respondent's memorandum of facts and arguments mailed March 6, 1979, and the complainant's reply memorandum of facts and arguments mailed March 20, 1979, each with attached exhibits.

By complaint filed September 26, 1978, the complainant, Rene D. Lyon, Inc., an importer of Christmas tree decorations, alleges that respondent American President Lines, Ltd. (APL), an ocean carrier operating from ports in the Far East to Pacific Coast ports, overcharged the complainant in violation of section 18(b) of the Shipping Act, 1916 (the Act), on certain shipments of Christmas tree decorations from Far East origins to the Port of San Diego made from about November 1975, through January 1978. Complainant also alleges a violation of section 17 of the Act, insofar as it is contended that APL did not observe and enforce a just and reasonable practice relating to the handling and delivery of complainant's merchandise at the Port of San Diego.

Specifically, complainant's goods were delivered to the Port of San Diego at APL's container freight station (CFS) or container yard (CY), both at the same

[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).

[2] Another proceeding in which the issues appear to be similar is No. 79–4, *Sol Spitz v. American President Lines, Ltd.*

location, namely *the premises or facilities of California Cartage Company, Inc.* (Cal-Cartage) at 2387 Faivre Street, Chula Vista, Calif. The goods reached Chula Vista in bond and, after customs clearance, were trucked by Cal-Cartage from 2387 Faivre Street to the Tenth Avenue Terminal in San Diego, for which drayage Cal-Cartage billed the complainant.

The alleged overcharges are the above drayage expenses paid by the complainant. The alleged unlawful handling and delivering practices are the delivery of the goods by APL to Chula Vista, rather than delivery to the Tenth Avenue Terminal in San Diego.

The bills of lading designate the cargo in issue variously as artifical flowers, Xmas decorations, candles, musical clown, musical piano, musical auto car, Xmas light sets, Xmas ornaments, marching soldier band, musical metal train passing through tunnel, holiday novelties, Xmas trees, dancing doll, etc.

An analysis of 138 bills of lading shows 66 shipments from Hong Kong, 51 from Keelung, Taiwan, 14 from Tokyo via Yokohama, and 7 from Kobe, Japan. Some of the bills of lading are almost illegible, but generally they all show that the shipments were destined to unnamed overland common points (O.C.P. destinations) in the United States. "O.C.P." is shown on the bills of lading in one or more of three places, namely under "onward routing from port of destination," "for transshipment" or under "marks and numbers." It is apparent and is concluded from the record that the complainant's purpose was to warehouse its O.C.P. shipments at the Tenth Avenue Terminal.

Most of the shipments were less-than-containerloads (l.c.l.) and accordingly went to APL's CFS so that the containers could be stripped and thus divided into shipments to two or more consignees. A few of the shipments herein were containerloads and accordingly went to APL's CY for further handling after release from customs.

Some of the shipments in the list attached to the complaint show cargoes ex "ASIA MARU," ex "ZIM-H.K.," and ex other ships, which do not appear to be those of the respondent. The complaint seeks $6,476.32 in damages. In the complainant's opening memorandum in the affidavit of its Secretary-Treasurer, it is said that complainant paid a total of $5,865.97 to Cal-Cartage for the drayage here in issue. In Exhibit A attached to complainant's reply memorandum, a total of drayage bills of about $5,236.04 is listed.

The respondent points out that the shipments in question moved during 1976 and 1977, and that some of the earlier 1976 shipments are barred by section 22 of the Act, which provides that complaints may be filed within two years after the cause of action accrued. Determination of which shipments may be barred need not be made now, inasmuch as the complainant states in its reply memorandum that should it be found entitled to reparation, it will file a complete reparation statement pursuant to rule 252 of the Commission's Rules of Practice and Procedure (46 CFR 502.252). At that time any barred shipments could be deleted from the reparation statement.

There are certain "non-issues" in this proceeding. The shipments in issue were transported by APL in its ocean service from the Far East origins to its Port of Los Angeles terminal in San Pedro, Calif., and thence were trucked in bond in substituted service to APL's Port of San Diego CFS or CY at Chula Vista. Said

CFS/Cy of APL at 2387 Faivre Street is about one-half mile from the waterfront of San Diego Bay, and is about six miles from the Tenth Avenue Terminal. The complainant alleged in error that APL docked its vessels at Long Beach rather than San Pedro, but this is of no moment to the issues herein.

In its reply memorandum the complainant concedes that at no time has it ever objected to the substituted service (trucking from San Pedro to the Port of San Diego), and that port equalization never has been at issue herein. The complainant is agreeable to the use by APL of any reasonable means to deliver the goods to the Port of San Diego. Rather, the complainant does complain that its goods were delivered to an area (APL's CFS/CY at Chula Vista) assertedly outside of the Port of San Diego.

Another "non-issue" relates to who directed Cal-Cartage to dray the complainant's goods from 2387 Faivre Street to the Tenth Avenue Terminal. In the complaint it was alleged that such drayage was for the convenience of the respondent and not at the request of, or at the direction of, the complainant. The Secretary-Treasurer of the complainant in an affidavit attached to the opening memorandum stated:

12. All transportation of goods and packages from Chula Vista to the Port of San Diego were done at the direction of American President Lines and its agent acting on their own and not at the specific request of Rene D. Lyon Co., Inc.

The above affidavit and allegation in the complaint have been refuted by the respondent, and the complainant does not dispute this refutation.

In respondent's memorandum of facts and arguments, the respondent states that the transportation of complainant's cargo from APL's CFS/CY at Chula Vista to the Tenth Avenue Terminal in San Diego was at the direction of Mr. Pres Jenkins, a licensed customs house broker who represented the complainant. At the request of Mr. Jenkins, the complainant's cargo was so handled, following customs clearance and APL delivery procedures. This is sworn to in the affidavit of Raymond J. Reynolds, Manager of the San Diego terminal of Cal-Cartage, which trucking company transported complainant's cargo from APL's CFS/CY at Chula Vista to the Tenth Avenue Terminal on a collect basis, and Cal-Cartage submitted freight bills for this service to the complainant, which paid all such bills promptly and without protest.

The respondent states in its memorandum that should the complainant in its reply memorandum dispute the above matter (as to who authorized the cargo to be moved from APL's CFS/CY at Chula Vista to the Tenth Avenue Terminal) then in that event the respondent requests the right to subpoena and depose Mr. Jenkins on these matters. In its reply memorandum, the complainant does not dispute the matter. Therefore, it is concluded and found that the complainant requested and ordered (through its customs house broker, Mr. Jenkins) that its cargo be transported by Cal-Cartage from APL's CFS/CY at Chula Vista to the Tenth Avenue Terminal.

APL does not use the Tenth Avenue Terminal in San Diego for its operations. Consignees who have made contractual storage arrangements at the Tenth Avenue Terminal or at any other warehouse in the Port of San Diego area must take delivery of cargoes transported by APL at the APL CFS/CY at Chula Vista, unless other arrangements authorized by the tariffs are utilized.

Drayage charges from Chula Vista to the Tenth Avenue Terminal are the same as charges for movement to that location from any point within the city limits of San Diego.

The genesis of the subject proceeding is that on March 27, 1978, the complainant filed a complaint in the Municipal Court of California, County of San Diego, seeking damage from respondent in the amount of $4,570.57. Respondent then moved to stay the Municipal Court proceedings on the grounds that the Federal Maritime Commission had primary jurisdiction. On July 6, 1978, the respondent and complainant stipulated to a stay of the Municipal Court litigation pending adjudication by the Federal Maritime Commission.

GENERAL DISCUSSION AND CONCLUSIONS

Two main issues in this proceeding are, one, whether APL performed its delivery services to the Port of San Diego in accordance with the applicable tariffs and the terms of its bill of lading, and two, if delivery to APL's CFS/CY at Chula Vista was in accordance with the applicable tariffs, whether the designation of the location of APL's CFS/CY for the Port of San Diego at Cal-Cartage's facilities at Chula Vista was a reasonable designation.

APL is required by 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; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, except in accordance with such tariffs.

In other words, APL must abide by the terms of its tariffs. It must charge the same rates to all shippers obtaining transportation of like cargo from the same Far East origin to the same Port of San Diego destination. APL may not rebate a portion of such charges, by paying for any transportation beyond APL's Port of San Diego CFS/CY. That is, APL may not pay for drayage from its San Diego CFS/CY at Chula Vista to another terminal unless APL's tariff so provides.

Thus, we return to the main question whether APL properly designated Cal-Cartage's facilities at Chula Vista as APL's CFS/CY for the Port of San Diego.

APL's bill of lading provides in Clause 12, in part, that the Carrier without giving notice either of arrival or discharge, may discharge the goods directly as they come to hand at or onto any wharf, craft *or place that the Carrier may select,* (emphasis supplied).

APL's bill of lading provides in Clause 18, in part, that any persons, firm or corporation engaged by the Shipper or Consignee to perform forwarding services with respect to Goods shall be considered the exclusive agent of Shipper or Consignee for all purposes.

APL as a member of the Trans-Pacific Freight Conference of Japan/Korea (TPFC/JK), was subject to its tariffs on shipment herein from Japan to San Diego.

TPFC/JK Tariff No. 35, FMC-6, provides in General Rule No. 23, that on cargo delivered breakbulk ex container, delivery is accomplished by making the cargo available at carrier's CFS, and on cargo delivered in containers delivery is accomplished by making the containers available at carrier's Container Yard (CY).

TPFC/JK's tariff also provides in Rule 46, in part, that for delivery of cargo discharged at other than bill of lading port of destination, the ocean carrier shall arrange at its expense for movement of the shipment via rail, truck, or water, the mode to be determined by the ocean carrier, from the port of actual discharge to the ocean carrier's conventional or container facilities on file with the Conference Chairman for the port of destination. Rule 100(c) of this tariff defines CFS as the location designated by the carrier in the port area defined under Rule 100(H). Rule 100(d) similarly defines CY. Rule 100(E) provides in part that the CY and the CFS may not be shipper's, consignee's, forwarder's or NVOCC's place of business.

Rule 100(H) of this tariff provides in part that the port area at destination ports is:

> that geographic area encompassing those CFS's and CY's on file with the Conference Chairman and in effect on May 18, 1973.

The respondent's memorandum in its attachments or Exhibits F-1, F-2, F-3, and F-4 gives various lists of CY and CFS destinations, effective at various dates. Attachment or Exhibit F-1 shows the CY's and CFS's effective April 19, 1973. Exhibit F-2 was effective August 24, 1976, Exhibit F-4 was effective March 22, 1977, and Exhibit F-3 is for the list of CY's and CFS's effective April 6, 1978.

APL's shipments from Hong Kong and Taiwan are subject to its Hong Kong-Taiwan Freight Tariff No. 5, F.M.C. No. 67. This tariff in its Rule No. 50 provides in part that CFS means the location designated by the carrier or his agent and that such locations must be on file with the Agreement Secretary (Ageement No. 10107, Trans-Pacific Freight Conference HK/Independent Lines Rate Agreement). In the same rule CY is similarly defined as the location designated by the carrier, on file with the Agreement Secretary. All CFS locations must be on the carrier's pier or in the immediate port area as defined by the Chairman or Secretary of Agreement 10107.

Rule No. 175 of this Hong Kong-Taiwan tariff provides, in part, that on cargo delivered breakbulk ex container, delivery is accomplished by making the cargo available at carrier's CFS, and that on cargo delivered in containers, delivery is accomplished by making the container available at carrier's CY. The tariff ocean rates do not include any services beyond delivery to the CFS or CY.

In Tariff No. 1-E of the Port of San Diego, California, San Diego Unified Port District, "Port" is defined as meaning "San Diego Unified Port District" and "District" is defined as encompassing "all of the tideland areas of the Cities of San Diego, National City, Chula Vista, Imperial Beach and Coronado, surrounding San Diego Bay, as well as the navigable waters therein."

The respondent states that the Port of San Diego tariff is not directly relevant to this case, but that it is indicative of the fact that the "port area" as defined by the TPFC/JK tariff is not arbitrary or unreasonable.

Complainant disagrees and submits the affidavit of the Port Director for the Port of San Diego, who states that the only portions of the City of Chula Vista that are within the borders of the San Diego Unified Port District are the tideland areas of that city, that 2387 Faivre "Avenue" (sic) is not in the San Diego Unified Port District, and that APL's CFS at this location is not in the Port of San Diego. It is to be borne in mind that the tariff of the Port of San Diego is designed to meet its own purposes, and is not the controlling tariff setting APL's ocean rates and the services for which these rates apply. It probably is true that the Port of San Diego as a terminal operator or lessor of terminal facilities would be a competitor of Cal-Cartage to some extent insofar as Cal-Cartage is rendering terminal services. Of course, the tariff of the Port of San Diego is pertinent to the issues herein insofar as it may be considered as one factor in the measure of the reasonableness of APL's designation of 2387 Faivre Street as its CFS/CY.

Complainant insists that the literal definition of tideland area is the area between the high and low water marks, but this more properly would seem to be the definition of tideland. Tideland area necessarily encompasses more than tideland, that is, tideland area is the area in the general vicinity of the tideland. In the present case, the tideland area reasonably may encompass many points near the San Diego Bay and local waters, including the Paradise Creek, Sweetwater River, and the Otay River, which empty into the San Diego Bay. However, in any event it is the definition of "port area" in APL's tariffs that is controlling. Of course, the mere filing of a tariff and acceptance of same for filing by the Commission does not make any tariff provision reasonable and lawful, if on complaint it can be shown otherwise.

The complainant insists that APL's CFS at Chula Vista is not directly adjacent to the water (apparently meaning San Diego Bay), although Exhibit A-1 attached to complainant's opening memorandum shows that APL's CFS on Faivre St. (marked with an asterisk on Exhibit A-1, page 2), is very near the Otay River.

Likewise an examination of other CFS/CY locations listed in Exhibits F-1, F-2, F-4 and F-3 shows that a number are not located on piers and docks, but reasonably may be considered to be in the "port area," and even in the tidelands area.

These same exhibits show that not only did APL designate 2387 Faivre Street as its CFS/CY, but also that other ocean carriers designated the same address or facility of Cal-Cartage as their CFS or CY or both. Kawasaki Line, Moeller Line, Maersk Line, Nippon-Yusen-Kaisha Line, and Yamashita-Shinnihon Steamship Co., Ltd., listed 2387 Faivre Street at one time or another. Also respondent states that Sea-Land Service, Inc., established the first CFS in Chula Vista in about 1970, and the use of this area has been popular with conference members.

The complainant argues that Rule 100(H) of the tariff of TPFC/JK defining the port area as the geographical area encompassing the CFS's and CY's on file with the conference is in the nature of an "escape clause," and begs the question of what is a reasonable port area, since Rule 100(H) allegedly sets up no reasonable guidelines for the sites of a CFS. The apparent guidelines have been the commercial customs and practices of the members of TPFC/JK and of Agreement No. 10107 in setting up the locations of their CFS's and CY's. Those practices, that is, the location and use of these CFS's and CY's, have been established for at least 7 or 8 years, and have been commercially accepted apparently by shippers and consignees for some time, even including the complainant, which accepted delivery at APL's Chula Vista location and paid drayage charges from there without protest, for at least 2 years, prior to the filing of the present complaint.

The complainant mistakenly relies on a proposed definition of "Port," which never became effective. Complainant's error is understandable. In the U.S. Government Printing Office publication, entitled, Code of Federal Regulations, 46 Shipping Part 200 To End, Revised as of October 1, 1977, there are two versions of "section 536.1 Definitions." At page 850 of this publication is the version of the definitions effective at the time, and no definition of "Port" is included. At page 871 of this same document is another section 536.1 Definitions, which in subpart (p) defines port as "When used in this part the term 'port' means a place having facilities to originate or terminate water transportation and at which the actual transportation by water commences or terminates as to any particular movement of cargo."

However, this section 536.1 never became effective, see page 870, which states in part, "In order to permit additional time to evaluate petitions for reconsideration, it has been determined to postpone the effective date until further order of the Commission, see 41 FR 44041, Oct. 6, 1976."

In fact, effective January 1, 1978, in Docket No. 72–19, *General Order No. 13, Part 526–Publishing and Filing Tariffs by Common Carriers in the Foreign Commerce of the United States*, certain modifications were made and many sections of the regulations were renumbered (mimeographed regulations served November 10, 1977). In this revision, section 536.2 is the "Definitions" section, and again there is no definition of "Port."

In a similar mimeographed publication not here controlling, but of interest, served October 3, 1977, effective January 1, 1978, concerning Docket No. 76–40, *General Order No. 38*, regarding tariffs in the *Domestic* Offshore Commerce, section 531.2 (m) defines "Port" as "a place at which a domestic offshore carrier originates or terminates (by transshipment *or otherwise*) its actual ocean carriage of property or passengers as to any particular transportation movement." (Emphasis supplied.)

The complainant argues that the definition of "Port" as provided in Section 536.1(p), the definition which never became effective, precludes areas inland from the water, and therefore that any tariffs filed by or on behalf of APL containing some other definition of port are in contravention of the Code of Federal Regulations. As seen, complainant relies on a never-effective proposed definition.

Therefore, we must return to the definitions of CFS's and CY's as provided in the tariffs governing APL. APL's designation of its CFS/CY location at Chula Vista was lawful in accordance with APL's tariffs.

The question remains whether or not the tariffs provided reasonable rules.

It appears reasonable from a public and commercial standpoint to designate the Chula Vista location as APL's CFS/CY. An examination of Exhibits F-1, F-2, F-4, and F-3, attached to respondent's memorandum shows that various locations were used for CFS's and CY's for the ocean carriers offering service to the Port of San Diego. Such locations include or included:

(a) Tenth Avenue Terminal San Diego
(b) California Cartage 1421 Sicard Street, San Diego

(c) La Salle Truck, 690 Anita Street, Chula Vista
(d) California Cartage, 2387 Faivre Street, Chula Vista
(e) Sky Trucking, 5010 Market Street, San Diego
(f) Sky Trucking, 2163 Hancock Street, San Diego
(g) Port Transport, 415-30th Street, National City
(h) 24th Street Terminal, San Diego
(i) G&H Transportation, Inc., 1950 Newton Street, San Diego
(j) Container Freight Corp., 415-30th Street, National City

A number of the above terminals do not appear to be directly on the San Diego Bay.

In days past when all ships were conventional breakbulk vessels, it was natural to unload the ships at the waterfront and stack the loose pieces of cargo on the pier or in sheds near the water. But, with modern containerships and with limited spaces for handling large containers, apparently it has become feasible to move the containers some distances from the water to container yards for delivery of the full containers to shippers, and in the case of less-than-container loads to container freight stations not right on the water but some distance away, where there is space for appropriate facilities for stuffing and stripping containers.

Some latitude in picking the location of CY's and CFS's is necessary both from an economical standpoint and also from the standpoint of avoiding congestion of trucks. If all trucks do not have to go to the same location, traffic may be spread out, avoiding congestion in limited areas adjacent to the water.

The Administrative Law Judge has no knowledge of the specific situation herein, that is, of any problems of the economics of the location of CY's and CFS's at the Port of San Diego, or of any possible truck congestion, but it would appear wise as a general rule not to unduly limit the sites of CY's and CFS's in the Port of San Diego. A requirement that APL could not select its Chula Vista CFS location, as it did, would seem to be unduly restrictive and unreasonable.

Modern and far-sighted regulation should not tie down a carrier to any narrow technical choice of location of its CY or CFS. Rather, an ocean carrier should be free to select a site for its CY or CFS, provided the location selected is within reason and serves a legitimate public need, and further provided that the location(s) selected is (are) in accordance with applicable tariff provisions.

Of course, selection of Tia Juana, Mexico, as the site for a CFS or CY for the Port of San Diego would be unreasonable under present circumstances, but this record does not support a finding that 2387 Faivre Street, Chula Vista, is an unreasonable location for APL's CFS/CY at the Port of San Diego. A look at a San Diego area map confirms that San Diego, National City, Chula Vista and other nearby cities are all in close proximation to each other and to San Diego Bay and its tributary waters.

It is ultimately concluded and found, that complainant's shipments in issue herein were delivered properly in accordance with respondent's applicable tariffs to respondent's container freight station/container yard at Chula Vista, Calif.; that those shipments were not overcharged; that the complainant has not shown that respondent's designation of its container freight station/container yard at Chula Vista for delivery of goods to the Port of San Diego was an unreasonable designation; that APL's selection of its CFS/CY at Chula Vista and delivery of goods thereto was not an unreasonable practice relating to the handling and delivery of goods consigned to the Port of San Diego; that the drayage of complainant's shipments from Chula Vista to the Tenth Avenue Terminal in San Diego was at the request and direction of complainant, through its customs house broker; and that complainant was aware that the drayage was at its expense and paid such drayage without protest. Complaint dismissed.

(S) CHARLES E. MORGAN
Administrative Law Judge

WASHINGTON, D.C.
April 13, 1979

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 574

INGERSOLL RAND INTERNATIONAL

v.

PERALTA SHIPPING CORP.
FILING AGENT FOR
IRAN OCEAN SHIPPING CO., INC.

DENIAL OF PETITION TO INTERVENE; REMAND OF PROCEEDING

May 23, 1979

Administrative Law Judge John E. Cograve served his initial decision in this proceeding January 8, 1979, wherein he granted the application of Peralta Shipping Corporation, agent for Iran Ocean Shipping Company, Inc., (IROSCO) for permission to waive a portion of freight charges. No timely exceptions were filed. MCT Shipping Corporation, however, later petitioned to intervene and to reopen the proceeding. Replies to these petitions have been filed. We determined to review the initial decision by notice served February 12, 1979.

As part of our review of the initial decision in this matter we have considered the petition of MCT to intervene and have determined that it should be denied. MCT is the disponent owner of the M.V. KOH EUN, the vessel which performed the voyage in question. MCT alleges that IROSCO abandoned the voyage and as a consequence MCT took control of the vessel and completed the voyage. MCT further alleges that it obtained maritime liens on all of the vessel's subfreights. MCT states that inasmuch as it is ultimately entitled to the freights from this voyage, it has an obvious interest in this proceeding because the outcome of this proceeding will determine the amount of freight actually due on the shipment.

The instant proceeding involves an application under section 18(b)(3) of the Shipping Act, 1916, for waiver of a portion of freight charges. The statute authorizes such an application by a common carrier by water and permits a grant of such application where it appears there is an error in a tariff due to inadvertence in failing to file a new tariff. The instant application was filed on behalf of a common carrier and alleges such an inadvertence. For an inadvertent failure to file a tariff to serve as a basis for waiver, it must be determined that a prior agreement or understanding that a particular filing would be made by the carrier existed. Such an agreement or understanding, of course, must be formed prior to the start of the shipment. If such an arrangement was negotiated here it would have been by or for the carrier which issued the bill of lading and which originally took responsibility for the voyage. Obviously, MCT played no part in any such arrangement, as the voyage was initiated some time in November, 1977 and MCT, by its own admission, obtained no interest in the voyage until December 14, 1977. It is apparent that all the events that bear on determining whether there was a previously agreed rate or on what would be the applicable tariff rate absent such an agreement, occurred prior to MCT's arrival on the scene. Because this proceeding is limited to determining if a waiver is authorized based on a finding as to the properly applicable rate, MCT's participation is neither necessary nor warranted. Indeed, MCT's attempts to interject issues regarding whether or not it has a lien on the freights are irrelevant.[1] These issues will be for the District Court to decide. We need only decide the applicable rate and the amount of freight based on that rate. We need not decide who ultimately is entitled to the ocean freight as a result of the alleged abandonment of the voyage.

One point made in MCT's pleadings which is relevant to our determination here is that the record contains evidence that the alleged negotiated rate was not on behalf of IROSCO, but was on behalf of Jeddah Overseas Industrial Sea Transport (JOIST). However, this information is already in the record of this proceeding and MCT's participation is not needed to resolve that question. In light of the above discussion, the petition of MCT to intervene is denied.[2]

Upon review of the record in this proceeding, we have determined to vacate the initial decision and to remand the matter to the Administrative Law Judge for further proceedings and issuance of a supplemental decision. The initial decision would grant the application for waiver on the basis of a finding that a $90 W/M rate was negotiated for the shipment in question. This finding is based on an affidavit supplied by Mr. Jorge Rivera, Peralta's Assistant Line Manager for IROSCO, which confirms a $90 W/M rate quote was given (presumably by Peralta or IROSCO) to the shipper's freight forwarder (SCAC Transport). The Administrative Law Judge, however, did not reconcile this with the evidence of record contained in a December 5, 1978, letter to Peralta from SCAC Transport in which it is stated that a $90 W/M rate was negotiated by SCAC with *JOIST*, and that later a corresponding booking contract was received by SCAC from *JOIST* (emphasis added). Peralta's affidavit in response to MCT's petition to intervene attempts to explain the IROSCO/JOIST discrepancy. It is suggested there that the negotiations were in fact with a Mr. Camuti of IMPACT, an agent for both JOIST and IROSCO, and that SCAC erroneously assumed in its December 5, 1978, letter that negotiations were on behalf of JOIST. This explanation, however, contradicts Peralta's earlier suggestion that it (not IMPACT) was responsible for negotiating and filing the rate on behalf of IROSCO. The above demonstrates that the present record affords no basis for concluding that a $90 W/M rate was negotiated for carriage of the shipment in question by

[1] This finding and our ultimate conclusion here make it unnecessary to rule on MCT's petition for leave to file a supplementary memorandum of law on whether a lien has attached.

[2] Denial of the petition to intervene precludes consideration of MCT's petition to reopen. We have, however, determined on our own motion to reopen and to remand the proceeding to the Administrative Law Judge.

IROSCO. Neither can we determine that the various agents involved were empowered by their agency arrangements to act on behalf of or to bind IROSCO by their actions. It must be established that the carrier *or its authorized representative* agreed to the rate and determined to apply it to this shipment by seeking special docket relief.

Accordingly, it is ordered that the initial decision is vacated and the matter is remanded to the Administrative Law Judge for further proceedings to determine:

(1) Whether a $90 W/M rate for the carriage by IROSCO of the shipment in question was in fact agreed to prior to shipment and inadvertently not filed.

(2) Whether the entity or entities negotiating the alleged rate on behalf of IROSCO was empowered by any agency arrangements to bind IROSCO to such rate, and to file it on IROSCO's behalf.

(3) Whether Peralta was empowered by its agency arrangement with IROSCO to file on behalf of and to bind IROSCO to the conforming tariff of $90 W/M filed, effective May 11, 1978.

(4) Whether Peralta was empowered by its agency arrangement with IROSCO to file the instant special docket application.

(5) Whether the special docket application should be granted.

The Administrative Law Judge is directed, in his discretion, to conduct whatever further proceedings are deemed necessary to resolve these questions and to issue a supplemental decision.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 574

INGERSOLL RAND INTERNATIONAL

v.

PERALTA SHIPPING CORPORATION, FILING AGENT
FOR IRAN OCEAN SHIPPING CO. INC.

January 8, 1979

Application granted.

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

Iran Ocean Shipping Co. Inc. (Irosco) through its agent Peralta Shipping Corporation seeks permission to waive collection of $6,345.63 on a shipment of Road Making or Earth Moving Equipment which moved from Norfolk, Virginia, to Jeddah, Saudi Arabia. The shipment consisted of 14 pieces of equipment weighing 76,960 lbs. and measuring 4,615 cu. ft.

In October of 1977 JCAC, a freight forwarder (FMC No. 1773), acting for Ingersoll Rand, negotiated a rate of $90.00 per 2240 lbs. or 40 cu. ft. to be applied to the shipment of road building equipment destined for Jeddah. Peralta, the filing agent for Irosco was instructed to file the $90.00 rate with the Commission. At the time this instruction was given Peralta, Mr. W. Hageman was Peralta's Irosco line manager and Miss Diane Ennis was his secretary. Neither is now in the employ of Peralta. However, Mr. Jorge Rivera states in an affidavit that at the time of the incident in question he was the assistant line manager and worked directly with Mr. Hageman and that,

> Miss Diane Ennis . . did have knowledge of the October 24th, 1977 $90 W/M quote given to SCAC for the movement of Road Building Machinery . . . and I am able to swear that our failure to file this rate resulted solely from an oversight on the part of Miss Ennis who was handling our tariff filings at that time.

When the shipment left Norfolk the applicable rate under the Irosco Freight Tariff No. 1 (FMC 1) was $145.00 W/M, which would have resulted in a total charge of $16,729.38. At the $90 W/M negotiated rate the total charge would have been $10,383.75. The latter was the actually collected charge and permission to waive $6,345.63 is requested.

[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)

Section 18(b) (3) of the Shipping Act, 1916, permits the Commission to waive collection of a portion of the freight charges when there has been an error due to an inadvertent failure to file a new tariff. The error under consideration here is clearly within the statute. The present application conforms to the requirements of Rule 92(a), Special Docket Applications, Rules of Practice and Procedure, 46 CFR 502.92(a). The error which resulted in the inadvertent failure to file the rate is of the kind contemplated by section 18(b) (3).

Therefore, after consideration of the application and the exhibits attached to it I find that:

1. There was an error which resulted in the inadvertent failure to file a negotiated rate which would have been in effect if the error had not been made.
2. The waiver sought here will not result in discrimination among shippers.
3. Prior to applying for the waiver, Irosco filed a new tariff which set forth the rate on which the waiver should be based.
4. The application was filed within 180 days from the date of shipment.

Accordingly, permission is granted to Irosco to waive collection of a portion of the freight charges in the amount of $6,345.63.

(S) JOHN E. COGRAVE
Administrative Law Judge

WASHINGTON, D.C.
January 8, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-7

AGREEMENT NOS. 9929-2, ET AL.
(MODIFICATION OF COMBI LINE JOINT SERVICE AGREEMENT), AND AGREEMENT NOS. 10266, ET AL.
(JOINT SERVICE AGREEMENT BETWEEN INTERCONTINENTAL TRANSPORT, B.V., AND COMPAGNIE GENERALE MARITIME)

ORDER PARTIALLY ADOPTING INITIAL DECISION

June 5, 1979

On January 30, 1979, Administrative Law Judge Stanley M. Levy (Presiding Officer) issued an Initial Decision in the present proceeding which conditionally approved Agreement No. 9929-5 and Agreement No. 10266-2 (Agreements) pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. 814).[1] No exceptions to this decision were filed by the Proponents or Protestants in the case and it is assumed that the Presiding Officer's conditions of approval are acceptable to the parties.[2] A Final Energy and Environmental Impact Statement was served by the Commission's Office of Environmental Analysis on February 16, 1979, which concluded that approval of the Agreements was the environmentally preferable course of action.[3] On March 5, 1979, the Commission determined to review the Initial Decision on its own motion.

Upon examination of the entire record, it has been concluded that the result reached by the Presiding Officer is essentially correct. The Commission does not, however, agree with all of the steps taken to reach that result and finds that further modifications to the Agreements are necessary if they are to be approved. Supplemental discussion is particularly warranted in light of the Commission's intervening decisions in *Agreement No. 9929-3—Pendente Lite Approval of Combi Line Non-LASH Service,* served March 5, 1979, and *Agreement Nos.*

[1] Agreement No. 9929-5 was approved on the condition that Compagnie Generale Maritime not participate in the Combi Line LASH vessel service and that the two remaining parties not concertedly offer LASH service between Mexican and United States ports. Agreement No. 10266-2 was also approved on the condition that the parties not offer joint container/breakbulk service between Mexican and United States ports. Reporting requirements were imposed to assure compliance with the limitation on total carryings established by Article 2.2 of Agreement No. 9929-5.

[2] The Proponents are Hapag-Lloyd Aktiengesellshaft (Hapag); Intercontinental Transport, B.V. (ICT); and Compagnie Generale Maritime (French Line). Protestants are United States Lines, Inc. (USL); Sea-Land Service, Inc. (Sea-Land); Seatrain International, S.A. (Seatrain); and the Commission's Bureau of Hearing Counsel.

[3] By carrying more TEU's per vessel, Proponents can achieve a more fuel efficient operation. Over 500,000 barrels of Bunker C fuel (or its equivalent) could be conserved annually. The use of larger vessels would also increase air pollutants emitted in United States ports by about 11 tons annually, but the additional amounts emitted in each port of call would have only a minimal effect on local air quality.

9902-5 and 9902-8 (Euro-Pacific Joint Service), served March 29, 1979. Accordingly, the Initial Decision will be adopted except to the extent it is inconsistent with the following analysis.

Discussion

The Proposals

Agreement No. 9929-5 has two separate and distinct parts. Part I calls for the *joint operation* of a two vessel LASH service by the three Proponents to be known as "Combi Line." Expenses and revenues would be divided in proportion to each party's capital contributions. Hapag and ICT are each required to contribute a LASH vessel, but French Line's contribution would be limited to one or more feeder vessels, if and when the Joint Service commences a feeder operation at European ports.

Part II of Agreement No. 9929-5 would authorize Hapag, ICT and French Line to cross-charter container space from one another on any and all vessels *separately operated* by these three carriers in the U.S. Gulf and South Atlantic/Continental Europe, United Kingdom, Eire trade.[4] The Proponents may employ whatever vessels they wish, but will limit their *containerized* cargo carryings on these vessels to a combined total of 800 twenty foot equivalent container units (TEU's) per week in each direction (averaged quarterly).[5]

Hapag and ICT presently operate a joint "Combi Line" LASH service, container cargo service and conventional (breakbulk cargo) service, in the trade. The container service features four "Omni Class" container/breakbulk ships which have been or will soon be modified to carry 950 TEU's each. Combi Line now carries approximately 800 TEU's per week under Agreement No. 9929-3, and its container service has been used and been found reliable by shippers since January, 1973. The Proponents would use these modified Omni vessels—all four of which are owned by Hapag—in their proposed "coordinated container service."[6] One or more additional vessels may also be used from time to time. Proponents originally contemplated the use of between four and six new 1,500 TEU containerships, three or four of which would be owned by Hapag, one or two by ICT, and one by French Line. These vessels were scheduled to become available in 1978 and 1979. Proponents have now decided not to employ these vessels in the trade and are unlikely to alter that decision until such time as adequate container facilities are constructed in Mexican ports.[7]

In situations where no conference or other lawful ratemaking body establishes rates for containerized commodities carried by the Proponents, they will themselves agree upon the rates they charge to shippers. No pooling of revenues or

[4] Ports in Scandinavia and along the Baltic are included in Proponents' service area. Mediterranean ports are not.

[5] Of these 800 TEU's, no more than 100 eastbound and 225 westbound (averaged monthly) may be carried to or from U.S. South Atlantic ports and none shall be loaded or discharged north of Charleston, South Carolina. Moreover, no more than 30 TEU's of refrigerated cargo may be carried eastbound and no more than 10 such TEU's may be carried westbound. After the first year of operation the westbound limit may be increased to 15 TEU's and after the second year to 20 TEU's.

[6] Agreement No. 9929-5 does not authorize Proponents to time charter vessels from each other. Any such arrangement must be separately submitted for section 15 consideration.

[7] The U.S. Gulf and South Atlantic/Europe trade is unbalanced in favor of eastbound movements. The Mexico/Europe trade is unbalanced westbound. It is traditional for carriers to follow an itinerary outbound from Europe to Mexican ports, then to U.S. Gulf ports, and then back to European ports. Exhibit 13.

expenses would be allowed under Part II of Agreement No. 9929–5. Approval of Part II would therefore terminate an existing joint container service featuring relatively little competition between the parties and replace it with an arrangement involving a significantly greater level of competition between Hapag and the two other Proponents. In addition, the five-year covenant not to compete contained in the present Combi Line Agreement has been entirely eliminated from Agreement No. 9929–5.

Agreement No. 10266–2 is a joint service arrangement between ICT and French Line whereby these carriers will share all revenues and expenses from the operation of container, conventional and container/breakbulk ships in the trade under a yet to be selected common trade name.[8] As long as ICT and French Line remain parties to Part II of Agreement No. 9929–5, the *containerized* cargo carried by their joint service will be subject to the TEU ceiling imposed by that agreement. Both Part II of Agreement No. 9929–5 and Agreement No. 10266–2 have a term of four years.[9]

Modifications Necessary for Approval

The Commission has determined that certain modifications, in addition to those ordered by the Presiding Officer, must be made before the Agreements can be approved. These modifications stem primarily from the fact that the two agreements before the Commission do not adequately reflect the three distinct section 15 activities proposed by Proponents: (1) a joint Hapag/ICT LASH and conventional vessel service; (2) a joint ICT/French Line container and conventional vessel service; and (3) a Hapag, ICT and French Line cross-charter arrangement for container space. Accordingly, approval of these proposals will be conditioned upon the division of the present two-agreement packages into three separate agreements. Part II of Agreement No. 9909–5 must be revised to contain a complete container cross-charter agreement and will be assigned a new FMC processing number.

Part I of Agreement No. 9929–5 concerns the operation of LASH vessels. Proponents allege, however, that Article 1.2 of Agreement No. 9929–5 also authorizes them to operate a joint conventional vessel service. Article 1.2 simply states that the joint LASH service will "use supplementary space on [the Proponents'] owned and chartered conventional vessels as needed." This language is vague under the circumstances. Most conventional vessels are incapable of carrying LASH barges and it would be unreasonable to assume that an entire conventional vessel service was being authorized through 1986 by this phrase alone, especially since Proponents have not described the working details of their proposed breakbulk operation.

The Commission has consistently interpreted section 15 as requiring a clear and detailed statement of the activities to be engaged in by the parties to a proposed agreement. Nothing in the record indicates that a *joint service arrangement* is necessary to achieve the one-way conventional service Combi Line has been providing for declining amounts of breakbulk cargo.[10] Conventional

[8] Agreement No. 10266–8 is therefore not properly described as a mere "marketing" arrangement.

[9] Part I of Agreement No. 9929–5 has a December 31, 1986 termination date.

[10] In June, 1977, Combi Line's conventional vessel service consisted of four Hapag owned ships with a combined capacity of only 50,000 long tons. Combi's two LASH vessels have a combined capacity of 363,440 long tons. Exhibits 7 and 8.

vessels of the type Combi Line has been employing require a far smaller capital commitment than do the large LASH and container vessels being operated in the trade. The outsized or heavy-lift cargo carried by the Combi conventional vessel service can also be handled by Combi LASH vessels or by Proponents' container vessels. To the extent breakbulk cargo originates at ports not regularly served by those vessels, it could be readily carried by Hapag's conventional vessels (acting individually) or the new ICT/French Line joint service.[11] Accordingly, approval of Part I of Agreement No. 9929–5 will be conditioned upon the deletion of the "supplementary space" clause in Article 1.2. This action is without prejudice to the submission of an adequately justified conventional service agreement between Hapag and ICT.

