FEDERAL MARITIME COMMISSION

DOCKET NO. 82-17

INTERNATIONAL HARVESTER COMPANY

v.

SOUTH AFRICAN MARINE CORP., LTD.

NOTICE

October 4, 1982

Notice is given that no exceptions have been filed to the August 30, 1982 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, that decision has become administratively final.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-17
INTERNATIONAL HARVESTER COMPANY

v.

SOUTH AFRICAN MARINE CORPORATION, LTD.

Complainants, a shipper and freight bill auditor, alleged that respondent carrier overcharged the shipper on two shipments of automobile parts for assembly in violation of section 18(b)(3) of the Shipping Act, 1916, for which complainant shipper seeks $21,385.97 in reparation. Complainants allege that respondent failed to rate the individual boxed packages of each shipment under a low special boxed rate of $84.75 per cubic meter but either charged the entire shipment under an unboxed rate of $109.25 or portions of one shipment under a higher boxed rate of $91.25. Respondent contended that it followed the bill of lading descriptions, that the claims had been filed too late under the tariff rule, that complainant shipper had not shown it had paid the freight, that the two shipments were not completely boxed, and that the tariff did not clearly allow rating by individual boxed portions. It is *held*:

(1) Respondent's preliminary defenses that the tariff barred claims submitted more than six months after shipment, that the bill of lading descriptions governed, and that complainant shipper had not shown proof of payment of the freight are not valid as a matter of law or, as to the last defense, because complainants submitted proof of payment by the shipper;

(2) The tariff item in question governing the commodities shipped is more reasonably read to mean that shipments consisting of pieces or packages of automobile parts for assembly should be rated by boxed and unboxed portions and assessed the boxed and unboxed rates respectively. Even respondent, when the bill of lading so broke down the shipments, rated them in that fashion on one shipment. Even if the tariff did not clearly show that the shipments should be so broken down, respondent's inability to clarify the tariff item shows that the tariff is ambiguous, in which case the law has always held that the ambiguity must be construed against the carrier, not the shipper;

(3) The best available calculation of the overcharge is $21,385.97. Reparation is awarded in that amount with interest as calculated under the Commission's General Order 16, Amendment 40, 46 CFR 502.253.

Russell S. Ragsdell for complainants.

David A. Brauner for respondent.

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

Finalized October 4, 1982

This case began with the filing of a complaint which was served on March 18, 1982. Complainant, International Harvester Company (IHC), is a manufacturer of truck parts with a home office in Chicago, Illinois. Complainant, Continental Freight Data Systems, Inc., (CONDATA), is a freight bill auditing firm located at South Holland, Illinois. Complainants alleged that respondent South African Marine Corporation, Ltd. (Safmarine), a carrier by ocean vessel, transported two shipments of truck parts for assembly from Baltimore, Maryland, to Durban, South Africa, in May and July of 1980 on respondent's vessels *Iktinos* and *Ghikas* respectively and overcharged the shipments, in violation of section 18(b)(3) of the Shipping Act, 1916 (the Act). Complainants originally calculated the alleged overcharge to be $22,497.76 but later amended this amount, first to $22,370.97, and finally, to $21,385.97, upon which last figure they now rest. Complainants requested that the complaint be handled under the shortened procedure set forth in Subpart K of the Commission's Rules of Practice and Procedure, 46 CFR 502.181 *et seq.* In support of their complaint, complainants attached various documents consisting of claim forms prepared by CONDATA, bills of lading, invoices of forwarding charges, seller's invoices, and packing lists.

In response to the complaint, respondent Safmarine filed an answering memorandum of facts and arguments on April 6, 1982. Respondent agreed to the use of the shortened procedure. In addition, respondent contended that it had no knowledge of the actual nature of the goods shipped except as reflected on the shipping documents prepared by complainants. Respondent cited its tariff rule (Article 16 of the U.S. South and East Africa Conference Southbound Tariff No. 6, F.M.C. No. 8) by which respondent is not obligated to consider claims based on alleged rating errors if the claims are presented after the shipment leaves the custody of the carrier or if claims are submitted more than six months from date of shipment. (However, respondent noted that its tariff notifies shippers of their rights to file complaints with the Commission within the statutory two-year period provided by section 22 of the Act.) Respondent also contended that its tariff provides that the commodity description set forth in the bill of lading shall determine the rate to be applied.

In addition to the above contentions, respondent asserted several affirmative defenses. First, respondent contended that complainants had

[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).

failed to show that they paid the freight because they had failed to provide paid freight bills as required by Rule 186, 46 CFR 502.186. Second, respondent contended that complainants were seeking to have the two shipments rated under a special rate for completely boxed automobiles, knock down, of $84.75 per cubic meter, instead of the rate applicable to unboxed automobiles which was $109.25 per cubic meter. Respondent, citing the packing lists submitted with the two shipments, contended that the shipments contained were not completely boxed since both of them contained portions consisting of unboxed bundles of rails as well as boxed truck parts. Therefore, according to respondent, the special lower rate of $84.75 as well as another special boxed rate of $91.25 for boxed automobiles and parts would not apply because the shipments cannot be broken down into their boxed and unboxed portions under the tariff but must be considered as an entirety, in which case neither shipment was completely boxed. Respondent also cited another tariff rule (Note 4 to the special rates) which further requires that shipments must be completely boxed on skids and so noted on the dock receipt and bill of lading, requirements that were not met as to the two shipments in question. In short, respondent argued that the two shipments were not completely boxed and therefore were not entitled to either of the two lower special rates for boxed automobiles and parts, $84.75 or $91.25. Before I could proceed to the merits of the ultimate issue concerning whether the shipments or any portion of them were entitled to either of the two lower rates for boxed automobiles and parts, it was necessary to clear the case of several preliminary technical problems and to ensure that the record was adequately developed at minimal cost and delay in the spirit of the shortened procedure which both parties had requested.

RESOLUTION OF PRELIMINARY TECHNICAL ISSUES

The preliminary technical issues arose from the complaint and answering memorandum. They dealt with the following matters: (1) respondent's defense that the claims had been submitted more than six months after date of shipment; (2) respondent's defense that its tariff provides that the description on the bill of lading determines the rate to be applied; (3) complainants failure to provide paid freight bills as evidence of payment of freight; and (4) the unclear status of CONDATA, a freight auditing firm, which had not paid the freight, as a complainant in the case. These matters can be quickly resolved and dismissed so that the matter can proceed to the essential question concerning the proper rating of the goods shipped.

First, as to the defense that the claims were not submitted within six months after date of shipment, it is well settled that rules in tariffs restricting the time for claims to be submitted to carriers are not valid defenses in complaint cases before the Commission inasmuch as section

22 of the Act permits complaints to be filed within two years after the cause of action accrues. See, e.g., *Sun Co. v. Lykes Bros.*, 20 F.M.C. 67, 69 (1977); *Kraft Foods v. F.M.C.*, 538 F. 2d 445 (D.C. Cir. 1976); *Polychrome Corp. v. Hamburg-America Line*, 15 F.M.C. 220, 222 (1972); *Union Carbide Corp. v. Nippon Yusen Kaisha (N.Y.K. Lines)*, 24 F.M.C. 159, 162 (1981).[2]

Second, as to the defense that respondent's tariff requires the carrier to follow the commodity description on the bill of lading when rating the shipment, this may explain why a carrier believes that overcharge claims submitted after the goods have left the carrier's custody and cannot be re-examined are unfair but it does not bar a reparation claim under longstanding Commission precedent. As has been held in countless cases of this type, a shipper is entitled to show what was actually shipped notwithstanding bill of lading commodity descriptions or tariff rules requiring notations of one type or another to be inserted on bills of lading. *Sanrio Ltd. v. Maersk Line*, 23 F.M.C. 150, 159-164, 189 (1980); *Western Publishing Co. v. Hapag Lloyd AG*, 13 SRR 16, 17 (1972); *Sun Co. v. Lykes Bros.*, cited above, 20 F.M.C. at 69-70; *Durite Corp. Ltd. v. Sea-Land*, 20 F.M.C. 674, 675-676 (1978), affirmed under the name *Sea-Land Service, Inc. v. F.M.C.*, 610 F. 2d 1000 (D.C. Cir. 1979); *Cities Service International, Inc. v. Lykes Bros.*, 19 F.M.C. 128(1976); *Union Carbide Corporation v. American and Australian Steamship Line*, 17 F.M.C. 177, 178 (1973).

As to respondent's contention that complainants failed to provide paid freight bills as evidence that the shipper IHC paid the freight, complainants cured this problem by submission of evidence and explanations in response to my instructions issued in a preliminary ruling. (See Order to Supplement the Record, May 6, 1982, pp. 6-7 n. 2.) Because payment of freight by complainant or an assignment of the claim to complainant is a jurisdictional prerequisite if a complainant seeks reparation in an overcharge case, it is necessary that the record show that complainant so qualifies. See, e.g., *Sanrio, Inc. v. Maersk Line*, 19 SRR 907, 908 (1979), and the numerous cases cited therein; *3M v. Hapag-Lloyd*, 23 F.M.C. 352 (1980). Although the complaint alleged that IHC had been subjected to payment of the overcharge, the supporting evidence, which consisted of a forwarder's invoices to IHC purportedly covering the shipments involved, did not appear to correlate exactly with the amount of ocean freight due and paid. (See ruling cited above, p. 7 n. 2, and my letter of instructions dated June 29, 1982,

[2] Moreover, the Commission has recently issued a new regulation which will prohibit carriers from imposing time limits of six months or otherwise less than two years after the cause of action accrues for shippers desiring to file overcharge claims. Therefore, in the future the six-months' defense will no longer appear in these cases. See General Orders 13 and 38; Docket No. 81-51, Time Limit for Filing of Overcharge Claims; 25 F.M.C. 185 (1982).

p. 2.) In response to my instructions, complainants submitted additional evidence and explanations consisting of copies of the forwarder's debit memoranda to IHC and a further sworn statement explaining how the vouchers and invoices reflect payment. (See complainant's supplemental arguments and evidence, May 26, 1982, para. 2 and appendix 1; verified statement of Nils G. Wickstrom, received July 27, 1982, p. 1.) This evidence shows payment by IHC on IHC's vouchers of ocean freight for shipments listed on the forwarder's debit memoranda which show identical lot numbers as those shown on the packing lists and on IHC's invoices which accompanied the shipments in question. There is thus ample proof of payment of ocean freight for these shipments by IHC.

Fourth, as to the status of CONDATA, although CONDATA is not a shipper and did not pay the freight or obtain an assignment of the shipper's claim, it has standing to file a complaint alleging a violation of the Act. Any person may file such a complaint. See, e.g. *Cargill, Inc. v. Waterman Steamship Corporation*, 24 F.M.C. 442, 460 (1981); *Anglo Canadian Ship. Co., Ltd. v. Mitsui S.S. Co., Ltd.*, 4 F.M.B. 535, 539 (1955); *Ace Machinery Co. v. HapagLloyd*, 16 SRR 1258, 1262 (1976). However, CONDATA is not entitled to recover reparation if a violation has been shown, such reparation being due to the shipper. Moreover, as a corporation, the Commission's rules preclude CONDATA from representing IHC and since the only appearance entered for IHC is by an F.M.C. practitioner, Mr. Russell S. Ragsdell, who stated in the complaint that he was authorized to act on behalf of IHC, it appeared that CONDATA was not represented as well as being not entitled to recover reparation. See Rule 21(a), 46 CFR 502.21(a); *Wilmot Engineering Company v. United States Lines, Inc.*, 19 F.M.C. 403 (1976). To make a long story short, I advised CONDATA that under the circumstances I would either dismiss CONDATA as a party complainant or allow it to remain in the case as a complainant which was alleging a violation of the Act but was not seeking reparation. (See ruling of May 6, 1982, cited above, pp. 8-9.) In response to this ruling, CONDATA, through the registered F.M.C. practitioner, Mr. Ragsdell, agreed that it would be considered a nominal complainant which was not seeking reparation. (See complainant's supplemental arguments and evidence, May 26, 1982, para. 1.)

Having disposed of the four preliminary technical issues and problems, the matter is ripe for decision on the merits of complainants' contentions that portions of the two shipments were entitled to the lower of two special rates for boxed automobiles and parts.

DISCUSSION AND CONCLUSIONS

THE CONTENTIONS OF THE PARTIES

The main issue in this case is simply whether the two shipments which consisted of numerous boxes of truck parts for assembly plus

several bundles of "rails" should have been rated only under an unboxed rate of $109.25 W/M (in practice, per cubic meter) or whether the shipments should have been broken down by their boxed and unboxed portions and assessed one of the lower special rates for boxed automobiles and parts, either $91.25 W/M or $84.75 W/M, as to the boxed portions. The question arises because respondent's tariff (United States/South and East Africa Conference South Bound Freight Tariff No. 6, F.M.C. No. 8) at the time of the shipments published three different rates for automobiles, trucks, etc. and parts for assembly as Item No. 350. (Copies of the relevant tariff pages in effect at the time of shipments are attached in the appendix to this Initial Decision for ready reference.) As seen by the tariff pages cited, the rate of $109.25 appears to apply to commodities described in Item No. 350 if they are "Unboxed" and are destined to ports in the "Capetown/Durban Range." As also seen from the tariff pages, however, a special rate of $91.25 applies to the commodity shipped if "Completely Boxed (Completely Knocked Down)" to the same range of ports and an even lower special rate of $84.75 applies to such "completely boxed" commodities "On quantities of 150 Metric tons or more" which are shipped "from one loading port to one discharge port from one shipper to one consignee." To make the matter more complex, the tariff also publishes four conditions, called "Notes," which appear to apply to all three rates. Thus, Note 1 states that the rates apply "on packages or pieces weighing up to and including 5080 KGS., each." Note 2 states: "Other than completely boxed must be assessed the unboxed rate." Note 3 states that "Accessories, Parts and Tires (when accompanying shipments of automobiles) will be assessed the completely boxed rate . . ."; and Note 4 states that "On K.D. Automobiles and Manufacturer's parts for assembly completely boxed on skids and so noted on Dock Receipt and Bill of Lading freight will be calculated on overall measurement less skids."

Complainants contend that the two shipments should be broken down by boxed and unboxed portions and that the boxed portions should be assessed the rate of $84.75 whereas the unboxed bundles should be assessed the unboxed rate of $109.25. They have done this for both shipments, calculated the total freight, including any additional charges such as heavy lift and bunker surcharge, and conclude that total freight on such basis amounts to some $21,385.97 less than what IHC actually paid on the two shipments. Accordingly they claim that respondent overcharged IHC by that amount for which IHC seeks reparation.

Respondent, in its first answering pleading, contended that the shipments should not be broken down into their boxed and unboxed portions for rating purposes. Respondent argued that Note 2 of the tariff item, cited above, stating that "other than completely boxed must be

assessed the unboxed rate" means that the entire shipment must be completely boxed and that since each shipment contained some portions which were unboxed, the entire shipment should be assessed the unboxed rate of $109.25. Respondent also cited Note 4 providing that automobile parts for assembly completely boxed on skids and so noted on the dock receipt would be measured on overall measurement less skids. Respondent claimed that there was no evidence that either shipment was "completely boxed on skids" or that such notations were made on bills of lading or dock receipts. Complainants, in their supplemental arguments, of course disputed respondent's interpretations of the tariff and of Notes 2 and 4, contending that nothing in the tariff precluded rating the shipments by their boxed and unboxed portions and that Note 4 merely indicated how the carrier would determine measurement of a package of automobile parts on skids, i.e., that the shipper would not be charged for the cubic measurement of the skids. (See complainant's supplemental arguments, May 26, 1982, para. 3.) Complainants also contended that the lower special rate of $84.75 was properly applicable to the boxed portions of the shipments because, as the tariff required, both shipments exceeded 150 metric tons of boxed freight and both were consigned to one port of discharge (Durban) and were loaded at one port (Baltimore). (Id.)

In its final reply of May 27, 1982, submitted in response to my rulings of May 6, 1982, ordering supplemental arguments and evidence, as provided by Rule 184, 46 CFR 502.184, respondent appeared to be less certain of its argument that both shipments had to be completely boxed in all of their portions in order to qualify for either of the two lower special rates. Respondent acknowledged the fact that respondent itself had rated the two shipments inconsistently, rating the first (*Iktinos*) shipment by breaking out the boxed and unboxed portions, applying the $91.25 rate for the former portion and the $109.25 rate for the unboxed portion but rating the second shipment (*Ghikas*) merely by applying the unboxed rate of $109.25 to the entire shipment (674.426 cubic meters) without any breakdown.[3] Respondent noted, however, that on the first shipment, the bill of lading (on which the carrier presumably relied) had itself broken the shipment into boxed and unboxed portions whereas the bill of lading for the second shipment showed no such breakdown. However, because respondent itself had rated the first shipment apparently under complainants' interpretation (except for the application of the $91.25 special rate rather than $81.75 special rate) respondent made further inquiries, requesting a clarification of tariff Item No.

[3] In fairness to respondent, it should be pointed out that respondent noted that the bills of lading and shipping documents were filled out by claimant rather than respondent and that part of the confusion resulting in different methods of rating the two shipments may therefore have stemmed from the inconsistent descriptions contained in the bills of lading.

350 from the Chairman of the United States/South and East Africa Conference, Mr. Charles F. Fischer. Respondent received a letter of attempted clarification from Mr. Fischer, which stated that "each package or piece of the shipment must be considered separately so that the rating on a single bill of lading presumably could be split between boxed and unboxed commodities." However, Mr. Fischer went on to describe the purpose of Note 2 in such a way that "respondent confesses itself to be at this point uncertain itself as to the proper application of the tariff." (Respondent's supplemental submission, May 27, 1982, p. 3). To this statement, complainants respond by stating that Mr. Fischer's letter supports their contentions and note that respondent's own confessed uncertainty as to the meaning of the tariff demonstrates an ambiguity in the tariff which the Commission holds must be construed against the carrier. (Complainant's Response to Defendant's (sic) Supplemental Submission, July 27, 1982, p. 2.)

WHY COMPLAINANTS' CONTENTIONS ARE VALID

There are both facts in this case as well as principles of law that support complainants' argument that both shipments should have been rated by applying the boxed rate for the boxed portions of the shipments and the unboxed rates for the unboxed portions.

In point of fact, as noted above, respondent itself, when provided a filled-in bill of lading by the forwarder which showed that the shipment on the *Iktinos* consisted of "116 boxes" and "8 bundles," applied the special boxed rate of $91.25 to the boxed portion (787.049 cubic meters) and the unboxed rate of $109.25 to the unboxed portion (6.898 cubic meters.) (See bill of lading attached to the complaint as Exhibit "B", page 2.) On the second shipment (*the Ghikas*), when presented a bill of lading showing only "92 packages" and "674.426" cubic meters, respondent merely applied the unboxed rate of $109.25 per cubic meter to the total measurement of the undivided shipment, 674.426 cubic meters. This suggests that when respondent is informed that a portion of the shipment of automobile parts for assembly is in boxes, it will rate that portion under the boxed special rate. In other words, respondent's rating clerks may in practice accept the interpretation of Item No. 350 advocated by complainants as to separation of the shipment into boxed and unboxed portions.[4]

A second basis for concluding that both shipments should be rated by their boxed and unboxed portions is the opinion of Mr. Fischer, the

[4] It may be true that it is not the carrier's intent or practice which ultimately determines how a tariff is to be interpreted. Cf. *National Cable & Metal Co. v. American Hawaiian S.S. Co.*, 2 U.S.M.C. 470, 473 (1941); *Allied Chemical, S.A. v. Farrell Lines, Inc.*, 23 F.M.C. 375, 398 (1980). However, the fact that a carrier has, in effect, interpreted its tariff rule in a way which is against its own pecuniary interest by allowing a lower special boxed rate on a portion of the shipment lends support to complainants' arguments that such an interpretation is more reasonable than one contrary.

Conference Chairman, mentioned above. In his letter, as complainants have noted, Mr. Fischer twice indicated that shipments under tariff Item No. 350 should be rated by each individual package or piece as shown on the bill of lading. Thus, he states in relevant part: [5]

> In determining whether the "Completely Boxed" or the "Unboxeds" rate should apply *each package or piece* in the shipment must be considered separately. Thus, one ocean Bill of Lading may have some cargo under this Tariff item number rated as "Completely Boxed" and other freight rated as "Unboxed." (Emphasis in the original.)
>
> The stipulation under note 2--which reads "Other than Completely Boxed must be assessed the Unboxed rate" applies separately to each individual package or piece on the Bill of Lading.
>
> The note was originally placed in the Tariff to clarify the assessment or freight on set up vehicles which wer (sic) partially boxed.

A third basis indicating that the tariff item No. 350 contemplated rating shipments of automobiles and automobile parts for assembly by individual packages or pieces rather than by the shipment as an entirety is Note 1 in the tariff. As quoted earlier, this Note states that the rates apply "on packages or pieces weighing up to and including 5080 kgs., each." It is somewhat difficult to conceive how such a Note could reasonably be interpreted as applying to a gross shipment rather than to the "packages or pieces" which are the component parts of the shipment, especially with such a size limitation of only 5.080 metric tons. (The packing lists for the two shipments show that the total weight for each was several hundred thousand kilograms consisting of numerous packages or pieces weighing under 5,000 kilograms each.)

Finally, respondent cites Note 2 in the tariff, which states that "other than completely boxed must be assessed the unboxed rate." Respondent seems to find some confusion in Mr. Fischer's explanation of this Note, however. Because Mr. Fischer explained that the purpose of the Note was to clarify the assessment of freight on set up vehicles which were not completely boxed and because the subject shipments contained unboxed bundles of rails which were presumably parts of vehicles, respondent sees a problem in that each boxed vehicle or part in the shipments was not therefore completely boxed. I do not necessarily agree with respondent's analysis since the Note supposedly was designed to apply to "set up" vehicles, according to Mr. Fischer, not knock down vehicles and parts as the shipments appear to have com-

[5] The complete letter of Mr. Fischer is attached to respondent's supplemental submission dated May 27, 1982.

prised.[6] However, even if each supposedly boxed vehicle part cannot be considered completely boxed because some bundles of rails in the shipments were unboxed, thereby requiring every individual boxed vehicle or part thereof to be assessed an unboxed rate, such a result would not be permissible under applicable principles of law. First, it seems to represent a "strained and unnatural construction of the tariff" which one is not permitted to employ when applying tariffs. See, e.g., *Bulkley Denton Overseas, S.A. v. Blue Star Shipping Corp.*, 8 F.M.C. 137, 140 (1964); *Thomas G. Crowe et al. v. Southern S.S. et al.*, 1 U.S.S.B. 145, 147 (1929). Moreover, even if respondent's interpretation is not strained, respondent has confirmed the fact that tariff Item No. 350 with its various "Notes" and conditions is ambiguous, and it is ancient law that ambiguities in tariffs are construed against the carrier, not the shipper. See, e.g., *Bulkley Dunton Overseas, S.A. v. Blue Star Shipping Corp.*, 8 F.M.C. 137, 140 (1964); *Thomas G. Crowe et al. v. Southern S.S. Co. et al.*, cited above, 1 U.S.S.B. at 147; *Eli Lilly S.A. v. Mitsui O.S.K. Lines, Ltd.*, 24 F.M.C. 534, 537 (1982); *United States v. Hellenic Lines, Ltd.*, 14 F.M.C. 255, 260 (1971); *Sacramento-Yolo Port Dist. v. Fred F. Noonan Co., Inc.* 9 F.M.C. 551, 558 (1966); *Dow Corning Corp. v. Atlantic Container Line, Inc.*, 24 F.M.C. 14, 22 (1981) and the numerous cases cited therein.

On a number of grounds, therefore, I find that this record supports the conclusion that the two shipments rated under tariff Item No. 350 should be rated by individual pieces or packages and that for each piece or package that is boxed, either of two special rates ($91.25 or $84.75 per cubic meter) should apply, but for each piece or package that is unboxed, the unboxed rate of $109.25 per cubic meter applies. I find, furthermore, that of the two special lower rates for boxed pieces or packages, the shipments qualified for the lower of them, i.e., the rate of $84.75 per cubic meter. This is because the shipments moved from one loading port (Baltimore) to one port of discharge (Durban) and from one shipper International Harvester Company of Chicago, Illinois, to one consignee, International Harvester Company (S.A.) Pty. Ltd., of Durban, as the bills of lading show. Moreover, the shipments weighed more than 150 metric tons in their entirety, as the packing lists show. Thus, all the conditions set for the $84.75 rate have been met as shown in the tariff.

[6] It is possible that I may not have correctly understood respondent's apparent confusion as to Mr. Fischer's explanations as explained by respondent in its supplemental submission of May 27, 1982, p. 3. However, respondent appears to be so confused by its attempt to explain the purported confusion in Mr. Fischer's explanations that it confessed itself "uncertain itself as to the proper application of the tariff" and expressed no objection if I were to seek to unravel Mr. Fischer's explanations by going directly to Mr. Fischer.

CALCULATION OF THE AMOUNT OF OVERCHARGE AND REPARATION

Complainants originally alleged that IHC had been overcharged in the amount of $22,497.76. However, during the course of the proceeding it became clear that this figure was not sufficiently accurate. Accordingly, complainants recomputed the amount two more times and finally have calculated it as $21,385.97. This last amount appears to be the most accurate of the three calculations, has not been challenged by respondent, and considering the time and expense necessary to make further refinements, should suffice.[7]

The calculations supporting the figure of $21,385.97 as the total amount of overcharges for which reparation is sought on the two shipments is shown in detail in the record. (See Complainant's Response to Defendant's Supplemental Submission, received July 27, 1982.) For the first shipment on the *Iktinos*, the overcharge is shown as $5,115.84. The record shows that the only difference between complainants' calculations of freight due and those shown on respondent's bill of lading for this shipment is that respondent rated the boxed portion of the shipment at the higher boxed rate of $91.25 whereas complainants rated the boxed portion of the shipment at the lower boxed rate of $84.75 on the ground that the shipment moved from one shipper to one consignee and from one port of loading to one port of discharge, thereby qualifying under the tariff for the lower of the two special boxed rates, as I mentioned above. As for the rest of the charges (unboxed portion of the shipment, heavy lift, and bunker surcharge) the parties do not differ. The calculations are shown as follows:

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[7] The first calculations of the overcharges were not sufficiently accurate because complainants had merely rated the entire cubic measurement of the shipments under the $84.75 rate without breaking the shipment down into boxed and unboxed portions. The second calculation was an improvement but it merely factored in the unboxed portion on the *Ghikas* shipment. On my inquiries and instructions, complainants calculated the overcharge a third time by accounting for the boxed and unboxed portions of both shipments. On the *Iktinos* shipment, complainants used the breakdowns shown on the bill of lading without re-measuring each package of the entire shipment of 124 packages by using the packing list dimensions for each package. On the *Ghikas* shipment, complainants had to use the packing list to re-measure seven unboxed bundles of rails because the bill of lading contained no breakdown but otherwise relied upon the total measurement for the 92 packages shown on the bill of lading. It is possible that had complainants re-measured all 92 packages by using the packing list, they may have arrived at a different total measurement than that shown on the bill of lading. However, as complainants explained in a supplemental sworn statement responding to my inquiries, such an exercise would take more time and cost more than it was worth in terms of possible refinements, and complainants were prepared to accept the bill of lading figures for total measurement. Similarly, to determine if a heavy lift charge was applicable to the *Ghikas* shipment merely because one was applied to the *Iktinos* shipment, as I had noted in my inquiries, by acquiring old tariff pages and re-measuring or re-weighing the entire *Ghikas* shipment would be time-consuming and out of proportion to any possible adjustment, assuming any adjustment were in fact necessary. (See verified statement of Nils G. Wickstrom, received August 17, 1982.) Respondent has not challenged these calculations and I advised all parties that unless I heard to the contrary, I would find that the last calculations were sufficiently reasonable. (See my letter to Messrs. Ragsdell and Brauner, dated August 13, 1982.)

Boxed Rate:	787.049 CBM	@ 84.75 per CBM	$66,702.40
Unboxed Rate (rails):	7.898 CBM	@ 109.25 per CBM	753.61
Heavy Lift	70.35 CBM	@ 3.90 per CBM	274.37
Bunker Surcharge:	793.947 CBM	@ 30.00 per CBM	23,818.41
		TOTAL CHARGE	$91,548.79
		TOTAL PAID:	$96,664.63
		CORRECTED TO:	91,548.79
		OVERCHARGE	$5,115.84

On the second shipment on the *Ghikas*, complainants measured the portion of the shipment consisting of unboxed bundles of rails, taking the measurement data from the packing list because the bill of lading did not break the shipment down into boxed and unboxed portions. They determined that the unboxed portion of the shipment measured 10.339 CBM and applied the unboxed rate of $109.25 per CBM to that portion. They subtracted that portion from the total cubic measurement shown on the bill of lading for the shipment (674.426 CBM) and applied the lower boxed rate of $84.75 per CBM to the remainder of the shipment which consisted of boxed packages. There was no heavy lift charge shown on the bill of lading for this shipment. The result was a calculation of overcharge amounting to $16,270.13 as shown below:

Boxed Rate:	664.087 CBM	@ 84.75 per CBM	$56,281.37
Unboxed Rate (rails):	10.339 CBM	@ 109.25 per CBM	1,129.54
Bunker Surcharge:	674.426	@ 29.00 per CBM	19,558.35
		TOTAL CHARGE	$76,969.26
		TOTAL PAID:	$93,239.39
		CORRECTED TO:	76,969.26
		OVERCHARGE	$16,270.13

TOTAL OVERCHARGES	
Iktinos shipment:	$5,115.84
Ghikas shipment :	16,270.13
	$21,385.97

In view of the passage of time since the shipments occurred and consequent dispersal of the goods shipped, I find reliance on the bills of lading and packing list to compute the amount of overcharge to be reasonable and that further attempts to refine these amounts by even more calculations for the sake of relatively minimal adjustments to be more costly and burdensome than would be justified, as I explained in footnote 7 above. Accordingly, I conclude that respondent Safmarine has overcharged the shipper-complainant, International Harvester Company, in the amount of $21,385.97. In accordance with the Commission's standing regulation, respondent shall therefore pay IHC such amount together with interest computed under the formula provided by

that regulation. See General Order 16, Amdt. 40; 46 CFR 502.253, 24 F.M.C. 145 (1981).[8]

(S) NORMAN D. KLINE
Administrative Law Judge

[8] The regulation cited provides that simple interest will accrue from "date of payment of freight charges to the date reparations are paid." It also provides that "[t]he rate of interest will be calculated by averaging the monthly rates on six-month U.S. Treasury bills commencing with the rate for the month that freight charges were paid and concluding with the latest available monthly Treasury bill rate at the time reparations are awarded." The Commission also stated that where facts are not reasonably ascertainable, parties could settle overcharge cases, in which case the amount of interest could be left to the parties. See 24 F.M.C. at 149, and the text of 46 CFR 502.253.

APPENDIX

UNITED STATES/SOUTH AND EAST AFRICA CONFERENCE	Revision	Page
	First	161
SOUTH BOUND FREIGHT TARIFF NO. 6 F.M.C. NO. 8	Cancels	Page
FROM: United States Atlantic and Gulf Ports	Original	161
TO: Ports in Southwest, South, Southeast and East Africa and the Islands of Malagasy Republic (Madagascar), Reunion, Mauritius, Comoros, Ascension, Seychelles, St. Helena, as named herein	Effective Date	
	March 1, 1980	
UNLESS OTHERWISE HEREIN PROVIDED RATES APPLY PER CUBIC METER OR 1000 KILOS, WHICHEVER PRODUCES THE GREATER REVENUE	Correction	566

C—DENOTES "CONTRACT" RATES S—DENOTES "SINGLE" RATES
(SEE RULE 14 FOR "NON-CONTRACT" RATES)

UNLESS OTHERWISE SPECIFICALLY INDICATED RATES SHOWN HEREIN APPLY TO CAPETOWN. FOR APPLICATION OF RATES TO OTHER PORTS WITHIN THE SCOPE OF THIS TARIFF SEE PAGE 6

COMMODITY CODE	COMMODITY DESCRIPTION AND PACKAGING	TYPE	RATE BASIS	CAPE TOWN	ITEM NO.
	A—Continued				
	AUTOMOBILES, PASSENGER AND COMMERCIAL*				
	(Subject to Notes 1, 2, 3 and 4)				350
	Completely Boxed:				
	+Capetown/Durban Range	C		91.25	
	+SPECIAL RATE				
	Completely boxed (Completely Knocked Down) Capetown/Durban Range On quantities of 150 Metric tons or more. Rate applies from one loading port to one discharge port from one shipper to one consignee.				
	Subject to Tariff Rules and Regulations	C		84.75	
	Unboxed:*				
	+Capetown/Durban Range	C		109.25	

* — Freight to be assessed on overall measurement less bumpers.

\+ — Usual differentials to other ports as shown on Page 6.

NOTE 1: Rates apply on packages or pieces weighing up to and including 5080 KGS., each

NOTE 2: Other than completely boxed must be assessed the unboxed rate.

NOTE 3: Accessories, Parts and Tires (when accompanying shipments of automobiles) will be assessed the completely boxed rate, but subject to carriage at risk of cargo and Bill of Lading to be claused "Unprotected at shippers risk."

NOTE 4: On K.D. Automobiles and Manufacturer's parts for assembly completely boxed on skids and so noted on Dock Receipt and Bill of Lading freight will be calculated on overall measurement less skids.

This is an all inclusive classification and embraces Automobiles; Bodies; Trucks; Buses; Chasis; Trailers; Truck or Truck Tractor Type and Dump Trucks.

A — Increase

APPENDIX

UNITED STATES/SOUTH AND EAST AFRICA CONFERENCE	Revision	Page
	Second	161
SOUTH BOUND FREIGHT TARIFF NO. 6 F.M.C. NO. 8	Cancels	Page
FROM: United States Atlantic and Gulf Ports	First	161
TO: Ports in Southwest, South, Southeast and East Africa and the Islands of Malagasy Republic (Madagascar), Reunion, Mauritius, Comoros, Ascension, Seychelles, St. Helena, as named herein	Effective Date	
	June 24, 1980	
UNLESS OTHERWISE HEREIN PROVIDED RATES APPLY PER CUBIC METER OR 1000 KILOS, WHICHEVER PRODUCES THE GREATER REVENUE	Correction	1043

C—DENOTES "CONTRACT" RATES (SEE RULE 14 FOR "NON-CONTRACT" RATES) S—DENOTES "SINGLE" RATES

UNLESS OTHERWISE SPECIFICALLY INDICATED RATES SHOWN HEREIN APPLY TO CAPETOWN. FOR APPLICATION OF RATES TO OTHER PORTS WITHIN THE SCOPE OF THIS TARIFF SEE PAGE 6

COMMODITY CODE	COMMODITY DESCRIPTION AND PACKAGING	TYPE	RATE BASIS	CAPE TOWN	ITEM NO.
	A—Continued				
	AUTOMOBILES, PASSENGER AND COMMERCIAL*				
	(Subject to Notes 1, 2, 3 and 4)				
	Completely Boxed:				
	+Capetown/Durban Range	C		91.25	
	+SPECIAL RATE				
	Completely boxed (Completely Knocked Down) Capetown/Durban Range				
	On quantities of 150 Metric tons or more. Rate applies from one loading port to one discharge port from one shipper to one consignee.				
	Subject to Tariff Rules and Regulations	C		84.75	
	Unboxed:*				
	+Capetown/Durban Range	C		109.25	

* — Freight to be assessed on overall measurement less bumpers.

\+ — Usual differentials to other ports as shown on Page 6.

NOTE 1: Rates apply on packages or pieces weighing up to and including 5080 KGS., each

NOTE 2: Other than completely boxed must be assessed the unboxed rate.

NOTE 3: Accessories, Parts and Tires (when accompanying shipments of automobiles) will be assessed the completely boxed rate, but subject to carriage at risk of cargo and Bill of Lading to be claused "Unprotected at shippers risk."

NOTE 4: On K.D. Automobiles and Manufacturer's parts for assembly completely boxed on skids and so noted on Dock Receipt and Bill of Lading freight will be calculated on overall measurement less skids.

This is an all inclusive classification and embraces Automobiles; Bodies; Trucks; Buses; Chasis; Trailers; Truck or Truck Tractor Type and Dump Trucks.

• SPECIAL RATE (R)

Truck — Weigh. approx. 7420 Kgs. & meas. approximately 44.690 CBM each.
Truck — Weigh. approx. 11,360 Kgs. & meas. approximately 50.505 CBM each.
• NOTE: Subject to ten percent (10%) reduction off Tariff Rate & fifteen percent (15%) reduction off Heavy Lift & Long Length charges applicable at time of shipment. To Dar-es-Salaam Only — (Eff. thru 9/22/80)

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-7
AGREEMENT NOS. 9929-6, 10266-3 AND 10374

ORDER OF FURTHER INVESTIGATION AND HEARING

October 6, 1982

Agreement No. 9929-5, which was the subject of the earlier investigation and hearing in this proceeding, had two distinct parts. Part I called for the joint operation of a LASH and conventional vessel service by Hapag-Lloyd, A.G. (Hapag-Lloyd), Intercontinental Transport B.V. (ICT) and Compagnie Generale Maritime (CGM) (Proponents). This service was to be known as "Combi Line." Part II of the Agreement would have authorized Proponents to cross-charter container space from one another on any and all vessels separately operated by them in the trade. Because Agreement No. 9929-5 did not adequately reflect the distinct activity proposed by Proponents, the Commission divided it into separate agreements. Part I, the Combi Line Joint LASH service between Hapag-Lloyd and ICT became Agreement No. 9929-6; and Part II which authorized the cross-charter container arrangement among Hapag-Lloyd, ICT and CGM became Agreement No. 10374. The Commission's order approving Agreement No. 10374 authorized Hapag-Lloyd on the one hand and ICT/CGM, on the other hand to exercise separate votes in any conference or rate agreement of which they might be members.

On review, the U.S. Court of Appeals for the District of Columbia Circuit found, *inter alia*, that the voting provision authorized by the Commission's order appeared to expand the scope of anticompetitive authority proposed by the Proponents. While recognizing the Commission's statutory authority to modify a proposed agreement, the court held that modifications which expand the anticompetitive authority contemplated by Proponents must be preceded by notice and opportunity for hearing. *Sea-Land Service, Inc. v. FMC*, 653 F.2d 544 (D.C. Cir. 1981). The court remanded the proceeding in part because the factual record with respect to voting did not adequately support the contention that multiple voting restricted the scope of Agreement No. 10374.

By Order served October 9, 1981, the Commission, in response to the court's remand, directed the parties to this proceeding to, address:

> Whether, in light of its own structure and the structure of Agreement Nos. 9929-6 and 10266-3, Agreement No. 10374 should provide that Hapag Lloyd, on the one hand, and ICT/CGM, on the other hand, shall exercise separate votes in

conferences or rate agreements with respect to their respective container services, and the impact on competition in the trades of such a provision. Submissions by the parties on this issue should include, if possible, a discussion as to how Hapag and ICT/CGM have voted on conference and rate agreement decisions regarding container services since Agreement No. 10374 was given final approval by the Commission on December 28, 1979;

Although the proceeding on remand was limited to the submission of affidavits of fact and memoranda of law on the impact of the voting provisions, the parties were given the opportunity to submit recommendations as to the necessity for further proceedings and form that they should take. After reviewing the submissions of the parties, the Commission has concluded that further evidentiary hearings are required.

The issue to be resolved with respect to voting is whether the members of Agreement No. 10374 have an identity of interest when measured against the guidelines established by the Commission in *Johnson Scanstar, Agreement No. 9973-3*, 21 F.M.C. 218 (1978). Whether the *Johnson Scanstar* factors exist here is primarily a factual dispute which cannot be resolved from the face of the documents submitted by the parties. Moreover, none of the submissions provide any probative evidence which would show whether the parties to Agreement No. 10374 have, in fact, engaged in bloc voting. Accordingly, a further hearing will be instituted on the voting issue.

THEREFORE, IT IS ORDERED, That pursuant to sections 15 and 22 of the Shipping Act, 1916 (46 U.S.C. §§ 814, 821) an investigation is hereby instituted to determine whether Agreement 10374 should be modified to provide that the parties to that agreement can exercise only a single vote in any conference or rate agreement in the trades covered by Agreement No. 10374;

IT IS FURTHER ORDERED, That this matter be assigned to an Administrative Law Judge for public hearing and decision within the time limitations of Rule 61 of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.61) at a date and place to be hereafter determined by the Administrative Law Judge. This hearing shall include oral testimony and cross-examination in the discretion of the Presiding Officer only upon a proper showing that there are genuine issues of material fact that cannot be resolved on the basis of sworn statements, affidavits, depositions, or other documents, or that the nature of the matters in issue otherwise requires an oral hearing and cross-examination for the development of an adequate record;

IT IS FURTHER ORDERED, That notice of this Order be published in the *Federal Register* and that a copy thereof be served upon all parties of record;

IT IS FURTHER ORDERED, That other persons having an interest in participating in this proceeding may file petitions for leave to intervene in accordance with Rule 502.72 of the Commission's Rules (46 C.F.R. § 502.72);

IT IS FURTHER ORDERED, That all future notices, orders, or decisions issued in this proceeding, Including notice of the time and place of hearing or prehearing conference, be mailed directly to all parties of record; and

IT IS FURTHER ORDERED, That all documents submitted by any party of record in this proceeding shall be directed to the Secretary, Federal Maritime Commission, Washington, D.C. 20573, in accordance with section 502.118 of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.118) as well as being mailed directly to all other parties of record.

By the Commission.*

(S) JOSEPH C. POLKING
Assistant Secretary

Commissioner Richard J. Daschbach, dissenting.

This is yet another agonizing step in a case in which the Commission by a 3-2 vote (Commissioners Daschbach and Day dissenting) totally rewrote the presiding Administrative Law Judge's well-reasoned and legally sound initial decision. Judge Stanley M. Levy's January 30, 1979 Order, to which no exceptions were filed, *inter alia*, embodied a compromise between the proponents and protestants of the relevant agreements.

The Commission majority's June 5, 1979 decision pursuing some nebulous and nonsensical theory of procedural and philosophical purity has resulted in over three torturous years of legal wrangling. For what purpose?

I dissent.

* Commissioner Richard J. Daschbach's dissent is attached.

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-20
COMBI LINE JOINT SERVICE
(AGREEMENT NO. 9929)

ORDER OF DISCONTINUANCE

October 6, 1982

Agreement No. 9929 is a cooperative working arrangement between Hapag-Lloyd A.G. and Intercontinental Transport, B.V., two common carriers by water in the foreign commerce of the United States. It authorizes the parties to conduct a two-vessel LASH joint service trading in the name of "Combi Line" between Europe and the United States Gulf Coast.

On March 24, 1982 the Commission issued an Order directing the parties to Agreement No. 9929 to show cause why that Agreement should not be cancelled pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. § 814) because it was inactive and, as a result, no longer represented an active working arrangement between the parties nor met a serious transportation need, important public benefit or valid regulatory purpose.

In response to the Commission's Order to Show Cause, the parties filed an amendment, Agreement No. 9929-7, terminating Agreement No. 9929 effective April 30, 1982. Agreement No. 9929-7 was approved pursuant to delegated authority on June 11, 1982.

THEREFORE, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-57

TRACTORS AND FARM EQUIPMENT, LTD.

v.

WATERMAN STEAMSHIP CORP. AND COSMOS SHIPPING COMPANY

ORDER ON APPEAL

October 8, 1982

This proceeding was initiated upon the complaint of Tractors and Farm Equipment, Ltd. against Waterman Steamship Corporation and Cosmos Shipping Company, Inc. alleging violations of sections 14 Fourth and 44 of the Shipping Act, 1916 (46 U.S.C. § 812, and § 841(b)) and section 121 of the Bills of Lading Act, (49 U.S.C. § 812).[1] Complainant seeks reparations in the amount of $618,941.12.

On April 1, 1982, Administrative Law Judge Norman D. Kline issued a decision wherein he granted Cosmos' Motion to Dismiss.[2] Tractors filed an appeal to this ruling to which Cosmos replied.[3]

THE PRESIDING OFFICER'S RULING

The Presiding Officer found that section 22 of the Shipping Act, 1916, (46 U.S.C. § 821) does not provide Complainant with a "right of action" for alleged violations of section 44 of the Act.[4] (Ruling at 24). He held that section 44 is a licensing provision which does not proscribe any activity, amenable to a section 22 complaint, "other than perhaps operating without a license or bond." (Ruling at 28).

[1] The original complaint alleged only Bills of Lading Act violations. The Shipping Act allegations are set forth, albeit inartfully, in a September 14, 1981 letter from Complainant to the Commission's Secretary. At a prehearing conference held on January 26, 1982, the Presiding Officer accepted the September 14 letter and Complainant's explanations of its allegations as an amendment to the original complaint.

[2] Cosmos' Motion to Dismiss was originally denied by Administrative Law Judge Paul Fitzpatrick at a prehearing conference held on January 26, 1982. Shortly thereafter, Judge Fitzpatrick left the Commission and the proceeding was reassigned to Judge Kline. Judge Kline, in considering Cosmos' request for leave to appeal Judge Fitzpatrick's ruling denying its Motion to Dismiss, reviewed the merits of the Motion. Upon review, Judge Kline reversed Judge Fitzpatrick's January 26 ruling and dismissed the proceeding.

[3] Rule 227(b) of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.227(b), grants an automatic right of appeal to the Commission when a motion to dismiss is granted in whole or in part.

[4] The Presiding Officer also questioned whether Complainant's cause of action against Cosmos was not more "like a tort action, specifically one in fraud and deceit," rather than an action cognizable under section 22 or 44 of the Shipping Act, 1916. (Ruling at 19).

The Presiding Officer found that Congress enacted the fitness provisions of section 44 for the sole purpose of enabling the Commission to police the activities of licensed forwarders and to ensure that only qualified applicants were licensed. He believed that these provisions were not intended to authorize private persons to file section 22 complaints that only allege violations of section 44 of the Act.[5] The Presiding Officer viewed the relief accorded private parties in these situations as being limited to requesting the Commission to institute its own investigation under the fitness standards of section 44 of the Act (Ruling at 24).

POSITIONS OF THE PARTIES

Tractors first argues that Judge Kline improperly reversed Judge Fitzpatrick's denial of Cosmos' Motion to Dismiss. It points out that the only matter pending before Judge Kline was Cosmos' Motion for Leave to Appeal Judge Fitzpatrick's ruling pursuant to Rule 153 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.153.

Tractors also argues that the Presiding Officer erred in finding that section 44 may not be violated within the meaning of section 22 of the Act. Tractors points to that portion of the legislative history of section 44 which indicates that the Commission's regulatory authority over forwarders was intended to prevent recurrences of malpractices that were prevalent in the forwarding industry. It also notes that section 44(c) specifically authorizes the Commission to ensure a forwarder's financial responsibility and the performance of its contractual obligations.[6] Tractors argues that the Presiding Officer improperly failed to recognize that Congress intended the Commission to ensure the proper performance of services and not merely issue licenses. Tractors submits that the Shipping Act is violated when an ocean freight forwarder does not supply services in accordance with its contractual arrangements.[7]

Cosmos supports the Presiding Officer's Order of Dismissal. Cosmos argues that Tractors has failed to state a cause of action under the Shipping Act, 1916. It submits that Complainant's allegations raise issues relating to the issuance of a false bill of lading and a conspiracy

[5] The Presiding Officer acknowledged, however, that a private party could file a complaint seeking reparations from a forwarder for financial injury caused by a violation of a substantive provision of the 1916 Act, such as section 16 First or 17 (46 U.S.C. §§ 815 and 816). He also found that a private party might obtain reparations if a forwarder "operates without a license or bond and that fact causes direct and proximate harm" (Ruling at 29).

[6] Section 44(c) provides:

> The Commission shall prescribe reasonable rules and regulations to be observed by independent ocean freight forwarders and no such license shall be issued or remain in force unless such forwarder shall have furnished a bond or other security approved by the Commission in such form and amount as in the opinion of the Commission will insure financial responsibility and the supply of services in accordance with contract, agreement, or arrangements therefor.

[7] Tractors also argues that Congress did not intend to vitiate section 22 remedies when it enacted section 44.

to defraud, neither of which are cognizable under any section of that Act. Cosmos contends that the Commission may not assume section 22 jurisdiction unless a direct and basic charge of a violation of a substantive provision of the Act is alleged (*U.S. Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932)). Cosmos concludes that the language of section 44 and its legislative history support its contention that the statute is a licensing provision which cannot be violated within the meaning of section 22.

DISCUSSION

The Commission finds, without prejudging the merits of the allegations, that Tractors' complaint against Cosmos is cognizable under section 44 of the Act. We reach this conclusion because the allegations, if true, could support a finding that Cosmos violated certain provisions of Commission General Order No. 4 which results in a violation of section 44 of the Act.[8] The Commission will therefore grant Tractors' appeal and reverse the Presiding Officer's dismissal of Cosmos from this proceeding.[9]

Section 44 of the Act provides in pertinent part:

> A forwarder's license shall be issued to any qualified applicant therefor if it is found by the Commission that the applicant . . . is fit, willing, and able to properly carry on the business of forwarding and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission (Section 44(b)).

Paragraph (c) of section 44 states that "the Commission shall prescribe reasonable rules and regulations to be observed by independent ocean freight forwarders." Finally, section 44(d) provides, in part, that a forwarder's license may:

> [U]pon complaint, or the Commission's own initiative, after notice and hearing, be suspended or revoked for willful failure to comply with any provision of this Act, or with any lawful order, rule, or regulation of the Commission.

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[8] General Order No. 4 (G.O. 4) prescribes regulations governing the operations, practices and conduct of ocean freight forwarders. At the time of the shipments at issue, section 510.23 of G.O. 4 (46 C.F.R. § 510.23 (1980)) required a licensee to refuse to participate in a transaction where the licensee believed that its principal has made an error, misrepresentation or omission from any export declaration, bill of lading, or other document in connection with the shipment. It further prohibited a licensee from filing or assisting in the filing of any document which such licensee had reason to believe was false or fraudulent.

[9] Our disposition of Tractors' appeal on the merits obviates the need to address its procedural challenge to Judge Kline's reversal of Judge Fitzpatrick's earlier ruling on Cosmos' Motion to Dismiss. Nevertheless, we would point out that we do not consider Judge Kline's action improper. A presiding officer may properly reconsider and reverse interlocutory rulings made prior to the initial decision, whether those rulings are made by him or her or by a previously assigned administrative law judge. *See Knight v. Lane*, 228 U.S. 6 (1912); *Bookman v. U.S.*, 453 F.2d 1263 (Ct. Cl. 1972); *Faircrest Site Opposition v. Levi*, 418 F.Supp. 1099 (N.D. Ohio 1976).

> Section 22 of the Act, provides in relevant part:
> That any person may file with the Board a sworn complaint setting forth any violation of this Act by a[n] . . . other person subject to the Act, and asking reparations for the injury, if any, caused thereby.

Section 44 not only authorizes the Commission to license forwarders and prescribe forwarder rules, it also requires that these rules "be observed by" forwarders. The regulations mandated by section 44 were intended to preclude licensees from engaging in certain malpractices that had become prevalent in the freight forwarding industry.[10] Because section 44(c) requires forwarders to obey the Commission's regulations, it therefore follows that a violation of the regulations also violates section 44 of the Act.