Agreement No. 9929–5 authorizes the three Proponents to fix rates for containerized cargoes. When they so act, they are fully subject to the Commission's self-policing rules (46 C.F.R. Part 528). The self-policing provisions contained in Appendix A to Agreement No. 9929–5 do not comply with these regulations. Accordingly, approval of Part II of Agreement No. 9929–5 shall be conditioned upon *either* the deletion of the last 13 lines of Article 3.4 *or* the amendment of Appendix A to comply with Part 528 of the Commission's Rules. Because Part I, as conditionally approved herein, is a two party joint service arrangement, it is not subject to self-policing requirements.[12]

One of the major benefits of Part II of Agreement No. 9929–5 is the fact that the Combi Line joint container service is being replaced by an arrangement whereby Hapag will compete with ICT/French Line for container cargo. It is therefore inappropriate for the three Proponents to exercise a single vote on conference matters pertaining to such cargo. Accordingly, Article 3.4 of Agreement No. 9929–5 must be amended to apply only to the Hapag/ICT joint LASH service.

Conversely, Agreement No. 10266–2 does not presently limit ICT and French Line to a single vote on conference matters pertaining to their proposed joint service. Accordingly, approval of Agreement No. 10266–2 shall be conditioned upon the addition of a provision similar to present Article 3.4 of Agreement No. 9929–5.

The ICT/French Line joint service is unlikely to operate outside the framework of Agreement No. 9929–5 during the next four years. Nonetheless, in light of the Proponents' insistence that Agreement No. 10266–2 should not be tied to Agreement No. 9929–5, approval of the former shall be conditioned upon ICT and French Line adopting an 800 TEU per week containerized cargo limit of their own. This modification is necessary to avoid overtonnaging in the event Agreement No. 9929–5 were terminated and Hapag and the ICT/French Line service began competing without benefit of that agreement's capacity limitations.

Agreement No. 10266–2 also fails to describe adequately the proposed ICT/French Line conventional vessel service. ICT and French Line have expressed an intention to concentrate on containership operations to compete for both container and breakbulk cargo and the cross-chartering provisions of Article 2.3 of

[11] No justification was offered for the highly anticompetitive proposals which allow ICT to participate in *two* conventional vessel services in the same trade—the Hapag/ICT (Combi Line) service and the French Line/ICT service.

[12] Agreement No. 10266–2 is similarly exempt from Part 528.

Agreement No. 9929–5 do not apply to conventional vessels.[13] Because Hapag is likely to employ conventional vessels to supplement its container cargo service, and because direct vessel calls at smaller U.S. ports would meet a transportation need, the vagueness found in Agreement No. 10266–2 could be made acceptable if Article 1 were amended to limit the parties to one conventional vessel call per week as part of a voyage serving at least one U.S. port not otherwise receiving direct ICT/French Line service.

Article 2.3 of Agreement No. 9929–5 states that the Proponents may charter space to and from each other "in such quantities and on such terms as they may agree." The proportional shares of the parties are not revealed.[14] An amendment to Article 2.3 describing each party's relative share of the 800 TEU container capacity would ordinarily be necessary. However, the Commission would be able to monitor adequately the performance of the proponent lines if reporting requirements more detailed than those described in the Initial Decision were included.[15] Accordingly, approval of both Agreements shall be conditioned upon the submission of quarterly reports which reveal, for each voyage undertaken, the vessel's name, its operator (Hapag, ICT or French Line), the itinerary, the total number of TEU's carried, the number of TEU's carried by each Proponent, and the average number of TEU's per week carried in each direction (averaged quarterly).[16]

The Basis for Approval

The Presiding Officer found the Agreements to be subject to the Commission's *Svenska* doctrine[17] and further found that the proposal's anticompetitive effects would be offset by other legitimate Shipping Act considerations. Agreement No. 9929–5 authorizes price fixing and a limitation of production, both of which are *per se* violations of the Sherman Antitrust Act (15 U.S.C. 1 *et seq*.). Agreement No. 10266–2 is a joint service arrangement. Such agreements between established ocean carriers are viewed as arrangements for dividing markets and are also presumed to reduce potential, if not actual, competition between the participants. The Commission will therefore require an appropriate justification without regard to whether their particular proposal constitutes a *per se* violation of the antitrust laws.

In this instance, Proponents have demonstrated that Agreement No. 9929–5, as modified, would allow the use of more efficient containerships while avoiding the detrimental effects of overtonnaging.[18] Three carriers could participate in a modern all-water container service without duplicating the extensive capital

[13] Indeed, the principal reason for both Agreement No. 10266–2 and Part II of Agreement No. 9929–5 is the high cost of entering the container cargo market and the parties' plans to acquire efficient vessels for use in the trade.

[14] Exhibits 23 and 42 indicate that a 40%-40%-20% split between Hapag, ICT and French Line may be planned.

[15] Additional reporting requirements would be necessary in any event. These particular requirements are intended to facilitate prompt Commission action in the event an excessive inbalance should develop in the relative carryings of the three proponent lines.

[16] As long as Agreement No. 9929–5 is in effect, no separate report need be filed by the parties to Agreement No. 10266–2.

[17] *Federal Maritime Commission v. Svenska Amerika Linien*, 390 U.S. 238, 243-246 (1968).

[18] Based upon the relatively small (approximately 4.0%) annual growth rate predicted for all U.S. Gulf/Europe cargo and the fact that much of this cargo is not susceptible to containerization, there is a real possibility excess container capacity could develop in the trade. Exhibit 46. Without Agreement No. 9929–5, at least 950 and perhaps as many as 3,000 TEU's would be required in order for Hapag and ICT to provide the more efficient service necessary to assure their continuance as effective competitors in the trade.

investment required to operate such a service. Experience has proven that an overcommitment of capital relative to cargo availability is likely to cause irresponsible rate competition, rebating, service disruptions, carrier failures and other conditions associated with serious instability. Hapag could provide high levels of container service on its own, but without Agreement No. 9929–5 there would either be a dramatic increase in tonnage or a marked decrease in ICT's participation in the container market. French Line might find itself unable to enter that market with even an infrequent containership service.

As modified, the practical effects of Agreement No. 10266–2 on the Proponents' competitors should not be significant, especially with regard to containerized cargo. The ICT/French Line service would add no more than 800 TEU's per week to the 5,000 plus TEU's presently available to shippers each week.[19] Moreover, as long as ICT and French Line participate in Agreement No. 9929–5, they will carry considerably less than 800 TEU's per week (probably 60% of that amount). The ICT/French Line service will therefore attract less than ten percent of the moderately growing container cargo market and would certainly enjoy no unfair advantage over Sea-Land and the other frequent all-water container operators now serving U.S. Gulf and South Atlantic ports.

In short, the Agreements, as modified, would serve a serious transportation need by continuing a reliable, shipper accepted LASH service and make an improved container service available to the shipping public. They would also provide a public benefit by furnishing the improved container service in a manner which adds to the number of competitors and increases the level of competition in the trade.[20] Lastly, they would accomplish a valid regulatory purpose by assuring that this improved container service and increased competition occur *without* causing overtonnaging or otherwise creating unstable or harmful conditions in the trade.[21]

THEREFORE, IT IS ORDERED, That Part I of Agreement No. 9929–5 is disapproved pursuant to section 15 of the Shipping Act, 1916, effective June 29, 1979, unless the Commission actually receives at its offices in Washington, D.C., on or before June 28, 1979, a modified version of that agreement designated "FMC Agreement No. 9929–6," signed by both Hapag-Lloyd Aktiengesellshaft and Intercontinental Transport, B.V., which is limited to the Hapag/ICT joint LASH service and contains the following amendments:

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[19] Sea-Land offers 1,400 TEU's per week as a direct, all-water service. U.S. Lines (1,000 TEU's), Seatrain (1,800 TEU's) and the American Export Division of Farrell Lines, Inc (1,000 TEU's) call weekly at South Atlantic ports and serve Gulf Coast ports by a minilandbridge service. BaltAtlantic (350 TEU's) has a weekly all-water service from North and South Atlantic ports. Lykes Bros. Steamship Co., Inc. (230 TEU's averaged weekly); BaltGulf (443 TEU's averaged weekly); Atlantic Cargo Services (216 TEU's averaged weekly); Waterman Steamship (143 TEU's averaged weekly); Norwegian American Line; Polish Ocean Line, Unigulf Line, and Harrison Line offer less frequent container service in the trade. Exhibits 41 and 42 and tariffs on file with the Commission

[20] The existing Combi Line service has been the largest overall carrier of liner cargo in the trade. The proposed Agreements would disperse this concentration of market power. The Combi Line LASH service will compete on a relatively equal basis with Lykes Bros., the improved Hapag and ICT/French Line container services will not secure an unfair advantage over existing container operators, and Hapag and ICT/French Line will compete for both container and breakbulk cargo.

[21] Pages 34 to 47 of the Initial Decision are inconsistent with this analysis and are not adopted by the Commission. The economic needs of ocean carriers, although relevant Shipping Act considerations, are not "transportation needs" within the meaning of the *Svenska* doctrine. Further, the "regulatory purpose" criterion is intended to curtail specific adverse conditions which the Shipping Act was designed to eliminate (*e.g.*, cutthroat competition, rebating, undue market power, carrier failure, and activities detrimental to the foreign commerce of the United States). Increased carrier efficiency and competition generally fall within the "public benefit" criterion. The Commission specifically notes that French Line's proposed contribution to the joint LASH service is not a basis for approval in light of the deletion of French Line from that service.

(1) Delete "Compagnie Generale Maritime" in all instances where it presently appears;

(2) Delete all references to service between United States ports and ports in Mexico which presently appear;

(3) Delete the fourth "Whereas" clause;

(4) Delete the last fourteen words in Article 1.2;

(5) Appropriately renumber Articles 3.1 through 3.5;

(6) Delete those portions of present Articles 3.1 through 3.5 which apply to the Proponents' proposed cross-charter arrangement for container cargo; and;

IT IS FURTHER ORDERED, That upon full and timely compliance with the conditions set forth in the above ordering clause, Agreement No. 9929–6 shall be approved; and

IT IS FURTHER ORDERED, That Part II of Agreement No. 9929–5 is disapproved pursuant to section 15 of the Shipping Act, 1916, effective June 29, 1979, unless the Commission actually receives at its offices in Washington, D.C., on or before June 28, 1979, a modified version of that Agreement to be designated "FMC Agreement No. ______," signed by Hapag-Lloyd Aktiengesellshaft, Intercontinental Transport, B.V., and Compagnie Generale Maritime which contains the following amendments:

(1) Delete all references to service between United States ports and ports in Mexico which presently appear;

(2) Delete the second and third "Whereas" clauses;

(3) Appropriately renumber Articles 2.1 through 3.5;

(4) Delete the last thirteen lines of present Article 3.4 or modify Appendix A to comply fully with the self-policing requirements of 46 C.F.R. Part 528;

(5) Delete the proviso clause of present Article 3.4 and the two sentences immediately following that clause;

(6) Add a new final Article which reads as follows:

The parties shall submit quarterly operating reports to the Federal Maritime Commission concerning their activities in the subject trade. These reports shall include the dates, ports of call and vessels employed for each voyage undertaken by any of the parties in each direction; the total number of loaded containers (expressed in TEU's) carried on each voyage between European and (a) U.S. Gulf ports and (b) U.S. South Atlantic ports; the number of TEU's carried by each party on each voyage between European and (a) U.S. Gulf ports and (b) U.S. South Atlantic ports; the number of refrigerated containers carried on each voyage; and the average number of TEU's carried in each direction per week between European and (a) U.S. Gulf ports and (b) U.S. South Atlantic ports (averaged quarterly). The first such report shall be filed on or before November 15, 1979, and shall cover the period July 1 through September 30, 1979.

and;

IT IS FURTHER ORDERED, That upon full and timely compliance with the conditions set forth in the above ordering clause, the renumbered version of Part II of Agreement No. 9929–5 shall be approved; and

IT IS FURTHER ORDERED, That Agreement No. 10266–2 is disapproved pursuant to section 15 of the Shipping Act, 1916, effective June 29, 1979, unless the Commission actually receives at its offices in Washington, D.C., on or before June 28, 1979, a modified version of that Agreement to be designated "FMC Agreement No. 10266–3," signed by both Intercontinental Transport, B.V., and

Compagnie Generale Maritime, which contains the following amendments:

(1) Change the title from "Joint Marketing Agreement" to "Joint Service Agreement;"

(2) Delete all references to service between United States ports and ports in Mexico;

(3) Modify Article 1 by adding the following proviso clause:

Provided, That the parties shall carry no more than 800 twenty foot equivalent container units (TEU's) of containerized cargo; nor shall the parties furnish more than one conventional vessel call per week between any two ports covered by this agreement and then only as part of a voyage which calls at at least one U.S. port not otherwise receiving direct service from the parties.

(4) Add a new Article 8 which contains the conference participation provisions found in present Article 3.4 of Agreement No. 9929-5. It is unnecessary, however, for the Proponents to include the last sentence of Article 3.4 if they do not wish to do so.

(5) Add a new Article 9 which contains the following provisions for reporting the Proponents' operating results to the Commission:

Reporting Requirements: In the event the parties cease to participate in FMC Agreement No. ______ (or some similar agreement limiting their container carryings to a greater extent than is provided in Article 1 hereof), the parties shall file quarterly reports with the Federal Maritime Commission concerning their container cargo activities in the subject trade. These reports shall include the dates, ports of call and vessels employed for each voyage undertaken by the Joint Service in each direction; the total number of loaded containers (expressed in TEU's) carried on that voyage; and the average number of TEU's carried in each direction per week (averaged quarterly);

and;

IT IS FURTHER ORDERED, That upon full and timely compliance with the conditions set forth in the above ordering clause, Agreement No. 10226-3 shall be approved.

SEPARATE OPINION OF CHAIRMAN DASCHBACH AND COMMISSIONER DAY

We concur with the opinion of the majority "that the result reached by the Presiding Officer is essentially correct." Unlike the majority, we do agree with all of the steps taken in the Initial Decision to reach that result. Consequently, we believe that the only further modifications necessary to the Agreements are the more detailed reporting requirements imposed by the Commission's Order and the requirement that the Agreements be amended to comply with the self-policing requirements of 46 C.F.R. Part 528.

The minute dissection of the two filed Agreements, which imposes a new name; creates three agreements where there were two, necessitating refiling with attendant expense and delay; and arbitrarily imposes a single vessel call remedy for perceived vagueness in Agreement No. 10266 exceeds the proper role of the Commission. It is not for the Commission to redesign the details of commercial arrangements to suit its preference. Agreements Nos. 9929-5 and 10266-2 as conditionally approved by the Presiding Officer met with *Svenska* burden of outweighing their anticompetitive impacts. That is sufficient to warrant Commission approval. Painstaking inquiry into and alterations of every detail of these agreements is an exercise in abusive and excessive regulation.

Other weaknesses in the majority's opinion include the logically unfounded attempt to interpose for consistency's sake a separate proceeding, Docket No. 77-4, *Agreements No. 9902-5 and No. 9902-8*. Those Agreements were considered in light of the circumstances existing in the U.S. Pacific Coast/Europe trade. The instant proceeding involves a totally different trade. Thus Agreements Nos. 9929 and 10266 should, and can, be approved independently.

Additionally, a significant fact relied upon by the majority cannot be found in the record. The allegation that the proponents have "now decided" not to employ the 1500 TEU vessels, whose use was a central issue litigated before the Presiding Officer, is not contained in Exhibit 13 as the majority's opinion misleadingly indicates.

Further, the imposition in Agreement No. 10266 of a tonnage limitation on the two weaker carriers, ICT and French Line, in the event Agreement No. 9929 is terminated, is illogical. As the majority itself points out, without Agreement No. 9929 there would probably be a marked decrease in ICT's participation in the market while French Line would probably not be able to enter it at all. What is the efficacy of imposing a limitation on two weak entities at a time when their stronger competitor has no such similar limitation?

Another weakness of the majority opinion is the arbitrary imposition of a single vessel call per week on the ICT/French Line conventional service. Whether this is a rational resolution of the perceived vagueness of Agreement No. 10266 is unknown because this issue was never addressed by the parties during this proceeding.

Finally, our primary objection to the majority's opinion is based in its sweeping dismissal of the reasoning of the Initial Decision which is inappropriately buried in footnote 21. The majority's statement that the Initial Decision is inconsistent with their analysis is incorrect. "Transportation needs" is broad enough to include both the benefits to shippers outlined by the majority *and* the economic needs of ocean carriers described by the Presiding Officer. As pointed out in the majority order, carrier needs *are* relevant Shipping Act considerations. Why then does the majority disregard these concerns and the thoughtful reasoning of the Presiding Officer on that subject? A thorough consideration of these Agreements mandates inclusion of that reasoning, and its exclusion requires us to depart from the majority.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 77–7

AGREEMENTS NOS. 9929–2, ET AL.
(MODIFICATION OF COMBI LINE JOINT SERVICE AGREEMENT), AND
AGREEMENTS NOS. 10266, ET AL. (JOINT MARKETING AGREEMENT
BETWEEN INTERCONTINENTAL TRANSPORT (ICT) B. V. AND
COMPAGNIE GENERALE MARITIME)

Partially Adopted on June 5, 1979

Agreements Nos. 9929–5 and 10266–2, if modified by its proponents as clarified and directed herein, are approved.

The criteria of section 15 of the Shipping Act, 1916, has been met, as well as those of *Svenska* which is applicable.

Edward Schmeltzer and *George Weiner* for proponents Hapag-Lloyd A.G., Intercontinental Transport (ICT) B.V., and Compagnie Generale Maritime.

Paul J. McElligott and *John A. Douglas* for protestant Sea-Land Service, Inc.

Neal M. Mayer and *Paul D. Coleman* for protestant Seatrain International, S.A.

Russell T. Weil and *Elizabeth Ritvo* for protestant United States, Lines, Inc.

J. Robert Ewers, Joseph B. Slunt, John Cunningham and *Alan Jacobson* as Hearing Counsel.

INITIAL DECISION[1] OF STANLEY M. LEVY, ADMINISTRATIVE LAW JUDGE

Docket No. 77–7 was instituted by the Commission's April 8, 1977, Order of Investigation and Hearing, to determine whether to approve, pursuant to section 15 of the Shipping Act, 1916 (the Act), 46 U.S.C. 814, Amendments 2, 3 and 4 to Agreement No. 9929 and Agreement Nos. 10266 and 10266-1. Named as proponents were Hapag-Lloyd A.G., Intercontinental Transport B.V. (ICT) and Compagnie Generale Maritime (CGM). Named protestants were United States Lines, Inc. (USL), Sea-Land Service, Inc. (Sea-Land), and Seatrain International, S.A. (Seatrain). The Bureau of Hearing Counsel was also named a party.

This proceeding originated with the filing on October 1, 1976, of Amendment 2 to Agreement No. 9929 and Agreement No. 10266. Agreement No. 9929 was originally approved by the Commission in 1971 and authorized the operation by Hapag-Lloyd and the predecessor-company[2] of ICT of a joint liner service with lighter-aboard-ship (LASH) vessels, conventional vessels and other specialized vessels,[3] between the U.S. Gulf and South Atlantic and European ports. Agree-

[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).

[2] This was Holland-America Line.

[3] Ex. 1 at Article 1.2.

ment No. 9929–2[4] revised the basic agreement by: (1) adding CGM as a party thereto; (2) separating the ongoing joint LASH service from a "coordinated container service," by which the Combi Line joint container service would be terminated and the three parties would cross-charter to each other container space available on their respective vessels operated in this trade. Agreement No. 10266 was an agreement between ICT and CGM for the joint marketing of their non-LASH services in this trade.

Notice of Agreement Nos. 9929-2 and 10266 was published in the *Federal Register* on October 14, 1976. USL, Sea-Land and Seatrain filed comments and requested that a hearing be held prior to approval of these agreements. Proponents' response to these comments included the submission of Amendments 3 and 4 to Agreement No. 9929 and Amendment 1 to Agreement No. 10266. Agreement No. 9929-3 extended the effective term of the non-LASH portion of the Agreement for two years beyond its then-scheduled termination date of April 8, 1977.[5] Agreement No. 9929-4 (as well as Amendment 1 to Agreement No. 10266) specified a five-year term of approval of the Agreement and was included in response to matters raised by the commenting parties.

Notice of Agreements Nos. 9929-3, 9929-4 and 10266-1 was published in the *Federal Register* of February 2, 1977, and comments and requests for hearings were again submitted by USL, Sea-Land and Seatrain. In its April 8, 1977, Order of Investigation, the Commission noted its consideration of "the submissions of both the protestants and the proponents . . . [and] determined that issues have been presented which can only be resolved in a formal proceeding." Order of Investigation, p. 5. The Commission there enumerated 11 issues to be considered in Docket No. 77–7.

Hearings were held for the presentation of proponents' case-in-chief in Washington, D.C., on June 20-28, 1977. Prior to the conclusion of cross-examination of proponents' witnesses and before presentation of testimony by Hearing Counsel and protestants it became necessary to resolve certain discovery issues. These issues related primarily to the application of FMC discovery procedures to data and documents located abroad and the contention of proponents that the laws of the home countries of proponents limited proponents' ability to comply with discovery procedures. Ultimately the discovery requested was submitted.[6]

In the interval following the end of evidentiary hearings in June of 1977, events transpired which led to the submission of substantial revisions to the proposal embodied in the agreements subject to the April 8, 1977, Order of Investigation. These revisions, first filed with the Commission for approval on January 12, 1978, were denominated Agreement No. 9929–5 and Agreement No. 10266–2 and were designed to eliminate or narrow contested issues which had arisen in this proceeding. The principal substantive revisions were: (a) Article 2.2 of Agreement No. 9929–2, which called for proponents' employment in this trade of up to six, 1,500-TEU containerships, was revised to provide for

[4] Agreement No. 9929–1, approved April 7, 1974, simply extended for three years Commission approval of the non-LASH portion of the basic agreement. The LASH service portion of the original Agreement No. 9929 was approved for a 15-year term.

[5] As the Commission noted in its Order of Investigation (at page 3), Agreement No. 9929–3 "is an interim measure designed to prevent Combi's non-LASH authority from expiring while the Commission is considering the other amendments and new Agreements covered by this Order, and in the event the Commission disapproves the other amendments and Agreements."

[6] See letter of August 30, 1978, from Hearing Counsel to the Presiding Judge.

operation by proponents of a weekly container service, limited to lifting an average of 800 TEU's of containerized cargo per sailing [see Ex. 39 at Article 2.2]; (b) Articles 1.8 and 2.7 of Agreement No. 9929-2, calling for separate conference and rate agreement participation by the ongoing Combi Line LASH service and the three individual proponents, were revised to allow for individual membership by the proponents, with total voting rights equivalent to those afforded single conference members [see Ex. 39 at Article 3.4]; and (c) in various provisions, the geographic scope of the service to be provided was more clearly defined.

The Commission on February 3, 1978, issued a "Modification of Order of Investigation and Hearing" in Docket No. 77-7, directing that these newly-filed agreements be made the subject of Docket No. 77-7 and requesting that "[t]he Presiding Administrative Law Judge . . . fashion such procedures as are necessary to incorporate this new development into the fabric of the proceeding . . . ." Pursuant to this order, I convened a status conference on February 27, 1978, to consider such procedures, at which time further proceedings were deferred pending additional consideration by all parties of the newly-filed agreements, as well as additional terms discussed at that conference. Further status conferences, convened on March 15 and April 25, 1978, to discuss additional terms of these agreements, resulted in proponents' submission on April 27, 1978, of an "Agreement No. 9929-5 (Clarified)."

This agreement was considered during a further status conference convened May 24, 1978, at which protestants indicated that, should certain clarifications be made, protestants would no longer oppose approval of the agreements. These clarifications were discussed and read into the record of the May 24 conference and are reflected in proponents' filing on June 12, 1978, of agreements denominated by the Commission staff as "Agreement No. 9929-5 (2d Revised)" and "Agreement No. 10266-2 (Revised)."[7] It should here be made clear that it is only the versions of the agreements reflected in these latest submissions (hereinafter referred to as the "subject Agreements" collectively or "Agreement No. 9929-5" and "Agreement No. 10266-2" individually) for which proponents now seek approval.

At the May 24, 1978, status conference, procedures were developed for the submission by proponents of additional testimony in connection with the subject Agreements. Pursuant thereto, proponents on July 31, 1978, submitted such direct testimony. Cross-examination of witnesses by Hearing Counsel was carried out through written questions and answers. Jay A. Copan, appearing on behalf of Hearing Counsel, subsequently submitted economic testimony pursuant to a similar procedure. Protestants stated that they did not oppose approval of the subject Agreements and therefore did not submit written direct testimony or present witnesses for cross-examination.

At the final status conference convened on November 9, 1978, there was admitted into the record some 49 exhibits. Including the testimony and cross-examination of witnesses, this comprises the record for decision in this proceeding.

[7] Restatements of both Agreement No. 9929 and Agreement No. 10266, as they would read upon inclusion of the terms for which approval is now sought, are Exs. 39 and 40, respectively.

FINDINGS OF FACT[8]

1. Proponents (or their predecessor-companies, see Ex. 50) have a long history of service in the Europe/U.S. Gulf and/or South Atlantic liner trade. Hapag-Lloyd has served the trade since 1865, ICT since 1912 and CGM since 1909.

2. In January of 1971, Hapag-Lloyd and the predecessor-company of ICT submitted to the FMC for section 15 approval Agreement No. 9929, an agreement calling for: (a) operation of a joint service under the name Combi Line, "between United States South Atlantic ports (from Cape Hatteras southward), United States Gulf of Mexico ports, and ports and places on the United States inland waterway system tributary to such United States South Atlantic and Gulf of Mexico ports, on the one hand, and United Kingdom/Eire ports and European Continental ports, excluding the Mediterranean, and ports and places on the United Kingdom and continental European waterway systems tributary to such United Kingdom and European ports, on the other hand, including transshipment services To/From any other port"; (b) utilizing conventional vessels, LASH vessels and "other specialized vessels" to offer up to approximately three sailings per week from both the U.S. Gulf and U.S. South Atlantic port ranges.

3. Agreement No. 9929 was approved by Commission order of April 8, 1971. The portion of the agreement pertaining to LASH service was approved until December 31, 1986. All other services were approved until April 8, 1974. Amendment 1 to Agreement No. 9929, extending approval of the non-LASH services specified in the agreement for an additional three-year period, was approved by the Commission on April 7, 1974.

4. Pursuant to Agreement No. 9929 and No. 9929-1, Combi Line has operated: (a) two LASH vessels, together offering a service frequency of 18 days; (b) container vessels, beginning in January of 1973 with two, 400-TEU vessels on a 17-day frequency, increased to three such vessels (on a 12-day frequency) in May of 1973, reduced in 1974 again to two vessels, and modified in August of 1976 to four, 420-TEU vessels offering weekly service between Houston and New Orleans (with alternate fortnightly calls at Mobile and Miami) and Rotterdam, Bremen, Greenock and (fortnightly) Gothenburg; and (c) a varying number of conventional vessels, calling principally outbound, from U.S. Gulf and South Atlantic ports to various European destinations.

5. The four vessels currently employed in the Combi Line container service, known as "Omni"-class ships, were constructed in 1970—71 as conventional breakbulk vessels equipped with on-board cargo booms and gear. These ships can operate at 22 knots and in their original configuration had an under-deck bale cubic capacity of 800,000 feet (exclusive of gear), which capacity could be increased by carrying containers, lumber and other suitable cargo on deck.

6. In their original configuration, the Omni vessels could accommodate only about 300 TEU's, but, for stability reasons, this container capacity could be achieved only when a sufficient weight of breakbulk cargo was loaded below

[8] It should be noted that, pursuant to various rulings by the Presiding Judge, certain data submitted by the parties during this proceeding were to be maintained on a confidential basis pursuant to Rule 167 of the Commission's Rules of Practice and Procedure.

*Confidential data.

deck. With this need to combine both breakbulk and container cargo, it was not possible to use these vessels in such a way as to reach optimum capacity levels; therefore, prior to employment in the Combi Line container service, these vessels were modified (by removal of certain cargo loading gear and installation of cell guides and permanent ballast) to increase their container capacity to 420 TEU's. Therefore, the effective cargo carrying capacity of the Omni ships as now configured is limited to approximately 420,000 cubic feet, as contrasted to their design capacity (as conventional ships) of 800,000 cubic feet plus additional on-deck capacity.

7. Since the last quarter of 1976 through the second quarter of 1978, utilization of the Combi Line containerships has averaged 91.7 percent eastbound and 92 percent westbound.

8. Notwithstanding these utilization levels, the Combi Line container service in 1976 incurred losses totalling approximately * , * million for the first half of 1977, and * for the second half of 1977 (second half of 1977 results also affected by longshoremen strike).

9. It is intended that the coordinated container service specified in the subject Agreement will employ these Omni vessels subsequent to modifications (adding of a new midsection and clearing remaining self-support gear) which will bring the capacity of these vessels to about 950 TEU's. Notwithstanding these modifications, the Omni vessels will have the same operating speed, require no additional crewing and will have approximately the same fuel consumption characteristics. It is also intended that the four modified Omni vessels will be supplemented by one or more compatible vessels.

10. Article 3.2 of Agreement No. 9929 as originally approved and now in effect specifies generally that all marketing agents represent the Combi Line joint service (not the individual parties thereof) and further specifies the geographic scope of any marketing representation undertaken by either of the partners, i.e., that ICT is to act as general agent for the joint service in Belgium, Holland, Luxembourg and Switzerland, that Hapag-Lloyd will act as general agent for the joint service in Germany and Austria, and that in all other countries the joint service will appoint common representatives.

11. Hapag-Lloyd and ICT (the latter as a participant in another service, in which CGM also participates) are direct container service competitors in the U.S. East Coast/Europe trade. However, by the terms of Article 3.2 of Agreement No. 9929, any of Hapag-Lloyd's U.S. East Coast/Europe shippers located in Switzerland or the Benelux countries and also desiring service to/from the Gulf and South Atlantic must be referred to ICT representatives of the Combi Line service, which representatives also market the competing U.S. East Coast/Europe service. The converse situation applies to ICT in areas where Hapag-Lloyd represents Combi Line.

12. Hapag-Lloyd and ICT each offer services to various areas of the world and each has therefore established organizations to market these services. However, under Article 3.2 of Agreement No. 9929 as now in effect, any marketing by the parties thereto of container service to/from the U.S. Gulf and South Atlantic must be done on behalf of the Combi Line joint service, not on a basis identified with either of the respective carrier-parties to Agreement No. 9929.

13. The Combi Line LASH service is chiefly utilized to transport commodities that typically have not moved via the containerships operated by Combi Line.

14. The Combi Line LASH service is the only LASH service to any trade offered by the proponents and almost exclusively carries, in barge-load lots, bulk or neo-bulk commodities which do not lend themselves to movement in containers because of their physical dimensions or relatively low value.

15. In 1970, CGM became a party to FMC Agreement No. 9891, with Armement Deppe; Ozean/Stinnes was added as a party in 1972. Agreement No. 9891 was a scheduling and sailing arrangement in the eastbound trade from U.S. Gulf ports to North Europe, pursuant to which the parties operated the "Uni-Gulf" conventional vessel service. CGM offered approximately ten eastbound sailings annually, utilizing one-to-two conventional vessels, as part of the Uni-Gulf service. Prior to the filing of Agreement No. 9929-2, CGM gave notice of its withdrawal from Agreement No. 9891 (approved by FMC Order of December 10, 1976), and has from that time offered only sporadic conventional-vessel calls in this trade.

16. The withdrawal of CGM from the UniGulf service was based upon the desire of CGM to offer container service in this trade, which was not possible within the framework of Agreement No. 9891. CGM's intention to offer a container service in the context of a rationalized operation proceeded from consideration of factors related to: (a) the level of capital investment involved in constructing the number of modern containerships needed to offer a competitive frequency of service; (b) the difficulty of chartering a fleet of necessarily compatible vessels to offer such a service on a viable basis; and (c) the level of capacity in the trade upon introduction of such a fleet into service.

17. By the terms of Article 1.5 of Agreement No. 9929-5, CGM's participation in the Combi Line LASH service will be limited to its proportional contribution of capital equipment to such service, and the only anticipated new capital expenditure in connection with the LASH service is the possibility of a LASH feeder operation.

18. A LASH feeder service is only in the conceptual stages, but as envisioned would operate only in European waters to move cargo to/from the two European ports (Rotterdam and Bremen/Bremerhaven) now called by the Combi Line LASH service. It is unlikely that inauguration of a feeder service would alter the European port calls of the LASH vessels. At most only one port call could be eliminated, saving one day of the present 34-day roundtrip time for the LASH vessels, allowing for a maximum of one-third of one additional sailing per LASH vessel annually.

19. Agreement No. 9929-5 terminates the Combi Line joint container service and prescribes that each party is to solicit its own cargo. Absent Agreement No. 10266, ICT and CGM thus would each individually have to market the container space available to them per Article 2.3 of Agreement No. 9929-5, which should total approximately 320 TEU's and 160 TEU's weekly, for ICT and CGM respectively, for U.S. Gulf and South Atlantic/Europe cargo (with a further limitation on South Atlantic cargo).

20. Hapag-Lloyd has established and developed a marketing system for its various services throughout Europe, and, in the relevant trade, is the only carrier

of the largest volume European trading partner of the U.S. CGM has never marketed a container service in the relevant trade. The ICT marketing organization was originated under its present name in 1975.

21. In operating a container service, it is necessary to maintain a shoreside support organization and to offer a mix of 40- and 20-foot containers (further diversified as to dry vans, open-top, reefer and tank containers and flat-racks), spread over the number of port pairs resulting from the itinerary of the service. The service proposed in Agreement No. 9929-5 involves approximately 25 port pairs.

22. Agreement No. 9929-5 in Article 2.2 provides that proponents will lift not more than 800 TEU's weekly in both directions in the overall U.S. Gulf and South Atlantic/Europe trade, with an additional limitation of 100 TEU's eastbound and 225 TEU's westbound weekly to/from the South Atlantic.

23. The dominant direction of historic traffic movements in this trade is eastbound from U.S. Gulf and South Atlantic ports to Europe. The capacity to be offered by proponents eastbound from South Atlantic ports (i.e., an average of 100 TEU's weekly) amounts to only approximately 3.4 percent of export liner traffic moving in that trade in 1976 and will represent an increase of approximately four percent in present U.S. South Atlantic/Europe export container capacity.

24. The container capacity to be employed by proponents in the eastbound trade from U.S. Gulf ports to Europe will on average total 700 TEU's weekly, as compared to the present 420 TEU's per week, and would increase container capacity in the U.S. Gulf/Europe trade by 280 TEU's per week (14,560 TEU's annually), an increase of 12 percent in trade container capacity and an increase of four percent in overall trade capacity.

25. At the time the Combi Line joint service was formed in 1971, 11 carriers (in addition to Hapag-Lloyd, ICT and CGM) were offering common carrier service in the U.S. Gulf and South Atlantic/Europe trade. Of these carriers, all (except one line operating a Seabee service) operated breakbulk ships. At the present time, eight carriers (in addition to Combi Line) offer regular container service in the U.S. Gulf and South Atlantic/Europe trade, either by direct calls or by combining direct service with minilandbridge operations. Five of these carriers offer container service on a weekly frequency.

26. The Maritime Administration publication, *Containerized Cargo Statistics*, shows for the years 1970 through 1974 growth in containerized export cargo movements on Trade Route 21 (comprising the U.S. Gulf/Europe trade) as follows:

Trade Route 21, Export Container Traffic, 1970-1974

Year	Tonnage (Thousands of Long Tons)	Yearly Percentage Increase	Annual Percentage Compounded Growth Rate From 1970
1974	542.8	12	87
1973	482.8	194	121
1972	164.2	89	92

1971*	87.1	95	95
1970	44.7	—	—

*Longshore strike.

27. Export liner capacity, at design capacity, in the U.S. Gulf/Europe trade currently is approximately 2,567,679 long tons, of which 914,713 long tons consist of container capacity. The additional container capacity to be employed per Agreement No. 9929-5 would be approximately 14,560 TEU's annually, or design capacity at 112,986 long tons, resulting in overall trade capacity for 1979 (the first year in which this capacity would be fully deployed) of approximately 2,680,665 long tons, of which 1,027,699 long tons would be container capacity.

28. If Agreement No. 9929-5 is approved, the proponents' combined share of the total container capacity in the South Atlantic/North Europe trade will be slightly less than five percent, as compared to the present one percent share of the Combi Line joint container service, and proponents' combined share of the total overall capacity in that trade will be 11 percent, as compared to the present ten percent share of the Combi Line joint container and LASH services.

29. If Agreement No. 9929-5 is approved, the proponents' combined share of the total container capacity in the Gulf/North Europe trade will be 27 percent, as compared to the present 19 percent share of the Combi Line joint container service, and proponents' combined share of the total overall capacity in that trade will be 23 percent, as compared to the present 20 percent share of the Combi Line joint container/LASH/conventional services.

30. Between 1970 and 1976, the liner cargo share of total dry cargo exports from the U.S. Gulf Coast to Europe declined from 11.66 percent to 7.91 percent.

31. Between 1970 and 1976, eastbound liner shipments from the U.S. Gulf Coast to Europe increased at an average annual compounded rate of 3.84 percent; eastbound shipments of non-liner cargo grew at an average annual compounded rate of 11.53 percent.

32. The U.S. Maritime Administration recently published a study entitled "A Long-Term Forecast of U.S. Waterborne Foreign Trade, 1976—2000" (hereinafter referred to as "MarAd Forecast"), which developed predictions of growth on each U.S. trade route, based on actual 1975 traffic statistics. Ex. 44 at 12. For Trade Route 21, the MarAd Forecast predicts for the period 1975-2000 an overall annual growth rate for export and import traffic of 3.8 percent yearly.

33. The predicted growth rates in the MarAd Forecast are based upon aggregate data for liner, non-liner and tanker services, but analysis, by reference to projections for specific commodity movements in the MarAd Forecast, of the 25 leading export liner commodities on Trade Route 21 in 1976 (which comprised 84 percent of export liner traffic in that year) shows that the volume of those commodities is predicted to increase at an annual rate of 4.1 percent for the period 1975-1985.

34. Anticipated growth in the Southeastern United States is expected to far outpace the remainder of the nation. This is in terms of both personal income growth and population growth. These factors, when combined with expected growth in industrial production and gross national product, appear to indicate a continuing upsurge in the Gulf and South Atlantic markets.

35. In addition to service between U.S. Gulf and South Atlantic and European

ports, in Agreement No. 9929-5 proponents seek approval to operate a wayport service between Mexican ports and U.S. Gulf and South Atlantic ports. Proponents will operate in the trade between Europe and Mexico, in which trade westbound movements predominate, as well as in the trade between Europe and the U.S. Gulf and South Atlantic, where eastbound movements are heaviest. This would result in an equipment imbalance requiring re-positioning of empty equipment absent its use in a service between Mexico and U.S. Gulf and South Atlantic ports. There is now no regular liner service northbound or southbound between Mexican and U.S. Gulf and South Atlantic ports, although certain carriers call on an inducement basis. Less than 15 percent (by value) of all export traffic and 23 percent of import traffic moving between Mexico and the U.S. is transported by water services; the balance moves predominantly by rail and truck.

36. Mexican ports currently lack the infrastructure and proper organization for the efficient large scale transportation of containers. Minimum requirements for the operation of a full container service at Mexican ports would include the adaptation of the ports to container service, the establishment of a customs inspection system, the restructuring of cargo handling tariffs at the ports, and the adaptation of regulations and tariffs for the containers' inland transportation in Mexico. At the present time, Veracruz is the only port in Mexico that has definite plans to develop container handling facilities, with a container crane expected to be available by the end of 1979.

37. Proponents intend to include container service calls at Mexican ports, and to some extent the configuration of the container service (in terms of itineraries and number of vessels for their overall services) depends on development of container facilities and infrastructure in Mexico, which has lagged behind earlier-anticipated schedules.

38. In providing its present services, Combi Line in some European locations is assisted by or works with several Hapag-Lloyd and ICT subsidiaries or affiliates which are engaged in various maritime-related businesses, including cargo booking, stevedoring, trucking, insurance, container maintenance and tug and barge operations.

39. Hapag-Lloyd and ICT's predecessor company served the Scandinavia/Baltic range as part of their U.S. Gulf and South Atlantic/Europe services before forming Combi Line. Combi Line has served the Scandinavia/Baltic range since its inception in 1971, originally by transshipment only (except for direct calls on inducement), but, since 1977, by direct fortnightly containership calls at Gothenburg.

40. Article 1.3 of Agreement No. 9929 as originally approved and now in effect authorized the parties to supply conventional vessel tonnage to the "joint service as their owned or chartered vessels are available," with the view to offering up to three sailings per week from both the U.S. Gulf and South Atlantic ranges. Article 1.5 of the current Agreement No. 9929 authorizes the parties to offer "[s]upplementary space on conventional vessels of the parties . . . to the extent deemed necessary by the parties and required by the trade." These two provisions were combined in Article 1.2 of Agreement No. 9929-5, providing

that the parties "will use supplementary space on their owned and chartered conventional vessels as needed."

41. The conventional-vessel service of proponents has provided (and will continue to provide) a regular direct service for shippers of out-size, heavy-lift and other unusual cargoes between outports not receiving adequate or direct service by other lines.

42. Article 3.4 of Agreement No. 9929–5 provides that each of the proponents may maintain separate conference and rate agreement membership, but that the votes exercised by proponents in such agreements shall not be greater than that which may be accorded to a single member of such agreements.

43. Article 4.3 of Agreement No. 9929 as originally approved and now in effect requires that: (a) any individual party terminating the Agreement do so on two-year's written notice; (b) such notice could in any event be given for approximately three years subsequent to the date of the filing of the Agreement with the FMC; (c) a party terminating the Agreement individually could not operate its LASH vessel in the trade covered by the Agreement for a period of five years commencing from the date of notice of termination; and (d) during such five-year period the non-terminating party had the right of first refusal in the event the terminating party wished to sell its LASH vessel. Article 3.2 of Agreement No. 9929–5 provides only that a party, terminating the Agreement unilaterally, provide two-years' written notice to the remaining parties.

44. In the event Agreement Nos. 9929–5 or 10266 were terminated other than by mutual assent, the remaining party(ies) would have to undertake extensive preparations (in terms of obtaining suitable vessels, necessary equipment, port and marketing arrangements) prior to actual termination in order to be able to continue operations without disruption of service.

45. A requirement that Agreement No. 10266 remain effective only so long as Agreement No. 9929–5 was effective would also require that, prior to a mutual termination of Agreement No. 9929–5, the parties to Agreement No. 10266 would either each have to undertake development of new marketing organizations or seek approval of a further amendment to Agreement No. 10266 allowing for its operation beyond termination of Agreement No. 9929–5.

46. Where a marketing representative is jointly appointed by two or more steamship lines, the representative is responsible for soliciting cargo on behalf of the jointly-appointing lines. In so doing, it is not feasible for the representative to allocate to one or the other of the appointing lines individually particular cargoes solicited on their joint behalf. Conversely, since any cargo booked on the vessels of the appointing lines is booked on their joint behalf, it is not possible to allocate expenses in connection with the movement of particular cargoes to one or the other of the appointing lines.

47. If offered individually by the three proponents, the type of service contemplated by Agreement No. 9929–5 would require three fleets of five vessels of 1,000 TEU's each. The four Omni vessels to be employed in the coordinated container service specified by the subject Agreement are owned by one of the proponents who, absent the Agreement, would likely employ these vessels (with one or two additional compatible ships) in a service similar to that contemplated by the Agreement. The remaining proponents each have long histories of service

to this trade and would, absent the Agreement, undertake to maintain their presence with some combination of additional vessels and/or revised itineraries of other vessels which would enable them to serve this trade.

48. Many shippers and port interests rely on the LASH, conventional and container service offered by Combi Line and support approval of the services to be offered by proponents per the subject Agreements because: (a) they have had favorable experience with the reliability of the Combi Line container service, including the availability of specialized equipment; (b) the Combi Line LASH and conventional services have facilitated the movement of outsized cargoes between outports in this range; (c) the direct services offered by proponents have proved a preferable alternative to minilandbridge services in terms of reliability and minimizing overhead; (d) the presence of the services offered by proponents will avoid shortages of container capacity such as those experienced in this trade in 1974 and will add to the number of competing liner services available in this trade; and (e) in the case of the Port of New Orleans, approval of the Agreement will increase utilization of the expensive container facilities constructed by the Port and augment service between New Orleans and Western Europe, which accounts for the largest share of all cargo moving through the Port.

DISCUSSION

Section 15 provides, in pertinent part:

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

As the terms of the subject Agreements now stand, they are not discriminatory vis-a-vis proponents and competing carriers. Five of the issues noted by the Commission in its Order of Investigation pertain to the impact of the then-subject Agreements upon other carriers. These are: (a) overtonnaging; (b) the creation of excess market power; (c) unfair advantage for the proponents in conference affairs; (d) the "open-ended" authority to charter supplementary conventional vessels; and (e) definition of the operational relationship between the LASH and container services. The terms of the Agreements as revised and the evidence of record establishes that approval would not have a "discriminatory or unfair" impact upon carriers in the trade.

(a) "[W]hether approval . . . will enable the parties to offer a viable container service without overtonnaging the trade, as the proponents claim, or whether the trade is already overtonnaged and will be made more so by approval of the Agreements, as the protestants claim . . . ."

This issue was directed to the provision of Agreement No. 9929-2 whereby proponents would have placed in the trade up to six, 1,500 TEU vessels, operating on a weekly frequency. As set out in Agreement No. 9929-5, however, proponents will lift in the U.S. trades not more than 800 TEU's weekly on an overall trade basis, with further specified limitations for South Atlantic container traffic.

It is anticipated that the operation now proposed will enable proponents to offer a "viable container service" and, with the limitations on capacity incorporated into Agreement No. 9929–5, protestants have withdrawn their previous opposition to approval on the grounds of overtonnaging. Proponents' witness Rugan and Hearing Counsel's witness Ellsworth analyzing current levels of capacity and traffic in the U.S. Gulf/Europe trade concluded that there does not presently exist in this trade the severe disequilibrium between capacity and cargo which is associated with overtonnaging, and that the capacity which would be employed under Agreement No. 9929–5 will not bring about such a disequilibrium.

No party to this proceeding opposes approval of the subject Agreements on the basis of potential overtonnaging, and the record establishes that the container capacity proposed in Agreement No. 9929–5 will not, by reason of creating an overtonnaged situation or otherwise, have a discriminatory effect upon other carriers. Hearing Counsel's economic witness, Mr. Copan, also testified that approval of the subject Agreements will not create an overtonnaged situation in this trade.

Upon approval of the subject Agreements, "Combi Line" will only be the ongoing joint LASH service offered by the proponents. The two subject Agreements will act to separate the present joint Combi Line container service into two independent entities, the container service marketed by Hapag-Lloyd and that marketed by ICT and CGM. This is not simply an elevation of form over substance. Witnesses for the lines explained that a principal basis for the subject Agreements was to allow independent competition between these two marketing organizations in the container service market, and the terms of Agreement No. 9929–5 clearly preclude the pooling of expenses and revenues among the parties to the container service portion of the Agreeent. Thus, reference to prospective market shares upon approval of the subject Agreements must take into account that approval will act to diffuse present market shares.

Approval of the Agreements will result in a change of less than one percent in the market shares of all other carriers, but will mean that ICT/CGM and Hapag-Lloyd, respectively, will be the fourth and fifth largest carriers in the trade, in comparison to the present position of the Combi Line *joint* service as the largest operator, overall, in this trade.

(b) "[W]hether approval of the Agreements will strengthen the competitiveness of the LASH service and will make the parties more competitive among themselves with respect to the container service, as the proponents claim, or whether approval will give the parties excess market power and will create severe and dangerous competitive pressures on the other lines in the trade, as the protestants claim . . . ."

Within the framework of the terms of the subject Agreements as now revised, protestants no longer claim that approval will afford proponents "excess market power" and that approval "will create severe and dangerous competitive pressures."

Proponents' affirmative claim that the subject Agreements will result in increased competitiveness of their respective services is supported by the record. The LASH service will, in terms of capacity and frequency, remain unchanged from present levels. CGM would be added as a party to the ongoing Combi Line *joint LASH service, but only to the extent of its capital contribution to that* service. Agreement No. 9929-5 includes the possible employment of a LASH feeder service, to which CGM would contribute, but such a feeder service would only implement the movement of LASH cargoes to/from the two European ports currently served by the Combi Line LASH service. Even if one of these calls were eliminated by the feeder service, the resulting "increase" in LASH capacity would be one-third of one additional sailing annually for each of the two LASH vessels. Thus, the "competitiveness" of the LASH service, in terms of capacity and frequency of service, would in effect remain at the *status quo,* although a feeder service could facilitate for shippers and consignees the movement of LASH cargoes. In short, a better LASH service could be provided without adverse impact on carriers competing with Combi Line.

As to increased competition in the market for container services, witnesses for the proponents explained that the basis for establishing separate marketing organizations as between Hapag-Lloyd and ICT and CGM was, in contrast to the system presently in effect, to permit the parties to increase their respective identities in the market place and to allow each organization to market container service in all geographic areas within the scope of the subject Agreements. Agreement No. 9929-5 will lead to the creation of two container services (instead of the single Combi Line joint container service at present) marketed on an independently competitive basis. Moreover, Agreement No. 9929-5 does not, like the Agreement presently in effect, call for the pooling of revenues and expenses among the parties. This Agreement allows only for the cross-chartering of container slots on the vessels of the respective proponents. Thus, the subject Agreements have as their purpose the separation of proponents' container services and placing the two marketing organizations on a competitive footing both as between themselves and among other carriers in the trade. Finally, considering that the impact of these two marketing organizations will be spread over the limited amount of capacity specified in Agreement No. 9929-5, approval of the subject Agreements will serve to diffuse substantially the present market share of Combi Line as the largest carrier in the trade, thus precluding the creation of "severe and dangerous competitive pressures on other lines in the trade."

(c) "[W]hether a restriction should be placed on the open-ended provision in Section 1 (the LASH section) of Agreement No. 9929-2, which permits the parties to charter supplementary space on conventional vessels as such space is needed . . . ."

As explained in the direct testimony of witness Thiede the question of "open-ended" chartering authority proceeded from a combining of two provisions of the original Agreement No. 9929 into one provision of the Agreement first made the subject of Docket No. 77-7. That is, Article 1.3 of the original Agreement authorized the parties to supply conventional vessels to the "joint service as their owned or chartered vessels are available" and contemplated the parties offering up to three sailings per week from both the U.S. Gulf and South Atlantic ranges. Article 1.5 of the original Agreement further provided that the parties were to offer "[s]upplementary space on the conventional vessels of the parties . . . to the extent deemed necessary by the parties and required by the trade." In drafting Agreement No. 9929-2, however, the pertinent portions of original Articles 1.3

and 1.5 were combined in a new Article 1.2, which provided that the parties would "charter supplementary space on conventional vessels as needed."

While this wording could have been read to encompass "open-ended" authority for chartering conventional vessel space, even on ships of outside carriers, it was the intent of the parties only to allow for continuation of the Combi Line conventional vessel service authorized by the terms of the original Agreement No. 9929. To clarify this intent, proponents in Agreement No. 9929–5 revised the pertinent wording of Article 1.2 to provide that the parties "will use supplementary space on their owned and chartered conventional vessels as needed."

Thus, Agreement No. 9929–5 makes clear that the proponents do not seek new authority with respect to conventional vessel service, and seek only to continue to provide a regular, direct breakbulk service for shippers of out-size, heavy-lift and other unusual cargoes between outports not receiving adequate or direct service by other lines. While Article 1.2 remains "open-ended," in terms of vessel number and capacity, it has not been suggested at any point in this proceeding that the conventional vessel service offered under terms essentially identical to Article 1.2 has had any negative effects upon other carriers in the trade. Thus, any restrictions upon conventional vessel service are unwarranted in view of the already-limited nature of this service.

(d) "[W]hether the separate voting provisions contained in Agreements Nos. 9929–2 and 10266 may result in unjust or unfair advantage to the parties in conference affairs . . . ."

The "separate voting" provisions of Agreements Nos. 9929–2 and 10266 have been eliminated from Agreements Nos. 9929–5 and 10266–2. Article 3.4 of Agreement No. 9929–5, to which no party objects, provides that each of the proponents may maintain separate conference/rate agreement memberships, but that their combined voting power in such agreements shall not exceed that afforded to single members, an arrangement which cannot afford proponents "unjust or unfair" leverage in conference matters.

(e) "[W]hether the Agreement No. 9929–2 should be modified to more precisely define the operational relationship between the joint LASH service and the coordinated container service . . . ."

Mr. Thiede testified that the lack of an "operational relationship" between the Combi Line LASH and Combi Line container services was one of the reasons for separating the present Combi Line operation into an ongoing joint LASH service and two container services marketed independently by Hapag-Lloyd and, under Agreement No. 10266, by ICT and CGM. As further explained by witness Thiede, in those instances where containers would be carried aboard the LASH or conventional vessels operated by proponents in this trade, such containers would be included in the capacity limitations set out in Agreement No. 9929–5. No party has suggested a further clarification of this "operational relationship" and none would appear warranted in view of the inclusive scope of the capacity limitations now incorporated into the subject Agreements.

The subject Agreements are not "unjustly discriminatory or unfair as between . . . shippers, exporters, importers . . . or between exporters from the United States and their foreign competitors"

None of the issues noted in the Commission's original Order of Investigation made any reference to a possible discriminatory impact upon shippers as a result of approval of the subject Agreements, and no such claim was raised at any point in this proceeding. Several U.S. shippers did, however, appear in this proceeding to testify on behalf of proponents, regarding the services provided by Combi Line and in support of the service proposed to be offered.

There has been no suggestion in this proceeding that the subject Agreements are discriminatory or unfair to importing or exporting shippers. There is testimony regarding the benefits to the shipping public resulting from approval of the subject Agreements.

The subject Agreements are not "unjustly discriminatory or unfair as between . . . ports

None of the issues raised in the Order of Investigation touched upon discrimination vis-a-vis U.S. Gulf and South Atlantic ports, nor has there been any claim in this proceeding that approval of the subject Agreements would have any discriminatory or unfair impact upon ports. Mr. Reed, Executive Port Director and General Manager of the Board of Commissioners of the Port of New Orleans, testified in support of the service to be offered by proponents. There is no evidence that the subject Agreements will have a discriminatory impact upon relevant ports.

The subject Agreements would not "operate to the detriment of the commerce of the United States," nor would they "be contrary to the public interest"

Apart from such matters as overtonnaging and the creation of excess market power, none of the 11 issues specified in the Order of Investigation dealt in direct terms with "detriment [to] . . . the commerce of the United States" resulting from approval of the subject Agreements. In considering the "public interest" criterion of section 15, the antitrust principles incorporated therein by the *Svenska* decision, as well as the evidence of "serious transportation needs" and "important public benefits" as hereinafter more fully discussed, the record supports the conclusion that the subject Agreements are not contrary to the public interest. Three of the issues specified by the Commission are related to the "public interest" criterion and are discussed in this context:

(a) "[W]hether Agreements Nos. 9929-2 and 10266 establish unnecessary restraints on individual termination (the Agreements require each party to give two years' notice prior to cancellation, and no notice can be given prior to December 31, 1979, in the case of Agreement No. 10266) . . . ."

Agreements Nos. 9929-5 and 10266-2 continue the provision requiring two-years' written notice of an individual termination, but eliminate the further restriction against giving such notice within a specified time period (longer than two years) from the date of the filing of the Agreements. The remaining termination provisions of the subject Agreements are a normal commercial practice (in fact carried over from the originally-approved Agreement No. 9929), necessary to avoid the severe disruption of the services of one or more of the parties in the event of an unexpected unilateral termination of the Agreements. Such a disruption would not be in the public interest in the maintenance of regular, stable liner services in this trade. The subject Agreements do allow for termination at any time by mutual assent of the parties, and Agreement No. 9929–5 further eliminates the restriction in the originally-approved Agreement against a party (terminating unilaterally) operating its LASH vessel in this trade for a period of five years, as well as the right of first refusal by the non-terminating party in the event the other party sought to sell its LASH vessel. Thus, the subject Agreements are less restrictive as regards termination than either the original Agreement No. 9929 or the Agreements first made the subject of this proceeding, retaining only a "restraint" constituting a reasonable commercial necessity.

(b) "[W]hether Agreement No. 10266 should be amended to make it clear that it shall exist only so long as the parties' relationship under Agreement No. 9929–2 is maintained . . . ."

As explained by witness Drabbe, the container service portion of Agreement No. 9929–5 (as well as No. 9929–2) was from the outset constructed by the parties to be only a rationalization plan allowing the three proponents to cross-charter space on their respective vessels employed in this trade. Agreement No. 10266 was constructed separately only as between ICT and CGM, and was entered into by those parties in view of their market positions independent of participation by those lines in Agreement No. 9929–5.

While the Commission did not in framing this issue specify the basis for its concern about the separate existence of the Agreements, proponents argue that a requirement that Agreement No. 10266 exist only so long as Agreement No. 9929 is also maintained would be contrary to the public interest. That is, except in cases where there was less than unanimous consent to terminate (invoking the two-year notice provision discussed above), they claim such a requirement could inhibit the parties' operation independent of Agreement No. 9929–5. As stated by witness Drabbe:

> For example, if the three parties mutually desire to cancel Agreement No. 9929–5, it could be the result of a decision to act independently of the cross-chartering provisions of that Agreement and have the two respective marketing organizations compete with each other independent of any agreement on vessel use. If, however, ICT and CGM were at the same time faced with the prospect of disbanding their arrangements under Agreement No. 10266 (requiring extensive preparation for new marketing representation or a new approval procedure before the FMC), this would at least require postponing a decision to operate independently of Hapag-Lloyd under Agreement No. 9929–5. Therefore, making the existence of Agreement No. 10266 dependent on the existence of Agreement No. 9929–5 could inhibit or prevent ICT and/or CGM from joining in a mutual decision with Hapag-Lloyd to act independently of Agreement No. 9929–5.

Thus it would appear, to the extent it can be said that antitrust principles, inherent in the public interest standard of section 15, are "infringed" by the rationalization plan of Agreement No. 9929–5, a requirement that Agreement No. 10266 be entirely co-existent with No. 9929–5 could act to forestall the parties' operation independent of that latter Agreement. Further, given the established principle that the Commission can at any time review operations under previously-approved agreements as part of its "responsibility of continuing surveillance over Section 15 agreements,"[9] there is no need to impose the restriction referred to in the Order of Investigation.

[9] *Mediterranean Pools Investigation*, 9 F.M.C. 264, 292 (1966).

(c) "[W]hether approval of the Agreements will result in rationalized use of vessels and container space, thus achieving substantial savings in fuel consumption, as the proponents claim, or whether this benefit is purely speculative since the parties are unlikely to institute individual container services in the event of disapproval of these Agreements, as the protestants claim . . . ."

Each of the proponents has a long history of liner service to the relevant trade. Hapag-Lloyd has offered service since 1865, ICT since 1912 and CGM since 1909. Proponents have chosen to maintain their commitment to direct, all-water liner service in this trade by the rationalization plan set out in Agreement No. 9929–5, but each of the proponents has indicated that, absent approval, they would individually seek by alternative means to maintain their services to this trade. The four, 950-TEU vessels to serve as the nucleus of proponents' rationalized service are owned by one of the proponents and the remaining proponents have considered possible alternative services, albeit at levels of frequency and regularity which are inferior to that proposed under Agreement No. 9929–5.

Absent approval, therefore, it is likely that considerably more capacity would be placed on berth (although not all in service patterns that are optimal for regular direct service to this trade) than the 800 TEU's[10] per week to be offered by the rationalized service. Thus, approval will result in the rationalized use of vessels and container space, not only achieving a substantial savings in fuel consumption but also avoiding the prospect of excess trade capacity. Such results would be in furtherance of the public interest and operate to the benefit of the commerce of the United States.

The subject Agreements would not "be in violation of the [the] Act"

While not framed in terms of actual or potential violations of other provisions of the Shipping Act, three issues set out in the Order of Investigation bear on matters related to interpretations of various provisions of the Act and/or have been considered issues of law for the purposes of this proceeding. These issues are:

(a) "[W]hether the addition of the words 'Scandinavia and Baltic' to the scope of Agreement No. 9929–2, and hence to Agreement No. 10266, constitutes an enlargement of the existing geographic scope of the basic Agreements, as the protestants claim, or whether the purpose of the addition is only clarification since Combi has served those areas since it commenced operations, as the proponents claim . . . ."

As originally approved by the Commission in 1971, the scope of the service authorized by Agreement No. 9929 was defined as between U.S. Gulf and South Atlantic ports "and United Kingdom/Eire ports and European Continental ports, excluding the Mediterranean . . . ." Thus, the European scope of the service was originally defined in the all-inclusive terms of "European Continental ports," with any exclusions (i.e., the Mediterranean) set out in specific terms. Pursuant to this authority, Combi Line from its inception continued service to the Scandinavian and Baltic ranges, which service had previously been offered by its

[10] The modified Omni vessels which will serve as the nucleus of the rationalized service will be of 950-TEU capacity, and, if employed in this trade individually by one of the proponents, would not be limited to the 800-TEU level specified in the Agreement (as well as the further limitation for South Atlantic cargo). Thus, even assuming that the remaining proponents would not individually offer service if the Agreement is disapproved, these ships alone could place on berth more weekly capacity than that called for in the subject Agreement.

constituent members. Combi Line service to this range was originally on a transshipment basis (except for direct calls on inducement), but since 1977 Combi Line has offered direct service with regular fortnightly calls of its containerships at Gothenburg. However, since this provision of the original Agreement No. 9929 also specified certain ranges (i.e., the United Kingdom and Eire) included within the scope, on drafting the revisions which became Agreement No. 9929–2 it was decided to clarify this provision by including reference to Scandinavia and the Baltic.

Reason supports the conclusion that "Scandinavia and Baltic" ports are included within the term "European Continental" ports. Inspection of a map shows that Scandinavia is part of Europe and that the Baltic is a European sea. The dictionary defines Scandinavia as a "region in N. Europe, including Norway, Sweden & Denmark and, sometimes, Iceland & the Faeroe Islands." and the Baltic Sea as a "sea in N. Europe, south & east of the Scandinavia Peninsula and west of the U.S.S.R., joining the North Sea."[11] Protestants no longer argue that such calls constitute an "enlargement" of the scope of service. There has been no evidence presented in this proceeding which could warrant precluding proponents from serving this integral part of the European range.

(b) "[W]hether approval of the Agreements should be conditioned upon the parties meeting all tariff filing requirements with respect to the foreign-to-foreign coordinated container service between ports in Mexico and ports in Continental Europe . . . ."

This issue apparently proceeded from certain language of Agreement No. 9929–2, which could have been construed as a request by proponents for section 15 approval of service between Mexico and Europe, and from proponents' memorandum of justification submitted with the filing of Agreement No. 9929–2, which referred to proponents' expectation that substantial portions of the 1,500-TEU vessels then planned for employment in this trade would be devoted to Mexico/Europe cargo. Protestants, in their comments and during the hearings, questioned the extent to which the carriage of such foreign-to-foreign cargo would affect the level of capacity employed in the U.S. trade.

The pertinent language of Agreement No. 9929–2, however, now has been clarified to reflect the parties' original intent to include only wayport service between Mexican ports and the U.S. Gulf and South Atlantic. Proponents will file appropriate tariffs covering the U.S./Mexico service. Further, the earlier perceived possibility of shifting "excess" capacity in the Mexico/Europe trade to the U.S. Gulf and South Atlantic trade has been obviated by the reduced capacity of the vessels now to be employed and by the inclusion in Agreement No. 9929–5 of the 800-TEU limitation on liftings from U.S. ports, which limitation would include containers loaded or discharged at U.S. ports regardless of their origin or destination outside the U.S. Gulf or South Atlantic range.

(c) "[W]hether approval of the Agreements should be conditioned upon deletion or limitation of authority in Agreement No. 9929–2 for the parties to provide LASH service on a transshipment basis to or from ports outside the geographic scope of the Agreement."

This issue has been resolved by the deletion in Agreement No. 9929–5 of authority to provide LASH transshipment service "to/from any other port" outside the scope of the Agreement.

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[11] *Webster's New World Dictionary of the American Language, Second College Edition*, at pp. 1270, 108, respectively.

For all the foregoing reasons it is concluded that the subject Agreements will contravene none of the criteria for disapproval set out in section 15 and that the current terms of the Agreements as well as the evidence of record resolve favorably the 11 issues set out in the Commission's original Order of Investigation.

Agreements Nos. 9929-5 and 10266-2 are subject to the Svenska standards

Proponents argue that approval of the subject Agreements is not governed by the standards approved by the Supreme Court in *FMC v. Svenska Amerika Linien,* 390 U.S. 238, 243-246 (1968), which require that in order to be approved, an agreement must be shown to be required by a serious transportation need, necessary to secure important public benefits or necessary to achieve a valid regulatory purpose of the Shipping Act. Proponents' position is without merit. Both Agreement No. 9929-5 and Agreement No. 10266-2 represent commercial arrangements which are significantly anticompetitive and thus contrary to the antitrust laws. Shipping Act immunity for these arrangements should be granted, therefore, only upon a showing that immunity is justified under the *Svenska* standards.

With respect to Agreement No. 9929-5, this Agreement represents an arrangement whereby three shipping lines are agreeing to limit "production" in a particular market, that is, cargo capacity in the U.S. South Atlantic and Gulf/North Europe trade. The proponents' preferred phrase is "rationalization of vessels and container space." By either label, such a practice represents an effective division among the three proponents of cargo moving in that trade. Such a horizontal market division represents a *per se* violation of section 1 of the Sherman Act. *Addyston Pipe and Steel Co. v. United States,* 175 U.S. 211, 244-245 (1899); *Citizen Publishing Co. v. United States,* 394 U.S. 131, 135-136 (1969). Agreement No. 9929-5 also contains authority for the three proponents to fix prices in certain circumstances. Price-fixing is another *per se* violation of section 1 of the Sherman Act *United States v. Trenton Potteries Co.,* 273 U.S. 392 (1927). Proponents try to limit the application of the *Svenska* standards to ratemaking by conferences. But price-fixing is illegal *per se* whether undertaken by three parties, as here, or by thirty-three. The test for *per se* illegality is not whether proponents can control rates throughout the trade, but whether their agreement interferes with "the freedom of traders and thereby restrain[s] their ability to sell in accordance with their own judgment." *Kiefer-Steward Co. v. Joseph E. Seagram & Sons,* 340 U.S. 211, 213 (1951). Nor does the fact that Agreement No. 9929-5 represents an extension of ratemaking authority previously approved by the Commission remove the Agreement from the *Svenska* standards. Each extension of ratemaking authority must be shown to meet the same *Svenska* standards of approval, as the Commission's Order in Canadian-American Working Arrangement, 16 SRR 733 (FMC, 1976), makes clear.

With respect to Agreement No. 10266-2, Article 4 of that Agreement states that ICT and CGM will "share in and contribute to any and all revenues and expenses incurred by the parties collectively." Such a division of revenues is another way of dividing a market, and is again a *per se* violation of section 1 of the Sherman Act. See *Citizen Publishing Co. v. United States,* 394 U.S. 131 (1969). Even if Agreement Nos. 9929–5 and 10266–2 did not contain provisions *per se* unlawful, the facts of this case could support a finding that the Agreements are sufficiently restrictive of competition to be required to meet the *Svenska* standards.[12]

It is clear that the three proponents would, absent these Agreements, maintain their long presence in this trade, individually if necessary. Individual service would, of course, be more competitive than the combined services proposed in the Agreements. Hence, the Agreements substantially reduce the level of competition both among the proponents and in the U.S. South Atlantic and Gulf/Europe trade in general. Hapag-Lloyd, ICT, and CGM are all long-established or descendants of long-established shipping companies which operate world-wide. They all have substantial resources which can be deployed to assist their cargo-carrying ventures; these include a multitude of subsidiary and affiliate companies, some of which already assist the European end of the Combi Line service. Any combination between such enterprises must be scrutinized carefully before given antitrust immunity; they must meet the standards of *Svenska* before they are approved under section 15.

Svenska Criteria

The *Svenska* test is framed in the disjunctive, i.e., proof of either serious transportation need, *or* important public benefits *or* furtherance of a valid regulatory purpose. As more fully set forth hereafter it is concluded that the uncontraverted evidence of record demonstrates that the Agreements should be approved under all three parts of the *Svenska* formulation.

1. "Serious transportation needs."

(a) The need to employ more efficient container vessels.

The four containerships which have been employed in the Combi Line container service were originally constructed as conventional breakbulk vessels, equipped with on-board cargo handling gear, and had an underdeck bale cubic capacity of 800,000 cubic feet (exclusive of gear), plus additional on-deck carrying capacity. To optimize their cargo carrying capacity as containerships, these ships underwent certain modifications, but their maximum capacity as presently configured is only 420 TEU's. Thus, Combi Line has been operating ships designed with an 800,000-plus bale cubic capacity but with an inherent limitation on effective capacity of roughly half that amount.

This inherent inefficiency is underscored by the fact that, despite utilization factors averaging better than 90 percent in both directions from the fourth quarter of 1976 through the second quarter of 1978, the Combi Line container service incurred substantial losses. Thus, there exists a serious transportation need to place this service on a viable footing, which proponents propose to do by further modification of these vessels to bring their capacity to approximately 950 TEU's

[12] ". . . the fact that a given practice is considered under a rule of reason, rather than as a *per se* violation, does not mean that the dangers to competition in any particular circumstance are necessarily lower; clearly, certain practices which are not *per se* violations may, depending upon the facts of the particular case, restrict competition more severely than would *per se* restraints." *United States Lines, Inc. v. FMC,* 584 F. 2d 519, 15 SRR 411, 423, n. 31 (D.C. Cir., July 28, 1978).

(while maintaining the same operating speed and fuel and manning requirements, with the number of vessels sufficient to offer the weekly service (at least to/from U.S. Gulf ports) which is a competitive necessity in this trade.)[13]

(b) The need for CGM's participation in the rationalized container for LASH services.

CGM, like the other two proponents, has a long history of liner service in this trade, having served the trade since 1909. In 1970 CGM became a party to FMC Agreement No. 9091 with Armement Deppe and Ozean Stinnes by which these parties operated the "UniGulf" service, an eastbound conventional vessel service from U.S. Gulf ports to Europe. CGM saw the rapid development of containerization in this trade and wished to modernize its service, but also saw a serious transportation need to undertake this modernization in connection with a rationalized service.[14] As explained by witness Mirobent:

> It was, however, necessary for us to consider several factors in connection with starting such a service. Given: (a) the substantial investment involved in building a fleet of modern containerships of a sufficient number to offer the weekly service necessary to be comparable to those already offered by the established container operators; (b) the difficulties usually involved in chartering a fleet of ships with the necessary compatibility to offer such a service; and (c) the fact that placing an entire new such fleet into this trade could have led to a situation of excess capacity, CGM wished to participate in some sort of rationalized service in order to offer a containerized operation to this trade.

CGM also would participate in the ongoing LASH service, but only to the extent of any future capital contributions thereto, and the only new capital expenditure presently envisioned is the possibility of instituting a LASH feeder service to operate in European waters. No such specialized system is presently offered in this trade, and, in view of the already substantial capital investment by Hapag-Lloyd and ICT in the LASH service, CGM's participation in and contribution to this service will serve serious transportation needs by facilitating the development of such a feeder system should it prove technically feasible.[15]

(c) The need to separate the present Combi Line joint container service.

Termination of the joint Combi Line container service also is prompted by serious transportation needs related to coverage of and identity in the relevant market. That is, Article 3.2 of Agreement No. 9929 as presently in force requires that any marketing of this service be undertaken by jointly-appointed representatives for the Combi Line service, not the individual constituent lines. Article 3.2 further specifies in geographic terms that ICT is to act as general agent for the joint service in Belgium, Holland, Luxembourg and Switzerland, that Hapag-

[13] See Ex. 41 at 15-16, where, in response to an issue framed in the Commission's Order of Investigation, witness Thiede explained:

> A "viable container service" in this trade must meet two basic requirements. First, it must be of a weekly frequency in order to remain competitive with the various weekly all-water and minibridge services. Second, such a service must utilize suitably efficient vessels in order to place the service on an economic footing. Under the proposed Agreement No. 9929–5, the parties and both marketing organizations will be able to offer weekly capacity at least in the U.S. Gulf portion of the trade, and, as described above, the modifications to the Omni vessels will avoid the inefficiencies inherent in their use as full containerships in their present configuration. Therefore, this Agreement should enable the parties to offer a "viable container service."

[14] Witness Mirobent pointed out that CGM's "partners in the UniGulf service did not wish to undertake in the near future the conversion from breakbulk to container service in this trade" [Ex. 43 at 5], and, as noted by witness Thiede, Hapag-Lloyd and ICT viewed CGM's participation favorably because, *inter alia*, "it had been obvious for some time that Combi Line container service needed to be improved. This meant the commitment of new tonnage to the trade [and] [a] third partner to share the risks in any such improvement plan made sense from a rationalization viewpoint." Ex. 41 at 11-12.

[15] Development of such a system is still in the discussion stage, but CGM's participation at this point is, as explained by witness Thiede, necessary to avoid revising preliminary planning for such an undertaking.

Lloyd act as general agent for the joint service in Germany and Austria, and that in all other countries the joint service is to appoint common representatives.

This arrangement has led to two marketing difficulties. First, Hapag-Lloyd and ICT (the latter in a service in which CGM is also a participant) are direct competitors in the North Atlantic trade and have established marketing outlets for those services. However, for U.S. Gulf and South Atlantic cargo of North Atlantic shippers of the respective lines, the geographic divisions of Article 3.2 require in certain areas that the one line refer its shippers to the other, competing line for movement via Combi. Second, the requirement of Article 3.2 that *any* marketing (whether by the constitutent lines or appointed agents) be undertaken on behalf of the Combi Line joint service has precluded the lines from identifying themselves in the market with service to the U.S. Gulf and South Atlantic.

Separation of the present joint container services into two independently-marketed services will thus meet the need to correct the marketing "overlap" which developed under the present Agreement and will allow the respective lines to develop their identities in the market.

(d) The need to rationalize the container fleet of the proponents.

Continued rationalization of the vessels and container capacity to be employed in these services will further meet serious transportation needs in connection with what had been the principal disputed issue in this proceeding, the possibility of overtonnaging. The capacity limitations incorporated into Agreement No. 9929–5 have obviated protestants' continiued opposition to approval on the grounds of excess capacity, and witnesses for both proponents and Hearing Counsel concur in the conclusion that the trade will not be overtonnaged as a result of the capacity to be employed. While it is not possible to develop a precise level of capacity proponents would employ in the trade individually absent approval, each of the proponents would undertake to retain their longstanding presence in the trade (but, in some instances, with services less desirable for the trade in terms of frequency and regularity), and the capacity of the ships, owned by one of the proponents, would, if operated independently, alone be greater than the capacity limitations set out in Agreement No. 9929–5. Thus, approval of the Agreement will serve the serious transportation need of avoiding the possibility of the destabilizing conditions which can occur in an overtonnaged trade.[16]

(e) The need for ICT and CGM to rationalize their marketing activities.