A statutory violation could result even if the authorizing statute does not expressly command obedience of the underlying regulations. This is so because a lawfully adopted regulation is but an extension of the statute pursuant to which the regulation is promulgated.[11] As such, a violation of a Commission regulation which explains, interprets and implements a substantive provision of the 1916 Act will also result in a violation of the statutory provision which the breached regulations implement. *Admission, Withdrawal and Expulsion. Self-Policing Reports. Shippers' Request and Complaints - Outward Continental North Pacific Freight Conference*, 10 F.M.C. 349, 354 (1967) affirmed *sub nom. Outward Continental North Pacific Freight Conference v. F.M.C.*, 385 F.2d 981 (D.C. Cir. 1967).[12] As the Commission explained in denying rehearing in *Admission to Conference Membership - Pacific Coast European Conference*, 9 F.M.C. 241 (1966); affirmed *sub nom. Pacific Coast European Conference v. F.M.C.*, 376 F.2d 785 (D.C. Cir. 1968):

> . . . General Order No. 9 was necessary to carry out the provisions of the [Shipping] Act and was intended to effectively insure that the Congressional intent behind the "reasonable and equal provision [of section 15] was realized" . . . In . . . this proceeding we found that respondents agreement failed to

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[10] The legislative history of section 44 indicates that this statute was enacted because of Congress' interest in the need to establish and *maintain* standards of fitness consistent with a forwarder's fiduciary responsibilities and to aid the Commission in *preventing* the malpractices that had become prevalent in the forwarding industry. To achieve its objectives, Congress not only directed the Commission to consider, among other things, an applicant's willingness to conform to the Commission's regulations before issuing a freight forwarder license, but also directed it to prescribe reasonable rules and regulations "*to be observed*" by ocean freight forwarders. See Senate Report 691, 87th Cong., 1st Sess. (1961); Senate Report 1096, 87th Cong., 1st Sess. (1961); *Hugo Zanelli and Company*, 18 F.M.C. 60, 74 (1974); *Investigation of Practices, Operations, Actions and Agreements of Ocean Freight Forwarders*, 6 F.M.B. 327 (1961).

[11] Davis, Administrative Law of the Seventies § 5.03 at 147 (1976).

[12] *Compare Unapproved Section 15 Agreements - Gulf/United Kingdom Conference*, 7 F.M.C. 536 (1963), where the involved general order did not explain, interpret or implement a substantive provision of the 1916 Act.

> meet the requirements of General Order No. 9. Therefore, since General Order No. 9 was . . . [an] explanation and effectuation of the "reasonable and equal" provision of section 15, we found that the agreement failed to meet the requirements of section 15. (9 F.M.C. at 262).

The rationale the Commission expressed in *Admission to Conference Membership and Outward Continental, supra,* has been recognized by the courts for many years. In *Atchison, Topeka & Santa Fe Railway Co. v. Scarlett,* 300 U.S. 471 (1936), the Supreme Court, in finding that the railroad had fulfilled its duty by complying with the Interstate Commerce Commission's regulations implementing the Safety Appliance Act, remarked:

> The regulation having been made by the Commission in pursuance of constitutional statutory authority, it [the regulation] has the same force as though prescribed in terms by the statute (at 474).

Similarly, in *Westmoreland v. Laird,* 364 F.Supp. 948, 951 (E.D. N.C. 1973), *aff'd* 485 F.2d 1237 (4th Cir. 1973), the court in disposing of a federal employee's claim of an unlawful discharge stated:

> An administrative regulation promulgated within the authority granted by statute has the force of law and . . . a violation of a valid administrative regulation, even by the authority promulgating same, constitutes in legal effect, a violation of the statute.

The courts have also found statutory violations where there have been infractions of the implementing regulations that are enforced through legislatively imposed penalties.[13] In *United States v. Grimaud,* 220 U.S. 506 (1911), the Supreme Court reviewed a criminal indictment charging violations of the Forest Reserve Act and its implementing regulations. In upholding the indictment, the Court established a three-pronged test for a statutory violation premised on an implementing regulation: a congressionally mandated general standard, lawfully adopted implementing regulations, and finally, a statutory penalty for violating the regulation.

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[13] In *United States v. Howard,* 352 U.S. 212 (1957), the Supreme Court construed a state regulation as "the law of the state" for the purpose of a criminal prosecution. There, the Federal Black Bass Act of May 20, 1926, 44 Stat. 576, made it unlawful for a person to deliver for transportation any black bass or other fish if such transportation is contrary to the law of the state. The Florida legislature had created a state agency to regulate the management of fresh-water fish and authorized it to promulgate regulations to effect its statutory mandates. The legislature also provided a misdemeanor penalty for violations of the agency's regulations. The agency, pursuant to its authority, promulgated regulations prohibiting the transportation of certain fish outside of the state. The Court, upon review of a federal criminal prosecution for violation of the Federal Black Bass Act, held that the agency's regulations, as enforced by the state's misdemeanor provisions, is a "law" of the State of Florida for the purposes of the federal statute.

In *Grimaud, supra,* Congress had created a statutory scheme which authorized the President to designate certain lands as "forest reservations." The Secretary of Agriculture was authorized to make rules and regulations to protect the reservations and regulate their use. Violations of the statute or the implementing regulations were subject to a fine of $500 and/or 12 months imprisonment. The Court found that Congress had not improperly delegated its legislative authority to declare activity unlawful, but rather had vested the Secretary of Agriculture with the authority to fill in the details of the statute. As the Court explained, Congress may enact a statute which gives the executive branch:

> The power to fill up the details by the establishment of administrative rules and regulations, the violations of which could be punished by fine . . . or penalties fixed by Congress, *or measured by the injury done. Grimaud, supra,* at 517 (Emphasis added).

The Court, therefore, affirmed the indictment and noted that Congress, not the Secretary of Agriculture, had declared violations of the regulations to be unlawful.[14]

Likewise, in *United States v. Hark,* 320 U.S. 531 (1944), a case involving criminal indictments charging violations of the Emergency Price Control Act of 1942 and its implementing regulations, the Court citing *Grimaud* with approval, noted that:

> . . . though the regulation calls the statutory penalties into play, the statute, not the regulation, creates the offense and imposes punishment for violations. *Hark* at 536 (footnote and citation omitted).

In this proceeding, Tractors' allegations, if proven, could support a finding that Cosmos violated the provisions of G.O. 4. Because those regulations are designed to interpret, explain and implement section 44 and are enforced through the penalty provision of section 32(c), 46 U.S.C. § 831(c), their violation results in a violation of section 44 and establishes a cause of action for reparations under section 22 of the Act.

THEREFORE, IT IS ORDERED, That Tractors' Appeal from the Presiding Officer's dismissal of Cosmos as a Respondent in this proceeding is granted to the extent indicated above; and

IT IS FURTHER ORDERED, That the Presiding Officer's ruling of April 1, 1982, is reversed; and

IT IS FURTHER ORDERED, That Tractors' request for oral argument is denied; and

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[14] The Court distinguished *United States v. Eaton,* 144 U.S. 667 (1892), where the statute required certain books to be kept under the supervision of the Commissioner of Internal Revenue. The statute also authorized the Commissioner to make rules for carrying the statute into effect. However, because the statute in *Eaton,* unlike the *Grimaud* statute, did not impose a penalty for violation of the Commissioner's regulatory pronouncements, the Court dismissed the indictment charging violations of the statute and the Commission's implementing regulations.

IT IS FURTHER ORDERED, That this proceeding is remanded to the Presiding Officer for further hearing and decision on the merits of the complaint.

By the Commission.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-6

WESTERN PIONEER, INC. - POSSIBLE VIOLATION OF SECTION 2,

INTERCOASTAL SHIPPING ACT, 1933

NOTICE

October 8, 1982

Notice is given that no exceptions have been filed to the September 1, 1982 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, that decision has become administratively final.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-6
WESTERN PIONEER, INC.-POSSIBLE VIOLATION OF SECTION 2, INTERCOASTAL SHIPPING ACT, 1933

Respondent is a "common carrier by water in interstate commerce," as that term is defined in unnumbered section, preceding section 2 of the Shipping Act, 1916, 46 U.S.C. 801.

Respondent is in violation of section 2, Intercoastal Shipping Act, 1933, 46 U.S.C. 844, for failure to have its tariff on file with the Federal Maritime Commission.

Civil penalty found not to be warranted, however, respondents ordered to cease and desist from conducting operations as a common carrier by water in interstate commerce until such time as there is on file with the Commission a schedule (tariff) showing all the rates, fares and charges for or in connection with such operations.

Harold E. Mesirow and *Richard D. Gluck* for Western Pioneer, Inc.

John Robert Ewers for Bureau of Hearings and Field Operations.

Joseph B. Slunt and *Aaron W. Reese* for Office of Hearing Counsel.

INITIAL DECISION [1] OF SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE

Finalized October 8, 1982

This proceeding was instituted by Order of Investigation and Hearing (Order), served January 18, 1982, to determine whether the respondent, Western Pioneer (Western), had violated section 2 of the Intercoastal Shipping Act, 1933, 46 U.S.C. 844, by engaging in operations as a common carrier by water without having a tariff on file with the Federal Maritime Commission and, if so, to determine whether penalties should be assessed against Western.

Specifically, the Order required the determination of the following issues:

1. Whether Western is a "common carrier by water in interstate commerce" as that term is defined in unnumbered section preceding section 2 of the Shipping Act, 1916, as amended, 46 U.S.C. 801 (for obvious reasons, the unnumbered section is sometimes referred to as section 1 of the Shipping Act, 1916);

[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. Whether Western is in violation of section 2, Intercoastal Shipping Act, 1933, 46 U.S.C. 844, for failure to have its tariff on file with the Federal Maritime Commission; and
3. Whether civil penalties should be assessed against Western pursuant to section 32 of the Shipping Act, 1916, 46 U.S.C. 831(e), if it is found to be in violation of section 2, Intercoastal Shipping Act, 1933, and, if so, the amount of any such penalty which should be imposed, taking into consideration factors in possible mitigation of such a penalty.

The matter is before me for final determination on submissions which are tantamount to a joint proposed settlement.

PROCEDURAL BACKGROUND TO THE SETTLEMENT

Shortly after the Order instituting this proceeding was issued, I was advised by counsel for respondent and by Hearing Counsel orally, that they were undertaking discovery procedures, informally, in the belief that all issues were susceptible to settlement. At a later prehearing conference, counsel confirmed that advice. In accordance with an agenda established at the prehearing conference, counsel entered into a Joint Stipulation of Relevant Facts,[2] which they submitted on July 23, 1982. Simultaneously, Western's counsel submitted another document, entitled Respondents' Offer of Proposed Settlement and Argument in Support Thereof. Hearing Counsel considered that document to be a motion for termination of the proceeding to which it desired to reply.[3] On August 6, 1982, Hearing Counsel filed its Reply.[4]

There is no real dispute between Western's counsel and Hearing Counsel on the legal issues. The only fault that Hearing Counsel finds

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[2] Attached to the Joint Stipulation are the following:
(1) Affidavit of Max Soriano, Western's Vice President and General Counsel;
(2) Mr. Soriano's second affidavit;
(3) Affidavit of Earl K. Peterson, quondam in-house accountant for Western (1975-1980);
(4) Letter, dated February 10, 1978, from the Commission's staff (Newton Frank for Albert J. Klingel, Jr., Director, Bureau of Industry Economics) to Western (Peterson);
(5) Affidavit of Albert E. Holman, Western's Traffic and Pricing Manager;
(6) Letter, dated February 13, 1978, from Western (Soriano) to the Commission (Klingel);
(7) Letter, dated April 18, 1978, from Western (Holman) to the Commission's San Francisco office (L.A. Hammond);
(8) Letter, dated May 22, 1978, from the Commission (James A. Warner, Chief, Domestic Tariff Branch) to Western (Holman);
(9) Western file memorandum (Holman) dated May 30, 1978;
(10) Letter (Transmittal No. 5), dated June 21, 1978, Western (Holman) to the Commission (Bureau of Domestic Regulation);
(11) Letter (Transmittal No. 6), dated June 21, 1978, Western (Holman) to the Commission (Bureau of Domestic Regulation);
(12) Supplement No. 1 to FMC-F No. 3 canceling FMC-F No. 3, effective June 30, 1978;
(13) Supplement No. 3 to FMC-F No. 2, canceling FMC-F No. 2, effective June 30, 1978.

[3] Letter dated July 29, 1982, from Hearing Counsel to me.

[4] The Reply is entitled Reply of Hearing Counsel to Respondent's Offer of Proposed Settlement and Argument in Support Thereof. '

with Western's Offer is that it does not go far enough in explicitly addressing the three issues enumerated in the Order.

Hearing Counsel perceives the Offer as a motion to terminate the case without assessment of a civil penalty (Issue No. 3), on condition that Western file a tariff with the Commission. Hearing Counsel do not object to this disposition of Issue No. 3, but do ask for findings with respect to the other issues. Accordingly, Hearing Counsel want Western to be found to be a common carrier by water in interstate commerce (Issue No. 1) and to be in violation of section 2 of the Intercoastal Shipping Act (Issue No. 2). To remedy the violation, Hearing Counsel seek an Order requiring Western to cease and desist from operating as a common carrier by water in interstate commerce until it files an appropriate tariff with the Commission. It is implicit in the very nature of Western's offer that Hearing Counsel's position with respect to Issue No. 3 makes Hearing Counsel's views with respect to Issues No. 1 and No. 2 agreeable to Western. This, together with the fact that Western has not sought leave to respond to Hearing Counsel's Reply, warrants the conclusion that the various submissions are the equivalent of a jointly proposed settlement.

THE STIPULATION

By way of introduction, the parties agree that the stipulated facts address the issues raised in the Order by describing Western's past and present operation, and by explaining the reasons why, after consultation with the Commission's staff, Western discontinued the filing of its tariff with the Commission in 1978. They add that the stipulated facts are drawn from and based on relevant information and documents set forth in n. 2, *supra*. These, then, are the stipulated facts: [5]

1. Western is the successor to Pioneer Alaska Lines, a contract water carrier which began service to Alaska in 1958. Western purchased the assets of Pioneer Alaska Lines in 1972 and Western has operated between the Pacific Northwest and Western Alaska since that time.

2. Between 1972 and 1976, Western maintained two types of service: a common carrier service offered to all types of shippers, and a specialized service which served only the fisheries trade.

3. During 1975 and 1976, Western's common carrier operation was conducted with two vessels, the *Western Pioneer* and the *Pribilof*. Due to a fire, the *Western Pioneer* was withdrawn permanently from service in January 1976. The *Pribilof* was withdrawn from Western's service at the end of the same year when its charter expired.

4. Thereafter, the only vessels Western continued to operate were those serving the fisheries trade. These vessels were and are operated

[5] The stipulation was edited to conform to terminology and usages which appear elsewhere in this decision. No substantive changes were made.

pursuant to provisions found in 46 U.S.C. §§ 88(b), 367 and 404, which exempt vessels engaged solely in the fisheries trade from certain Coast Guard inspection requirements. In contrast, the *Western Pioneer* and the *Pribilof* had been inspected by the Coast Guard and had been eligible for unlimited general cargo operations.

5. The annual income and operating statements (Form FMC-64) submitted to the Commission by Western for the period 1972-1976 reported specific, detailed data concerning only the company's common carrier operations involving the *Western Pioneer* and the *Pribilof*. Information about the operation of Western's fisheries vessels was also reported on Form FMC-64, but only as a separate and distinct item on Schedule 302, separate and apart from Western's common carrier operations. This method of reporting was consistent with past accounting practice used by Western's accountant, and it was never challenged by the Commission.

6. Western followed this separate form of reporting information because it believed that its fisheries service was not a common carrier undertaking. In fact, the Coast Guard insisted that the fisheries vessels could not qualify for the inspection exemption unless they carried only cargo that was directly fisheries related.

7. As noted above, the operation of both Western's non-fisheries related vessels had ceased by the end of 1976. However, Western received an inquiry from the Commission dated February 10, 1978, requesting operating and income data for the year 1977, and enclosing a copy of Form FMC-64. By letter dated February 13, 1978. Western asked the Commission whether it was any longer required to file such reports, inasmuch as the two inspected vessels which it had used in unlimited general cargo service were not operated by Western in 1977. Western was advised by the Commission that only common carrier vessel operations had to be reported. On that basis, Western did not file a report in 1977, and discontinued filing of any further FMC-64 reports.

8. In April 1978, Western received a telephone inquiry from the Commission's staff office in San Francisco requesting copies of bills of lading used on Western's vessels. By transmittal letter dated April 18, 1978, Western sent to the San Francisco office sample bills of lading from each of Western's four vessels, and a copy of Western's tariff.

9. By letter dated May 22, 1978, the Chief of the Commission's Domestic Tariff Branch informed Western that the Commission was "in receipt of information that your company is no longer operating as a common carrier by water in the Alaska trade." This letter advised Western that its then-effective tariff FMC-F No. 2 should be canceled if Western did not "intend to provide the service set forth in this publication," and it enclosed a specimen copy of a cancellation supplement for the Western tariff. The letter asked Western to notify the Commission "[i]f our information concerning your discontinuance is correct."

10. On May 30, 1978, Western's Traffic and Pricing Manager spoke with a Commission staff person concerning the specific explanatory language to be used on the Western cancellation supplement, and he was advised that the statement ". . . cancelled in its entirety account discontinuance of our common carrier operation" would be acceptable. He was also advised by the staff person that it would be permissible to postpone cancellation of the existing Western tariff for 30 days, until Western could issue a memorandum type tariff.

11. In approximately March and November of 1979, Commission field investigators visited Western to discuss and review its operations, including the discontinuation of its tariff filings with the Commission. Although these investigators tentatively concluded that they felt Western was operating as a common carrier on a limited basis, Western advised them that both the Coast Guard and the Commission had previously said that Western was *not* operating as a common carrier. At the conclusion of their visit, the Commission investigators did not caution Western to file a tariff with the Commission, nor did they contact Western later to advise it of any potential violations.

12. Western publishes and maintains a memorandum freight tariff, establishing rates on more than 400 commodities, for the carriage of cargo between Seattle and Bellingham, Washington, on the one hand and ports in Alaska and the Aleutian Islands on the other.

13. Western limits its service to the fisheries trade in order to preserve the exemption of its vessels from Coast Guard inspection requirements pursuant to 46 U.S.C. §§ 88(b), 367 and 404.

14. Western offers its services to all shippers and consignees in the trade it serves, subject to the fisheries trade limitation discussed in stipulation number 13.

15. Western issues bills of lading for all cargo carried.

16. Western provides regular service between the ports named in its tariff. Some services, however, are seasonal as a result of weather conditions and the seasonal peculiarities of the fishing trade.

17. Western advertises its sailings.

18. Western accepts responsibility for the carriage of cargo, pursuant to the provisions of its tariff and bill of lading.

THE STATUTES INVOLVED

As pertinent, the unnumbered section preceding section 2 of the Shipping Act provides the following definition of a "common carrier by water in interstate commerce":

> The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of . . . property on the high seas . . . on regular routes from port to port between one State . . . of the United States and any other State . . . of the United States. . . .

As pertinent, section 2 of the Intercoastal Shipping Act [6] provides:

> That every common carrier by water in intercoastal commerce shall file with the [Commission] and keep open to public inspection schedules showing all the rates, fares and charges for or in connection with transportation between intercoastal ports on its own route;

DISCUSSION

I.

WESTERN IS A COMMON CARRIER BY WATER IN INTERSTATE COMMERCE. IT IS IN VIOLATION OF SECTION 2 OF THE INTERCOASTAL SHIPPING ACT BECAUSE IT DOES NOT HAVE A TARIFF ON FILE WITH THE COMMISSION.

The law is well established that the term "common carrier," as used (although not defined) in the Shipping Act, means a common carrier at common law. *Philip R. Consolo v. Grace Line, Inc.*, 4 F.M.B. 293, 300 (1953); *Galveston Chamber of Commerce v. Saguenay Terminals*, 4 F.M.B. 375, 378 (1954); *Activities, Tariff Filing Practices and Carrier Status of Containerships, Inc.* (*Activities*), 9 F.M.C. 56, 62 (1965); *McAllister Brothers v. Norfolk Western Railway Company*, 20 F.M.C. 63, 65 (1977). Common carrier status is not determined by a rigid and unyielding dictionary definition, but is a flexible regulatory concept. The regulatory significance of a carrier's operation may be determined by considering a variety of recognized criteria, even though the absence of one or more of them does not rule out common carrier status. Rather, the determination is made upon consideration of the combined effect of those factors. *Activities, supra*, 9 F.M.C. at 65.

It is generally understood that among the factors to be considered are the following indicia: (1) the variety and type of cargo carried; (2) number of shippers; (3) type of solicitation utilized; (4) regularity of service and port coverage; (5) responsibility of the carrier towards the cargo; (6) issuance of bills of lading or other standardized contracts of carriage; and (7) method of establishing and charging rates. *United States v. Stephen Brothers Line*, 384 F.2d 118 (5th Cir. 1967); *McAllister Brothers v. Norfolk Western Railway Company, supra; Possible Violations of Section 18(a) of the Shipping Act, 1916, etc.*, 19 F.M.C. 44 (1975); *Activities, supra*; and *Investigation of Tariff Filing Practices of Carriers Between Contiguous States of the United States and Alaska* (*Investigation of Tariff Filing Practices*), 7 F.M.C. 305 (1962).

[6] Section 5 of the Intercoastal Shipping Act, 46 U.S.C. 845b, makes the provisions of that Act applicable "to every common carrier by water in interstate commerce, as defined in section 1 of the Shipping Act, 1916."

Measured against all of those enumerated indicia, Western's operations are those of a common carrier. Unquestionably, Western advertises its services (No. 3); it provides a regular service between points in the State of Washington and points in the State of Alaska (No. 4); under its bills of lading and tariff it is responsible for the cargo during carriage (No. 5); it issues bills of lading (No. 6); and it publishes a tariff of standard rates and charges and bills its customers accordingly (No. 7). Just as certainly, Western's operations are those of a common carrier under indicia Nos. 1 and 2, as will be seen.

It has been said that the most frequently mentioned characteristic of common carriage is the holding out, by a course of conduct, to accept goods from the general public to the extent of a carrier's ability to carry. *Activities, supra,* 9 F.M.C. at 62; *Transportation by Southeastern Terminals and S.S. Co.,* 2 U.S.M.C. 795, 797 (1946). But this does not mean it is necessary for a carrier to offer to carry all commodities for all shippers. "A line may be a common carrier of certain commodities as long as it is willing to carry those commodities for all who wish to ship them." *Investigation of Tariff Filing Practices, supra,* 7 F.M.C. at 318.

Thus, the limitation of service to shipments related to the fisheries trade does not change Western's status from that of a common carrier. Western's holding out has been made to all those willing to use its proffered service, and that includes any shipper of any commodity related to the fisheries trade.[7] A carrier may be a common carrier of only one commodity. *Activities, supra,* 9 F.M.C. at 65. Western's tariff lists more than 400 commodities. Here, of course, Western's holding out is to "all who wish to ship them," and that satisfies the test. After all, it is well settled that "The public does not mean everybody all the time." *Terminal Taxicab Co. v. Kutz,* 241 U.S. 252 (1916).

In consideration of the combined effect of the factors generally associated with common carrier status, I find that Western is a common carrier in interstate commerce.

Under the express provision of section 2 of the Intercoastal Shipping Act, common carrier operations in interstate commerce are prohibited unless the person engaged in such operation maintains an effective tariff on file with the Commission. *Transportation-U.S. Pacific Coast and Hawaii,* 3 U.S.M.C. 190, 195 (1950); *Investigation of Tariff Filing Practices, supra,* 7 F.M.C. at 330. Therefore, Western, which has been operating as a common carrier in interstate commerce without an effective tariff on file with the Commission, is found to be in violation of section 2 of the Intercoastal Shipping Act. Under the terms of the

[7] The stipulation does not mention the number of shippers using Western's services, but the fair inference to be drawn is that the number of shippers and consignees served is as extensive as its holding out and the industry it serves.

order which follows, it will be required, consistent with the terms of its own undertaking to do so, to have an effective tariff on file with the Commission prior to conducting any further common carrier operations.

II.

CIVIL PENALTY NOT WARRANTED

Sometime after the inception of this proceeding, Western came to understand, for the first time, that the specialized fisheries service it had been conducting since 1972 was and is a common carrier operation subject to the tariff filing requirements of the Intercoastal Shipping Act. Western's erroneous perception, i.e., that the fisheries service was not a common carrier operation, appears to have been shared by the Commission's staff when Western canceled its tariff in 1978.

There is no dispute that the mutual misperception of the fisheries service by Western and the Commission's staff resulted from a misunderstanding, by both of them, of the reach and purpose of laws administered by the United States Coast Guard and the effect of certain administrative determinations under those laws upon the coverage of the Intercoastal Shipping Act. There is also no dispute that, from 1972 to the present, Western fully and voluntarily disclosed all the facts concerning its carrier operations to the Commission staff.

Inasmuch as the stipulated facts and attachments suggest that Western was encouraged to substitute an unfiled memorandum tariff for the ones filed with the Commission until June 30, 1978, it is reasonable to conclude that when Western did cancel its filed tariffs, it did so in the belief that it was complying with and not thwarting regulation.

Nothing that occurred during the field office's investigation of Western in March and November 1979 alters the conclusion that Western continued to believe it was complying with regulation until it received the Order instituting this proceeding. It should be remembered that the investigators offered only a tentative conclusion that Western was operating as a common carrier in interstate commerce. As the attachments to the stipulation show, Western was assured that the tentative conclusion would be reviewed by the staff and that Western would be informed of the staff's determination. Inasmuch as Western was not informed of the results of the staff review, it was justified in continuing to believe in the validity of the Commission's staff's earlier, albeit mistaken, conclusion that the fisheries service was not common carriage.[8]

[8] The second Soriano affidavit, see n. 2, *supra*, contains the following uncontroverted passages:

Continued

It should be observed, in passing, that a staff position, whether expressed or implied, is not binding upon the Commission in carrying out its adjudicatory function. See, e.g., *Investigation of Tariff Filing Practices, supra*, 7 F.M.C. at 330:

> We take occasion here to point out, primarily for the future, that failure of Commission personnel to advise that an organization which has furnished full operating details is a common carrier, and required to file tariffs, in no way militates against Commission decision that the organization is a common carrier, and required to file. Neither would a direct statement by our staff that the organization is *not* a common carrier.

To the same effect, see *United States v. New York, New Haven and Hartford Railroad Company*, 276 F.2d 525, 535 (2 Cir. 1959), cert. denied, sub nom. *Tri-Continental Financial Corp. v. United States*, 362 U.S. 961 (1960) and sub nom. *Tri-Continental Financial Corp. v. Glenmore*, 362 U.S. 964 (1960).

Western, explicitly, and Hearing Counsel, implicitly, agree that Western did not intentionally violate the tariff filing requirements of the Intercoastal Shipping Act. Relying upon the mitigating factors they stipulated to, Hearing Counsel supports Western's request that no civil penalty be assessed in this proceeding.[9] Chief Administrative Law Judge John E. Cograve, in his recent Initial Decision in Docket No. 81-59, *General Transpac System-Possible Violations of Section 15, Shipping Act, 1916*, 25 F.M.C. 270 (1982), established that motive and intent are relevant to the determination of the amount, if any, of a civil penalty to be assessed in proceedings brought pursuant to section 32 of the Shipping Act. Upon a finding that "the degree of culpability was slight indeed," Judge Cograve concluded that "a penalty is neither dictated by the respondent's past actions resulting in the violation nor warranted as a deterrent to future unlawful activity by the respondent." Id. at 281.

On the facts here presented, the record is devoid of any evidence from which one might draw an inference that Western intended to violate the Intercoastal Shipping Act. I find that the violation of section

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In approximately March and November of 1979 investigators from the Federal Maritime Commission field office visited the office of Western Pioneer, Inc. to investigate the nature of our operation. In Particular [sic] the fact that we were no longer filing a tariff with the FMC. When they finished their last visit the investagators [sic] stated their tentative conclusion to us was that they felt we were operating as a common carrier on a limited basis. In turn we told them that in our view we were not operating as a common carrier and that both the FMC and the Coast Guard had already said so as well.

When the investigators left they did not caution us to file a tariff with the FMC. They said only that they would go back to San Francisco and review the matter with Washington and get back to us. We never heard from them again. The next communication to us on this was when the FMC in Washington issued it's [sic] order of investigation and hearing in January of this year.

[9] I construe Hearing Counsel's measured statement that it does not oppose Western's request for no monetary assessment to mean that Hearing Counsel are supporting Western's position on this issue.

2 of that Act was unintentional. Accordingly, I find that Western's past actions do not call for a penalty and that a penalty would serve no useful purpose to deter future unlawful activity in these circumstances.

Nevertheless, Western is in violation of section 2 of the Intercoastal Shipping Act now, and it will remain in violation if it continues to conduct common carriage operations without an effective tariff on file as required by section 2.

ORDER

Accordingly, it is ordered that Western Pioneer, Inc., cease and desist from acting as a common carrier of property by water in interstate commerce unless and until such time as it shall file with the Federal Maritime Commission and keep open to public inspection schedules (tariffs) showing all the rates, fares and charges for or in connection with transportation between intercoastal points on its own route.

(S) SEYMOUR GLANZER
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-9
CARRIER INTERNATIONAL CORPORATION

v.

AMERICAN ATLANTIC LINES

NOTICE

October 8, 1982

Notice is given that no exceptions have been filed to the September 2, 1982 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, that decision has become administratively final.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-9
CARRIER INTERNATIONAL CORPORATION

v.

AMERICAN ATLANTIC LINES

Respondent's tariff found unambiguous. Claim for reparation denied and complaint dismissed.

Henry L. Martin for complainant.

John P. Love for respondent.

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

Finalized October 8, 1982

Carrier International Corporation seeks $23,255.30 as reparation for an alleged misapplication of rates by American Atlantic Lines. As described on the bill of lading, the shipment in question consisted of "refrigerating machines and air-conditioning machines." The shipment was delivered to American Atlantic's facilities packed in "export crates." American Atlantic placed the cargo on flatracks and loaded it into containers because the next of its vessels on berth was a containership. The shipment was rated as "Appliances, Commercial and Household, NOS" (U.S. Atlantic & Gulf Southeastern Caribbean Conference Freight Tariff FMC No. 9, 8th Revised Page 63). The rate under this item was $145.00 per ton W/M.

The nature, weight or dimensions of the shipment are not in issue. The sole question presented is whether the shipment should have been assessed the lump sum container rate of $1,850 per 20' container and $3,690 per 40' container. Complainant's basic contention is that since the shipment actually moved in containers, it is entitled to the container rate. Respondent however points to Rule 40 of the Southeastern Conference tariff and argues that since complainant's shipment met none of the Rule's requirements it is not entitled to the lump sum rate. Rule 40 provides in pertinent part:

> These rules and regulations govern the carriage of cargo in ocean carrier's (hereinafter called the Carrier) containers

[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 the shipper or consolidator or inland common carrier, subject to prior booking arrangement with the Carrier, may file and ship the cargo therein pursuant to the following terms and conditions and will apply unless otherwise indicated, only when the container has been filled by shipper, consolidator or inland common carrier (as agent for the shipper) at his expense off the premises of the Carrier and/or unloaded by consignee at his expense off the premises of the carrier or port. . . .

This opening paragraph is followed by a series of conditions covering such things as the actual pick up of the container, the use by more than one shipper of a single container, liability for the container, and delivery to the carrier of the loaded container.[2]

A review of the circumstances giving rise to the complaint is necessary to place the complainant's claim for reparation in its proper perspective.

On authorization from Carrier International the complaint here was filed by Mr. Henry Martin, Vice President, Ocean Freight Consultants, Inc. (OFC).[3]

The complaint was based upon the fact that since the shipment had actually moved in containers, the container rate not the breakbulk rate should have applied. In a "Statement of Facts" attached to the complaint [4] Carrier International based its claim on the following:

> The shipment was rated as per rate on tariff page 63, 8th revision, "Appliances, Commercial and Household NOS" as class 4 $145.00 per ton 40 cu. ft. Normally the rate applied would be correct had the shipment not moved in containers since the tariff provides a special, lump sum rate of $1,850.00 per 20' container and $3,690.00 per 40' container for Trinidad. The applicable lump sum rate is based on full container without any condition that the container be house to house or pier to pier. We discussed this matter with Southeastern Caribbean Conference on 6/8/81 and they agreed with our interpretation that the container rate is applicable to all containerized shipments notwithstanding the fact that container moves house to house or pier to pier.

There follows a general statement on ambiguous tariffs and their construction against the maker of the tariff. Complainant's next statement of its position appears in its response to respondent's motion to dismiss.[5] Here complainant states that the "full container rate does not

[2] The text of Rule 40 is set out in the Appendix to this decision.

[3] The complaint was made necessary when respondent rejected Mr. Martin's claim against it. The record does not show the precise grounds for the denial.

[4] Complainant requested the Shortened Procedure of Subpart K of the Commission's Rules of Practice and Procedure. This was modified to allow respondent to use the discovery procedures in Subpart L.

[5] Reply of Carrier International dated April 6, 1982.

make reference to rule 40 and it is not conditioned upon the fact that shipment moved house to house or pier to pier." Complainant points to the rate on bottles to show that where a particular rate is conditioned on other provisions of the tariff, a notation to that effect is made. Additionally complainant states:

> Shipments not intended for containers do not have container numbers listed on the bill of lading as on the attached bill of lading, Attachment II. The bill of lading covering the shipment in dispute has container clearly printed on it confirming that the shipment was *intended and meant for movement in containers.* (Emphasis mine.)

The only inference to be drawn from this statement is that from the beginning Carrier International had intended that the shipment move in containers. The facts of record show otherwise. The container numbers which complainant rely upon at this stage of the case were added to the bill of lading by the complainant or its forwarder after being informed by the respondent that the cargo had been loaded into containers by the respondent and after the respondent gave the complainant the list of container numbers to facilitate the tracing of the shipment.[6] The original bill described the cargo as breakbulk and it was delivered to American Atlantic as breakbulk cargo.

Finally complainant, in its reply memorandum states:

> As for the application of Rule, if the $1,855 per container rate was conditioned upon any other provision of the tariff it should have been so noted. Shipments are clearly marked as moving in containers and hence entitled to container rate listed on page 159 [of the tariff].

It must be remembered that the basis for complainant's claim here is an alleged ambiguity in the respondent's tariff. However, complainant never says what that ambiguity is or where in the tariff it can be found. The only conclusion to be drawn is that complainant's notion of an ambiguity is as vague as the argument it offers in support of it. If I understand complainant, the argument demonstrates the alleged ambiguity as follows. Page 159 of the tariff provides for a full container rate to Trinidad. Nowhere on page 159 is there any reference to Rule 40 or any other condition which would affect complainant's right to that rate. Since there is no reference to Rule 40 on page 159 and its application to the full container rate an ambiguity is created which must be resolved

[6] This would not appear to be a deliberate attempt by complainant to mislead, but rather the result of a lack of knowledge on the part of Mr. Martin who it can be presumed was in possession of only those facts produced by his "audit" of Carrier International's freight bills. Since he was not privy to the circumstances of the shipment he apparently assumed the container numbers on the bill of lading were part of the original.

against the respondent as the maker of the rate, i.e., the full container rate is the proper rate.

Presumably as an example of how it was led astray, complainant cites respondent's tariff item on BOTTLES, Jars and Jugs, Glass or Plastic Empty, as showing that where a rate is conditioned upon some other provision of the tariff it is so noted on the page containing the rate. The item as it appears on 1st Rev. Page 69 is:

*BOTTLES, Jars and Jugs, Glass or Plastic
Empty
+ Plastic in carrier's containers minimum
1800 cubic feet to Trinidad.....
+ Through June 14, 1980
*See also section A

Here, once again complainant does not say which notation it means. If it is referring to the specific provision for "Plastic in carrier's containers" then the argument is less than precise because there is no reference to another provision of the tariff. If however the reference is to the asterisk preceding "BOTTLES" then complainant, as it has throughout its assertion of this claim, simply ignores crucial points against it. The asterisk directs the reader's attention to the statement, "See also section A." Section A of respondent's tariff contains its full container rates and it need only be noted here that the item under which complainant's shipment was rated reads in relevant part:

*Appliances, Commercial and Household, NOS

* * *

*See also Section A

Thus, complainant was put on notice that full container rates were available to it under section A of the tariff.

While subject to the complexities of all ocean carrier tariffs, the format of respondent is reasonably designed to guide even the minimally diligent user through its intricacies. The Table of Contents runs from "Abbreviations and Symbols" (Rule 42) through Livestock, Other Animals, Poultry and Birds (Rule 38) to "Weights, Measurements and Disposition of Fractions" (Rule 49). Included in the Table is a specific reference to "Shipments in Shipper's/Carrier's Containers" which directs the user to Rule 40 and the conditions under which the full container rates found in Section A are available. But throughout this case complainant has refused to accept any obligation to acquaint itself with the provisions of the tariff. Instead it attempts to create an ambiguity because of the absence of any specific reference to Rule 40 on page 159 of the tariff.

If accepted, complainant's position would impose upon carriers the duty of establishing an elaborate cross-referencing system the complexity of which fairly boggles the mind. Under such a system the tariff

page upon which a specific commodity rate appeared must also contain a specific cross reference to each and every rule, regulation, term or condition which could in any way affect the application of that rate to a particular shipment. The physical limitations of the page itself would preclude such a system, and complainant has not pointed to a single authority which would impose such a duty upon a carrier.

Tariffs must be read in whole not in part, *Storage Practices at Longview, Wash.*, 6 F.M.B. 178, 182 (1960); and a shipper is conclusively presumed to have knowledge of the rates, rules and regulations of the tariff. *Kraft Foods v. Moore McCormack Lines*, 17 F.M.C. 320, 322 (1974), rev'd on other grounds, 538 F. 2d 445. The failure of respondent to include a specific reference to Rule 40 on the tariff page bearing the full container rate did not render that rule inapplicable to complainant's shipment and since complainant did not comply with the terms of Rule 40 its shipment was not entitled to the full container rate.

Complainant makes the further argument that equity demands that it be given the full container rate. The carrier loaded the shipment into containers for its own convenience and since containerized shipments are easier to handle and are more economical, complainant contends that it is unfair to let respondent reap these benefits without giving complainant the benefit of the container rate. Respondent on the other hand points out that it bore the costs of loading the cargo into the containers. Complainant's position is dependent upon the establishment of a "windfall" by respondent because of its containerizing the shipment otherwise the equities would not be on complainant's side. The record is devoid of any such evidence.[7]

Finally respondent argues that complainant has no standing to bring its claim because it did not have title to the goods at the time of shipment.[8] Complainant paid the freight and this fact is dispositive of the issue. *Trane Co. v. South African Marine Co.*, 19 F.M.C. 375 (1976).

The complaint is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

[7] This is not to say that equitable considerations enter into matters of tariff interpretation. *Union Carbide Inter-America v. Venezuelan Line*, 17 F.M.C. 181 (1973).

[8] Respondent's argument is constructed upon base of the Uniform Commercial Code (which is the law in every state) and the "Revised American Foreign Trade Definitions" adopted by a joint committee of the Chamber of Commerce of the U.S., the National Council of American Importers and the National Foreign Trade Council. Complainant has supplied a copy of the canceled check demonstrating that it paid the freight. Respondent says that even if complainant paid freight, it was only as a "conduit" for the consignee.

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-75

CARGO EXPORT CORPORATION

v.

INTERMODAL CONTAINER SERVICE, LTD., ET AL.

NOTICE

October 12, 1982

Notice is given that no exceptions have been filed to the September 3, 1982 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, that decision has become administratively final.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-75
CARGO EXPORT CORPORATION

v.

INTERMODAL CONTAINER SERVICE, LTD., ET AL.

Held:

(1) Where the Respondents filed a tariff change one day before the shipment took place, which change reflected a reduced rate, and the only errors in the tariff were of a technical nature, there was no violation of the Shipping Act, and relief under section 22, Shipping Act, 1916, is unwarranted.

(2) Where the record fails to disclose any causal connection between any violation of the Shipping Act and any damages alleged to have been suffered by the Complainant, relief under section 22 is unwarranted.

(3) Where the Complainant freight forwarder hires an NVOCC, which enables the forwarder to receive a commission 400 percent greater than it would have received had it hired the carrier directly; and where the forwarder or one of its principal officers received an additional $15,000 payment; and where the evidence established a conspiracy to defraud between the Respondent NVOCC and at least one principal officer of the Complainant; and where any damages which may have been suffered by the Complainant are the result of the Respondent NVOCC's misappropriation of the actual shipping charges—no relief will lie under section 22 in favor of the Complainant either with respect to the carrier and his agent or the NVOCC.

Anthony V. Barbiero for Complainant, Cargo Export Corporation.

Arthur A. Appleman for Respondent Intermodal Container Service, Ltd.

William J. Burke for Respondents Bangladesh Shipping Corporation and Peralta Shipping Corporation.

INITIAL DECISION [1] OF JOSEPH N. INGOLIA, ADMINISTRATIVE LAW JUDGE

Finalized October 12, 1982

BACKGROUND INFORMATION

This case began with the filing of Complaint pursuant to the provisions of section 22 of the Shipping Act of 1916 (46 U.S.C. 821). The Complaint was filed by Cargo Export Corporation (CEC) against Intermodal Container Service, Ltd., (Intermodal), the Bangladesh Shipping Corporation (BSC), and Peralta Shipping Corporation (Peralta). It al-

[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 C.F.R. 502.227).

leges that the Respondents knowingly and willfully combined and conspired to obtain and permit transportation by water at less than the rates otherwise applicable in violation of section 16 of the Shipping Act, 1916; subjected the Complainant to rates for transportation in violation of sections 14, 16 and 18 of the Shipping Act, 1916; and further engaged in an unlawful and unreasonable practice in violation of section 17 and unlawful retaliation in violation of section 14 of the Act. The Complaint seeks reparation and damages totalling $1,119,527.[2]

During the pendency of this proceeding, Respondent Intermodal, although properly served, failed to file any pleadings or to appear at any time. The Complainant, as well as both Peralta and BSC, filed a motion for a default judgment, and an Order To Show Cause why default judgment should not be entered against Intermodal was served.[3] Intermodal never responded to the Order To Show Cause. In addition, Peralta and BSC have filed a Motion To Dismiss this proceeding on the basis that: (1) additional parties not joined in the case are indispensable to the proceeding under Commission Rules of Practice and Procedure, 41, 42 and 62; (2) the Complaint is premature in that it seeks an "anticipatory refund" of monies from Peralta and BSC which are the subject of a suit in the United States District Court for the Eastern District of New York; [4] (3) the Commission lacks jurisdiction over certain conduct occurring in Bangladesh under the provisions of the Foreign Sovereign Immunities Act of 1976; and (4) the claim is barred by the statute of limitations.

This case was set down for hearing to begin on September 28, 1981. The parties did not submit a written stipulation of facts. However, some documents were stipulated and others were placed in the record through various witnesses. The documentary exhibits are referred to throughout this discussion as follows:

Stipulated Exhibit - SE
Complainant's Exhibit - C
Respondent's Exhibit - R

By Order served August 12, 1982, and on Motion of the Complainant, the record was reopened to admit the statement of the Complainant's principal witness. Pertinent excerpts from that testimony are set forth and commented on in Note 12, *infra*.

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[2] As will become evident from this decision, Complainant has, in effect, amended the Complaint both as to the specific nature of the alleged offenses and the amount of reparations and damages claimed.

[3] See Order To Show Cause, served August 31, 1981.

[4] There are several federal District Court cases pending or recently concluded which are related to this proceeding. They will be discussed as is necessary throughout this decision. It should be noted that these cases, one of which involves a criminal information and indictment, have caused some delay in the disposition of the instant case.

FINDINGS OF FACT

1. The Complainant, CEC, is a corporation organized and existing under the laws of the State of New York, whose principal office is located at 1975 Linden Boulevard, Elmont, Nassau County, New York. It is a licensed ocean freight forwarder and is subject to the rules and regulations of the Federal Maritime Commission.

2. The Respondent Intermodal is an NVOCC (Non-Vessel Operating Common Carrier).

3. The Respondent BSC is a common carrier as defined in the Shipping Act, 1916, is a foreign corporation, and is the national flag carrier of the government of Bangladesh. Its principal offices are located at Dacca, People's Republic of Bangladesh.

4. Peralta is the designated general agent of BSC in the United States, whose principal office is located at 25 Broadway, New York, New York.

5. In accordance with the Foreign Assistance Act of 1961,[5] as amended, the Administrator of the Agency for International Development (AID) entered into a loan agreement with the People's Republic of Bangladesh, the purpose of which was to supply financing for part of the cost of a fertilizer plant in Bangladesh.[6]

6. Pursuant to the Letter of Commitment, dated May 25, 1977, AID agreed to provide loan funds in the sum of $7,000,000.00 to the People's Republic of Bangladesh, structured as follows:

> Ashuganj Fertilizer and Chemical Co., Inc. (AFCC), acting on behalf of Bangladesh, established an account at the Pubali Bank at Dacca in Bangladesh. Through the Pubali Bank, AFCC arranged for letters of credit to be issued by the Manufacturers Hanover Trust Company (MHT), in favor of Foster Wheeler Limited (FWL). FWL is a foreign corporation based in Reading, England, which was the general contractor in charge of designing, supervising and erecting the fertilizer plant in Bangladesh.
>
> The first letter of credit, No. 727,000, was opened in favor of FWL on August 15, 1977. Pursuant to the letter of commitment, FWL was given the option to establish subsidiary letters of credit. Acting with MHT, FWL established a document called "transferred confirmed irrevocable straight credit," No. 727000E, in favor of CEC.
>
> CEC had been selected by FWL and approved by AFCC as the freight forwarder for the fertilizer plant project for all goods originating in the United States. It was part of CEC's duties to receive goods which had been manufactured for the project in the United States, to issue warehouse receipts to the

[5] See 22 U.S.C. 2151 *et seq.*
[6] SE-62.

suppliers and fabricators, and to generally handle, store and call forward the supplies at the request of FWL, and to arrange for shipment of those supplies to the project by either air or ocean carrier.

In order to use the letter of credit, shipment to any Bangladesh P.O.E. (Port of Entry) was to be made on vessels bearing the flag of a country "included in AID geographic code 941."

Ex. 62, 63, 64; Tr. 117-119.

7. In September of 1978, CEC received information from FWL indicating that a particular shipment of trucks was urgently needed and undertook to arrange the shipment. Ex. C-1, C-2, C-3; Tr. 118120, 126.

8. After receiving the order numbers of the trucks from FWL, CEC learned that they were being sold to FWL by Gateway Overseas, Inc. (Gateway), and CEC's Secretary/Treasurer called Gateway and secured the dimensions of the trucks and began looking for a suitable carrier. Tr. 127, 128.

9. CEC checked the sailing dates of various carriers, and in September of 1978, its Secretary/Treasurer called Peralta.[7] He gave them the cubic measurement and weight of the shipment and received a rate from Peralta. According to the Secretary/Treasurer, the base rate was $121.50, a 4% Suez charge, plus a $25.50 bunker charge—for a total of $151.86. He then applied this rate to the measurement tons of 1,440.3, which gave him $218,723.95, to which he added heavy lift charges, which increased the total charge to $238,528.73. Ex. SE-6; Tr. 134, 135.[8]

10. After talking with Peralta, CEC's Secretary/Treasurer contacted Intermodal and orally gave them the contract of carriage for an all-inclusive rate of $150 a ton. Tr. 137, 138.

11. CEC then prepared dock receipts for the trucks and sent them to Phoenix Manufacturing, which was the truck fabricator. The dock receipts contained the following pertinent information:

10	Dump Trucks	1528	cuft	EA	18,500	lbs.	EA
10	"A" Frame Trucks	2072	cuft	EA	17,000	lbs.	EA
1	Fuel Bowser	2069	cuft		16,600	lbs.	
10	Flat Bed Trailers	1864	cuft	EA	14,900	lbs.	EA
1	Ambulance	923	cuft		4,500	lbs.	

Ex. SE-4; Tr. 139.

[7] Complainant's witness testified he originally contacted Gateway between September 18 and September 22, 1978, and then called Peralta shortly thereafter. This seems unlikely since Intermodal called Peralta on September 13, 1978, *after* being contacted by CEC. In any event, the time sequence is not determinative of the issue involved.

[8] The computation mistakenly did not include a $4 "add-on" for Chalna. Tr. 136.

12. On September 13, 1978, Intermodal, by its Executive Vice-President, telephoned Peralta and spoke with the booking clerk in charge of the Bangladesh trade. An all-inclusive rate of $90 per 2240 lbs. or 40 cu.ft. from the United States to Chalna, Bangladesh, was quoted to Intermodal for transportation of the equipment described in paragraph 11 above. On September 20, 1978, Peralta confirmed the quoted booking in writing on behalf of BSC. Ex. R-7; Tr. 630-632, 640, 641.

13. As of September 20, 1978, and prior thereto, BSC had a tariff on file with the Commission entitled "Bangladesh National Line India, Pakistan, Bangladesh, Ceylon and Burma, Freight Tariff No. 1, F.M.C. No. 1, From: U.S. Atlantic and Gulf Ports To: India, Pakistan, Bangladesh, Ceylon and Burma Ports." Page 123 of the tariff was in pertinent part as follows: [9]

COMMODITY CODE	COMMODITY DESCRIPTION AND PACKAGING	RATE BASIS	BOMBAY CALCUTTA	COLOMBO	KARACHI	ITEM NO.
	AUTOMOBILES, S.U., K.D. OR C.K.D.: Busses Chassis Passenger Cars Trucks including dump N.O.S.					85
	Boxed		65.75	79.00	72.75	
	Unboxed (Rate to be assessed on overall measurements less bumpers)		82.00	98.00	90.50	
	AUTOMOBILE PARTS and Materials for Assembly N.O.S.		65.75	79.00	72.50	

Page 242 was almost blank except for the following entries:

V					
VALVES, N.O.S.		110.00	131.25	121.25	1560
VANADIUM PENTOXIDE	W	70.75	84.50	78.00	1565

[9] Ex. SE-9.

Page 239 was, in pertinent part, as follows:

COM-MODITY CODE	COMMODITY DESCRIPTION AND PACKAGING	RATE BASIS	BOMBAY CALCUTTA	COLOMBO	KARACHI	ITEM NO.
	TRUCKS:					
	Equipped with Mechanical Equipment or Devices N.O.S., Packed or Unpacked	))))))	121.50	145.00	121.50	1550
	Fork Lift	)				
	Tank, without special equipment other than pump: Boxed		72.75	87.25	72.75	

14. When Peralta booked the truck shipment, it knew that it would have to file a new tariff incorporating the $90.00 all-inclusive rate. It waited a period of time to insure that the booking would not be cancelled and then on October 10, 1978, filed a new corrected tariff page 242 as follows: [10]

(I)(R) VEHICLES
TO CHALNA ONLY
Minimum 32 units, viz: 90.00 (ALL INCLUSIVE)

		Lbs.	Cu.Ft.
1	Fuel Truck	16600	2069
1	Ambulance	4500	923
10	"A" Frame Trucks ea.	17000	2072
10	Dump Trucks ea.	17000	1526
10	Flatbed Trailers ea.	14900	1864

Expires November 13, 1978

15. On October 17, 1978, the truck shipment began from Philadelphia, Pennsylvania, aboard the *Banglar Maan*. Ex. SE-11.

[10] The effective date of the tariff was no later than October 16, 1978.

16. Peralta issued its own bill of lading for the truck shipment. The original was punch stamped "non-negotiable." Ex. C-12, C25.

17. On October 17, 1978, Intermodal issued its own bill of lading for the truck equipment, which showed prepaid freight charges of $216,045.00. Ex. C-4.

18. On October 23, 1978, CEC presented a sight draft to MHT drawn on the letter of credit described above, together with documentation including the Intermodal bill of lading. CEC received $216,200.00 from MHT. Ex. C-4, C-17.

19. Later, on November 6, 1978, CEC paid Intermodal $216,045.00 after receiving a bill from Intermodal for that amount. Ex. C-18; Tr. 290.

20. Also, on November 6, 1978, Intermodal by check paid CEC $21,604.50 (10 percent) in brokerage fees. Had CEC hired the carrier, BSC, directly, its fee could only have been $5,301.13 (2 1/2 percent).[11] Tr. 305.

21. By telex dated November 15, 1978, Peralta advised BSC not to release the cargo to the consignee since it was holding the original bill of lading for non-payment of the ocean freight in the amount of $129,627.00. Ex. SE-13.

22. By letter dated December 8, 1978, Intermodal requested that the cargo be remeasured saying it should be 53,103 cft. and not 57,612 cft. The Peralta employee responsible for the truck shipment believed Intermodal was "stalling" on payment for the shipments by requesting the remeasurement. Peralta then sent a letter to Intermodal asking for payment of the amount not in dispute. Ultimately, Peralta agreed to the lesser measurement and sent Intermodal a bill of lading showing reduced freight charges totalling $119,526.75, and requesting payment. Exs. SE-16 through SE-21, SE-66, 67.

23. In December of 1978, and through January of 1979, there was correspondence between Peralta, BSC and Intermodal regarding the latter's failure to pay the ocean freight and the fact that the cargo was not being released. During that period, BSC directed Peralta to contact CEC, and the attorney for Intermodal suggested a "quick solution" to the problem. Exs. SE-22 through SE-32, SE-68.