The rationalization of marketing activities called for in Agreement No. 10266–2 also is necessitated by serious transportation needs. As explained by witnesses for ICT and CGM, those lines are, vis-a-vis Hapag-Lloyd and other established operators, newcomers insofar as marketing in this trade is concerned. CGM has never offered a container service in this trade, and ICT did not form its marketing organization until 1975. Absent Agreement No. 10266, each of the lines would be left to market the capacity respectively allocated to them by the terms of the limitations set out in Agreement No. 9929–5. Within those limitations, however, ICT and CGM would be left in an untenable position upon entering this market. As explained by witness Drabbe:

[16] The Commission's thorough report in the *Mediterranean Pools Investigation*, 9 F.M.C. 264, 291 (1966), remains a leading study of the results in an overtonnaged trade "where malpractices flourish, rate instability exists and competition is wasteful and destructive . . . ."

. . . *assuming at best that, as an internal matter among the three parties, ICT were to be allocated* 40 percent of the slots available on the ships operated under Agreement No. 9929-5 and CGM 20 percent, these two lines would have respectively a total of 320 and 160 TEU's weekly for U.S. Gulf and South Atlantic cargo. With further limitations for its South Atlantic cargo, this would leave a very small amount of capacity available for the South Atlantic part of the trade. Taking first ICT's position without Agreement No. 10266, because of the mix of 40-foot and 20-foot containers, our 320 TEU's would mean on average only a total of approximately 200 boxes. However, considering that these ships will probably serve five ports on each side of the trade, producing 25 port pairs, this would give ICT itself an average of only eight boxes per port pair. One also must bear in mind the need to have some diversification in equipment, such as 20- and 40-foot dry vans, open-top and reefer containers, tank containers, flat racks, etc. Thus, were ICT alone marketing the capacity available, the overall capacity limitations in Agreement No. 9929-5 would be such that finding a competent agent who could be expected to develop the market with such small amounts of capacity available, as well as the difficulty of making necessary equipment available against such limited capacity, would be commercially undesirable and perhaps impossible, particularly in the South Atlantic where even further limitations apply. For CGM, with only 160 TEU's weekly, the same considerations would apply but with greater force.

Additionally, to implement a joint marketing venture such as Agreement No. 10266, there is a serious transportation need for the constituent lines to pool revenues and expenses. That is, in order that the services of both parties be marketed by all outlets to be employed, proponents claim it is necessary that these marketing organizations be jointly appointed to represent both ICT and CGM. In the course of such representation, it is impossible for the marketing organizations to allocate to one or the other of the principals cargoes (of varying ocean freight rates) solicited on their joint behalf. The converse applies with respect to expenses incurred in connection with the transportation of such cargoes, and it is therefore necessary that Agreement No. 10266 include a provision for the sharing of revenues and expenses.

Approval of the subject Agreements will thus meet serious transportation needs by: (1) allowing proponents to improve the fleet of inherently inefficient ships presently operated in the Combi Line service, thus placing proponents' container service to this trade on a more viable footing; (2) permitting CGM to offer a regular, direct container service in this trade, without the prospect of excess capacity, as well as to contribute to implementation of a LASH feeder service; (3) eliminating the restrictions in the present Agreement No. 9929 both with respect to geographic limitations on the respective proponents' participation in marketing container service and the limitation to marketing only on a joint service basis; (4) rationalizing the amount of tonnage to be placed on berth, thereby avoiding the prospect of overtonnaging the trade; (5) separating the present joint Combi Line container service into two independently marketed services, and, under Agreement No. 10266, placing the services jointly marketed by ICT and CGM on a reasonably competitive footing vis-a-vis Hapag-Lloyd and other operators in this trade.

2. "Important Public Benefits."

(a) Providing additional container capacity to the trade.

Since the Combi Line service was first formed in 1971, the liner trade in question has experienced a rapid movement toward containerization. Moreover, as reflected by current utilization data of container operators in this trade, shipper demand for container space has continued at very high levels. Thus, improvement of the container service heretofore operated per Agreement No. 9929 will serve an important public benefit by making available additional container capacity needed by shippers in this trade.

(b) Continuing to provide conventional service.

Similarly, continuation of the conventional vessel service offered under Agreement No. 9929 will ensure regular, direct breakbulk service for shippers of out-size, heavy-lift and other unusual cargoes between outports not receiving adequate or regular, direct service by other lines. This service has proved to be a valuable one to shippers in this trade, and its continued operation will thus serve to maintain the important public benefits derived from this service.

(c) Increasing carrier participation in the trade without excess capacity.

CGM's participation in Agreement No. 9929–5 will permit this line's entry into the market for container service in this trade, but, through the rationalized service contemplated by that Agreement, will avoid the prospect of overtonnaging as a result of its entry. In connection with approval of another rationalization agreement, the Commission has made clear the important public benefits inherent in maximizing carrier-participation without excess capacity [*Agreements Nos. 9178–3 & 9731–5*, 16 SRR 1553, 1567 (FMC 1976)]:

> 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 . . . .

Additionally, CGM's participation in the LASH service will not add to the capacity offered by that service, but will serve an important public benefit by assisting in the development of a LASH feeder service that would facilitate the movement of LASH cargoes in this trade.

(d) Increasing the level of competition in the container service market.

Through the "Co-ordinated Container Service" portion of Agreement No. 9929–5 and the formation of Agreement No. 10266, there will be substituted for the present joint Combi Line container services two independent, competitively marketed container services, a development serving important public benefits by giving shippers a wider choice of transportation alternatives than at present. The rationalization of container space per Agreement No. 9929–5 does not allow for the pooling of revenues and expenses among the three proponents, as contrasted to the present Agreement, and is thus an arrangement more competitive vis-a-vis these lines and other operators in this trade. Approval of the subject Agreements will therefore have a favorable impact upon competition in this trade and will thus serve the important public benefits inherent in increasing the level of competition in the relevant market, while avoiding the prospect of instability in the trade which could result from overtonnaging.

3. "Furtherance of a Valid Regulatory Purpose of the Shipping Act.

There is no precise definition of the term "valid regulatory purpose" in the Shipping Act or its legislative history, or in the legislative history of the 1961 amendments to the Act, or in Commission or court cases related to the Shipping Act. It is fair to say, however, that the objectives, set forth in the recommenda-

tions in the Alexander Report[17] *and in reports of the Commission, concerning the* proper function of section 15 provide appropriate parameters to the "valid regulatory purposes" here to be considered. These include: (a) regular and frequent service to shippers; (b) trade stability; (c) prevention of overtonnaging; (d) participation by a sufficient number of carriers to provide competition in a trade; (e) maintenance of specialized services to meet the needs of the trade; and (f) economy in the cost of service.

(a) Regularity and frequency of service.

The Alexander Report characterizes regularity and frequency of service as an advantage that is said to result from agreements and conferences.[18] Agreement No. 9929-5 will allow national-flag lines of France, Germany, and the Netherlands to provide regulary weekly service in the trade between the U.S. Gulf and Europe, a level of service seen as optimum in this trade.[19]

(b) Trade stability.

The Alexander Report emphasized that, unless trades were stabilized, competitors would be driven out by rate wars, and the carriers which remained in the trade ultimately would have to increase rates to recoup rate war losses.[20] Agreement No. 9929-5 will help to stabilize the trades between U.S. Gulf and South Atlantic ports and ports in Europe by preventing overtonnaging. If each of the three parties to Agreement No. 9929-5 were to supply the tonnage necessary to provide its own weekly sailings, a large amount of additional capacity would have to enter the trade.[21] The Agreement permits its three member lines each to offer weekly sailings with a single fleet of vessels.

(c) Prevent overtonnaging.

Measures to remedy or foreclose the development of overtonnaged liner trades is another valid regulatory purpose of the Act, as the Commission has recognized in its decisions dealing both with matters such as tradewide pools[22] and rationalized service agreements.[23] As shown above, Agreement No. 9929-5 is designed to allow proponents to provide weekly container service without overtonnaging the trade.

(d) Maximizing carrier participation in the trade.

One of the purposes of the Shipping Act is to encourage participation by a sufficient number of carriers to maximize competition in a trade. This was confirmed in *Agreements Nos. 9718-3 and 9731-5,* 16 SRR 1553, 1567 (FMC 1976), where the Commission held that the agreements there in question

[17] The Committee's recommendations were designed to secure the advantages seen "as resulting from agreements and conferences if honestly and fairly conducted, such as greater regularity and frequency of service, stability and uniformity of rates, economy in the cost of service, better distribution of sailings, maintenance of American and European rates to foreign markets on a parity, and equal treatment of shippers through the elimination of secret arrangements and underhanded methods of discrimination." *House Comm. on the Merchant Marine and Fisheries, Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade,* 63d Cong., 2d Sess. (Vol. 4) 416 (1914) (hereinafter cited as *Alexander Report*). While the Alexander Report primarily relates the advantages it discusses to tradewide agreements, they are no less advantageous when derived from other kinds of section 15 agreements.

[18] See *id.*

[19] See Ex. 41 at 15-16; Ex. 43 at 4; Ex. 46 at 27.

[20] See *Alexander Report* at 416.

[21] See Ex. 45 at 2-4, 8-9, 11-12; Ex. 46 at 27-28.

[22] See, e.g., *Mediterranean Pools Investigation,* 9 F.M.C. 264 (1966).

[23] See, e.g., *Agreements Nos. 9718-3 and 9731-5,* 16 SRR 1553 (1976).

"tend[ed] to ameliorate the overtonnaging problem in the [relevant] trades and tend[ed] to keep a high number of common carriers in those trades." Both results were found by the Commission to be "beneficial to the public, and [to] outweigh the anticompetitive effects of these agreements, demonstrated on this record, sufficiently to justify the continued implementation of these agreements . . ."

By permitting the three proponents (including CGM, a new entrant in the container market) to rationalize their container operations so as to maintain a weekly frequency of service, and by separating the present joint container service framework to allow for two competitively-marked outlets for each service, the subject Agreements are in furtherance of this regulatory purpose.

(e) Maintenance of specialized services.

Encouraging services that are tailored to meet the needs of shippers is another valid regulatory purpose of the Act, as the Commission has long recognized, particularly in connection with the development of innovative transportation systems.[24] Agreement No. 9929–5 will allow its member lines to offer additional container service which is needed by the trade,[25] maintain the conventional services which are now utilized by shippers, and improve the LASH service by a possible feeder operation.[26] The conventional services, particularly, are tailored to meet the needs of shippers on routes that are not served by the container carriers and to carry cargoes that are not carried as efficiently by containerships or LASH vessels.[27]

(f) Economy in the cost of service.

Economy in the cost of service is an advantage set forth in the Alexander Report[28] and "the Commission has often recognized that the financial soundness of carriers serving the commerce of the United States is a necessary consideration [under the Act] because carriers are the 'instrumentalities' of that commerce."[29] It is plain from the record that a financially sound service cannot be provided with the existing container vessels operated by Combi Line.[30] Approval of Agreement No. 9929–5 will enable the proponents to utilize efficiently the same kind of

[24] See, e.g., *Disposition of Container Marine Lines*, 11 F.M.C. 476 (1968), where, in dealing with the propriety of an early intermodal through tariff, the Commission noted (11 F.M.C. at 482-83):

> . . . [the] Commission need be ever mindful of its responsibilities as a body to which Congress has delegated certain responsibilities. The exercise of that delegated authority was intended by Congress, and must be interpreted by us, to be performed in the most judicious manner in our quasi-judicial capacity and in our best discretion. The administration of the Commission's duties requires flexibility of action and purpose when necessary and possible.
>
> The determination of the issues in this proceeding will have far-reaching importance. Traditional methods of transporting cargo are rapidly being replaced by the growth of new techniques and transportation systems. The Federal Maritime Commission has not been unmindful of these developments and has sought to facilitate, wherever possible, the implementation of improved shipping systems. In the Order of Investigation in this proceeding the Commission stated that it "does not wish to discourage the inauguration of any transportation services which might be of great benefit to shippers." It is in accordance with that injunction that the Commission must arrive at its decision herein.

[25] Witnesses Thiede and Rugan testified as to the present demand for additional container capacity in the U.S. Gulf/Europe trade. See Ex. 41 at 8 and n. 2; Ex. 44 at 6-10.

[26] Witness Thiede also discussed the potential benefits of the LASH feeder service. See Ex. 41 at 18-19.

[27] See Ex. 13 at 36-39, 40-41.

[28] See *Alexander Report, supra*, at 416.

[29] Docket No. 76–14, *Agreement No. 10116–1–Extension of Pooling Agreement*, slip opinion at 54 (Initial Decision, served November 21, 1978). Judge Kline in his opinion here cites *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).

[30] See Ex. 41 at 4-9, wherein witness Thiede explains the inherent operating inefficiencies of the Combi Line container vessels in their present configuration.

vessels with substantially the same vessel operating costs and fuel consumption but modified to transport more than twice their present container capacity on each sailing.[31] The capacity increase which will co-exist with Agreement No. 9929-5 will enable proponents' container vessels to operate on a more cost-efficient basis and place proponents' respective container services on a more viable financial footing.

Moreover, as already noted, the container vessels the proponents intend to operate in the trade will be modified to carry more than double their present capacity, but with approximately the same fuel consumption, thus reducing fuel consumption per container mile with these ships as well as conserving the fuel which would be used if proponents could not operate with the benefit of this vessel rationalization plan.[32]

It is, therefore, concluded that Agreement No. 9929-5 will be in furtherance of valid regulatory purposes of the Shipping Act.

The "Antritrust Implications" of the Subject Agreements Call For Their Approval Under Section 15

The Court of Appeals in *United States Lines, Inc. v. FMC*, 584 F.2d 519, 15 SRR 411 (D.C. Cir. 1978), held that the principles underlying section 15 required Commission consideration of the "antitrust implications" of all agreements submitted for approval, not only those constituting *per se* violations and considered under what the Court characterized as "the strict antitrust standard" of the *Svenska* decision. 15 SRR at 421. As the Court there stated (quoting from *Volkswagenwerk A.G. v. FMC*, 390 U.S. 261 (1968)), section 15 requires that the Commission "scrutinize [any] . . . agreement to make sure that the conduct thus legalized does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the regulatory statute." 15 SRR at 421-22. Thus, while the Court made clear that "the strict antitrust standard" of *Svenska* was not applicable to all agreements, the Commission was nonetheless instructed to view the "antitrust implications' of every agreement either by the *Svenska* formulation (where applicable) or in terms of the balancing approach referred to in the *Volkswagenwerk* decision.

It is concluded that for reasons of serious transportation needs, important public benefits, and valid regulatory purposes served by or resulting from the subject Agreements the record demonstrates that approval is warranted by "the strict antitrust standard" of *Svenska*, as well as the less rigorous criterion of "antitrust implications." That is, any anticompetitive implications of the subject Agreements are overbalanced by the positive contributions to the trade and furtherance of regulatory objectives of the Act that would flow from approval.

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[31] See *id.* at 9, where witness Thiede explains that proponents "intend to use these Omni ships, with substantial modifications, as the basis for the replacement fleet. These ships are to be further modified by adding a new midsection and clearing remaining self-support gear, which will give each Omni vessel a capacity of approximately 950 TEU's. These ships will, even with these modifications, be able to maintain the same operating speed as at present, will require no additional crewing, and will have roughly the same fuel consumption characteristics. As a result, we will be able to more than double the container carrying capacity of the Omni ships and eliminate to a great extent the 'wasted' capacity in their current configuration, but with almost no increase in vessel operating costs."

[32] The conservation of fuel is another valid regulatory purpose, as recognized in such statutes as the Energy Policy and Conservation Act of 1975, 42 U.S.C. §§6201-6422, which in section 382(b) thereof requires the Commission to consider the impact of any final agency action "on energy efficiency and energy conservation." 42 U.S.C. §6362(b).

To recapitulate, the rationalization efforts incorporated into the subject Agreements are fully consistent with the regulatory purposes of the Act by allowing an improvement of service to the trade (as well as allowing a new entrant into the market) while obviating the prospect of excess trade capacity. The "antitrust implications" of the Agreements are the minimum necessary to achieve these purposes, and the Agreements in fact establish an operational and marketing framework more competitive than under the present Agreement No. 9929, but circumscribed in such a way as to ensure that proponents' rationalization efforts will not result in an undue concentration of market power.

Protestants' Position

Protestants United States Lines, Inc., Sea-Land Service, Inc., and Seatrain International, S.A., do not oppose approval of Agreements Nos. 9929–5 and 10266–2 as these agreements have been amended and revised and are now before the Commission for its consideration. None of the protestants filed reply briefs but such non-action is not to be construed as necessarily agreeing with all the arguments set forth in proponents' opening brief.

Hearing Counsel's Position

Hearing Counsel believe that with the exception of two provisions in Agreement No. 9929–5, proponents have adequately justified the Agreements and so the Agreements should be approved.

The first exception of Hearing Counsel deals with the provisions of Agreement No. 9929–5 which include CGM in the Combi Line LASH service and authorize a container service between Mexican ports and U.S. Gulf and South Atlantic ports. Hearing Counsel argues that these provisions are insufficiently concrete to warrant Commission approval.

Article 1.5 of Agreement No. 9929–5 provides that CGM will participate in the Combi Line LASH service to the extent of the proportion that it contributes capital equipment to the trade. However, the only capital expenditure the parties are considering for the LASH service is the implementation of a LASH feeder operation, and this concept is still in the exploratory stages. Therefore, proponents cannot state if CGM actually will be participating in the LASH service to any extent.

A second aspect of Agreement No. 9929–5 which Hearing Counsel contends lacks the requisite amount of definiteness for Commission approval is Article 2.1 in which proponents seek the authority to implement a container service between United States ports and ports in Mexico. At the present time, no Mexican ports have container facilities and only one port has definite plans to develop them in the future. The elements of proponents' container service necessarily depend upon the construction of such facilities which at this point is uncertain.

The Commission has recently stated that "it will not abdicate its responsibilities under the Shipping Act, 1916, by approving an agreement that is not so sufficiently precise so as to permit any interested party to ascertain how the agreement works without resorting to inquiries of the parties." *Agreement No. 10066–Cooperative Working Arrangement*, FMC Docket No. 74-5, November

17, 1978, slip opinion at *29*. In *Agreement No. 10066* the Commission refused to approve a coordination of services provision in the Agreement because "beyond some unspecified plan for coordination of sailings, no action was contemplated under the provision." The Commission cited a conclusion of the Presiding Officer that "[i]ndeed, in the United States West Coast to Colombia trade [no coordination of services] is presently feasible given the itineraries of the parties." As in Docket No. 74-5, the justification offered to support the two aspects of Agreement No. 9929-5 mentioned above reveals that there are only ambiguous plans for the development of the services proposed and fails to demonstrate to an "interested party," in this case the Commission, that action is definitely contemplated or presently feasible.

Hearing Counsel believes that the amount of information noticeably absent from Agreement No. 9929-5 is significant. Proponents have attempted to provide details as to how CGM's participation in a LASH feeder service would operate and what economic effect it would have if implemented "so as to permit any party to ascertain how the agreement works." Proponents explain that the LASH feeder service, "as envisioned would operate only in European waters to move cargo to/from the two European ports (Rotterdam and Bremen/ Bremerhaven) now called by the Combi Line LASH service. It is unlikely that inauguration of a feeder service would alter the European ports calls of the LASH vessels. At most only one port call could be eliminated . . ." Hearing Counsel argue that this information cannot cover for the lack of the most fundamental operative facts, which are whether CGM will actually participate in the LASH service, whether a feeder service will be implemented and when, and what the proportionate share of CGM's contribution will be if the system is implemented. The LASH feeder system is only in the exploratory stages. Factors still remaining to be considered are the availability of suitable equipment, the ability to develop a suitable and financially sound operation, and the desirability of instituting such an operation. Hearing Counsel says proponents have explained what they expect to happen if a feeder service is implemented, but have not explained what they actually intend to do.

Hearing Counsel says that there are also gaps of information concerning the operation of a container service to Mexico. Proponents cannot explain even what they expect to happen. They state that Combi Line seeks to operate a wayport service between Mexican ports and U.S. Gulf and South Atlantic ports in order to resolve an equipment imbalance resulting from a predominantly westbound movement of goods from Europe to Mexico and a predominantly eastbound movement from U.S. Gulf and South Atlantic to Europe. However, proponents do not definitely know when Mexican container facilities will be available. Veracruz is the only port in Mexico that even has plans to develop container facilities and it is not expected that it will have even a container crane available until the end of 1979. There is no indication of what other ports will develop facilities or of any possible time-table for their doing so. Even if a container crane does become available in Mexico, there is presently no infrastructure or proper organization for the efficient large scale transportation of containers. Minimum requirements for the establishment of an infrastructure are significant: the adoption of the ports to a container service; the establishment of a customs inspection system; the restructuring of cargo handling tariffs at the ports, and the adaptation of regulations and tariffs for the containers' inland transportation in Mexico. These tasks are not quickly or easily accomplished. Clearly Combi Line could initiate a container service to Mexico before the complete development of such an organization, but proponents admit that to some extent the configuration of the container service (in terms of itineraries and number of vessels for their overall services) depends upon the development of container facilities as well as infrastructure in Mexico. It is Hearing Counsel's position that to grant authority to provide a container service before answers are provided to these fundamental questions concerning the existence of container facilities would be premature.

Hearing Counsel believe that the facts which remain to be supplied in Agreement No. 9929–5 are not simply "working details" which the Commission has stated may be determined by the parties after an agreement is approved. In *Agreement No. 9835–Japanese Lines' Pacific Northwest Containerships Service Agreement,* 14 F.M.C. 203 (1971), the Commission found that an agreement was final and approvable even though schedules, advertising, space charters, mutual accounting procedures and container interchanges remained to be filled-in, because there was an agreement. There is no definitive agreement on the CGM/LASH and Mexican matters between the parties to Agreement No. 9929–5. Proponents are asking the Commission to approve hypothetical propositions. The participation of a major carrier has not been determined in the LASH service, and the institution of a Mexican service is not even possible at this point and therefore cannot be determined. Hearing Counsel say these absences constitute more than "interstitial sort of adjustments."

Proponents set forth several arguments in opposition to Hearing Counsel's position. They argue that because the capacity of the LASH service would remain unchanged, the competitiveness of the service would also remain unchanged, and consequently a feeder service could be implemented which would benefit shippers without adversely affecting Combi Line's competitors. As for the Mexican container operation, proponents state that "such a service would provide the important public benefits derived from inaugurating such a service and afford an alternative to the overland systems which presently accommodate most such movements."

In considering an agreement, the Commission must determine what the benefits to the public interest and the agreement's anticompetitive effects actually are. The issue here is whether the agreement is so indefinite as to preclude the Commission from making these determinations. As stated in *In the Matter of Agreement 9448–Joint Agreement Between Five Conferences in the North Atlantic Outbound/European Trade,* 10 F.M.C. 299, 307 (1967);

> . . . great care must be taken when the agreements are approved to see that (1) the Commission knows precisely what it is approving, and (2) the agreements set forth clearly, and in sufficient detail to apprise the public, just what activities will be undertaken . . . . It would be contrary to the public interest to approve an agreement whose coverage is so vague that the public cannot ascertain the coverage by reading the agreement. The approval of such an agreement would deprive the public of the protection, afforded by statute, of the Commission's surveillance over conference activities. The blank check that would be afforded by the approval of this agreement would simply fail to protect the public interest and the flow of commerce in the manner contemplated by Congress in the enactment of section 15.

*It is Hearing Counsel's position that CGM's participation and the implementa-*tion of a feeder service is speculative and the benefits that may accrue are speculative as well. Hearing Counsel claim that the Mexican container operation is so vague that it is impossible to even determine what the nature of the benefits is, let alone speculate on their actually coming into effect. In essence, Hearing Counsel argue, proponents are seeking a blank check from the Commission. They wish to institute a Mexican container service, but do not wish to be bound as to whether, when, or how such services are to be developed. Proponents appear to be asking for the authority to discuss the implementation of services and in that sense have really only proposed before the Commission an agreement to agree. They state that "[p]lanning a joint service among lines must include consideration of numerous factors concerning costs, construction and compatibility of vessels and equipment, which process should most efficiently include from the outset participation by all the lines to be involved."

The Commission however is not authorized to approve "agreements to agree."[33] In *Matson Navigation Co. v. FMC and United States,* 405 F. 2d 796 (9th Cir. 1968), the Court of Appeals found that as a matter of jurisdiction, the Commission could not grant final approval of a merger when the agreement between the parties was to merely agree to a merger. The Court stated that "[t]he Commission thus cast its official approval and the mantle of antitrust immunity over whatever arrangements the lines might come up with. Matson contends that this is not consistent with the intent of §15. We agree . . . The Commission here has done no more than consent that the three companies involved proceed to work out an arrangement. This is not a sufficient discharge of the Commission's responsibilities." Thus, the Commission cannot grant final approval to those aspects of Agreement No. 9929-5 to which the parties themselves have not made or cannot make a final commitment. As for proponents' argument that it is more efficient to include all of the involved parties from the outset, the Court stated "[t]he uncertainty of ultimate governmental approval and the risk that elaborate and expensive preparations will go for naught are facts of life in the field of corporate reorganization. We find no strength in the argument that the shipping industry should be made an exception."

It is Hearing Counsel's further position that because Agreement No. 9929-5 allows the proponents to operate in a somewhat unusual manner, i.e., TEU limitations rather than ship-size limitations, approval of that Agreement should be conditioned upon a requirement that the proponents file reports for each quarter of each calendar year, indicating (1) the number of TEU's carried in the trade eastbound from U.S. South Atlantic ports, and (2) the number of TEU's carried in the trade eastbound from U.S. Gulf ports. They say this requirement will enable the Commission to monitor the proponents' operations under the limitations of the Agreement.

Proponents do not oppose approval of Agreement No. 9929-5 subject to the conditions requested by Hearing Counsel with respect to CGM's participation in the LASH service and the joint Mexico/USA service. Proponents similarly do not

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[33] Nor is it necessary for the Commission to approve a discussion agreement concerning the implementation of services. The Commission must authorize discussion agreements where the discussions themselves may violate section 15, but this is not the case here. *Agreement 9448, supra,* at 305; *In Re: Far East Discussion Agreement, No. 9981-5,* 17 SRR 857 (FMC, 1977)

oppose the reporting requirement requested by Hearing Counsel. Proponents' position in this regard is without prejudice to their filing of any subsequent amendments to the Agreements with respect to these matters.

CONCLUSION

For all of the reasons hereinabove set forth Agreements Nos. 9929–5 and 10266–2[34] are approved upon condition that Agreement No. 9929–5 be modified as follows:

(1) Article 1.1 shall be modified to read as follows: "*Scope of the Joint Service*. Hapag Lloyd and ICT shall . . . ."

(2) Article 2.1 shall be modified to delete the final phrase reading, "and between United States ports and ports in Mexico."

(3) Article 2.2(a) shall be modified to delete the final phrase reading, "and between United States ports and ports in Mexico."

(4) Consistent modifications shall also be made to the Agreement's second, third and fourth "Whereas" clauses and to the second "Whereas" clause in Agreement No. 10266–2.

Further, as a condition of approval proponents shall file reports for each quarter of each calendar year, indicating (1) the number of TEU's carried in the trade eastbound from U.S. South Atlantic ports, and (2) the number of TEU's carried in the trade eastbound from U.S. Gulf ports.

(S) STANLEY M. LEVY
Administrative Law Judge

WASHINGTON, D.C.
January 29, 1979

[34] Exhibits 39 and 40.

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-47

MISCELLANEOUS AMENDMENTS TO RULES OF PRACTICE AND PROCEDURE

ORDER OF RECONSIDERATION

June 7, 1979

On February 14, 1979, the Commission published in the *Federal Register* a Final Rule revising section 502.67 of its Rules of Practice and Procedure 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.*).[1] The Final Rule established procedural guidelines for participants in proceedings instituted under section 3 of the Intercoastal Shipping Act.

Sea-Land Service, Inc., has petitioned the Commission to reconsider this Final Rule. The Military Sealift Command (MSC) has filed a Reply opposing the petition.

Sea-Land asks the Commission to reconsider that part of Rule 502.67 which requires carriers to file their direct case and underlying workpapers concurrently with any general rate increase or decrease, and serve copies of this material on designated interested parties and make them available to any person executing a certification which restricts the use of the information to the preparation of potential protests to the rate changes (46 C.F.R. 502.67(a) (2)).

Sea-Land opposes making its workpapers available to anyone other than the Commission prior to the filing of a protest or order of investigation on the grounds that such a requirement would be overly burdensome, and would impose an unequal burden on the U.S.-flag carriers because its foreign competitors would have access to their current financial and operating data. Sea-Land also challenges the requirement of filing the carrier's direct case with the tariff changes on the ground that it violates the Administrative Procedure Act and P.L. 95-475 because the carrier is in essence being subjected to the requirements of a hearing without prior notice of the specific issues which will be addressed at that hearing.

MSC takes the position that the certification requirement of any person seeking to view the workpapers (46 C.F.R. 502.67(a) (2)) will preclude disclosure to

[1] P.L. 95-475 establishes time limitations on hearings conducted pursuant to section 3 of the Intercoastal Shipping Act. If a hearing is ordered the Commission has 180 days from the effective date of the tariff matter under investigation to complete all proceedings and issue a final decision. 46 U.S.C. 845(b).

foreign competitors, and that in any event the need of ratepayers to have access to this data outweighs the need of the carrier to be protected from any potential disclosure. Additionally, MSC contends it is imperative that the carrier file its direct case with the tariff changes to give protestants and the Commission's Bureau of Hearing Counsel opportunity to analyze and interpret the data and prepare their positions.

The Commission has considered Sea-Land's contentions in this matter and finds them to be without merit. The question of an undue burden was discussed in the Supplemental Information accompanying the Final Rule and will not be repeated here. Furthermore, the Commission has determined that the information required by these rules is necessary to substantive regulation under the Intercoastal Shipping Act, 1933, as amended, that it is meant to apply only to records of operations in the domestic offshore trades and, that with minor exceptions, no unequal burden or prejudicial loss of confidentiality would arise. Therefore, no legal infirmity can be discerned in this regard. *Alcoa Steamship Co., Inc. v. Federal Maritime Commission*, 348 F.2d 756, 761 (D.C. Cir. 1965).

Requiring the filing of financial data and justification for general rate changes concurrently with the filing of the tariff changes is merely an extension of long standing Commission practice and is supported by the legislative history of P.L. 95-475. S. REPT. 95-1240, 95th CONG., 2d SESS. 12, reprinted in [1978] U.S. CODE CONG. & A.D. NEWS 3331, 3342. It does not constitute the initiation of a "hearing" under the Commission's Rules;[2] rather, it is a procedural requirement that is unavoidable if the Commission is to make a rational and timely decision as to whether a hearing is necessary and the specific issues to be resolved thereby, as is required by P.L. 95-475. The protest/reply procedures before an investigation is ordered and the prehearing conference procedures after an investigation is ordered give the carrier ample opportunity to know the claims of an opposing party and to meet them. Such procedures fulfill the requirements of due process. *Morgan v. United States*, 304 U.S. 1 (1937).

THEREFORE, IT IS ORDERED, That the Petition for Reconsideration of Sea-Land Service, Inc., is denied.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[2] This argument is undermined by Sea-Land's own suggestion, contained in its Petition for Reconsideration, that the carrier's direct case be filed 45 days after the tariff changes and 15 days before the serving of the Commission's Investigation and Suspension Order and the *Federal Register* notice thereof.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79–19

SEA-LAND SERVICE, INC.

v.

EURO-PACIFIC JOINT SERVICE,
HAPAG-LLOYD AKTIENGESELLSCHAFT,
COMPAGNIE GENERALE MARITIME,
AND INTERCONTINENTAL TRANSPORT (ICT) B.V.

NOTICE

June 7, 1979

Notice is given that no appeal has been filed to the April 26, 1979, order of discontinuance 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, the order of discontinuance has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 79–19

SEA-LAND SERVICE, INC.

v.

EURO-PACIFIC JOINT SERVICE,
HAPAG-LLOYD AKTIENGESELLSCHAFT,
COMPAGNIE GENERALE MARITIME,
AND INTERCONTINENTAL TRANSPORT (ICT) B.V.

PERMISSION TO WITHDRAW COMPLAINT GRANTED: PROCEEDING DISCONTINUED

Finalized on June 7, 1979

Complainant Sea-Land Service, Inc., by letter dated April 10, 1979, states that it has determined to withdraw its complaint. Sea-Land asserts that it does not wish to pursue the matters raised in its complaint because, in its opinion, the Commission's recent decision in Docket No. 77–4[1] confirms Sea-Land's interpretation of the restrictions imposed on respondents under Agreement 9902, as amended and in effect at the time of the filing of the complaint. Therefore, Sea-Land believes it to be a wasteful exercise to seek to obtain the interpretation which it already believes has been confirmed by the Commission or to be the means to obtain compliance with Commission orders and approvals. The letter, which I am treating as a motion for leave to withdraw the complaint, has received no reply from respondents, whose counsel advised me orally that respondents would not be filing a reply.

There is no authority of which I am aware which holds that a complainant can be compelled to litigate against its wishes under circumstances such as presently exist, especially when a responsive pleading to the complaint has not even been filed. Permission to withdraw is therefore granted and the proceeding is discontinued. In issuing this ruling, I make no comment on the validity of Sea-Land's statements regarding the meaning of the Commission's decision in Docket No. 77–4. The important point is that Sea-Land believes that the Commission has agreed with its interpretation of the limitations imposed on the parties to the subject agreement presently in effect[2] and further believes that it is not incumbent

[1] *Agreements No. 9902–3, et al. (Modification of Euro-Pacific Joint Service Agreement)*, Docket No. 77–4, March 29, 1979.

[2] The agreement presently in effect which is mentioned in Sea-Land's complaint is Agreement No. 9902–5, which, according to the Commission's decision in Docket No. 77–4 (pp.16,17), is due to expire on May 31, 1979.

upon a private complainant to bear the expense of pursuing issues relating to compliance with Commission orders and approvals, which issues formed the gravamen of the complaint.

(S) NORMAN D. KLINE
Administrative Law Judge

June 7, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-31

FAST INTERNATIONAL FORWARDING CORP.—
INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION AND
POSSIBLE VIOLATIONS OF SECTION 44, SHIPPING ACT, 1916

NOTICE

June 11, 1979

Notice is given that no exceptions were filed to the May 8, 1979, initial decision in this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the initial decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 78–31

Fast International Forwarding Corporation— Independent Ocean Freight Forwarder Application and Possible Violations of Section 44, Shipping Act, 1916

Finalized on June 11, 1979

Applicant-respondent (Fast International Forwarding Corporation) (1) found to have violated section 44(a) of the Act by engaging in unlicensed forwarding activities on 173 occasions after having been warned against unlicensed forwarding, including 45 occasions subsequent to a second warning; (2) found to have received moneys from shippers for ocean freight and to have failed to pay this ocean freight to the ocean carriers; and (3) applicant-respondent (Fast International Forwarding) and its president, Ms. Elia A. Lopez, both found not to possess the requisite fitness under section 44(b) of the Act to be licensed as an independent ocean freight forwarder. Freight-forwarder license application denied.

Thomas P. Carlos and *Jack L. Weitzman* for respondent-applicant.

John Robert Ewers, Joseph B. Slunt, and *Polly Haight Frawley* as Hearing Counsel.

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

Fast International Forwarding Corporation (Fast or applicant-respondent) filed an application for a license as an independent ocean freight forwarder. The Commission instituted this proceeding by its Order of Investigation and Hearing served August 29, 1978, in which it stated that its prior investigation had disclosed that Fast, on nineteen or more occasions, appeared to violate section 44(a) of the Shipping Act, 1916 (the Act), by engaging in unlicensed forwarding activities during the period September 1977, through April 1978, although warnings had been received by Fast on August 26, 1977, and subsequent thereto about unlicensed forwarding activities.

On May 26, 1978, pursuant to section 510.8 of the Commission's General Order 4 (46 CFR 510.8), the Commission advised Fast of the Commission's intent to deny Fast's freight forwarder application, and on June 26, 1978, Fast requested the opportunity at a hearing to show that denial of the application was unwarranted.

Hearing was held in Miami, Florida, where Fast is located, for its convenience and so that it could present any character or other witnesses in its behalf at the least expense. Fast presented no witnesses, but was represented by counsel.

Two matters are to be determined in this proceeding. First, Fast as a respondent is charged with violations of section 44(a) of the Act for allegedly engaging

[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.

in unlicensed forwarding activities subsequent to August 26, 1977. Second is the matter whether Fast, as an applicant for a freight-forwarder license, can be found to possess the requisite fitness within the meaning of section 44(b) of the Act to be licensed as an independent ocean freight forwarder.

Hearing Counsel presented extensive evidence at the hearing showing that Fast violated the Act and that Fast is unfit to be licensed as a forwarder.

Hearing Counsel filed their "Reply Brief" as directed on April 9, 1979. Fast's "Brief" was due on March 23, 1979, but was submitted late to the Office of the Secretary of the Commission on April 2, 1979, but without proper copies. Being thus advised by the Secretary by letter dated April 4, 1979, Fast later made proper filing of its brief with necessary copies on April 16, 1979. By letter to the Administrative Law Judge dated March 27, 1979, but with envelope postmarked April 6, 1979, Fast's counsel asked permission to serve its brief late. Hereby it is ruled that Fast's late-filed brief is accepted into the record as such, but not as to the accuracy of all statements therein.

For example, in the brief counsel for Fast state that "Respondent has frankly admitted its fault," and "No member of the shipping public has been injured as a result of Respondent's alleged illegal forwarding activities." Also, ". . . Respondent made no misrepresentations to the Federal Maritime Commission." However, neither Ms. Lopez nor any other officer or employee of Fast appeared at the hearing, nor did anyone frankly admit Fast's fault. No exhibit or paper was presented in evidence by Fast admitting its fault. The shipping public has been injured by Fast, insofar as certain ocean freight monies entrusted to Fast have not been paid by Fast to the ocean carriers which transported the shippers' cargoes. American Financial and Trade Corp., a shipper, issued Fast a check on August 3, 1978, covering, among other charges, $6,074.70 for ocean freight. Fast did not attempt to pay the carrier for this shipment until two months later, at which time Fast's check was returned not paid because of insufficient funds. As of February 6, 1979, Fast still owed the ocean carrier, Farovi Shipping Corporation. Hearing was held on February 9, 1979, and Fast introduced no evidence that this ocean freight had been paid. The shipper, American Financial and Trade Corp., may be held responsible for payment of the ocean freight charges by the ocean carrier if Fast fails to pay.