24. In addition, beginning on December 30, 1978, BSC began a series of correspondence with FWL, as well as Peralta, in which it sought payment of the ocean freight on the truck shipment. The correspond-

[11] The cancelled check evidencing payment was not available in CEC's records. Its witness testified, "We don't keep copies. It goes to the accounting department and they deposit it." Also, as will be noted and discussed more fully later, a criminal information was filed in the United States District Court, Southern District of New York, charging CEC's principal witness with criminal conspiracy. The information, among other charges, alleges the witness personally received $15,123.15 from Intermodal on November 6, 1978, with respect to the truck shipment. A plea of guilty to the information has been entered.

ence indicates that BSC wished to avoid legal proceedings. It requested that Peralta attempt to collect the freight charges without legal action but directed it to inform FWL that government ministry action would be taken. Nevertheless, Peralta did threaten legal action against FWL, and ultimately BSC sought to press its claim by seizing any property it could find belonging to FWL in Bangladesh. Finally, FWL's reputation and future prospects were endangered, and it paid the freight charges to BSC. Exs. SE-35 through SE-39.

25. In the meantime, Intermodal and CEC began corresponding with respect to Intermodal's failure to pay BSC. By letter dated February 14, 1979, Intermodal's President informed CEC's President that due to certain described "management misjudgments," Intermodal did not have the cash to pay BSC. As a result, CEC corresponded with FWL. In that correspondence, FWL asked why Intermodal was used at all and ultimately demanded that CEC pay BSC directly. SE-40 through SE-43, SE-45, 46, SE-48 through SE-51, SE-53 through SE-58, C-19 through C-23.

26. On April 27, 1979, CEC filed suit against Intermodal in the Supreme Court of the State of New York, County of New York. The Complaint contains the following pertinent provisions:

> THRID [sic]: Plaintiff entered into an agreement with the defendant whereby the defendant would containerize and deliver certain cargo for plaintiff and plaintiff's client, Foster Wheeler, Ltd of Bangledesh [sic] from the point of shipment to the point of destination. It was further agreed that upon delivery of the cargo, the defendant was to receive from the plaintiff the sum of $216,045.00 from which the defendant was to pay the carrier vessel the freight charge of transportation in the amount of $119,526.75.

Exs. R-1 through R-6.

27. Sometime in 1980, the United States of America brought suit against CEC in the United States District Court, Eastern District of New York, CV-80-0670. In that suit, the judge granted the Plaintiff's Motion for Summary Judgment by Order dated March 31, 1981. The pertinent parts of the Order are as follows:

> This is an action brought by the United States to recover $216,045 paid by the Agency for International Development ("A.I.D.") to Cargo Export Corporation ("CEC") pursuant to a Supplier's Certificate and Agreement (the "Form 282 Agreement") entered into to finance CEC's shipment of cargo to Bangladesh. A.I.D. seeks refund of its payment for the ocean freight charges alleging that CEC breached the Form 282 Agreement by transporting the cargo on a foreign flag vessel that was ineligible for AID financing and by improperly certifying that the vessel used was a United States flag vessel.

The United States has moved for summary judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure. For the reasons set forth below, the motion is granted.

On October 23, 1978, CEC executed a Form 282 Agreement with A.I.D. which, through its incorporation of Letter of Credit #727000-E dated November 4, 1977, and issued by Manufacturers Hanover Trust Company in favor of CEC, enabled CEC to draw down sums to cover freight charges. The Form 282 Agreement specified, *inter alia*, that shipment was to be made in accordance with the terms of the Letter of Credit. The Letter of Credit specifically stated that shipment was to be made on vessels bearing the flag of a country included in A.I.D. Geographic Code 941, and flag ships of a "cooperating country," which the parties agree in this case was Bangladesh, were expressly excluded from the Code 941 list. Hence, under the terms of the Letter of Credit, the Bangladesh flag vessel, SS BANGLAR MANN, on which CEC transported the cargo here at issue to Bangladesh, was ineligible for A.I.D. financing. CEC argues that, because Code 941 was amended effective June 15, 1978, before the Form 282 Agreement was signed, to permit use of vessels of cooperating country registry, the shipment was eligible for A.I.D. financing under the terms of the Letter of Credit. However, plaintiff has established without genuine dispute from defendant that the amendment did not retroactively modify contractual requirements under already existing letters of credit, including the November 4, 1977 Letter of Credit at issue here. Indeed, in letters of August 8, 1979, and October 22, 1979, CEC acknowledged that it was not entitled to A.I.D. financing for this shipment. The parties agree that CEC might have obtained A.I.D. funds by requesting A.I.D.'s prior written waiver of the Code 941 restrictions. CEC, however, failed to make such a request. In fact, in its Form 282 Agreement, CEC represented that the ship to be used was a United States flag ship and thus eligible for A.I.D. financing, not that it was to be a ship of a cooperating country made eligible for financing under the amendment.

Accordingly, the record requires a conclusion that CEC breached the Form 282 Agreement in two respects: first, by its use of a Bangladesh flag vessel, a vessel expressly ineligible for A.I.D. financing, and second, by improperly certifying that the vessel was a United States flag ship. By breaching the terms of the Form 282 Agreement and of the Letter of Credit incorporated therein, CEC wrongfully obtained A.I.D. financing for this shipment and must, under the case law and contract, make "appropriate refund" to A.I.D. *See United States v. Framen Steel Supply Co.*, 435 F. Supp. 681, 685 (S.D.N.Y.

1977); *United States v. Emons Industries, Inc.*, 406 F. Supp. 355, 358 (S.D.N.Y. 1976).

28. In June of 1982, the United States Attorney for the Southern District of New York filed a criminal felony Information entitled, *United States v. Munsch*, 82 Cr. 0461. The Information charges CEC's principal witness with willful conspiracy with CEC's President and a former employee to defraud FWL, the World Bank and AID by making false, fictitious and fraudulent claims to AID and then with concealing and covering up material facts by trick, scheme and device. The more pertinent portions of the Information are as follows:

> 10. From in or about July 1975, up to and including December 1979, in the Southern District of New York and elsewhere, PAUL MUNSCH, the defendant, along with Eugene Pagano and Armand Ventura, who are named herein as coconspirators but not as defendants, unlawfully, wilfully, and knowingly did combine, conspire, confederate and agree together and with other persons to the United States Attorney known and unknown, to defraud FWL, the World Bank and the United States and its agencies thereof, to wit, the Agency for International Development ("AID") and to commit offenses against the United States, to wit, violations of Title 18, United States Code, Sections 287, 1001, 1341 and 1343.
>
> * * *
>
> 14. Among the means which the defendant and his co-conspirators would and did employ to effectuate and carry out the conspiracy were the following:
>
> (a) On four occasions, CEC solicited the services of a NVOCC to act as a middleman in order to inflate the cost of the ocean freight charged FWL and AID.
>
> (b) On these occasions, CEC would agree with the NVOCC on an ocean freight rate to charge FWL and AID which was significantly in excess of the ocean freight rate actually charged by the steamship line that carried the cargo.
>
> (c) Thereafter CEC would bill AID, and on one occasion the World Bank, at the inflated high rate without disclosing the actual lower rate charged by the steamship line for the shipment.
>
> (d) The defendant and his co-conspirators would then split the substantial difference between the high rates charged AID and the low rates charged by the steamship line with the NVOCC without disclosing, among other things, their excessive gain to FWL or AID.
>
> (e) The defendant and his co-conspirators employed their scheme on the first three cargoes they handled for the Bangladash [sic] Project. The first cargo was shipped on or

about November 17, 1977, and consisted of a bulky rock crushing and cement batching plant ("rock crusher"). Rather than offer the rock crusher to an ocean carrier of the Conference to ship, as required by the Contract, the defendant and his co-conspirators instead used a NVOCC to ship the rock crusher on the excluded BSC line. In this case, CEC billed the World Bank $158,039.12 for ocean freight, although BSC only charged $106,267.69 to actually ship the goods, for an undisclosed $51,708 profit to the defendant and his co-conspirators, which was split with the NVOCC and others.

(f) On the second and third cargoes of some appliances which were shipped together from Los Angeles on a Scindia ship, CEC billed AID $32,000 and $11,578.62, respectively, although Scindia charged only $23,857.79 and $10,480.99 to ship the goods, for an undisclosed total profit of $9,239.84 to the defendant and his co-conspirators, which was split with the NVOCC and others.

(g) CEC billed and received from AID $67,143.37 for costs incurred for handling, storing, and heavy lifting the rock crusher before the shipment, whereas in fact the actual cost was approximately $50,000.

(h) From in or about February 1978, up to and including August 1978, AID was billed $588,926.26 for ocean freight on 32 cargoes shipped on five Waterman ships. For these 32 cargoes, CEC invoiced AID at a rate approximately 10% higher than was charged by Waterman. In each instance, CEC received an invoice from Waterman for the 10% project discount rate but nevertheless billed AID at the higher non-discounted rate. The overcharges to AID for these claims exceeded $50,000.

(i) In or about October, 1978, CEC handled a large shipment of 31 trucks and an ambulance ("the truck shipment") to the Bangladesh Project. Again, rather than offer or book the truck shipment with the Conference as required by the Contract, CEC again used a NVOCC to ship the trucks on the excluded BSC line. For this truck shipment, CEC billed AID $216,045 for ocean freight but only had to pay BSC $119,526.75 to ship the trucks, for an undisclosed $96,518 profit which was split with the NVOCC.

* * *

(u) In or about September 1978, CEC agreed with a NVOCC to book the truck shipment from the United States to Bangladesh.

(v) On or about September 20, 1978, a NVOCC booked the truck shipment with BSC through Peralta.

(w) On or about October 17, 1978, a NVOCC issued a bill of lading for the truck shipment rated at $216,045.

(x) On or about October 23, 1978, CEC submitted a claim to AID through Manufacturers Hanover Trust Company for $216,045 for the ocean freight charges on the truck shipment.

(y) On or about October 23, 1978, CEC submitted an AID Form 282 to AID through Manufacturers Hanover Trust Company falsely certifying, among other things, that the ocean freight charges for the truck shipment were $216,045 and that the ocean carrier was a United States flag vessel.

(z) On or about October 26, 1978, Manufacturers Hanover Trust Company mailed a $216,045 check to CEC as payment for the truck shipment.

(aa) On or about November 6, 1978, a NVOCC issued a check to CEC for $21,604.50 and a check to defendant PAUL MUNSCH for $15,123.15 as part of the profit on the truck shipment.

Ex. R-13.

29. On June 24, 1982, Mr. Munsch pleaded guilty to the criminal information. Some of the more pertinent portions of it are as follows:

THE DEFENDANT: In 1975 Cargo Export was designated as an exclusive freight forwarder to book ocean shipments from the United States to an AID finance project in Bangladesh.

THE COURT: Excuse me. This is being taken down by the court reporter. So you will have to read it a little more slowly and distinctly.

THE DEFENDANT: Yes, sir. Eugene Pagano was president, I was secretary-treasurer, Armand Ventura was director of marketing in charge of the Bangladesh project.

Eugene Pagano, Armand Ventura and I, Paul Munsch, agreed to submit false certifications to the Agency for International Development showing high ocean freight rates to be paid to Cargo Export Corporation by the agency when in fact the true ocean freight rates were much lower. We did this by using an NVOCC as a middle. We split the difference between the higher rates and the lower rates between ourselves and others.

There were three cargoes shipped to Bangladesh by Cargo Export that were falsely certified to the agency and in one case the World Bank by Cargo Export in the fall of 1977.

One cargo of a rock crusher aboard a Bangladesh vessel we billed 158,000, but the actual cost was only $106,000. Two cargoes of house appliances that were shipped on an Indian vessel we billed at 32,000 and 11,000, but the actual cost was only 24,000 and 10,000 respectively.

When we billed we had to complete government forms which were falsely certified. Eugene Pagano and I, Paul Munsch, in the fall of 1977, falsely certified to the agency that the handling cost for the rock crusher that we had shipped to Bangladesh aboard a Bangladesh vessel was $67,000 when in fact the true cost was approximately $50,000.

Eugene Pagano and I, Paul Munsch, for a period of February 1978 through the fall of 1978, shipped 32 cargoes aboard five vessels to Bangladesh for which we falsely certified to the agency 32 times that the ocean freight was 10 percent higher than the true cost, which amounted to $52,000.

During the course of the AID investigation I created ten credit memos which Gene Pagano had knowledge of in order to balance the prior billings to AID for the cargo shipped on Waterman vessels.

Eugene and I, Paul Munsch, in the fall of 1978, shipped a cargo of trucks to Bangladesh aboard a Bangladesh vessel for which we falsely certified to the agency that the ocean freight was $216,000 when I knew the ocean freight was much lower. The difference was split between ourselves and others.

It was also falsely certified to the agency that the vessels carrying trucks was a U.S. flag vessel.

* * *

Q. And you and the other officers of CEC, namely, Eugene Pagano and Armand Ventura, combined and conspired and agreed together that you would defraud AID and Foster Wheeler in connection with your participation as the exclusive freight forwarder for this project?

A. Yes, sir.

Q. And it was part of that conspiracy that you would present claims for payment for expenses in connection with freight shipments which you knew were in part false and fraudulent?

A. Yes, sir.

Q. And in order to do that you solicited the services of a nonvessel operating common carrier, or NVOCC, to act as a middleman in order to inflate the cost?

A. Yes, sir.

Q. And on those occasions you agreed with the NVOCC to charge Foster Wheeler and AID a freight rate which was substantially in excess of the freight rate actually charged?

A. Yes, sir.

Q. And thereafter you billed AID at the inflated rate without disclosing the actual lower rate?

A. Yes, sir.

* * *

Q. And on another occasion in about October 1978, in connection with a shipment of 31 trucks and an ambulance, you billed $216,000 for ocean freight but only paid out $119,000, for an undisclosed profit of about $96,500?

A. Yes, sir.

Q. How did these overcharges come to light?

A. Well, on the $216,000 shipment I knew what the NVOCC was going to pay. On the first three I did not know. But to my knowledge, I know that they work on a 40 percent—approximately 40 percent markup.

Q. Which you didn't really have to pay, and you split that markup with them?

A. Yes, we got a percentage of that.

Q. So CEC received substantial amounts?

A. Yes.

Q. And you knew they were receiving substantial amounts on all these overcharges?

A. Yes. If you compare it to the brokerage that the conference carriers pay, yes, we did receive much more.

Q. Were you a stockholder in CEC?

A. Yes, sir.

Q. And did you receive additional dividends? How did this money appear? Did it appear on your books or was it off your books?

A. No, it was all deposited in the corporation.

Q. And you paid corporate income taxes on it?

A. I believe so. My accountant does all that, sir.

Q. But you received increased dividends as a result of this?

A. I personally?

Q. Yes.

A. Yes. Well, we took—we got some personal money out of it, sir.

Q. And you knew that this was a fraud on the Agency for International Development?

A. Yes, sir.

Q. And you knew that that was an agency operating under the auspices of the United States Department of State?

A. Yes, sir.

Q. Have you gone over with your attorney the complete information, all of the charges made in it, including all of the overt acts that are alleged?

A. Yes, sir.

Q. Are all of them, all of those charges, accurate?
A. Yes, sir.

* * *

THE COURT: The court finds that the plea is knowledgeable and voluntary and that it has a basis in fact.

Mr. Munsch, how do you plead to the information, guilty or not guilty?

THE DEFENDANT: Guilty, your Honor.

Ex. R-14.

30. In June of 1982, the United States Attorney for the Southern District of New York indicted the President of CEC and one of its former employees in a case styled *United States v. Pagano, et al.*, 82 Cr. 0433. The indictment contains the same charges as are contained in the criminal Information discussed in paragraphs 28 and 29, above. Mr. Pagano has pleaded not guilty to the charges. Ex. R-15.

ULTIMATE FINDINGS OF FACT

31. The Complainant has failed in its burden to show that co-respondents BSC and Peralta violated the Shipping Act in any substantive manner.

32. Even if the facts were sufficient to show a substantive violation, the record is devoid of any evidence which establishes that the Complainant suffered damages and is entitled to reparations under section 22 as a result of those damages.

33. Any damages suffered by the Complainant were due to Intermodal's (the NVOCC) illegal actions, and especially its failure to pay the freight charges to BSC. Further, the Complainant is itself at fault in that it knew or should have known of what was transpiring both with respect to the filing of a new tariff and the failure of Intermodal to pay the freight charges.

34. The record establishes that the Complainant, through one or more of its officers, conspired to defraud the United States (AID) regarding the truck shipment involved here.

35. The facts of record do not warrant any judgment in favor of the Complainant, either as to co-respondents BSC and Peralta or as to Intermodal. While the latter did not appear in the proceeding, and was obviously engaged in illegal conduct respecting the truck shipment, it is clear that the Complainant took part in that conduct. Also, it is clear that any damages the Complainant may have suffered as a result of Intermodal's actions were not the result of violations of the Shipping Act, but rather resulted from Intermodal's failure to complete the illegal scheme it was engaged in with CEC, i.e., it did not pay the actual shipping charges after splitting the excess charges received from AID with CEC.

DISCUSSION AND CONCLUSIONS

As has been noted, the Respondent has filed a Motion to Dismiss this proceeding based on various factors. They include argument regarding the absence of indispensable parties, prematurity, jurisdiction and immunity, and untimeliness. We have concluded that the Commission does have jurisdiction to render a decision on the merits in this proceeding. The Initial Decision on the merits makes any further ruling on the Respondent's dismissal motion unnecessary and, therefore, no such ruling will be forthcoming herein.

Section 22 of the Shipping Act, 1916, provides in pertinent part:

> SEC. 22. (a) That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby. . . . The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

Case law has established certain well-settled rules and principals. In reparation proceedings, the claimant has the burden of establishing by a preponderance of the evidence that the respondent exacted charges in excess of those lawfully applicable. *Madeplac S.A. Industria de Madeiras v. L. Figuriedo Navegacao S.A. a/k/a Frota Amazonica, S.A.*, Docket 75-45, Adoption of Initial Decision, dated 4/12/78, page 3, 16 F.M.C. 87, aff'd 21 F.M.C. 214 (1978). Further, even if the rate under investigation is a new rate, in a complaint proceeding the burden of proof is upon the complainant. *Hawaii Meat Co., Ltd. v. Matson Navigation Co.*, 21 F.M.C. 43 (1978). See also *West Gulf Maritime Assn. v. Port of Houston Authority*, 21 F.M.C. 244 (1978), aff'd 610 F.2d 1001, cert. denied 449 U.S. 822.

As to adherence to the tariff rate, in the light of violations claimed under section 22, it is unlawful to charge or demand or collect or receive a greater or less different compensation for transportation of property than the rates, fares and/or charges which are specified in tariffs filed with the Commission and in effect on the date of the shipment. *Aluminum Products of Puerto Rico, Inc. v. Trans-Caribbean Motor Transport, Inc.*, 5 F.M.B. 1 (1956), *Corn Products Co. v. Hamburg-Amerika Lines*, 10 F.M.C. 388 (1966). The rate of the carrier as filed in the tariff is the only lawful charge. *Ocean Freight Consultants, Inc. v. Bank Line Ltd.*, 9 F.M.C. 211 (1966). Further, with respect to tariff rules and regulations, there is a presumption that the shipper's knowledge of the lawful rate is conclusively presumed. *Kraft Foods v. Moore McCormack Lines, Inc.*, 17 F.M.C. 320, 323 note 4 (1974), citing 227 U.S. 639. Finally on this point, the legality of the actions of a common carrier by water can only be judged against the rates and charges

which are specified in its tariffs on file with the Commission and duly published and in effect at that time. A shipper and carrier are free to negotiate whatever terms they may wish. Until those understandings are fixed as specified by the Shipping Act, the Federal Maritime Commission is not involved. *Sidney-Williams Co. v. Maersk Line*, 20 F.M.C. 324 (1977).

Finally, as to reparations claimed under section 22, it is well-settled that while "any person" may file a complaint, reparation may be awarded only to a complainant who has shown that it was injured by a violation of the statute. *Williams, Clarke Co., Inc. v. Sea-Land Service, Inc.*, Order on Remand, S.D. No. 489, dated 11/29/77. Section 22 does not "require" the award of reparations even when a violation has been found. The language of the section is that the Commission "may" direct the payment of full reparation for injury caused by the violation. The language is permissive, not mandatory, and the mere fact that a violation of the Shipping Act has occurred does not compel a grant of reparations. *Philip R. Consolo v. Flota Mercante Grancolumbiana*, 7 F.M.C. 635 (1963); *Parsons & Whittemore, Inc. v. Johnson Line, et al.*, 7 F.M.C. 731 (1963). Further, no principle of equity or justice authorizes the Commission to base an award of reparation to any party upon that party's prospective reliance upon the unlawful act of another. *L'Aluminum Francois v. American Export Lines, Inc.*, 8 F.M.C. 87 (1964); and finally, businessmen engaged in the import and export trade are not innocent, but rather negligent when they make no effort to determine and follow through on the cost of shipping services they intend to utilize. Unilateral assumptions by shippers, unrelated to a misleading act of a carrier, will not support equitable relief. A shipper is charged with knowledge of the correct rate, and the only lawful rate is the one on file with the Commission. *Bernard Bauman Corp. v. American Export Lines, Inc.*, 8 F.M.C. 155 (1964), citing 262 F.2d 474.

Despite the holdings in the above-cited cases, the Complainant here would have the Commission determine that BSC and Peralta "have violated the Shipping Act as well as the rules of this Commission, such that the Respondents should be held in damages in an amount equal to 213,429.40." In support of its contention that the Respondents demanded and collected "untariffed" rates, the Complainant notes that (1) the tariff was not filed until October 16, 1978, (2) the symbols I & R were used erroneously, (3) the tariff correction was filed on the wrong page at least with respect to those trucks which were specially equipped, (4) the corrected tariff continued the wrong cubic measurement of 57,612 cft., instead of 53.103 cft. The Complainant asserts that BSC and Peralta "virtually ignored its filed tariff rates, offering contracts of carriage at whatever the market would bear." It states that BSC and Peralta's practice of filing tariff changes within one day of sailing "was not calculated to give notice as required by the Commission, but appears to

have been motivated by the Responent's [sic] attempt to disguise its practice of operating outside of its filed tariffs." The Complainant concludes that BSC and Peralta's actions resulted in an unreasonable preference in favor of Intermodal against CEC and "amounted to unreasonable prejudice and unjust discrimination against the Complainant," and that BSC and Peralta collected untariffed rates in violation of the rules of the Commission. Generally, in support of its views, CEC cites *First International Development Corporation v. Shipper's Overseas Services, Inc.*, 23 F.M.C. 47 (1980), *Roco Worldwide, Inc., v. Constellation Navigation*, 660 F.2d 992 (4th Cir. 1981); and *Trans Pacific Freight Conference of Japan/Korea v. F.M.C.*, 650 F.2d 1235 (CA, DC, 1980).

On the basis of BSC and Peralta's dealings with Intermodal, the Complainant argues that the "Respondent BSC/Peralta engaged in unlawful practices within the boundaries of the United States in attempting to secure collection of its untariffed freight charges." It seems to consider BSC and Peralta guilty of wrongdoing because they did not notify CEC when Intermodal defaulted, and cites a debt owed by Intermodal to BSC and Peralta on a previous shipment as a possible reason for BSC and Peralta's actions. CEC then concludes that "the contractual liabilities created bwteeen [sic] the Respondent, BSC/Peralta, and the Respondent, Intermodal, were such that Intermodal alone was responsible for the payment of freight charges." It then argues that BSC and Peralta "coerced Complainant's principal to pay for freight charges in the sum of $119,516.75, for which it was not obligated to pay." CEC finally alleges that BSC and Peralta violated sections 817 and 815 of the Shipping Act.

The Complainant also alleges that BSC and Peralta's actions outside the United States are "subject to the jurisdiction of this Commission" and that such actions "constitute unreasonable practice in violation of the Shipping Act as well as the Hamburg Convention."

Finally, the Complainant "computes" the reparations due it totalling $213,429.40, asserting that $93,902.65 is the difference between "the higher tariff rate and the lower special rate." It states the remaining $119,526.75 is due to it as reparations "penalizing the Respondent BSC/Peralta for unlawful practices within and without the United States in collecting $119,526.75 freight charges from Complainant's ultimate user and principal."

In answer to the Complainant's arguments, BSC and Peralta state:

> If this claim has any merit at all, it lies only against the defaulting lead co-respondent, Intermodal Container Service, Ltd. ("Intermodal"). As to all other respondents it is an artificial claim based solely on their solvency. At most, Complainant has proven: (a) harmless clerical error by co-respondent Peralta Shipping Corporation ("Peralta"), and (b) enforcement of a written security agreement in accordance with its terms

> and applicable law by the other co-respondent, Bangladesh Shipping Corporation ("Bangladesh"). Such proof does not justify the windfall bonanza sought from these litigating respondents.

The Respondents point out that the Complainant's use of Intermodal allowed CEC to receive a 400 percent higher commission than it would otherwise have received. They pointed out that their dealings with Intermodal were documented and not oral as was Intermodal's agreement with CEC. They note that Intermodal was unavailable to give its version of the agreement and that "all we have is the word of Complainant's operating officer."

As to the case law cited by the Complainant, the Respondents note that *International Development Corp. v. Ship's Overseas Services, Inc., supra,* has been reversed on jurisdictional grounds in *Ship's Overseas Services, Inc. v. Federal Maritime Commission,* 670 F.2d 304 (D.C. Cir. 1984). Even further, they differentiate the facts of the above case from those present in the instant case.

As to the tariff violations cited by the Complainant, the Respondent Peralta asserts there were no violations of the Shipping Act. It argues that there was an offer of business from Intermodal with whom Peralta negotiated a commercially reasonable rate, that it prepared the new tariff upon the specifications and measurements given it by Intermodal, that the tariff was on file before the vessel sailed and that the freight collected was in accordance with the amended tariff. It states that at most the "Complainant has raised a quibble over a typographical error in a citation, the use of two code letters in a tariff instead of one, and the choice of a page on which a tariff amendment appears—matters which, if proven, never harmed Complainant."

On the basis of the facts presented in this case, and the case law applicable to those facts, we must hold that the Complainant is not entitled to relief under section 22 of the Shipping Act. First of all, even if we were to accept all of the Complainant's evidence as fact—and we do not—it still would have failed in its burden. We agree with the Respondent that Peralta's dealings with Intermodal, *which was hired by the Complainant* to handle the shipment, were entirely proper. They, in effect, negotiated a special rate for the truck equipment, which was a lower rate than that previously on file, and the new rate was filed prior to the date of shipment. The Complainant's assertion that the filing "was not calculated to give notice" is an entirely gratuitous statement unsupported by any evidence of record. Indeed, if the shipment was as large and as important to CEC as its principal witness states it was, it is inconceivable that it did not know or should not reasonably have known of the new tariff and the new rate. Further, in light of statements made by CEC's principal witness in pleading guilty to the criminal conspiracy Information, such an argument is frivolous. The witness

clearly stated that CEC and Intermodal knew what the actual freight charges were. Indeed, from them they computed their respective shares of the excess they illegally obtained from AID. As to the use of the initials I and R, the tariff page on which the new rate was filed, and the original error in measurement, as well as similar matters, these are technical errors, as the Complainant itself admits in its Post Trial Memorandum of Law at page 27. Some occurred because of Intermodal's actions, and not those of Peralta. More importantly, if CEC had exercised the care and diligence it should have, it would have possessed the knowledge the law presumes it to have. *Kraft Foods* and *Bernard Bauman, supra.*

With regard to BSC and Peralta's actions in attempting to collect the freight rate after Intermodal defaulted, we do not believe they violate any section of the Shipping Act. When BSC did not receive the freight charges due, it contacted the "notify party" (FWL) as set forth on the bill of lading. It asked for payment and waited a reasonable time. When payment was not forthcoming, it exerted pressure through its government and otherwise and finally secured the funds due it. Whether it did so under a separate agreement, as it alleges, or under the bill of lading, CEC has no cause to complain. It seems to argue that once it paid Intermodal, its responsibility ceased, but this is completely untenable. Intermodal was working for CEC and/or the shipper or consignee, not BSC or Peralta. There was no duty on BSC and Peralta to monitor what went on between Intermodal and CEC. They carried the goods and sought the payment due them from the shipper or consignee (notify party). That Intermodal embezzled or misappropriated the funds given them by CEC certainly cannot be imputed to BSC or Peralta and be used by CEC as a basis for a reparations claim against BSC and Peralta.

So here, even if we found the facts that the Complainant would have us find, we could not rule in his favor because they do not establish a wrong under the Shipping Act, nor a basis for a finding of reparations. However, there is more to consider. This record is replete with indications that the dealings between Intermodal and the Complainant were not the normal arm's-length business transactions one might expect. For example, the record indicates that CEC not only received a 400 percent larger commission by using Intermodal rather than dealing with BSC directly, but that its principal witness received a check for over $15,000 besides. In addition, CEC, through at least one of its officers, fraudulently obtained federal funds from AID by falsifying records. On at least two separate occasions, it erroneously stated that Intermodal was being paid to containerize the shipment, when in fact it was not. Even more to the point, it appears that CEC engaged in a course of conduct using Intermodal and others whereby it defrauded the United States and others by overstating the shipping charges and then splitting the proceeds of those overcharges with its co-conspirators. A reading of

the exhibits in evidence which relate to the pending or completed related federal court cases clearly indicates that CEC is before us with unclean hands. In essence, we believe that what happened here is all too clear. CEC hired Intermodal knowing the freight rates it was collecting from AID were inflated. It secured the money from AID by false pretense, gave it to Intermodal, and then on the same day received its share of the excess freight rates from Intermodal. Whether it knew every detail of the truck shipment is not really important, the fact is it was well aware of what was transpiring. Its mistake was that it relied on Intermodal to complete the transaction. It did not foresee that Intermodal would fail to pay any of the freight charges, and it now seeks to be "made whole" because of Intermodal's failure to complete what between them was a fraudulent and illegal activity. Of course, in light of the facts as found and the case law previously cited, any such holding on our part would be completely erroneous. So here, we find in favor of the Respondents BSC and Peralta and hereby deny the relief sought by the Complainant. As to Intermodal, and the Order to Show Cause why it should not have a default judgment rendered against it, we would ordinarily find in favor of the Complainant since Intermodal misappropriated the shipping charges and failed to appear at all in these proceedings. However, given the fact that other court proceedings are pending and the complicity of CEC's actions with those of Intermodal, we do not believe reparations awarded under section 22 is the proper vehicle for settling accounts between two wrongdoers. Therefore, we will not enter a default judgment against the Respondent Intermodal.[12]

It is hereby Ordered that this case be dismissed.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

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[12] Complainant's Motion to Reopen the record to admit the testimony of its principal witness was made and granted after this Initial Decision was written. Initially, it was thought that the Decision would be rewritten and the additional testimony added and discussed where necessary. On reflection, this was not done because, while the testimony supports and buttresses what had already been written in the Decision, it is not necessary to it. The testimony speaks for itself and is as follows:

STATE OF NEW YORK)
COUNTY OF NASSAU) ss:
PAUL G. MUNSCH, being duly sworn, deposes and says:

1. In the above mentioned proceeding I gave testimony regarding the amount of commission which CARGO EXPORT CORPORATION (hereinafter "CEC") received as a result of the truck shipment. The testimony given by me in that regard, both in depositions before trial and at the trial, was incorrect, such that by this affidavit I wish to correct said testimony. In my testimony before the Commission, at page 304, line 5, I was asked the following question:

Continued

Q Now, you have testified, I believe, that you placed two phone calls . . . strike that. It is one area I wanted to touch but neglected to.

Mr. Munsch, you testified that you awarded the shipping contract to Intermodal and you did not award it to Bangladesh Shipping.

Did Cargo Export Corporation receive any fee as a result of the awarding of the contract to Intermodal?

A Yes, we did.

Q What did you receive?

A 10%.

Q Of what?

A Of the freight.

Q Is it 10% of the cargo or 10% of the freight bill?

A 10% of the amount of the money that we paid to Intermodal.

Q I don't understand your answer sir.

A In other words, I paid Intermodal $216,000 and I received a 10% brokerage or commission from Intermodal.

Q Did you in fact collect that 10% commission?

A Yes, we did.

Q When did you receive it?

A I believe we received it the same day as we paid them.

Q And how did you receive it?

A In the form of a check.

Q An Intermodal check?

A I believe it was. I mean I don't recall the check.

Further in my examination before trial, at page 105, line 22, I was asked the following questions:

Q Return for a moment to the Intermodal, Cargo Export Corporation agreement. Did CEC receive a brokerage fee of any kind?

A Yes, it did.

Q How much was the fee?

A 10%.

Q Of what?

A Of the freight. . . .

Q Did the 10% brokerage fee affect your selection of Intermodal as the carrier. . .?

A It was not the prime consideration.

Q Was it one of the considerations?

A Yes, it was.

Q Did CEC receive any other fee or income as a result of its agreement with Intermodal apart from the 10% fee you just referred to on this shipment?

A No, it did not.

Q No remuneration of any kind other than the 10% fee?

A On this shipment?

Q Yes.

A No it did not.

2. Prior to giving the shipment to Intermodal, I was in touch by telephone with Dennis McCabe. (I cannot recall whether he called me or I called him, but I do recall that he had called me to solicit business from CEC before, and I do recall that we had never done business with him [sic] firm before this shipment.)

3. Shortly after our initial contact, McCabe called me with his final proposition for the freight. He indicated to me that he could pay a commission of approximately $35,000.00, and that the commission would be paid in the form of a check for 10% drawn to the order of CEC, with the balance in a separate check. He indicated that the maximum allowed on his tariff was 10% and that is why the amount of the check to the company would reflect that amount.

4. After the freight had been shipped and after we had received the freight charges from our principal, both myself and Eugene Pagano, President of CEC, met with McCabe and his associate, Gunther Perl, at our office. We exchanged checks as follows:

(a) $216,045.00 was paid to CEC by Intermodal;

(b) $21,604.50 was paid in the form of a check from Intermodal to CEC; and

(c) $15,123.15 in an additional check was drawn to my order.

I accepted the additional check and deposited it in the CEC account.

Continued

5. During my negotiations with Mr. McCabe, before agreeing to give him the freight, he disclosed to me the approximate amount that he was supposed to be paying the steamship line. He represented that amount to be approximately $100 per ton. He further represented that our commission would be approximately $35,000.00. He said that sum would be computed by subtracting the $100 per ton from the amount I was going to charge the shipper-in-fact. He further represented that after deducting $3,000.00 or $4,000.00 for "other expenses" which he had incurred, the difference would be halved, thus generating the $35,000.00 commission.

6. Although the actual amount paid to CEC as reflected by the two checks amounts to exactly 17% of the freight charges which I submitted to the shipper-in-fact, at no time did we ever agree on this fixed percentage. The amount of the final dollars and cents of the "differential check" was left up to Mr. McCabe and was substantially in accordance with our agreement, such that it was accepted without question.

7. I do not offer this affidavit as an excuse for my actions. Although the custom of using an N.V.O. is well entrenched in our business, I now realize that I was wrong to entrust this shipment to Intermodal for reasons that are obvious; that I was wrong to accept a payment in excess of an amount I believed the N.V.O.'s tariff permitted; and finally, and most importantly, that I was wrong not to disclose the additional payment in my testimony before this Commission. That I received an unlawful commission does not change the thrust of the action which CEC has presented before this Commission.

For the reasons above set forth, I respectfully request that the record be amended, and that upon the record as amended, judgment be awarded on the complaint.

(S) Paul G. Munsch

FEDERAL MARITIME COMMISSION

(46 C.F.R. PART 522; DOCKET NO. 76-63)
FILING OF AGREEMENTS BY COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT, 1916
GENERAL ORDER 24; AMENDMENT 2

October 13, 1982

ACTION: Final Rules

SUMMARY: This revises the Commission's regulations prescribing procedures for filing of agreements pursuant to section 15 of the Shipping Act, 1916. The purpose of the revision is to ensure the fair, orderly, and expeditious processing of agreements.

DATES: Effective January 1, 1983.

SUPPLEMENTARY INFORMATION:

By Notice published in the *Federal Register* of June 20, 1979 (44 F.R. 36077-36080), the Commission proposed to revise its regulations (46 C.F.R. Part 522) governing the filing of agreements by common carriers and other persons subject to section 15 of the Shipping Act, 1916 (46 U.S.C. § 814). This further proposed revision was published in response to the original Notice of Proposed Rulemaking which appeared in the *Federal Register* of November 23, 1976 (41 F.R. 51622). Comments on the proposal were submitted by conferences of carriers, individual carriers, shipowners associations, port authorities, a shipper, and the United States Department of Justice. A list of commentators is set forth in Appendix A hereto.

Although many of the commentators welcome the concept of the proposed procedures, certain general objections are raised which are discussed below.

1. *Delay in Processing Agreements.*

A number of commentators object to the perceived premise for the proposal, *i.e.*, that those filing agreements were responsible for the delay in processing. Commentators assert that much of the delay rests with the Commission and that internal deadlines should be established for processing and incorporated into the rules.

The purpose of the proposed revision was to provide for standardized, expeditious processing of agreements; there was no intention to assign blame for delay to anyone. Internal deadlines and procedures have been established and are now in the process of being further updated. However, these matters are inappropriate for inclusion in a

Commission General Order and are more properly the subject of an internal Commission directive.

2. *Filing of Supporting Statements.*

Of great concern is the requirement for the filing of a supporting statement along with the agreement. Many arguments are asserted which need not be dealt with in light of the final rule promulgated here. The final rule makes the filing of statements supporting the approval of agreements optional with the filing parties.[1] However, the Commission will require that a letter of transmittal accompany the agreement which summarizes its contents and expressly requests approval pursuant to section 15. This will facilitate preparation of the *Federal Register* notice of filing.

3. *Scope of the Rules.*

Several port authorities believe that the rules should not apply to terminal agreements. Much of their argument goes to the originally proposed requirement for submission of supporting statements. The elimination of that requirement should serve to obviate the port authorities' concerns. In any event, we see no reason to make an exception for this or any other type of agreement.

4. *Rejection of Agreements.*

Objection is made to the provision that empowered the Commission staff to reject agreements for failure to comport with the requirements of the proposed agreement processing rules. Again, the basis of these arguments is the requirement for submission of supporting statements which has been eliminated. Rejection now will be made only for failure to comply with procedural requirements.

5. *Miscellaneous Comments.*

a. In proposed section 522.2, comment is made that the definition of "modification" to an agreement would require the submission of a supporting statement for cancellation of an agreement. In light of the elimination of the supporting statement requirement, no further consideration of this comment is necessary. In addition, we have simplified the definition of "modification."

b. In proposed section 522.3, objection is made to the filing of 15 copies of an agreement. The Commission has carefully considered its internal requirements and concludes that 15 copies are necessary.

[1] This does not, however, eliminate the need for supporting statements where they are otherwise legally required. It is established that proponents of an agreement which is anticompetitive by its nature have a burden to demonstrate that it is required by a serious transportation need, is necessary to secure important public benefits or is in furtherance of a valid regulatory purpose of the Shipping Act. *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968); *United States Lines, Inc. v. FMC*, 584 F.2d 519 (D.C. Cir., 1978).

c. Objection is made to the elimination of current section 522.6 which prescribes suggested language for agreements. The existence of this section, although providing some uniformity, conveys a false impression of automatic approvability. It is the economic consequences of an agreement which should control, not its form.

d. With respect to proposed section 522.6, certain commentators suggest a limitation on public access to information submitted in support of the filing of an agreement. A section 15 agreement is not a private contract but one impressed with the public interest. Limitation on access to information would stifle candid justification and explicit protests. Accordingly, no claims for confidentiality will be allowed.

e. A number of technical comments were submitted regarding proposed section 522.7, which governs the content of comments and protests to agreements. The Commission has considered carefully all of these and concludes that the proposed rule should be adopted in substance. Some technical changes have been made to the rule and a provision for the filing of supplemental documents upon a showing of good cause has been added.

f. One commentator suggests that proposed section 522.8, which provides that nothing in the rules should be construed as limiting the Commission's authority to require information from persons subject to its jurisdiction, is extraneous. We agree and it has been eliminated in the final rule. This action should in no way be interpreted, however, as a retreat from the proposition reflected in the section.

g. Several commentators suggest that proposed section 522.9 is unnecessary and one suggests that it await further study. We are satisfied that inclusion of the section is worthwhile. The section has undergone revision, however, mostly in the interest of simplification and clarification. Another commentator suggests an amendment to provide for interim approval. This was not contemplated by the proposed rule and cannot be dealt with in this proceeding.

Other commentators suggest certain changes as to technical details which we believe to be either satisfied by the final rule or unwarranted. Certain purely editorial changes have also been made in the text of the final rule. All comments not specifically discussed herein have been carefully considered and either incorporated in the final rule or rejected.

List of subjects in 46 C.F.R.: Administrative Practice and Procedure.

Therefore, pursuant to 5 U.S.C. § 553 and sections 15, 21, 22 and 43 of the Shipping Act, 1916 (46 U.S.C. §§ 814, 820, 821 and 841a), Part 522 of Title 46, Code of Federal Regulations, is amended as follows.

1. Part 522 is amended by deleting the title of Part 522, "FILING OF AGREEMENTS BETWEEN COMMON CARRIERS OF FREIGHT BY WATER IN THE FOREIGN COMMERCE OF THE

UNITED STATES," and substituting therefor the following: "FILING OF AGREEMENTS BY COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT, 1916."

2. Section 522.1 is revised to read as follows:

§ 522.1 *Purpose*

This part establishes procedures for: (a) filing agreement approval requests pursuant to section 15, Shipping Act, 1916 (46 U.S.C. § 814), including statements in support thereof; (b) filing comments and protests to such agreements, and responsive pleadings thereto; and (c) the disposition of agreement approval requests. The purpose of this part is to ensure the fair, orderly and expeditious processing of agreement approval requests.

3. Section 522.2 is amended to read as follows: [2]

§ 522.2 *Definitions*

For the purposes of the provisions in this part, the following definitions of terms used therein shall apply.

(a) *Agreement.* As used in this part, an agreement is a written document which reflects an understanding, arrangement, or undertaking, between two or more common carriers by water or other persons subject to the Shipping Act, 1916, which is required by section 15 of the Act to be filed with the Commission. The term "agreement" includes, but is not limited to, the following types:

* * *

(b) *Modification.* An amendment to an approved agreement.

(c) *Proponents.* The parties to an agreement for which section 15 approval has been requested pursuant to this part.

4. Section 522.3 is revised to read as follows:

§ 522.3 *Filing of agreements*

Agreement approval requests shall be submitted to the Secretary, Federal Maritime Commission, Washington, D.C. 20573. Such requests shall consist of a true copy and 15 additional copies of the agreement and all supporting information. Requests shall also be accompanied by a letter of transmittal which summarizes the agreement's contents, and expressly requests Commission approval pursuant to section 15. The true copy shall be signed by each of the proponents personally or by an authorized representative, and shall show immediately below each signature the name, position, and authority of the signer. Requests for

[2] Only those portions of section 522.2 which were the subject of the Commission's rulemaking proceeding in Docket No. 76-63 are included here. The definitions of various types of agreements contained in subparagraphs (a)(1) through (a)(7) of existing section 522.2 were not part of the rulemaking and, while not republished here, remain unchanged.

approval which do not meet the requirements of this section shall be rejected within 30 days of receipt.

5. Section 522.4 is revised to read as follows:

§ 522.4 *Modifications*

(a) A request for approval of an agreement modification shall be filed in accordance with the provisions of section 522.3 and shall identify the page and paragraph to be amended and restate each such paragraph. The language to be excised should be struck through, but not obliterated, and the substituted language, if any, should be inserted directly following that which is to be excised. The new language should be underscored. If the modification does not completely replace approved provisions, the page or pages on which the proposed amendments will appear should be restated with the proposed amendments underscored and placed in proper sequence on the page.

(b) Whenever an approved agreement shall have been modified three times in the manner stated in paragraph (a), the next succeeding modification shall be accomplished by restating the entire agreement, incorporating all previous modifications, and showing the latest change in the manner required by paragraph (a).

6. Section 522.5 is revised to read as follows:

§ 522.5 *Supporting statements*

Agreements submitted for approval may be accompanied by a supporting statement, signed by an authorized representative of the proponents, indicating the reasons which caused the making of the agreement and the results intended to flow from its implementation, or other facts or arguments which support approval. Affidavits or other evidence may be attached to such statements. Supporting statements are public records. No claims of confidentiality will be allowed.

7. Section 522.6 is deleted and new section 522.6 is added as follows:

§ 522.6 *Federal Register Notice*

Requests for approval which are not rejected pursuant to section 522.3 shall be noticed in the *Federal Register*. The notice shall include:

(a) a short title for the agreement;

(b) the identity of the proponents;

(c) the Federal Maritime Commission agreement number;

(d) a concise summary of the agreement's contents;

(e) a statement that the agreement and any supporting statement are available for inspection at the Commission's offices;

(f) the final date for filing protests or comments regarding the agreement; and

(g) the name and address of the filing agent.

8. Section 522.7 is deleted and new section 522.7 is added as follows:

§ 522.7 *Comments and protests*

(a) A comment is a written statement regarding the approvability of an agreement. Comments have no prescribed form or content and are not limited in any way, except by the time limits provided in the *Federal Register* notice. A written communication regarding the approvability of an agreement, not conforming to the requirements of paragraph (b) of this section, shall be considered a comment. Filing a comment shall not necessarily entitle a person to: (1) any discussion of the comment in a Commission order disposing of the agreement; (2) the institution of any further Commission proceeding; or (3) participation in any further proceeding which may be instituted.

(b) A protest is a written opposition to the approval of an agreement which complies with the requirements of this paragraph. A protest also constitutes an undertaking by the protestant to actively participate as a party in any further proceeding concerning the agreement, and protestants shall be so named in any Commission hearing order which may be issued. Protests shall:

(1) identify, with particularity, the reasons why the agreement, or any constituent part, should be disapproved;

(2) address the accuracy of any statements and conclusions submitted by the proponents pursuant to section 522.5 of this part;

(3) allege facts which support the arguments made in subparagraphs (1) and (2) of this paragraph; and

(4) specify the source or derivation of the facts alleged pursuant to subparagraph (3).

(c) A copy of all comments and protests filed with the Commission shall be served upon the filing agent identified in section 522.6(g) on the same date they are filed with the Commission. A certificate of service attesting that this requirement has been met shall be attached to the comment or protest.

(d) Within 15 days from the date that comments or protests are due (as specified by the *Federal Register* notice or as subsequently extended by the Commission), the proponents or their authorized representative may file a response to each such comment or protest with service to all persons which have filed comments or protests.

(e) Except as provided in this section and section 522.5, or unless specifically requested in writing by the Commission, with copies to the proponents and persons which have filed protests or comments, no other written or oral communication concerning a pending agreement shall be permitted. Amendments or supplements to documents submitted pursuant to section 522.5 and this section shall be permitted in the discretion of the Commission upon a showing of good cause; *provided that*, in no case shall such permission be granted where the agreement has been scheduled and noticed for an agency meeting pursuant to 46 C.F.R. 503.82. A change in material fact or in applicable law occurring

after the submission of the initial statement, comment or protest will normally constitute good cause. Inquiries as to the status of agreements shall be made to the Secretary of the Federal Maritime Commission.

9. Section 522.8 is deleted and new section 522.8 is added as follows:

§ 522.8 *Disposition of agreement approval requests*

(a) The Commission shall, by conditional or unconditional orders, approve, disapprove or institute further proceedings regarding agreements filed with it.

(b) Further proceedings regarding an agreement will be instituted when:

(1) the Commission, in its discretion, considers further inquiry advisable;

(2) a protest alleges material facts which, if true and reasonably subject to proof on the basis of their source and derivation, and arguments advanced, would preclude approval of the agreement; *provided, however,* that no further proceeding will be instituted if the disputed factual issues are resolved by the proponents' acceptance of conditions imposed by a conditional order in accordance with paragraph (c) of this section;

(3) the proponents of an agreement which seemingly contravenes the standards of section 15 properly exercise their right to request a further hearing pursuant to paragraph (d)(2) of this section.

(c) The Commission may issue a conditional order prescribing modifications in the agreement necessary to obtain approval when the agreement: (1) does or appears to contravene the standards of section 15; and (2) if so modified, would be approvable without further proceedings. If conditions imposed by the Commission are met within the time specified by a conditional order, the revised version will stand approved from the date of receipt. Notice of such date shall be given to proponents or their representative by the Commission.

(d) Failure to meet conditions imposed by the Commission will result in either: (1) the automatic disapproval of the agreement; or (2) the institution of further proceedings by the Commission on its own initiative or, where the conditional order found that the agreement was unapprovable, pursuant to a request from proponents. Any such request shall include a detailed recital of the facts that they intend to prove at that hearing, a description of evidence intended to be used to prove those facts, and an explanation as to why the facts sought to be proven support the approval of the agreement. If a finding of unapprovability was made, the conditional order will expressly state the date upon which disapproval would take place.

(e) It is unlawful to carry out the provisions of a conditionally approved or disapproved agreement prior to approval by the Commission in this section.

By the Commission.

(S) JOSEPH C. POLKING
Assistant Secretary

APPENDIX A

I. Conferences

A. Conference Group A

Agreement No. 10140; Australia - Eastern USA Shipping Conference; Continental North Atlantic Westbound Freight Conference; Continental/US Gulf Freight Association; The "8900" Lines; Greece/United States Atlantic Rate Agreement; Gulf-European Freight Association; Gulf-United Kingdom Conference; Iberian/US North Atlantic Westbound Freight Conference; Marseilles/North Atlantic USA Freight Conference; North Atlantic Baltic Freight Conference; North Atlantic Continental Freight Conference; North Atlantic French Atlantic Freight Conference; North Atlantic Mediterranean Freight Conference; North Atlantic United Kingdom Freight Conference; North Atlantic Westbound Freight Association; Scandinavia Baltic/US North Atlantic Westbound Freight Conference; South Atlantic - North Europe Rate Agreement; UK/USA Gulf Westbound Rate Agreement; US Atlantic and Gulf/Australia - New Zealand Conference; US North Atlantic Spain Rate Agreement; US/South Atlantic/Spanish, Portuguese, Moroccan, and Mediterranean Rate Agreement; The West Coast of Italy, Sicilian, and Adriatic Ports North Atlantic Range Conference.

B. Conference Group B

Associated Latin American Freight Conference; Atlantic & Gulf/Panama Canal Zone & Panama City Conference; Atlantic and Gulf/West Coast of Central America and Mexico Conference; Atlantic and Gulf/West Coast of South America Conference; East Coast Colombia Conference; Leeward and Windward Islands and Guianas Conference; United States Atlantic and Gulf-Haiti Conference; United States Atlantic and Gulf-Jamaica Conference; United States Atlantic and Gulf-Santo Domingo Conference; US Atlantic and Gulf-Venezuela and Netherlands Antilles Conference; and West Coast South America Northbound Conference.

C. Conference Group C

Inter-American Freight Conference; The Far East Conference; The Atlantic and Gulf/Indonesia Conference; and the Atlantic and Gulf/Singapore, Malaya, and Thailand Conference.

D. Conference Group D

Japan/Korea-Atlantic and Gulf Freight Conference; Japan-Puerto Rico and Virgin Islands Freight Conference; New York Freight Bureau; Philippines North America Conference; Straits/New York Conference; TransPacific Freight Confer-

ence (Hong Kong); TransPacific Freight Conference of Japan/Korea; Agreement No. 10107; Agreement No. 10108; and their member lines.

E. Conference Group E

Latin America/Pacific Coast Steamship Conference; North Europe-US Pacific Coast Freight Conference; Pacific Coast - Australasian Tariff Bureau; Pacific Coast European Conference; Pacific Coast River Plate Brazil Conference.

F. Conference Group F

Pacific Westbound Conference; Pacific-Straits Conference; Pacific Indonesia Conference.

II. Carriers

A. Seatrain International, S.A.

Seatrain Pacific Services, S.A.

B. Moore-McCormack Lines, Inc.

C. Sea-Land Service, Inc.

III. Shipowners Associations - CENSA

European and Japanese National Shipowners Association, Council of - (CENSA) - National Shipowners' Associations of Belgium, Denmark, Finland, France, the Federal Republic of Germany, Greece, Italy, Japan, the Netherlands, Norway, Sweden, and the United Kingdom, plus individual liner operators/container consortia from most of these countries.