In another instance, Fast issued a check on July 24, 1978, to Transytur Lines in the amount of $858.16 for ocean freight for two shipments, one from Andreco Trade International to a consignee in Maracaibo, Venezuela, with $288.08 of ocean freight charges, and the other shipment from the Wilson Tire & Supply Co. of Ga., Inc., to a consignee in La Guaira, Venezuela, with $570.88 of ocean freight charges, in both instances with the freight charges prepaid by the shippers to Fast, and with Fast issuing its check to Transytur, but with said check being returned not paid because of insufficient funds. The president of Transytur Lines stated that as of February 6, 1979, Fast owed Transytur $856.16 for ocean freight for the two shipments.

The three shippers above and the two ocean carriers above are part of the shipping public and have been injured, contrary to the mistaken statement of counsel for Fast.

Ms. Lopez made two misrepresentations to the Commission's Gulf District staff when she stated on February 10, 1978, that Fast had performed freight forwarding services for only twelve (12) shipments and that Fast had turned over smaller shipments to Almar International Corp., a licensed independent ocean freight forwarder. In fact, Ms. Lopez or Fast did not turn over any shipments to Almar, and Fast performed forwarding services on many more than 12 export shipments prior to her conversation with the Gulf District staff.

Ms. Lopez and Fast had been warned not to perform freight forwarding service by letter dated August 22, 1977, from Mr. Charles L. Clow, Office of Freight Forwarders, Federal Maritime Commission. On February 10, 1978, when Ms. Lopez visited the Gulf District Office of the Federal Maritime Commission in an interview with District Director Harry T. Statham and Investigator Jules Z. Johnson, Ms. Lopez was advised that Mr. Statham believed that Fast was in violation of section 44(a) of the Act and that Fast should cease all unlicensed forwarding activity. On that date Ms. Lopez stated to Mr. Statham and Mr. Johnson that Fast would cease unlicensed freight forwarding activity.

In late 1977, Ms. Lopez requested and received permission[2] from the president of Almar International Corporation to use the freight forwarding license number of Almar on bills of lading for four or five shipments for which fast would peform the freight forwarding services. The president of Almar determined that Ms. Lopez was using the license number of Almar to perform freight forwarding services in excess of four or five shipments after Almar was contacted by Coordinated Caribbean Transport, Inc., for payment of ocean freight charges owed by Fast that were attributed to having been owed by Almar, which orally and by registered letter then advised Ms. Lopez to cease and desist from using the freight forwarding license number of Almar.

In a similar situation, in August 1977, Ms. Lopez requested and received permission from the owner of Malvar Forwarding Service, a licensed ocean freight forwarder, to use its license number. Ms. Lopez was requested by Malvar to cease using its license number because ocean freight monies owed by Fast were being attributed to having been owned by Malvar.

In another situation, not exactly the reverse of the above, Ms. Lopez loaned the license number which she did not have, but which Ms. Lopez said had been assigned to her by the Federal Maritime Commission to Vincent Kessler, president of Land Sea Air Cargo Expediters, Inc., pursuant to an arrangement under which Ms. Lopez would keep one-half of certain compensation from ocean carriers, and turn the remaining half and other monies for advance charges over to Mr. Kessler. A check issued by Fast on August 16, 1978, to Land Sea Expediters in the amount of $884.12 was returned not paid because of insufficient funds, and Land Sea had not received payment by October 13, 1978. Mr. Kessler discontinued the agreement with Ms. Lopez.

Hearing Counsel listed on brief seventy-three (73) proposed findings of fact, detailing some of the above facts and many others. All of these proposed findings of fact are accepted and should be referred to if more details are deemed necessary. However, it is believed that the prior recitation of facts and the facts below are sufficient basis for the ultimate findings and conclusions herein.

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[2] Use of one forwarder's license number by another person is contrary to the law.

The Gulf District Office of the Commission began an Investigation of Fast as a result of a complaint which it received on October 7, 1977, from Prudential Lines in Miami that Fast had been late in paying ocean freight charges to Prudential and that some checks issued by Fast to Prudential had been returned not paid because of insufficient funds.

Certain letters of reference submitted by Fast (Exhibit 14) in support of its application all predate August 26, 1977, and are entitled to little weight in view of the countervailing evidence of record. No one appeared at the hearing as a character witness or otherwise in support of Fast or Ms. Lopez.

Fast has violated section 44(a) of the Act. Nineteen instances are documented in Exhibit No. 5, one hundred fifty-two instances are listed in Exhibit No. 8, and two instances occurred in January 1979, as listed in Exhibit Nos. 17 and 18. The total is 173 instances of violation by Fast. Forty-five violations by Fast occurred after a second warning on February 10, 1978, as listed in Exhibit Nos. 5, 8, 17 and 18.

Fast and Ms. Lopez are not fit to be licensed as an independent ocean freight forwarder. Ms. Lopez is the only officer of Fast attempting to qualify for a license. Fast and Ms. Lopez have shown a flagrant and persistent disregard of the provisions of the Shipping Act, they have not conducted their business affairs with integrity and responsibility, and have failed to cooperate with the Federal Maritime Commission.

Ms. Lopez has expressed no regret at past violations and has demonstrated no extenuating circumstances to justify her past conduct. Ms. Lopez has disregarded warnings against illegal forwarding activities. All of the 173 shipments documented in the record for which Fast performed the freight forwarding services occurred after August 26, 1977, when she was first warned by Mr. Clow. She continued her illegal forwarding services after a second warning. How many chances should she get? The answer is no more. Fast and Ms. Lopez are unfit for a license because of financial irresponsibility (bad checks, unpaid ocean freight charges) and because of flagrant disregard of the law.

On brief, counsel for Fast do not argue the facts, but argue the law. Counsel interpret past forwarder application cases as showing a liberal attitude for the granting of licenses, but counsel fail to realize that the conduct of Fast and Ms. Lopez is of far more serious nature than that of the applicants in the cited cases.

Counsel for Fast insist that Ms. Lopez' conduct is of a "lesser degree of moral turpitude." Counsel for Fast, as seen, are incorrect in stating that Fast has not injured the shipping public.

Counsel for Fast make the final argument that:

> In concluding this discussion, the fact that Respondent has attempted to become a part of the system through the submission of its application rather than attempting to function outside of the system, as have many other persons and entities, should have a strong bearing on the outcome of the consideration of Respondent's application. Also, the Court should take note of the fact that there are many ways by which the law and the regulations can be circumvented by persons desiring to do so and that such may very well be encouraged by the denial of a license application in situations similar to the situation of Respondent.

To the contrary, granting of Fast's application would encourage other misrepresentations to the Commission's staff and other non-payments to ocean carriers of ocean freight charges when moneys for the payment of same have been *entrusted by shippers to forwarders acting as shippers'* agents. One of the prime duties of an agent entrusted with his principal's monies is to keep those monies in a special account, or in escrow or trust, for the principal. Fast did not so act when Fast took the shippers' prepaid freight charges and failed to pay such charges to the ocean carriers.

It is concluded and found that applicant-respondent, Fast International Forwarding Corporation, and its president, secretary and 100-percent owner, Ms. Elia A. Lopez, by engaging in unlicensed ocean freight forwarding activities, have violated section 44(a) of the Shipping Act on 173 occasions subsequent to August 26, 1977, when Fast and Ms. Lopez first were warned not to engage in such unlawful conduct, and that included among those unlawful activities, Fast and Ms. Lopez have harmed the shipping public by receiving monies from shippers for ocean freight and have failed to pay this ocean freight to the ocean carriers. It is further concluded and found that Fast and Ms. Lopez do not possess the requisite fitness under section 44(b) of the Shipping Act to be licensed as an independent ocean freight forwarder. The application herein for an ocean freight forwarder license hereby is denied.

(S) CHARLES E. MORGAN
Administrative Law Judge

WASHINGTON, D.C.
May 7, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 78–2

ORGANIC CHEMICALS (GLIDDEN-DURKEE) DIVISION OF SCM CORP.

v.

ATLANTTRAFIK EXPRESS SERVICE

NOTICE

June 11, 1979

Notice is given that no exceptions were filed to the May 4, 1979 initial decision in this proceeding, and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, the initial decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 78-2

ORGANIC CHEMICALS (GLIDDEN-DURKEE)
DIVISION OF SCM CORPORATION

v.

ATLANTTRAFIK EXPRESS SERVICE

Finalized on June 11, 1979

Complainant has carried its heavy burden of proof and established the proper measurement of the shipments in issue.
Respondent found in violation of section 18 (b) (3).
Reparation awarded.

Merlin H. Staring for complainant, Organic Chemicals (Glidden-Durkee), Division of SCM Corporation.
Neal M. Mayer and *Paul D. Coleman* for respondent, Atlanttrafik Express Service.

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

The Organic Chemicals Division of SCM Corporation charges Atlanttrafik Express Service with violations of section 18(b) (3) of the Shipping Act, 1916, (46 U.S.C. 817) and seeks reparation of $5,693.33. A brief discussion of the procedural background of this case is necessary to an understanding of its somewhat unusual posture.

This case was originally consolidated with Docket No. 78-3—Organic Chemicals (Glidden Durkee) Division of SCM Corp. v. Farrell Lines, Inc. In No. 78-3 Organic charged Farrell with violations of section 18(b) (3) on essentially the same facts and circumstances as make up the gravamen of the complaint here. At a prehearing conference a discovery schedule was set up and a tentative hearing date was set, and the parties then filed extensive requests, including interrogatories, requests for production of documents and for admissions. Objections to some of the discovery requests and refusals to make the requested admissions followed and it became apparent that counsel on both sides were becoming concerned about the cost of litigating the cases when that cost was compared to the amount of the recovery by the complainant should it prevail and the amount saved by respondents should they prevail. When counsel for complainant filed a

[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).

list of seventeen witnesses which he intended to call at the hearing this concern expressed itself at an informal conference held in my office.

As a result of the informal conference Organic and Farrell filed a joint motion for settlement and dismissal of the complaint in No. 78-3. The motion recognized that Commission policy was against settlement of cases arising under section 18(b) (3) but nevertheless sought a change in that policy. In denying the motion I stated that had it not been for Commission precedent I would have granted it and gave the parties leave for immediate appeal to the Commission. The Commission after establishing certain criteria for settlements of cases arising under section 18(b) (3) granted the motion, and the case was ultimately dismissed.[2]

At about the same time that Organic and Farrell filed their motion, counsel for Atlanttrafik filed a "Notice of Discontinuance of Active Participation." The reasons given for this discontinuance were that:

> . . . whether or not Atlanttrafik wins the case the expenses of defending against the claim for $5,693.33 is not warranted since the cost will far exceed any possible savings from prevailing in the matter. This is especially true where no settlement appears possible under the case law and section 18(b) (3).

In declining further participation, Atlanttrafik refused to concede that it had violated section 18(b) (3) but agreed that it would abide by any decision of the Commission on the merits based upon whatever evidence complainant submitted, saying:

> Despite Atlanttrafik's decision to cease active participation in the proceeding, Atlanttrafik wants it clearly understood it does not concede that it has violated Section 18(b) (3) so as to require Atlanttrafik to pay SCM as requested in the complaint. Rather, Atlanttrafik believes that although it is at risk because it is foregoing a full and complete defense, the Administrative Law judge and the Commission must still weigh whatever evidence SCM puts into the record and determine if complainant has produced sufficient evidence to prove a violation of the Act. (See, *E. I. DuPont De Nemours and Company v. Seatrain International S.A.*, Docket No. 78-7, FMC Order dated August 22, 1978.) Atlanntrafik will, of course abide by the decision of the Commission on the merits of the claim.

At this point counsel for complainant elected to flesh-out the record with affidavits of the witnesses he had intended to call and by "Argument of Complainant" or brief. The affidavits are given exhibit numbers and admitted into evidence by an appendix to this decision.

Facts

Organic is in the business of producing, manufacturing and marketing industrial chemicals. Atlanttrafik is a common carrier by water subject to the requirements of section 18(b) (3) of the Shipping Act. The crux of the complaint is that Atlanttrafik assessed ocean freight on shipments of Organic "which [were] higher than the proper charge, since the ocean freight was assessed on an incorrectly high cubic measurement of the containers actually composing the shipments involved." The "containers" were 55 gallon steel drums either 18 gauge or 18/20 gauge. The "incorrect cubic measurement" was the result of a mistake by an employee of complainant.

[2] See Docket No. 78-3, *Organic Chemicals v. Farrell Lines, Inc.*, Order of January 25, 2979, and Order of March 14, 1979.

In 1973 this employee compiled a table "Shipping Weights, Cubic Measurements and Flashpoints". At the end of the table appear "Drum Statistics". It is in these statistics that the source of incorrectly high cubic measurement is found. The cubic measurement for the 18 gauge drum is reached through the formula "24″ × 24″ × 34-5/8″" equals 11.54 cubic feet. The cubic for the 18/20 gauge drum is arrived at by the formula 24″ × 24″ × 35″ equals 11.66 cubic feet.

All of the steel drums used by Organic were purchased from one or another of three makers: (1) Florida Steel Drum Company, Inc., (2) Inland Steel Container Division of Inland Steel, or (3) Rheem Manufacturing Company. The drums were procured by Organic under contracts or purchase orders which specified that the drums were to be 55-gallon Tight-Head Universal Drums conforming to U.S. Department of Transportation Specification 17E (49 CFR 178.116).[3] DOT 17E requires among other things that the drum's diameter "over rolling hoops" be 23-15/32 inches with a tolerance of +0 −1/16 of an inch. The height is to be 34-3/4 inches. The "Tweed's Accurate" cubic measurement is stated to be 10.715 cubic feet.

Atlanttrafik is a member of the U.S. Atlantic & Gulf/Australia New Zealand Conference, and Rule 2(d) of the Conference's Freight Tariff No. 3 (FMC 12) provides:

RULE 2 APPLICATION OF RATES

(d) Rates will be assessed on the accurate shipper's gross weight and overall measurement of the individual pieces or packages calculated when the cargo is delivered to the carrier and measurements shall be computed in accordance with "Tweed's Accurate Cubic Tables". Measurements shall be calculated in accordance with the following with respect to fractions:

All fractions under ½ inch are to be dropped.

All fractions exceeding ½ inch are to be included as full inches.

Where there is a fraction of ½ inch on one dimension of a package, same is to be included as a full inch.

Where there are fractions of ½ inch on two dimensions of a package, one is to be included as a full inch and the other dropped.

Where there are fractions of ½ inch on three dimensions, two are to be included as full inches and the other dropped.

When giving and taking fractions of ½ where same occur on two dimensions, the one on the smaller dimension is to be included.

When giving and taking fractions of ½ inch, where same occur on three dimensions, the one on the largest and smallest dimensions are to be included and the other dropped.

Rule 2(d) is the center of the controversy. Under Rule 2(d) Organic was entitled to drop the 15/32 of an inch in diameter when measuring the cube. By doing so it would come up with "Tweed's Accurate" cube of 10.715. Instead, its employee took the 23-15/32" to the next full inch (24") and arrived at a cube of 11.54 or 11.66. As Atlanttrafik has noted the case turns on 1/32 of an inch and "no carrier measures drums with such fineness."[4] Up to this point there is little room for controversy if the drums used by Organic adhered to the prescribed standards.

[3] The standards of DOT 17E are specifically adopted by the industry by "American National Standard Specifications for 55 Gallon Tight-Head Universal Drums" (ANSI, MH2, 1974). (See Appendix D to the complaint).

[4] This is somewhat inconsistent with the rule of the Conference's tariff which states that freight charges be assessed on "the actual measurement calculated when cargo is delivered to the carrier.

However, one of the three makers of the drums used by Organic specifically concedes that the drums made by it are subject to a plus or minus 1/16" manufacturing tolerance. Inland Steel's specifications contain "Note 1" which states, "All dimensions are given in inches. Dimensions are within normal manufacturing tolerances of ±1/16" . . . ." The record does not disclose how many of the drums carried by Atlanttrafik were from Inland. The respondent's proposition made in an earlier motion to dismiss the case is that all or an unidentifiable portion of the drums carried by Atlanttrafik could have been made by Inland. Since the alleged mismeasurement is stated to be only 1/32" at the diameter some or all of those drums could have been properly rated. Since the drums are no longer around to be measured, it is Atlanttrafik's position that it is impossible to determine the number improperly rated and therefor the amount of reparation. Against this proposition the evidence of record supplied by the complainant establishes the following.

All of Organics shipments for which reparation is claimed were in 55-gallon steel drums manufactured either of 18 gauge steel throughout or of 20 gauge steel bodies with 18 gauge steel drum heads and bottoms. As noted all of the drums used by Organic came from only three sources: (1) Florida Steel Drum Company, (2) Inland Steel Container Division of Inland Steel Company, or (3) Rheem Manufacturing Company; and all of the drums were procured under purchase orders or contracts which specified that the drums comply with DOT 17E.

The drums supplied to Organic by Florida Steel were made under its policy and objective of adherence to the specification and dimensional tolerances of the American National Standard Specifications (ANSI) or DOT 17E.[5] The drums were made with tools and under processes designed and set up to insure that the drums have a diameter of less than 23.5", and have been produced under quality control procedures designed to insure compliance with the specifications. A master gauge of sufficient precision is used by Florida Steel to insure that the overall diameter of the drums does not exceed the specifications. While it is possible due to variations in materials and equipment that some drums made by Florida Steel might have dimensions or distortions which exceed the specification by a "minute" amount, the number of drums doing so would be exceedingly small and minimal. In 23 years of supplying 55-gallon steel drums, the President of Florida Steel has never known an instance in which Florida's production-run drums were returned or rejected because of their diameter exceeding specification, nor has it ever come to his attention that any carrier has ever refused to honor or accept the declared American National Standard shipping cube of a drum made by Florida.

The drums supplied Organic by Inland were produced with tools and processes designed to insure that the overall diameter of the drums was less than 23.5 inches. Inland has quality control procedures which include the systematic use of gauges of sufficient precision to insure that the overall diameter is less than 23.5 inches. Again while it is possible that variations in materials or equipment could result in drums which exceed the maximum, the number of drums doing so would be extremely small and minimal.

[5] ANSI is an industry association which establishes standards for the industry. The standards of ANSI are the same as those of DOT 17E.

Rheem also makes its drums with tools and processes that are designed to insure that the overall diameter is less than 23.5 inches and they have been produced under quality control procedures which includes the use of a precision gauge at the beginning of each production run which insures the adherence to specifications. With Rheem, as with Florida and Inland, the Resident Plant Manager cannot recall a single instance in which a drum was returned or rejected because it exceeded the specified overall diameter.

Mr. Jack H. Cross, Pricing Analyst for Organic, in company and with the assistance of Mr. Max F. McLead, Organic's Superintendent of Shipping, measured the overall diameter of some 25 drums both 18 gauge and 18/20 gauge which were then on hand at Organic's facilities. In Cross's affidavit he states:

> . . . the measurements thus taken were made with the use of a six-foot folding ruler and, even allowing for the possible imprecision of measurements made by that means, I discovered that none of the drums thus measured appeared to equal or to exceed 23½ inches in diameter over the rolling hoops or to exceed 35 inches in height.

Mr. Vincent F. Gentile, a machinist for over 30 years, and at the time of his affidavit was employed by The Adherence Group, Inc. (TAG).[6] Mr. Gentile's job was "the measurement of shipments of goods" in ocean commerce. In the course of his employment Mr. Gentile was told to inspect and measure a containerized shipment of 69 drums of Citral 70 which had been tendered to Sea-Land Service by Glidden-Durkee Export Division of Cleveland. Mr. Gentile made "actual physical measurements of the outside diameter and height of several steel drums which were accessible to [him] at the rear of the opened container." The measurements were made with a graduated steel rule. An inspection report dated April 20, 1977, was then submitted by Mr. Gentile, who goes on to say:

> . . . in that inspection report of April 20, 1977 I recorded the outside diameter of the drums so sampled as 22¾"; that I measured the diameter of the drums on that occasion across the drum head, and not over the rolling hoops; and that the measurement which I thus took was consistent with the size of a standard 55-gallon tight-head steel drum (DOT-17E) manufactured in compliance with ANSI Specification MH2.1-1974, within the limit of accuracy of the measurement means then available to me.

On January 17, 1978, Mr. Gentile measured another containerized shipment of 80 steel drums of Citral-70 which had been tendered to United States Lines by SCM International, Ltd. About this shipment Mr. Gentile states:

> That, in making the inspection and measurement . . . I made actual physical measurements of the outside diameter and the height of each of several of the steel drums which were accessible to me at the rear of the opened container; that I made the measurement of the height with a graduated steel rule; that I made the diametric measurements with an L.S. Starrett 36" firm-joint outside machinist caliper, Mode #26 applied over the rolling hoops at the maximum diameter of the drum then transferred to a graduated steel rule for quantification . . . .

Mr. Gentile found that the drums measured complied with DOT-17E. The outside diameter over the rolling hoops was 23⅜".

This seems a good point at which to try to clear up what could be an inadvertent error on the part of Inland Steel.

As noted above one (if not the only) cause of the dispute here is Note 1 of Inland's specification sheet or "flyer" on its 55-gallon drums. As printed on the

[6] An organization then used to "spot check" shipments for irregularities.

sheet Note 1 can be read as allowing a tolerance of plus or minus 1/16 of an inch in the diameter of the drum. Thus an error of plus 1/16 of an inch would under the conference Rule 2d require the diameter measurement of 23 17/32" to be carried to the next higher inch or to 24". This is precisely the result of the Organic employee's mistake. However, elsewhere in Inland's specifications it is stated that the drums meet ANSI requirements and that the drums in issue here meet the specifications of DOT-17E.

The ANSI and DOT-17E standard however do not permit a *plus* or minus 1/16" tolerance. The diametric specification is written as:

Diameter over rolling hoop 23.15/32 + 0 −1/16

Thus, there is no plus tolerance only a minus tolerance of 1/16 of an inch. This was deliberate. Mr. Vincent G. Grey a former employee of ANSI who was in charge of supervision of the "Standards Committee" affirms that "a maximum dimension or plus-zero tolerance on drum diameter measured over the rolling hoops . . . was to ensure that production-run drums would fit into mechanical handling equipment and facilities frequently employed by drum users, carriers, and consumers. . . ." Mr. H. M. Shappill, Technical Director of Steel Shipping Container Institute and Secretary of ANSI confirms the zero-plus tolerance.

There is an obvious inconsistency in Inland's specification sheet—Inland cannot comply with ANSI's standards and DOT-17E and still allow a plus tolerance in a drum's diameter. Mr. Larry A. Istel, Vice President of Operations for Inland specifically states:

> That Inland Steel's production tools and processes have been designed and are setup to manufacture such 55 gallon containers with an overall diameter of less than 23.5" and with an overall height of less than 35.5 inches; and that the quality-control procedures at Inland Steel's New Orleans plant include the systematic use of gauges of sufficient precision to check the overall diameter and height of the drums being produced to insure that those dimensions do not exceed the dimensions stated . . . .

Mr. Istel makes no mention of the specification sheet or flyer. In weighing the affidavit of Mr. Istel against Inland's specification sheet, I give the affidavit considerably more weight than the specification sheet.

The standard cube of 10.715 for the 55 gallon drum is commonly known and accepted by carriers and shippers and the common practice among shippers and carriers is to declare and accept the shipping cube of the drums as expressed to the nearest tenth of a cubic foot, or 10.7 cubic feet. This is demonstrated by the corrective actions taken by several carriers on a number of Organic's shipments which were known or believed to still be in the carrier's custody after the error in the "Drum Statistics" had been discovered. Organic notified 12 different carriers that an erroneous declaration of cubic measurement was made on 17 separate shipments. Adjustment was requested on the basis of a cube of 10.7 cubic feet. In each instance the adjustment was made. Respondent itself made the adjustment of four shipments.

Since correcting its error, Organic has placed with respondent 39 separate shipments in the 55 gallon drums in question and in each case Atlanttrafik has accepted the shipments at the declared cubic measurement of 10.7 cubic feet per drum and freight was assessed on that basis.

Discussion and Conclusion

Underlying respondent's position in this case is the proposition, (1) that after the cargo has left the custody of the carrier the actual measurement of the cargo cannot be established; (2) if the claim for reparation is based on mismeasurement, the actual measurement controls; and (3) since the actual measurement controls there can be no reparation. In short a claim for reparation based on an error in measurement cannot be supported by indirect evidence.[7]

Of course where the issue is the correct measurement of a shipment, the actual physical measurement of the cargo is the best evidence. However, this is rather rarely the case in the steamship industry. What then does the shipper do when, as Organic did, he finds what he believes to be an erroneous measurement of his shipment? Particularly, what does he do when the erroneous measurement is admittedly his own fault, and the carrier has relied on the shipper's own albeit erroneous statement of the measurement?

A shipper is not bound by an unintentional or inadvertent mistake in describing his shipment. *Western Publishing Company v. Hapag Lloyd,* Informal Docket No. 283, served May 4, 1972. However, claims involving alleged error of weight, measurement or description of necessity involve a heavy burden of proof once the shipment in question has left the custody of the carrier. *Colgate Palmolive Company v. United Fruit,* Informal Docket No. 115, served October 6, 1970. In *Kraft Foods v. Moore McCormack Lines Inc.*, 19 FMC 407, 16 SRR 1575 (1976),[8] Kraft declared the cargo as measuring 145.01 cubic feet but Mormac assessed freight charges on a measurement of 284 cubic feet claiming that it had actually measured the cargo when Kraft delivered it. The Commission found for Kraft concluding that it had carried its admittedly heavy burden of proof. The way in which Kraft sustained its burden is particularly relevant here.

The respondent supported its claim of actual measurement by some handwritten notations on the back of the dock receipt for Kraft's shipment. The notations merely listed "the measurements of some undescribed lots of 30, 30, 30, 30 and 25 packages." The total measurement was said to be 283.50 cubic feet. To counter this Kraft offered a copy of its sales invoice showing what the shipment consisted of, and copies of its price list pages indicating the *standard measurement* of its products identified with numbers which coincided with the products shipped. Concerning Kraft's evidence the Commission said:

> From all this information it is demonstrated that a shipment consisting of a number of cases and types of products listed, when checked against complainant's sales brochure, would have a standard measurement of 146 cubic feet, the measurement for which complainant argues the shipment should have been rated. As indicated above this measurement is also the amount shown on the face of the dock receipt.

The Commission went on to say that while generally "it is difficult to overcome evidence regarding measurement of cargo" when it is "actually recorded by measurement at the pier," nevertheless "the measurements on the back of the dock receipt . . . have absolutely no relation to what are shown to be the standard

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[7] Reducing the limited argument made by respondent to its simplest term may not be completely fair to respondent since it did not avail itself of the opportunity to fully explain its position.

[8] Some of the cases discussed deal with misclassification rather than mismeasurement, but the misclassification cases are cited only for general principles which apply equally to mismeasurement cases.

measurements of the cargo shipped.'' The Commission concluded that the ''actual'' measurements said to have been made at the pier could not have been for Kraft's shipment.

Significantly, in the *Kraft* case the Commission accepted Kraft's stated *standard* measurements for its products and awarded reparation on the basis of those standard measurements, and it did so with a great deal less evidence establishing those measurements than complainant has introduced here.

Organic's evidence clearly establishes the standard measurements for the drums used by it and it is entitled to have its shipments rated on the basis of those measurements absent some reason to believe that the drums do not meet the standard. The vast preponderance of the evidence here demonstrates beyond even a reasonable doubt that the drums did meet those standards and should be so rated. In failing to properly rate the shipments here in issue respondent has violated section 18(b) (3) of the Shipping Act.

Accordingly, Atlanttrafik Express Service is ordered to pay Organic Chemicals (Glidden Durkee) Division of SCM Corporation reparation in the amount of $5,693.33. Upon notice that payment has been received the proceeding will be dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

WASHINGTON, D.C.
May 3, 1979

APPENDIX

The following exhibits are admitted into evidence in this proceeding, Docket 78-2—*Organic Chemicals (Glidden-Durkee) Division of SCM Corporation v. Atlanttrafik Express Service:*

Exhibit 1, Affidavit of Richard D. Barrett and attachments.
Exhibit 2, Affidavit of Jack H. Cross and attachments.
Exhibit 3, Affidavit of Judy M. McGunagle and attachments.
Exhibit 4, Affidavit of Gaston L. Dickens.
Exhibit 5, Affidavit of Max F. McLead with attachments.
Exhibit 6, Affidavit of Bruce J. Hebel with attachments.
Exhibit 7, Affidavit of H. M. Shappill with attachments.
Exhibit 8, Affidavit of Louis J. DeHayes with attachments.
Exhibit 9, Affidavit of Vincent F. Gentile with attachments.
Exhibit 10, Affidavit of Richard Proscia with attachments.
Exhibit 11, Affidavit of Louis J. Deutsch.
Exhibit 12, Affidavit of Larry A. Istel.
Exhibit 13, Affidavit of Vincent G. Grey.
Exhibit 14, Affidavit of Benjamin F. Coke with attachments.
Exhibit 15, Affidavit of Donald C. Long with attachments.
Exhibit 16, Affidavit of Paul Samuel with attachments.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76–46

AGREEMENT NOS. T–3191, ET AL.

Neal M. Mayer, Charles L. Haslup III, and *Paul D. Coleman* for Seatrain Gitmo, Inc.
Amy Loeserman Klein, Olga Boikess, William Karas and *Robert L. McGeorge* for Puerto Rico Ports Authority
Gerald A. Malia, Gary R. Edwards and *Edward A. McDermott, Jr.* for Sea-Land Service, Inc.
Edward J. Sheppard, Mario F. Escudero, Dennis N. Barnes, Louis A. Rivlin, John T. Schell, Lawrence White, Susan M. Liss and *Michael W. Beasley* for Puerto Rico Maritime Shipping Authority.
Joseph B. Slunt, Jack Ferrebee and *John Robert Ewers* for Bureau of Hearing Counsel.

REPORT AND ORDER

June 15, 1979

By the Commission: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice-Chairman;* James V. Day and Leslie L. Kanuk, *Commissioners).**

This proceeding was initiated on August 24, 1976, by Order of Investigation and Hearing to determine the approvability under section 15 of the Shipping Act, 1916 (46 U.S.C. 814) of four agreements relating to the use of marine terminal facilities at Puerto Nuevo, San Juan, Puerto Rico between and among the Puerto Rico Ports Authority (PRPA), the Puerto Rico Maritime Shipping Authority (PRMSA) and Sea-Land Service, Inc. (Sea-Land).[1] PRMSA, PRPA and Sea-Land were named respondents and Seatrain Gitmo, Inc. (Seatrain) was named petitioner.[2]

Hearings commenced on April 5, 1977, before Administrative Law Judge William Beasley Harris (Presiding Officer). They adjourned, however, when the Commission, on that same day, issued an Amended Order of Investigation and Hearing (Amended Order).[3] The Amended Order raised the additional issues of: (1) whether twenty-three other agreements between PRPA, Sea-Land, and/or PRMSA for the lease or use of berths or land parcels at Puerto Nuevo were subject to section 15, and, if so, whether they should be approved, disapproved,

* Commissioner Bakke recused himself from consideration of the matters herein on July 9, 1976.

[1] Agreements Nos. T–3191, T–3193, T–3199, and T–3210.

Additionally, the Order raised as issues: (1) whether an unfiled agreement between Sea-Land and PRMSA (the Puerto Nuevo Contract) was subject to section 15; and (2) whether the Puerto Nuevo Contract together with the above four agreements constituted the parties' complete understanding concerning the use of marine terminal facilities at Puerto Nuevo.

[2] Seatrain had protested the above four agreements and had requested a hearing. Subsequently, by letter dated March 3, 1977, Seatrain withdrew from this proceeding.

[3] The Amended Order was presaged by the Order of Conditional Approval of Agreement No. DC–75, September 22, 1976.

or modified; (2) whether any other agreements existed between PRPA, PRMSA and/or Sea-Land; and (3) whether any agreements determined to be subject to section 15 were implemented prior to Commission approval. PRPA and PRMSA filed petitions for reconsideration of the Amended Order, which were denied by the Commission.[4]

The Presiding Officer subsequently limited the scope of this proceeding to what he determined were the five agreements presently in existence which had not received Commission approval[5] (Memorandum of Procedural Schedule, November 6, 1978). The Commission's Bureau of Hearing Counsel filed an Offer of Proof consisting of twenty-two documents which it deemed necessary to resolve the third issue raised by the Amended Order.[6] The proponents of the remaining agreements filed memoranda of justification on their behalf.[7]

BACKGROUND

The Puerto Nuevo marine terminal complex is the major container facility in San Juan. It consists of fourteen berths (600 feet long and 32 feet wide) and approximately 264 acres of land adjacent to the berths suitable for development as back-up areas. Three berths are suitable for breakbulk vessels (A, B, and D); one for roll-on/roll-off vessels (C); and the rest for container vessels. Berths E, F, G, and H are the only fully developed container facilities.[8] Five shoreside container cranes are located at Berths E through H.

Prior to 1974, when PRMSA was formed,[9] the terminal facilities at Puerto Nuevo were leased to Transamerican Trailer Transport, Inc. (TTT) and Sea-Land.[10] PRMSA subsequently acquired all the stock of TTT's Puerto Rico subsidiary and thereby assumed responsibility for its leases. PRMSA also purchased the assets of the remaining carriers in the United States/Puerto Rico trade, including many of Sea-Land's. Sea-Land had intended to move its remaining operation to the marine terminal facilities at Isla Grande across the harbor from Puerto Nuevo. Unforeseen difficulties ensued, however, and Sea-Land and PRMSA worked out a temporary arrangement for the use of the Puerto Nuevo facilities.[11]

PRPA, PRMSA and Sea-Land finally clarified their relationship at Puerto Nuevo through eight agreements which were recently approved by the Commission[12] and by the five agreements which are still pending Commission approval.

[4] *Order Denying Reconsideration*, served October 17, 1978. The Commission noted that PRMSA's request to restructure the proceeding could more appropriately be raised before the Presiding Officer pursuant to Rule 147(a) of the Commission's Rules of Practice and Procedure.

[5] Agreement Nos. T-3193, T-1582, T-3212-1, T-3393, and T-3211, as amended by T-3211-1 and T-3211-2 (the Extant Agreements).

[6] The record consists of: (a) the April 5, 1977 hearing; (b) Prehearing Exhibit A and twenty attachments received in evidence November 2, 1978; and (c) Exhibits 1-21, identified during the April 5, 1977 hearing (Order served December 18, 1978).

[7] Hearing Counsel filed a letter dated November 30, 1978, stating that it had no objection to approval of the Extant Agreements.

[8] Berths J and K have crane rails but no improved backup facilities. Berth L has only one crane rail. Berths M and 1/2N have no crane rails.

[9] PRMSA was created by the Puerto Rico Maritime Shipping Authority Act, Act No. 62, June 10, 1974.

[10] TTT had preferential use of Berth C and exclusive use of Parcel 4. Sea-Land had preferential use of Berths E, F, G, and H and exclusive use of certain backup areas. Sea-Land also had an option to lease Berths J and K.

[11] Agreement DC-75 between Sea-Land and Puerto Rico Maritime Management, Inc. (PRMMI), PRMSA's managing agent, was conditionally approved by the Commission on September 22, 1976, pending resolution of this proceeding.

[12] Agreement Nos. T-3565, T-3565-A, T-3567, T-3567-A, T-3638, T-3638-A, T-3212, and T-3627.

All other agreements between these parties have been canceled, withdrawn, superseded, or have expired.

The Presiding Officer issued an Initial Decision on February 2, 1979, in which he found that the Extant Agreements are subject to section 15 and should be approved. In addition, he found the Puerto Nuevo Contract subject to section 15 and ordered that it be immediately filed with the Commission. Exceptions to the Initial Decision were filed by Sea-Land, PRMSA, and Hearing Counsel. PRPA and Sea-Land filed replies to exceptions.

Position of the Parties

Sea-Land excepts to the findings that the Puerto Nuevo Contract:

(1) is an agreement for land and use of cranes;

(2) in a manner provides for an exclusive or preferential working arrangement; and

(3) is subject to section 15 and should be submitted for Commission approval.

Sea-Land contends that these findings are not supported by substantial evidence and that, moreover, the Puerto Nuevo Contract was terminated and, therefore, no agreement exists to submit for approval.[13]

Additionally, Sea-Land submits that there is no reason to reexamine certain agreements referred to by Hearing Counsel in its exceptions. It notes that all twenty-three agreements included by the Amended Order have been superseded, approved or withdrawn, except for those discussed in the Initial Decision. It also argues that the scope of the proceeding was committed to the Presiding Officer's discretion and there is no regulatory purpose served by disturbing his decision. Sea-Land concludes that the only possible purpose for examining those agreements is to find section 15 violations which would support the imposition of penalties. It argues, however, that having once determined an agreement is not subject, the Commission cannot retroactively reverse that determination and then find the parties in violation of section 15 for having implemented unfiled agreements.[14]

PRPA contends that the Presiding Officer properly scoped this proceeding consistent with the Commission's directive and that it should not, therefore, be expanded to include many of those agreements raised by the Amended Order.

Hearing Counsel excepts to the Presiding Officer's alleged failure to:

(1) adequately review the relationships between PRPA, PRMSA and Sea-Land concerning the use of marine terminal facilities at Puerto Nuevo; and

(2) consider whether any agreements subject to section 15 were implemented without Commission approval.

Hearing Counsel also notes that the Presiding Officer did not fully explain his reasons for finding Agreements T-1582, T-3211 (as amended) and T-3212-1 subject to section 15.

[13] PRMSA adopted Sea-Land's exceptions and brief.

[14] Eleven of the twenty-three agreements added by the Amended Order were never filed with the Commission. However, five of the eleven amend other agreements which were filed and found not subject.

DISCUSSION

The Extant Agreements

The Presiding Officer found the five Extant Agreements subject to the filing requirements of section 15 and concluded that they should be approved (Initial Decision, at 18 and 19). The Commission basically agrees with this finding of fact and ultimate conclusion of law. However, because some of the parties have repeatedly argued that many of these agreements are not subject to section 15 (although all were filed), the reasons for concluding that they are subject will be more fully explained.