IV. Port Authorities

A. California Association of Port Authorities

Northwest Marine Terminal Association, Inc.

California Association of Port Authorities (Port of Long Beach, Port of Los Angeles, Port of Oakland, Oxnard Harbor District, Port of Hueneme, Port of Redwood City, Port of Richmond, Port of Sacramento, Port of San Diego, Port of San Francisco, Port of Stockton) and the Northwest Marine Terminal Association (Port of Anacortes, Port of Astoria, Port of Bellingham, Port of Everett, Port of Grays Harbor, Port of Longview, Port of Olympia, Port of Port Angeles, Port of Portland, Port of Seattle, Port of Tacoma, Port of Vancouver, SeaTerm Services, Inc.)

B. Port of Houston Authority

C. Maryland Port Administration

D. Port of New Orleans

E. Port Authority of New York and New Jersey

F. Virginia Port Authority

V. Shippers - Outboard Marine Corporation

VI. U.S. Government - Department of Justice

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-12
AGREEMENT NO. 7680-39

NOTICE

October 20, 1982

Notice is given that no appeal has been taken to the September 15, 1982 Order of Discontinuance in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-12
AGREEMENT NO. 7680-39

DISCONTINUANCE OF PROCEEDING

Finalized October 20, 1982

The proponents of the subject agreement move "that the Commission's Order of Investigation served February 23, 1982 be terminated and that this proceeding be dismissed." This proceeding concerns an amendment to a basic conference agreement, which amendment would grant intermodal rate-making authority to the American West African Freight Conference.

In reply to the motion, Hearing Counsel state that the investigation should be terminated and the proceeding discontinued.

By letter dated September 10, 1982, addressed to the Commission's Secretary, the American West African Freight Conference has withdrawn the subject agreement.

Good cause appearing, the subject proceeding hereby is discontinued.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-19
COCOON HOLLAND, B.V.

v.

HAPAG-LLOYD AKTIENGESELLSCHAFT

NOTICE

October 26, 1982

Notice is given that no appeal has been taken to the September 21, 1982 Order of Discontinuance in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the order has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-19
COCOON HOLLAND, B.V.

v.

HAPAG-LLOYD AKTIENGESELLSCHAFT

Leon Dembo of Jubanyik, Varbalow, Tedesco & Shaw for the Complainant.
Dorothy Nichols of Billig, Sher & Jones for the Respondent.

APPROVAL BY WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE, OF AGREEMENT OF SETTLEMENT

Finalized October 26, 1982

The complaint in this proceeding was served March 22, 1982; subsequently permission was granted to amend the complaint. The amended complaint was served June 4, 1982.

The parties entered into the following Agreement of Settlement:

AGREEMENT OF SETTLEMENT

WHEREAS, complainant, Cocoon Holland, B.V. ("CH"), has filed an Amended Complaint alleging that respondent, Hapag-Lloyd, AG ("H-L"), overcharged it on several shipments of coating solution, shipped under Bills of Lading Nos. 19615117, 19637110, 19649192; and

WHEREAS, CH has fully investigated its claims and after investigation has concluded that it is in its interest to settle this matter in order to avoid the expense and interruptions to its business which continued litigation would cause and that the settlement as hereinafter set forth is a fair and reasonable compromise of the dispute between the parties; and

WHEREAS, H-L, without admitting liability or conceding any defenses, has nevertheless agreed to enter into this Agreement of Settlement ("Agreement") to avoid further expense, inconvenience and distraction of burdensome and protracted litigation;

NOW, THEREFORE, it is agreed by and between the undersigned parties that the claims of CH as embodied in the Amended Complaint in Docket No. 82-19 should be fully settled and compromised as hereinafter expressly set forth, upon approval by the Federal Maritime Commission ("FMC"):

1. H-L shall pay to CH the sum of $19,500 in full and complete settlement of CH's claims asserted in the Amended Complaint in Docket No. 82-19. Payment shall be made within ten days after date of service of the FMC's notice rendering approval of this Agreement administratively final.

2. Upon approval of this Agreement by the Administrative Law Judge, a final order and judgment shall be entered providing that all claims of CH against H-L arising under sections 22 and 18(b)(3) of the Shipping Act, 1916, as amended (46 U.S.C. §§ 821, 817(b)(3)), which have been now or could have been asserted in the Amended Complaint shall be dismissed with prejudice.

3. In consideration of said payment as provided in paragraph 1 above, CH hereby releases H-L from all claims arising under sections 22 and 18(b)(3) of the Shipping Act, 1916, as amended (46 U.S.C. §§ 821, 817(b)(3)), which have been now or could have been asserted in the Amended Complaint. CH shall, in addition, refrain from pursuing its claims in this or any future proceedings.

4. In the event that the FMC fails to approve this Agreement or any material part thereof, this Agreement shall become null and void unless the parties hereto promptly agree to proceed with the Agreement as and if modified by the FMC.

5. The provisions of this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

6. This Agreement shall become effective upon its execution by undersigned counsel for the respective parties.

On behalf of complainant, Cocoon Holland, B.V.

Dated: Aug. 26, 1982

(S) LEON D. DEMBO
JUBANYIK, VARBALOW, TEDESCO & SHAW
900 HADDON AVENUE
COLLINGSWOOD, N.J. 08108
Attorney for Cocoon-Holland, B.V.

On behalf of respondent, Hapag-Lloyd, AG

Dated: Aug. 31, 1982

(S) DOROTHY L. NICHOLS
BILLIG, SHER & JONES, P.C.
2033 K STREET, N.W.
WASHINGTON, D.C. 20006
Attorney for Hapag-Lloyd, AG

The parties filed on September 16, 1982, the following Joint Affidavit in Support of the Agreement of Settlement:

JOINT AFFIDAVIT IN SUPPORT OF THE AGREEMENT OF SETTLEMENT

We, the undersigned, on behalf of complainant Cocoon Holland, B.V. ("CH") and respondent Hapag-Lloyd, AG ("H-L"), and being each first severally sworn, depose and say for and on behalf of our respective parties:

1. The claims involved in Docket No. 82-19 arise under Sections 22 and 18(b)(3) of the Shipping Act, 1916, as amended (46 U.S.C. § 821, § 817), and present a genuine dispute, the facts critical to the resolution of which are not readily ascertainable.

2. The parties to Docket No. 82-19 have entered into the accompanying Agreement of Settlement ("Agreement") which, upon approval by the Federal Maritime Commission ("FMC") will conclusively resolve their dispute.

3. The accompanying Agreement was entered into after full and thorough investigation and consideration of all the material circumstances involved herein including, among other things, the estimated cost of further litigating the issues herein, the inconvenience and distraction of continued litigation, the possibility for each party of an unfavorable decision on the merits after continued litigation, and the desirability of maintaining amicable relations between the parties.

4. The accompanying Agreement is a fair and reasonable commercial settlement of the dispute in this case which will avoid the need for further extensive, costly, burdensome and economically unjustified litigation.

5. The accompanying Agreement is a *bona fide* attempt by the parties to terminate this controversy in a commercially reasonable manner, and is not a device to obtain transportation at other than the lawfully applicable rates and charges or otherwise circumvent the requirements of the Shipping Act, 1916, the Intercoastal Shipping Act, 1933, or any other applicable law.

WHEREFORE, for all the foregoing reasons, the parties respectfully request FMC approval of their settlement, and dismissal of the proceeding herein, in accordance with the terms of the accompanying Agreement.

COCOON HOLLAND, B.V.

BY: (S) BOB BOYD
Title: Agent

Subscribed and sworn to before me
this 26th day of August 1982.

(S) Eileen W. Grossmick
Notary Public
My Commission Expires June 11, 1983

HAPAG-LLOYD, AG

BY: (S) VINCENT S. BROOKS
Title: Pricing Manager
UNITED STATES NAVIGATION INC.
AGENTS

Subscribed and sworn to before me
this 10th day of September, 1982.

(S) Norma Frevola
Notary Public
My Commission Expires March 30, 1983

The parties submitted the following Joint Memorandum in Support of the Agreement of Settlement:

JOINT MEMORANDUM IN SUPPORT
OF THE AGREEMENT OF SETTLEMENT

The undersigned, complainant Cocoon Holland, B.V. and respondent Hapag-Lloyd, AG, hereby respectfully submit this memorandum in support of the Agreement of Settlement, attached hereto as Exhibit A. The parties are requesting that the proposed settlement be approved as fair and reasonable and that an appropriate judgment be entered directing the parties

to carry out the terms of the settlement and dismissing the Amended Complaint on the merits in accordance with the provisions of the Agreement of Settlement.

I

BACKGROUND

1. This proceeding arises out of a reparations complaint filed on March 19, 1982 by Cocoon Holland, B.V. pursuant to § 22 and § 18(b)(3) of the 1916 Shipping Act (46 U.S.C. § 821, 817). Essentially, complainant alleged that respondent overcharged it on a shipment of coating solution due to an error it made in classification.

2. On May 11, 1982, Hapag-Lloyd, AG answered the complaint denying the substantive allegations raised by complainant and objecting to handling this proceeding under the shortened procedure.

3. On May 25, 1982, a prehearing conference was held before Judge William Beasley Harris. At this conference, complainant agreed to certain discovery requests made by respondent and was granted permission to amend its original complaint.

4. On June 8, 1982, complainant filed its Amended Complaint, adding two more shipments on which it alleged an overcharge. Under the Amended Complaint, complainant seeks to recover alleged overcharges of $21,054.41. Were complainant to succeed and interest awarded on these claims, recovery could be as much as $27,590.

5. In due course, it became apparent that litigation of the issues would likely be complex and costly, particularly in view of the significant differences between the litigants on various questions of law and fact. Accordingly, in an effort to resolve their differences in a commercially reasonable manner and without the burden, expense and uncertainty of further litigation, the parties have, after arms-length negotiations, reached—and request approval of—the settlement agreement more fully described below and in the accompanying documents.

II

THE SETTLEMENT

6. The main issue in this action involves a determination of the applicable rates for three shipments of coating solution shipped pursuant to Bills of Lading Nos. 1915117, 19637110, 19649192. This involves the proper identification of commodities which were shipped over two years ago, a determination of the proper tariff rates, and proof as to whether the alleged overcharges were paid by Cocoon Holland, B.V. within two

years of the date on which the complaints were filed. Resolution of these questions, if fully litigated, could require each of the parties to produce expert witnesses and incur substantial legal expenses. Moreover, continued litigation of this controversy would undoubtedly inconvenience employees of both parties and distract from their every day corporate duties.

7. There is, accordingly, little likelihood that this action could be resolved by litigation without burdening the parties and incurring substantial expenses. Accordingly, in light of all of the circumstances of this case and the Federal Maritime Commission's (the "Commission") policy of promoting settlements wherever possible, the parties, after several offers and counteroffers, have agreed to a negotiated arms-length settlement of their dispute and request approval thereof.

8. It is well established that both law and Commission policy "encourage settlements and engage in every presumption which favors a finding that they are fair, correct, and valid." *Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 23 F.M.C. 707, 709 (1981); *Old Ben Company v. Sea-Land Service, Inc.*, 21 F.M.C. 505 (1978); *accord* 46 C.F.R. § 502.91, § 502.94 and 5 U.S.C. § 554(c)(1). Settlements are particularly warranted where, as here, the parties are "faced with the uncertainty and expense of further litigation." *Celanese Corp. v. Prudential Steamship Co.*, 23 F.M.C. 1, 5 (1980). Moreover, as demonstrated in various Commission cases, proceedings may now be terminated by mutual settlement for amounts less than those originally sought in the complaint and without admissions of statutory violations. *Del Monte Corp. v. Matson Navigation Company*, 22 F.M.C. 364, 368-369 (1979) citing cases; *Ellenville*, 23 F.M.C. at 711.

9. This is equally true with respect to the settlement of § 18(b)(3) complaints where, as here, certain conditions have been satisfied. As the Commission has held, it would be "unnecessarily restrictive" to bar the settlement of such claims unless and until a statutory violation has been admitted or conclusively established on the record. Rather, such settlements are to be presumed valid, provided the parties thereto: (a) submit a signed agreement to the Commission and apprise the Commission of the reasons for settlement; (b) attest that the settlement is a *bona fide* attempt to terminate the controversy and not a device to circumvent the requirements of law; and (c) show that the complaint on its face presents a genuine dispute, and that the facts critical to the resolution of the dispute are not reasonable ascertainable. *Organic Chemicals v. Atlanttrafik Express Service*, 18 S.R.R. 1536a, 1539-40 (FMC 1979); *Organic Chemicals v. American Export Lines, Inc.*, 19 S.R.R. 240 (Settlement Officer 1979) (administratively final June 4, 1979); *Celanese Corp. v. Prudential Steamship Company, supra*, 23 F.M.C. 1. It is also well established that the

parties to a settlement agreement may decline the award of interest. *Interest in Reparation Proceedings*, 24 F.M.C. 145, 149 (1981) ("Because interest is not part of the freight rate, it is appropriate that its treatment in settlement agreements be left to the parties").[1]

10. In the instant case all these conditions have been fully satisfied and the accompanying Agreement of Settlement should therefore be approved. The Commission has been fully apprised, both herein and in the attached supporting affidavit (*see* Exhibit B), of the various reasons for the parties' desire to settle this case without further expense and litigation. The precise terms of the settlement are contained in the accompanying signed Agreement Of Settlement and the principals have duly attested, in the accompanying sworn affidavit, that the settlement is a *bona fide* attempt to terminate the controversy in a commercially reasonable manner and is not a device to circumvent any requirements of law.[2]

11. Further, as previously discussed, the complaint on its face presents a genuine dispute and the facts critical to its resolution are not reasonably ascertainable without further litigation which, in turn, would entail the wasteful expenditure of additional funds. Accordingly, the parties submit that—in view of the respective merits of the case, the costs of further litigating the issues, and the parties' desire to reach a commercially sound and mutually acceptable compromise—the settlement negotiated by the parties herein is just and reasonable and should be approved.

III

CONCLUSION

WHEREFORE, for all the foregoing reasons, the parties respectfully request that the attached Agreement of Settlement be approved and that this proceeding be dismissed with prejudice.

[1] Here the parties were aware of the potential for recovery under Rule 253 (46 C.F.R. § 502.253) of the Commission's Rules of Practice and Procedure and took this factor into consideration in their negotiations.

[2] The settlement agreement and supporting affidavit have, moreover, been generally modeled after the form approved in *Organic Chemicals, supra*, 19 S.R.R. 240 and *Celanese, supra*, 23 F.M.C. 1.

RESPECTIVELY SUBMITTED,

(S) LEON D. DEMBO
JUBANYIK, VARBALOW, TEDESCO & SHAW
900 HADDON AVENUE
COLLINGSWOOD, N.J. 08108

Attorney For Complainant
COCOON HOLLAND, B.V.

(S) DOROTHY L. NICHOLS
STANLEY O. SHER
BILLIG, SHER & JONES, P.C.
2033 K STREET, N.W.
WASHINGTON, D.C. 20006

Attorneys For Respondent
HAPAG-LLOYD, AG

DISCUSSION

The Presiding Administrative Law Judge has been advised by counsel for the parties of the Agreement of Settlement, setting forth the terms and conditions upon which the parties propose to settle the claims pending in this proceeding. Upon review of the Joint Affidavit In Support Of Settlement Agreement, explaining the parties' reasons for the settlement, and the cases and argument set forth in the Joint Memorandum In Support Of The Agreement Of Settlement, the Presiding Administrative Law Judge is satisfied that the settlement is fair and reasonable, and should be approved.

Therefore, it is ORDERED, subject to review by the Commission as provided in the Commission's Rules of Practice and Procedure, that:

1. The Agreement of Settlement, as proposed by the parties, is approved.

2. The claims asserted in The Amended Complaint are dismissed with prejudice, and Hapag-Lloyd, AG is discharged from all liability to Cocoon Holland, B.V. in respect to any claims arising under sections 22 and 18(b)(3) of the Shipping Act, 1916, as amended (46 U.S.C. §§ 821, 817(b)(3)), which have been now or could have been asserted in the Amended Complaint.

3. Hapag-Lloyd, AG shall pay $19,500 to Cocoon Holland, B.V. in accordance with the terms of the Agreement of Settlement and notify the Commission of how and when this was done.

4. The provisions of this Order and Judgment shall inure to the benefit of and be binding upon each of the parties in this proceeding and each of their respective successors and assigns.

5. This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

(46 C.F.R. PARTS 521 & 522; DOCKET NO. 76-63)
FILING OF AGREEMENTS BY COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT, 1916
GENERAL ORDER 17; AMENDMENT 3
GENERAL ORDER 24; AMENDMENT 2

October 28, 1982

ACTION: Supplement to Final Rules

SUMMARY: This supplements final rules in this proceeding by adding matters unintentionally omitted from previous publication.

DATES: Effective January 1, 1983, pending OMB review of revision to reporting requirements.

SUPPLEMENTARY INFORMATION:

The Commission published its final rules in this proceeding on October 18, 1982 (47 F.R. 46284) revising procedures for filing and processing of agreements under section 15 of the Shipping Act, 1916. The following matters were unintentionally not included in that final rule.

Section 522.1 *Purpose,* of Title 46 C.F.R. was revised in its entirety. However certain material recently adopted by the Commission (December 28, 1981; 46 F.R. 62652) was inadvertently omitted from the revision of this section. This supplement corrects that omission.

Section 522.6 *Federal Register Notice,* of Title 46 C.F.R. contains new provisions regarding notice and comment on section 15 agreements and is largely duplicative of existing provisions in 46 C.F.R. 521.10. § 521.10 was intended to be deleted and that deletion is accomplished by this supplement.

Finally, the final rule failed to give notice that OMB approval of reporting requirements is pending. That notice is included immediately below.

OMB CONTROL NUMBER: Approval by OMB is pending. In accordance with the Paperwork Reduction Act of 1980 (P.L. 96-511), the revisions to the reporting requirements that are included in this regulation have been or will be submitted to the Office of Management and Budget. They are not effective until OMB action has been completed. A *Federal Register* notice will be published when the revision has been approved by OMB.

Accordingly, pursuant to 5 U.S.C. 553 and sections 15, 21, 22 and 43 of the Shipping Act, 1916 (46 U.S.C. 814, 820, 821 and 841a) the

Commission's final rule in this proceeding is supplemented to amend Title 46 C.F.R. in the following respects:

1. The title of Part 521 is revised to read "TIME FOR FILING CERTAIN AGREEMENTS."

2. *Section 521.10 Notice of filing of agreements and modifications under section 15 of the Act and application under section 14(b) of the Act* is removed.

3. Section 522.1 is revised to read as follows:

§ 522.1 *Purpose*

(a) This part establishes procedures for: (1) filing agreement approval requests pursuant to section 15, Shipping Act, 1916 (46 U.S.C. § 814), including statements in support thereof; (2) filing comments and protests to such agreements, and responsive pleadings thereto; and (3) the disposition of agreement approval requests. The purpose of this part is to ensure the fair, orderly and expeditious processing of agreement approval requests.

(b) Adherence with the statute and rules of the Commission is mandatory, and persons operating under agreements without prior Commission approval may be liable to penalties and damages for violations of the anti-trust laws of the United States and may be subject to civil penalties of up to $1,000 for each day of such default (46 U.S.C. 814) and/or disapproval of agreements.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-24
AGREEMENT NO. 9925-3

ORDER OF CONDITIONAL APPROVAL

November 2, 1982

This proceeding was initiated to investigate several issues which had been raised by Agreement No. 9925-3, a proposed extension of the Pacific America Container Express (PACE) cooperative working arrangement [1] which had been filed for approval pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. § 814). During the course of this proceeding the parties - Proponents, Protestant Farrell Lines, Inc., Intervenor Trader Navigation Co., Ltd., and the Commission's Bureau of Hearings and Field Operations - reached a settlement concerning the issues raised by the Order and consequently submitted a proposed Order of Conditional Approval to Administrative Law Judge Norman D. Kline.

In an Initial Decision served September 16, 1982, the Presiding Officer concluded that the proffered settlement should be accepted and approval granted upon receipt of an amended Agreement containing the conditions set forth in a "Proposed Second Order of Conditional Approval" which was attached as an appendix to the Initial Decision.

Proponents filed "Exceptions" to the Initial Decision pointing out that the proposed Order attached to the Initial Decision was never actually *issued* by the Presiding Officer and contending that the Commission should therefore issue an Order of Conditional Approval in the form proposed so that the settlement which was accepted by the Presiding Officer could be effectuated. Farrell concurred, but requested that any order issued by the Commission be served no later than October 16, 1982.

The Commission has reviewed Proponents' Motion for Order of Dismissal, Clarification and Order of Conditional Approval, the Replies thereto, the Initial Decision of the Presiding Officer, the Exceptions thereto and Replies to Exceptions, and concludes that Agreement No. 9925-3 should be approved subject to the conditions set forth in the Presiding Officer's proposed second order of conditional approval.

[1] Proponents of Agreement No. 9925-3 are Associated Container Transportation (Australia) Ltd., a Commission-approved joint containership service among Blue Star Line, Ltd., Port Line, Ltd., and Ellerman Lines, Ltd. (Agreement No. 9767) and the Australian Shipping Commission, trading as Australian National Line (ANL).

THEREFORE, IT IS ORDERED, That Agreement No. 9925-3 is approved pursuant to section 15 of the Shipping Act, 1916, on the condition that the Commission receives within 60 days of the date of the letter transmitting this Order a complete and accurate copy of amended Agreement No. 9925, signed by both parties thereto, modified as follows:

I. Article 1 be amended to read:

> 1. When participating in any conference or rate agreement in connection with their services under this Agreement, the parties shall do so jointly as a single member for all purposes, including without limitation voting and the apportionment of expenses under such conference or agreement.

II. Article 4 be amended to read:

> 4. The parties may operate both containerized and conventional vessels under this Agreement, provided that no more than six such vessels may be operated at any one time and no more than 19,000 loaded TEUs may be carried northbound or southbound under this Agreement during any calendar year. For purposes of this Article, one loaded TEU of breakbulk cargo shall be deemed to consist of 16 weight tons (of 2,240 lbs.) in the case of reefer cargo and 10 such weight tons in the case of all other breakbulk cargo.

III. Article 5 be amended to read:

> 5. The parties shall provide equipment such as containers and related equipment by such means and in such proportions as they may determine.

IV. Article 13 be either deleted or amended to substitute the phrase "different vessels" for "additional vessels."

V. The last sentence of Article 14 be amended to read:

> The parties shall also submit to the Commission a semi-annual report setting forth the name, refrigerated cargo capacity, general cargo capacity, and ownership of each vessel employed under this Agreement, and the carryings under this Agreement per voyage (northbound and southbound, separately) of each such vessel in loaded TEUs [2] and revenue tons for both refrigerated and general cargo. Reports shall be submitted to the Commission within 45 days following the end of each semi-annual reporting period.

VI. Articles 8 and 9 be amended to read:

> 8. ACTA, through its agents, shall be responsible for the collection of all revenues. The respective parties shall be re-

[2] The Commission assumes that this will include breakbulk cargo converted to loaded TEUs in the manner set forth in Article 4 of the Agreement.

sponsible for the operation and provision of their own vessel or vessels.

9. Revenues and all other expenses, such as cargo and container handling costs, agency commissions and administrative expenses, shall be shared between the parties on such basis as they shall determine (the parties hereby agreeing promptly to notify the Commission of such basis and any changes therein). On an annual basis, ACTA, through its agents, shall settle accounts and shall distribute to the parties their respective shares of such revenues after deduction of all such expenses (or, in the event of a loss, shall collect from the parties their respective shares of the excess of such expenses over revenues). Pending final accounting advances of such shares of revenues less expenses shall be made periodically during the year.

VII. Article 21 be amended to read:

21. This Agreement shall be governed by and construed in all respects in accordance with the law of England and the United States statutes administered by the Federal Maritime Commission.

VIII. Article 22 be amended to change "March 31, 1991" to "October 30, 1985.";

IT IS FURTHER ORDERED, That, within 10 days after the date of this Order, the parties to Agreement No. 9925-3 shall apply to each of Agreements Nos. 6200 and 10268 for merger of their separate membership into a single membership, provided that such merger shall not require the payment of a new admission fee, and shall submit evidence of such applications to the Commission;

IT IS FURTHER ORDERED, That, if any information (including reports) submitted to the Commission under Agreement No. 9925-3 and marked "confidential—submitted under Agreement No. 9925-3 and subject to the Federal Maritime Commission's final order in Docket No. 82-24," shall be requested under the Freedom of Information Act, the Commission shall, at least 10 days prior to the release of any such information, give notice to the submitter, identifying the information to be released and the name and address of the requester; and

IT IS FURTHER ORDERED, That the approval contained herein shall be effective on the date upon which the Commission receives a copy of Agreement No. 9925 which meets the above conditions, at which time this proceeding will stand discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-43
INDEPENDENT FREIGHT FORWARDER LICENSE NO. 1483
TOKYO EXPRESS CO., INC. AND KOZO AND KATHLEEN KIMURA
D/B/A COSMOS TRADING COMPANY

ORDER OF DISCONTINUANCE

November 8, 1982

The Commission's Order Adopting Initial Decision in this proceeding served September 17, 1982 approved the Settlement Agreement proffered by the parties on the condition that the amount of penalty be increased from $15,000 to $20,000 by the addition of two installments of $2,500 and that an executed copy of the modified Settlement Agreement and promissory note be submitted within 45 days. Upon receipt of such submission this proceeding would be discontinued.

The parties now have submitted the modified Settlement Agreement and promissory note to comply with the earlier order. Accordingly, proceedings in this matter are discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-39
AGREEMENT NOS. 10333, 10333-1 AND 10333-2
CALCUTTA/BANGLADESH/USA POOL AGREEMENT

NOTICE

November 12, 1982

Notice is given that no appeal has been taken to the October 7, 1982 Order of Discontinuance in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, that order has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-39
AGREEMENT NOS. 10333, 10333-1 AND 10333-2
CALCUTTA/BANGLADESH/U.S.A. POOL AGREEMENT

INVESTIGATION DISCONTINUED WITH PREJUDICE AGAINST A RENEWAL OF INFORMAL OR FORMAL PROCEEDINGS CONCERNING THE QUESTION OF PRE-APPROVAL IMPLEMENTATION OF AGREEMENT NO. 10333-2

Finalized November 12, 1982

Proponents seek dismissal of this proceeding with prejudice against renewal by way of an informal staff investigation into allegations of pre-approval implementation of Agreement No. 10333-2.[1] Reversing their initial opposition to this "with prejudice" feature of Proponents' motion for dismissal, Hearing Counsel now joins in support of the motion.

In my judgment, the motion to terminate the proceeding with prejudice should be granted.

PROCEDURAL BACKGROUND

The proceeding was initiated by Order of Investigation and Hearing (Order), served June 17, 1981, to determine the approvability of Agreement No. 10333-2 (Amendment No. 2) and the continued approvability of Agreement Nos. 10333 (Agreement) and 10333-1 (Amendment No. 1)[2] under section 15 of the Shipping Act, 1916, 46 U.S.C. 814. With respect to the general issues of approvability, the Order directed the parties to address eleven particular questions which were specified by number. Only one of those questions—No. 11—is presently relevant. It asks, "Have the terms of Agreement No. 10333-2 been implemented in any way prior to approval of that Agreement by the Commission?"[3]

[1] As used by Hearing Counsel, the term "informal staff investigation" subsumes informal or formal civil penalty proceedings. See, e.g., transcript (Tr.) of prehearing conference, held April 13, 1982, at Tr. 31-32.

[2] Hereafter, the Agreement and Amendment No. 1 will sometimes be referred to, together, as the Amended Agreement.

[3] Hearing Counsel posited that Questions No. 9 and No. 10 might be linked, subordinately, to Question No. 11. Question No. 9 reads, "Has Waterman been prevented by its membership in Agreement No. 10333 from offering service to shippers who have otherwise been unable to obtain adequate service?" Question No. 10 reads, "has Waterman been limited to carriage of a specific amount of cargo prior to the approval of individual carrier shares by the Commission?"

The Order named Bangladesh Shipping Corporation (B.S.C.), Cunard-Brocklebank, Ltd. (Cunard), Farrell Lines, Inc. (Farrell), Hellenic Lines, Ltd. (Hellenic), Scindia Steam Navigation Co., Ltd. (Scindia), Shipping Corporation of India Limited (S.C.I.), and Waterman Isthmian Line, Division of Waterman Steamship Corporation (Waterman) as Proponents in the proceeding. The Bureau of Investigation and Enforcement (Hearing Counsel) was named a party to the proceeding. Inasmuch as the Order did not contemplate an assessment proceeding [4] under section 32(e) of the Shipping Act, 1916, 46 U.S.C. 831(e), none of the Proponents was named a respondent.

The Agreement and Amendment No. 1 were approved January 30, 1980. The Amended Agreement established a framework for a cargo revenue pool in the inbound trade from Calcutta,[5] India, and from ports in Bangladesh to ports on the Atlantic and Gulf Coasts of the United States. However, the Amended Agreement did not assign individual revenue shares to members of the pool. Had it been approved, Amendment No. 2 would have established such shares for active members of the pool and would have reserved such shares for Hellenic and Cunard, who are signatories to the Agreement but not to either Amendment.

In November 1981, Proponents moved for termination, stay or modification of the Order. Administrative Law Judge Paul J. Fitzpatrick, to whom the case was then assigned, certified the motion to the Commission for decision. The motion was premised upon changed circumstances, including Farrell's resignation from the Agreement and from the conference in the trade,[6] Proponents' withdrawal of Amendment No. 2 from consideration for approval, and Proponents' representation that negotiations were in progress which might result in a new agreement to supersede the Amended Agreement.

Hearing Counsel opposed that motion, noting, among other things, that the investigation concerned present operating conditions under the still effective Amended Agreement and pre-approval implementation of Amendment No. 2.

By Order On Motion To Terminate And Stay (Second Order), served February 25, 1982, the Commission denied Proponents' motion to terminate, basing its decision on essentially the same grounds relied upon by Hearing Counsel in opposing the motion. However, the Commission did grant a limited stay of the proceeding [7] to allow Proponents time to complete their negotiations and file a proposed superseding agreement. In this connection, the Second Order contained the

[4] An assessment proceeding is a formal civil penalty proceeding. Cf. n. 1, *supra.*
[5] Under Article 2 of the Agreement, Calcutta is defined to include the port of Haldia.
[6] Agreement No. 8650, Calcutta, East Coast of India and Bangladesh/ USA Conference.
[7] The stay was for a period of 30 days from the date of service of the Second Order.

suggestion that Proponents should consider canceling the Amended Agreement, because it simply could not be operated effectively without individual revenue shares, without prejudice to the filing of the superseding agreement.[8]

When the stay expired without the filing of a superseding agreement, I noticed a prehearing conference for April 13, 1982.

On April 7, 1982, Proponents notified the Secretary of the Commission that the Amended Agreement had been terminated and, on April 9, 1982, they filed a new motion to dismiss the proceeding, without prejudice to the filing of a superseding agreement, as the Commission's Second Order had suggested, although not within the exact time frame contemplated by the Commission.

At the prehearing conference, Hearing Counsel tendered their reply to Proponents' motion in which they advised that they "support Proponents' motion and urge [me] to discontinue the proceeding."

But Hearing Counsel added another condition to their support of the motion. Hearing Counsel wished to continue to pursue their inquiry into pre-approval implementation of Amendment No. 2 after discontinuance of the proceeding. Thus, they urged that the dismissal be without prejudice to an informal staff investigation and appropriate action.[9]

I was not favorably disposed to do what Hearing Counsel proposed. It seemed to me that Hearing Counsel should have opposed the motion to dismiss if they had a prima facie case of pre-approval implementation or if they had reason to believe that a prima facie case could be made following prehearing discovery. On the other hand, if Hearing Counsel did not believe it could make out a prima facie case at a hearing, they should not have sought the condition they wanted imposed.

In general, I was concerned about the obvious due process and vexatious prosecution problems stemming from Hearing Counsel's pro-

[8] The Second Order dismissed Hellenic and Cunard from the proceeding. Farrell was not dismissed on Hearing Counsel's representation that Farrell might have been involved in pre-approval implementation.

[9] Hearing Counsel's reply contained the following remarks:

> In that the withdrawal of Agreement No. 10333 and 10333-1 has effectively eliminated the subject matter of the instant proceeding, Hearing Counsel agree with Proponents that no valid regulatory purpose would be served by continuing this investigation. Although the issue of Proponents' possible preapproval implementation of Agreement No. 10333-2 survives the cancellation of the basic pool agreement, it is Hearing Counsel's belief that this matter can be adequately addressed through informal investigation.* Use of informal methods would make possible a more efficient utilization of Commission resources while maintaining maximum flexibility in the pursuit of this issue.

* Upon dismissal of the present investigation, the question of Proponents' possible preapproval implementation of Agreement No. 10333-2 will be referred to the appropriate staff office for further inquiry and appropriate action.

posal. In particular, I was concerned about dismissing an issue specified by the Commission upon the casual showing made by Hearing Counsel [10] because the Commission stressed the importance of the issue in denying Proponents' earlier motion to terminate this proceeding and because of the implied suggestion that the serious issue of a possible violation of section 15 of the Shipping Act was merely an "add on" and not intrinsically worthy of survival in a formal proceeding.[11]

Therefore, I reserved decision on the motion to dismiss and authorized the parties to perfect their positions in subsequent briefs. The briefing schedule called for Hearing Counsel to open by May 13, 1982, and Proponents to reply by June 1, 1982. Hearing Counsel was given the option of filing or not filing an answering brief.

The opening and reply briefs were timely filed, but, because Hearing Counsel did not adequately address the issues which I stressed as being of most concern, I issued a Further Order on Motion to Dismiss [12] in which I directed Hearing Counsel to file an answering brief containing the following numbered items:

> (1) A statement, in the form of an offer of proof, showing all the material Hearing Counsel has at hand and which it would seek to introduce in evidence in order to prove preapproval implementation of Agreement No. 10333-2 (Question Nos. 9, 10 and 11 of the Order of Investigation and Hearihg, served June 17, 1981).
>
> (2) A detailed explanation showing the difference between the informal methods of investigation to be pursued and the methods of investigation Hearing Counsel would use in this formal proceeding. The explanation shall contain a time and cost study showing whether the informal staff investigation would, at this stage of events, be a more efficient allocation of Commission resources, as alleged by Hearing Counsel. [Marginal note omitted.]

In their answering brief of July 16, 1982, Hearing Counsel modified their position. They urged that I defer ruling on Proponents' motion to dismiss with prejudice (a course contained in Proponents' reply brief) for a period of 90 days during which Hearing Counsel would try to develop their case which they outlined in response to item (1) [13] of the Further Order on Motion to Dismiss. Hearing Counsel did not respond

[10] See n. 8, *supra.*

[11] See Tr., *passim*, and Order on Motion to Dismiss, served April 15, 1982.

[12] Served June 15, 1982.

[13] Hearing Counsel attached two sets of exhibits to their answering brief. One set was labeled confidential. Hearing Counsel asked that the confidential set be covered by a protective order. I issued a temporary protective order on August 2, 1982, and later extended the temporary order. In the light of the disposition of this proceeding, the order which follows will direct the Secretary of the Commission to return the confidential exhibit to Hearing Counsel.

to item (2) because they believed that their new approach made that item moot.

Hearing Counsel's response to item (1) served the useful purpose of informing Proponents of the nature and details of the allegations concerning pre-approval implementation. To meet those allegations, Proponents asked for and obtained leave to file a reply brief. On August 19, 1982, Proponents' reply brief was filed, together with exhibits consisting of affidavits of Charles F. Fischer, who was the Chairman of the Amended Agreement. Among other things, the reply brief contained proposed findings of fact, meeting the allegations head-on. Proponents concluded by renewing their request for dismissal with prejudice.

Proponents' reply brief evoked a motion from Hearing Counsel for leave to file a response. Their response was included as part of the motion. For the purpose of the motion, Hearing Counsel does not dispute the proposed findings of fact, based primarily upon Mr. Fischer's affidavits, as a correct statement of what the record would show if evidence had been introduced in the case by Proponents. Based upon that showing, Hearing Counsel now joins with Proponents in support of their motion to dismiss with prejudice.

FACTS [14]

1. The Agreement and Amendment No. 1 were approved by the Commission on January 30, 1980. The Amended Agreement provided for revenue pooling and service rationalization in the trades between the United States and the East Coast of India and Bangladesh. The Pool was divided into Indian and Bangladesh Sections (also called "Calcutta" and "Chittagong" Sections), each with a "General Committee." The General Committees were to be overseen by a New York Governing Committee. Although there were no approved individual carrier pool shares, the Amended Agreement did include "Flag Group" Basic Entitlements for United States, Indian and Bangladesh flag carriers.

2. In the Indian Section the approved Basic Entitlements were 45% for U.S. flag carriers (Waterman and Farrell), 45% for Indian flag lines (Scindia and SCI), and 10% for B.S.C. In the Bangladesh Section, the approved Basic Entitlements were 40% for the U.S. flag group, 40% for Bangladesh Shipping and 20% for the Indian lines.

[14] N.b. The findings of fact are intended solely for the purpose of deciding the motion to dismiss with prejudice. Because so many of them are designed to place the matter of allegations of pre-approval implementation in perspective, they should not be construed as binding by way of *res judicata* or collateral estoppel in any future proceeding, including a proceeding, should there be one, to determine the approvability of a superseding pool agreement. Of course, the foregoing limitation does not apply to the question of pre-approval implementation.

3. The functions of the Pool Committees in implementing rationalization measures are summarized in the Commission's Order of Approval of January 30, 1980, at p. 2:

> The activities of each of the two sections (which are both domiciled in the Bay of Bengal area and are responsible to the New York Governing Committee) are monitored by a General Committee. The primary function of the General Committee is to make continuing assessments of trade conditions in order to determine whether the service offered by the participating lines is adequate, excessive or insufficient for the trade's needs, and to ensure that each line is meeting its obligations arising from its participation in the Pool. In appropriate circumstances, the Committees are authorized to "request" of the individual lines that they adjust their service offerings, schedules and/or itineraries to accommodate the trade or to insure that their cargo liftings approximate their basic entitlements.

It was the intention of the parties that each flag group would provide sufficient space to carry its portion of the Basic Entitlement.

4. This Pool Agreement was formed primarily to preserve the ability of the member carriers to serve this trade, with its difficult service characteristics and low-rated commodities. The trade has lost several carriers in recent years (including, most recently, Cunard and Farrell), and the idea of the pool was to rationalize services so as to reduce costs, maintain rate stability and maintain an optimal level of service for shippers.

5. Among the difficulties in serving the trade which gave rise to the need for rationalization and pooling are the difficult port conditions, climate conditions and business practices of the trade. In the Indian portion of the trade, the primary ports are Calcutta and Haldia. Calcutta is located 126 miles up the Hooghly River and accordingly is subject to silting and draft limitations, while Haldia is about 76 miles up the Hooghly River. Two natural phenomena, monsoons and bore tides, make the ports unusually difficult to serve during the monsoon season. From June until September, congestion invariably occurs. The bore tides are not always a problem but several times a year make loading of cargo extremely difficult and sometimes impossible. The river is serviced by a series of lock gates through which most lighters and vessels must pass from time to time. Substantial sections of the port become non-operative when difficulties occur with the gates. The port areas are heavily labor-intensive and, due to economic and societal circumstances, the introduction of mechanized cargo-handling equipment is kept to a bare minimum. The vessels used in the trade are generally break-bulk or lighter-aboard-ship (LASH) type vessels. The great majority of all cargoes flowing to the port are jute products which are transported mainly from upriver mills in lighters that are brought to ship side in the stream. Loading is, therefore, relatively slow and

laborious. Strikes are frequent occurrences. Although there had been rumors of rebating in the trade prior to implementation of the pool, those rumors appeared to Respondents to subside during the period of the Pool's operations.

6. Major items moving in the trade are jute and jute products, which are relatively low-rated and not highly profitable to transport. Jute products are sold under very ancient contracts between the mills and the exporters and the buyers. Under the contracts there are two kinds of shipments, one being "end-month" and the other "mid-month." Most of the goods move on the end-month vessels which under the terms of the contract must basically qualify for carriage of jute products by arriving in port before the end of the month. The procedure has resulted for many years in the bunching of vessels to pick up end-month cargoes. The consequences of this antiquated contractual machinery have been, therefore, to cause the expenditure of additional time in port. Further difficulties encountered in Calcutta include frequent strikes, slowdowns by supervisory and clerical staff of the Calcutta dock labor board, severe bore tides, power shortages, general strikes, berthing delays, insufficient dock labor, monsoon rains, etc.

7. Port conditions in Bangladesh also are difficult. The principal loading port for jute carpet backing is Chalna, a river anchorage. All of the cargoes delivered to Chalna arrive by barge. Barges are always in short supply and are usually in bad condition. Loading from barges is a much slower process than loading from a shoreside facility. There is also a bar problem at Chalna. The other major Bangladesh port is Chittagong which is a river port but not a lighterage port. There is also a bar condition which restricts the draft of arriving vessels. Berths are scarce. When grain imports are heavy, the port becomes congested to the point where berthing delays are common, and these delays are aggravated by the monsoon season and, in October, delays are further aggravated by cyclones, one of which completely devastated the port several years ago.

8. The Pool Agreement was envisioned as a means by which the parties could achieve economies and improve service, despite the difficult conditions discussed above. The basic notion was that lines would cooperate, under the guidance of Pool Committees for the Bangladesh and Calcutta Sections, in scheduling sailings and port calls and thereby reducing the number of sailings, as well as port time and costs necessary for each sailing. In addition, national flag and individual line entitlement percentages were included so that each line and national group could be assured of maintaining a significant and reasonable portion of the trade revenues. The lines thereby anticipated that their resources would be put to their optimum uses, that port service could be improved through better vessel utilization, that fuel savings would result, that rate pressures would diminish, and that the ability of the

members to serve this trade with its low-rated commodities would be preserved.

9. When the Pool Agreement was approved by the Commission in January of 1980, no individual shares were in effect. Although the lines had not yet agreed to individual pool shares, there was an agreement as to national flag "Basic Entitlements," which were approved by the Commission as part of Amendment No. 1. After approval by the Commission, the lines began, in June of 1980, to implement the pool so as to permit rationalization pursuant to the guidelines approved by the Commission.

10. When the Pool commenced, it developed that only Waterman sailed from both Calcutta and Bangladesh in June of 1980. Waterman lifted the available cargo and thereby carried the entire first month's cargo under the pool. Thus Waterman's carryings were far above the U.S. flag Basic Entitlements. In an effort to implement rationalization and to bring the lines' carryings into closer balance with the Basic Entitlements, Waterman restricted the U.S. discharge port itinerary on their July vessel with the understanding that other carriers would schedule calls for those ports. The Trade in the U.S. reacted with complaints. One problem was that a significant amount of the cargo shipped in June and July of 1980 consisted of goods as to which the letter of credit, issued prior to commencement of the Pool, had committed Waterman as the carrier. Thus, the shippers were not satisfied by vessels of the other pool members.

11. Waterman related the situation to the other pool members suggesting that the Pool be suspended so that the problems could be discussed at the scheduled September owners' meeting. Not all members were agreeable, and Waterman submitted its resignation on August 14, 1980. Waterman advised the Commission of its resignation and stated in a letter of August 27, 1980, that the reason for the resignation was its "forced overcarrier" status. The Commission's Office of Agreements advised the member lines in a letter of September 25, 1980, of their concern that the Pool "had been operating to force [Waterman] to become an overcarrier." At the owners' meeting in London, in September of 1980, the situation was discussed, and Waterman agreed to withdraw its resignation, after satisfying itself that the pool members understood its apprehensions as to its overcarriage and were willing to take necessary steps to improve the operations of the pool, so that Waterman could reduce its overcarriage.

12. Accordingly, Waterman withdrew its resignation on September 24, 1980. Nevertheless, it continued to prove difficult to rationalize service inasmuch as Waterman continued to carry a portion of trade cargo far above the approved United States flag share of 45%, in the Calcutta section of the Pool. Indeed, Waterman's carryings rose from a level of 60% of pool tonnage in August 1980, to 76% at the end of

December 1980. Conversely, the share of the Indian lines in the Calcutta section declined far below their approved 45% joint entitlement, to an aggregate total of only 12% of revenues and tonnages. Letter of credit nominations continued to be a problem, as the Indian carriers reported that their vessels were several times withdrawn because of lack of cargo. A dock labor strike in November and December of 1980 created further loading difficulties.

13. In a further owners' meeting, held on January 27, 1981, in Dacca, Bangladesh, the members discussed the difficulties encountered in balancing carryings with entitlements in the Pool. The Indian Flag carriers expressed grave concern at Waterman's 76% carrying in the Calcutta section. Waterman responded that its overcarrier position was involuntary and a matter of great concern to it as well. The lines therefore agreed, among other things, that the Calcutta General Committee would assist Waterman and the other lines in rationalizing the services offered by the lines by scheduling U.S. discharge ports of call so as to reduce Waterman's percentage of pool carryings to a target of 60% of total revenues and tonnage by May of 1981. This 60% figure was of course far above the approved United States Flag share of 45%, which applied to Farrell as well as Waterman, in the Calcutta Section.

14. At the same meeting there was a discussion concerning the status of B.S.C. as an overcarrier in the Chittagong section. It was agreed that B.S.C. would attempt to stay within the limits of its entitlement in the Chittagong section. Of course, since B.S.C. was the only Bangladesh Flag carrier in the Pool, it was entitled to the entire Bangladesh Flag share of 40% which had Commission approval under Agreement 10333-1.

15. After the January 1981 owners' meeting, efforts were made through the Calcutta Pool Committee to rationalize ports of call in the Eastern United States. The Committee requested Waterman to load cargo only for a limited range of U.S. ports, while other member lines sought to provide appropriate coverage for the trade. Still, problems remained because of shipper nominations, and also, because, due to high interest rates, many shippers anticipated financial benefits from Waterman's faster transit time. The Indian lines were often unable to obtain sufficient cargo amounts and complained of having to withdraw their vessels.

16. In March of 1981, a complaint was received from the Burlap and Jute Association that the service to certain ports, Wilmington, Del., Norfolk and Newport News, Va., and Wilmington, N.C., was inadequate. Other complaints were also received, for the same reasons, including a call from a Commission staff member who stated that a complaint had been received concerning inadequate service to Norfolk. Efforts were made to resolve the complaints, by ensuring that all relevant U.S. discharge ports were adequately covered by the Pool

members. The Chairman of the New York Governing Committee was aware of no cargo which went uncarried because of the rationalization efforts. For the first year of Pool operations, ending May 31, 1981, Waterman's carryings in the Calcutta section did not drop below 60% of pool revenues. Although proposals were made to exclude certain ports from the Pool (so that Waterman could lift cargo to those ports without increasing its overcarriage), the member lines were unable to reach agreement on such proposals.

17. The pool revenues were never liquidated on any basis. Under Articles 5 and 6 of the Amended Agreement, the only sanctions for "deliberate" under or overcarriage would have involved adjustments to Basic Entitlements or denial of carrying allowances, at the time of settlement, upon a determination by the New York Governing Committee that deliberate under or overcarriage had occurred. As no pool settlement ever took place, no sanctions were ever considered for any under or overcarrier. In no case was any member line restricted to the pool share contained in Amendment No. 2 in any respect. The described actions taken by the Pool members were all considered to be consistent with the authority approved by the FMC in its order of approval concerning the Amended Agreement.

DISCUSSION AND CONCLUSION

While it lasted, the Amended Agreement provided a framework for a pool which established basic carrying entitlements for flag groups rather than for individual carrier participants. General Committees, one for each of the two geographic sections into which the Amended Agreement was divided, monitored the activities. These committees were empowered to request that participants undertake certain rationalization functions in order to carry out their responsibilities under the Amended Agreement. In order to meet those obligations, the participants were authorized to "adjust their offerings, schedules and/or itineraries to accommodate the trade or to insure that their cargo liftings approximate their basic entitlements."

The obvious defect in the Amended Agreement was that it was merely a skeleton. As the Commission commented in its Second Order, it could not be operated effectively until it was fleshed out with individual revenue shares. Amendment No. 2 might have remedied that defect had it not been withdrawn and had it been approved.

Hearing Counsel's concern about pre-approval implementation of Amendment No. 2 apparently arose from fragments of information imparted by shippers (consignees at bypassed United States Ports) and by Waterman, itself. Those bits and pieces of complaints and conversations led Hearing Counsel to believe that individual pool shares were being distributed in advance of approval of Amendment No. 2 or that

some forms of impermissible sanctions were being imposed upon Waterman by the pool's committees.

However, it is clear that the measures undertaken by the committees and by Waterman were authorized rationalization procedures under the Amended Agreement. There were no sanctions and there were no settlements of individual revenue shares.

Accordingly, I find that the answer to Question No. 11 is no,[15] there was no pre-approval implementation of Amendment No. 2.

ORDER

The investigation instituted under the terms of the Order of Investigation and Hearing, as modified by the Order On Motion To Terminate And Stay, is discontinued, with prejudice against its renewal, by way of informal or formal investigation, into allegations of pre-approval implementation of Agreement No. 10333-2.

The confidential exhibits attached to Hearing Counsel's answering brief of July 16, 1982, shall remain confidential and shall be returned to Hearing Counsel by the Secretary of the Commission upon this order becoming the final order of the Commission.

(S) SEYMOUR GLANZER
Administrative Law Judge

[15] The answers to the subordinate Questions, Nos. 9 and 10, are also in the negative.

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-37
UNION CARBIDE CORPORATION

v.

DELTA LINES

NOTICE

November 12, 1982

Notice is given that no exceptions have been filed to the October 6, 1982 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, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-37
UNION CARBIDE CORPORATION

v.

DELTA LINES

Respondent carrier found to have overcharged complainant shipper in the amount of $8,801.02 in connection with a shipment consisting of twelve 20-foot containers loaded with insecticides. Respondent is ordered to pay reparation in that amount plus interest as required by the Commission's regulations.

Respondent erred in rating the shipment by failing to include 432 loose cartons when calculating freight charges. Had respondent included these cartons, it would have seen that the shipment satisfied the minimum size requirement published in the tariff and that it should therefore have used actual weight of the shipment, not a higher minimum weight, when beginning its freight calculations.

Peter Nelson for complainant.

Sean G. Burke for respondent.

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

Finalized November 12, 1982

This case began with the filing and service of a complaint on August 17, 1982, in which complainant Union Carbide Corporation alleges that respondent Delta Steamship Lines, Inc., had violated section 18(b)(3) of the Shipping Act, 1916, by overcharging Union Carbide on a shipment of insecticides which Union Carbide had shipped via Delta from Charleston, South Carolina, to Guayaquil, Ecuador, under Delta's bill of lading dated March 30, 1981. Union Carbide alleges that it was overcharged in the amount of $8,801.02 because Delta failed to include certain portions of the shipment consisting of 432 loose cartons when rating the shipment with the result that Delta mistakenly believed that the shipment fell below the minimum size required for the twelve 20-foot containers which held the shipment. Because of that mistaken assumption, Delta allegedly raised the actual weight of the shipment to a required minimum weight of 85 percent of the weight capacity of the containers under the pertinent tariff rule, applied the tariff rate of $161 per 2,000 lbs. to such minimum weight to derive ocean freight, and

[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 C.F.R. 502.227).

similarly applied incidental container usage, bunker surcharge, and port congestion surcharges to the minimum weight rather than actual weight of the shipment, in accordance with other tariff rules. Had Delta correctly included the 432 loose cartons in rating the shipment, complainant alleges that Delta would not have had to raise actual weights to 85 percent of the containers' weight capacities before applying the rate of $161 per 2,000 lbs. and similarly could have utilized actual weights when determining the three incidental charges. If Delta had used actual weight, furthermore, complainant alleges that Delta would have seen that actual weight times the rate of $161 would have fallen below a minimum-revenue rule in the tariff, and Delta would merely have applied that minimum revenue ($2,318 per 20-foot container) to the 12 containers in the shipment (the incidental charges remaining at actual weight times each charge). Under this latter method of rating, complainant alleges that total freight would have been $8,801.02 below what Delta actually charged. Complainant therefore seeks reparation in this amount together with interest.