Briefly, these agreements provide as follows:

a. T-3193: between Sea-Land and PRMSA, for the preferential interchange of container cranes at Berths E, F, G, and H;

b. T-1582: Sea-Land's lease from PRPA of Parcel 8 for use of a truck terminal (for receipt and delivery of less than truckload cargo);

c. T-3211: PRMSA's lease from PRPA of Parcels IV-F and IV-G, an area of approximately eight acres. The first amendment to this agreement, T-3211-1, merely changes the annual rental fee;

d. T-3211-2 and T-3212-1: these agreements, between PRPA and PRMSA, provide PRMSA with an option to renew, for an additional 15 years, Agreements T-3211 and T-3212 (which has been approved); and

e. T-3393: PRMSA's option to lease from PRPA a 32 acre tract of land behind Berth J.

The crane interchange agreement, T-3193, is an agreement between common carriers by water which provides for a cooperative working arrangement and is, therefore, subject to section 15 of the Act. In fact, neither Sea-Land nor PRMSA disputed this point in their briefs. The remaining four agreements, all leases of realty or options concerning such leases, are between PRPA on the one hand and either Sea-Land or PRMSA on the other. In the circumstances presented, PRPA is clearly an "other person subject to [the] Act" within the meaning of section 1 of the Act.[15] *See e.g., Agreement Nos. T-2455/T-2553*, 14 S.R.R. 1317 (1974); *Agreement No. 8905–Port of Seattle and Alaska Steamship Co.*, 7 F.M.C. 792 (1964). Moreover, because these agreements provide the lessee with the exclusive use of certain terminal facilities, in conjunction with its preferential berthing rights, they provide for an exclusive working arrangement, bringing them within the ambit of section 15.[16]

In this particular case it is of little import that these leases relate to areas which are not directly adjacent to the berths being leased by the parties on a preferential use basis. Leases granting exclusive use of backup (marshalling) areas have been found subject to section 15 if the areas are in the locale of the berth and are essential to its operation. *Agreement No. T-4*, 8 F.M.C. at 528; *See also, Agreement Nos. T-1685 and T-1685-6*, 16 S.R.R. 1677, 1696 (1977). There is no requirement that the backup area be contiguous to the berth. In fact, the

[15] Section 1 defines the term "other person subject to the Act" to include, *inter alia*, one ". . . furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water." 46 U.S.C. 801.

[16] These leases could also have been found subject to section 15 because they: (1) fix or regulate transportation rates or fares, *See Agreement No. 8905*, 7 F.M.C. at 797; or (2) give special rates, accommodations, or other privileges, *See Agreement T-4*, 8 F.M.C. 521, 530 (1965).

properties which were the subject of Agreement No. T-4 were two blocks apart at one port and a half-mile apart at the other. It is therefore concluded that these four agreements concern backup areas in the locale of the berths which are essential to the respective carriers' operations at the berth.

No anticompetitive impacts of the Extant Agreements have been demonstrated. Adequate space remains at Puerto Nuevo for any carrier which desires to lease and develop terminal facilities. Moreover, since Seatrain's withdrawal, no party opposes these agreements. The memoranda of justification submitted by the proponents of these agreements set forth a sufficient rationale for their approval.[17]

These agreements are neither unjustly discriminatory or unfair as between carriers, shippers, exporters, or importers; nor operate to the detriment of the commerce of the United States; nor are contrary to the public interest; nor are otherwise in violation of the Shipping Act, and will, therefore, be approved.

The Remaining Agreements

As mentioned above, the Commission's Amended Order interjected 23 additional agreements into this proceeding. However, because the Presiding Officer "scoped and sculptured" this proceeding to include just the Extant Agreements, only four of these agreements were addressed in the Initial Decision. The Commission does not agree with this resolution of the remaining 19 agreements, but concludes nonetheless, that the ultimate result is correct.[18]

Any discussion of these additional agreements must begin with the observation that all have been terminated either by cancellation, withdrawal, or the passage of time. Therefore, the only issues applicable to them are whether they were subject to section 15 and, if so, whether they were in any manner implemented prior to Commission approval. In addition, this group of nineteen agreements can be further narrowed to the eleven agreements which were never filed with the Commission for approval.[19] The other eight were at one time or another filed with the Commission and found not subject to section 15.

The agreements before the Commission generally fall into three categories. One set relates to Berths E and F. Under the original agreement, T-1583, entered into in 1963, Sea-Land was granted preferential berthing rights at Berths E and F

[17] Among the various justifications offered are:

1. Sea-Land's Puerto Rico operation would be seriously disrupted without its truck terminal;

2. it would not be feasible for Sea-Land and PRMSA to acquire additional cranes. The crane sharing arrangement is a highly efficient and practical method of providing an extra crane when needed;

3. PRMSA needs space for a parking lot for containers on chassis; and

4. the long term options are requirements for obtaining federal assistance for future development.

[18] The Presiding Officer denied Hearing Counsel's request to consider each and every agreement mentioned in the Amended Order because of possible due process violations and because it would better serve a regulatory purpose to consider only the Extant Agreements (Memorandum of Procedural Schedule, November 6, 1978, at 2). He based his action on a statement in the Commission's Order Denying Reconsideration of October 17, 1978, that "PRMSA's request to restructure this proceeding can more appropriately be raised before the Presiding Officer" and on a reference to Rule 147(a) of the Commission's Rules of Practice and Procedure (Order Denying Reconsideration, at 2, 3). The Presiding Officer apparently misunderstood our directive. The reference to "restructuring" the proceeding in the Order Denying Reconsideration was made in the context of PRMSA's request to *sever* the proceeding into two distinct phases and not in response to PRPA's contention that the 23 agreements added by the Amended Order needed no further investigation. We did not contemplate nor encourage such a wholesale deletion of a major portion of the Amended Order.

[19] These agreements are designated, using the Port Authority's system, as: AP-64-65-41; AP-64-65-237;AP-65-66-28; A7-AP-62-63-169; A1-AP-68-69-57; AP-67-68-48; March 7, 1968 amendment to AP-67-68-48 and AP-67-68-49; June 2, 1969 amendment to AP-67-68-48; A-2-AP-67-68-48; and November 16,1972 letter amendment to AP-67-68-48.

and exclusive use of adjacent parcels of land. This agreement was filed with the Commission and, by letter dated October 20, 1964 (Exhibit 17), found not subject to section 15. Two subsequent agreements, AP-64-65-41 and AP-64--65-237, allowing Sea-Land to make certain improvements at the Berths, were not filed. Agreement T-1583-1,by which Sea-Land leased an additional parcel and received permission to install more improvements, was also filed with the Commission and found not subject. Again, two subsequent agreements amending T-1583 were entered into but not filed (AP-65-66-28 and A7-AP-62--63-169). Finally, an agreement canceling all the above agreements (T-3271) was filed and found not subject.

The second group relates to Berths G and H. The original agreement granting Sea-Land preferential use of these berths (T-2253) was found not subject on October 2, 1969. Another agreement relating to the same area, T-2254, was also found not subject. A third agreement, A1-AP-68-69-57, amended T-2253 by leasing Sea-Land about 3 acres behind pier G but was not filed.

The third group is comprised of six agreements between PRPA and TTT (AP-67-68-48, A-2-AP-67-68-48, A-3-AP-67-68-48, and three letters concerning AP-67-68-48). The basic agreement (AP-67-68-48) grants TTT preferential use of Berth C and exclusive use of adjacent areas. The others make minor modifications. None was filed with the Commission.

The primary purpose of including the twenty-three agreements by way of the Amended Order was so that the Commission would have before it all the agreements which constituted the parties' complete relationship at Puerto Nuevo, not just the four agreements which had originally been filed for approval. As the initial Order of Investigation indicated, the Commission wished to review the parties' complete understanding concerning this port area. For it was only by conducting this review that the Commission could properly exercise its obligations under the Shipping Act in determining whether to approve the four agreements.

During the course of this proceeding the relationship among PRPA, PRMSA and Sea-Land has been appreciably altered. As a result, the five agreements approved herein coupled with the eight agreements recently approved by the Commission satisfactorily explain the current and complete relationship at Puerto Nuevo. Because the primary purpose in raising these additional agreements has been achieved, and because of the unique circumstances of the case,[20] no further inquiry into this matter is warranted.[21]

The Puerto Nuevo Contract

In his Memorandum of Procedural Schedule the Presiding Officer "scoped" this proceeding around those agreements appearing in Prehearing Exhibit A. The

[20] The parties to the eleven unfiled agreements were probably relying upon earlier Commission determinations that their predecessor agreements or similar agreements were not subject to section 15. Moreover, most of these agreements are but minor modifications to agreements which were filed and found not subject—none supersedes its predecessor to the extent that a completely new arrangement results.

[21] *Today's decision should in no way be construed as approval or acceptance* of the parties' failure to file *all* terminal agreements which are potentially subject to the requirements of section 15. If doubt exists, an agreement should still be filed with the Commission for review. *See* 46 C.F.R. 530.5(a); *Arrangements Relating to the Use of Isla Grande Marine Terminal, San Juan, Puerto Rico*, 17 S.R.R. (1978).

[22] It was, however, included in this proceeding by the original Order of Investigation and Hearing served August 24, 1976 and was never expressly deleted by either the Commission or the Presiding Officer.

Puerto Nuevo Contract was not among them.[22] Nevertheless the Presiding Officer included the Puerto Nuevo Contract in his Initial Decision and found that it was an agreement "... for land and use of cranes" and "in a manner provide [d] for an exclusive or preferential working arrangement." He further concluded that this agreement should be filed with the Commission for approval.

The Puerto Nuevo Contract was entered on November 14, 1975, between Sea-Land and PRMSA (Exhibit 14). By its terms, Sea-Land agreed to sell to PRMSA certain leasehold improvements it had made at Berth F (Article I).[23] PRMSA agreed to reimburse Sea-Land for temporary improvements Sea-Land would have to make at Berth E for a minimum period of two years (Article 2). In addition, PRMSA obtained a six month option within which it could cause Sea-Land to transfer to it a lease on a container crane (Article 3).[24]

Although Sea-Land correctly states that the Initial Decision did not properly characterize the terms of this agreement, the Commission cannot conclude on the record that the Puerto Nuevo contract is beyond our jurisdiction. On its face the Puerto Nuevo Contract does not clearly fit into that category of agreements which courts have determined not be covered by section 15. *See Seatrain Lines v. Federal Maritime Commission*, 460 F.2d 932 (D.C. Cir. 1972), *aff'd* 411 U.S. 726 (1973). Additional information would be necessary to develop the actual relationship established.[25] There is no need to develop this information, however, for it appears that the Puerto Nuevo Contract was terminatd by mutual agreement on January 25, 1978 (Attachment II to Exceptions of Sea-Land)[26] and under no circumstances is required to be filed with this Commission.

There remains the issue of whether this contract, if subject to section 15, was implemented in any manner prior to approval by the Commission. For reasons similar to those mentioned above in the context of the eleven unfiled agreements the Commission declines to further explore this issue.

THEREFORE, IT IS ORDERED, That the Initial Decision issued in this proceeding is adopted to the extent indicated above, and Agreement Nos. T-3193, T-1582, T-3211, T-3211-1, T-3211-2, T-3212-1 and T-3393 are approved;

IT IS FURTHER ORDERED, That the Exceptions of Sea-Land Service, Inc., Puerto Rico Maritime Shipping Authority, and Bureau of Hearing Counsel are denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

[23] This article became effective upon the effective date of Agreement T-3210. That agreement never became effective, however, because it was superseded by Agreements No. T-3567 and T-3567-A.

[24] The six month period began to run on the date of "Deferred Closing" apparently mentioned in a "Memorandum of Understanding" between PRMSA and Sea-Land executed on December 20, 1975. No copy of this memorandum was made part of the record and, therefore, the date of deferred closing cannot be ascertained.

[25] Sea-Land has alleged that the temporary entry complex contemplated by Article 2 has been constructed and paid for and that PRMSA relinquished its option under Article 3 (Exceptions at 9). If true, these facts could have some bearing, albeit not determinative, on whether or not the Commission has jurisdiction over the contract. They are, however, merely allegations of counsel and are not part of the record in this proceeding, and could not, therefore, be utilized by us in reaching our decision.

[26] We are treating this attachment as a late-filed exhibit and admitting it into the record of this proceeding. No party commented adversely on its inclusion in Sea-Land's brief.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 602

APPLICATION OF TRANS FREIGHT LINES, INC. FOR THE BENEFIT OF INTERNATIONAL TRANSPORTATION CORPORATION

ORDER PERMITTING WAIVER OF CHARGES

June 21, 1979

In its order of Conditional Denial of Application issued in this proceeding, the Commission determined that the record contained conflicting statements as to the prior existence and nature of an agreement between Trans Freight Lines, Inc. (Applicant), and International Transportation Corporation on the rate to be applied to the shipment of two containers of construction materials from New York to Rotterdam, The Netherlands. The Commission determined to deny the application unless applicant provided conclusive evidence of the existence of such agreement and of the level of the negotiated rate.

Applicant has now submitted evidence in the form of a booking order for the two containers and an affidavit from an official of the freight forwarder, which evidence establishes that: (a) the parties had agreed on a rate of $40.00 w/m per 20' container, minimum 900 c.f., and $42.50 per 40' container, minimum 1600 c.f.; (b) that the rate was intended to be filed upon confirmation of the booking; and (c) that due to clerical error, it was not so filed.

The application complies with all requirements of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817(b)(3) and, accordingly, Applicant is authorized to waive collection of $6,201.25 from the charges previously assessed.

THEREFORE, IT IS ORDERED, That Applicant shall publish promptly in its appropriate tariff, the following notice:

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 602 that effective August 29, 1978 for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period August 29,1978 and September 6, 1978, the rate on supplies and materials for construction of the Ramses-Hilton Hotel in Cairo is $40.00 w/m, minimum 900 cft. per 20' container and $42.50 w/m, minimum 1600 cft. per 40' container, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

IT IS FURTHER ORDERED, That waiver of the charges shall be effectuated within thirty (30) days of service of this notice and Applicant shall within five (5) days thereafter notify the Commission of the date and manner of effectuating the waiver and submit a copy of the published tariff notice.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-51

AGREEMENT NO. 10349—A CARGO REVENUE POOLING AND SAILING AGREEMENT—ARGENTINA/UNITED STATES ATLANTIC TRADE

DOCKET NO. 78-52

AGREEMENT NO. 10346—A CARGO REVENUE POOLING AND SAILING AGREEMENT—ARGENTINA/UNITED STATES GULF COAST TRADE

Agreement Nos. 10346 and 10349, cargo revenue pooling and sailing agreements in the northbound Argentina/United States trades, found subject to section 15 of the Shipping Act, 1916, and approved pursuant to that section, subject to certain modifications.

Joseph A. Klausner for Reefer Express Lines Pty.
Elmer C. Maddy, George Dalton and *John Greenwood* for A/S Ivarans Rederi.
David A. Brauner and *Nathan Bayer* for Empresa Lineas Maritimas Argentinias S.A.
Edward S. Bagley and *Frederick Wendt*, for Delta Steamship Lines.
Neal M. Mayer and *Gladys Gallagher* for Companhia de Navegacao Lloyd Brasileiro and Companhia Maritima Nacional.
Odell Kominers, William Fort, John W. Angus, III and *Jonathan Blank* for Moore-McCormack Lines, Inc.
John H. Dougherty for Companhia de Navegacao, Maritima.
Robert L. McGeorge for Holland Pan American Lines.
David C. Jordan and *Stanley O. Sher* for Transportacion Maritima Mexicana S.A.
Thomas K. Roche for Northern Pan-American Lines.
Edward M. Shea for Sea-Land Service, Inc.
Renato C. Giallorenzi for Cia de Navegacao Maritima Netumar.
Stuart Benson and *Judy Bellow* for the Department of State.
Paul A. Mapes and *Janice Reece* for the Department of Justice.
John Robert Ewers, C. Douglass Miller, Bruce Love and *William Weiswasser*, Hearing Counsel.

REPORT AND ORDER

June 22, 1979

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

* Commissioner Bakke joined in the Commission decision, but also has filed a separate concurring opinion.

BACKGROUND OF PROCEEDINGS

These related but unconsolidated proceedings were instituted to determine the approvability of certain cargo revenue pooling agreements which were filed with the Commission pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C.A. 814).

Agreement No. 10349 (the Atlantic Agreement), the subject of Docket No. 78–51, is an agreement between Empresa Lineas Maritimas Argentinas, S.A. (ELMA), Moore-McCormack Lines, Incorporated (Mormac) and Sea-Land Service, Inc. (Sea-Land),[1] as national-flag lines and Companhia Navegacao Lloyd Brasileiro (Lloyd), Cia de Navegacao Maritima Netumar[2] (Netumar), A/S Ivarans Rederi (Ivarans), Van Nievelt Goudriaan and Company (Hopal), and Montemar S.A. Commercial y Maritimas (Montemar), as third-flag lines,[3] in the northbound trade from Argentine ports within the LaPlata/Rosario range, both inclusive, to ports on the United States East Coast. The Atlantic Agreement provides that 80% of the cargo revenue shall be divided equally among the national-flag lines—40% to the Argentine-flag line(s) and 40% to the United States-flag line(s). The remaining 20% of the pool is to be allocated among the third-flag lines on a percentage basis.[4] By its terms the Atlantic Agreement expires December 31, 1980.

Agreement No. 10346 (the Gulf Agreement), the subject of Docket No. 78–52, is an agreement between ELMA, A. Bottacchi S.A. de Navegacion C.F.I.I. (Bottacchi), and Delta Steamship Lines (Delta), as the national-flag lines, and Northern Pan-American Lines (Nopal), Lloyd, Companhia Maritima Nacional (Nacional), Montemar and Navimex S.A. de C.V. (Navimex), as third-flag lines, in the northbound trade from Argentine ports within the LaPlata/Rosario range, both inclusive, to ports on the United States Gulf Coast. The Gulf Agreement, like the companion Atlantic Agreement,[5] provides that 80% of the cargo revenue shall be divided equally among the national-flag lines—40% to the Argentine-flag line(s) and 40% to the United States-flag line(s). The remaining 20% of the pool is to be allocated to the third-flag lines on a percentage basis.[6] The Gulf Agreement also expires on December 31, 1980.

The Gulf and Atlantic Agreements were noticed in the *Federal Register* on July 31, and August 22, 1978, respectively. The United States Department of

[1] Sea-Land, though a signatory to the Atlantic Agreement, has assigned all of its rights, responsibilities, and obligations under the Atlantic Agreement to Mormac.

[2] On June 15, 1979, the Commission was advised that Netumar had, on May 21, 1979, decided not to participate in the Atlantic Agreement and that Lloyd would assume its rights and duties under the Agreement.

[3] As used herein the term "third-flag line" refers to other than an Argentine or United States liner operator.

[4]

THIRD-FLAG LINES	1978	1979	1980
Brazilian (Lloyd and Netumar)	6.0%	6.6%	7.2%
Ivarans	12.5%	11.8%	11.1%
Hopal	1.0%	1.0%	1.0%
Montemar	0.5%	0.6%	0.7%

[5] Hereinafter, the Atlantic and Gulf Agreements are collectively referred to as "the Agreements".

[6]

THIRD-FLAG LINES	1978	1979	1980
Brazilian (Lloyd and Netumar)	6.85%	7.40%	7.90%
Montemar	1.05%	1.05%	1.05%
Nopal	11.10%	10.55%	10.05%
Navimex	1.00%	1.00%	1.00%

Justice (Justice), Transportacion Maritima Mexicana S.A. (TMM) and Reefer Express Lines Pty. (REL) protested the Gulf Agreement and requested a hearing. The Department of State (State), A/S Ivarans Rederi (Ivarans), Justice and REL protested the Atlantic Agreement and requested a hearing.

On November 30, 1978, the Commission instituted proceedings pursuant to section 15 to determine whether the Agreements are "unjustly discriminatory or unfair to the protesting carriers", REL, TMM and Ivarans.[7] However, because of public interest considerations found by the Commission, the Agreements were granted *pendente lite* approval. The Commission's Bureau of Hearing Counsel (Hearing Counsel) was made a party to both proceedings.[8]

On March 23, 1979, the United States Court of Appeals for the District of Columbia, in response to the petitions for review filed by Ivarans and REL, stayed the Commission's November 30, 1978 Orders of Interim Approval, but deferred the effectiveness of that stay for 60 days.[9] The Court also remanded the record to the Commission and directed it to provide for "appropriate expedited notice and hearings under section 15 of the Shipping Act, 46 U.S.C. 814 (1976)."

On April 12, 1979, the Commission, in response to the Court's orders of remand, and after consideration of briefs filed by the parties, referred the proceedings to the Presiding Officer for an expedited hearing. In its Order on Remand, the Commission directed the presiding Administrative Law Judge Thomas W. Reilly (Presiding Officer), to certify the record to it for decision on or before May 2, 1979, and ordered the simultaneous filing of proposed facts and briefs on May 9, 1979.[10]

After providing for an expedited discovery procedure, the Presiding Officer held hearings from April 26 through May 2, 1979. On May 3, 1979, the Presiding Officer certified the record to the Commission for decision.[11] The parties have filed their proposed findings and briefs,[12] and the matter is now before the Commission for decision.[13]

FACTS

Argentina, like a number of other nations, particularly in South America, has instituted programs, through a series of laws, decrees, and resolutions, designed to develop, maintain and promote a merchant marine that is capable of carrying a substantial portion of its commerce. The general purpose of these enactments is to reserve a fixed or substantial portion of Argentina's waterborne commerce to

[7] Ivarans, while a signatory to the Atlantic Agreement, was designated a protestant in the November 30, 1978 Orders of Investigation, as were TMM and REL.

[8] Justice and State later sought and were granted permission to intervene in these proceedings. Neither party called any witnesses. State did not offer any evidence for the record, and Justice presented only one exhibit which was sponsored by a witness for TMM.

[9] The stay was originally scheduled to take effect on May 21, 1979. However, by order of May 17, 1979, the Court postponed the effectiveness of its stay through June 23, 1979.

[10] These dates were later extended to May 3 and May 11, 1979, respectively.

[11] The Presiding Officer certified that "the record is a full and sufficient basis for agency decision and . . . that there exists no questions of witness demeanor or witness credibility not sufficiently reflected by the record."

[12] Although signatories to the Agreements and named as proponents in the November 30, 1978 Orders of Investigation, neither Nopal, Bottacchi, Netumar or Montemar participated in these proceedings.

[13] These proceedings have not been formally consolidated. However, because they are legally and factually related, it is appropriate to dispose of both proceedings in a single Report and Order.

Argentine-flag vessels. The principal Argentine cargo reservation law is Law 18.250, as amended. That law, as enacted in 1969, reserves the Argentine-flag carriage *all* goods imported for, or for the account of, the national or provincial governments or any corporation which is either owned or controlled by a government entity.[14] This reservation also applies to any import cargo that is financed through the state banking system or which enjoys any duty or tax benefit. In addition, Law 18.250 provides that Argentine-flag carriers shall participate substantially in the carriage of Argentine exports.[15]

In 1972 and 1973 Argentina amended Law 18.250 (Laws 19.877 and 20.447, respectively) to permit Argentine imports to be carried on vessels of the exporting nations providing there exists an intergovernment or commercial agreement which allocates no less than 50% of the freight revenues earned to Argentine-flag carriers. Law 20.447 establishes the Argentine merchant marine as an instrument of national economic policy and affirms Argentina's right to carry 50% of its export waterborne cargo in Argentine-flag vessels. This law also directs the State Secretary of Maritime Interests (SEIM) to negotiate bilateral or multilateral arrangements "to promote the organization" of Argentina's international waterborne commerce.

In December of 1976, SEIM promulgated Resolution 507 which instituted a procedure for obtaining waivers from the Argentine import reservations. When it became effective on January 19, 1977, Resolution 507 required that Argentine-flag vessels be given the right of first refusal for all Argentine imports controlled by Law 18.250. The Resolution provided that these cargoes could only be carried on non-Argentine-flag vessels if the consignee in Argentina applied for and received a waiver from the Argentine reservations laws at least 30 days in advance.

Resolution 507 created an "avalanche of concern" by United States shippers and carrier interests.[16] Generally, these parties complained of the "stifling" effects of the Resolution on the movement of goods from the United States to Argentina and the chaotic conditions created by that Resolution at loading docks, cargo terminals, and in the traffic departments of major United States shippers.

In response to these protests, Robert J. Blackwell, then Assistant Secretary of Commerce for Maritime Affairs, met with Admiral Carlos N. A. Guevara, the Argentine Secretary of State for Maritime Interests in February of 1977.[17] Admiral Guevara expressed concern that the cargo subject to the then existing northbound pooling agreements (Agreement Nos. 10038 and 10039) was not growing as fast as nonpool cargo. Accordingly, Admiral Guevara suggested that the existing pooling agreements were losing their stabilizing effects. Admiral Guevara took the position that the north and southbound United States/Argentine trades are "interlinked," and urged Mr. Blackwell to take some action which would assure Argentine-flag carriers reciprocity in the carriage of northbound cargo.

[14] The relevance of the import trade to the northbound trade is explained further, *infra*.

[15] In 1971 Argentina instituted a "drawback system" which provides for tax rebates to Argentine exporters. Where the cargo is shipped in Argentine ships, an additional refund is granted based upon a percentage of the freight charges.

[16] The United States Maritime Administration (Marad) received protests from the Commerce and Industry Association of New York, the National Industrial Traffic League, International General Electric, Ford Motor Company, and DuPont, among others.

[17] Mr. Blackwell and Admiral Guevara had met earlier in late 1976.

Although Mr. Blackwell was unable to negotiate a final solution to the difficulties resulting from Resolution 507 at the February 1977 meeting, Admiral Guevara did agree to exempt Mormac from the pre-waiver procedures because of its existing pooling agreement with ELMA in the northbound Atlantic trade (Agreement No. 10038).

Thereafter, Marad, in conjunction with the State Department, prepared a Memorandum of Understanding (Memorandum) addressing Argentina's concerns over maritime matters in the Argentina/United States trade. On March 21, 1978, the draft Memorandum was executed with minor modifications by Mr. Blackwell and Admiral Guevara. As executed, the Memorandum provides, in pertinent part:

> Each party recognizes the intention of the other party in carrying a substantial portion of its liner trade in vessels of its own flag in accord with appropriate legislation in each country. For purposes of this paragraph, the vessels of Argentina shall include vessels under Argentine registry or charter. This provision, established in the light of the reciprocal interest of the two countries, does not affect the right of flag vessels of the third parties to carry goods between the ports of the two Parties, as implemented in the terms of Paragraph 2 below, and in accord with the appropriate legislation in each country.
>
> * * *
>
> The establishment of mechanisms and procedures necessary to the implementation of the carriage of cargo envisioned in Paragraph 1 of this Memorandum of Understanding, such as revenue shares for the lines in the trade, number of sailings, overcarriage and undercarriage provisions, and similar matters, will be determined by commercial agreement between their respective national-flag carriers, subject to approval by the appropriate governmental agencies of each of the Parties. (Hearing Counsel Ex. 1, App. 4).

Although the Memorandum does not specifically detail the particulars of the commercial agreement between the respective national-flag lines, it does, as Mr. Blackwell testified, appear to contemplate a commercial cargo revenue pool that includes third-flag carriers.

Subsequent to the execution of the Memorandum, ELMA was directed to draft a pool agreement with the other national-flag carriers then serving the United States/Argentine trade.[18] On May 31, 1978, ELMA sent draft copies of the Agreements to the Secretary of the Inter-American Freight Conference requesting comments and the convening of a principals' meeting on the Agreements. Meetings were held in Buenos Aires on June 27 and 28, 1978 to discuss the Gulf Agreement and on June 29 and 30, 1978 on the Atlantic Agreement.[19]

All of the carrier parties to the instant proceedings were represented at the Buenos Aires meetings. The Agreements were discussed except to the extent they addressed the individual third-flag allocations, a matter which had not been included in ELMA's draft. The third-flag lines caucused separately to negotiate

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[18] TMM in the instant proceedings urges the imposition of sanctions, pursuant to 46 C.F.R. 502.210, against ELMA for its failure to produce the SEIM document(s) that directed ELMA to form a pool. TMM objects to all "portions of the record referring to any Argentine Government instructions and orders" to ELMA to form u cargo revenue pool. Although the SEIM document may have been the "best evidence" of SEIM's instructions to ELMA, the record evidence presented by all of the parties on this matter, including Mr. Blackwell's testimony (see Hearing Counsel Exhibit 1, *e.g.* at pages 81 and 82), the Memorandum of Understanding, and the acquiescence of State to ELMA Exhibit 3, Attachment B (a cable sent from the Argentine Government to the Department of State and the Department of Commerce), does clearly establish that SEIM directed ELMA to formulate the pooling agreements now at issue. Because of the availability of other probative evidence relative to SEIM's instructions to ELMA and in the interest of expediting the disposition of these proceedings, TMM's request is denied.

[19] In 1974, prior to the events set in motion by Resolution 507, ELMA convened a principals' meeting in an attempt to formulate a 85%, national-flag,—15%, third-flag—pool among all the carriers in the northbound Argentina/United States trade. These meetings were recessed without reaching an accord.

their individual pool shares and conveyed the results to the open transcribed meetings attended by all the parties. Although neither ELMA nor any of the other national-flag lines had any interest in the third-flag allocations, an ELMA representative was asked to chair the third-flag caucus.

In the Gulf Agreement caucus, Montemar, Navimex, Nopal and the Brazilian carriers Lloyd and Nacional agreed on a division of the third-flag allocation. TMM did not request a specific share and was offered one percent. REL attended the third-flag caucus, but its representative had instructions to reject any and all offers.[20]

At the open meetings, when TMM asked the third-flag carriers to advise as to the manner by which the third-flag share had been divided, Mr. Arieira of Lloyd explained that the allocation was made based upon: (1) best performance during the last several years; (2) historical participation in the trade; and, (3) with respect to the Brazilian share, reciprocity and compensation to the Brazilian lines for the cargo and shares contributed by Brazil in the Brazil/United States trade.[21]

The Gulf Agreement was executed on June 28, 1978, over TMM's objections to its share. As executed, the Gulf Agreement allocates a 1% share to TMM should it decide to participate in the pool.

In the Atlantic Agreement caucus, Ivarans, which had been carrying approximately 22-23% of the total northbound cargo, offered to reduce its share of the third-flag allocation to 17.2%, with the remaining 2.8% to be divided among the other third-flag carriers. These other third-flag carriers refused to accept Ivarans' offer, and eventually agreed to the division presently set forth in the Atlantic Agreement.[22] Ivarans did not agree to this allocation, and on June 30, 1978, the Atlantic Agreement meeting was adjourned without an agreement being reached.[23] At the close of the meeting, Captain Barni of ELMA advised that SEIM would be issuing a resolution governing loading rights in Argentine ports and that another principals' meeting would be convened in the near future. He also advised that if any carrier refused to accept a share at the next meeting, that carrier's share would be forfeited to the national-flag lines until it joined in the pool.

On July 17, 1978, SEIM promulgated Resolution 619. That Resolution provides that all Argentine export cargoes shall be carried only by conference members or, where pooling agreements approved by SEIM exist, by members of the pool. The Resolution does not apply to cargo not covered by the conference agreement or to cargo moving outside the geographic scope of the pool. The Resolution allows for a waiver of the carrier requirement when no conference or pool member is in a position to lift cargo. For perishable cargo such as refrigerated commodities, a waiver may be obtained if there is no pool member in a position to lift the cargo within 48 hours of the desired date of shipment.

On July 31 and August 1, 1978, the principals met again in Buenos Aires to discuss the Atlantic Agreement. At these meetings, Ivarans' representative, Mr.

[20] See, for example, Tr. 1026 and Mormac Ex. 2, Attach. P, page 8.

[21] These criteria were also applied to the third-flag allocations in the Atlantic Agreement.

[22] See footnote 4, *supra*.

[23] REL's representative also attended the Atlantic Agreement meeting. Again, he did not have authority to bind REL to the Atlantic Agreement and was instructed to reject any and all offers.

John Schmeltzer, advised that, in view of SEIM Resolution 619, Ivarans would sign the Atlantic Agreement but only under protest. When ELMA explained that SEIM would not permit it to sign the Atlantic Agreement under protest, Ivarans agreed to sign the Atlantic Agreement reserving its legal rights.

Discussion and Conclusion

Section 15 of the Shipping Act, 1916, requires the filing for approval of every agreement between common carriers, or other persons subject to the Shipping Act, 1916:

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

Section 15 also requires that the Commission shall:

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

An approved section 15 agreement is exempt from the antitrust laws of the United States. However, where an agreement submitted to the Commission for approval is established as violative of the antitrust laws, this alone will normally constitute substantial evidence that the agreement is contrary to the public interest, unless the proponents to the agreement can demonstrate that the particular 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." *Federal Maritime Commission v. Svenska Amerika Linien*, 390 U.S. 238 at 243 (1968).

Cargo revenue pooling and sailing agreements of the type now before us are *per se* violative of the antitrust laws of the United States and are *prima facie* subject to disapproval unless justified. *Agreement No. 10056–Pooling, Sailing, and Equal Access Agreement to Cargo in the Argentina/United States Pacific Coast Trades*, 20 F.M.C. 255, 17 S.R.R. 1323 (1977); *Mediterranean Pools Investigation*, 9 F.M.C. 264 (1966). Before addressing the question of justification, however, we must first determine if the Agreements in fact are "agreements" within the meaning of section 15 of the Act.

Section 15 Jurisdiction

Justice argues that the Agreements are not *bona fide* agreements because they were allegedly "coerced by Argentine Resolution 619 and the Argentine threat to create chaos in the southbound United States Argentine trade." It contends that before an agreement may be considered for approval under section 15 of the Act, there must be mutual assent among the parties and a voluntary meeting of the minds. Justice takes the position that these required conditions are lacking here because SEIM Resolution 619 restricts certain Argentine exports to pool members, and because SEIM has allegedly threatened to disapprove the southbound pools if these Agreements are disapproved. It concludes that these Agreements were *forced* on the parties and therefore do not constitute "agreements" within the meaning of section 15.[24]

Ivarans also argues that the Atlantic Agreement is not within the scope of section 15. It explains that it did not "voluntarily" sign that Agreement but did so only to protect its interests. Ivarans points out that its representative at the July 30-August 1, 1978 Buenos Aires meetings originally advised that Ivarans would sign the Atlantic Agreement but only under protest and that this protest was withdrawn only after ELMA advised that it could not execute a protested Atlantic Agreement. Ivarans notes that it did, however, reserve its legal rights.

Cited by both Ivarans and Justice as support for the position that the Agreements cannot be approved because they are the result of government compulsion and therefore not *bona fide* agreements within the meaning of section 15 is the Commission's decision in *Inter-American Freight Conference–Cargo Pooling Agreement Nos. 9682, 9683, and 9684*, 14 F.M.C. 58, 72 (1970). This reliance on the *Inter-American* decision is misplaced.

The Commission's refusal to approve the agreements at issue in *Inter-American* was not grounded on any alleged governmental involvement, but rather on the fact that the Commission lacked the requisite subject matter jurisdiction to determine the merits of the agreements, because of the withdrawal of some of the parties to those agreements.[25] *Inter-American, supra,* at 62. The language relied on by Justice and Ivarans is clearly dicta. *Ibid,* at 62, 72. In any event, the allegations of coercion raised by Justice and Ivarans are not supported by the records in these proceedings.

The Gulf Agreement was executed on June 28, 1978, the last day of the Gulf Agreement principals' meeting in Buenos Aires. The alleged threat of SEIM intervention and the promulgation of Resolution 619 on July 17, 1978, which Justice argues forced the carriers to assent to the Gulf Agreement, occurred *after* the Gulf Agreement had been executed. Nor does the evidence relating to the Gulf Agreement meetings and the execution of that Agreement otherwise indicate that the Argentine Government coerced the carriers into entering into the Gulf Agreement. On the contrary, the record evidence indicates that, with the exception of REL's representative, who had been instructed to object to any proposal, and TMM's representative who did not ask for a specific share, the negotiation and execution of the Gulf Agreement was spirited but free from any duress or coercion. The Commission therefore finds that the Gulf Agreement reflects a "voluntary meeting of the minds" of its signatories, was mutually agreed to by those signatories, and is subject to our consideration under section 15 of the Shipping Act, 1916.

The June 29-30, 1978 meetings on the Atlantic Agreement were adjourned because the third-flag carriers were unable to reach a consensus on the allocation of shares. Prior to the adjournment, Captain Barni of ELMA advised that a SEIM resolution was forthcoming. Thereafter, Resolution 619 was promulgated.

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[24] If Justice is correct, it would also appear that the Agreements would not be subject to the United States antitrust laws. *Inter-American Refining Corp. v Texaco Maracibo*, 307 F.Supp. 1291 (1970).

[25] For a more recent discussion of this issue, see *Agreement No. 8080-11, Amendment to the Atlantic and Gulf/Indonesia Conference Agreement*, 19 F.M.C. 500, 17 S.R.R. 21 (1977) and the cases cited therein.

At the subsequent Atlantic Agreement meetings Ivarans advised that it would sign the Agreement, but only under protest. Ivarans withdrew this "protest," reserving its legal rights, when ELMA advised that SEIM would not permit ELMA to sign a protested agreement.[26]

The evidence presented with respect to the Ivarans' protest and its subsequent withdrawal is contained in the transcript of Buenos Aires meetings, and the testimony of Mr. Holter-Sorensen and Mr. Schmeltzer. There is nothing in the Agreement itself that would even suggest that Ivarans signed that Agreement under duress or coercion and not on its volition. On the contrary, the Atlantic Agreement provides on the signature page, just above Mr. Schmeltzer's signature for Ivarans, that:

> The parties hereto have caused this Agreement to be executed voluntarily, *of their own free will* . . . (Emphasis added) (Mormac Ex. 1).

Furthermore, although Ivarans has protested the Atlantic Agreement before this Commission, it has not repudiated or disassociated itself from the Atlantic Agreement in any way.[27] In fact, Ivarans, through one of its principal owners, Mr. Holter-Sorensen, testified that it advised ELMA that:

> We [Ivarans] confirm that we shall comply with the terms and provisions of pool (sic) Agreement signed Buenos Aires August 1, 1978, if and when agreement has been approved by Argentine and United States authorities in accordance with Argentine and United States law. (Ivarans Ex. 2, p. 17).

Ivarans now, however, cites the *withdrawn* "protest" as indicative, at least in part, of the alleged duress that caused it to sign the Atlantic Agreement. This position is in conflict with Mr. Holter-Sorensen's admission that Ivarans will participate in the pool if approved, and Mr. Schmeltzer's acknowledgment that Ivarans voluntarily, and of its own free will, executed the Atlantic Agreement.

Finally, while SEIM Resolution 619 does restrict certain Argentine exports to pool participants, the promulgation of that Resolution does not mandate a finding that the Atlantic Agreement was not voluntarily entered into by its signatories, including Ivarans. SEIM Resolution 619 directs that certain Argentine exports be carried on conference vessels or, if the conference members form a pool, that the cargo be carried on the vessels of those conference members who are also pool members.[28] Although Resolution 619 recognizes the conference lines' attempt to formulate a pooling Agreement, it does not *mandate* the creation of a pool. Nor does it *direct* the allocation of any specific pool shares. While the promulgation of Resolution 619 may be further evidence of the Argentine Government's sanction of pooling agreements in its export trades, its provisions cannot be construed *to require* the Agreements now in issue. The record simply will not support a finding that these Agreements were compelled by Resolution 619. Accordingly, we find that the Atlantic Agreement is subject to our consideration under section 15 of the Shipping Act, 1916.[29]

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[26] While the record does not indicate the reasons for SEIM's refusal to permit ELMA to sign the Atlantic Agreement, SEIM was probably concerned that the Ivarans' protest would abrogate the Agreement under Argentine or United States law.

[27] See *Agreement No. 8080–11, supra;* and *Inter-American, supra.*

[28] As implemented, Resolution 619 only applies to Argentina's export trade with the United States. However, Article 6 provides that it may be "extended to cover Argentine exports to other countries."

[29] While Ivarans has objected to the approval of the Atlantic Agreement in general, its primary concern is the allocation of the third-flag shares. We believe our disposition of the third-flag share issue as discussed, *infra*, addresses Ivarans' concerns and minimizes any impact Resolution 619 may have on Ivarans.

Justification

Having resolved the jurisdictional issue, the Commission must now determine whether the Agreements have been demonstrated to be required by a serious transportation need, necessary to secure important public benefits, or in furtherance of a valid regulatory purpose of the Shipping Act. Also to be determined is whether the Agreements are unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports or between exporters from the United States and their foreign competitors or operate to the detriment of the commerce of the United States. As might be expected, the Agreements' proponents and their protestants are divided over the quantity and quality of the evidence presented on these issues.[30]

In general, the Agreements' proponents take the position that the Agreements are justified by the Argentine cargo preference laws, and the Blackwell-Guevara Memorandum of Understanding. They point out that the Commission has previously recognized that cargo preference laws tend to bring about international conflict and that these conflicts are generally resolved by commercial arrangements, such as the ones now in issue. In proponents' view, the disapproval of these Agreements would result in a disruption of United States-flag service and adversely impact on shippers particularly in the United States/Argentina southbound trade. Proponents cite the evidence of record which indicates that the northbound and southbound trades are "interlinked" and submit that disapproval of these northbound Agreements could well mean a return to the chaotic conditions that arose in 1977. Finally, proponents contend that the protestants have failed to demonstrate that the Agreements are unjustly discriminatory or unfair.

Protestants argue that the Agreements have not been properly justified, and that they are unjustly discriminatory and unfair. They point out that while the Blackwell-Guevara Memorandum may contemplate a pool, it does not require the shares provided for in the Agreements. Furthermore, protestants submit that the proponents have not established that the Argentine government has directed the allocations of the shares provided for in the Agreements.

Protestants note that the national-flag lines, ELMA, Delta, and Mormac were carrying approximately the same share of the trade now allocated to them prior to the implementation of these Agreements. This fact, protestants argue, evidences the lack of any economic justification for the Agreements. This failure of justification is further allegedly supported by the fact, admitted by proponents, that the trade is not overtonnaged and is generally free of malpractices.

Protestants take the position, that *Svenska*, *supra*, requires proponents to come forth with economic justification before the Commission may approve an agreement which is *per se* violative of the antitrust laws. In protestants' view, this evidence is lacking. Protestants take issue with proponents' attempt to justify these Agreements on the grounds that they will avoid international conflict and promote governmental harmony. Protestants submit that even if these were proper grounds for approval, a point which the protestants do not concede, the evidence of record in these proceedings does not establish that disapproval of the Agreements will result in such conflict or disharmony.

[30] While Hearing Counsel urges approval of the Agreements, it submits that the third-flag share should be reallocated. Justice, on the other hand, argues for the disapproval of the Agreements. State takes a middle ground but advises that disapproval could have at least some short-term disruptive effects.

Finally, protestants argue that the third-flag allocations are unjustly discriminatory and unfair because they were determined without regard to the third-flag participants' past carryings in the trades.

Upon consideration of the entire record in these proceedings, including the proposed findings and briefs of the parties, and for reasons stated below, the Commission finds the Agreements have been justified under the *Svenska* standard. We further find that the Agreements are not unjustly discriminatory or unfair providing they are modified as required herein. Accordingly, Agreement Nos. 10346 and 10349 are approved subject to certain conditions.

Argentina has since 1948 "adopted certain discriminatory practices which effected a routing preference in favor of its national-flag line," ELMA. *Agreement No. 10056–Pooling, Sailing, and Equal Access to Cargo in the Argentina/U.S. Pacific Coast Trade*, 20 FMC 255, 17 S.R.R. 1323 (1977). (See page 14 of the Slip Op. Appendix which was not published in the S.R.R.) Since that time, the Argentine Government has continued to take actions designed to assure that Argentine-flag vessels carry a substantial portion, if not all, of Argentina's water-borne foreign commerce. While the cargo preference laws and decrees, promulgated by Argentina may not be wholly consistent with the policies of the United States, they are nevertheless duly enacted promulgations of a sovereign state. The actions of the Argentine Government must, in the interest of international comity, be recognized and to the extent possible be accommodated by this Commission, an agency of the United States Government.[31]

The Argentine Government has enacted legislation that virtually assures that 100% of its imports will be carried on its national-flag vessels in the United States/Argentina trades. However, as the United States has itself provided by its limited cargo preference laws,[32] Argentina has preserved a right for its trading partners' vessels to carry a portion of the reserved cargo. Thus, Argentina enacted Law 19.887 which permits Argentine imports to be carried on vessels of the exporting nation where a government to government or commercial agreement exists which allocates no less than 50% of the freight revenues earned to Argentine-flag vessels.

The United States-flag carriers serving the southbound United States/Argentina trades were insured a share of Argentine imports by virtue of Agreements Nos. 10038 and 10039.[33] SEIM resolution 507 effectively vitiated these Agreements by requiring United States-flag carriers to obtain waivers for cargo carried in the trades. The impact of Resolution 507 resulted in the Blackwell-Guevara negotiations. At these negotiations the Argentine officials took the position that the southbound trade, and the availability of Argentine imports for carriage by non-Argentine-flag carriers, was tied to the northbound trade and that

[31] *Agreement No. 9939–1–Modification and Extension of a Pooling, Sailing and Equal Access Agreement*, ___ F.M.C. ___, 18 S.R.R. 1623 (1979); *Agreement No. 10066–Cooperative Working Arrangement*, ___ F.M.C. ___, 18 S.R.R. 1229 (1978); *Agreement No. 9932–Equal Access to Government Controlled Cargo and Interim Cooperative Working Arrangement, et al.*, 16 F.M.C. 293 (1973).

[32] See for example, P.L. 664, the Cargo Preference Act of 1954, 68 Stat. 832; Public Resolution 17, 46 U.S.C.A. 124(b) (1). *Agreement No. 10066, supra*.

[33] Although the Commission must give the same measure of protection to third-flag carriers that it does to United States-flag carriers, this does not necessarily mean that the third-flag carriers receive identical treatment. Third-flag carriers may be subject to handicaps and impediments not borne by United States-flag carriers, in the same trades, for the third-flag carriers, as cross-traders, cannot offer the required reciprocity in the concerned trade. *Agreement No. 9939–1, supra*, and *Agreement No. 9932, supra*. See also *Alcoa Steamship Company v. FMC*, 321 F.2d 756 (D.C. Cir. 1963).

Argentina was to carry at least 50% of that cargo. As Mr. Blackwell testified, the Memorandum was negotiated and executed in order to address these concerns of the Argentine Government and to protect the United States maritime interest in the trades.

The United States Government itself therefore has recognized the interdependence of the north and southbound United States/Argentina trades.[34] It is therefore not only appropriate but a sound regulatory practice that the impact of the Agreements on United States commerce in the southbound trades be considered in determining whether the Agreements now in issue are justified.

In the northbound United States/Argentina trades, Argentina has asserted its right to carry 50% of its export cargoes in Argentine-flag vessels. To guarantee its access to 50% of the *export* cargoes, Argentina has limited the availability of Argentine *imports* for carriage by non-Argentine-flag vessels. Moreover, it has initiated and sanctioned these Agreements which are designed to assure substantial Argentine-flag participation in its export trade with the United States.[35] Absent these Agreements, the Argentine Government is, at a minimum, likely to reinstitute the pre-waiver requirements of Resolution 507. Such action would again adversely affect United States shipper and carrier interests and operate to the detriment of the commerce of the United States.[36] These interests and our commerce would be further impaired if the United States took retaliatory measures to offset any unfavorable conditions caused by the Argentine Government.[37]

As we explained in *Agreement No. 9939–1, supra,* at 1628:

> When a commercial arrangement . . . provides a means to reconcile 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 intergovernmental conflict. In addition, to the extent . . . [an agreement] allows United States-flag carriers access to a significant portion of government-controlled cargo that would otherwise not be available [or readily available], thereby also improving common carrier service to shippers and consignees, [the agreement] provides additional important public benefits.[38]

The rationale expressed in *Agreement No. 9939–1* also applies to Agreement Nos. 10346 and 10349. These Agreements serve an important public benefit by maintaining international harmony through the avoidance of disruptive retaliatory action and resultant international conflict. Additionally, because the inbound and outbound trades are "interlinked," the Agreements serve a serious transportation need by avoiding a disruption of United States foreign commerce and the consequential injury to shipper and carrier interest in the United States/Argentina trades, particularly southbound.

[34] This interdependence also takes into consideration the manner in which cargo moves and trades are served. Liner operators generally serve a geographic area both inbound and outbound with the same service and vessels. It is therefore appropriate to consider the effects of an agreement on both the inbound and the reciprocal outbound trade. Similarly, it is pertinent to consider the effects an agreement may have on related geographic trade areas served by the parties to that agreement. At least some of the parties to these proceedings call at other South American ports with their United States/Argentina trade vessels.

[35] Even were the Commission to find, that SEIM had not initiated the Agreements now in issue, the Agreements nevertheless may have Argentine Government sanction in view of the fact that Argentine Law 20.447 declares the Argentine merchant marine, which presumably includes ELMA, as an instrument of Argentina's national economic policy.

[36] The United States Department of State, has advised that disapproval of these Agreements would strain diplomatic relations with Argentina and would disrupt, at least on a short-term basis, United States maritime and commercial interests.

[37] As we have previously explained, "whenever section 19 of the Merchant Marine Act, 1920 has been invoked in the past it has almost always resulted in a commercial arrangement," like the ones now in issue, which has offset the restrictive measures imposed. *Agreement No. 10056, supra,* Slip. Op. App. at 25; see also *Agreement No. 10066, supra,* and *Alcoa Steamship Company v. FMC, supra.*

[38] See also *Agreement No. 10066, supra.*

This does not end our inquiry, however. In considering the grant of an antitrust exemption for these Agreements, the Commission must make certain that the conduct legalized does not invade the antitrust laws any more than is necessary to serve the purposes of the Shipping Act, 1916 and the legitimate objectives of the Agreements. *United States Lines v. FMC,* 584 F.2d 519 (D.C. Cir. 1978).

The Agreements allocate 80% of the pool to the national-flag lines on an equal basis. These allocations appear reasonable in view of the past carryings of the national-flag carriers in these trades. In fact, in the Gulf trade, the national-flag carriers ceded a portion of their past carryings to the third-flag lines. Furthermore, the national-flag allocations appear to be consistent with the Blackwell-Guevara Memorandum and the declared intent of the Argentine Government.

The methodology used to divide the third-flag allocation however places unwarranted and unjustified emphasis on zonalism without regard to the past carryings of the third-flag carriers in these trades. Moreover, the third-flag divisions appear to unduly restrict competition within the third-flag share.

The third-flag allocations were determined at the Buenos Aires meetings in the caucuses among third-flag lines. These caucus meetings were chaired by an ELMA representative, although neither ELMA, the other national flag lines, *nor the Argentine Government had an interest in the actual divisions of the third-flag shares.*

Unlike the principals' meetings, the third-flag caucus meetings were not transcribed. The only evidence in these proceedings that addresses the individual allocations of the third flag shares, is certain testimony presented at the hearing and a brief portion of the transcript from the Buenos Aires principals' meetings. In general, this evidence reveals that the third-flag allocations were determined by: (1) best performance during the last several years; (2) historical participation in the trade; and, (3) with respect to the Brazilian share, reciprocity and compensation to the Brazilian lines for the cargo and shares contributed by Brazil in the Brazil/United States trade.

Mr. Arieira of Lloyd explained that the Brazilian lines were entitled to some compensation in the Argentine pool because of the Brazilian contribution to the overall United States/South American trade. In this regard, he testified that common carriers generally serve the Argentina/Brazil/United States trade with the same service and vessels, and that Brazil had made some of this cargo available for carriage by non-Brazilian-flag vessels.[39] He advised that the Brazilian-flag shares, and the reciprocity and compensation to Brazil, were based at least in part on what he calls a "zonal concept." This "zonal concept" relates to Brazil's geographic proximity to Argentina. In Mr. Arieira's view, the Argentina/Brazil/United States trade is a "neighborhood trade" and, as he testified:

> We feel that we are entitled to have a participation in the trades between Argentina and the United States because we are third-flag but we are also a zonal flag in that area. We carry something for the trade. We have the trade of Brazil in between so we feel that we are entitled to a larger share than anybody else that doesn't bring anything into the trades. He is just there giving service. (Tr. p. 714).

[39] Like many South American countries, Brazil has also promulgated cargo preference laws which reserve a substantial portion of Brazil's water-borne commerce to Brazilian-flag vessels. The Commission has recently approved certain agreements in the United States/Brazil trade which have the effect of permitting non-Brazilian-flag carriers to carry Brazilian cargo (see for example Agreements Nos. 10320 and 10027).

The Commission has been urged to reject the zonal concept as contrary to the Commission's decision in *Northern Pan-American Lines, (Nopal) v. Moore-McCormack Lines, Inc., et al.*, 8 F.M.C. 213 (1964). In that proceeding, the Commission considered three criteria, *i.e.* national-flag interests, pioneering efforts developing the trade, and actual carryings under the previous pooling agreement, to determine the pool allocations. The Commission approved the last of these criteria, explaining:

> In concluding that the use of the ''national-flag'' ''pioneering'' factors is contrary to the provisions of section 15, we do not mean to imply that past carryings is the sole permissible standard for allocating pool quotas. Where factors other than past earnings are employed, however, they must be acceptable ones under the act; and as we have indicated, no such acceptable factors have been suggested to us by the parties to these proceedings. *Nopal, supra,* at 231.[40]

The ''zonal concept'' was the major, if not the sole criteria, used in allocating third-flag shares under the Agreements. This is evidenced by the fact that shares were allocated to Brazilian-flag carriers although these carriers have not recently served the trades covered by the Agreements. The evidence of record also suggests that there was little, if any, consideration given to the past trade carryings of the other third-flag carriers during the last several years.

Although Brazil's contribution to the overall trade area and its geographic proximity to Argentina are a consideration, the past carryings of other carriers cannot be disregarded. To do so, could well result in the abrupt curtailment of the services provided by a carrier who had been carrying significant amounts of cargo. On the other hand, if only past carryings were to be considered, Ivarans with past carryings of 20-23% would be entitled to the entire third-flag allocation, at least in the Atlantic trade. Either criteria, applied exclusively, would be inequitable and would unreasonably deny other third-flag carriers access to the United States/Argentina trades.

The record indicates that neither the national-flag lines *nor the Argentine Government* has an interest in how the third-flag allocations are divided. Therefore, although third-flag carriers may operate at some fundamental disadvantage with respect to government-controlled cargo, the Commission must nevertheless assure that the third-flag allocation is fairly divided and preserves as much competition as possible within the limits prescribed.

The Commission finds that the Agreements' allocations of the third-flag shares are unjustly discriminatory and unfair because of the manner in which the third-flag allocation criteria were applied. However, because these Agreements otherwise provide important public benefits and are approvable, the Commission shall approve the Agreements on the condition that they be modified to provide for open competition *within* the third-flag share as described herein. This will not only obviate the Commission having to undertake a possible arbitrary reallocation of the third-flag share but is also consistent with the Commission's interest in preserving as much competition as possible within that share.

The condition imposed should not provoke international conflict since the Argentine Government admittedly has no interest in the specific allocations of the third-flag share. Moreover, this condition will not operate to expand the

[40] Since its decision in *Nopal*, the Commission has, at least to some extent, determined that national-flag interests are an appropriate factor that should be considered when evaluating section 15 agreements that derive their impetus from foreign cargo preference laws. *See Agreement No. 10066, supra; Agreement No. 9939-1, supra;* and *Agreement No. 9932, supra.*

shares available to third-flag carriers. Each third-flag party to the Agreements[41] can compete for and carry any cargo which it can secure. To the extent that the *total* third-flag carryings exceed the twenty percent allocated to the third-flag carriers, each participating third-flag carrier would repay to the national-flag pool a proportionate share of the revenues resulting from such overcarriage.[42] For example, given the following hypothetical third-flag carryings in a given pool year, each participant would have overcarried and would make overcarriage payments proportionally as follows:

Carriers % of Total Pool	Share Overcarried	Overcarriage Proportional Payment Rate[43]
A 15%	3/7 (15/35)	6.4285
B 10%	2/7 (10/35)	4.2857
C 5%	1/7 (5/35)	2.1428
D 3%	3/35 (3/35)	1.2857
E 2%	2/35 (2/35)	.8571
Total 35%		

The condition imposed not only appears to be consistent with the Blackwell-Guevara Memorandum, but also satisfies the Commission's statutory duty to make certain that an agreement, which is violative of the antitrust laws, does not invade those laws any more than is necessary to serve the purpose of the Shipping Act, 1916, and the legitimate objectives of the agreement. Accordingly, if they are modified as provided above, the Agreements will be approved and if not so modified the Agreements will be disapproved.

Possible Unfiled Section 15 Agreement

Much has been made in these proceedings of an alleged side agreement between the Brazilian Government or carriers and the Argentine Government or carriers.[44] This agreement allegedly assures the Brazilian-flag carriers a significant portion of the Argentine pool as compensation for the shares received by Argentine-flag carriers in the Brazil/United States pool. The record in this proceeding will not support the finding that such an agreement exists.

The Lloyd representative at the Buenos Aires meetings, indicated that the Brazilian share in these Agreements, was based, at least in part, on the "zonal concept" and compensation to Brazil for the shares contributed by it to the overall trade. It is this representation that is cited to us as evidence of the alleged side agreement. We are not advised, however, as to how the Argentine carriers fulfilled their end of the bargain. While the record does reveal that an ELMA representative did chair the third-flag caucus meeting, it also confirms that ELMA's representative did not actively participate in the third-flag negotiations. Nor did ELMA dictate or approve, insofar as the record reflects, the third-flag allocations agreed upon by the parties.

[41] In view of SEIM Resolution 619, a carrier would have to be a signatory to the Agreements to lift Argentine export cargo. REL and TMM therefore must become signatories to these agreements in order to participate in the third-flag allocation.

[42] The provisions for overcarriage must apply to all carriers alike regardless of flag.

[43] Amount carried, divided by the percentage of the total pool carried by third-flag lines, times the amount the third-flag percentage exceeds the twenty percent, equals the proportional payment rate.

[44] The Commission's jurisdiction, however, is limited to any agreement that may exist between the carrier parties.

Mr. Arieira's statement that the Brazil share was based on "zonalism" and compensation explains the basis upon which the Brazilians bargained in the commercial negotiations, rather than bearing out any allegation of a side agreement. Moreover, as found earlier, the impact of related geographic regions is generally not an inappropriate factor to consider in determining the approvability of a pooling agreement, such as the ones before us here. Indeed, the record reveals that geographic proximity and contribution to the overall trade route were the paramount factors in the negotiations that preceded the execution of these Agreements. As Mr. Arieira testified:

Yes. We supported ELMA's application [in the Brazil pool] not because of any alleged secret agreement, but rather because we believe there is an economic and geographic community of interest between Argentina and Brazil, and it was our judgment that ELMA's participation in the Brazilian pool would result in improving the economic strength of both countries. In addition, and just as significant, from a purely commercial sense, I believe that as a matter of Lloyd's future bargaining position, if and when an Argentine pool would be formed, Lloyd stood a better chance of obtaining a portion of any Argentine pool on the basis of the strong argument that it was entitled to reciprocity. This decision was made without discussion or negotiation with ELMA. It was arrived at on the basis of my assessment of what was best for Lloyd and what was best for Brazil. (Lloyd Exhibit 2, at 3).

The fact that the Brazilian and Argentine-flag carriers invited each other to participate in their respective pools, is certainly not determinative of the existence of a side agreement between these parties, given their conference membership, geographic proximity and their respective contributions to the overall trade route.

Finally, although Mr. Holter-Sorensen testified that certain ELMA officials had admitted the existence of an unfiled agreement, these same officials categorically denied the existence of such an agreement at the hearings in these proceedings.

For the foregoing reasons, the Commission finds that the evidence in these proceedings does not establish the existence of an unfiled agreement.[45]

Article 16 of the Agreements

Article 16 of both Agreements provides for the establishment of a "Pool Committee" to, *inter alia*, collaborate in the development of, and render service in, the trades and to solve any differences which may arise. Mormac advises that the Atlantic Agreement "Pool Committee" has met two or three times and that no action has been taken which would *restrict any carrier's service*.[46] Because it appears that Article 16 gives the "Pool Committees" authority to restrict or otherwise affect the services provided by the signatories of these Agreements, we shall require that any action taken under this provision be submitted to the Commission for its approval before it is implemented.

CONCLUSION

In reaching our decision in these proceedings, the Commission has considered the complete record, including the objections thereto, and the briefs and argu-

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[45] Even if such an agreement did exist, however, its impact in these proceedings has been negated by our disapproval of the third-flag criteria and allocations in these proceedings.

[46] Presumably, because Article 16 is identical in both Agreements, the Gulf Agreement Pool Committee could also restrict a carrier's service.

ments of the parties. Arguments and contentions not specifically discussed in this Report were nevertheless considered and determined to be either without merit or resolved by our decision in these proceedings.

Agreement Nos. 10346 and 10349, if modified as provided herein, are found to be in the public interest, and not to constitute a greater invasion of the prohibitions of the antitrust laws than necessary, to further the purposes of the Shipping Act, 1916 and the objectives of the Agreements. Moreover, the extent of the anticompetitive impact of the Agreements, as conditionally approved is not sufficient to outweigh the benefits found and warrant disapproval. Furthermore, the Agreements as so modified are not unjustly discriminatory or unfair, or detrimental to the commerce of the United States or otherwise in violation of the Shipping Act, 1916.

Finally, because a lapse in these Agreements could result in a disruption to United States foreign commerce in the United States/Argentina trade, and because such a result outweighs any harm that implementation of the Agreements as submitted may cause the third-flag carriers pending modification of the Agreements as required by this Report and Order, the Commission is granting the Agreements interim approval through July 23, 1979.

THEREFORE, IT IS ORDERED, That Agreement Nos. 10346 and 10349 are interimly approved through July 23, 1979.

IT IS FURTHER ORDERED, That Agreement Nos. 10346 and 10349 are approved pursuant to section 15, Shipping Act, 1916, providing that the Commission receive at its offices in Washington, D.C. on or before July 23, 1979, the Agreements modified as required herein.

IT IS FURTHER ORDERED, That Agreement Nos. 10346 and 10349 are disapproved effective July 24, 1979, if the above conditions are not met.

IT IS FURTHER ORDERED, That these proceedings be discontinued.

Commissioner Karl E. Bakke, concurring.

I concur in the reasoning and the result of the majority as set forth in the Report and Order. However, I wish to confirm my previously expressed views with respect to the proper consideration of potential intergovernmental conflict in section 15 proceedings.

Since there is probative evidence in this proceeding to support a finding of intergovernmental conflict if these agreements should not be approved, I agree that avoidance of such conflict is a valid public benefit consideration. However, I continue to be of the view that mere speculation that intergovernmental conflict might result, from disapproval of an agreement, without good evidence to support such a conclusion, cannot be a basis for section 15 approval. See my dissenting opinions in *Agreement No. 9939-1, supra*, and *Agreement No. 10066, supra*.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 497(I)

ORGANIC CHEMICALS (GLIDDEN-DURKEE) DIVISION OF SCM CORPORATION

v.

LLOYD BRASILEIRO

ORDER OF ADOPTION

June 26, 1979

On May 5, 1978, the Commission served notice of its determination to review the decision of the Settlement Officer served in this proceeding on April 19, 1978. In that decision the Settlement Officer awarded reparation to Complainant Organic Chemicals (Glidden-Durkee) Division of SCM Corporation (Organic Chemicals) for freight overcharges by Respondent Lloyd Brasileiro on shipments of industrial chemicals from Savannah, Georgia, to Brazil.

The Commission's determination to review the decision of the Settlement Officer was based on the fact that other complaint proceedings initiated by Organic Chemicals against different carriers but involving the same facts and issues, were pending in Docket Nos. 78-2 an 78-3.[1]

Chief Administrative Law Judge John E. Cograve has now issued an Initial Decision in Docket No. 78-2 in which he determined that Organic Chemicals had sustained its burden of proving freight overcharges and on that basis awarded reparation.[2] No exceptions were filed to the Initial Decision in Docket No. 78-2, and that decision became administratively final on June 11, 1979.

In view of the foregoing, the decision of the Settlement Officer issued in this proceeding is hereby adopted by the Commission.

IT IS SO ORDERED.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

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[1] The complaint in Docket No. 78-3 was subsequently dismissed after a settlement proposed by the parties was approved by the Commission.

[2] The Chief Administrative Law Judge determined in Docket No. 78-2, as did the Settlement Officer in this proceeding, that freight overcharges by the carriers resulted from erroneous statements on the measurements of the cargo in the bills of lading by Complainant. The evidence relied upon in these proceedings appears to support the conclusion reached.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 497(I)

ORGANIC CHEMICALS (GLIDDEN-DURKEE) DIV. OF SCM CORPORATION

v.

LLOYD BRASILEIRO

Adopted June 26, 1979

DECISION OF GEORGE D. UNGLESBEE, SETTLEMENT OFFICER[1]

Reparation Awarded in part.

Organic Chemicals (Glidden-Durkee) Division of SCM Corporation (complainant) claims $168.25 from Lloyd Brasileiro (carrier) for alleged freight overcharges on two shipments of industrial chemicals from Savannah, Georgia to Brazil. One shipment consisted of nine (9) drums of Camphene 46 to Santos, Brazil via the LLOYD ESTOCOLMO on a bill of lading dated April 19, 1976; and the second consisted of twenty-eight (28) drums of Intermediate Geraniol 60 to Rio de Janeiro, Brazil via the LLOYD JACKSONVILLE on a bill of lading dated October 9, 1976. Complainant specifically alleges a violation of Section 18 [(b) (3)] of the Shipping Act, 1916.

The transportation charges assessed by the carrier were based upon total measurements of 104 and 326 cubic feet, declared by complainant and shown on the respective bills of lading, on the shipment of nine (9) drums of Camphene 46 and the shipment of 28 drums of Intermediate Geraniol 60, respectively. The total cubic measurement of each shipment was based upon a measurement of 11.66 cubic feet per drum. Complainant now asserts that the correct total cubic measurement of the shipments should have been 96 and 300 cubic feet on the Camphene 46 and Intermediate Geraniol 60, respectively, based upon a measurement of 10.715 cubic feet per drum. Complainant contends that the declared cubic measurements were unintentionally incorrect and were the result of an unintentionally erroneous application by complainant of Rule 12(a) of the governing conference tariffs[2] which provides, in pertinent part, as follows:

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[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.301-304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2] Inter-American Freight Conference-Section A Tarriff No. 5, FMC No. 11, Inter-American Freight Conference-Section A Tariff No. 6, FMC No. 13.

RULE 12 *MEASUREMENT*
(a) Weight or measurement freight rates shall be assessed on actual measurement calculated when cargo is delivered to carrier, in accordance with the following regulations:
1-All fractions under ½ inch are dropped.
2-All fractions of ½ inch or over shall be taken to the next full inch, except where three such fractions occur, that on the largest and smallest dimensions which shall be taken to the next full inch, and the other dropped.
3-Where two dimensions of exactly ½ inch appear the one on the smaller dimensions shall be carried to the next full inch and the other dropped.

Specifically, complainant computed the cubic measurement of a drum by increasing all three dimensional fractions to the next full inch, rather than by dropping the two fractions of less than one-half inch and increasing only the one remaining fraction of over one-half inch to the next full inch. A drum measures 23-15/32" × 23-15/32" × 34-3/4". In other words, complainant computed the cube of a drum by multiplying 24" × 24" × 35" for a total of 20,160 cubic inches or 11.66 cubic feet per drum (1,728 cubic inches equal one cubic foot), instead of by multiplying 23" × 23" × 35" for a total of 18,515 cubic inches or 10.715 cubic feet per drum.

In support of its claim complainant has submitted the following:

1. An affidavit signed by complainant's Director of Purchasing. This document declares that all 55-gallon drums used by complainant conform to the United States Department of Transportation Specification 17E (DOT-17E) published in 49 CFR 178.116; and that the drums are procured from one or the other of the following three sources: Florida Steel Drum Company, Inc. (Florida Drum), Pensacola, Florida; Inland Steel Container-Division of Inland Steel Company (Inland Steel), New Orleans, Louisiana; and Rheem Manufacturing Company (Rheem), Savannah, Georgia.

2. A copy of *American National Standard Specifications for 55-Gallon Tight-Head Drums (DOT-17E)* (ANSI). In pertinent part, this publication reveals that the ocean shipping cube of the drums covered thereby is 10.715 cubic feet. The figure contained in the standard shows the drums to measure 23-15/32" in diameter over rolling hoops and 34-3/4" in overall height. Based upon these dimensions, the resultant ocean shipping cube of a drum is 10.715 cubic feet. (23-15/32" × 23-15/32" × 34-3/4" or, in conformity with Rule 12(a) of the conference tariffs 23" × 23" × 35" equals 18,515 cubic inches, divided by 1,728 cubic inches per cubic foot, equals 10.715 cubic feet.)

3. A copy of the specification sheets of Florida Drum, Inland Steel and Rheem. These specification sheets indicate that the ocean shipping cube of the drums manufactured and sold by these companies is, respectively, 10.72 cubic feet; "conform to ANSI Standards"; and "10/9—meaning 10-9/12, or 10.75 cubic feet."

4. A brief prepared by attorneys for complainant.

In considering claims involving disputes as to the nature of cargo, if the cargo has left the custody of the carrier before the claim is brought and the cargo cannot be reexamined, the Commission has traditionally imposed a heavy burden of proof on complainant. In Informal Docket 283(I), *Western Publishing Company, Inc. v. Hapag Lloyd A.G.*, order served May 4, 1972, the Commission stated:

"the test is what claimant can now prove based on all the evidence as to what was actually shipped, even if the actual shipment differed from the bill of lading description. In rating a shipment the carrier is not bound by shipper's misdescription appearing on the bill of lading. *Likewise, claimant is not bound at least where the misdescription results from shipper's unintentional mistake or inadvertence.* But where the shipment has left the custody of the carrier and the carrier is thereby prevented from personally verifying claimant's contentions, the claimant has a heavy ulitmate burden of proof to establish his claim." (emphasis added).

On the shipment of Camphene 46 to Santos complainant was assessed:

$\frac{104}{40}$ cu. ft.	= 2.6Mt (rate $142.50)	=	$370.50
	2.6Mt (Bunker S/C of $10.00)	=	26.00
Transportation charges paid			$396.50

Correct assessment:

$\frac{96}{40}$ cu. ft.	= 2.4Mt (rate $142.50)	=	$342.00
	2.4Mt (bunker S/C of $10.00)	=	24.00
			$366.00
	Claim		$ 30.50[3]

On the shipment of Intermediate Geraniol 60 to Rio de Janeiro complainant was assessed:

$\frac{326}{40}$ cu. ft.	= 8.15Mt (rate $165.00)	=	$1,344.75
	8.15Mt (bunker S/C of $10.00)	=	81.50
	Ad. Val. 5.5 long tons ($.24)	=	1.32
Transportation charges paid			$1,427.57

Correct assessment:

$\frac{300}{40}$ cu. ft.	= 7.5Mt (rate $165.00)	=	$1,237.50
	7.5Mt (bunker S/C of $10.00	=	75.00
	Ad. Val. 5.5 long tons ($.24)	=	1.32
			$1,313.82
	Claim		113.75

Here complainant seeks an adjustment in freight charges which were levied by the carrier on the basis of an unintentional and erroneous declaration by complainant of the cubic measurement of the cargo. Thus, the heavy burden of proof requirement applies. It is believed complainant has met this requirement.

Complainant has provided detailed specifications and information sufficient to clearly establish the dimensions of the 55-gallon drums it utilizes and the resultant ocean shipping cube of 10.715 cubic feet, and also that the declared excess cubic measurements were erroneous and unintentional. Reparation is awarded. However, in computing the correct total freight charges on the shipment of Camphene 46 to Santos, complainant neglected to add, no doubt inadvertently, the sum of $24.00 attributable to the application of the bunker surcharge to the freight rate computation. Accordingly, reparation in the amount of $144.25, rather than $168.25 is proper.

(S) GEORGE D. UNGLESBEE
Settlement Officer

April 19, 1978

[3] Complainant's claim was for $54.50. The bunker surcharge of $24.00 was incorrectly excluded from the correct assessment.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 502(I)

ORGANIC CHEMICALS (GLIDDEN-DURKEE)
DIVISION OF SCM CORPORATION

v.

JAPAN LINE

ORDER OF ADOPTION

June 26, 1979

On June 7, 1978, the Commission served notice of its determination to review the decision of the Settlement Officer served in this proceeding on May 24, 1978. In that decision the Settlement Officer awarded reparation to Complainant Organic Chemicals (Glidden-Durkee) Division of SCM Corporation (Organic Chemicals) for freight overcharges by Respondent Japan Line on shipments of industrial chemicals from Jacksonville, Florida to Tokyo, Japan.

The Commission's determination to review the decision of the Settlement Officer was based on the fact that other complaint proceedings initiated by Organic Chemicals against different carriers but involving the same facts and issues, were pending in Docket Nos. 78–2 and 78–3.[1]

Chief Administrative Law Judge John E. Cograve has now issued an Initial Decision in Docket No. 78–2 in which he determined that Organic Chemicals had sustained its burden of proving freight overcharges and on that basis awarded reparation.[2] No exceptions were filed to the Initial Decision in Docket No. 78–2, and that decision became administratively final on June 11, 1979.

In view of the foregoing, the decision of the Settlement Officer issued in this proceeding is hereby adopted by the Commission.

IT IS SO ORDERED.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

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[1] The complaint in Docket No. 78–3 was subsequently dismissed after a settlement proposed by the parties was approved by the Commission.

[2] The Chief Administrative Law Judge determined in Docket No. 78–2, as did the Settlement Officer in this proceeding, that freight overcharges by the carriers resulted from erroneous statements on the measurements of the cargo in the bills of lading by Complainant. The evidence relied upon in these proceedings appears to support the conclusion reached.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 502(I)
ORGANIC CHEMICALS (GLIDDEN-DURKEE) DIV. OF SCM CORPORATION

v.

JAPAN LINE

Adopted June 26, 1979

DECISION OF ROLAND C. MURPHY, SETTLEMENT OFFICER[1]

Reparation Awarded

Organic Chemicals (Glidden-Durkee) Division of SCM Corporation (complainant) claims $613.07 from Japan Line (carrier) for alleged freight overcharges on a shipment of industrial chemicals from Jacksonville, Florida to Tokyo, Japan. The shipment consisted of 187 drums of intermediate linalool-95 (beta type), intermediate-750 and hydroxycitronella pure, myrcene 85. Complainant specifically alleges a violation of Section 18(b)(3) of the Shipping Act, 1916.

The transportation charge assessed by the carrier was based upon a total measurement of 2180 cubic feet declared by the complainant and shown on the applicable bill of lading. The total cubic measurement of the shipment was based upon a measurement of 11.66 cubic feet per drum. Complainant asserts that the correct total cubic measurement of the shipment should have been 2001 cubic feet based on a measurement of 10.715 cubic feet per drum. The complainant contends that the declared cubic measurements were unintentionally incorrectly assessed and resulted from an erroneous application by complainant of Rule No. 2(b) of the governing conference tariff[2] which provides, in part, as follows:

"(b) *Measurement Cargo:*

Cargo freighted on a measurement basis shall be assessed rates on the gross or overall measurement of individual pieces or packages when the cargo is delivered to the carrier, and shall be computed in accordance with 'Tweed's Accurate Tables', except as may be otherwise provided in paragraphs (c), (d), (e), (f) of this rule, subject to the following rule with respect to disposition of fractions of inches:

"All fractions UNDER one-half inch are dropped.

"All fractions OVER one-half inch are extended to the next full inch.

"Where there is a fraction of one-half inch on ONE dimension, it is extended to the next full inch.

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[1] Both parties have consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2] Far East Conference Tariff No. 27, FMC No. 10.

"Where there are fractions of one-half inch on TWO dimensions, the one on the small dimension is extended to the next full inch and the other dropped. If these dimensions are equal, drop one and increase the other to the next full inch.

"Where there are fractions of one-half inch on THREE dimensions, those on the largest and smallest dimensions are extended to the next full inch and the other dropped."