In support of its claims, Union Carbide furnished the relevant tariff pages, bill of lading, packing list, and a letter from Delta Line acknowledging the claim but declining to honor it because of its tariff rule which barred such claims if submitted more than six months after shipment. Complainant asks that this case be decided under the Commission's shortened procedure (Subpart K of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.181 through 502.187).

Although the complaint had been served on August 17, 1982, as noted above, and Delta was supposed to have filed an answer either within 20 days if it declined to consent to the shortened procedure or within 25 days if it consented to such procedure, Delta initially failed to respond. Rather than issue some type of default judgment without affording Delta an opportunity to explain its failure to respond to the complaint, I provided Delta with such opportunity under less technical administrative procedures and to assure myself that Delta had been given a full opportunity to present its defense. (See Order to Show Cause Why Initial Decision Should Not Issue Under the Shortened Procedure, September 20, 1982.) [2] Shortly thereafter I was contacted by Delta's general counsel, Mr. Sean G. Burke, who advised that the

[2] In the Order to Show Cause cited, I relied upon a number of court and agency decisions which hold that administrative agencies like the Commission are not courts, are not bound by hard and fast technical rules applicable to courts, and ought not to use their rules of procedure to defeat the ends of justice. See *Oakland Motor Car Co. v. Great Lakes Transit Corp.*, 1 U.S.S.B.B. 308, 311 (1934); *Utd.-Buckingham Frt. Lines v. United States*, 288 F.Supp. 883, 886 (D. Neb. 1968); *N.L.R.B. v. Monsanto Chemical Co.*, 205 F.2d 763, 764 (8th Cir. 1953). However, agencies, while relaxing rules of pleadings and procedure, must ensure that every party has had an opportunity to make its case or defense. *City of Portland v. Pacific Westbound Conference*, 5 F.M.B. 118, 129 (1956); *Pacific Coast European Conf.—Limitation on Membership*, 5 F.M.B. 39, 43 (1956).

complaint, which had been served on Delta's New York office, had apparently become mislaid and had not been transmitted to Delta's home office in New Orleans. Mr. Burke further advised that he would submit a response to the complaint and did so by letter of September 24, 1982. In that letter, he stated that Delta does not dispute the merits of Union Carbide's claim but denied the claim initially only because of the tariff's so-called six-months' rule. He further advised that Delta does not wish to defend the validity of that rule in consideration of previous decisions by the Commission and that "Delta respectfully requests that the appropriate order be issued for the refund." [3]

DISCUSSION AND CONCLUSIONS

The basic principle of law which governs overcharge cases is essentially the principle enunciated in *Western Publishing Company v. Hapag-Lloyd A.G.*, 13 S.R.R. 16 (1972), and its progeny. Very simply, complainants in these types of cases are permitted to show what actually moved in a shipment notwithstanding bill of lading descriptions. However, they are required to show the validity of their claims on the basis of a preponderance of the evidence and "must set forth sufficient facts to indicate with reasonable certainty and definiteness the validity of the claim." *Merck Sharp & Dohme v. Atlantic Lines*, 17 F.M.C. 244, 245 (1973). See discussion and case citations in *Sanrio Co., Ltd. v. Maersk Line*, 23 F.M.C. 150, 159-164 (1980).[4]

The instant case does not present the problem usually encountered in overcharge cases in which shippers claim that the carriers charged higher rates than those specified in the tariffs because the cargo was misdescribed on the bill of lading on which the carrier relied when rating the shipments. The problem here is not that the cargo was misdescribed on the bill of lading as to the nature of the commodity shipped but that the measurement of the shipment was erroneously understated with the result that Delta invoked a minimum-size rule so as to increase freight charges. The facts necessary to establish the validity of the claim and to support the foregoing conclusion are

[3] Also following issuance of the Order to Show Cause, Mr. E. T. Woods, Area Manager, Liner Services, for Union Carbide, called me to inquire as to the status of the case. I advised him that in view of Delta's response to the complaint and Order to Show Cause, as shown in the letter of September 24, 1982, complainant need not file anything further in the case and that my Initial Decision would issue promptly.

[4] As Delta has correctly noted, furthermore, tariff rules which bar the filing of claims with carriers beyond *six months after shipment* or cause of action accrues cannot be used as defenses to complaints alleging overcharges in violation of section 18(b)(3) of the Act. Furthermore, the Commission has recently issued a rule which will require the elimination of such rules in the tariffs themselves so that in the future carriers will be able to honor such claims as the one in the present case without forcing shippers to file them with the Commission. See *Sun Co. v. Lykes Bros.*, 20 F.M.C. 67, 69 (1977); *Kraft Foods v. F.M.C.*, 538 F.2d 445 (D.C. Cir. 1976) (tariff rules shortening time to submit claims to carriers are not defenses to formal complaints filed with Commission); Docket No. 81-51, *Time Limit for Filing of Overcharge Claims*, 25 F.M.C. 185 (1982).

clearly shown in the shipping documents, particularly the packing list and the bill of lading, and are not disputed by Delta. These documents show that the shipment of insecticides which was carried in twelve 20-foot containers weighed a total of 278,136 lbs. and measured 11,346 cubic feet. However, the bill of lading on which Delta relied when rating the shipment, shows 278,136 lbs. but only 10,488 cubic feet. The reason why the bill of lading shows fewer cubic feet than actually shipped is that someone failed to carry over to the bill of lading the measurement figures for 432 loose cartons shown on the packing list. These loose cartons measured 858 cubic feet. Had Delta added these 858 cubic feet to the 10,488 cubic feet comprising the rest of the shipment, its bill of lading would have shown the correct total measurement of 11,346 cubic feet (10,488 plus 858). This figure more than equals 85 percent of the cubic capacity of the twelve 20-foot containers. Therefore, according to Delta's tariff, the shipment can be rated at actual weight, not at the higher minimum weight also set at 85 percent of weight capacity of the containers.[5] By using actual weight, basic ocean freight amounts to $22,389.95 (278,136 lbs. times $161 per 2,000 lbs.). However, because this amount is below the required minimum revenue for 12 containers, rated at $2,318 per 20-foot container under the tariff,[6] base freight is raised to $27,816 (12 containers times $2,318). The three incidental charges (container usage, bunker surcharge, and port congestion) are figured at actual weight times each charge. The total freight then comes to $32,683.38, the correct amount which Union Carbide should have paid. Since Union Carbide actually paid $41,484, based upon the erroneous raising of actual weight of the shipment to a minimum weight of 85 percent of the containers' aggregate weight capacity, Union Carbide seeks return of the additional amount, some $8,801.02, plus interest. The following table illustrates the foregoing calculations:

[5] Delta's tariff has a rule (Rule 43(N)(3)) which provides that if cargo rated by weight tons does not fill a container to 85 percent of the recorded weight capacity, the carrier will raise the actual weight to a figure which represents 85 percent of the weight capacity of the container when rating the shipment. Eighty-five percent of the weight capacity of the twelve 20-foot containers used by Delta amounts to 423,300 lbs., and Delta rated the shipment by using that amount rather than the actual weight of the shipment, which was 278,136 lbs. However, Delta's tariff also has a rule (Rule 43(N)(4)) which makes the preceding 85-percent rule inapplicable if the cargo fills the container to 85 percent of the recorded cubic capacity of the container. Another tariff rule (43(N)(1)) defines 85 percent of the cubic capacity of a 20-foot container to be 935 cubic feet (85 percent of 1,100 cubic feet). Because the aggregate cargo filling the 12 containers in the subject shipment occupied more than 935 cubic feet per container (11,346 cu. ft. total measurement divided by 12 equals 945 cubic feet) the shipment should have been rated at the actual weight, 278,136 lbs., rather than the minimum weight of 423,300 lbs.

[6] Delta's tariff Rule 43(N)(8) requires a minimum revenue of $2,318 per 20-foot container.

Correct Freight Calculation

12 containers, 278,136 lbs. x $161 per 2,000 lbs.	=	$22,389.95
Minimum revenue required under Rule 43(N)8 ($2,318 per container x 12)	=	27,816.00
Additional Charges:		
Container usage (278,136 lbs. x $10/2000 lbs.)	=	1,390.68
Bunker surcharge (278,136 lbs. x $22/2000 lbs.)	=	3,059.50
Port congestion surcharge (278,136 x $3/2000 lbs.)	=	417.20
Total	=	$32,683.38

Delta's Freight Calculation

423,300 lbs. x $161 per 2,000 lbs.	=	$34,075.65
Additional Charges:		
Container usage (423,300 lbs. x $10/2000 lbs.)	=	2,116.50
Bunker surcharge (423,300 lbs. x $22/2000 lbs.)	=	4,656.30
Port congestion surcharge (423,300 lbs. x $3/2000 lbs.)	=	634.95
Total	=	$41,484.40 [7]

Total freight paid:	$41,484.40
Correct Freight:	32,683.38
Overcharge:	$8,801.02

I conclude that respondent Delta Steamship Lines, Inc., has overcharged Union Carbide in the amount of $8,801.02 because of Delta's failure to account for the measurement of 432 loose cartons in the shipment, which, when added to the measurement figures relating to the other portions of the shipment, satisfied the minimum-size requirements of Delta's tariff and required Delta to rate the shipment on the basis of actual, not the higher minimum weight. On such actual weight basis, base ocean freight falls below another minimum-revenue-per-container rule but even after applying that rule, total freight amounts to $8,801.02 less than the amount Union Carbide actually paid. Reparation is therefore awarded in that amount. In accordance with the Commission's governing regulation concerning interest, Delta shall pay Union Carbide such amount plus interest computed under the formula provid-

[7] Correct total is $41,483.40. Delta's addition was in error.

ed by that regulation. See Rule 253, 46 C.F.R. 502.253, 24 F.M.C. 145 (1981).[8]

(S) NORMAN D. KLINE
Administrative Law Judge

[8] The regulation cited provides that simple interest will accrue from "date of payment of freight charges to the date reparations are paid." It also provides that "[t]he rate of interest will be calculated by averaging the monthly rates on six-month U.S. Treasury bills commencing with the rate for the month that freight charges were paid and concluding with the latest available monthly Treasury bill rate at the time reparations are awarded." The Commission however, also stated that when the facts are not reasonably ascertainable, parties could settle overcharge cases, in which case the amount of interest could be left to the parties. See 24 F.M.C. at 149.

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-26
RASCATOR MARITIME S.A.

v.

CARGILL INCORPORATED

ORDER

November 15, 1982

This proceeding is before the Commission upon review of Administrative Law Judge Charles E. Morgan's Order Approving Settlement Agreement and Discontinuing Proceeding, served September 2, 1982. In that Order, the Presiding Officer approved the settlement negotiated by the parties, but further held that the Commission did not have jurisdiction over the complaint because it was time-barred.

The two-year limitation in section 22 of the Shipping Act, 1916 (46 U.S.C. § 821) applies only to requests for reparations. The complaint in this proceeding alleged violations of section 17 of the Act (46 U.S.C. § 816) and asked for a cease and desist order as well as reparations. Thus, the Commission retains jurisdiction over the complaint even though the actions which form its gravamen took place more than two years ago. The Commission therefore rejects the Presiding Officer's statements concerning its lack of jurisdiction over the matter at issue. However, we agree that the parties' settlement agreement does not appear to violate the Act and should be approved.

THEREFORE, IT IS ORDERED, That except to the extent modified above, the September 2, 1982 Order Approving Settlement Agreement and Discontinuing Proceeding is adopted by the Commission; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-26
RASCATOR MARITIME S.A.

v.

CARGILL INCORPORATED

RULING ON MOTION FOR AN ORDER APPROVING SETTLEMENT AGREEMENT AND DISCONTINUING PROCEEDING

Partially Adopted November 15, 1982

By complaint filed April 29, 1982, and served May 5, 1982, the complainant, Rascator Maritime S.A. (Rascator), alleged that respondent, Cargill Incorporated (Cargill), operated a grain elevator at Channelview, Texas, known as the "Cargill Houston Elevator"; that Cargill as operator of a marine terminal filed a tariff with the Federal Maritime Commission, namely its Houston Tariff No. 2; that Rascator chartered the *M/V BRABANTIA*, and on or about September 20, 1978, subchartered this motor vessel to the Embassy of Pakistan for the carriage of wheat in bulk from the U.S. Gulf Coast to Karachi, Pakistan; that an application was made to berth this vessel at the Cargill Houston Elevator and that on September 27, 1978, this vessel docked at the Cargill Houston Elevator berth and commenced loading; that only one vessel could be loaded at a time at this terminal facility; that loading of this vessel reasonably could take about two days; that for its own reasons Cargill did not complete promptly the loading of the *BRABANTIA*; that Cargill received other vessels for loading out of turn; and that loading of the *BRABANTIA* was not completed until October 10, 1978, and this motor vessel sailed from Houston for Karachi on October 11, 1978.

The complainant further alleged that Cargill on or about October 18, 1978, submitted an invoice for $21,357.26 for dockage for the September 27 to October 10, 1978, period; that Rascator through its agent protested the invoice on October 25, 1978; that Rascator on September 25, 1981, filed suit against Cargill in the United States District Court for the Southern District of New York based upon the above circumstances, *Rascator Maritime S.A. v. Cargill Incorporated*, S.D.N.Y. No. 81 Civ. 5956-CLB; and that Rascator sought to recover damages of $409,088.77.

Cargill's answer to the complaint in the Federal Court included a defense that the allegations of the complaint fell within the exclusive primary jurisdiction of the Federal Maritime Commission.

Cargill in Federal Court further argued that its actions were justified and permitted by an item in its tariff which provided:

> Cargill, in its sole discretion, may change the turn of vessels whether berthed or not or assign a berth to vessels passed in specific compartments when confronted by an urgent need to receive or ship a particular grade or kind of grain or when, in its judgment, conditions at the dock or in the elevator will be facilitated thereby.

Cargill moved for summary judgment in the Federal Court, and United States District Court Judge Brieant decided the motion on January 29, 1982, stating in part that even if the Federal Maritime Commission found that its jurisdiction over compensatory damages were time barred, that the Commission still might grant prospective relief to the complainant, if the Commission were to sustain Rascator's criticism of the tariff, 46 U.S.C. section 816, with regard to the Commission's power to make findings regarding "just and reasonable regulations and practices related to or connected with the receiving, handling, storing or delivery of property" under section 17 of the Shipping Act, 1916 (the Act).

Therefore, Judge Brieant concluded that the Court should abstain in favor of the exercise by the Federal Maritime Commission of its primary statutory jurisdiction, and Rascator was directed to file an appropriate complaint with the Commission, and proceedings in the Federal Court were stayed pending action by the Commission.

Further, it appears that Judge Brieant reserved the right to rule on the matter of compensatory damages to Rascator if such damages were unobtainable before the Commission because time barred. The above matters have been recited in some detail because of their bearing on the Commission's jurisdiction.

Now, the matter for current consideration and ruling is the "Joint Motion For an Order Approving Settlement Agreement and Discontinuing Proceeding," filed by Rascator and Cargill on August 25, 1982.

The parties submit that their settlement agreement is fair to both in view of the complex legal issues, the difficulties of making full discovery, and the estimated cost and complexity of continued litigation. Their settlement agreement provides, in part, after the discontinuance of both of the proceedings (the one before the Commission and the one pending in the U.S. District Court), that Cargill pay $25,000 to Rascator without any admission of liability, that Cargill will not receive and Rascator will not be required to pay any sums with respect to Cargill's counterclaim in either proceeding.

It is concluded and found that based upon the pleadings and facts presented, there is no reason shown why the Federal Maritime Commission should disapprove the settlement agreement of the parties. The settlement agreement does not appear to contravene any law or public policy.

The question remains as to the jurisdiction of the Federal Maritime Commission. The Commission may award reparation or compensatory damages if a complaint is filed within two years after the cause of action accrued. Insofar as Rascator's complaint seeks damages in connection with events occurring more than two years prior to the filing of its complaint, the complaint appears time barred.

The settlement agreement on its face does not appear to be concerned with the present or future tariff provisions of Cargill applicable at its Houston elevator. In fact, the settlement agreement does not mention anything about the present or future terms of the tariff of Cargill applicable at its Houston elevator, and the parties are deemed to have abandoned their contentions under section 17 of the Act.

Under all the circumstances, it is concluded that were the Federal Maritime Commission shown to have jurisdiction, it should approve the settlement agreement. But, it is concluded that insufficient facts have been presented to show that the Commission has jurisdiction over the settlement agreement of the parties.

The complaint in this proceeding is dismissed for lack of jurisdiction, and the proceeding hereby is discontinued.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 73-17
SEA-LAND SERVICE, INC. AND GULF PUERTO RICO LINES, INC. - PROPOSED RULES ON CONTAINERS

DOCKET NO. 74-40
PUERTO RICO MARITIME SHIPPING AUTHORITY - PROPOSED ILA RULES ON CONTAINERS

ORDER

November 18, 1982

On July 2, 1982 the United States Court of Appeals for the District of Columbia Circuit issued a Supplemental Opinion Following Remand in *Council of North Atlantic Shipping Associations and New York Shipping Association, Inc. v. F.M.C. and U.S.A.*, D.C. Cir. No. 78-1776, in which it vacated that part of the Commission's May 19, 1982 Report and Order on Remand discontinuing these proceedings. On September 23, 1982, the Court denied the Commission's request for rehearing with respect to the Supplemental Order. The Court has directed that the Commission "defer further action in its Dockets Nos. 73-17 and 74-40 until it has reached its final decision in its Docket No. 81-11 and until the Supreme Court has concluded its action [on a petition for writ of certiorari with respect to the Court of Appeals March 2, 1982 decision in No. 78-1776.]* . . . The Commission should then reconsider its conclusions in Dockets Nos. 73-17 and 74-40."

THEREFORE, IT IS ORDERED, That these proceedings are reopened and all action in them is stayed pending further order of the Commission.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

* On October 4, 1982, the Supreme Court denied the petition.

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-74
AGREEMENT NO. 9718-8
CALIFORNIA JAPAN/KOREA SPACE CHARTER AGREEMENT

ORDER DISCONTINUING PROCEEDING

November 19, 1982

On January 16, 1981, the Commission conditionally approved Agreement No. 9718 (the Agreement) [1] through August 22, 1983. 20 S.R.R. 776. One of the conditions required the parties to limit the total container capacity operated pursuant to the Agreement to 8,512 TEU's.[2] *See* 20 S.R.R. at 785.

The Commission's order of approval was appealed to the U.S. Court of Appeals for the District of Columbia Circuit by certain carriers who had protested the Agreement. In the meantime, on June 23, 1981, the parties filed Agreement No. 9718-8 (Amendment No. 8) which proposed to raise the capacity ceiling to 9,126 TEU's by October 21, 1981 and to 10,011 TEU's by March 30, 1982. Protests were filed by Sea-Land Service, Inc., United States Lines, Inc., American President Lines, Ltd. and Lykes Bros. Steamship Co., Inc. By an Order of Investigation served December 14, 1981, this proceeding was instituted to determine whether Amendment No. 8 should be approved, disapproved or modified pursuant to section 15 of the Shipping Act, 1916, 46 U.S.C. § 814.

The Order of Investigation set five issues down for investigation: (1) the relevant market for purposes of determining the market share of the parties to the Agreement; (2) the market share of the parties to the Agreement; (3) whether the trade to which the Agreement applies is overtonnaged and, if so, to what extent; (4) whether there is adequate forty-foot container and reefer capacity in the trade; and (5) whether there has been or will be enough cargo growth in the trade to justify increasing the tonnage in it to the extent proposed by Amendment No. 8. The proceeding was initially limited to simultaneous filing of opening

[1] Agreement No. 9718 applies to the trade between ports in California and ports in Japan and Korea, and permits the parties to, *inter alia*, charter space aboard each other's vessels, interchange equipment and jointly schedule sailings. The parties to the Agreement are Japan Line, Ltd., (Japan Line); Kawasaki Kisen Kaisha, Ltd. (K Line); Mitsui O.S.K. Lines, Ltd. (Mitsui); and Yamashita-Shinnihon Steamship Co., Ltd. (Y-S Line).

[2] Twenty foot equivalent unit.

and reply affidavits of fact and memoranda of law before the Commission.

All of the parties' written submissions have been filed. However, pursuant to the decision on July 13, 1982 by the Court of Appeals *in Sea-Land Service, Inc. v. United States,* 683 F.2d 491 (D.C. Cir. 1982), the Commission is by separate order served this date in Docket No. 82-54, *Agreements Nos. 9718-7, et al. - Space Charter and Cargo Revenue Pooling Agreements in the United States/Japan Trades,* initiating further hearings on remand into the approvability of the underlying Agreement. There is extensive congruence between the issues which, pursuant to the Court's decision, require further investigation before the question of the approval of the Agreement can be resolved, and the issues included within the investigation of Amendment No. 8. In addition, the issues of overtonnaging, market share and projected cargo growth should be resolved on the most recent probative data available.

For these reasons, the Commission hereby discontinues Docket No. 81-74. The matters put at issue and the record in Docket No. 81-74 will be included in Docket No. 82-54.

THEREFORE, IT IS ORDERED, That this proceeding is hereby discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-35

IN THE MATTER OF AGREEMENT NO. 10423, BETWEEN PHILIPPINES, MICRONESIA & ORIENT NAVIGATION COMPANY AND MATSON NAVIGATION COMPANY

ORDER DENYING PETITION FOR DECLARATORY JUDGMENT OF THE PHILIPPINES, MICRONESIA AND ORIENT NAVIGATION COMPANY

November 24, 1982

The Philippines, Micronesia and Orient Navigation Company (PM&O) has petitioned the Commission for a declaratory order interpreting the Commission's Order of December 17, 1981 approving Agreement No. 10423 between PM&O and Matson Navigation Company (Matson).[1] PM&O asks the Commission to find that the Order of Approval was limited to the westbound activities contemplated under the agreement and was not an exercise of Commission jurisdiction under section 15 of the Shipping Act, 1916 (46 U.S.C. § 814) over the eastbound contract carriage provided for in the Agreement. The Commission has section 15 jurisdiction over the entire Agreement and exercised that jurisdiction in approving the Agreement. The Petition for Declaratory Order is therefore denied.

BACKGROUND

Agreement No. 10423 covers the trade between the U.S. West Coast and ports in Micronesia. PM&O operates 2 vessels between Portland, Los Angeles, Oakland, and Honolulu on the one hand, and the Micronesian Islands of Majuro, Ebeye, Tarawa, Kosrae, Ponape, Truk, Saipan, Yap and Koror on the other. PM&O has a tariff on file for the westbound service from the U.S. West Coast to Micronesia, but carries only contract cargo, mostly pineapple, in the eastbound trade. Matson is the predominant carrier in the U.S. West Coast/Hawaii trade. Matson also offers service between the U.S. West Coast and the Micronesian islands of Majuro and Ebeye, via tug and barge between Hawaii and Majuro/Ebeye.

Under Agreement No. 10423, Matson agrees to transship cargo for PM&O between Honolulu and U.S. West Coast ports at rates set forth in a schedule of charges attached to the Agreement. The transshipment

[1] Notice of the filing of the Petition was published in the *Federal Register* on July 13, 1982, 47 Fed. Reg. 30646 (1982). No comments to the Petition were received.

arrangement applies to both east and westbound trades, and no distinction is made in the Agreement between the trades or between PM&O's contract cargo and its common carrier cargo. The purpose of the Agreement is to permit PM&O to avoid some sailings to and from the U.S. West Coast without disrupting its 25-30 day service frequency, and to provide time for annual drydocking of PM&O's vessels.

POSITION OF PETITIONER

PM&O urges the Commission to clarify its approval of Agreement No. 10423 by limiting that approval to the activities involved in the westbound trade in which PM&O operates as a common carrier. PM&O maintains that, as a contract carrier in the eastbound trade, it is neither a common carrier nor an "other person subject to the Act" for section 15 purposes, and thus its agreement with Matson is not subject to section 15 insofar as it concerns eastbound voyages. PM&O notes that it is lawful for a single carrier to perform both common and contract carriage. *Fall River Line Pier, Inc. v. International Trading Corp.*, 399 F.2d 413 (1st Cir. 1968). PM&O argues that "it is the attempted use of contract carriage to violate the Act" or evade regulation that brings such carriage under the Commission's jurisdiction, citing *Grace Line, Inc. v. FMB*, 280 F.2d 790 (2nd Cir. 1960), *cert denied* 364 U.S. 933 (1960); *Flota Mercante Grancolombiana v. FMC*, 302 F.2d 887 (D.C.Cir. 1962); *Gulf Mediterranean Ports Conference Agreement No. 134-21*, 8 F.M.C. 459 (1965); *New Orleans Steamship Association v. Bunge*, 8 F.M.C. 687 (1965); *Puerto Rican Rates*, 2 U.S.M.C. 117 (1939); and *Puerto Rican Forwarding Co. Inc. Possible Violations*, 16 S.R.R. 1433 (ID 1976).

PM&O further argues that the Commission has in the past limited its approval to those portions of agreements dealing with activities which were subject to its jurisdiction, citing cases dealing with agreements under which some activities are subject to the Interstate Commerce Commission's (ICC) jurisdiction and some are subject to FMC jurisdiction,[2] and in which the Commission has approved agreements which include parties not subject to the Act.[3]

DISCUSSION

The opening phrase of section 15 establishes the Commission's Jurisdiction over persons, including common carriers by water, without regard to their activities.[4] Neither section 15 nor section 1 of the Act

[2] *Freight Forwarder Agreement 71-7*, 17 F.M.C. 302 (1974), *Investigation of Wharfage Charges on Bulk Grain at Pacific Coast Ports*, 8 F.M.C. 653 (1965), *Atlantic Gulf/West Coast of South America Conference*, 13 F.M.C. 121 (1969).

[3] *New York Shipping Association - NYSA - ILA Man Hour Tonnage Method Assessment*, 16 F.M.C. 381 (1973) *aff'd New York Shipping Association, v. FMC*, 495 F.2d 1215 (2nd Cir. 1974).

[4] Specifically, it provides that:

Continued

(46 U.S.C. § 801), in defining the term "common carrier by water," limits the Commission's personal jurisdiction over such carriers to their activities "while acting as such." *Grace Line, Inc. v. FMC*, 280 F.2d at 792.

Section 15's subject matter jurisdiction extends to any agreement

> . . . 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 or 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.

> "If a contract is of that nature, it is within the reach of Section 15 and subject to the Commission's jurisdiction. . . ." *FMC v. Pacific Maritime Association*, 435 U.S. 40, 53 (1978).

PM&O states in its Petition that it is a common carrier by water in the U.S. foreign commerce. Its agreement with Matson, another such common carrier, provides for the "giving or receiving [of] special rates, accommodations, or other special privileges or advantages" and establishes a "cooperative working arrangement." PM&O argues that its contract carriage eastbound makes its westbound common carriage possible. In facilitating that eastbound service, as well as the westbound service, the Agreement affects competition among these common carriers and falls within the ambit of section 15.

None of the cases relied upon by PM&O requires the Commission to limit its jurisdiction under section 15 as requested. In *Agreement No. 134-21 Gulf/Mediterranean Ports Conference, supra*, the Commission investigated an amendment to a conference agreement exempting from conference jurisdiction full shiploads of one commodity by one shipper under charter conditions. The conference argued that the amendment was outside the Commission's jurisdiction because it related to tramp or contract operations exempted by section 1 of the Act. The Commission ruled that the agreement was among carriers subject to the Act and would be disapproved if the contract operations would result in discrimination against common carrier patrons in violation of section 16 of the Act (46 U.S.C. § 815) *Id.* 8 F.M.C. at 707 (I.D., adopted at 8 F.M.C. 460). The Commission thus asserted section 15 jurisdiction over the agreement; the question of discrimination violative of section 16

"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. . . ."

related to the agreement's approvability, not the Commission's jurisdiction under section 15.

In *Fall River Line Pier, Inc. v. International Trading Corp., supra,* the court ruled that a terminal's services in connection with common carriers did not bring its alleged discrimination against a contract carrier within the Commission's jurisdiction either under section 16 or section 17 of the Act (46 U.S.C. § 816).[5] *Fall River* did not deal with the Commission's jurisdiction under section 15. The issue raised by PM&O's Petition is not whether the Commission has jurisdiction over its operations as a contract carrier under sections 16 and 17, but over its relationships with other common carriers under section 15.[6]

The Commission's section 15 jurisdiction is not limited by the subject matter jurisdiction granted in other sections of the Act. The cases interpreting the subject matter jurisdictional reach of section 15 have noted the "expansive" nature of that jurisdiction, *Volkswagenwerk Aktiengesellschaft v. FMC,* 390 U.S. 261, 273 (1967), in keeping with the provision's purpose to "regulate[ ] competition in the shipping industry." *FMC v. Pacific Maritime Association,* 435 U.S. at 54. The Commission has appropriately asserted subject matter jurisdiction over agreements which include some parties not subject to its personal jurisdiction, *N.Y. Shipping Association v. FMC, supra,* as well as agreements among persons subject to its jurisdiction which provide for activities not subject to jurisdiction under other sections of the Act but which affect competition among the parties.

In *Freight Forwarder Agreement No. 71-7,* 17 F.M.C. 302 (1974), the Commission asserted jurisdiction over an agreement among parties subject to its personal jurisdiction, where the activities contemplated under the agreement (acquisition of ICC Part IV freight forwarder rights) were not subject to FMC substantive regulation, but the agreement was one to affect competition among the parties. Contrary to PM&O's interpretation, in that case the Commission did not eschew section 15 jurisdiction despite its recognition that some of the ultimate activities contemplated would not be subject to its continuing substantive regulation under other sections of the Act.

Similarly, in *Transpacific Freight Conference of Japan v. FMC,* 314 F. 2d 928 (9th Cir. 1963) the Commission's section 15 jurisdiction to interpret a previously approved agreement was upheld despite the fact

[5] This case is inconsistent with the earlier *Grace Line, supra,* and *Flota Grancolombiana, supra,* cases which it criticized. The latter cases are better reasoned and have been consistently followed by this Commission and the courts.

[6] Although the Commission indicated some reluctance to assert section 15 jurisdiction over the segregated activities of a terminal operator which served contract carriers at one facility and common carriers at another, (*see New Orleans Steamship Assoc. v. Bunge, supra*), that case can not be read so broadly. The case did not discuss section 15 jurisdiction, or distinguish between personal and subject matter jurisdiction under section 15.

that the incident giving rise to the need for the interpretation involved foreign-to-foreign carriage, under an agreement covering both the U.S. and Canadian trades with Japan.[7] The court's "fundamental reason" for affirming the Commission's jurisdiction was that the decision of the conference members to file a unitary agreement covering both trades subjected the entire agreement to FMC jurisdiction under section 15 since it was among "common carriers in foreign commerce," as defined in the Act. *Id.*, 314 F.2d at 933. The court agreed with the Commission's refusal to treat the agreement as two agreements, only one of which would be subject to its jurisdiction. *Id.*, 314 F.2d at 934, footnote 6. The court there further noted the agreement's provisions relating to submission of the agreement for FMC approval and effective date (after Commission approval). *Id.*

Agreement No. 10423 similarly provides unitary treatment of the PM&O arrangement with Matson, without regard to whether it is in the eastbound or westbound trade, and provides for an effective date following Commission approval. We believe the parties created a unitary agreement which was duly submitted to the Commission for approval pursuant to section 15. The Commission exercised its jurisdiction under section 15 in approving Agreement No. 10423 in its entirety.

THEREFORE, IT IS ORDERED That the Petition for Declaratory Order is denied.

By the Commission*

(S) FRANCIS C. HURNEY
Secretary

[7] The court, however, noted that the fines imposed on complainant by the neutral body and set aside by the Commission were not based upon the foreign-to-foreign transaction but upon complainant's refusal to permit inspection of its records by a neutral body which it maintained was ineligible for appointment as such under the terms of the conference agreement. Thus, it was a provision of the agreement universally applicable to both trades which the Commission was interpreting and not its direct applicability to a transaction in a non-U.S. trade.

* Vice Chairman Moakley's concurring opinion is attached.

Vice Chairman Moakley, concurring

The majority opinion has addressed the rather narrow question presented by the subject petition and has concluded correctly, in my opinion, that, as a unitary, interrelated package, the entire agreement between Matson and PM&O is subject to our jurisdiction under section 15 of the Shipping Act. However, the rationale used by the majority contains an implication that an agreement between these two parties dealing solely with the eastbound, contract carriage of PM&O would also be subject to section 15 because of its affect on competition between the common carrier operations of the parties.[1]

I believe that this is too broad a reading of our jurisdiction under section 15. There are many agreements among common carriers by water which affect competition among such carriers but which are not subject to FMC jurisdiction. Conferences serving Canadian or Mexican ports whose members also serve U.S. ports are prime examples of such arrangements. The competitive impact of such conferences on U.S. common carrier service is obvious, but has never been (and hopefully never will be) used as a basis for jurisdiction under section 15.

In order for section 15 to apply to an agreement, there must be both personal jurisdiction and subject matter jurisdiction. If PM&O is purely a contract carrier eastbound and if it should enter into an agreement with Matson dealing solely with that contract carriage, it would be arguable whether either personal jurisdiction or subject matter jurisdiction attached. I therefore disassociate myself from any implication to the contrary.

[1] The majority order states, at p. 5: "PM&O argues that its contract carriage eastbound makes its westbound common carriage possible. *In facilitating* that eastbound service, as well as the westbound service, the Agreement affects competition among these common carriers and falls within the ambit of section 15."

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-8
COMPLIANCE WITH GENERAL ORDER 7, REVISED, SELF-POLICING

ORDER

November 26, 1982

By Order served January 22, 1982, the Commission directed the member lines of five rate agreements (Respondents) [1] to show cause why those agreements should not be disapproved for failure to comply with the requirements of General Order No. 7, (G.O. 7) 46 C.F.R. Part 528.[2] In response, Agreement Nos. 8470, 8480, and 8490 (Household Goods Agreements) filed a joint "Motion to Dismiss and Petition for Exemption." The remaining two agreements, Agreement Nos. 8760 and 9247 (Pacific/India Agreements), filed amendments to their underlying agreements in an attempt to comply with G.O. 7 and, simultaneously, filed identical "Motions to Dismiss." The Commission's Bureau of Hearings and Field Operations submitted a memorandum in reply.

POSITIONS OF THE PARTIES

The Petition filed by the Household Goods Agreements seeks an exemption from the G.O. 7 neutral body requirement to permit an employee to act as the head of their policing authority pursuant to 46 C.F.R. § 528.3(b)(3). They argue that their trades are relatively free of malpractices because they are limited to commercial movements of only one commodity, used household goods. Further, they contend that because of the nature of this traffic, there is no incentive for carrier rebating. It is also alleged that the agreements are so limited in scope that the retention of an outside, independent self-policing body would impose an unrealistic financial burden on their members. In this regard,

[1] Respondents are: International Household Goods Rate Agreement (Agreement No. 8470), U.S. Hawaii/Puerto Rico/Guam Household Goods Rate Agreement (Agreement No. 8480), U.S. Alaska Household Goods Rate Agreement (Agreement No. 8490), Pacific/India Rate Agreement (Agreement No. 8760), and Pacific/India Rate Agreement (Agreement No. 9247).

[2] G.O. 7 was amended on September 2, 1978 (43 F.R. 42760) to establish minimum standards for judging the adequacy of self-policing activities, assist ocean carriers to obtain expeditious approval of their section 15 agreements concerning self-policing, provide the Commission with reliable information concerning the nature and performance of self-policing systems, and curtail rebating and other malpractices by ocean carriers (46 C.F.R. § 528.0(a)). Agreements subject to the rule were given until January 1, 1979 to file conforming amendments. These rules were subsequently upheld by the U.S. Court of Appeals for the D.C. Circuit. *Trans-Pacific Freight Conference of Japan/Korea v. F.M.C.*, 650 F.2d 1235 (D.C. Cir. 1980), *cert. denied* 451 U.S. 984 (1981).

the Household Goods Agreements point out that their total membership is 79 carriers; that in 1980, only 20 shipments were made under the agreements, for gross revenues of $180,464.20; and the estimated cost of an independent policing body would be $197,500.00. These Respondents suggest that the president of the Household Goods Carriers' Bureau, Inc. is well qualified to conduct self-policing activities and would be able to do so without conflicting with his other obligations. In the alternative, they request that the retired, former president of the Household Goods Carriers Bureau be permitted to act as their independent policing authority. If their Petition is not granted, these Respondents contend that they will accept disapproval of their agreements. The alleged result of this action would be the proliferation of independent tariffs and the possibility that some carriers would leave the trades.

The Pacific/India Agreements amended their underlying agreements in an attempt to comply with the requirements of G.O. 7. Because they have allegedly taken all action available to them, they contend that they should be dismissed from this proceeding and be treated in the same manner as other agreements which presently have self-policing amendments pending before the Commission. An affidavit attached to their motions argues that these self-policing amendments could not have been filed sooner. The Agreements' Secretary states that they began drafting conforming amendments in February 1981, but that it was not until September 1981, when their petitions for exemption were denied, that they knew for a certainty that they would need to adopt a self-policing system. They advise that it then took them until March 1982 to get their final draft approved by the membership.

DISCUSSION

The amendments to Agreement Nos. 8760 and 9247 which were filed to comply with G.O. 7 (Agreement Nos. 8760-12 and 9247-9, respectively), were conditionally approved by the Commission on June 16, 1982. The conditions were subsequently met and these agreements therefore stand approved as of August 12, 1982. Because the Pacific/India Agreements are now in full compliance with G.O. 7, no further purpose would be served by continuing this proceeding as to them and they will therefore be dismissed.

A review of the Household Goods Agreements' Petition for Exemption and the affidavit attached thereto indicate that they have met the requirements of 46 C.F.R. §§ 528.3(b)(3)(i)-(iii). Accordingly, they will be granted an exemption from the independent self-policing authority requirement so that one of their officers or employees may act as the head of their policing authority. As a result, these Agreements will likewise be dismissed from this proceeding.

THEREFORE, IT IS ORDERED, That Pacific/India Rate Agreement No. 8760 and Pacific/India Rate Agreement No. 9242 are dismissed from this proceeding; and

IT IS FURTHER ORDERED, That the "Motion to Dismiss and Petition for Exemption" filed on behalf of the International Household Goods Rate Agreement (Agreement No. 8470), the U.S. Hawaii/Puerto Rico/Guam Household Goods Rate Agreement (Agreement No. 8480), and the U.S. Alaska Household Goods Rate Agreement (Agreement No. 8490) is granted to the extent discussed above and these agreements are also dismissed from this proceeding; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-54
TIME/VOLUME RATE CONTRACTS - TARIFF FILING REGULATIONS APPLICABLE TO CARRIERS AND CONFERENCES IN THE FOREIGN COMMERCE OF THE UNITED STATES

ORDER

December 8, 1982

On July 8, 1982, the Commission issued a final rule in the above-referenced proceeding which sets forth uniform procedures concerning the use of time/volume rates (47 *Fed. Reg.* 29671). The rule permits the offering of time/volume rates by common carriers by water in the United States foreign commerce, or conferences of such carriers, subject, however, to several conditions, including the requirements that time/volume rates and related contracts be published in tariffs on file with the Commission and that time/volume contracts contain certain minimum provisions.

Sea-Land Service, Inc. has filed a Petition seeking clarification of certain aspects of the rule. Sea-Land contends that the rule should be clarified to expressly provide that time/volume rates may not be implemented without an executed contract between the parties, which contract must be retained by the designated recordkeeper. In addition, Sea-Land seeks clarification from the Commission that the filing of a specimen time/volume contract complies with the tariff filing requirement contained in the rule (46 C.F.R. § 536.7(a)).

The Commission believes that the rule as it presently stands is sufficiently clear on the point that a time/volume rate cannot be implemented without an executed time/volume contract. The definition of a time/volume rate clearly indicates that such a rate can only be implemented "pursuant to the terms of a time/volume contract" 46 C.F.R. § 536.2(p). That contract must be one executed between the offeror of the time/volume rate and the individual shipper or consignee accepting the rate and shipping its goods pursuant to it.

The rule does not, however, require that the designated recordkeeper for "time/volume shipment records" also maintain a copy of the executed time/volume contract. While such a requirement has a certain appeal, the Commission believes that this is a matter better left to the parties' discretion. They are, of course, free to stipulate in their contract that the recordkeeper will maintain a copy of it.

The Commission further believes that the fact that the filing of a specimen time/volume contract does comply with the requirement that time/volume contracts be published in tariffs on file with the Commission is reasonably apparent from a reading of the rule. Section 536.7(a) states that "[t]ime/volume rates and related contracts shall be published in tariffs on file with the Commission and made available to all shippers or consignees under the same terms and conditions 46 C.F.R. § 536.7(a). The contract to be published in the tariff and made available to all shippers could only be a specimen contract, and not an executed contract between the offeror and one shipper or consignee. There is no need, therefore, to amend the rule to make this fact clearer.

THEREFORE, IT IS ORDERED, That the Petition for Clarification filed by Sea-Land Service, Inc. is granted to the extent discussed above and is denied in all other respects.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-62

WESTINGHOUSE ELECTRIC CORPORATION

v.

DELTA STEAMSHIP LINES, INC.

ORDER

December 8, 1982

This proceeding came before the Commission on a proposed settlement submitted for approval by Complainant Westinghouse Electric Corporation and Respondent Delta Steamship Lines, Inc., which would terminate their controversy over the proper classification of oil circuit breakers carried by Delta on behalf of Westinghouse.

The parties reached a settlement after the issuance of an Initial Decision by Administrative Law Judge Charles E. Morgan, and the filing of Exceptions by Delta.

BACKGROUND

The dispute which gave rise to the settlement in question involves three shipments of oil circuit breakers tendered by Westinghouse to Delta for carriage from Baltimore, Maryland, to Rio Haina, Dominican Republic. Each of the circuit breakers measured in excess of 1700 cubic feet, weighed 13,000 pounds and was mounted on its own skid.

At the time of the first shipment in December 1980, the tariff of the United States Atlantic and Gulf-Santo Domingo Conference, of which Delta is a member, contained a commodity rate of $64.50 M for "ELECTRICAL DEVICES, Equipment and Materials in minimum lots of 1600 cft" and a Class 55 rate of $167.00 M or $247.00 W for "ELECTRICAL APPARATUS N.O.S." Prior to the second shipment in February 1981, the Conference revised the description of "ELECTRICAL DEVICES . . ." to read "ELECTRICAL WIRING DEVICES . . .," which description also was in effect at the time of the third shipment in July 1981.[1]

Delta assessed ocean freight charges on the three shipments at $167.00 M applicable to "ELECTRICAL APPARATUS, N.O.S." and

[1] 6th Rev. page 103, effective 11/5/80, and 7th rev. page 103, effective 1/17/81. Effective August 17, 1981, the tariff description was further revised to read "ELECTRICAL WIRING DEVICES . . . per carrier's container" and by adding under Class 55 a new item, "CIRCUIT BREAKERS, Industrial electrical, not household."

refused to accept Westinghouse's offers of payment based on the $64.50 rate applicable to "ELECTRICAL DEVICES. . . ."

The Presiding Officer found that "at the time of shipment" the descriptions electrical devices, electrical wiring devices, or electrical apparatus were equally specific. Applying Rule 32 of the Tariff pursuant to which commodity rates take precedence over class rates,[2] the Presiding Officer determined that the circuit breakers were subject to the $64.50 commodity rate provided for electrical devices or wiring devices.

Delta filed Exceptions to the Presiding Officer's classification of the February and July shipments as "ELECTRICAL WIRING DEVICES", and to the conclusion that the December 27, 1980 shipment could reasonably be classified as "ELECTRICAL DEVICES". Delta also requests the correction of some minor technical errors in the Initial Decision.

THE PROPOSED SETTLEMENT [3]

Under the proposed settlement, the parties agree that the December 27, 1980, shipment was subject to the $64.50 M rate, applicable to "ELECTRICAL DEVICES," whereas, in view of the January 17, 1981 change in the tariff,[4] the parties agree that the shipments which moved in February and July, 1981, were subject to the rate of $167.00 M applicable to "ELECTRICAL APPARATUS N.O.S.," both rates reduced by the applicable project rate discount.[5]

DISCUSSION

Section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. § 817(b)(3)) forbids ocean carriers subject to that Act from charging or collecting "a greater or less or different compensation for the transportation of property" than the rates and charges specified in their tariffs. In light of this prohibition, while it has generally followed a policy of encouraging the settlement of controversies,[6] the Commission has set certain conditions for approval of settlements of claims arising under section 18(b)(3), that is: the parties must show that the settlement is a bona fide attempt to settle their controversy, not a device for obtaining transportation at other than the applicable rates and charges; the complaint on

[2] As mentioned, the Tariff provided a commodity rate for "ELECTRICAL DEVICES" and a class 55 rate for "ELECTRICAL APPARATUS, N.O.S."

[3] The full text of the settlement is attached to this Order as Appendix I.

[4] As mentioned, the tariff was revised to read "ELECTRICAL WIRING DEVICES."

[5] The circuit breakers were proprietary cargo entitled to project rate discounts which reduced the $64.50 to $60.50 and the $167.00 to $160.50.

[6] *Merck, Sharp and Dohme v. Atlantic Lines*, 17 F.M.C. 244 (1973); *Old Ben Coal Co. v. Sea-Land Service, Inc.*, 21 F.M.C. 505 (1978); *Del Monte Corporation v. Matson Navigation Company*, 22 F.M.C. 364 (1979) and cases there cited. See also Rule 91 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.91, and section 5(b)(1) of the Administrative Procedure Act, 5 U.S.C. 554(c)(1).

its face presents a genuine dispute; and the facts critical to the resolution of the controversy are not reasonably ascertainable.[7] In this instance, no relevant facts are in dispute - the sole issue being the proper classification of the cargo under the applicable tariff. Approval, therefore, must rest on the merits to insure that the settlement is consistent with the requirements of section 18(b)(3) of the Act and of the carrier's tariff.[8]

As stated in the Initial Decision, "the intrinsic nature of the item shipped controls the tariff rate to be applied." [9] This means that while tariff words generally are to be given their ordinary meaning, matters outside the express language of the tariff may have to be considered in order to establish the import of those words in a particular context, especially where (1) the language of the tariff is itself vague; *Aleutian Homes Inc. v. Coastwise Line*, 5 F.M.B. 602 (1959); *Thomas C. Crowe v. Southern S.S. Co.*, 1 U.S.S.B. 145 (1929); or (2) there exists a custom or usage of a trade or a course of dealing of the parties which, although not specified in the tariff, is such that it should be applied; *Sacramento-Yolo Port District v. Fred F. Noonan Co., Inc.*, 9 F.M.C. 551 (1966); *C.S.C. International v. Lykes Bros.*, 20 F.M.C. 552 (1978).

The tariff description at issue here is arguably vague and there is conflicting evidence of record as to whether the circuit breakers of the size shipped are generally considered in the industry as "apparatus" or "devices." However, whatever the intent of the carrier may have been, the tariff item itself specified no size or other limitation for the term "ELECTRICAL DEVICES," except for the proviso that the shipments be in minimum lots of 1600 cft." (Each of the circuit breakers exceeded 1700 cubic feet.) Therefore, because the words "devices" and "apparatus" are generic terms referring to a class or group of unspecified items, the classification of the December 27, 1980 shipment of circuit breakers as "ELECTRICAL DEVICES," does not appear unreasonable or arbitrary.

There remains the question of whether the revision to the tariff adding the word "WIRING" to the phrase "ELECTRICAL DEVICES" so restricted the meaning of the term "device" as to render it inapplicable to the last two shipments. Both Delta's pricing manager and its expert witness attested that the phrase "ELECTRICAL WIRING DEVICES" is a commonly accepted term in the trade which "would not encompass large oil circuit breakers." In addition, the "Westinghouse Quick Selector" Catalog 25-000, 7th Edition, 1977, in-

[7] *Organic Chemicals (Glidden-Durkee) Division of SMC Corp. v. Atlanttrafik Express Service*, 18 S.R.R. 1536, 1539-1540 (1979).

[8] *In re Hugoton-Anardarko Area Rate Case*, 466 F.2d 974 (9th Cir. 1972).

[9] *European Trade Specialists, Inc. v. Prudential Grace Lines, Inc.*, 21 F.M.C. 888, 890 (1979); *Sunmark, Inc.*, 22 F.M.C. 714, 717 (1980).

troduced in evidence by Delta, lists under "Wiring Devices" various types of switches, receptacles, locking devices, wall plates and plugs, none of which approaches in size or description the oil circuit breakers shipped by Westinghouse. Westinghouse's expert witness did not refute these statements or present any evidence to the contrary. The preponderance of the evidence, therefore, leads to the conclusion that the oil circuit breakers at issue here cannot be classified as "ELECTRICAL WIRING DEVICES."

Consequently, the proposed settlement whereby the circuit breakers which moved in December 1980 is to be classified as "ELECTRICAL DEVICES," subject to the rate of $64.50 M or, as reduced by the project rate discount, to $60.50, and the shipments which moved in February and July, 1981, after the amendment to the tariff, would come under the tariff description "ELECTRICAL APPARATUS N.O.S.," subject to the rate of $167.00 M, or $160.50 after the project rate reduction, appears to be in compliance with the requirements of section 18(b)(3) of the Shipping Act, 1916, and of Delta's tariff.

THEREFORE, IT IS ORDERED, That the settlement reached by Complainant Westinghouse Electric Corporation and Respondent Delta Steamship Lines, Inc., which terminates their controversy over the proper classification of three shipments of oil circuit breakers, which Delta Steamship Company, Inc., carried in December 1980, February 1981, and July 1981, is approved.

IT IS FURTHER ORDERED, That the Initial Decision issued in this proceeding is vacated; [10] and

IT IS FINALLY ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[10] Approval of the settlement renders moot the Initial Decision.

APPENDIX I

October 14, 1982

Honorable Francis C. Hurney
Secretary
Federal Maritime Commission
1100 L Street, N.W.
Washington, D.C. 20573

Re: Westinghouse Electric Corporation v. Delta Steamship Lines, Inc., FMC Docket No. 81-62

Dear Mr. Hurney:

Subsequent to service of the Administrative Law Judge's Initial Decision in the above-referenced proceeding and the filing of Exceptions thereto by Respondent Delta Steamship Lines, Inc. ("Delta"), Delta and Complainant Westinghouse Electric Corporation ("Westinghouse") have entered into further discussions regarding the appropriate rates to be applied to the three shipments in question based on the evidence of record. As further discussed below, the parties have now agreed to a settlement of the subject dispute, in accordance with the rates which they jointly accept as being properly applicable to each of the subject shipments.

As set forth in the Initial Decision, this case involves three separate shipments of electrical circuit breakers by Westinghouse aboard Delta vessels from Baltimore to Rio Haina, Dominican Republic on December 27, 1980, February 5, and July 16, 1981, respectively. At the time of the first shipment, the applicable United States Atlantic and Gulf-Santo Domingo Conference Tariff, FMC Tariff No. 5, contained entries for (1) "ELECTRICAL DEVICES, Equipment and Materials in minimum lots of 1600 cft: $64.50," and (2) "ELECTRICAL APPARATUS, N.O.S.," which was subject to a "Class 55" rate, equalling $167.00 per measurement ton or $247.00 per weight ton, whichever produced the greater charge. Subsequent to the first shipment, but prior to the second and third shipments, the first of these tariff entries was revised to read "ELECTRICAL *WIRING* DEVICES, Equipment and Materials in minimum lots of 1600 cft: $64.50." All of the rates were subject to an applicable project discount.

The Initial Decision concluded that the circuit breakers reasonably could be considered to be either electrical devices or electrical wiring devices, and recommended that all three shipments be invoiced at the rate applicable to those tariff entries. Delta filed Exceptions (1) challenging the conclusion that the circuit breakers could reasonably be considered electrical wiring devices based on the evidence of record, and maintaining that the last two shipments should have been rated in accordance with the electrical apparatus tariff item, (2) challenging the

determination that the circuit breakers could be reasonably considered electrical devices as to the first shipment, and (3) requesting certain minor corrections to the Initial Decision. But for Delta's belief that the Initial Decision was clearly erroneous as to Exceptions (1) and (3), Delta would not have filed its Exception (2).