The complainant computed the cubic measurement of a drum by increasing all three dimensional fractions to the next full inch instead of dropping the two fractions of less than one-half inch and increasing only the one remaining fraction of over one-half inch to the next full inch. A drum measures 23 15/32" x 23 15/32" x 34". Complainant computed the cube of a drum by multiplying 24" x 24" x 35" for a total of 20,160 cubic inches or 11.66 cubic feet per drum (1,728 cubic inches equal one cubic foot), instead of multiplying 23" x 23" x 35" which equals 18,515 cubic inches or 10.715 cubic feet per drum.

Complainant in support of his claim submitted the following:

1. An affidavit signed by complainant's Director of Purchasing. This document declares that all 55-gallon drums used by complainant conform to the United States Department of Transportation Specification 17 E (DOT-17E) published in 49 CFR 178.116; and that the drums are procured from one or the other of the following three sources: Florida Steel Drum Company, Inc. (Florida Drum), Pensacola, Florida; Inland Steel Container-Division of Inland Steel Company (Inland Steel), New Orleans, Louisiana; and Rheem Manufacturing Company (Rheem), Savannah, Georgia.
2. *A copy of American National Standard Specifications for 55-Gallon Tight-Head Drums (DOT-17E)* (ANSI). In pertinent part, this publication reveals that the ocean shipping cube of the drums covered thereby is 10.715 cubic feet. The figure contained in the standard shows the drums to measure 23 15/32" in diameter over rolling hoops and 34 3/4" in overall height. Based upon these dimensions, the resultant ocean shipping cube of a drum is 10.715 cubic feet. (23 15/32" x 23 15/32" x 34 3/4" or in conformity with Rule 12(a) of the conference tariffs 23" x 23" x 35" equals 18,515 cubic inches, divided by 1,728 cubic inches per cubic foot, equals 10.715 cubic feet).
3. A copy of the specification sheet of Florida Drum, Inland Steel and Rheem. These specification sheets indicate that the ocean shipping cube of the drums manufactured and sold by these companies is, respectively, 10.72 cubic feet; "conform to ANSI Standards", and "10/9—meaning 10 9/12, or 10.75 cubic feet."
4. A brief prepared by attorneys for complainant.

The Commission in considering claims involving disputes as to the nature of cargo, if the cargo has left the custody of the carrier before the claim is brought and the cargo cannot be reexamined, has traditionally imposed a heavy burden of proof on complainant. In Informal Docket 283(I), *Western Publishing Company, Inc. v. Hapag Lloyd A.D.*, Order served May 4, 1972, the Commission stated:

"the test is what claimant can now prove based on all the evidence as to what was actually shipped, even if the actual shipment differed from the bill of lading description. In rating a shipment the carrier is not bound by shipper's misdescription appearing on the bill of lading. *Likewise, claimant is not bound at least where the misdescription results from shipper's unintentional mistake or inadvertence.* But where the shipment has left the custody of the carrier and the carrier is thereby prevented from personally verifying claimant's contentions, the claimant has a heavy ultimate burden of proof to establish his claim." (emphasis added)

It is readily apparent there could have been no intent, purpose or motivation of ultimate gain or advantage in the claimant/shipper's perpetration of the error underlying the claims. Since the shipper's error was an unintentional mistake, he is not bound by his erroneous declaration of cubic measurement.

On the shipment of 187 drums of industrial chemicals complainant was assessed:

$\frac{2180 \text{ cu ft}}{40}$ = 54.5 cu ft X Rate of $137.00 M = $7,466.50 transportation charges paid

Correct assessment:

$\frac{2001 \text{ cut ft}}{40}$ = 50.025 cu ft X Rate of $137.00 M = $6853.43 transportation charge

Overcharge is $613.07

Complainant seeks an adjustment in freight charges which were assessed by the carrier based on an unintentional and erroneous declaration by complainant of the cubic measurement of the cargo. Therefore, the heavy burden of proof requirement applies. It is believed complainant has met this requirement.

The carrier has interjected a statement to the effect that he has refused to honor the subject claim on the basis of Tariff Rule No. 9 in Tariff FMC-10 which requires that claims be filed within six-months after date of shipment.[3]

Complainant has supplied detailed specifications and data sufficient to establish the dimensions of the 55-gallon drums it utilizes and the correct ocean shipping cube of 10.715 cubic feet. It was also determined that the declared excess cubic measurement was erroneous and unintentional. Complainant is therefore awarded reparation in the amount of $613.07.

(S) ROLAND C. MURPHY
Settlement Officer

May 24, 1978

[3] The complaint was filed with this Commission within the time limit specified by statute; and it has been well established by the Commission that carrier's so-called "six-month" rule cannot act to bar recovery of an otherwise legitimate overcharge claim in such cases.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–50

NORTH CAROLINA STATE PORTS AUTHORITY; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO LOCAL 1426; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 1426-A, WAREHOUSEMEN

v.

DART CONTAINERLINE COMPANY, LIMITED

June 28, 1979

The use of an intermodal through rate to absorb the full cost of motor carrier transportation between the adjacent container ports of Wilmington, North Carolina, and Norfolk, Virginia, is an unjust and unreasonable device violative of sections 16 and 17 of the Shipping Act, 1916, when the diverting carrier makes no vessel calls at Wilmington, the containerized cargo in question is first brought to Wilmington from inland locations at shipper expense, facilities available at Wilmington can adequately accommodate the diverted cargo, and no transportation efficiencies are created.

George J. Oliver for North Carolina State Ports Authority.
A.A. Canoutas for International Longshoremen's Association, AFL-CIO, Local 1426.
Samuel Whitt for International Longshoremen's Association, AFL-CIO, Local 1426-A, Warehousemen.
Edwin Longcope and *Frederick L. Shreves* for Dart Containerline Co., Ltd.
Martin A. Hecksher and *Thomas P. Preston* for Delaware River Port Authority, *et al.*

REPORT

BY THE COMMISSION: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice-Chairman;* James V. Day, *Commissioner)**

This is a complaint proceeding brought by Wilmington, North Carolina port interests (Complainants) against the indirect or "substituted" service arrangement offered by Dart Containerline Company, Limited (Dart), under its FMC Tariff No. 28.[1] Tariff No. 28 pertains exclusively to the export carriage of unmanufactured tobacco in containers. It states that Dart has the "option" of serving Wilmington by direct vessel call or by overland service. Dart has admitted, however, that it does not intend to send ships to Wilmington and is in fact offering an intermodal motor/water service between Wilmington and

* Commissioner Karl E. Bakke dissenting and issuing a separate opinion. Commissioner Leslie L. Kanuk dissenting.

[1] Dart is a common carrier by water in the foreign commerce of the United States. The Complainants are: (1) the North Carolina State Ports Authority; (2) Local 1426 of the International Longshoremen's Association; and (3) Local 1426-A, Warehousemen, of the International Longshoremen's Association.

Europe.[2] Complainants allege that this one commodity intermodal service will thereby unfairly divert cargo from Wilmington in violation of sections 16 and 17 of the Shipping Act, 1916 (46 U.S.C. 815 and 816).[3]

Under Tariff No. 28, Dart would accept containerized shipments of unmanufactured tobacco at the Port of Wilmington and pay motor carriers to transport this cargo to Dart vessels calling at Norfolk, Virginia, an area within the Port of Hampton Roads located some 236 highway miles to the north.[4] An ocean bill of lading would be issued listing Wilmington as the port of origin and applying the liability limitation of the Carriage of Goods by Sea Act (46 U.S.C. 1300 *et seq.*) to the inland segment of its route. Dart's tariff rates from Wilmington and Norfolk would be identical. Accessorial charges at the two ports are basically equal. The overland cost of moving a container of tobacco from Wilmington to Norfolk is approximately $300. Dart's rate for the ocean transportation of Wilmington cargo is therefore effectively $300 less than its ocean rate for Norfolk cargo.[5]

All unmanufactured tobacco moving from Wilmington to Europe is containerized. Almost 32,000 tons of such cargo passed through Wilmington in 1977. It represented 11.4% of that port's total exports. Regular all-water container service is provided to Wilmington by Seatrain International, S.A. (Seatrain), and Polish Ocean Lines (POL), and vessel calls from these lines are highly important to the economic position of Wilmington's port. During 1977, Seatrain carried 27,946 tons of tobacco in 1,449 containers. POL carried 4,031 tons in 101 containers. Because the tobacco carried by POL is purchased on behalf of the Polish Government's trade monopoly, only the tobacco carried by Seatrain is likely to be diverted by Dart's overland service. Seatrain's tobacco carryings represent about 10% of Wilmington's total export cargo and have an annual revenue potential to the port of approximately $80,000.00. Seatrain provides adequate service to the Port of Wilmington to meet the needs of tobacco shippers, and that port has adequate facilities for handling containerized tobacco shipments.[6]

Wilmington is closer (between 6 and 66 miles) to most of the major tobacco markets of North Carolina and Virginia than is Norfolk.[7] Dart and Seatrain offer a

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[2] Tariff No. 28 does not involve "substituted service" as that term is generally understood by the Commission. "Substituted service" occurs when a carrier making regular vessel calls to a port is faced with unexpected operating conditions requiring the use of alternate service to fulfill the carrier's existing cargo commitments. A "port" is a place where actual transportation by ocean going vessels begins or ends and not merely a place possessed with port facilities. *See* 46 C.F.R. 531.2(m) adopted in Report and Order in Docket No. 76-40, 17 S.R.R. 1255, 42 *Fed. Reg.* 54810; *see generally Austasia Container Express*, 17 S.R.R. 89, 100 (1977) *rev'd on other grounds*, 580 F.2d 642 (D.C. Cir. 1978).

[3] Complainants also allege violations of section 8 of the Merchant Marine Act, 1920 (46 U.S.C. 867), a statute not administered by the Federal Maritime Commission and which contains no specific prohibitions in any event.

[4] Although Tariff No. 28 has a September 19, 1977 effective date, Dart's overland service had not been implemented at the time of the Initial Decision and may still be inactive. Complainants obtained a preliminary injunction against Tariff No. 28 from the United States District Court for the Eastern District of North Carolina pending resolution of the instant FMC proceeding. Civil Action No. 77-73-CIV-7, served January 18, 1978. This injunction was dissolved on February 15, 1979 by the United States Court of Appeals. *North Carolina State Ports Authority v. Dart Containerline Company, Ltd.*, 592 F.2d 749 (4th Cir. 1979).

[5] The Commission's intermodal tariff filing regulations apply to the through routes of single carriers as well as the joint offerings of more than one carrier. Because motor carriage of agricultural products is exempt from Interstate Commerce Commission regulation Dart's motor/water service from Wilmington to Europe is not considered *joint* through transportation, but it is still an intermodal through route subject to the requirement that the ocean portion of the through rate be separately stated in Dart's tariff. 46 C.F.R. 536.8.

[6] Wilmington installed a modern, high speed container crane in May, 1977 and was to have expanded container storage and handling facilities in place by May, 1979. Wilmington's major disadvantage in attracting containerized tobacco shipments is the absence of a four lane highway system between the major tobacco markets and its docks.

[7] *See* Exhibit No. 11 attached as Appendix "A" hereto. The 12 tobacco markets in question are the most commercially significant to

weekly service from Norfolk and Wilmington, respectively. Dart's service reaches certain relevant European destinations a few days sooner than Seatrain's, but any advantage in speed is usually unimportant to tobacco shippers because unmanufactured tobacco is not a time sensitive commodity.[8] The largest single destination for unmanufactured tobacco leaving both Wilmington and Norfolk is Hamburg, Germany. Containerized tobacco is sensitive to differences in inland transportation costs.

On January 19, 1979, Administrative Law Judge Stanley M. Levy (Presiding Officer) issued an Initial Decision denying the Complaint. The Initial Decision relied heavily upon the Commission's 1978 minilandbridge decisions, particularly upon the port diversion standards articulated in the "*CONASA*" decision.[9]

Position of the Parties

1. *Complainants*

Exceptions to the Initial Decision were filed by Complainants which argue that the Presiding Officer:

(1) failed to find that Dart would not move containers through the Port of Wilmington;[10]

(2) failed to find that Wilmington is closer to eight of the twelve tobacco markets examined in the proceeding;[11]

(3) erroneously applied the cargo diversion standards articulated in the Commission's *CONASA* decision to the instant proceeding;

(4) failed to distinguish the facts of the present case from those of the *CONASA* decision;

(5) failed to recognize the continuing validity and present applicability of local absorption cases such as *Intermodal Service to Portland, Oregon,* 17 F.M.C. 106 (1973); *Sea-Land Service, Inc. v. South Atlantic & Caribbean Line, Inc.*, 9 F.M.C. 338 (1966); and *City of Portland v. Pacific Westbound Conference,* 4 F.M.B. 664 (1955).

(6) failed to place upon Dart the burden of proving that unmanufactured tobacco in containers is not naturally tributary to Wilmington;

(7) failed to consider the long-term effects of cargo diversion on the viability of carrier service to a port.

Wilmington, but are not necessarily the sole source of unmanufactured tobacco shipments handled by that port. The market at Goldsboro, North Carolina closed in early 1978.

[8] Dart's southeastern sales manager testified that some tobacco shipments are handled on an expedited basis, but that most tobacco is stored for a year after arrival in Europe. The record does not indicate that tobacco is warehoused in port terminal areas. European consignees seeking special types of tobacco would therefore obtain it from warehouses located in the major tobacco markets and would best save transit time by sending their cargo directly to Norfolk rather than using an intermodal routing through Wilmington.

[9] The Commission has denied port diversion complaints based upon intermodal through rates between U.S. East Coast ports and the Far East, *Council of North American Shipping Associations (CONASA) v. American President Lines, Inc.*, 18 S.R.R. 774 (1978), and between U.S. Gulf Coast ports and Europe, *Port of New Orleans v. Seatrain International, S.A.*, 18 S.R.R. 763 (1978). In these cases, vessel calls were made at a different range of ports under a direct intermodal routing hundreds of miles shorter and several days faster than the all-water route available through the complaining ports.

[10] Complainants must believe insufficient emphasis was given to this fact, as it was stipulated by the parties and plainly stated in the Initial Decision.

[11] The Initial Decision discusses four of the twelve tobacco markets examined in the proceeding and makes the accurate, but diluted finding that Wilmington is an "average of 11 miles" closer to the major markets than is Norfolk. Complainants urge that the findings be modified to state that the "major tobacco markets are from 6 to 66 miles closer to Wilmington."

2. *Intervenors*

On March 7, 1979, the Delaware River Port Authority and related Philadelphia port interests filed a "Petition to Intervene" for the limited purpose of excepting to the Initial Decision. The Commission granted this petition on May 9, 1979.

The intervenors espouse the same position as Complainants. Their Exceptions are largely duplicative, except that they include the broader policy argument that denial of the complaint would unduly concentrate shipping services at the Port of Norfolk and injure Wilmington's viability as a container port. They also argue that the Presiding Officer erroneously concluded that Dart's substituted service would further the public interest and economic welfare of the entire nation.

3. *Respondent*

Dart contends that the Initial Decision is correct in all respects. Particular emphasis is given to the fact that the Presiding Officer's findings relating to the naturally tributary status of the major tobacco markets were based upon Complainants' own evidence. Dart argues that Tariff No. 28 must be lawful because cargo originating at these markets is clearly tributary to both Norfolk and Wilmington.

Discussion

The gravamen of any port equalization complaint is whether a class of shippers *should* bear certain costs which the carrier is willing to assume; to analyze equalization practices in terms of whether the carrier is "assuming costs the shipper otherwise would have borne" evades the issue. Although intermodal transportation may not result in the ocean carrier assuming a *particularly identified* cost item for the shipper, the incremental pricing theory ordinarily employed in such cases clearly permits cost savings which are not experienced by port-to-port shippers. An ocean carrier therefore "absorbs" elements of shipper cost whenever it publishes a joint through rate (or a proportional rate) which is lower than its local rate.[12] An "absorption" is not necessarily unlawful.[13] The question presented by the instant case, therefore, is should Dart be permitted to absorb the entire costs of transporting export tobacco to the next closest competing port after the tobacco has arrived at Wilmington from inland points of origin.[14]

The Commission recently held that the cargo diversion *standards* developed in its minibridge decisions are applicable to local port equalization practices as well as equalization affecting ports in distant port ranges.[15] The fact that the *CONASA* standards apply to all cargo diversion complaints does not mean that all diver-

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[12] The cost of bringing cargo to the place where ocean transportation begins is a cost for which the shipper is fully responsible absent some alleviation of that cost by the ocean carrier. Special ocean rates which make through carriage more attractive effectively reduce the shipper's inland costs.

[13] The terms "absorption" and "equalization" tend to be used interchangeably to describe diversionary activities. The choice of terminology has little, if any, substantive significance in such matters, each of which must be examined on its own particular facts. *See Intermodal Service to Portland, Oregon, supra*, at 132.

[14] There are closer ports (*e.g.*, Morehead City, North Carolina), but not with comparable *container cargo* facilities. Except when Tariff No. 28 applies, Dart places the cost of transporting tobacco to ship's tackle upon the shipper.

[15] *Pacific Westbound Conference–Equalization Rules and Practices*, Order Restructuring Proceeding, 19 S.R.R. 133 (1979), note 5.

sionary practices are lawful.[16] These standards were designed to accommodate and promote transportation improvements, not to encourage unnecessary backhauling and other inefficiencies.

The burden of establishing whether unmanufactured tobacco in containers is naturally tributary to Wilmington is upon the Complainants, not upon Dart. It is unnecessary, however, for Complainants to prove the existence of a precise zone from which tobacco would move only to Wilmington. It is sufficient that legitimate transportation factors consistently direct an identifiable quantity of cargo from identifiable points of origin to the Port of Wilmington.

Inland freight rates from the major Virginia/North Carolina tobacco markets to Norfolk and Wilmington vary significantly because tobacco is an ICC-exempt commodity and shippers negotiate individualized rates with motor carriers.[17] In any given case, it may cost more to ship to Wilmington than to Norfolk, even if Wilmington is the shorter haul. Nonetheless, it must be assumed that there is a consistent inland cost differential favoring Wilmington. Other things being equal, shippers would not otherwise send containerized tobacco to Dart at *Wilmington*—they would send it to Dart at *Norfolk*. The very nature of Dart's intermodal service depends upon the fact that some unmanufactured tobacco will naturally move to Wilmington. That tobacco from the same or similar origins also moves consistently through the Port of Hampton Roads does not defeat Wilmington's claim to naturally tributary status as to cargo which has already arrived at its port.

One of the four criteria for determining whether cargo is naturally tributary to a port is the "natural or geographical transportation patterns and efficiencies" governing the proposed movement.[18] *CONASA* decision, at 779. *See generally Proportional Commodity Rates on Cigarettes and Tobacco,* 6 F.M.B. 48 (1960). Minibridge transportation allows cargoes originating within a reasonable distance of East Coast port cities to benefit from the natural transportation efficiencies of a rail/water movement through West Coast gateways. In the instant case, tobacco shippers are encouraged to benefit from Wilmington's geographic and inland rate advantages, by delivering European trade tobacco containers to that port from destinations 60 to 200 miles away. Dart then deprives Wilmington of these advantages by backhauling this cargo to Norfolk—a greater overland distance than the direct route—without moving it significantly closer to its ultimate destination. This inefficient practice would also result in "subsidization" of the transportation costs of tobacco shippers which use Dart's Wilmington service by those similarly situated shippers which send their containers directly to Norfolk. In this era of inflation and dwindling fuel resources, shippers, carriers and the commerce of the United States are best served by competi-

[16] In this sense, *Intermodal Service to Portland, Oregon, supra,* and *Sea-Land Service, Inc. v. South Atlantic & Caribbean Line, Inc., supra,* still reflect Commission policy. The actual holdings of the minibridge cases are not precedent for overland cost absorptions intended to attract cargo tributary from *nearby ports* with adequate facilities for handling such cargo.

[17] Inland freight costs from the tobacco markets to Wilmington range between $120 and $360 and between $140 and $330 to Norfolk. Shippers located in most of the 12 markets can find at least one motor carrier with a Norfolk rate that is lower than another motor carrier's Wilmington rate and *vice versa*. However, rates from Goldsboro, Kinston and Smithfield, North Carolina will generally be lower to Wilmington than to Norfolk because these three markets are so much closer to Wilmington. Exhibit 10.

[18] The other three criteria are: historic cargo patterns, inland transportation rates, and shipper/cargo needs. The record indicates that containerized tobacco has moved through Wilmington in consistent quantities since 1972, that Wilmington is inland rate favorable to certain tobacco markets and that Wilmington can accommodate containerized tobacco shipments.

tion which increases productivity rather than competition based upon artificial shipper inducements.[19]

Whatever the inland rate differential between a particular tobacco market and Wilmington and between that market and Norfolk, it is considerably less than the $300 cost of transporting a container 236 miles from Wilmington to Norfolk.[20] Under these circumstances, Dart's payment of the full $300 to attract the business of shippers who stand to save only some small fraction of that amount is an unfair competitive device. This unfairness is aggravated by the fact that Dart's tariff applies to all containerized tobacco tendered at Wilmington, regardless of its point of origin.

The record fails to show why it is necessary for Dart to compete for unmanufactured tobacco in this manner.[21] Although Dart's intermodal service from Wilmington may fail to achieve commercial acceptance, it is also possible that containerized tobacco is so cost sensitive that the prospect of saving $40 or $50 on inland transportation will cause the diversion of all Wilmington's present tobacco business—a full 10% of that port's export cargo. The *CONASA* standards do not require that a port actually suffer a substantial loss of cargo before remedial action may be taken. The clear possibility of substantial harm is sufficient. Such a possibility exists when a substantial quantity of cargo is subject to an unfair diversionary practice. The export tobacco subject to Dart's Tariff No. 28 represents a substantial quantity of Wilmington's cargo.

Diversion of naturally tributary cargo cannot be justified simply because a carrier makes a business decision not to compete head on with carriers which serve a particular port by direct vessel call. In the present case, Dart contended that its overland service from Wilmington was justified because the containerized tobacco Seatrain carried from Wilmington in 1977 could be transported by Dart at considerably less expense by using a motor carrier rather than a feeder barge or direct containership call. This "single commodity" analysis only emphasizes the unfairness of Tariff No. 28 to those carriers which do invest in all-water service to Wilmington. A diverting carrier must demonstrate more than the attractiveness of certain cargoes at effectively lower ocean rates. Dart has not proven that the cost, operational and competitive characteristics of serving Wilmington make regular containership service to that port inherently unreasonable.

Accordingly, the Commission concludes that Dart's FMC Tariff No. 28 is unduly preferential and unjustly discriminatory within the meaning of sections 16 and 17 of the Shipping Act, 1916.

THEREFORE, IT IS ORDERED, That the complaint of the North Carolina State Ports Authority and International Longshoremen's Association is granted; and

IT IS FURTHER ORDERED, That Dart Containerline Company, Limited's, FMC Tariff No. 28 is cancelled; and

[19] A different situation would be presented if Dart were to compete for North Carolina tobacco by openly adjusting its *Norfolk* rates rather than publishing fictitious Wilmington rates. In any event, it would be most appropriate for Dart to publish a true point-to-point intermodal tariff from the major tobacco markets to Europe (*e.g.*, Danville, Virginia, to Hamburg, Germany).

[20] Excluding Goldsboro, the greatest geographical differential is 66 miles in favor of Wilmington.

[21] Dart apparently devised its inefficient "triangular route" because of restrictions in U.S. North Atlantic conference agreements to which Dart is a party. *See* February 14, 1978, "Petition for Declaratory Order" at 4, wherein Dart states that it is an independent operator at Wilmington, but a conference operator at Norfolk.

IT IS FURTHER ORDERED, That Dart Containerline Company, Limited, cease and desist from publishing tariffs or offering transportation between the Port of Wilmington, North Carolina and European destinations whereby containerized tobacco is carried overland at Dart's expense from Wilmington, North Carolina to vessels calling at Norfolk or other areas within the Port of Hampton Roads, Virginia; *Provided*, that any cargo which has been already accepted by Dart at Wilmington, but not yet delivered to its European destination, may be so transported.

(S) FRANCIS C. HURNEY
Secretary

APPENDIX A

MILEAGE

FROM	TO Norfolk, VA	Wilmington, NC	Morehead City, NC
Danville, VA	191	202	223
Farmville, NC	131	112	93
Goldsboro, NC	160	89	92
Greenville, NC	123	117	80
Henderson, NC	137	158	163
Kinston, NC	151	85	67
Oxford, NC	145	163	171
Rocky Mount, NC	116	134	115
Smithfield, NC	161	110	113
Wendell, NC	153	132	130
Wilson, NC	134	117	118
Williamston, NC	114	148	79
And From			
Wilmington, NC	236		102

North Carolina State Ports Authority

Commissioner Karl E. Bakke, dissenting.

In my view, the Administrative Law Judge's analysis of the facts of record and applicable law is sound and should have been adopted.

The majority, in choosing to do otherwise, have sought to substitute an "ivory tower" regulatory theory for pragmatic commerical judgment. This rather surprises me, given the dispositon of my esteemed colleagues to joining consistent (and legitimate) criticism of the Department of Justice for precisely that presumption.

Significant, and fatal, inconsistences in the majority's reasoning are apparent:

- They observe that "A different situation would be presented if Dart were to compete for North Carolina tobacco by openly adjusting its *Norfolk* rates . . ."[i]t would be most appropriate for Dart to publish a true point-to-point intermodal tariff from the major tobacco markets to Europe . . ." [Report, p. 12, n. 19.] So much, at the majority's own hands, for the "naturally tributory cargo" theory that the majority seek to resurrect for purposes of this case.
- They imply that by underwriting the "backhaul" cost from Wilmington to Norfolk, Dart is prejudicing Seatrain's ability to compete for handling that cargo out of Wilmington. (Report, p. 12.) Yet, the commercial reality of the competition involved is ignored. If it costs Dart $300 per box to move the export tobacco cargo to Norfolk, Seatrain ought to be able to adjust its rate out of Wilmington downward by an amount sufficient to retain a competitive price advantage, which could even be less than the net cost basis of Dart's "backhaul" to Norfolk. Would the majority view such a rate adjustment by Seatrain as unjustly discriminatory as to Dart if the lower ocean freight cost to shippers were to divert tobacco from Norfolk to Wilmington?
- They imply that Dart is required to demonstrate that it is "necessary . . . to compete for unmanufactured tobacco in this manner." [Report, p. 12] Balder-

dash. If imagination or innovation in competitive mechanisms must be *necessary* before it will be permitted, the free enterprise system is dead.

• They cite "dwindling fuel resources" in condemning Dart's "backhaul" from Wilmington to Norfolk [Report, p. 12], yet observe that Dart has "not proven that the cost, operational and competitive characteristics of serving Wilmington make regular containership service to that port inherently unreasonable." [Report, p. 14.] The record clearly demonstrates the contrary: for the cargo here involved, which is the only issue before the Commission, it is manifest that the bunkerage consumption alone for direct pick-up at Wilmington rather than Norfolk would be prohibitive.

In short, I view the majority decision as a classic of rationalization, rather than of the ratiocination that one might reasonably expect of a quasi-judicial body.

Commissioner Leslie Kanuk, dissenting: I would adopt the Initial Decision and agree with the points raised in Commissioner Bakke's dissent.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-4

SOL SPITZ COMPANY, INC.

v.

AMERICAN PRESIDENT LINES, LTD.

NOTICE

June 28, 1979

Notice is given that no appeal has been filed to the May 15, 1979, order of dismissal 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, the order of dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 79-4

SOL SPITZ CO., INC.

v.

AMERICAN PRESIDENT LINES, LTD.

Finalized on June 28, 1979

Merel G. Nissenberg of Nissenberg & Nissenberg for Complainant.
J. Donald Kenny of Kenny & Finan for Respondent.

NOTICE OF (1) WITHDRAWAL OF COMPLAINT (2) DISCONTINUANCE OF PROCEEDING

In Docket No. 78-37, *Rene D. Lyon Co., Inc. v. American President Lines,* Initial Decision of Administrative Law Judge Charles E. Morgan, served April 16, 1979 (19 SRR 213) footnote 2, page 1 states, "Another proceeding in which the issues appear to be similar is No. 79-4, *Sol Spitz v. American President Lines, Ltd.*" A letter from counsel for the complainant, dated and postmarked San Diego, California May 10, 1979, received May 14, 1979, stated. *inter alia:*

Subsequent to the decision handed down in the case of *Rene D. Lyon, Inc., v. American President Lines, Ltd.* (Docket No. 78-37), the Complainant in Docket No. 79-4, *Sol Spitz Co., Inc.,* has decided to dismiss its Complaint and has agreed with Respondent American President Lines to terminate the said proceedings, with each side to bear its own costs.

Accordingly, I am enclosing herewith the original of a stipulation incorporating the above terms and signed for said parties by the attorneys therefor.

STIPULATION

IT IS HEREBY STIPULATED by and between SOL SPITZ CO., INC., and AMERICAN PRESIDENT LINES, LTD., by and through the parties' respective attorneys, that the Complaint in the matter of SOL SPITZ CO., INC. v. AMERICAN PRESIDENT LINES, LTD., Docket No. 79-4, be dismissed and the entire action terminated, each party to bear its own costs.

DATED: May 7, 1979.

[/s/ *Merel G. Nissenberg*]
MEREL G. NISSENBERG
Attorney for Complainant,
SOL SPITZ CO., INC.

DATED: May 8, 1979.

[/s/ *J. Donald Kenny*]
J. DONALD KENNY
Attorney for Respondent,
AMERICAN PRESIDENT LINES, LTD.

DISCUSSION

The complainant has decided to dismiss its complaint, i.e., to remove it, to take it away from the Commission without any further hearing. It is *found* and *concluded* that the complainant has this right. It is commendable that the Initial Decision of Judge Morgan in the *Lyon Co.* case, *supra,* aided and abetted counsel's decision to dismiss the complaint herein.

The stipulation above of counsel also helps clarify the termination of the entire action.

Upon consideration of the above, the Presiding Administrative Law Judge *finds* and *concludes*, in addition to the findings and conclusions hereinbefore stated:

1. Dismissal of the complaint by the complainant is accepted and approved.
2. Termination of this proceeding is approved.

Wherefore, it is *ordered,* subject to review by the Commission as provided in the Commission's Rules of Practice and Procedure, that:

(A) The complaint in this proceeding be and hereby is dismissed in conformity with complainant's decision so to do.

(B) This proceeding be and hereby is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

May 15, 1979

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.

NOTICE

June 28, 1979

Notice is given that no appeal has been filed to the May 15, 1979, order of dismissal 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, the order of dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 71–70

DELAWARE RIVER PORT AUTHORITY, ET AL.

v.

UNITED STATES LINES INC., ET AL.

No. 73–13

DELAWARE RIVER PORT AUTHORITY, ET AL.

v.

SEATRAIN LINES, INC.

(1) MOTION TO WITHDRAW COMPLAINTS GRANTED; PROCEEDINGS DISCONTINUED

Finalized on June 28, 1979

Complainants Delaware River Port Authority and six other complainants representing Philadelphia interests[1] have filed a motion seeking permission to withdraw their complaints in these two proceedings. Complainants assert that because of the long passage of time in connection with a companion Commission investigation, Docket No. 73–35, *Intermodal Service of Containers and Barges at the Port of Philadelphia, etc.*, which was discontinued by order of the Commission, served January 2, 1979, they are no longer in a position to proceed to a hearing on their complaints, witnesses having become unavailable, and evidence having become stale or unavailable as to the events described in the old complaints. They seek to withdraw their complaints without prejudice and have obtained the concurrence in this request from the only two respondents remaining in the cases, United States Lines, Inc. and Seatrain Lines, Inc. However, these two respondents disassociate themselves from the lengthy statement of reasons

[1] The other six complainants are in Docket No. 73–13 and except for the Greater Philadelphia Chamber of Commerce, are also complainants in Docket No. 71–70. The six are: Philadelphia Port Corporation; Port of Philadelphia Marine Terminal Association; Philadelphia Marine Trade Association; City of Philadelphia; ILA, Philadelphia District Council; and the Greater Philadelphia Chamber of Commerce.

which complainants advance in support of their motion, having advised complainants' counsel that while not objecting to withdrawal of the complaints without prejudice, respondents do not concur in the supporting statement.

If complainants wish to withdraw their complaints for whatever reasons, there is no authority of which I am aware which would require that they continue to litigate or that the case must continue under the circumstances which now exist. Accordingly, the motions to withdraw the complaints are granted and these proceedings are discontinued.

(S) NORMAN D. KLINE
Administrative Law Judge

May 15, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 79–20

C. S. GREENE AND COMPANY, INC.

v.

SEA-LAND SERVICE, INC.

NOTICE

June 28, 1979

Notice is given that no exceptions were filed to the May 23, 1979 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, the initial decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 79–20

C. S. GREENE AND COMPANY, INC.

v.

SEA-LAND SERVICE, INC.

Finalized on June 28, 1979

Reparation granted.

Glenn Weisenberger for C. S. Greene and Company, Inc.
J. M. Ridlon for Sea-Land Service, Inc.

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

C. S. Greene and Company, Inc. holder of freight forwarder license FMC No. 927, seeks the recovery of alleged overcharges in the amount of $6,373.29 from Sea-Land Service, Inc., a common carrier by water subject to the Shipping Act, 1916. Greene alleges that Sea-Land violated section 18(b) (3) of the Shipping Act by imposing an improper freight rate on two shipments of "carbon paper" which were carried by Sea-Land from New Orleans, Louisiana, to Rotterdam, Holland. Greene requests that claim be handled by the shortened procedure allowed under Subpart K of the Commission's Rules of Practice and Procedure (46 CFR 502.181 et seq.).[2] Sea-Land has consented to the shortened procedure.

The basis for Greene's complaint is that Sea-Land applied the rate for "carbon paper" to the cargo in question when in actuality the shipment was made up of electrostatic masters. It appears from the record here that the erroneous description was made by Greene who prepared the bill of lading. In any event, Sea-Land using the description on the bill of lading, applied the Paper N.O.S. rate since the Gulf European Freight Association Tariff No. 2 (FMC 2) had no specific commodity rate for carbon paper. The N.O.S. rate $159.52 W/M was applied and resulted in freight charges of $9,297.22. Greene paid the charges and then billed the A.B. Dick Company, Greene's principal, for the same amount. A.B. Dick, however, deducted $6,373.29 from Greene's bill on the ground that

[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).

[2] In brief Subpart K provided for the decision of a case on the complaint, affidavit, and memorandum of law by the complainant and the answer and memorandum of respondent. No oral hearings are contemplated.

Greene had misdescribed the shipment as carbon paper when it was in fact a shipment of "Electrostatic masters."

By letter dated August 28, 1978, Greene sought to recover the overcharges from Sea-Land. The letter assigned the Overcharge Claim number 6,187,051 and had attached to it as supporting documents:

1 Copy of Standard Overcharge Claim
1 Copy of Shipper's Export Declaration
1 Copy Shipper's Corrected Export Declaration
1 Copy your [Sea-Land's] B/L 031-717434 dated 4-08-77
1 Copy Shipper's Commercial Invoice/Packing List[3]

The letter closed by requesting Sea-Land to acknowledge the complaint and inform Greene of its disposition. The claim was submitted some 16 months after date of shipment. In a letter dated October 23, 1978, Sea-Land told Greene that:

> . . . it would appear that your claim is indeed in order. However, further review of the claim indicated that the claim for adjustment of freight charges was filed on August 29, 1978 as opposed to the sailing date of the vessel, April 7, 1977.

Sea-Land then noted that Original page 70 of the Gulf European Freight Association Tariff No. 2 prohibited Sea-Land from processing the claim. Sea-Land then "respectfully" declined any responsibility for payment of the claim. Greene then filed this complaint.

On the basis of the foregoing Greene alleges in addition to the already noted 18(b) (3) violation, that Ru' 28 violates section 17 of the Shipping Act because it provides for an unjust and unreasonable practice in the adjustment of claims. The fact that the Association itself is not a party aside, the Commission has considered this so-called six-month rule on several past occasions and has refused to *find it in violation of section 17. See e.g., Time Limit on Overcharge Claims,* 10 F.M.C. 1 (1966); *Proposed Rule–Time Limit on Filing Overcharge Claims,* 12 F.M.C. 298 (1969). As for the alleged violation of section 18(b) (3), Sea-Land "neither admits or denies" that it has committed a violation. Sea-Land does admit, however, that the claim is accurate with appropriate mathematical corrections.[4]

The record before me indicates that the commodity actually carried by Sea-Land was electrostatic masters and that the rate which should have been applied was that found on 9th Rev. Page 98, Gulf European Freight Association Tariff No. 2 for "electrostatic paper in rolls, etc." I therefore find that Sea-Land has violated section 18(b) (3) of the Shipping Act.[5]

Although Greene described the shipment as carbon paper on the bill of lading, A.B. Dick, the shipper described shipment as electrostatic masters on its own Shipper's Invoice and Packing List. Additionally, the record contains a specification sheet put out by A.B. Dick which demonstrates that the term electrostatic masters as used by that company means the same thing as "electrostatic copy paper in rolls, etc." as set out in the Association tariff. Finally, there is in the

[3] The letter and supporting documents were attached to the complaint as exhibits.

[4] The correct rate for "electrostatic masters" [i.e. electrostatic copy paper, in sheets or rolls, in cartons, on pallets, in house-to-house containers, minimum 18 tons per container] was $81.75. A.B. Dick erroneously applied a rate of $80.75. Using the $81.75 rate (the correct rate) the overcharge was $6,337.29.

[5] A finding of a violation is a necessary prerequisite to an award of reparation under section 22, even where as here the respondent was justified in relying on the description of the bill of lading.

record an affidavit by Edward Pudlo, a Senior Traffic Specialist for A.B. Dick which affirms that the shipment in question consisted of electrostatic masters. Thus, the complainant has shown by a preponderance of the evidence that the commodity shipped was electrostatic masters.

Accordingly, Sea-Land Service, Inc., is ordered to pay, as reparation, to C. S. Greene and Company, Inc., the sum of $6,337.29.

Upon notice from complainant that payment has been received the case will be dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

WASHINGTON, D.C.
May 18, 1979

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