Following receipt of Delta's Exceptions, Westinghouse requested its technical staff to re-evaluate the pertinent evidence of record. In regard to Delta's Exception (1), Westinghouse's review indicates that there is merit to Delta's position and Westinghouse therefore agrees the Initial Decision should be amended accordingly. Westinghouse further agrees that the minor errors noted in Delta's Exception (3) should be corrected by the Commission.

Following careful reconsideration of the record, and in view of Westinghouse's concurrence in Delta's Exceptions (1) and (3), Delta agrees to accept the Administrative Law Judge's findings and conclusions in regard to the first shipment of circuit breakers, which moved prior to the tariff change discussed above, and agrees that such findings and conclusions are adequately supported by the evidence of record. Delta therefore withdraws its Exception (2).

In accordance with the foregoing and the evidence of record in this proceeding, Westinghouse's December 27, 1980 shipment of circuit breakers should be subject to the tariff rate for "ELECTRICAL DEVICES, Equipment and Materials," while the February 5 and July 16, 1981 shipments should be subject to the tariff rate for "ELECTRICAL APPARATUS, N.O.S." The parties therefore request the Commission to approve settlement of this proceeding on such grounds, and either to amend the Initial Decision in accordance therewith, or to direct withdrawal of the Initial Decision in view of the settlement.

The parties submit that such settlement is in the public interest, and fully consistent with Section 18(b)(3) and the Commission's responsibilities thereunder, in that the settlement is based upon application of filed tariff rates that the parties now agree are applicable to the respective shipments, and further that application of such rates is supported by the evidence of record in this proceeding.

For all the foregoing reasons, Westinghouse and Delta respectfully request the Commission to approve settlement of this proceeding on the foregoing basis and to issue an appropriate Order in accordance therewith.*

Respectfully submitted,

(S)_____
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Attorney for Respondent, Delta Steamship Lines, Inc.

JWP/mh
cc: Honorable Charles E. Morgan

* If for any reason the Commission declines to approve the foregoing settlement of this proceeding, the parties have agreed to, and hereby request the Commission to approve, an extension of time of twelve days after receipt of notice of such adverse action for Westinghouse to file a Reply to Delta's Exceptions. The parties further agree that under such circumstances the matters set forth herein will not prejudice the position of either party.

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-48
INTERCORP FORWARDERS, LTD. - INDEPENDENT OCEAN FREIGHT FORWARDERS LICENSE APPLICATION AND POSSIBLE VIOLATIONS OF SECTION 44, SHIPPING ACT, 1916

ORDER ADOPTING INITIAL DECISION

December 16, 1982

This proceeding was instituted by Order of Investigation and Hearing served August 21, 1981, to determine whether:

(1) Intercorp violated section 44(a), Shipping Act, 1916, 46 U.S.C. § 841(b) by engaging in unlicensed forwarding activities;

(2) Civil penalties should be assessed against Intercorp pursuant to section 32 of the 1916 Act, 46 U.S.C. § 831, for violations of that Act, and, if so, the amount of any such penalty which should be imposed; and

(3) In light of the evidence adduced pursuant to the first issue, together with any other evidence adduced, Intercorp possesses the requisite fitness within the meaning of section 44 to be licensed as an independent ocean freight forwarder.

On August 9, 1982, Administrative Law Judge Norman D. Kline served an Initial Decision in this proceeding, which found that: (1) Intercorp had operated as a forwarder without a license on 27 shipments, albeit under mitigating circumstances, and had used incorrect insurance invoices and improperly marked up the cost of accessorial services; (2) Intercorp was otherwise fit to be licensed as an independent ocean freight forwarder; and (3) Intercorp should be assessed a civil penalty of $3,000 to be paid in $500.00 installments at six-month intervals with 12% interest on the unpaid balance.[1] The Commission's Bureau of Hearings and Field Operations (Hearing Counsel) filed Exceptions to the Presiding Officer's "fitness finding" to which Respondent, Intercorp, replied.

Hearing Counsel believes that the circumstances surrounding Intercorp's violations require a finding that Intercorp is not fit to be licensed as an independent ocean freight forwarder. It contends that a finding

[1] The first installment is due 30 days from the date of this Order.

would be consistent with the Commission's precedent. Hearing Counsel maintains that Intercorp's violations are not only devious but also indicative of its disregard for the Commission's regulations.

Intercorp urges the Commission to affirm the Presiding Officer's Initial Decision. It notes that it has promised to adhere to the Commission's freight forwarder regulations and agreed to periodic audits of its activities. Finally, Intercorp advises that its related business has been adversely affected by this proceeding and its refusal to perform forwarding services pending the outcome of this proceeding.

The Commission finds, upon review of the record in this proceeding, the parties' pleadings, and precedent, that the Initial Decision is well-reasoned and supportable, both in law and fact. The Presiding Officer's fitness and civil penalty findings are supported by Commission precedent.[2] Accordingly, the Commission will adopt the Presiding Officer's Initial Decision in this proceeding. Intercorp's freight forwarder license, which will allow it to commence business, will be issued when it satisfies the bonding requirements of section 44 of the Act.

THEREFORE, IT IS ORDERED, That Hearing Counsel's Exceptions in this proceeding are denied.

IT IS FURTHER ORDERED, That the Presiding Officer's Initial Decision in this proceeding is adopted.

IT IS FURTHER ORDERED, That Intercorp shall submit the civil penalty installments and the interest payments to the Commission's Office of Budget and Financial Management at its offices in Washington, D.C.

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

By the Commission.[3]

(S) FRANCIS C. HURNEY
Secretary

[2] The Commission does not endorse Hearing Counsel's suggestion that applicant respondents have a heavier burden of proof, with regard to mitigation, than do licensed respondents.

[3] Vice Chairman Moakley dissents on the fitness issue.

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-48
INTERCORP FORWARDERS, LTD. - INDEPENDENT OCEAN FREIGHT FORWARDERS LICENSE APPLICATION AND POSSIBLE VIOLATIONS OF SECTION 44, SHIPPING ACT, 1916

This is an investigation begun to determine whether applicant Intercorp Forwarders Ltd., which to all intents and purposes is Mr. Robert Stettner, the sole salaried employee and President, deserves to obtain a freight forwarder's license in view of the fact that allegedly Intercorp operated as a forwarder without a license for a period of time in the past, in violation of section 44 of the Shipping Act, 1916, and carried on certain billing practices which concealed his mark-ups from shippers and used incorrect insurance invoices when billing shippers on some shipments. Additionally the investigation is to determine whether Intercorp should pay a civil penalty for the past violations. The Commission's Bureau of Hearings and Field Operations urges a finding that Intercorp is unfit to obtain a license and should pay a civil penalty of $5,000 for the violations. On the basis of the evidence developed and governing Commission precedent, it is found that:

(1) Intercorp, which filed its application in October 1980, deserves an opportunity to operate its forwarding business notwithstanding past violations of law but should pay a civil penalty of $3,000 and be subjected to periodic auditing.

(2) The Bureau's hard-nosed position marks an abrupt change from Commission precedent which has developed the principle that past violations of law do not automatically bar a person from obtaining a forwarder's license if there are mitigating circumstances and if the record does not show that the applicant's conduct has been so flagrant and reprehensible that he can never be trusted or redeemed. In such cases the Commission has permitted persons to carry on their forwarding businesses after paying civil penalties and undergoing periodic auditing and surveillance.

(3) Applicant did carry on forwarding without a license but had believed that it had a valid arrangement with a licensed forwarder as a sales representative which it terminated in early 1981 during the course of this proceeding. Applicant also forwarded three shipments later in 1981 in order to retain the business of two of its valued customers in its customs house brokerage business. Applicant's billing practices included mark-ups for its services but without so indicating and in five instances utilized artificial supporting insurance invoices. These practices, while unacceptable, are no worse than those of at least three recent forwarders who did these things and more but were permitted to continue operating their businesses by the Commission after paying fines and agreeing to certain types of surveillance. Harsher treatment of this applicant than that accorded to the three forwarders and others similarly situated would be arbitrary and unfair.

Robert Stettner and *David Stettner* for applicant/respondent Intercorp Forwarders, Ltd.

John Robert Ewers, Joseph B. Slunt, Charles C. Hunter, and *Stuart James* for the Bureau of Hearings and Field Operations, Office of Hearing Counsel.

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

Adopted December 16, 1982

This is an investigation begun by the Commission's order served on August 21, 1981, to determine, after hearing, whether an applicant for a freight forwarder's license, a corporation known as Intercorp Forwarders, Ltd., which to all intents and purposes, consists of Mr. Robert Stettner, its President, deserves to obtain such license or whether because of alleged past violation of section 44 of the Shipping Act, 1916, namely, carrying on the business of forwarding without a license, plus certain other alleged activities relating to Intercorp's billing practices, applicant should be denied a license and furthermore should be assessed a civil penalty. The case had its origins in the filing of an application by Mr. Stettner for Intercorp on October 6, 1980, a letter of intent to deny the application following a staff investigation because of alleged past violations of law on April 27, 1981, and Mr. Stettner's request for a hearing on the matter, submitted by letter dated May 8, 1981.

In response to his request for a hearing, the Commission instituted the present proceeding and framed three issues relating to Intercorp's alleged operation without a license and to the alleged billing practices and questioned Intercorp's fitness to obtain a license. Because of these allegations of operations and practices, furthermore, the Commission questioned not only whether Intercorp should be denied a license but whether Intercorp ought to be assessed civil penalties. Specifically the allegations concerned Intercorp's purportedly having forwarded at least 24 ocean freight shipments and sharing compensation from carriers for its services presumably with a licensed freight forwarder. In addition applicant allegedly "inflated" charges for ancillary services including inland freight and insurance charges on its invoices to shipper clients and for some of the shipments furnished shippers with false insurance invoices in order to support its own invoices. The Commission's Order of Investigation and Hearing therefore stated that "[t]he alleged violations described above could, if proven, reflect adversely upon Intercorp's fitness" and set down the following three issues for determination (Order of Investigation and Hearing, pp. 2, 3):

1. Whether Intercorp violated section 44(a) of the Shipping Act, 1916, by engaging in unlicensed forwarding activities;
2. Whether civil penalties should be assessed against Intercorp, pursuant to section 32 of the Shipping Act, 1916 and Part 505.3 of the Commission's regulations (46 CFR 505.3) for

[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).

violations of the Shipping Act, 1916, and, if so, the amount of any such penalty which should be imposed; and

3. Whether in light of the evidence adduced pursuant to the first issue, together with any other evidence adduced, Intercorp possesses the requisite fitness, within the meaning of section 44(b), Shipping Act, 1916, to be licensed as an independent ocean freight forwarder.

DEVELOPMENT OF THE EVIDENTIARY RECORD

The record in this proceeding was developed under procedures designed to avoid unnecessary costs and formalities. Two informal conferences were held in my office attended by Hearing Counsel and Mr. Stettner and a series of status reports were submitted by the Office of Hearing Counsel on behalf of the Commission's Bureau of Hearings and Field Operations (the Bureau). Because Mr. Stettner was not represented by an attorney, special efforts were made to advise him of customary procedures and his procedural rights. Although, early in the proceeding, it appeared from the Bureau's initial status report that the issues involved close legal questions as to whether Intercorp's practices had risen to the level of "carrying on the business of forwarding" and the possibility of settlement had been mentioned, the Bureau indicated in their second status report that more recent information about Intercorp's activities changed the complexion of the case from one of interesting legal issues with possible settlement to one of violations with little likelihood of settlement. (See Order to Furnish Prehearing Statement, November 12, 1981.) Therefore, it was decided that litigation was necessary. After the furnishing of information by Intercorp in response to the Bureau's discovery requests, Hearing Counsel drafted a proposed stipulation of facts which, with minor modifications, was submitted into evidence. In addition, Hearing Counsel submitted written testimony of two Commission employees, Mr. Robert James Klapouchy of the Commission's Office of Freight Forwarders, and Mr. Peter S. Breslaw, District Investigator assigned to the Commission's Atlantic District Office in New York City. A written statement of Mr. Stettner plus recent financial statements of Intercorp were also received into evidence. These documents together with various attached documents constitute the documentary evidence of record. In addition, in order to assure Mr. Stettner a completely fair hearing, the Bureau's witnesses were presented for cross-examination at an oral hearing held on February 19, 1982, and Mr. Stettner was allowed to present his own testimony on the record subject to such questioning as Hearing Counsel deemed necessary. Again, the oral hearing was conducted with a view toward protecting Mr. Stettner, who had no legal counsel, from suffering any disadvantage because of his unfamiliarity with Commission hearing procedures. The post-hearing briefing procedure required the

Bureau to file first with their opening brief, thereby enabling Mr. Stettner and Intercorp an opportunity to ascertain and understand fully the Bureau's case against applicant and answer it accordingly. A final reply brief was permitted to the Bureau.

The evidentiary record established under the procedure described above, to a large extent with the full cooperation of applicant who willingly turned over relevant business records requested by the Bureau, essentially shows no factual disputes but rather differing legal conclusions and disputes over the terminology employed by Hearing Counsel in describing applicant's past practices. The following findings of fact are therefore drawn largely from the stipulation of facts entered into by both parties but with some modifications and amplifications drawn from other documents and evidence in the comprehensive record.

SUMMARY OF THE EVIDENCE

The Corporation

1. Respondent and applicant Intercorp Forwarders, Ltd., is a corporation organized under the laws of the State of New York with its principal place of business at 32 Broadway, New York, N.Y.

2. Robert Stettner is the President of Intercorp and holder of forty percent of the corporate stock. The remainder of the stock is held by Serena Stettner.

3. Robert Stettner is the sole salaried officer/employee of Intercorp. However, since May of 1981, Mr. Stettner's brother David became a Vice-President engaged in sales and another person named Joseph DeFronzo became associated with Intercorp as a commission sales agent. (Tr. 88).

4. Intercorp is a licensed customs house broker and also operates as an air freight forwarder and an import consolidation break bulk agent.

Robert Stettner's and Intercorp's Two Applications

5. The application which is the subject of this proceeding is actually Mr. Stettner's second application. On May 2, 1977, Mr. Stettner d/b/a Trans-World Impex Forwarding Ltd. applied as a sole proprietor for an independent ocean freight forwarder license.

6. In acknowledging receipt of Mr. Stettner's application, the Commission's Office of Freight Forwarders advised Mr. Stettner of the prohibition against carrying on the business of ocean freight forwarding without benefit of a license issued by the Commission. The letter, dated May 12, 1977, states: "If you should engage in the business of forwarding before receiving your license, you will be subject to penalties provided by law and may prejudice the issuance of your license."

7. By letter dated September 21, 1977, Mr. Stettner was advised of an intent to deny his application on the ground that he lacked the requisite training and experience to be licensed as an independent ocean freight forwarder. According to the information and references received by the Commission's staff, Mr. Stettner's experience while working for a licensed freight forwarder (Rohner Gehrig & Co.) had been limited to sales rather than documentation. However, by letter dated July 25, 1977, Mr. Stettner had indicated to the Commission's staff that, after leaving Rohner Gehrig, he had tried to obtain employment from freight forwarders but without success because, in his opinion, the forwarding companies "deem me to be too much of a threat to their interests." Mr. Stettner also indicated that he had acquired reference books on forwarding and had studied them. (Ex. C, Appendices III, IV, VI). By letter of September 8, 1977, Mr. Stettner had also written to the staff that "it's very important to me to attain this license as soon as possible because in the meantime I have not been able to make a living" and also stated that he had received offers to give him business if he could obtain a license. (Ex. C, Appendix III). As part of his application file, there was a letter from an American importer located in Waltham, Massachusetts, commending Mr. Stettner and concluding by stating: "Thank you for a job well done and it is a pleasure to be dealing with a man of your knowledge and business acumen." (Ex. C, Appendix III). However, the file also contained a letter from Mr. Stettner's supervisor at Rohner Gehrig where he had been employed, casting aspersions on Mr. Stettner's character, and referring to a "breach of confidence," which negative reference accounts for Mr.. Stettner's difficulties in finding subsequent employment with forwarders, according to Mr. Stettner. (Ex. C, Appendices III and IV).

8. By letter dated October 4, 1977, Mr. Stettner withdrew his application, stating that he wished to withdraw the application "without prejudice but wish to refile above application as soon as positive results are received by me pursuant to the U.S. Customs House Broker's License examination which I took yesterday" (Ex. C, Appendix VI).[2]

9. By letter dated May 1, 1978, Mr. Stettner advised the Commission's Office of Freight Forwarders that he had incorporated his firm and had passed the customs house broker's examination. Mr. Stettner, as President of Intercorp, therefore, asserted Intercorp's eligibility to be licensed as an ocean freight forwarder. Mr. Stettner advised that he had received a grade of 82 percent on the examination given on April 3,

[2] Later Mr. Stettner states that he also withdrew the application because of financial difficulties and because the requirement for bonding had been trebled. (Ex. D, statement of Mr. Stettner, February 19, 1982). This statement is confusing since the bonding requirement raising forwarder's surety bonds from $10,000 to $30,000 became effective at the end of 1978, long after Mr. Stettner's application had been withdrawn in 1977.

1978, in New York City and that "[i]nsofar as a licensed U.S. Customs House Broker's application for approval as FMC licensed independent ocean freight forwarder represents 'prima facie evidence' of documentation and procedure competence as required by the Federal Maritime Commission and, since this is in direct reply to the objection of the Federal Maritime Commission in your letter of September 21, 1977, it is the wish of the writer to see this matter speedily concluded so that normal business may ensue." (Ex. C, Appendix VII). In a later statement, dated February 19, 1982, Mr. Stettner states that he had been advised by Mr. Charles Clow, former Chief of the Office of Freight Forwarders, that passage of the customs house broker's examination would represent "prima facie" evidence of export documentation experience. (Ex. D, p. 3). He also stated that in the course of obtaining the broker's license he had undergone investigation by the Federal Bureau of Investigation and that customs house brokers' functions and that of ocean freight forwarders overlapped in certain respects when importers seek duty-free treatment on goods imported into the United States and their brokers must show proof of the goods' previous manufacture and exportation from the United States by using export ocean bills of lading and export declarations. (Ex. D, p. 2).

10. In response to Mr. Stettner's letter advising that he had passed the broker's examination and believed himself now eligible to obtain a forwarder's license, the Commission's Office of Freight Forwarders, by letter dated May 16, 1978, advised Mr. Stettner that he needed to file an application for a license as a corporation rather than as a sole proprietor together with certain financial information pertaining to the corporation. The Office also furnished Mr. Stettner with other materials including a form letter which is sent to all new applicants detailing the procedure for applying for a license and copies of Form FMC-18 and General Order 4 as a convenience to the applicant. (Ex. C, Appendix VIII). This package of materials again contained a warning against operating as a forwarder without benefit of a license.

11. Between May 16, 1978, and September 16, 1980, the record shows nothing to have happened between Mr. Stettner and the Commission's staff, since Mr. Stettner did not as yet file his application on behalf of Intercorp. However, on September 16, 1980, during the course of a conversation with Mr. Robert James Klapouchy, a Transportation Industry Analyst with the Office of Freight Forwarders, Mr. Stettner detailed his ocean freight forwarding experience. From this discussion Mr. Klapouchy came to believe that Mr. Stettner and Intercorp had engaged in unlicensed ocean freight forwarding activity. This is because Mr. Stettner indicated to Mr. Klapouchy that he had entered into an arrangement with a licensed ocean freight forwarder, Gateway Shipping Co., Inc. (FMC license No. 648), pursuant to which Intercorp had performed a variety of the duties normally performed by a licensee

on a number of ocean export shipments and had shared in the forwarder's compensation received from ocean common carriers on such shipments.

12. During the course of the September 16, 1980, discussion, Mr. Klapouchy advised Mr. Stettner that Intercorp appeared to be carrying on the business of ocean freight forwarding without benefit of a license issued by the Commission. According to Mr. Klapouchy, Mr. Stettner replied that under his agreement with Gateway, he was equivalent only to an employee of Gateway and that he was therefore acting legally.

13. By letter dated September 22, 1980, the Office of Freight Forwarders furnished Intercorp with another application packet. This packet also contained a warning against unlicensed ocean freight forwarding which "may prejudice the approval of your application" and also against use of another forwarder's license as well as against a licensed forwarder's permitting its license number to be used by another person. (Ex. C, Appendix IX). In addition, the packet contained copies of Form FMC-18, the application for license form, and copies of General Order 4 and sections 1 and 44 of the Shipping Act, 1916.

14. On October 6, 1980, Intercorp filed the second application by Mr. Stettner but his first on behalf of Intercorp. This is the application which ultimately triggered this formal proceeding.

15. As part of the application for Intercorp, Mr. Stettner was asked in a formal questionnaire whether he had read and understood all the provisions of the Commission's General Order 4 and the Shipping Act, 1916, as it related to the activities of an independent ocean freight forwarder. To both questions he checked the answer block marked "Yes." In addition, in a separate letter dated October 6, 1980, Mr. Stettner stated that he had read and understood the provisions of General Order 4 and the relevant provisions of the Shipping Act, 1916. (Ex. C, Appendix X).

16. By letter dated November 29, 1980, the Commission's Office of Freight Forwarders acknowledged receipt of Intercorp's application and advised Mr. Stettner once again of the prohibition against unlicensed freight forwarding activity.

17. In early February 1981, the Commission's Bureau of Certification and Licensing requested the Atlantic District Office to institute an investigation of Intercorp's possible unlicensed freight forwarding activity. This investigation was begun and Mr. Peter S. Breslaw, a District Investigator with that Office, was assigned to the investigation.

18. By letter dated February 4, 1981, the Commission's Office of Freight Forwarders notified Intercorp that an investigation of its application had been instituted.

19. Mr. Breslaw, during the course of his investigation, interviewed Mr. Stettner on February 13, 17, and 18, 1981.

Intercorp's Arrangement and Practices With Gateway Shipping

20. In March 1978, Intercorp entered into an arrangement with Gateway Shipping Company, Inc. (Gateway), holder of Independent Ocean Freight Forwarder License Number 648, pursuant to which Intercorp would handle ocean freight shipments for export in conjunction with Gateway. This arrangement terminated some time in February 1981. Mr. Stettner maintains that during this period of time he was not acting as a salaried employee of Gateway but as a "sales representative" or as a commission sales agent for Gateway. (Ex. B, para. 9; Ex. D, p. 1; Exs. 28, 29). In a letter dated May 19, 1978, which apparently summarizes the arrangement between Intercorp and Gateway which is peculiarly designated as "AMK International Corporation," a related company, Mr. Stettner outlined their understanding. (Ex. 28). Mr. Stettner stated that he agreed to become a sales representative of "AMK International" purportedly holding the freight forwarding license.[3] Mr. Stettner was to be paid 50 percent of the carrier compensation payable to the licensed forwarder as well as 50 percent of the forwarder's fees as a consequence of routing exports through the intermediary of the licensed forwarder and was to receive 66 percent of these fees and compensation apparently if the business "is obtained through the assistance of a foreign agent of Intercorp Forwarders, Ltd." (Ex. 28). The licensed forwarder was supposed to bill Intercorp for services rendered to Intercorp under the agreement while Intercorp billed Intercorp's own clients either before or after receipt of the licensed forwarder's invoices to Intercorp. The licensed forwarder's name was to appear on the ocean bills of lading, and that forwarder was not to solicit clients away from Intercorp in connection with any shipments which Intercorp had procured and in which the licensee participated. In addition to these provisions, Mr. Stettner quoted provisions of the Commission's General Order 4 forbidding licensees from sharing any of their compensation or fees with shippers, consignees, etc. (formerly 46 CFR 510.24(c)), but permitting an employee of a licensed forwarder to function without having to obtain his or her own license (formerly 46 CFR 510.4(b)). Moreover, Mr. Stettner cited a reference book on forwarding, recommending that "sales representatives" for

[3] The designation of the other party to the arrangement in Mr. Stettner's written letter (Ex. 28) as "AMK International Corporation" is somewhat confusing. It is clear from the actual shipping documents employed under the agreement that Gateway Shipping Co., Inc., the holder of FMC license No. 648, is the real ocean freight forwarder and that "AMK International Corporation" is some type of affiliated or related company with a common officer, Mr. Abe Knipper. Apparently Mr. Stettner addressed "AMK International" either out of confusion or for convenience. The Commission's records as to Gateway in the Office of Forwarders show "AMK International" as a possible affiliated company with Mr. Knipper involved, possibly as an air freight forwarder. It is clear from those records, however, that it is Gateway that holds the ocean freight forwarder's license, not "AMK International." The parties in this proceeding, however, addressed "AMK International" as a "parent" of Gateway.

licensed forwarders provide a statement to the licensee that no part of the forwarder's revenue would revert to a person included in the prohibited list of persons under the applicable regulation and law and made such statement to the licensed forwarder as part of their arrangement.

21. Twenty-four ocean shipments were forwarded under the arrangement entered into by Intercorp and Gateway beginning in mid-1978 and ending in early (mid-February) 1981.

22. The twenty-four shipments forwarded pursuant to the arrangement were handled for clients secured by or for Intercorp.

23. The bills of lading and dock receipts necessary to forward the twenty-four shipments handled pursuant to the arrangement were prepared by Gateway which also made payments of ocean freight charges to the carriers involved. Intercorp performed all other functions necessary to facilitate the export movement of the twenty-four shipments.

24. Among the services which Intercorp performed in handling the twenty-four shipments forwarded pursuant to the arrangement with Gateway were the following:

(a) preparation and processing of export declarations;
(b) preparation and processing of delivery orders;
(c) arranging for inland transportation;
(d) arranging for cartage or drayage;
(e) coordinating the movement of cargo to the pier;
(f) consular document preparation and processing;
(g) preparation and processing of certificates of origin;
(h) booking, arranging or confirming cargo space;
(i) clearing shipments through customs;
(j) arranging for insurance coverage;
(k) preparing insurance certificates;
(l) dealing with foreign banks;
(m) dealing with foreign consignees;
(n) advancing ocean freight charges; and
(o) receiving, examining and implementing shipper instructions.

25. Intercorp dealt directly with the clients for whom the twenty-four shipments forwarded pursuant to the arrangement were handled. Gateway had no direct contact with these clients. The record contains also an advertised listing of Intercorp Forwarders Ltd., 32 Broadway, Suite 1712, with telephone number, included in an alphabetical listing of various other companies in shipping or related businesses in the *Journal of Commerce "Transportation Tickler,"* with no indication of any rela-

tionship with Gateway. (Ex. 28, attached page; Ex. 29, answer to interrogatory No. 16).

26. The clients for whom the twenty-four shipments forwarded pursuant to the arrangement were not apparently advised directly of Gateway's role in the forwarding of the shipments. However, these shipper-clients were provided with copies of ocean bills of lading which contained Gateway's name on the appropriate space provided for forwarders together with Intercorp's invoices to the shipper-clients. (Ex. 29, answer to interrogatory No. 11). In several instances Intercorp itself indicated to the shipper that "AMK International" was somehow involved (Exs. 6-Q, 8-0, 9-0) or the shipper wrote to Intercorp in care of "AMK International." (Ex. 1-T).

27. Intercorp invoiced the clients for whom the twenty-four shipments were forwarded. These clients were not provided with copies of Gateway's invoices to Intercorp.

28. On ten of the twenty-four shipments forwarded under the arrangement, Intercorp deducted amounts from the sums paid to Gateway equal to fifty or sixty percent of the ocean carrier compensation received by Gateway on these shipments. The amount of $1,642.61 was so retained by Intercorp.

29. Intercorp received $1,570 in forwarding fees on the twenty-four shipments forwarded under the arrangement.

30. On February 18, 1981, Mr. Breslaw, the Commission's District Investigator in New York, interviewed Mr. Stettner and advised him to discontinue the aforesaid activities. Mr. Breslaw believed that what Mr. Stettner and Intercorp had been doing constituted unlicensed forwarding in violation of section 44 of the Shipping Act, 1916, but Mr. Breslaw, assuming that Mr. Stettner understood the applicable law, did not go into detailed enumeration of what constituted unlicensed forwarding. Nor did Mr. Breslaw cite to Mr. Stettner Commission decisions holding that the activities described above constituted unlicensed forwarding. Mr. Breslaw also does not recall that he flatly stated to Mr. Stettner that these activities constituted unlicensed forwarding. However, Mr. Breslaw did explain the nature of his investigation to Mr. Stettner and referred to the relevant portion of the Shipping Act relating to unlicensed forwarding. (Tr. 22-28; 39; Ex. B, para. 14; Ex. D).

The Three Shipments Forwarded After Intercorp's Arrangement With Gateway Had Terminated

31. Subsequent to Mr. Stettner's discussions with Mr. Breslaw in February 1981, Intercorp forwarded three additional ocean shipments for two clients on or about April, July, and August 1981. (Ex. A, para. 18-21; Ex. A, Appendices 25-27; Tr. 39, 85).

32. Intercorp prepared all documentation (except perhaps for dock receipts on two of the shipments) (Tr. 86) and performed or arranged for the performance of all services necessary to facilitate the export of these three shipments, for which Intercorp received $466 in forwarding fees.

33. These three shipments were handled by Mr. Stettner for import clients of Intercorp who had specifically requested that he do the forwarding. Mr. Stettner acceded to the clients' requests in the belief that this was necessary in order to preserve their import business which was very important to Intercorp. Mr. Stettner believed that failure to satisfy their needs would have seriously threatened the existence of his company and that their continued business was "vital to my existing livelihood." Although since approached with more and "numerous" requests, Mr. Stettner has declined them, awaiting the Commission's decision on his application. Mr. Stettner received no compensation ("brokerage") from ocean carriers involved on these three shipments. (Ex. 29, answer to interrogatory No. 1; Ex. 29, letter of November 6, 1981; Ex. D, pp. 1, 2).

Intercorp's Practice of Marking Up Its Costs When Billing Its Clients

34. On twelve of the twenty-four shipments forwarded under the arrangement with Gateway, Intercorp arranged for inland transportation, cartage or drayage.

35. When invoicing its clients for services performed in forwarding these twelve shipments, Intercorp marked up the inland transportation, cartage and drayage costs incurred on the clients' behalf. Such mark-ups amounted to $2,785.06.

36. On thirteen of the twenty-four shipments forwarded pursuant to the arrangement with Gateway, Intercorp arranged for insurance coverage.

37. When invoicing its clients for services performed in forwarding these thirteen shipments, Intercorp marked up the insurance premiums paid on the clients' behalf. Such mark-ups amounted to $4,531.37.

38. When invoicing clients for whom the twenty-four shipments forwarded under the arrangement with Gateway were handled, Intercorp also marked up consular fees paid on behalf of those clients.

39. Intercorp's mark-ups of inland transportation, cartage, drayage, insurance and consular costs incurred on behalf of clients for whom the twenty-four shipments forwarded pursuant to the arrangement with Gateway were handled were not identified as mark-ups or designated as service or placement fees. These mark-ups were lumped together with the actual costs incurred and the total appeared as Intercorp's charges to the clients on Intercorp's invoices.

40. On five of the twenty-four shipments forwarded pursuant to the arrangement with Gateway, Intercorp instructed its insurance agent,

Loren Brokerage Co., to prepare a second "adjusted" invoice which increased the actual insurance costs shown on the first invoice. Intercorp paid the first or correct invoice. The second "adjusted" invoice was used by Intercorp to support its billing of its own clients. The shipments occurred only between August and December of 1978.

41. Mr. Stettner explained the above practice of utilizing incorrect, "adjusted" insurance invoices by stating that he used such invoices in order to secure profits "for lack of any other way known to us at the time" and that other functions were included in the service, namely responsibility for shipper collections. He stated furthermore that his clients did not object, that he was induced to do this by the insurance agent, and was young, naive, and had only $600 in the bank. (Tr. 79). In other respects on some shipments, Mr. Stettner states that he marked up inland trucking and rail freight costs when handling shipments for a British forwarder known as M & S Shipping, with whom Intercorp had business dealings, because of negative payment disputes with M & S. (Ex. D, p. 3; Tr. 43). Mr. Stettner also explained that he used markups on insurance costs to cover costs of collection of letters of credit. Consular fees were also marked up.

42. On the three shipments handled completely by Intercorp in 1981 after termination of the arrangement with Gateway, Intercorp marked up inland freight and insurance costs. The mark-up of the former amounted to $201.50; the mark-up of the latter amounted to $800.85.

Intercorp's Limited Financial Situation and Small Size

43. Intercorp is, as the Bureau acknowledge, "an extremely small operation possessed of limited financial resources." Opening Brief of Hearing Counsel, p. 33). As noted earlier, Mr. Stettner is the sole salaried officer/employee. For the twelve month period ending October 31, 1981, Intercorp generated a net profit of only $894.77 after taxes on gross income of $58,004.26. For the previous fiscal year ending on October 31, 1980, Intercorp's net profit had been $8,296.56, after taxes, out of gross income of $71,553.04. (Ex. E). For fiscal 1979, Intercorp showed only $414.84 net profit, after taxes, out of gross income of $138,156. (Ex. C, Appendix X, Financial Report). Intercorp has thus shown a steady decline from 1979 to 1981 in gross income and a sharp decline in net profits in 1981, after a significant gain in 1980, to a negligible amount.

44. Intercorp's net worth is also rather negligible. In its fiscal year 1981, its net worth (assets less liabilities) was only $14,582.25; in 1980 it was $13,687.48, and in 1979 it was $5,390.92. (Ex. E; Ex. C, Appendix X, Financial Report).

Background of Mr. Robert Stettner

45. Since Mr. Stettner is to all intents and purposes Intercorp Forwarders Ltd., any decision about the fate of Intercorp ought to show something about his background, and education. The resume which Mr. Stettner submitted to the Commission's staff with Intercorp's application for a license in October 1980 is contained in the record. (Ex. C, Appendix X). It shows that Mr. Stettner is 33 years old (born January 4, 1949). He was educated at the University of Vermont where he received a Bachelor of Business Administration degree in May of 1971 with a major in Finance and a minor in Spanish. According to this resume, he speaks, reads and writes Spanish fluently, German and Portuguese adequately, and French passably. He has also graduated from the National Credit Office in New York City, the World Trade Institute in "ocean shipping," and the World Trade Institute Language School in German. He had held a variety of jobs (sales, clerking with several non-shipping companies) until joining Rohner Gehrig & Co. where he was involved in ocean freight and air freight sales, traffic administration, and customs brokerage from February 1974 to February 1977. He has cleared shipments through U.S. customs, arranged air freight exports, filled out export declarations, and been involved in other transportation-related activities (documentations, issuing delivery orders, etc.). As noted before, he took and passed the examination for a U.S. Customs House Broker on April 3, 1978, for which he also underwent an F.B.I. investigation. Included in his application package (Ex. C, Appendix X) are several letters of recommendation or favorable responses from several companies (Rutland Maritime Management Corporation of New York City, Capitol Records, Inc.) as well as several credit references for Intercorp. (As also mentioned earlier, however, the record contains a negative report about Mr. Stettner from his previous supervisor at Rohner, Gehrig as well as a favorable report from the same person and a most favorable letter from an importer in Waltham, Mass., known as Compo Industries, Inc.) (Ex. C, Appendices III and IV).

DISCUSSION AND CONCLUSIONS

The questions to be determined are essentially three. First, did Intercorp carry on the business of forwarding without benefit of a license by performing forwarding services on 24 shipments under its arrangement with Gateway Shipping, a licensed forwarder, from 1978 to early 1981 and thereafter by forwarding three shipments on its own at the request of two clients, in violation of section 44(a) of the Shipping Act, 1916, 46 U.S.C. § 841b. Second, if Intercorp did carry on such business without a license in violation of law, should civil penalties be assessed under section 32(a) of the Act, 46 U.S.C. § 831 and, if so, in what amount. Third, does Intercorp deserve to obtain a license, in other

words, should Intercorp be found to possess the requisite "fitness" within the meaning of section 44(b) of the Act, 46 U.S.C. § 841b, if it is found to have carried on the business without a license or to have conducted itself in other ways suggesting unfitness.

The Bureau's Contentions

The Bureau of Hearings and Field Operations (Office of Hearing Counsel) are emphatic in their contentions that Intercorp engaged in the business of forwarding without a license, that for that reason and others Intercorp has not been shown to be fit to obtain a license, and that it should be assessed a civil penalty in the amount of $5,000. The Bureau argue that the evidence of record shows that Intercorp's arrangement with Gateway permitted Intercorp to perform a number of forwarding services which are more than enough to constitute the carrying on of the business of forwarding. Under the arrangement with Gateway, they argue, Gateway acted merely as a subcontractor to Intercorp by performing only a few services, namely, preparing ocean bills of lading, dock receipts, and paying ocean freight to carriers plus sometimes booking cargo space. On the other hand, Intercorp did all the rest of the forwarding services, e.g., preparing and processing export declarations, delivery orders, arranging for inland transportation, cartage, drayage, other documents, booking, arranging or confirming cargo space, handling financial matters, advancing ocean freight, implementing shipper instructions, etc. Moreover, Intercorp held itself out to its shipper clients in its own name and dealt directly with these shippers, the shippers not dealing with Gateway at all nor being directly advised of Gateway's involvement. As far as the final three shipments handled solely by Intercorp are concerned, the Bureau argue that there is no doubt that Intercorp acted as sole freight forwarder performing all necessary services with no subcontracting to Gateway whatsoever.

In support of their contentions, the Bureau cite numerous authorities, section 44(e) of the Act, 46 U.S.C. § 841b, listing forwarding functions, relevant portions of the Commission's regulation, General Order 4, 46 CFR 510.2(f) and 510.2(h), defining a freight forwarder and listing forwarding functions. In addition, the Bureau cite Commission decisions further defining and explaining the functions of forwarders which, they argue, show clearly that Intercorp was indeed carrying on a forwarding business, citing such decisions as *Investigation of Practices, Operations, Actions, and Agreements of Ocean Freight Forwarders. . .*, 6 F.M.B. 327, 334 (1961); *Dynamic International Freight Forwarder, Inc., Independent Ocean Freight Forwarder License Application. . .*, 23 F.M.C. 537 (1981); *Independent Ocean Freight Forwarder Application - Air-Mar Shipping, Inc.*, 14 SRR 97, 99-100 (I.D.), adopted by the Commission, 14 SRR 1250 (1974). Legislative history to the enactment of the Freight For-

warder Law is also cited to demonstrate that Intercorp's practices constituted forwarding.

On the question of Intercorp's fitness to obtain a license, the Bureau argue vigorously that Intercorp's past actions demonstrate unfitness and unreliability and show that it would not be able to maintain a standard of professional conduct reflecting the high degree of business responsibility which forwarders should and must possess before serving the public. The Bureau do not contend that past violations automatically bar a person from thereafter obtaining a license but cite Commission decisions holding that such violations are relevant to the question of fitness and "militate against the issuance of a license." The Bureau also cite Commission decisions emphasizing the need for forwarders to maintain high standards of business conduct and to show that they will adhere to law and Commission regulations since they occupy a position of trust and responsibility.[4] They argue that the record shows Mr. Stettner to have received warnings against operating without a license on at least four occasions by the Office of Freight Forwarders and on two occasions by Commission investigators or employees. Yet, argue the Bureau, Mr. Stettner continued his arrangement with Gateway and, after terminating the arrangement, forwarded three shipments after warnings from the investigator. This suggests to the Bureau that Mr. Stettner cannot be trusted to follow applicable law and regulations although he had stated in his application forms that he understood the law and regulations. The Bureau consider Mr. Stettnar's conduct to demonstrate such disregard of law that it is not likely that he can be trusted to obey fully the mandates and requirements of law and relevant Commission regulations. They dismiss Mr. Stettner's contention that he acted out of a feeling of financial need or desperation when servicing the last three shipments or in the belief that his arrangement with Gateway was permissible as indicating a weakness of character in that, according to the Bureau, Mr. Stettner may only conform to law when it is convenient to do so. Again, past Commission decisions in which applicants are denied licenses who have blatantly disregarded law or have engaged in deliberate schemes to evade the licensing

[4] The cases cited are: *Independent Ocean Freight Forwarder License Application - Guy G. Sorrentino*, 15 F.M.C. 127, 134 (1972); *Harry Kaufman d/b/a International Shipper Co. of N.Y.*, 16 F.M.C. 256, 271 (1973); *Cargo Systems International (CSI)*, 22 F.M.C. 56, 71 (1979). In *Harry Kaufman*, the Commission found respondents unfit who had either permitted use of a license by another person or transferred a license to another person without Commission approval or performed forwarding for a person whose license had been revoked. (16 F.M.C. at 264). However, even so, the Commission permitted a new corporation formed out of certain persons involved to refile its application for a license once certain defects had been cured. (16 F.M.C. at 261). In *Cargo Systems International*, applicant had devised a series of phony sales agency agreements which did not resemble an employee-employer contract at all and was found unfit. In *Guy G. Sorrentino*, applicant was actually found fit to obtain a license because of numerous mitigating circumstances although his previous forwarding company had engaged in a misclassification scheme with a shipper. (15 F.M.C. at 128, 130).

requirement are cited by the Bureau. The Bureau are vary emphatic as to Intercorp's practices of marking up invoices, which they call "inflating," and liken such practices to fraud and deception, facts which further militate against finding Intercorp to be "fit" since they call into question Mr. Stettner's honesty and integrity. Again, Commission and other decisions are cited to justify arguments against licensing Intercorp because of such activity.

On the question of penalties, the Bureau contend that ordinarily they would urge a penalty of $20,000 because of Intercorp's operations over a three-year period without a license which the Bureau argue to have been "knowing and wilful" despite numerous warnings. However, the Bureau acknowledge that because of Intercorp's "relatively precarious financial status," such a large fine or even one which would recover all of the forwarding fees received over the three year period ($12,000) "would seriously jeopardize the continued viability of Intercorp." (Opening Brief of Hearing Counsel, p. 33). The Bureau also briefly allude to Intercorp's cooperation in furnishing evidence during the course of the proceeding presumably as a minor mitigating factor. Therefore, the Bureau conclude that $5,000 would be a reasonable penalty. Such a penalty plus denial of a license, in the Bureau's view, would not leave applicant without means of support because applicant is a licensed customs house broker and has handled over $500,000 in gross revenues since Intercorp was incorporated, largely derived from other activities than forwarding.

Mr. Stettner's Arguments in Defense

Mr. Stettner suffers from the handicap of defending himself without benefit of trained legal counsel. Therefore, to some extent, he defends against contentions that were either not made against him or that are irrelevant.[5] However, he does stand up and fight for himself and his company in plain English. He states that he did not believe that his arrangement with Gateway was illegal and that he believed he was merely a sales representative or a "bona fide employee" of that licensed forwarder who, under Commission decisions, does not need his own license. He states that he never impeded his clients' market penetrations and that they never complained about him or Intercorp to the Commission when he handled the twenty-seven shipments. He contends that he

[5] For example, Mr. Stettner seems to believe that Intercorp is accused of having charged forwarding fees which were so high as to be detrimental to the commerce of the United States, contrary to section 18(b)(5) of the Act, and cites Commission decisions under that law. He also argues that he has suffered from "blacklisting" because of a former employer and unjust discrimination under section 17 of the Act, citing cases. But the issues and this decision have nothing to do with any alleged "blacklisting" or discrimination against Intercorp stemming therefrom. The Commission's Order does not refer to Mr. Stettner's or Intercorp's willingness or ability to perform forwarding services, only to the question of whether their alleged past operations as a forwarder without a license and certain billing practices render Intercorp unfit to obtain a license in the future.

acceded to the requests to perform forwarding for two clients in connection with the three shipments in 1981 handled solely by Intercorp in the belief that this was necessary to retain those clients' who used his customs house brokerage services because their business was vital to the continuation of Intercorp. Mr. Stettner states that he has cooperated with the Bureau by willingly furnishing all requested documents pertaining to his forwarding activities even though the materials furnished were damaging to his application, and he promises continued cooperation. He also states that he voluntarily discontinued all forwarding in August 1981 (even though elsewhere stating that he has had numerous requests from clients to perform forwarding which he has refused) and that he apparently first realized that he had possibly violated law only after the first informal conference in Washington with me and Hearing Counsel in September of 1981. In this regard he states that he never received a clear cease and desist order and that violations had not been found during the period of time that the Commission's staff had been advising him, that the Commission's investigator had "casually" interviewed him, and cites a Commission ruling that the Commission has no injunctive powers and can only issue cease and desist orders after hearing and upon findings of violations of law. (*Berthing of Seatrain Vessels in San Juan, Puerto Rico,* Docket No. 76-41, 9-7-76) (16 SRR 1395). Nevertheless, as noted, he states that he has ceased the questionable activity and promises to adhere to law and regulations in the future if he obtains a license for Intercorp.

Mr. Stettner contends furthermore that he has suffered "blacklisting" because of an unfriendly separation from employment with Rohner Gehrig and has had trouble finding employment with forwarders as a result. Therefore he asks that the Commission consider his past activities in the light of his financial and personal difficulties and problems during a period which he describes as one of "extreme hardship." (Respondent's Opening Memorandum of Law, p. 7). He cites a Commission decision frowning upon arbitrary or capricious exercise of the power of licensing and expressing the Commission's intent to consider "constitutional and lawful safeguards of individuals and their right to make a living." *Application for Freight Forwarder License, Carlos H. Cabezas,* 8 F.M.C. 130, 131 (1964).

Mr. Stettner cites other facts in support of his position. He states that none of the shippers whom he serviced ever complained to the Commission about Intercorp's charges, that the quality of his work justified the charges, and that the shippers used Intercorp's services and made their sales at profits to themselves, showing that his charges must have been reasonable. (Respondent's Memorandum, p. 11). Furthermore, he states that Intercorp. "went to whatever lengths were necessary to see that its clients were paid (Respondent's Memorandum, p. 19), citing

Commission decisions condemning forwarders who misuse shippers' funds entrusted to the forwarders."

As further evidence of his good character and ability, Mr. Stettner cites the fact that he has been licensed by the U.S. Department of the Treasury as a Customs House Broker for which he took and passed an examination and underwent an F.B.I. investigation. Moreover, Mr. Stettner argues that the Bureau's contentions that, if licensed, he and Intercorp may well depart from law and regulations are "unauthorized" and violative of his due process rights since, in his opinion, they represent "acrimony" and "innuendo" and are speculative. He cites a Commission decision holding that such speculation of future behavior is no ground for denial of a license but that if the licensee does violate law in the future, such conduct can be handled in an appropriate proceeding at the time. *Independent Ocean Freight Forwarder Application—Sequoia Forwarders Co.*, 19 F.M.C. 182, 189 (1976).

What is a Reasonable Disposition of the Application Under Commission Precedent?

The facts in this case are not especially complicated and there is no real dispute as to what happened. The real problem is that Intercorp has carried on the business of forwarding during the period 1978 through 1981 and has utilized "adjusted," incorrect invoices to itself to support some of its charges to its customers, thereby concealing mark-ups on its services, as the great preponderance of evidence shows. Given those facts, the question is whether this obviously struggling young man and his Intercorp company deserve to obtain a forwarder's license and, furthermore, whether Intercorp should pay a civil penalty for having operated without a license in violation of section 44 of the Act. The problem of reaching a just and reasonable decision is made more difficult by the fact that the Commission's many decisions in this area have not always been consistent. Sometimes licenses have apparently been granted or not revoked though the forwarders seemed more culpable than Intercorp and Mr. Stettner and sometimes licenses have been denied though the applicant seemed about equally culpable with Intercorp. However, in a number of recent decisions, forwarders have been permitted to retain their licenses or obtain them after paying something in settlement of the issues of violations very similar to those involved in this case and have been found fit to retain licenses after recommendations of fitness were submitted by the Bureau. Perhaps it is well to bear in mind the statements in these cases that each case requires careful consideration of the peculiar facts so that the Commission's exercise of its discretion will be sound and so that it will avoid arbitrariness or unfair discrimination against particular applicants in cases which lie in gray areas and in which reasonable persons can

differ. Thus, as the Commission stated in *Fabio A. Ruiz d/b/a Far Express Co.*, 15 F.M.C. 242, 243 (1972):

> An arbitrary denial of a freight forwarder license constitues a denial of due process of law. On the other hand, the government can require high standards of qualifications, such as good moral character or proficiency in the business before it admits an applicant. The matter of fitness or good moral character is a gray area where fair-minded men draw differing judgment from the same set of facts.[6]

As I explain below, I believe that the Bureau's tough-minded approach, while well argued and carefully researched, lacks an element of compassion or balance, hammering as it does on strict standards and extreme sanctions, although in a gray area case such as this one, reasonable persons could differ. I am also influenced by the fact that their approach departs abruptly from their own previous positions and Commission decisions in more recent cases of this type which refrain from extreme sanctions, preferring to fashion remedial orders and protective devices enabling persons to carry on forwarding businesses under periodic supervision when mitigating factors are present. I would therefore give young Mr. Stettner and his Intercorp company a chance to develop their forwarding business and extricate themselves from the financial doldrums in which they now reside under certain protective conditions which have been followed in numerous cases of this type. However, I would also follow the distinction between the remedial provisions of section 44 of the Act under which licenses can be granted and are not revoked if protective audits and supervision are maintained and the more punitive portion of law encompassed in section 32 of the Act prescribing civil penalties to deter recurrence of prohibited practices. Therefore, although I believe Intercorp should have an opportunity to serve clients under certain safeguards, it should not walk away from its past violation of law without a reasonable penalty which, however, considers its ability to pay, lest the penalty destroy the business before it has a chance to survive. I would therefore assess a penalty of $3,000 and permit payment over a three-year period of time

[6] The *Ruiz* decision bears further consideration and will be cited again. In that case Mr. Ruiz applied for a license and admitted that he had operated without a license, forwarding 23 shipments for under two months, knowing that this operation was a "lie" and was unlawful, although he did not defraud anyone, and that he was fully aware of the licensing requirements of section 44 and General Order 4 and had worked for freight forwarders and exporters for twenty years. (15 F.M.C. at 245). Yet both the presiding judge and the Commission found Mr. Ruiz to be fit, notwithstanding the knowing and wilful violations of law. Since the record in the case was submitted on paper, the presiding judge did not even observe the applicant and the Commission noted that fact. (15 F.M.C. at 243). There are striking similarities between Mr. Ruiz and Mr. Stettner, Mr. Ruiz stating that he did unlawful forwarding "in order to be able to support my family, and I did not wait for the issuance of my License, that I applied for." (15 F.M.C. at 245). I have observed Mr. Stettner in this case and find his demeanor and deportment to support his contentions that he acted under stress or misunderstanding of the law and promises to comply with the law in the future.

in view of Intercorp's precarious financial situation. Before elaborating on these conclusions, however, I must dispose of the issue of violations with adequate explanations.

Intercorp Did Carry on the Business of Forwarding Without a License and Did Utilize Incorrect Invoices But Prevailing Commission Decisions Do Not Require Denial of the Application

There is little doubt on this record that Intercorp was carrying on the business of forwarding during the period March 1978 through February 1981 under its arrangement with Gateway Shipping during which it handled 24 shipments and that thereafter it forwarded three additional shipments in April, July, and August 1981, all on its own. The Bureau's arguments and the evidence developed are persuasive. Although Mr. Stettner argues that he believed that he had only become a "sales representative" or a commission sales agent and not a forwarder in his or Intercorp's own right and that not being an attorney and not being provided with previous case law deciding what Intercorp's arrangement with Gateway Shipping really constituted, these arguments relate to mitigation of the offense, to the question of Intercorp's fitness to obtain a license, and to the amount of civil penalty. They do not provide a defense to the violation. The clear facts are, as described above, that Intercorp, without its own license, held itself out to perform forwarding services and performed virtually all of them except for preparation of ocean bills of lading, dock receipts, and initial payment of ocean freight, which services it subcontracted to Gateway Shipping under its arrangement with Gateway, and, furthermore, that Intercorp billed its own clients who were not billed by Gateway and were not directly informed of Gateway's involvement generally except through copies of the bills of lading given the clients, on which Gateway's name appeared. Under the arrangement, furthermore, Intercorp shared the compensation paid by carriers to Gateway, deducting its share from the money it remitted to Gateway for performing the limited services which Gateway performed for Intercorp. Though Mr. Stettner, in drawing up this arrangement with Gateway (actually addressing it to "AMK International Corporation," a related company) took pains to cite the Commission's General Order 4 prohibiting shippers, consignees, and other persons from receiving any portion of carrier compensation paid to licensed forwarders and referring to the portion of General Order 4 stating that employees of licensed forwarders need not be licensed themselves and stating that these prohibitions would be respected by Mr. Stettner, these facts again only illustrate Mr. Stettner's belief that he might have been acting legally but do not change the fact that, under the arrangement, he was carrying on the business of forwarding without benefit of a license and was, in effect, relying upon Gateway's license number which was placed on bills of lading so that

ocean carriers would pay compensation to Gateway. As case law clearly shows, the fact that Gateway performed three or so forwarding services (preparing bills of lading, paying ocean freight, preparing dock receipts) while Intercorp performed 15 or so other forwarding services running the gamut from preparation and processing of export declarations and other shipping documents, arranging inland transportation, booking cargo space, implementing shippers' instructions, etc. (see Summary of Evidence, paragraph No. 24) in no way indicates that Intercorp did not perform forwarding services. The Commission made clear in *Dynamic International Freight Forwarder, Inc.*, cited above, 23 F.M.C. 537, that a person could be carrying on the business of forwarding without performing all of the services which forwarders may perform. The Commission held that the terms "dispatching of shipments" and "handling the formalities incident to such shipments" contained in section 1 of the Act defining the term "carrying on the business of forwarding" have been treated as a "single concept to describe a range of activities, any one of which may constitute forwarding. . ." 23 F.M.C. at 543. The Commission furthermore explained that "a freight forwarding license is required for any one who proposes to engage in any of the 'forwarding' (or 'dispatching') activities described in . . . 46 CFR 510.2(c) . . . [now 46 CFR 510.2(h)]." The Commission affirmed the presiding officer's finding that Dynamic had violated section 44 of the Act because "Dynamic engaged in one or more of these activities on numerous occasions without a license .. . ." 23 F.M.C. at 544. Both the statute itself, section 44(e) of the Act, and the Commission's regulations in the portions cited in the quoted passage immediately above clearly include the type of services performed by Intercorp under its arrangement with Gateway [7] and, of course, on the final three shipments in 1981 when Intercorp performed all necessary services, there is no question that Intercorp was performing as a forwarder. Even if one could argue that the final three shipments handled by Intercorp in

[7] Thus, section 44(e) of the Act, 46 U.S.C. § 841b, sets forth the following functions performed by freight forwarders: soliciting and securing cargo, booking or otherwise arranging for cargo space, coordinating the movement of cargo to shipside, preparing and processing ocean bills of lading, preparing and processing dock receipts and delivery orders, preparing and processing consular documents and export declarations, and paying ocean freight charges. General Order 4, as revised effective October 1, 1981, 46 CFR 510.2(h), essentially recodifies the earlier 46 CFR 510.2(c) and lists such services as "ordering cargo to port; preparing and/or processing export declarations; booking, arranging for or confirming cargo space; preparing or processing delivery orders or dock receipts; preparing and/or processing ocean bills of lading; preparing or processing consular documents or arranging for their certification; arranging for warehouse storage; arranging for cargo insurance; clearing shipments in accordance with United States Government export regulations; preparing and/or sending advance notifications of shipments or other documents to banks, shippers, or consignees, as required; handling freight or other monies advanced by shippers . . .; coordinating the movement of shipments for origin to vessel; and giving expert advice to exporters concerning letters of credit, other documents, licenses or inspections, or on problems germane to the cargos (sic) dispatch." As the evidence shows, Intercorp performed many of the above services under its arrangement with Gateway and even more of them when it handled the three shipments in 1981 by itself.

April, July, and August 1981, at the specific behest of two of Intercorp's important customs house brokerage clients, were only sporadic and incontinuous and did not constitute "carrying on the business of forwarding" but only an occasional dabbling in forwarding with no holding out or solicitation of forwarding business as had occurred under Intercorp's arrangement with Gateway, the argument does not detract from the three-year period of holding out by Intercorp under its arrangement with Gateway. At best, therefore, Intercorp is shown quite persuasively on the evidence of record to have carried on a forwarding business without benefit of a license, notwithstanding its assertions that it had only believed itself to be a sales representative or agent or some other type of employee of Gateway Shipping and therefore did not itself need to obtain a license. Previous Commission decisions have held that similar type arrangements by which unlicensed persons entered into so-called "agency" or "employment" arrangements with licensed forwarders which did not constitute true employment relationships, did not exonerate the purported employee or agent from liability under section 44 of the Act. If, furthermore, the person involved deliberately conceived a phony employment arrangement to avoid the licensing requirement and to make use of a licensed forwarder's name and number to effectuate the scheme, such person has understandably been found to be unfit to obtain a license. If there has been no deliberate intent to conceive such a scheme, however, the results may be different. See, e.g., *Independent Ocean Freight Forwarder License Application, James J. Boyle & Co. . . . .*, 10 F.M.C 121 (1966) (applicant devised a phony employment relationship with a licensee's employee in order to use the licensee's name and number, the scheme being a product of "guile and deception"; applicant found unfit); *Cargo Systems International. . .*, 22 F.M.C. 56 (1979) (applicant devised phony commission sales agent agreements with a succession of licensed forwarders but ran the forwarding operation himself with no semblance of being a mere employee or sales agent of the licensees; applicant found unfit). But compare decisions in which applicants have been found fit when they mistakenly arranged to use licensed forwarder's license numbers and were found to have operated without a license in violation of law, albeit unintentionally. See, e.g., *Gemini International Co.—Possible Violations of Section 44(a)*, 24 F.M.C. 893 (1982) (licensee unintentionally permitted unlicensed person to perform forwarding services on 290 shipments as employee of the licensed forwarder in a "branch office" but discontinued this activity when discovering that the "branch office" had not been properly opened under Commission regulations; licensee found fit to retain its license but paid $2,500 in settlement); *Paulssen & Guice Ltd.—Freight Forwarder License*, 24 F.M.C. 583 (1982) (applicant forwarded 922 shipments for two years using licensed forwarder's license in mistaken belief that as a former branch office it could continue

to use the license but discontinued the practice when advised it was unlawful; found fit and agreed to pay $5,000 in lieu of civil penalties). As I indicate below, I do not classify Mr. Stettner's attempt to become a sales representative for Gateway as a deliberate scheme full of "guile and deception" because there is sufficient indication on the record that he believed his arrangement could conform to law and did not possess the necessary legal skills or knowledge to realize that his arrangement crossed the line from agency or employment to independent contracting between Intercorp as a forwarder in its own name and Gateway, a licensed forwarder. Were Intercorp's operations as a forwarder without a license the only problem in determining Intercorp's fitness, this proceeding would be easier to decide since the Commission has never held that past operations without a license act as an automatic, immutable bar forever to any applicant seeking to obtain a license if there are mitigating circumstances. See, e.g., *Independent Ocean Freight Forwarder Application—Air-Mar Shipping Co.*, 14 SRR 97, 101, 125 (I.D.), adopted, 14 SRR 1250 (1974); *Dixie Forwarding Co., Inc., Application for License*, 8 F.M.C. 109, 112 (1964), license granted on reconsideration, 8 F.M.C. 167; *Cargo Systems International (CSI)—Independent Ocean Freight Forwarder Application*, 22 F.M.C. 56, 71 (1979); *Fabio A. Ruiz*, cited above, 15 F.M.C. at 246; *Paulssen & Guice, Ltd.—Freight Forwarder License*, 24 F.M.C. 583, 589-590 (1982); *Kuehne & Nagel, Inc.—Independent Ocean Freight Forwarder License No. 1162*, 24 F.M.C. 315, 337-338 (1981).

The more difficult problem arises because while Mr. Stettner and Intercorp carried on a forwarding business without a license, Intercorp engaged in certain billing practices which in some instances fell below reasonable standards of honesty even though probably caused by economic hardships and pressures. I refer to Intercorp's unfortunate habit of concealing mark-ups on its invoices furnished to its clients but, more particularly, to its use of incorrect, "adjusted" insurance invoices. As described above (Summary of Evidence, paragraphs 34-42), Intercorp marked up its fees on its invoices covering such services as inland transportation, cartage, drayage, insurance, and consular costs. There is no prohibition in law against a business marking up its costs when it performs a service in order to realize a profit. Intercorp was not in business to be a non-profit charity donating its services to shippers for nothing. However, Mr. Stettner did two things in addition to the normal, accepted practice of marking up. First, he lumped his costs and mark-up together and presented to the shippers a charge for each service as a single figure so that the shipper could not tell whether the charge represented actual cost to Intercorp or cost plus profit nor, of course, what that margin of profit was. Second, and more seriously, in order to support some of the charges for cargo insurance which Intercorp billed its shipper clients, on five of the twenty-seven shipments

forwarded by Intercorp, Mr. Stettner arranged to have his insurance broker prepare a second "adjusted" insurance invoice which showed a greater premium cost than the actual cost on the first and real insurance invoice that Intercorp actually paid the insurance broker. This second, artificial invoice was used as the basis of billing the shippers. Mr. Stettner explained that he utilized these artificial insurance invoices in order to secure profits "for lack of any other way known to us at the time," and that he was misled by the insurance broker, was young, naive, and without much money. He also explained that he marked up other costs in order to cover costs of other functions included in the particular services performed, e.g., costs of letter of credit collections and because of payment disputes with a British forwarder who apparently owed Intercorp money. Such explanations might explain why any business person has to mark up his or her goods or services. However, they do not explain why this practice had to be done in such a devious way.

As to the practice of marking up each service performed, although not violative of normal profit-making business codes, as I have indicated, it does run afoul of the standards of practice prescribed by the Commission in General Order 4. Although technically, since Intercorp did not have a license when it performed the forwarding services in question and was not therefore perhaps bound by General Order 4, that regulation was designed to enunciate reasonable standards of conduct to ensure decent behavior by licensed forwarders and protect shippers against underhanded, deceitful practices. The relevant portions of General Order 4 pertaining to forwarders' billing practices are now 46 CFR 510.32(c), 510.32(d), and 510.32(h) of General Order 4, as revised, effective October 1, 1981, previously 46 CFR 510.23(d), 510.23(e), and 510.23(j). These three sections of the regulations deal with the forwarder's duty not to knowingly impart to its shipper clients false information relative to any forwarding transaction, not to withhold information from the forwarder's client, and the forwarder's duty to itemize its charges separately and to show actual costs for these charges separately. (In the revision to General Order 4, however, this last duty has been somewhat modified so that forwarders, while still required to list actual costs for each charge, may, however, provide only a general lumpsum service fee for all services. (See 46 CFR 510.32(h), the present provision, as compared to 46 CFR 510.23(j), the previous provision.) These regulations obviously, among other things, serve the purpose of enabling shipper clients of forwarders to determine whether the forwarder is marking up on its fees and services and even how much, but under the present regulation, however, only generally as to the total service fee rather than as to the mark-up on each service performed. Shippers can therefore change forwarders if they believe the mark-ups too high. (Of course, they could change forwarders even without knowing the

forwarders' mark-ups if they thought their fees were too high.) The greater offense to one's sense of integrity, however, is the use of false backup insurance invoices on the five shipments which could only have been used to induce shipper clients into believing that Intercorp's fees for obtaining cargo insurance were merely its actual costs without mark-ups. Mr. Stettner explained why he felt the need to do this and stated that no shipper complained. (One wonders what the shipper would say had he known about the practice, however.) But these excuses are not really valid. The phony invoice practice was plainly dishonest and although it was not as harmful as forwarders' absconding with shippers' funds or misusing shippers' funds for the forwarder's own private purposes rather than payment to ocean carriers, leaving shippers in great debt to carriers, it is inherently dishonest and deceitful. I cannot condone it. However, following many Commission decisions, I do not believe that Intercorp needs both to be penalized by paying what, for it, amounts to a significant monetary penalty, and also needs to be stigmatized permanently and forever banished from the forwarding business. Nor, in similar cases, does the Commission. For example, compare the recent case of *Chumet Shipping Co., Inc.—Freight Forwarder License*, 24 F.M.C. 609 (1982). In *Chumet*, among other things, the forwarder inflated the amount of insurance premiums it paid to insurance companies, marking up premium payments from 10 to over 100 percent without informing its clients of the true premium costs over almost three-years' period of time, realizing insurance profits of $152,836 in 1979. (24 F.M.C. at 618-619). Moreover, Chumet engaged in other unlawful practices, e.g., misrepresenting the selling price of certain merchandise by failing to disclose a five percent discount and failing to account to its principal for receipt of a claim on insurance. Yet Chumet was found fit to retain its license because of mitigating circumstances (employee responsible no longer with the company, discontinuance of the practice, sincere intention to comply with law in the future) (24 F.M.C. at 623-624). Chumet also agreed to permit unannounced audits of its books and to pay $20,000 over four years' time in lieu of civil penalties.

In another recent case, *Independent Freight Forwarder License No. 1483, Tokyo Express Co. Inc. and Kozo and Kathleen Kimura D/B/A Cosmos Trading Company*, 25 F.M.C. 339 (1982), the forwarder, among other things, on 29 shipments over a year and one-half invoiced shippers substantial amounts for payment of ocean freight above the actual ocean freight, overcharging shippers by $14,000, overcharged shippers for drayage in the amount of $2,062 over actual costs, billed shippers for forklift charges in the amount of $550 when there were no such costs on the shipment, overcharged shippers on the 29 shipments a total amount of $16,534.08, did not maintain receipts or documents to support its charges on the 29 shipments, and declared cubic measurements

which were less than actual measurements of the cargo (presumably thereby underpaying ocean carriers). (25 F.M.C. at 346). However, the forwarder, a small company serving the Japanese community in San Francisco, fully cooperated with the Commission's staff and showed an intent to comply with law in the future, discontinued its connection with a shipper, and corrected its dilatory record-keeping and other past sloppy practices. In addition, the forwarder agreed to pay $15,000 in settlement of the issues of violations (raised to $20,000 by the presiding judge) and was found fit to retain its license, revocation being found an extreme sanction. (25 F.M.C. at 347).

Finally, in an even more recent case, violations similar to and even worse than those found in this case did not result in revocation of the forwarder's license, again with the full agreement of the Bureau. In the case, *Ramon Arguelles—Freight Forwarder License*, 25 F.M.C. 39 (1982), the forwarder, among other things, had for a time operated without a license which had been revoked for lack of a surety bond, issued invoices to its clients billing them for cartage and insurance without performing any services and co-mingled various components of insurance and accessorial charges, invoiced clients for more than actual costs of the insurance, adding other expenses to the insurance charges, and even entered into a scheme with a carrier whereby the forwarder overcharged the shipper using phony bills, received refunds from the carrier, and paid the refunds to other persons. Yet the forwarder was found fit to retain its license after consideration of mitigating circumstances and after settlement of the issues of violations and agreement to pay $35,000 in lieu of civil penalties and after agreeing to be subjected to an audit over a four-year period. The record in the *Arguelles* case showed that these various violations occurred over many months' time and affected 584 shipments while the forwarder had no license and numerous shipments (over 100) in connection with the other objectionable practices. As a result of the various incorrect billings and overcharges to shippers, the record in that case indicates well over $16,000 was involved in monies which were improperly withheld from shippers or carriers or paid to third persons. As noted, included among the activities of *Arguelles* was a plan by which an ocean carrier added a phony handling charge to a bill of lading so that it could later issue a correction and remit funds to the forwarder who then sent them not to the shipper but to a third person.

All of the above activity makes Mr. Stettner look like small potatoes. Mr. Stettner handled only 27 shipments and on five occasions used artificial insurance invoices to support Intercorp's own invoices on insurance. But even then he at least performed the service for the shipper for which he thought Intercorp was entitled to a mark-up and did not extract extra money from the shipper to turn over to third persons or withhold money from his shipper clients to which money

they were entitled, things done by Arguelles. However, the Bureau entered into a settlement with Arguelles and there were mitigating factors (cooperation with Commission staff, discontinuance of the activities in question, sincere commitment to obey law in the future, limited period of time during which forwarder operated without a bond and without a license, less than two months without a bond and about five months without a license, the smallness of the forwarder's business and the dependence of the forwarder on future compliance with law for his business and livelihood). (25 F.M.C. at 46).

Ironically, in view of their present position, the Bureau of Hearings and Field Operations (speaking through Hearing Counsel) in the *Arguelles* case, after considering the above-described record of transgressions and the law favoring settlement of the issues of violations, argued in favor of a finding of fitness, stating that "The law is not totally inflexible, however, in regard to such sanctions [i.e., revocation or suspension of licenses for willful failure to comply with law] . . ." The Bureau proceeded to argue in the *Arguelles* case that "the Commission recognize[s] the persons holding a license are entitled to certain considerations, that section 44 of the Act is remedial, not a punitive statute, and that any regulatory agency ought to exercise its discretionary powers in a fair and consistent manner and fashion appropriate remedies to fit particular circumstances." (Bureau's Memorandum in Docket No. 81-42, April 9, 1982, p. 11, citing *E. Allen Brown—Independent Ocean Freight Forwarder License No. 1246*, 22 F.M.C. 583, 596).

In the *Arguelles* case, furthermore, the Bureau argued that the forwarder was fit, citing more Commission decisions holding that "even where in cases where the violation is clear, evidence of mitigation will be considered in tailoring the sanctions to the facts of the specific case" because "section 44 and its regulations are based on an underlying remedial public interest purpose and the sanctions imposed must serve such a purpose and not be punitive in character." (Bureau's Memorandum in Docket No. 81-42, p. 12, citing *Independent Ocean Freight Forwarder License E. L. Mobley, Inc.*, 21 F.M.C. 845, 847 (1979).) Finally, the Bureau also argued that "[p]ast violations, although a significant factor, do not automatically indicate that a freight forwarder is not fit; the violations must be considered in light of all the circumstances surrounding them. Revocation should only be imposed if, because of those circumstances, the licensee could not be trusted to refrain from violative conduct in the future. See *G. R. Minon-Freight Forwarder License*, 12 F.M.C. 75, 82 (1968)." (Bureau's Memorandum, p. 12). The Bureau then concluded that "[r]evocation would be a draconian, punitive action that would not further the underlying remedial public interest purpose of the Shipping Act" and "urge[d] the presiding Administrative Law Judge to approve the proposed settlement and to find MCS fit to continue to be licensed as an independent

ocean freight forwarder." (Bureau's Memorandum, cited above, pp. 12-13).

Denial of the License in This Case, Which the Bureau Urge, Would Depart From the Commission's Prevailing Decisions to Apply the Freight Forwarder Law Remedially and Without Resort to Unnecessarily Extreme Sanctions

The Commission, as noted in the preceding discussion, has developed a body of law in applying section 44 of the Act and its implementing regulation, General Order 4. Under it, the Commission recognizes the remedial nature of section 44 and the need to fashion reasonable, corrective orders when mitigating circumstances are present, in recognition of the needs and frailties of human beings, avoiding drastic sanctions of revocation or denial of licenses unless nothing short of such sanctions will work. As for proven violations, the Commission has also endorsed settlements embodying payments of money in the nature of fines to act as deterrents together with protective audits, reports, or similar types of surveillance. Thus, the Commission has tempered its decisions with a degree of understanding of the pressures of commercial life, by permitting the forwarder to continue its business notwithstanding past violations of law and has limited adverse action to fines, penalties, audits, reports, etc. This does not mean that in unusual cases of blatantly reprehensible or dishonest conduct carried on without just cause or excuse over a period of time with tangible harm to the shipping public where there is no evidence that the forwarder can be trusted to comply with law in the future, the Commission has never revoked or denied a license. Such cases are extreme, however, and, as the present case and recent Commission decisions indicate, the vast bulk of forwarder cases involve forwarders' errors and misconduct but with mitigating circumstances. In short, as was stated in another recent case, *Rodhe & Liesenfeld, Inc., Independent Ocean Freight Forwarder License No. 1832*, 25 F.M.C. 9, 21 (1982):

> . . . [T]he Commission seeks to fashion reasonable remedies and does not merely issue draconian decrees of revocation or suspension when such are unnecessary to achieve regulatory purposes. Moreover, the Commission has avoided such drastic sanctions even when the record shows . . . that there have clearly been willful violations of law. The Commission seems more concerned that it has evidence that a forwarder can be trusted in its future business behavior to adhere to all requirements of law and the Commission's regulations. (Case citations omitted.)

In a similar vein in another recent decision, *Arguelles*, cited above, 25 F.M.C. at 47-48, the decision corroborated the above-stated description of present status of law, stating:

On the one hand it has been held that where violations of the Shipping Act have occurred and it is believed the licensee will continue in the violative conduct, that licensee cannot be deemed fit to be so licensed. (Case citations omitted.) On the other hand, it has been held in [*Independent Freight Forwarder's License—E.L. Mobley Inc.* 21 F.M.C. 845, 847 (1979)] that:

> 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 (footnote omitted). Section 44 and its regulations are based on an underlying remedial public interest purpose and the sanctions imposed must serve such a purpose and not be punitive in character (footnotes omitted);

and in *E. Allen Brown—Independent Ocean Freight Forwarder License No. 1246*, FMC Docket No. 79-16, 22 F.M.C. 583, 598 (1980), that:

> . . . Thus, the courts as well as the Commission have recognized that evidence of mitigation should be considered when determining whether a license applicant should be found to be fit although implicated in violations of the Act in the past (citations omitted). Furthermore, in previous cases the Commission has expressed its belief that the Freight Forwarder Law, P.L. 87-254, was enacted as remedial statute in order to correct abuses in the forwarding industry (citations omitted).
>
> The principle that the Commission should not rush to extreme sanctions without considering all factors of mitigation in an effort to fashion a just and reasonable remedy is well supported by the courts. Although agencies are not required to impose sanctions in a perfectly even manner because of the wide latitude they are given by the courts as the expert bodies most skilled in devising means to carry out specific legislative purposes, the agencies are nevertheless expected to consider less drastic alternative remedies and to base whatever remedy they select on facts and reasonable interpretations of law (footnote omitted).

In view of the prevailing view of law followed by the Commission, it is difficult to understand the Bureau's hard-nosed position, namely, a $5,000 penalty and denial of a license without even a suggestion that Mr. Stettner could apply again some day in the future or might be permitted to operate with a license provided that he agree to periodic auditing, as so many previous forwarders have agreed. It is even more difficult to understand this abrupt change in position when one considers the three recent cases cited above, *Chumet, Tokyo Express*, and *Arguelles*, in which the Bureau urged that each forwarder be found fit to retain its license and continue its business subject to auditing, after

settling other issues and agreeing that the forwarder could pay money in lieu of penalties, not to mention countless other cases in recent years in which the Bureau has urged findings of fitness where forwarders had been involved in a wide variety of dishonest or otherwise unlawful practices.[8] But as to the three recent cases cited, the Bureau's inconsistent position and abrupt change are rather astounding since the forwarders in those three cases were apparently more culpable than Mr. Stettner and were much larger operations. Thus, in *Chumet*, as noted, the forwarder inflated insurance premiums, concealed mark-ups, realized handsome profits, misrepresented the selling price of merchandise, and failed to account to the shipper for receipt of an insurance claim. In *Tokyo Express*, as noted, the forwarder substantially overcharged shippers on its invoices, billed shippers for charges which did not exist, misdeclared cubic measurements, etc. In *Arguelles*, as noted, the forwarder operated without a license, billed clients for services it had not performed, invoiced clients for more than actual costs without notifying the clients, and even carried on a scheme with a carrier to list phony charges, receive refunds from the carrier, and remit the refunds not to the shippers concerned but to other persons. Of course in each case the Commission found mitigating circumstances (discontinuance of the practices, sincere promise to obey law in the future, cooperation with the Commission's staff, smallness of Chumet's and Arguelles' businesses and dependence on them, etc.). But in each case the Bureau urged a finding of fitness and consideration of the mitigating factors. Why, then, is Mr. Stettner and Intercorp now to be excluded from similar consideration? In the context of the three cases cited, Mr. Stettner's offenses seem rather small and relatively harmless. On twenty-four shipments he handled most of the forwarding services under an arrangement with a licensed forwarder, Gateway Shipping, in which Mr. Stettner believed he had been the forwarder's sales representative. In three isolated instances in 1981, he yielded to two customers in his brokerage business because he was fearful of losing their accounts, thus jeopardizing his business which the record shows to have returned virtually no profit in its fiscal year 1981. Thus he carried on the business of forwarding without a license in the mistaken belief for most of the period that he could legitimately work with Gateway without obtaining his own license. In previous cases involving similar employment arrangements, the Commission has found them not to excuse the forwarder from the licensing requirement but, unless there was deliberate "guile and deception," it has also permitted the applicant to obtain a license. (*Paulssen & Guice*, cited above, 24 F.M.C. 583; *Gemini International Co.*, cited above, 24 F.M.C. 893).

[8] For example, see *Kuehne & Nagel, Inc.*, cited above, 24 F.M.C. 315.

Mr. Stettner's and Intercorp's other transgressions involved his billing practices in which he marked up charges without so indicating to his clients and in some instances even used artificial insurance invoices to justify his own invoices. But these offenses are no worse than and even milder than similar conduct of Chumet, Tokyo Express, and Arguelles, who concealed mark-ups, inflated insurance premiums, used phony charges, withheld money from shippers, mismeasured cargo, etc., affecting far more than 27 shipments and involving greater sums of money. Mr. Stettner may have induced shippers to pay his fees without disclosing his mark-ups but at least he performed the services and did not withhold money lawfully due to his shipper clients. The worse that can be said about him is that he concealed his mark-ups and sometimes induced shipper clients to believe that his fees for obtaining cargo insurance reflected only actual costs without any mark-up. For all of this, even with his customs house brokerage, air freight forwarding, and break bulk consolidation agency, Mr. Stettner and Intercorp realized the grand profit of $894.77 in 1981, $8,296.56 in 1980, and $414.84 in 1979. Moreover, Mr. Stettner, like the forwarders in the cited cases who were allowed to continue in business, cooperated with the staff during the proceeding and promises to obey law in the future, discontinued the forwarding activities, explaining his past transgressions in terms of his belief that his arrangement with Gateway was proper and that his billing practices and the last three shipments forwarded were caused by economic pressure or hardship or fears for his business's continued livelihood. Yet the Bureau, which accepted similar defenses and excuses from Chumet, Tokyo, and Arguelles, now resolutely reject them from Mr. Stettner, and want him banned from forwarding with no apparent hope of redemption. I find no reasonable basis for such abrupt inconsistency by the Bureau either on this record or under acceptable norms and relevant principles of law.[9]

[9] The Bureau may wish to argue that there are distinctions between Mr. Stettner and Intercorp's defenses and those of Chumet, Tokyo Express, and Arguelles if the Bureau insist on following the hardnosed approach unlike that they followed in the three cases cited. One argument they have already made is that Mr. Stettner was warned four times by the Commission's Office of Freight Forwarders and perhaps twice more by Commission employees. But a close look at the warnings shows that they were contained in general form letters and application packages instructing anyone applying as to the prohibitions of section 44. As to Mr. Breslaw, it is not clear whether he specified in his interview with Mr. Stettner that the Gateway arrangement was definitely unlawful (Tr. 27) nor did he provide detailed descriptions of unlawful forwarding. (Tr. 27; Summary of Evidence, para. 30). Mr. Klapouchy appears to have been more definite about the unlawfulness of the Gateway arrangement, however. (Summary of Evidence, para. 12). However, informal advice from staff members, even if correct, does not constitute formal findings by the Commission nor cease and desist orders. A person has the right to obtain a formal Commission finding after hearing and is not required to cease doing business he believes to be lawful but which staff members believe to be unlawful. See 46 CFR 510.16(h) (right to a hearing after letter of intent to deny license application).

Another argument by the Bureau is that Mr. Stettner signed forms and stated that he had read and understood section 44 of the Act and General Order 4. Therefore, the Bureau castigate him for

Continued

Agencies Are Supposed To Apply Their Standards Consistently and Treat Similarly Situated Persons Equally But if They Depart From Precedent, to Explain the Departure Fully

I find that Intercorp deserves the chance to operate a forwarding business with a license albeit after paying a civil penalty for past violations and being subjected to surveillance, findings which I believe to be fully consistent with Commission precedent as it has evolved. However, because the Bureau is taking such a rigid contrary view and has made such an abrupt change from its previous positions in the recent cases cited, I believe a brief explanation of the principles of law governing consistency in administrative decisions would be helpful.

Very briefly, it is recognized and expected in administrative law that agencies will develop standards, will follow them consistently, and will not depart from them unless they provide adequate explanations for such departure. Furthermore, it is expected that agencies will treat similarly situated persons equally. For example, when the Interstate Commerce Commission granted a certificate to operate to one motor carrier but denied it to another in a similar position, the court stated:

> There must be, however, a rational basis for the agency's action. (Citations omitted.) Patently inconsistent application of agency standards to similar situations lacks rationality and is arbitrary. (Citations omitted.) . . . Thus, the grounds for an agency's disparate treatment of similarly situated applicants must be reasonably discernible from its report and order. (Citation omitted.) The commission's decision does not meet these requirements. Under substantially similar circumstances, Contractors and Russell received markedly different treatment. The commission stated no basis for its uneven disposition of the two applicants. . . . If the commission does not alter its decision, it should explicitly state its reasons for the apparently inconsistent treatment. . . . *Contractors Transport Corp. v. United States*, 537 F. 2d 1160, 1162 (4th Cir. 1976).

In another decision concerning an agency's inconsistent decisions, Judge Brown of the Fifth Circuit stated in *Mary Carter Paint Co. v. F.T.C.*, 333 F.2d 654, 660 (5th Cir. 1964), rev'd on other grounds, 382 U.S. 46 (1965):

> Our complex society now demands administrative agencies. The variety of problems dealt with make absolute consistency,

violating section 44 and the standards of G.O. 4. But such statements are routine on applications so that every time any forwarder fouls up on G.O. 4, he can be accused of a separate offense or violation of the statements made in the original forwarder application. I have not seen any previous Commission decisions punishing forwarders on such grounds in addition to the violations of the regulations and law themselves. Some provisions of law and regulations are, moreover, sufficiently complicated so that reasonable persons can differ on their interpretations. Should the erroneous interpreter be punished not only because he followed the wrong interpretation but because he had once stated that he had understood the law or regulation?

> perfect symmetry, impossible. And the law reflects its good sense by not exacting it. *But law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case.* (Emphasis added.)

Very recently the court had occasion to rebuke an agency for treating a particular applicant under a civil service examination differently than similarly situated other applicants for no discernible reason, stating in *Jesse I. Etelson v. Office of Personnel Management*, 684 F.2d 918, 926 (D.C. Cir. 1982):

> Government is at its most arbitrary when it treats similarly situated people differently.

There are countless other court decisions emphasizing the need for consistency or, if policy is to change, for reasoned explanation for the change. See, e.g., *Greyhound Corp. v. I.C.C.*, 551 F.2d 414, 416 (D.C. Cir. 1977), and the many cases collected and discussed in Davis, *1982 Supplement to Administrative Law Treatise*, § 17.07. See also the interesting case of *N.L.R.B. v. Sunnyland Packing Co.*, 557 F.2d 1157, 1161 (5th Cir. 1977) where, according to Professor Davis (op. cit., p. 260) the court allowed the agency to follow its most recent decisions without further explanation although it had gone the other way in the past.

This discussion does not mean that agencies cannot change their policies. However, in this case, I see no basis for the abrupt change from current precedent shown in *Chumet, Tokyo Express, Arguelles,* and so many other cases, by which forwarders are given an opportunity to do business under surveillance notwithstanding past violations of law but must pay fines or penalties and undergo certain auditing or other types of surveillance, unless there are no mitigating circumstances and their conduct has been flagrantly dishonest with no signs of future redemption. Abruptly changing current law to conform to the Bureau's hard-nosed position when the record shows this applicant to be no worse and less culpable than other Persons allowed to receive or retain licenses cannot be supported on this record. Furthermore, the danger of such an abrupt change in which this one applicant in a formal proceeding before the Commission suffers rejection not expected from previous decisions is that confidence in the entire administrative system suffers. As one authority in the field states it:

> The lack of definite standards deprives applicants of sufficient notice, allows retroactive application of new policy, prevents the growth of precedent and leads to a cynical public suspicion of a "corrupt" commission. S. Breyer and R. Stewart, Administrative Law and Regulatory Policy (Little Brown & Co. 1979), p. 373.

As I have indicated, I believe Mr. Stettner and his Intercorp company are as fit to receive a forwarding license as Chumet, Tokyo Express, and Arguelles, as well as other forwarders who have reached settlements with the Bureau and, for a variety of violations of law, have paid fines and undergone auditing or monitoring of their businesses. As I have also indicated, I find Mr. Stettner's defenses and excuses as valid as the ones accepted in past cases cited (discontinuance of the objectionable practices, promises to behave in the future, cooperation with the Bureau during the proceeding, mistaken belief of the law involved, etc.). But to provide the Commission with the flavor of this applicant's own defense and plea, I quote his own words from a statement (Ex. D) which he read into the record at the hearing (Tr. 43-44). Thus, he states in his own defense and in pleading for a license:

> This case and any "alleged violations" of the law incurred by Robert Stettner/Intercorp Forwarders, Ltd. should be viewed within the context of:
>
> a. The naivete and extreme hardship experienced by Robert Stettner/Intercorp Forwarders, Ltd. during its early days of business.
> b. The repeated denials of license to Robert Stettner/ Intercorp Forwarders, Ltd.
>
> Robert Stettner/Intercorp Forwarders, Ltd. commits itself to the achievement of greater understanding of the laws which govern the perimeters of its activities.
>
> We hope the Commission will view our case with understanding of the business realities faced by Robert Stettner/Intercorp Forwarders, Ltd. in its early days of business and Robert Stettner/Intercorp Forwarders, Ltd.'s present clarified understanding of the law and grant Intercorp Forwarders, Ltd. an independent ocean freight forwarder license with Robert Stettner as its qualifying officer.

I find that Robert Stettner/Intercorp Forwarders should be given a chance to operate his business and that, considering that he filed his present application in October 1980, has been waiting long enough for a license. However, consistent with Commission precedent, like other similarly situated forwarders, he should pay a reasonable civil penalty and be monitored by auditing conducted by Commission investigators, as I now explain.

Penalties and Future Surveillance

After permitting persons to continue forwarding businesses notwithstanding past violations of law, the Commission customarily fixes upon a reasonable civil penalty and maintains periodic surveillance over the forwarder to ensure further against recurrence of objectionable practices. Fixing an amount of penalty is not an exact science. However,

there are certain recognized criteria which are applied which, to some extent, are also applied in settlements. For example, the standards found in the Commission's regulations pertaining to settlements, 46 CFR 505.1 which incorporate such criteria as cost of collecting claims, enforcement policy (i.e., deterrent effect), and ability to pay are factors which have been considered. *Arguelless*, cited above, 25 F.M.C. at 45. However, mitigating factors are also considered, such as cooperation with investigators and the voluntary taking of corrective action. See, e.g., *Continental Forwarding Inc.*, 23 F.M.C. 623, 630-631 (1981); *Behring International*, 23 F.M.C. 973 (1981).

Ability to pay is also an important factor that has been considered. See *Emmett I. Sindik—Freight Forwarder License Application*, 23 F.M.C. 731 (1981); *Billie Ione Crtalic et al.—Possible Violations of Section 44(a)*, 23 F.M.C. 565 (1981); *Kuehne & Nagel, Inc.*, cited above, 24 F.M.C. at 332-333. Sometimes, moreover, if the degree of culpability is especially low and a person believed in good faith that he had not violated law and is free of past offenses, no penalty at all may be warranted. See Docket No. 81-59, *General Transpac System—Possible Violations of Section 15, Shipping Act, 1916*, 25 F.M.C. 269 (1982).[10] Furthermore, in order to alleviate the burden of penalties otherwise justified, the Commission permits installment payment schedules over a period of months or even years. See, e.g., *Chumet Shipping Co., Inc.*, cited above, 24 F.M.C. 609 (payments to be made over four years' period of time); *Tokyo Express Co., Inc.*, cited above, 25 F.M.C. at 348 (payments to be made over three years); *Gemini International Co.*, cited above, 24 F.M.C. at 898 ($2,500 payment per each respondent payable over two years); *Arguelles*, cited above, 25 F.M.C. at 45 ($35,000 over five years).

In the last analysis, while these factors are helpful, determining a reasonable amount of civil penalty seems to require an element of subjectivity and a belief by the decision-maker that the penalty is not out of proportion to the violation which has occurred and that it will serve a salutary deterrent purpose while not bludgeoning a person out of business. In this case, there have been mitigating factors noted earlier, for example, the belief by Mr. Stettner that his arrangement with Gateway was legal, his furnishing of all requested records to the Bureau even though they damaged his chances for a license, the termination of his arrangement with Gateway in February 1981 before waiting for a formal decision of the Commission finding it invalid, business pressures from his customs house brokerage customers to handle three more shipments and fears of jeopardizing his business if he had refused, his promises to comply with law in the future and, finally, his refusal to do any more forwarding despite requests and an obvious need for more

[10] This decision contains a good discussion of the standards employed in assessing penalties, including ability to pay, mitigating factors, etc.

income because of his company's poor financial position, pending Commission decision. Even the Bureau, which otherwise have resolutely insisted upon the most extreme sanction, i.e., outright denial of a license, acknowledge that Intercorp's "relatively precarious financial status" induced the Bureau to reduce the amount of penalty recommended from $20,000 to $5,000. I believe, however, that even a $5,000 penalty might throw little Intercorp over the line into a non-profit situation. In other words, I find little sense in granting a license to Intercorp to enable it to resurrect itself from its current financial distress while at the same time imposing a financial burden of $5,000 which is about five times Intercorp's net income before taxes for its fiscal year 1981 ($1,078.03) (Ex. E). Even if Intercorp could restore itself to its best previous year, fiscal 1980, when its net profit, before taxes, was $9,995.85, and it was operating under its arrangement with Gateway, a $5,000 penalty amounts to about 50 percent of that profit which partially came from lawful non-forwarding services.

The Bureau believe, however, that $5,000 is fair although they do not suggest how Intercorp is to pay such a sum or even suggest a schedule of installment payments such as the type of schedule they have so often entered into with other forwarders to spread the burden over a period of time as the cases cited above show. Again, I find that the Bureau's approach lacks balance and understanding of the pressures facing a small business like Intercorp and appears to single out Intercorp from previous forwarders for special harsh treatment in an abrupt change from previous positions of the Bureau. The Bureau, however, cite the fact that when one totals all fees, forwarder compensation, and mark-ups realized by Intercorp over the three-year period on the 27 shipments, Intercorp received about $12,000. Included in this figure, however, are gross revenue, e.g., forwarder's fees and compensation, not net profits, although the other components of this figure consist of the amount of mark-ups over Intercorp's costs. Even so, as I have noted, the Bureau does not urge a penalty of $12,000 out of their concern over Intercorp's "relatively precarious financial status."

I would assess a civil penalty of $3,000 and permit Intercorp an installment schedule not to exceed three years. I do this after seeing Intercorp's income statements for the past three fiscal years in this record and noting a decline over that period of time in its gross revenues, a net income in fiscal 1981 of only $894.77, after taxes, on gross income of slightly over $58,000 and a net worth and working capital of less than $15,000. I also consider the fact that during the bulk of this time, on 24 out of the 27 shipments forwarded without a license, Mr. Stettner thought he was operating under a valid arrangement as a sales representative and that his mark-ups, except for those associated with the five artificial insurance invoices, were normal business practice albeit his failure to identify mark-ups is a violation of General Order 4

which, not believing he was an independent forwarder, he would not have been following. Finally, I note that the most objectionable of his practices, the use of artificial insurance invoices on five shipments which, by the way, he used only between August and December of 1978 and not thereafter (Ex. A, Schedules A & C), recovered mark-ups of just under $3,000, which is a gross figure since federal income taxes would have to be paid on that amount. (Ex. A, Schedule C, actually $2,993.20 gross). A penalty of $3,000 would, therefore, more than remove all profit derived from that regrettable practice, and, if spread over about three years' time for payment, should permit Intercorp to operate as a forwarder without possibly placing it into a loss position for the first three years of its existence as a licensed forwarder. In considering Intercorp's limited ability to pay because of its shaky income position and attempting to permit Intercorp to pay a civil penalty over a future period of under three years, as I recommend below, and rejecting the view that Intercorp should cash in some of its assets of working capital to pay a penalty immediately, I am following past decisions in which ability to pay has been especially significant in devising the amount and form of payment. I cite *Emmett I. Sindik*, cited above, 23 F.M.C. at 738, especially. In that case the presiding judge reduced the Bureau's recommended penalty (for three forwarded shipments without a license) from $3,000 to $1,000 and suggested payment of that amount out of future earnings after the applicant's license would be granted. Although applicant had assets worth over $5,000, the presiding judge reduced the penalty to $1,000 rather than require applicant to liquidate three-fifths of his assets and, as noted, suggested payment out of future earnings. It is true that in *Sindik* there were other mitigating factors (minimal revenue received from the three shipments, no pattern of deliberate circumvention of the Act). However, ability to pay without undue hardship was uppermost on the mind of the presiding judge, as the decision cited clearly shows. Similarly, I see no basis to order Intercorp to extract $5,000 or even $3,000 from its last year's net worth/working capital of $15,000 but would also allow Intercorp to pay off the $3,000 penalty from future earnings.[11]

I would, therefore, fashion a penalty payment schedule comparable to those fashioned in similar cases, requiring payments every six months in installments of $500 each, commencing 30 days after adoption or administrative finalizing of this Initial Decision, and, similarly following such schedules, require payment of interest on the unpaid balance at 12

[11] Interestingly, Mr. Sindik was found fit to obtain a license notwithstanding past violations. Moreover, the record showed that he had a customs house brokerage license and a good reputation as a broker and that he had lost income because of the delay in awaiting processing of his application for a license. (23 F.M.C. at 737). Mr. Stettner also has such a broker's license and has also been waiting for a decision on his application and has stopped all forwarding since August of 1981 despite requests from shipper clients to perform forwarding services.

percent per annum with payment in full of the remaining balance in case of default, as is commonly done under such schedules. (See, e.g., the Promissory Note attached to the slip opinion in *Arguelles*, cited above, Docket No. 81-42, 25 F.M.C. 39 (1982).

Finally, as is done in the numerous settlement agreements which the Commission has sanctioned, I would maintain surveillance over Intercorp's operations during the life of the payment schedule by having periodic audits by Commission investigators to ensure that Mr. Stettner is correctly interpreting those provisions of General Order 4 requiring itemizations of its actual costs in its invoices to shippers and requiring a separate showing of its total service fee. 46 CFR 510.32(h). See *Arguelles*, cited above, 25 F.M.C. at 45; settlement agreement attached to slip Initial Decision, paragraph 3; *Chumet*, cited above, 24 F.M.C. 609.

Summary of Particular Factors Favoring a Grant of the License

As to the Bureau's contentions that Mr. Stettner and Intercorp are unfit because he cannot be trusted to follow law and Commission regulations if Intercorp is licensed because of past violations, concealed mark-ups, and continued operations after warnings from the Commission's staff, there are five responses. First, as Intercorp itself noted, the Commission has previously rejected arguments against licensing on the basis of speculation as to what the forwarder might do in the future. In *Independent Ocean Freight Forwarder Application—Sequoia Forwarders Co.*, cited above, 19 F.M.C. at 189, the Commission granted a license, stating that:

> What an applicant might do, if licensed, is insufficient to justify the denial of a license if that applicant is otherwise qualified in fact and in law. Once licensed, however, the forwarder is subject to all the Commission's rules and regulations and any conduct or activity can be handled in an appropriate proceeding.

Second, as the above quotation suggests, if there is any future recurrence by Intercorp of conduct of the type described above, the Commission can take steps to institute action leading to suspension or revocation of the license.

Third, as has been done in so many forwarder cases as a condition of licensing, the forwarder may be subject to auditing and monitoring for a limited period of time to guard against recurrence of previous objectionable conduct. Such monitoring can be instituted in this proceeding.

Fourth, although the Bureau believe Mr. Stettner's character to be suspect because of past practices, of which five were bordering on deception, the U.S. Department of the Treasury saw fit to confer on him a customs house broker's license after conducting its own examination and investigation of him between April and August 28, 1978, when it issued him a license. (Tr. 50-51; Ex. C, Appendix X). Treasury

Department laws and regulations pertaining to licensing of such brokers require licensees to be "of good moral character" and subject licenses to revocation if the broker is "incompetent, disreputable," or guilty of fraudulent conduct. Moreover, applicants are subjected to investigations as to their "knowledge" of customs laws and regulations and "fitness to render valuable service to importers, exporters . . ." and as to their "business integrity." See 19 U.S.C.A. § 1641(a); § 1641(b); 19 C.F.R. 111.11(a)(3); 19 C.F.R. 111.13(a); 19 C.F.R. 111.14(a) and (d); 19 C.F.R. 111.14(c)(2); 19 C.F.R. 111.16(b). The fact that the Treasury Department thought enough of Mr. Stettner as of August 1978 to grant him a license is certainly some indication of good character and reputation even if he committed transgressions of the Shipping Act thereafter as he did. Evidence of an applicant's good reputation as a customs house broker has been considered in at least one forwarder case. See *Emmet I. Sindik*, cited above, 23 F.M.C. at 737.

Fifth, although the Bureau argue that Mr. Stettner may well follow applicable law only when it is convenient for him to do so if Intercorp is granted a license, the record shows that he stopped using artificial insurance invoices as of December 1978, that he discontinued forwarding under the Gateway arrangement in February 1981 and handled no forwarding except three shipments handled under pressure for two important clients in his brokerage business, the last in August 1981, and has resolutely rejected requests to perform forwarding from these two important clients as well as other shippers despite the loss of income that such rejections meant. (Tr. 39; 92-93; Ex. D). If Mr. Stettner's character is so weak as the Bureau seem to fear, and if he is prone to devious practices, would not Mr. Stettner have yielded to temptation by now, in view of his company's obvious need for revenue, and done some forwarding while concealing any record of it so as not to prejudice his application, as Mr. Stettner himself remarked at the hearing? (Tr. 93). But, states Mr. Stettner (Tr. 93-94):

> For whatever the reasons, I could have made far more money in 1981 had I done these things, and I didn't. I'm trying to plant the roots of my company on a firm and legal basis for the future. . . . I have now an enhanced understanding of the law as explained to me by Mr. Hunter in our prehearing conferences, and if I am fortunate enough to receive this license, I will abide with the law to the letter.

In short, I find no more reason on this record to find Mr. Stettner any more unfit or untrustworthy than the forwarders in *Chumet, Tokyo Express, or Arguelles,* cited above, all of whom were found fit with the backing of the Bureau.

ULTIMATE CONCLUSIONS

Intercorp Forwarders Ltd., through its President and sole salaried employee, Mr. Robert Stettner, has sought an ocean freight forwarder's license since October 1980 in the name of Intercorp. After having been advised that Intercorp would be denied such license by the Commission's staff pursuant to Commission regulations, Mr. Stettner requested a hearing. The Commission granted him and Intercorp a hearing to determine whether Intercorp had carried on the business of forwarding without a license in the past, in violation of section 44 of the Act and had engaged in certain questionable billing practices and had disguised mark-ups on its fees and, if so, whether Intercorp was fit to obtain a license and should pay civil penalties.

The hearing disclosed that Intercorp had carried on forwarding without a license under an arrangement with a licensed forwarder known as Gateway Shipping, in which Intercorp performed most of the forwarding services on 24 shipments during 1978 through early 1981, Gateway performing limited services, and on three later shipments in 1981, Intercorp performed the forwarding entirely on its own, having terminated the arrangement with Gateway in February of 1981. Moreover, Intercorp marked up its service fees without identifying the mark-ups to its shipper clients and on five occasions used artificial insurance invoices to disguise mark-ups. Intercorp and Mr. Stettner operated with Gateway in the belief that he had a valid arrangement as Gateway's sales representative, thereby not requiring his own license. After Intercorp terminated the arrangement with Gateway in February 1981 during the course of this proceeding. Intercorp forwarded three more shipments for two of its customs house broker clients in the belief that it would lose their business vital to its existence if it refused. Its disguised mark-ups were used in the belief that such practices were necessary to obtain a profit. Mr. Stettner pleads economic hardship and misunderstanding of the applicable law during the relevant period of time and promises to conform to law if given a license and cites the fact that he terminated his forwarding, although later requested by clients to perform forwarding, pending Commission decision. He also states that he has been trying since October 1980 and even since 1977 to obtain a license and has obtained a customs house broker's license after passing an examination and undergoing an F.B.I. investigation, facts he cites as evidence of his fitness.

Denial of a license plus a penalty of $5,000 with no chance at redemption, as the Bureau urge, marks a radical departure from Commission precedent and current law which permits persons to obtain or retain license notwithstanding past violations of law absent flagrant abuses of law but with mitigating factors but imposes civil penalties for the violations and requires a certain degree of monitoring and auditing to ensure continued compliance with law. In three recent forwarder

cases, moreover, in which the respondents seemed more culpable than Mr. Stettner and Intercorp by operating without licenses, using phony invoices, withholding shippers' moneys, etc., the Bureau urged findings of fitness, after settling the issues of violations. The Commission approved the settlements, found fitness, granted or allowed licenses, imposed fines, and required auditing of the forwarders' records in finalizing these three cases. Imposing a more severe sanction against Intercorp than was done in the three cases, which are typical of many others, would be unfair and arbitrary according to the prevailing views of sound administrative law.

Intercorp should be and is found fit, and should be and is given a chance to conduct a forwarding business subject to periodic auditing and payment of civil penalties in the amount of $3,000 spread within a three-year period. This amount is determined after consideration of numerous mitigating factors but especially the precarious financial condition of Intercorp and the danger that a greater penalty might disable the company from getting its business underway by imposing too great a financial onus at the very outset of its struggle to succeed.[12]

(S) NORMAN D. KLINE
Administrative Law Judge

[12] Because Mr. Stettner is not an attorney and has represented his own corporation without familiarity with the Commission's rules of practice and procedure, I advise him that both he and the Bureau have the right to file exceptions to this Initial Decision within 22 days after the date of service and, furthermore, to file replies to the Bureau's exceptions within 22 days after the Bureau serves their exceptions. 46 Code of Federal Regulations, section 227(a). Furthermore, as done with Respondent's Opening Memorandum of Law, he should file an original and 15 copies for the Commission's use as well as mailing one copy to Hearing Counsel. 46 Code of Federal Regulations, section 118(a). Mr. Stettner should also realize that this decision is initial only and may be reversed, modified, or adopted by the Commission after the Commission considers the exceptions and replies to exceptions or, if none are filed, reviews the decision on its own motion if it chooses to do so.

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-52
AGREEMENTS NOS. 10186, AS AMENDED, 10332, AS AMENDED,
10371, AS AMENDED, 10377, 10364 AND 10329

Agreements Nos. 10364 and 10371, space charter agreements, approved subject to certain reporting requirements.

Agreement No. 10332, approved subject to certain reporting requirements and on condition that the revenue pooling provisions be deleted.

Seymour H. Kligler and *David R. Kay* for proponents of Agreement No. 10186.

Dennis N. Barnes for proponents of Agreement No. 10329 and Agreement No. 10377.

Charles F. Warren and *George A. Quadrino* for proponents of Agreement No. 10332 and Agreement No. 10371.

Donald J. Brunner for proponents of Agreement No. 10364.

John M. Ridlon on behalf of Sea-Land Industries, Inc., as to Agreement No. 10364.

Robert T. Basseches and *Timothy J. Shuba* for protestant American President Lines, Ltd.

J. Alton Boyer and *William H. Fort* for protestant Lykes Bros. Steamship Co., Inc.

Paul McElligott for protestant Sea-Land Service, Inc. as to Agreement No. 10332-1.

Russell T. Weil and *Daniel M. Conaton* for protestant United States Lines, Inc.

Charna J. Swedarsky, Alan J. Jacobson and *Paul J. Kaller* for the Commission's Bureau of Hearings and Field Operations (Hearing Counsel).

REPORT AND ORDER

December 22, 1982

BY THE COMMISSION: (ALAN GREEN, JR., *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; JAMES JOSEPH CAREY AND JAMES V. DAY, *Commissioners*)

This proceeding was initiated to determine whether six space chartering agreements among Korean-flag carriers and other carriers in the U.S./Korea/Far East trades should be approved or, if currently approved, remain approved pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. § 814).[1]

[1] The Commission's Order of Investigation and Hearing also directed the parties to address the following issues:

Continued

Administrative Law Judge William Beasley Harris (Presiding Officer) issued an Initial Decision in which he concluded that all the agreements under investigation, except two withdrawn or terminated[2] during the course of the proceeding, should be approved or continue approved.[3]

The proceeding came before the Commission upon the Exceptions of the Bureau of Hearings and Field Operations (Hearing Counsel), and protestants Lykes Bros. Steamship Co., Inc., and American President Lines, Ltd. (APL). The other protestants which participated in the proceeding before the Presiding Officer did not file exceptions or replies thereto.

THE AGREEMENTS

There are now only three agreements remaining at issue in this proceeding: Agreements Nos. 10332, 10332-1, 10332-2, 10371-1, 10364 and 10364-1. All three were granted approval *pendente lite.*

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1. whether and to what extent approval of any or all of the subject agreements will significantly affect the availability of waivers to shippers seeking to transport cargo on non-Korean flag vessels;

2. whether and to what extent approval of any or all of the subject agreements will significantly affect cargo capacity in the United States trades with Korea;

3. whether approval of any or all of the subject agreements will adversely affect rate stability in the United States trades with Korea;

4. whether approval of any or all of the subject agreements will result in unjust discrimination or unfairness against non-signatory carriers serving the United States trade with Korea;

5. the manner in which approval of any or all of the subject agreements will affect voting patterns within steamship conferences operating in the United States trades with Korea;

6. whether approval of any or all of the subject agreements is consistent with existing treaties of friendship, commerce, and navigation between the United States and other nations whose interests are represented in the United States trades with Korea;

7. whether the imposition of the waiver system by the Korean Government under its Maritime Transportation Promotion Law and other governmental cargo control activities have forced third-flag carriers to enter into these space charter agreements in order to have reasonable access to cargo in the U.S.-Korean trades; and

8. if the waiver system and other cargo control activities of the Korean Government have forced third-flag carriers to enter these space charter agreements, whether the agreements are so impregnated with unilateral government action as to be, in reality, non-commercial agreements over which the Commission should take no jurisdiction under section 15 of the Shipping Act, 1916.

[2] Agreements Nos. 10377 and 10329 were withdrawn and terminated, respectively.

[3] Subsequent to the issuance of the Initial Decision, APL filed a motion to reopen the proceeding which was supported by Lykes and Hearing Counsel. APL's motion was based on two events which allegedly had a bearing upon Agreement No. 10186. These were the acquisition in late December, 1980, by the owners of OOCL of a 51% interest in Seapac Container Services and the entry by the parties to Agreement No. 10186, and Neptune Orient Lines, into a agreement, Agreement No. 10409. If approved, Agreement No. 10409 would have superseded Agreement No. 10186. APL felt that these events warranted reopening the proceeding for the limited purpose of developing a record which would reflect their impact on the approvability of the agreement. Subsequently, Agreement No. 10409 was withdrawn and Agreement No. 10422, a new space charter agreement among the Korean Shipping Corporation (KSC), Neptune Orient Lines (NOL) and Orient Overseas Container Lines (OOCL) was filed to supersede Agreement No. 10186. By Order dated March 3, 1982, the Commission conditionally approved Agreement No. 10422. The conditions were met and the agreement approved on March 16, 1982. With the demise of Agreement No. 10186, APL's motion to reopen has been overtaken by subsequent events and rendered moot.

Agreement No. 10332, originally approved by the Commission on November 13, 1978, between Korea Marine Transport Company (KMTC) and Nippon Yusen Kaisha (NYK) provides for each to operate a 1,050 TEU container vessel in a direct service between Korea and the U.S. Pacific Coast, including Hawaii and Alaska. It also permits KMTC and NYK to charter space to each other on terms as they may agree. Under the agreement, sailing schedules are coordinated and revenues from containerized cargo are shared equally. Each carrier operates its own service and issues its own bills of lading. KMTC serves as NYK's agent in Korea and NYK serves as KMTC's agent in the U.S. Empty containers and related equipment may be interchanged as required and each party may, upon 90 days' written notice to the other, withdraw from the agreement. Agreement No. 10332 contains Commission imposed reporting requirements and was due to expire on June 30, 1980. Agreement No. 10332-1 would extend the term of the basic agreement through July 1, 1983.

Subject to a limitation of 80 TEUs per week, Agreement No. 10332-2 would permit NYK to carry containers transshipped at Korean ports as part of a through movement to or from Hong Kong and Taiwan.

Agreement No. 10371, approved August 16, 1979, permits KMTC and NYK to subcharter collectively up to 420 TEU's per month to Showa Lines, Ltd. Showa must issue its own bills of lading and is responsible to its customers for the carriage of their cargo. It is also required to carry only that cargo that moves directly between Korea and the U.S., with no intervening ports of call. Showa may not carry any cargo booked, forwarded, transshipped, or feeder-fed to or from Japan or any other East Asian nation. Agreement No. 10371 was scheduled to expire on June 30, 1980. Agreement No. 10371-1 extends the basic agreement through July 1, 1983, and also permits NYK to serve other trades in the commerce between the U.S. and the Far East. The cargo carried outside of the U.S./Korea trade would not be subject to revenue sharing but would be subject to the agreement's reporting requirements.

Agreement No. 10364 permits Sea-Land Service, Inc. and Hanjin Container Lines, Ltd. to charter up to 10,500 TEU's eastbound and 10,500 TEU's westbound per quarter on each other's vessels in the trade between the U.S. West Coast and Japan and Korea. Neither carrier may charter more than 70 percent of the eastbound or westbound total from the other, and no more than 70 percent of the vessel capacity of any one-way voyage may be chartered. The agreement also contains reporting requirements concerning vessel capacity and the number of TEU's and revenue tons chartered by each carrier. Cargo required to be carried by U.S.-flag vessels under U.S. cargo preference laws is not subject to the terms of this agreement. Agreement No.

10364 was approved on January 14, 1980, and is not scheduled to expire until January 8, 1983.

POSITIONS OF THE PARTIES

Agreements Nos. 10332 and 10371

KMTC, NYK and Showa maintain that approval of Agreement No. 10332 will permit the introduction of a direct non-stop service in the Korea-U.S. Pacific Coast trade with less tonnage than would otherwise be required to maintain a viable service. It is argued that this will, in turn, contribute to rate stability and will benefit the environment. Moreover, proponents argue that by scheduling their sailings, they are able to use only a single berth at ports in Korea and the United States thereby relieving terminal congestion.

The proponents argue that the additional carryings permitted by Agreement No. 10332-2 will have a *de minimis* impact on the trade while increasing competition by introducing a new service into the Hong Kong/Taiwan trade. By filling these additional 80 TEU's, NYK argues that it would increase its utilization under the agreement by more than 10 percent.

The proponents further contend that without revenue sharing allowed it Agreement No. 10332 would be less effective as a rationalizing device because neither party could be expected voluntarily to share its area of expertise with the other.

Both Agreements Nos. 10332 and 10371 are viewed by APL as the initial stage of the Korean Government's program to secure for Korean carriers 40% of the U.S.-Korean trade cargo. APL alleges that as a result of the Korean Government's promotional activities, cargo carryings on Korean-flag vessels in the U.S.-Korean trade have grown from a few percent in 1978 to over 20% in 1979 while the U.S.-flag carriers' share declined by 25% eastbound and more than 30% westbound between 1978 and the first half of 1980.

APL observes that the justification for the agreements is based upon the premise that absent approval of the agreements, proponents of Agreement No. 10332 will *individually* provide the service now performed *jointly* under the agreements. APL argues that the third-flag members of the agreements will simply leave the trade rather than attempt to compete without the preferred status conferred by the subject agreements. Moreover, it is said that the Korean-flag carriers are underutilized and would not aggravate that situation by adding additional vessels. APL notes that Agreement No. 10332 allows the sharing of profits and use of common agents. It does not believe that these elements of the agreement can be justified on the basis that NYK requires KMTC's Korean contacts to gain access to the Korean market and that KMTC needs protection from ordinary market forces while it learns to operate a container service. APL notes that NYK is one of

the world's major ocean carriers and that KMTC is hardly inexperienced as it operates a total of 18 vessels. APL believes that Agreement Nos. 10332 and 10371 should be disapproved, or in the alternative, modified to delete those provisions relating to pooling, joint agencies and transshipment of Hong Kong cargo. Finally, APL believes that the agreements, "if approved at all must include conditions which guarantee to the U.S.-flag carriers a share commensurate with their national-flag status and their level of service."

Instead of discouraging overtonnaging, Lykes believes that these space charter agreements have had the opposite effect. Lykes claims that under Agreements Nos. 10332 and 10371, NYK and Showa increased their Far East and Korea capacities above those offered in their existing Far East services under the Japanese agreements. Lykes further states that the agreements have contributed to overtonnaging by allowing KSC and KMTC to inaugurate services which they could not have commenced by themselves. It notes that while certain independent carriers were forced out of the trade, KMTC and KSC were able to continue to operate under the space charter agreements.

Lykes concedes that the agreements are not responsible for all the ills which plague the Far East trade. It suggests, however, that the Commission has a responsibility to insure that the agreements, if approved, are not unjustly discriminatory, unfair to non-parties, or contrary to the public interest or detrimental to the commerce of the United States. Lykes argues that the agreements should not be approved unless the Commission first adopts certain policy guidelines and places limitations upon the joint operations permitted under the agreements to prevent adverse impact upon the United States/Korea trade and the other operators in the trade.

Lykes urges certain specific limitations for each of the agreements. It believes that the authority to serve Hawaii and Alaska under Agreement No. 10332 should be eliminated, as direct service has never been performed in those trades and no justification has been offered to support it. It would also have the Commission restrict operation under that agreement to a bimonthly frequency and no more than 22,644 TEU's annually, the capacity presently offered. Lykes feels that neither KMTC nor NYK should be permitted to carry non-Korean cargo, as KMTC has never carried that cargo and to permit NYK to do so would be to grant it an additional competitive advantage not justified by this record. Lykes, like APL, believes that NYK should restrict itself to the carriage of Korean cargo as do KMTC and Showa. Finally, Lykes would like the 420 TEU per month ceiling reduced to 200 TEU's per month.

Hearing Counsel argues that, by permitting the parties to share revenues, Agreement No. 10332 diminishes the incentive for competition among the participants. As such, Hearing Counsel argues that it re-

quires more justification than space-chartering alone and that the required level of justification is not present. Because KMTC has had two years of experience to establish itself, Hearing Counsel believes that revenue sharing cannot be justified as part of a start-up operation. It notes that the parties to the other agreements do not require revenue sharing.

Hearing Counsel would also amend Agreement No. 10332-2 to conform to the understanding of the parties that the agreement permits each to operate any vessel of *up to* 1,050 TEU's and does not require a vessel of 1,050 TEU capacity.

Agreement No. 10364

Sea-Land and Hanjin argue that the January 8, 1980 order approving Agreement No. 10364 is fully supported by the record which was before the Commission at that time and that nothing has occurred subsequently which materially affects the findings and conclusions contained in that Order.

APL and Hearing Counsel do not oppose the continued approval of Agreement No. 10364. Lykes notes that Agreement No. 10364 has been rarely used and suggests that the Commission impose cross-charter limitations consistent with the actual use by the parties plus a reasonable additional amount to account for potential trade growth.

DISCUSSION

Before considering the merits of Agreements Nos. 10332, 10371 and 10364 under the standards and criteria governing the approvability of section 15 arrangements, we will first direct our attention to the eight specific issues which the Commission requested the parties to address as part of this investigation.

Generally, the eight issues were not fully developed by the parties, nor directly resolved by the Presiding Officer. This may in part be due to the breadth and complexity of some of these issues and the time restraints placed on the proceeding. In any event, the record is of marginal value in actually adjudicating all of these issues. We believe, however, that the Commission can properly address the merits of the agreements at issue and determine the approvability of each without attempting to expressly resolve every one of the eight issues.[4]

[4] Thus, to the extent the resolution of Issues 1, 2 and 3 turn on whether or not one believes that, absent the agreement, proponents would add tonnage to the trade, these issues are different facets of the ultimate factual issue to be resolved in this case. Also, Issue 5, relating to the effects of the agreements on conference voting patterns, may not be susceptible of proof under the circumstances of this case. To the extent it is, the issue is, in retrospect, of questionable relevance to the approvability of any *particular* agreement. Finally, Issues 6, 7 and 8 relate to Commission jurisdiction over the agreement, which no party has challenged.

Although the record does not permit detailed conclusions to be made as to each of the eight issues, it does allow certain more general findings. These are presented below:

> 1. Whether and to what extent approval of any or all of the subject agreements will significantly affect the availability of waivers to shippers seeking to transport cargo on non-Korean flag vessels.

Korean Ordinance No. 636 effectively increases the capacity of the Korean-flag fleet by exempting from the cargo promotion law third-flag carriers to the extent they charter space to Korean-flag operators. If the space charter agreements were disapproved, the Koreans might replace the capacity laws with additional tonnage and enforce the cargo promotion laws more vigorously. In all likelihood, this would increase the availability of waivers. However, there is a wide divergence of opinion among the parties as to whether this is likely to occur.

Lykes believes that approval of the agreements will result in a reduction of availability of waivers to shippers seeking to use third-flag vessels other than those operated by signatories to the subject space charter agreements. APL believes that if the agreements are disapproved, third-flag capacity in the trades under Agreement No. 10332 would be withdrawn which would increase cargo available to other third-flag carriers in the trade.

Proponents, on the other hand, contend there is no evidence to prove that approval or disapproval of the agreements will significantly affect the availability of waivers. Likewise, Hearing Counsel does not believe disapproval of the agreements would increase the availability of waivers.

The Commission is not satisfied that the protestants have established a causal connection between the agreements and the availability of waivers. Accordingly, it cannot be concluded on the basis of the record that approval of the agreements would be detrimental to the commerce of the United States or be unjustly discriminatory by reducing the availability of waivers.

> 2. Whether and to what extent approval of any or all of the subject agreements will significantly affect cargo capacity in the United States trades with Korea.

In the absence of capacity and service limitations, Lykes believes that approval of the agreements will significantly encourage overtonnaging in the trade. APL states that if the agreements are disapproved, the capacity in the U.S. Korea trades will be reduced.

Conversely, proponents argue that while approval of the agreements will not significantly affect cargo capacity, disapproval will cause proponents to introduce additional tonnage to maintain their semi-monthly service. Hearing Counsel agrees that, on balance, approval of the agree-

ments with certain modification will have a more positive impact on overtonnaging than would disapproval.

Resolution of this issue turns on whether or not one believes that absent the agreements, proponents would add tonnage to the trade. On the basis of the evidence discussed below, the Commission is satisfied that proponents are likely to add additional tonnage to the trade if the agreements are disapproved.

3. Whether approval of any or all of the agreements will adversely affect rate stability in the United States trades with Korea.

All parties agreed that low utilization of vessel capacity leads to rate instability while improved utilization has a salutory effect on rate stability. As discussed above, the parties differ on whether the agreements have the effect of decreasing capacity. Since the Commission has concluded that the agreements will tend to reduce overtonnaging, it follows that they are not likely to adversely affect rate stability.

4. Whether approval of any or all of the subject agreements will result in unjust discrimination or unfairness against nonsignatory carriers serving the United States trade with Korea.

No party disputes the fact that the agreements result in a certain degree of market concentration which enhances the member lines' ability to compete. Lykes and APL allege that the member lines are carrying cargo which, but for the agreements, might be carried on their vessels. This, it is alleged, amounts to unfair and discriminatory competition against U.S. and third-flag carriers in the trade.

Proponents contend that approval of the agreements does not result in unjust discrimination or unfairness against other carriers in the trade. Hearing Counsel agrees, believing that the market advantage gained by approval of the agreements has no significant impact on other carriers in the trade.

The capacity subject to the agreements is not large and no single agreement under examination in this proceeding appears to provide its members with a dominant position in the Far East trade. Protestants' fear of increased competition is not in and of itself evidence that the agreements are unjustly discriminatory or unfair.

5. The manner in which approval of any or all of the subject agreements will affect voting patterns within steamship conferences operating in the United States trade with Korea.

The parties generally believe that the record in this proceeding fails to establish a causal connection between the subject agreements and conference voting patterns. The Commission agrees. The Korea trade is only part of the total Far East trade. There are myriad factors, relating to both the Korea trade and the total trade, which would potentially

influence conference decisions. No attempt has been made to isolate the effect of these agreements on conference voting.

> 6. Whether approval of any or all of the subject agreements is consistent with existing treaties of friendship, commerce and navigation between the United States and other nations whose interests are represented in the United States trades with Korea.

No party alleges that approval of the agreements would be inconsistent with the existing treaties of friendship, commerce and navigation between the United States and the other nations which participate in the U.S./Korean trade. In *Agreement No. 9939, Pooling, Sailing, and Equal Access to Government-Controlled Cargo Agreement*, 16 F.M.C. 293, 308-309 (1973), the Commission concluded that a pooling agreement which was based in part on the cargo preference laws of Peru was not contrary to the terms of the Treaty of Friendship, Commerce and Navigation between the United States and Norway. There are no facts of record in this proceeding which would distinguish this proceeding from that in *Agreement No. 9939*. The reasons underlying the Commission's decision in *Agreement No. 9939* remain valid in the instant case.

> 7. Whether the imposition of the waiver system by the Korean Government under its Maritime Transportation Promotion Law and other governmental cargo control activities have forced third-flag carriers to enter into these space charter agreements in order to have reasonable access to cargo in the U.S.-Korea trades.

Unquestionably, the waiver system has acted as a strong incentive to third-flag carriers to enter into space charter agreements. However, no party alleges that this incentive "forced" third-flag carriers to take this action.

> 8. If the waiver system and other cargo control activities of the Korean Government have forced third-flag carriers to enter into these space charter agreements, whether the agreements are so impregnated with unilateral government action as to be in reality non-commercial agreements over which the Commission should take no jurisdiction under section 15 of the Shipping Act, 1916.

As discussed in connection with the previous issue, no party suggests that third-flag carriers were "forced" into space charter agreements. All parties believe that the agreements are fully subject to section 15, and that the waiver system and other cargo control activities of the Korean Government have not removed the agreements from the Commission's jurisdiction.

With these thoughts in mind, we turn now to a consideration of the approvability of the particular agreements at issue under the applicable standards of section 15.

Agreement No. 10364

Section 15 provides in relevant part that the Commission *must* approve an agreement subject to that section unless it can *find* that such agreement is, or will be, (1) discriminatory or unfair as between certain specified segments of the industry, (2) detrimental to United States commerce, (3) contrary to the public interest, or (4) otherwise in violation of the Shipping Act, 1916. In considering an agreement under the "public interest" standard of section 15, the Commission must evaluate the possible anticompetitive consequences of an agreement and determine whether they are outweighed by the agreement's legitimate commercial objectives. *United States Lines, Inc. v. Federal Maritime Commission*, 584 F.2d 519 (D.C. Cir. 1978).

Agreement No. 10364 is nothing more than an arrangement whereby the parties charter space on each other's vessels on a space available basis subject to a maximum. There is no provision authorizing the fixing of rates, coordination of sailings, joint solicitation of cargo or joint bills of lading. The vessel owner retains full control over the vessel. In short, the space charter places little or no restriction on the competition between the parties. Nor has it been shown, to the extent it was even argued,[5] that the agreement will adversely affect other operators in the trade competitively.

On the other hand, proponents of Agreement No. 10364 have come forward with evidence indicating that the agreement will allow for more direct calls, prevent the introduction of additional tonnage to the trade and result in a generally more efficient transportation service to the shipping public. The Commission is satisfied that these benefits outweigh any anticompetitive features of the agreement. Therefore, upon careful examination of Agreement No. 10364, in light of the record developed in this proceeding, we cannot find that the agreement presently operates or will, with reasonable probability, operate contrary to the public interest or in any other manner proscribed by section 15 of the Act. It will, accordingly, be approved.

Agreements Nos. 10332 and 10371

Because Agreements Nos. 10332 and 10371 have common parties and are otherwise interrelated, they will be considered and discussed together. Protestants object to the revenue pooling features of Agreement No. 10332 as well as its space chartering provisions. APL questions whether even the requested space chartering authority is justified in terms of reducing overtonnaging in the trade, which all parties agree exists.

Given the trade's overtonnaging APL does not believe that any non-Korean party to a space charter agreement would exacerbate the situa-

[5] As noted earlier, APL and Hearing Counsel do not oppose the continued approval of Agreement No. 10364.

tion and increase their tonnage to offset the capacity lost as a result of any disapproval of that agreement. APL argues that the addition of such tonnage would cause utilization levels to drop substantially thereby making the parties' service even more unprofitable, a situation they would endeavor to avoid. It is allegedly more likely that the non-Korean operators would, in the event of disapproval, withdraw that capacity currently operated under the space charter agreements.

While APL's contention has appeal, at least on a theoretical basis, it is not supported by history in the trade or the record in this case. The record demonstrates that despite past serious overtonnaging, several carriers have continued to place additional tonnage in the trade. Proponents of Agreements Nos. 10332 and 10371 have made clear their intentions to do likewise if those agreements are not approved.

In his direct testimony, Hiroshi Takahashi of NYK states that in the event of disapproval, NYK and KMTC would place additional vessels in the trade. Mr. Takahashi claims that despite the current unfavorable market conditions, which he views as transitory, NYK would unquestionably increase its tonnage by chartering a vessel or moving a vessel from another trade to this one. As for the Korean-flag operators, the Korean Government states that, in the event of disapproval, Korean-flag carriers would not abandon the U.S./Korean trade. Korea expects its exports to reach one hundred billion dollars by 1991 and believes that it cannot enjoy world trade without an effective shipping program. The Korean government would, if necessary, provide financial assistance to Korean-flag carriers to enable them to continue their service. Based on all the foregoing, the Commission is satisfied that proponents of Agreements Nos. 10332 and 10371 would in the future and in the absence of the agreements, increase their individually operated tonnage and thereby exacerbate the problem of overtonnaging. To that extent, Agreements Nos. 10332 and 10371 can be said to confer important public and transportation benefits by tempering overtonnaging which is a major cause of malpractices and rate instability.

Undoubtedly, the space chartering provisions of Agreements Nos. 10332 and 10371 gives proponents some advantage over lines such as APL and Lykes. However, the record fails to establish that this advantage is unjust, discriminatory or unfair to competing lines or otherwise contrary to the standards of section 15. The most that can be said is that protestant carriers face greater competition for cargo than they would in the absence of an agreement. This, standing alone, is not grounds for disapproving the agreements. *Alcoa Steamship Company, Inc. v. C.I.A. Anonima Venezolana de Navigacion*, 7 F.M.C. 345, 361 (1962) and *Agreement Nos. 9847 and 9848—Revenue Pools v. U.S./Brazil Trade*, 14 F.M.C. 149, 158 (1970). The Commission concludes therefore that, subject to certain modifications and reporting requirements dis-

cussed below, Agreements Nos. 10332 and 10371 meet the criteria for section 15 approval.

A semi-annual report of vessel capacity, utilization and cross-chartering of space, similar to that suggested by Hearing Counsel and Lykes, would enable the Commission to more efficiently and effectively maintain continuing surveillance over the chartering provisions of the agreements and to monitor their operations to ensure that the legitimate transportation objectives underlying the approval of those provisions are being realized.[6] Such a reporting requirement will therefore be imposed as a condition to approval.

Hearing Counsel's suggestion that the provisions of Agreement No. 10332-2 relating to transshipment be clarified also has merit. Accordingly, we will require the parties to amend the agreement to conform to the understanding of the parties that it does not require each party to operate a 1050 TEU vessel, but instead permits each party to operate a vessel of up to 1050 TEU's.

Although Agreement No. 10371 and the space chartering provisions of Agreement No. 10332, modified as indicated above, are found to satisfy section 15 approval requirements, the same cannot be said of the revenue pooling. Coordinations of sailings and joint agent provisions of Agreement No. 10332 reflect activity generally found violative of the antitrust laws. As such, they are deemed contrary to the public interest within the meaning of section 15 and must be disapproved unless proponents can make a countervailing showing that the provisions in question are necessary to meet a serious transportation need, secure an important public benefit or further a valid regulatory purpose of the Shipping Act, 1916. *Federal Maritime Commission v. Aktiebolaget*

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[6] APL and Lykes urge the Commission to place capacity and geographic limitations on the agreements to protect them from unjust and unfair competition. The Commission is not satisfied that such limitations are necessary. Absent a showing that the agreements are operating in a discriminatory or unfair manner the Commission will not impose limitations on the number of TEU's carried, or the ports served. The Commission also rejects Lykes' proposal that the Commission adopt certain "statements of future policy" with respect to the Korea trade. These concern the Commission's continuing surveillance of the agreements rather than the conduct of carriers. They would require that the Commission's continuing surveillance take a particular form and thus, in essence, constitute conditions on the Commission. As such, they would place unwarranted limitations on the flexibility of the Commission in exercising continuing surveillance over the subject agreements. Lykes also proposes that the Commission adopt certain "general standards and guidelines." While the Commission may adopt new standards as part of an adjudication in order to meet particular, unforeseeable situations:

> [t]he function of filling in the interstices of the Act should be performed, as much as possible, through . . . quasi-legislative promulgation of rules to be applied in the future.
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> *Securities and Exchange Commission v. Chenery Corporation*, 332 U.S. 194, 202 (1947).

The choice between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the agency. *Columbia Broadcasting System v. United States*, 316 U.S. 407, 421 (1942).

The Commission has established and the courts have sanctioned general standards which are applied to all section 15 agreements. We are not satisfied that conditions in the Korean trade are so unique as to require a separate set of standards in addition to those of general applicability.

Svenska Amerika Linien, 390 U.S. 238 (1968). Proponents have failed to sustain this burden. The record simply will not support the approval of the pooling and coordination arrangements. A space charter is all that can be justified on the basis of the record in this case.

We cannot agree with Proponents that KMTC needs protection from ordinary market forces while it learns to operate a container service. As APL points out, KMTC is hardly an inexperienced carrier as it operates a total of 18 vessels. KMTC has had two years of experience in the trade to establish itself. Under the circumstances, it does not need to pool revenues with NYK, one of the world's major carriers, in order to service the trade.

THEREFORE, IT IS ORDERED, That Agreements Nos. 10364, 10364-1, 10371 and 10371-1 are approved pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. $ 814); and

IT IS FURTHER ORDERED, That Agreement No. 10332-2, as amended by Agreement Nos. 10332-1 and 10332-2, is disapproved pursuant to section 15 of the Shipping Act, 1916, effective February 24, 1983, unless the Commission actually receives at its offices in Washington, D.C., on or before February 23, 1983, a modified version of that agreement, signed by the parties or their duly authorized representatives that:

1. Deletes Article 6;
2. Amends Article 1(a) to read:

   (a) The parties will operate two vessels of a capacity of no more than 1,050 twenty-foot equivalent container units (TEU's) each, in a direct, non-intervening ports of call service . . .
3. Amends Article 1(b) to limit capacity of any replacement vessel to 1,050 TEU's rather than 1,100 TEU's.
4. Amends Article 1(c) to read:

   NYK will transport commodities to and from Korea in accordance with Article 1(a), and will not transport in the service authorized here any cargoes booked, forwarded, transshipped, or feeder-fed from or to Japan or any other Far Eastern nation by any line including NYK, except for transshipment cargo destined to or originating from Hong Kong or Taiwan. The carriage of such transshipment cargo shall not exceed 80 TEU's per month.
5. Amend Article 13(B) to read:

   (B) *Cargo Data*:

   For each six-month period of operation, or part thereof, the parties shall compile and submit to the FMC, and to KMPA to the extent it desires, the following:

(i) the name, owner, flag, TEU capacity, and number of sailings for every vessel employed by the parties in the trades covered by this agreement,

(ii) for each party, stated separately eastbound and westbound, the total TEU capacity, Far East TEUs carried (excluding Korea), Korea TEUs carried, total TEUs carried and utilization,

(iii) for each party, stated separately eastbound and westbound, the total number of TEUs carried on its vessels and the number of TEUs carried for each of the other parties to this agreement and Showa Line Ltd. (stated separately).

IT IS FURTHER ORDERED, That upon full and timely compliance with the conditions set forth in the above ordering clause, Agreement No. 10332-3 shall be approved.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-44
INGERSOLL RAND COMPANY

v.

WATERMAN STEAMSHIP CORPORATION

NOTICE

December 27, 1982

Notice is given that the time within which the Commission could determine to review the November 10, 1982 order of dismissal in this proceeding has expired. No such determination has been made and accordingly, that order has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-44

INGERSOLL-RAND COMPANY

v.

WATERMAN STEAMSHIP CORPORATION

MOTION TO DISMISS GRANTED

Finalized December 27, 1982

By order dated November 10, 1982, the undersigned granted Ingersoll-Rand's Motion to Dismiss the complaint. In the order reference was made to the Commission's Rules of Practice and Procedure, section 536.5(d)(20), 46 CFR 536.5(d)(20), which makes "carrier custody" provisions in tariffs invalid. It should be noted that the Commission has "stayed" the final rule which was to become effective November 8, 1982, for 45 additional days.

The Commission's action in no way affects the validity of the granting of the Motion to Dismiss the complaint here. As the previous order notes there is no real justifiable controversy so that all that is really involved is the complainant's Motion to Dismiss the complaint which it now properly seeks to withdraw. Consequently, the previous order of November 10, 1982, is hereby reaffirmed.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-51
TIME LIMIT FOR FILING OVERCHARGE CLAIMS

ORDER ON RECONSIDERATION

January 5, 1983

This proceeding is before the Commission upon receipt of three Petitions for Reconsideration[1] and one Petition for Amendment[2] of the Commission's Final Rule, published August 10, 1982 in the *Federal Register* (47 Fed. Reg. 34556), (25 F.M.C. 185), proscribing carrier and conference tariff provisions which require overcharge claims to be filed with the carrier within six months or while the cargo is still in the carrier's custody. That rule was issued following consideration of 35 comments received from both shipper and carrier interests in response to the Commission's earlier Notice of Proposed Rulemaking (46 Fed. Reg. 43472).

PETITIONS FOR RECONSIDERATION

The petitions for reconsideration generally constitute repetitions of the arguments already raised in response to the Notice of Proposed Rulemaking, and therefore may not meet the procedural requirements of Rule 261 (46 C.F.R. § 502.261), which sets forth criteria to avoid summary rejection of petitions for reconsideration. However, the Commission will waive those requirements and address the merits of the petitions in order to consider fully the arguments presented by Petitioners.

All three Petitioners argue that this rulemaking reached a conclusion different from previous rulemakings on the subject of overcharge claim time limits, and did not explain or distinguish those proceedings. Petitioners contend that the Commission's previous conclusions were founded on evidentiary hearings, and that the Commission cannot now make a contrary decision in the absence of further evidentiary hearings. The FEC also suggests that should the Commission determine not to

[1] One Petition for Reconsideration was submitted by the Far East Conference (hereafter, FEC), and another was filed jointly by the Japan/Korea-Atlantic & Gulf Freight Conference, New York Freight Bureau, Philippines North America Conference, Trans-Pacific Freight Conference of Japan/Korea, Trans Pacific Freight Conference (Hong Kong) and Agreement Nos. 10107 and 10108 and their members (JKAG *et al.*). A Petition for Reconsideration and Stay and Motion for Waiver of Time were filed by the Pacific Westbound Conference (PWC). The motion for stay was granted by the Commission on November 4, 1982 deferring the November 8 effective date of the rule for 45 days, for the purpose of allowing sufficient time to rule on the petitions for reconsideration. The motion for waiver of time limit is also granted.

[2] The Petition for Amendment was filed by Sea-Land Service, Inc.

rescind its decision, it should at least reopen the proceeding to obtain evidence concerning whether circumstances have changed since the prior proceedings. Petitioners also generally argue that there is no probative evidence that six-month rules and cargo custody rules are unfair or unreasonable, and that the Commission is therefore bound to adhere to its previous findings.

The Commission took note of previous proceedings on the subject of overcharge claim time limits in the Final Rule. Both *Proposed Rule Covering Time Limit on the Filing of Overcharge Claims*, 12 F.M.C. 298 (1969), reaffirming 10 F.M.C. 1 (1966) and *Carrier-Imposed Time Limits on Presentation of Claims for Freight Adjustments*, 4 F.M.B. 29 (1952) either preceded or disregarded the Commission's recognition that it is not necessary to make specific findings of Shipping Act violations prior to adopting substantive rules, providing that the rules are in furtherance of general Shipping Act objectives. *See, e g., Austasia Container Express—Possible Violations of Section 18(b)(1) and General Order 13*, 19 F.M.C. 512, 521 (1977), reversed on other grounds. In those earlier rulemakings, the Commission focused its attention on whether the record evidenced specific statutory violations. Because the proposed rules in those proceedings were unsupported by findings of facts thought necessary to adopt such rules, the Commission failed to do so. The Commission's factual findings and conclusions of law in that context are not, therefore, dispositive in the instant proceeding.

A subsequent rulemaking, Docket No. 78-30, *Time Limit for Filing of Overcharge Claims*, 21 F.M.C. 713 (1979), did not include hearings, but was based solely on comments to the Notice of Proposed Rulemaking. The Commission's ultimate failure to proscribe time limits in that proceeding was primarily based on the inadequacy of the grounds set forth in the Notice. The operative portion of the Notice was limited to a recitation of two provisions of the Shipping Act, one of which, section 22, seemed in retrospect to have been inappropriately applied.[3]

In announcing its decision in Docket No. 78-30 not to prohibit time limits for filing claims, the Commission made no *factual* findings which could be considered to establish contrary precedent within the meaning of *Local 777, Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862 (D.C. Cir. 1978), cited by JKAG *et al.* The Commission's conclusions in the Final Rule of Docket No. 78-30 regarding the sections 14 and 22 issues consisted of the following, *in toto*:

[3] To the extent the Notice in Docket No. 78-30 would have precluded six-month time limitations under section 22 as a matter of law, it was overreaching. Section 22 establishes a two-year period with respect to claims filed with the Commission, not with those filed directly with the carrier. The instant proceeding considers whether the tariff time limits have the *practical effect* of restricting or discouraging shippers' rights under section 22.

> 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 [a ban on six-month rules]. Upon consideration of these comments, the Commission has decided not to adopt [such a ban].

21 F.M.C. at 716.

The Notice of Proposed Rulemaking in this proceeding clearly set forth the Commission's determination that tariff time limitations "*may . . . act as an obstacle* to the redress of section 18(b)(3) violations" and are "*likely to conflict with several* [other] *objectives* of the Shipping Act" (emphasis supplied). This rulemaking was not conditioned on the actual finding of Shipping Act violations, but was premised on the principle set forth above that rules may be adopted if they are *in furtherance of general Shipping Act objectives.*[4] The Notice discussed in detail why the proposed rule was necessary to meet each of several Shipping Act objectives, and cited sections 15 and 18(b)(3) as well as sections 14 Fourth and 22.

The Commission remains satisfied that, for the reasons set forth in the Final Rule and reiterated herein, promulgation of the Final Rule is necessary to meet and to further those statutory objectives. Moreover, the administrative burden to the Commission in adjudicating essentially *undisputed* claims brought before it by the operation of six-month time limits and carrier-custody requirements is less tolerable now, in this era of increasingly limited resources, and therefore constitutes an additional, compelling reason for the Commission to take action at this time.

Petitioners raise a number of other arguments, none of which the Commission finds persuasive.

PWC objects to carriers having to rule on post-custody claims, saying it is a waste of time to do so because the shipper can always get a *de novo* review before the Commission. PWC's argument overlooks the fact that, as noted in the Final Rule, a large percentage of claims before the Commission are undisputed or are even supported by the carriers. A carrier's consideration of an admittedly meritorious claim is not a waste of time; the waste occurs when these undisputed claims are filed with the Commission, thus resulting in an unnecessary burden on the administrative process. When a claim is disputed, the carrier's letter to the claimant rejecting the claim for specified reasons need only be copied and submitted to the Commission to constitute the carrier's participation in any claim eventually brought before the Commission. This hardly comprises the duplicative burden of which PWC complains.

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[4] *See New York Freight Forwarders and Brokers Assn. v. Federal Maritime Commission*, 385 F.2d 981 (D.C. Cir. 1967); *New York Freight Forwarders and Brokers Assn. v. Federal Maritime Commission*, 337 F.2d 289 (2d Cir. 1964).

JKAG *et al.* and PWC suggest that the Commission is attempting to absolve itself of its responsibility to resolve claims by delegating the responsibility to the carriers. The Commission fully intends to continue to expend its resources resolving real disputes. In fact, those resources will be more efficiently and effectively applied when they will no longer be diverted toward unnecessary proceedings. The Final Rule will help the Commission to avoid only those *uncontested* claims which can and should be handled without government intervention.

FEC criticizes the Final Rule's statistical analysis as "one-sided," and complains that the statistics do not consider the total number of claims filed with carriers and perhaps acted upon by the carriers. The data of which FEC complains were extracted from the publicly available files of the 189 informal docketed proceedings which were noticed for filing or assignment during calendar year 1981. The data showed that the percentage of *undisputed* informal docketed proceedings before the Commission as a result of six-month or carrier-custody rules was at least 39.7%, and probably higher. They were not relied upon to draw any negative inferences regarding the number of claims acted upon directly by the carriers within the six-month period, but rather to compute the extent to which Commission resources are expended on uncontested claims. Indeed, the Commission has utmost confidence in carriers' ability to resolve overcharge claims satisfactorily—including denying claims which are unsupported.

JKAG *et al.* and PWC suggest that the Commission should adopt simplified or expedited procedures for uncontested claims. As noted at footnote 15 of the Final Rule, this suggestion has already been taken under advisement, but in any case would be an appropriate subject for a future proceeding. It is beyond the scope of this rulemaking.

JKAG *et al.* argue that the Final Rule will result in an increase in claimants filing unsupportable, invalid claims and in rebating by carriers who will "cater" to the claims of their shippers. Again, the Final Rule has already fully addressed and dismissed that proposition:

> The Commission does not believe that reliance on carriers and shippers to resolve disputes will necessarily result in unlawful activity, either in the form of false shipper claims or unwarranted reparations by carriers. It rejects the proposition that both carriers and shippers need as much supervision as possible because they will act in bad faith at every opportunity, or at least will be tempted to yield to pressure to do so. The Commission expects parties subject to the Shipping Act to comply with it, and will vigorously make use of the statutory remedies for violations of the Act.

Moreover, to give credence to this argument would require the Commission to prohibit carriers and shippers from resolving *any* claims

among themselves, including those filed within six months after the shipment.

JKAG *et al.* argue that the assessment of an administrative fee for filing overcharge claims, a practice proscribed by the Final Rule, should in fact be permitted, because "the vast majority of overcharge claims result from errors committed by shippers, consignees or their agents." They argue that carriers should be permitted compensation for expense and effort in processing claims resulting from such errors.

The Commission disagrees. A flat claim-filing fee constitutes a penalty for seeking correction of a statutory violation, particularly if it applies regardless of who, if anyone, is "at fault" for the overcharge.[5] The Final Rule does *not*, however, bar a tariff provision which requires legitimate, actual expenses incurred in the investigation of a claim to be borne by the party at fault, or if no error is found, by the claimant. Thus, those parties responsible for an error in measurement or description could be held responsible for the expenses suffered in identifying the error.[6]

THE PETITION FOR AMENDMENT

Sea-Land's petition is limited to requesting reconsideration of the decision not to prescribe minimum standard documentation in post-custody overcharge claim cases.[7] Sea-Land requests the Commission to require, in post-custody claims involving alleged errors in weight, measure or cargo description, that claimants submit certified copies of mandatory documentation, *viz.*, the commercial invoice and either the Shipper Export Declaration (Form 7525-V) or the Special Customs Invoice (Form 5515), depending upon whether it was an export or import shipment. Other types of documentation, such as promotional or advertising literature, Sea-Land says, would be strictly corroboratory.

It is not entirely clear whether Sea-Land suggests these minimum standards apply to claims filed directly with the carrier, or to claims filed with the Commission as well. Should Sea-Land intend the latter, it must be stated that the Commission will not consider minimum specified standards of proof for *Commission* proceedings. The Commission shall, and perhaps must under section 18(b) of the Shipping Act, 1916,

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[5] If an overcharge is the result of the carrier's misapplication of a tariff's commodity descriptions to a particular shipment, then a claim-filing fee would clearly be unreasonable. If the overcharge resulted from the claimant's mismeasuresent, to require the claimant to pay the carrier's expenses in remeasuring in those circumstances would appear reasonable.

[6] It would appear that in a claim based solely on a disagreement over which commodity description should apply to a particular product, no actual investigatory expenses on the part of the carrier would be incurred and none could therefore be charged to a claimant.

[7] Sea-Land's concern is also addressed by PWC, which argues that there are no commercial standards which can be applied in post-custody cases, and that carriers should therefore be allowed to deny all post-custody claims. Sea-Land draws the opposite conclusion, however, and makes specific suggestions of minimum documentary support.

continue to consider and weigh *all* proffered evidence both in support of and in opposition to claims brought before it.

As to standards of proof for use in claims brought directly to the carrier, the Final Rule rejected Sea-Land's original suggestion in its comments to the Notice of Proposed Rulemaking that the Commission impose some standards of minimum documentation. The Commission noted:

> Any such list of documents would, on the one hand, be likely to omit means of proof which in certain circumstances would suffice to make a shipper's case, while on the other hand, include standards which in certain circumstances would be insufficient.

For example, it is likely that promotional material or evidence of prior or subsequent shipments could sometimes suffice to prove to a carrier that a particular shipper ships only an easily identifiable product, or one which comes only in a uniform size or weight. On the other hand, the documentation Sea-Land would require might, because of the way the various documents are prepared, all contain the same error of description or measurement.

Thus, the Commission has determined not to prescribe minimum standards for use by carriers in considering overcharge claims. However, the Final Rule does not prohibit carriers from adopting and publishing minimum requirements. It would be incumbent upon carriers, if they choose to adopt requirements, to maintain some degree of flexibility. Sea-Land's proposed standards would, for example, appear reasonable if *not* read to mean that the existence of an error in description or measurement must be provable in the prescribed documents alone. When adequate proof of overcharge in unspecified documents is afforded only "corroboratory" status, then probative evidence is being impermissibly excluded. The Commission's endorsement of carrier-imposed minimum documentary requirements is *not* an endorsement of carrier-imposed, *exclusive* means of proof. What must be avoided is a situation similar to that created by the tariff time limitations—that is, where carriers acknowledge or do not contest the validity of a claimant's argument but point apologetically to a tariff rule as an unavoidable bar to reparation. The Commission does not wish to discourage carriers from drafting requirements which strike an appropriate balance, giving to shippers reasonable opportunity to prove their case with reliable evidence, and giving to carriers guidance in adjudging shippers' claims by requiring adequate substantiation so as to assure the integrity of the system. All questions or challenges to the lawfulness if carrier-imposed requirements will be addressed by the Commission.

THEREFORE, IT IS ORDERED, That the Petitions for Reconsideration and the Petition for Amendment are denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-28
GILA RIVER PRODUCTS

v.

SEA-LAND SERVICE, INC.

NOTICE

January 7, 1983

Notice is given that the time within which the Commission could determine to review the November 23, 1982 initial decision in this proceeding has expired. No such determination has been made and accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-28
GILA RIVER PRODUCTS
v.
SEA-LAND SERVICE, INC.

Commodity properly classified and rated. Respondent ordered to cease and desist from efforts to reclassify and re-rate the commodity and from all attempts to collect additional freight charges on shipment.

Frank J. Dempsey, Jr., for complainant.

Claudia E. Stone and *John M. Ridlon* for respondent.

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

Finalized January 7, 1983

The complainant, Gila River Products, alleges that respondent Sea-Land Service, Inc. misrated a shipment of its products (one 40-foot container) in violation of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 819(b)(3).

The contents of the container were described on the bill of lading as:

> 1 40' CONT. S.T.C. 1504 Cartons Plastic and Plastic Strips Not Fabricated or Metal Clad—Item No. 893.0071

The item number referred to on the bill of lading (893.0071) is from the Gulf European Freight Association (GEFA) Tariff No. 5, FMC-10, and bears the description:

> Plastic Plate, Sheets, Strip Film or Mulch, N.O.S. (Not Fabric Backed or Metal Clad) . . . . . WM 78.50

The container moved from Houston to Le Harve, and freight charges of $2,073.35 were assessed based on the rate for "Plastic Plate, Sheets, etc." Gila paid the freight charges. However, a routine vessel audit led Sea-Land to bill Gila for an additional charge of $5,231.95.

The audit was conducted by The Adherence Group (TAG), hired by GEFA to perform cargo inspection, self-policing and enforcement functions in the GEFA trade. The audit, which actually consisted of a review of the documents covering the cargo aboard the *Sea-Land*

[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).

Venture on Voyage 138, showed a discrepancy in the documentation for the shipment in question. While the bill of lading listed the contents of the trailer as 1504 cartons of Plastic, etc., the Export Declaration described the contents as "1504 Ctns. containing Gila Automotive Accessories." After unearthing the discrepancy, the TAG man called Gila and in a letter sent in response to the call, Gila described the commodity as "film kits" and attached a products catalog to the letter. On the basis of all this, TAG concluded that the shipment should have been rated under GEFA item No. 732.1001, "Automobile, Passenger and Commercial, including Accessories . . ." TAG then sent Gila the bill for additional freight. Gila refused to pay the additional money and filed this complaint asking the Commission to issue an order compelling TAG and Sea-Land to cease their efforts to collect that additional freight.

Item No. 732.1001 provides:

> Automobiles, Passenger and Commercial, including Accessories and Parts (NOT Automobile Air Conditioners, which see, under Item 719.1201) (Not Tractors, Trucks, Trailers and Stackers especially designed for materials handling in and around Industrial Plants, Depots, Docks, Terminals, and similar installations)—Vehicles shall be freighted on the basis of extreme dimensions (including bumpers) as offered for shipment:
>
> | | |
> |---|---|
> | New for Commercial Export Sale: | |
> | Packed | 117.50 |
> | Unpacked | WM 131.00 |
> | New or Used, N.O.S.: | |
> | Packed | WM 123.00 |
> | Unpacked | WM 150.00 |
>
> Accessories and Parts which shippers elect to export unprotected will be assessed the PACKED rate, but subject to carriage at owner's risk. Semi-boxed vehicles MUST be assessed the UNPACKED Rate. This is an all inclusive classification and embraces Automobiles; Bodies; Trucks; Busses; Chassis; Trailers, Truck and Truck Tractor Type; Special Purpose Vehicles; Ambulances; Fire engines; Hearses; Maintenance and Repair Trucks, etc.

The commodity in question is a plastic sheeting which when placed over glassed windows acts as an insulator by reflecting or "rejecting" the sun's heat in summer and by "reradiating" interior heat in winter. The film can be used on any windows including automobile windows.

The 1504 cartons actually shipped included 7592 units of "Gila Window Classics." These units are "kits" which contain one "decorative window covering" and "transfer adhesive and trim blade." According to Gila, "These attractive, hand silk screened designs are easily attached to the windows of most pick-ups, cars, station wagons and vans by the average do-it-yourselfer." The silk screened designs range from "The American Eagle" to the "Rebel Flag," with tributes to Olympia, Anheuser-Busch and Coors along the way. These pictured coverings are most often seen on the rear and side windows of pick-ups and vans. The shipment also contained 3024 units Gila Window Film—Reflective Kits which contain "Gila Window Film [which] blocks out over 95% of the sun's damaging ultra violet rays, virtually eliminating fade damage to carpets, drapes and furniture." The shipment also included 4164 "Gila Window Film—Non-Reflective Kits," the rolls of plastic sheet which contain no designs and can be used on either vehicle or building windows. The remainder of the shipment was made up of 20 display stands for rolls of the "plastic film" and various cartons holding rolls of the plastic itself.

Complainant contends that Sea-Land's insistence that the commodity shipped should be rated as Automobile Accessories is based upon a strained and unnatural interpretation of Item 893.0071. To Gila the item by its plain language provides for the shipment of Automobiles and "allows for the inclusion of accessories" for those vehicles when they are shipped along with them. In other words, "The item reads 'including' not 'and,' therefore it is not applicable for shipments of accessorial items by themselves, but they can be included with the vehicle when the vehicle is shipped."

Gila further points out that the item deals primarily with the vehicles shipped under it and distinguishes between new cars for commercial sale and "new and used" cars and cars which are "packed" and those "unpacked." Moreover, says Gila, if "Accessories" were intended to be a "major entree" under the items, what need would there be for items such as 732.1003, Auto Lamps, 732.1005, Spray resistent flaps and/or sheets, and for item 732.8922, Shock Absorbers, Auto, which latter would move under the "Parts" heading of Item 732.1001.

Sea-Land's response to Gila is most notable for its brevity:

> Respondent submits that as demonstrated by the commercial invoice and the products catalog the majority of identifiable units comprising this shipment were decorative window covering kits described exclusively for application on vehicles. As such, Sea-Land submits that the shipment was properly rerated by The Adherence Group as Automobiles including Accessories and Parts pursuant to GEFA tariff item No. 732.1001.

As is easily seen, respondent's argument does not deal with complainant's contentions as to the proper construction of Item 732.1001, *i.e.*, must the accessories shipped under it be those for a particular vehicle which they accompany? Sea-Land simply assumes the very point at issue—that the item covers accessories, whether they are shipped with an automobile or separately. I cannot read the item that way.

Tariffs are but "forms of words" and a "fair and reasonable" construction must be given the terms of the tariff. *CSC Int'l v. Lykes Bros.*, 20 FMC 552, 555 (1978).

The item in question deals with "Automobiles . . . *including* Accessories and Parts." I can only read this as covering accessories which accompany an automobile which is shipped under the item. The total context of the item virtually precludes any other construction. While one can readily understand a reference to a packed (boxed) automobile, how can a shipment of accessories be "unpacked" unless the accessories are stowed within the automobile with which they are shipped? How, for instance, could the shipment in question be placed aboard the vessel "unpacked?"

It seems to me that this item allows a shipper to strip the vehicle of such things as outside mirrors, spotlights or chrome stacks (which would increase the outside dimensions of the vehicle) and ship them within the vehicle (either packed or unpacked), for installation after delivery at the destination. As mentioned above, Sea-Land simply does not bother to deal with complainant's construction of the item offering neither reasoned argument nor a single example to show complainant's construction is unreasonable or wrong.

But Sea-Land says that Item 893.0071, Plastic Plate, Sheets, etc., does not cover the shipment, and here again, Sea-Land's argument borders on the simplistic. It is simply that the "overwhelming majority of the contents of the container shipment, as identified by the products catalog and the commercial invoice, was decorative window covering kits and window film kits and not plastic film." Sea-Land says, "Of the entire 17,828 units comprising the container shipment, only 20 units identified as Gila Window Film-Bulk Roll Displays . . . may qualify for description as plastic film under GEFA tariff item no. 893.0071." This shows "clearly, that the rate for plastic film is not applicable to the shipment at issue."

Thus, Sea-Land's argument is based on the characterization of the units shipped as "kits," and the question becomes whether the inclusion of a tube of adhesive and a razor blade in the box with the roll of plastic film creates a "kit" which is no longer covered by the description "Plastic Plate, Sheets, Strip, Film or Mulch. . . ." The Gila Window Film is a thin plastic sheet (or film) that is shipped in rolls 22 or 30 inches wide and 5 or 10 feet long. The "Gila Window Classics" are in rolls 18 by 64 inches. These rolls are shipped in cardboard

cartons or tubes and except for the Bulk Roll Displays, the cartons and tubes each contain a razor blade and a tube of adhesive. The addition of the razor blade and tube of adhesive does not, of course, change the fact that the article they accompany is a roll of "plastic film." If Sea-Land is correct and these are plastic "kits," why then by the same reasoning are they not "accessory kits" and, as such, not accessories? It seems to me that Sea-Land's reasoning would just as readily serve to remove the shipment from the accessory description as it would the plastic item. And finally, what of the units of Window Film which it is admitted can be used on building as well as vehicle windows? Here it would seem that their classification as auto accessories is somewhat arbitrary.

I am well aware that the inclusion of other commodities in a package may remove the main or primary commodity from the coverage of an item description. However, in this case I think it would do violence to common sense to conclude that the adhesive and razor blade so changed the nature of the roll of plastic as to require that it be rated under some N.O.S. classification. What was shipped were rolls of plastic "sheet," "strip" or "film," and I find that the description in item 891.0071 most nearly describes the articles shipped.

For the foregoing reasons, I conclude that the shipment in question was properly classified and respondent is ordered to cease all efforts to collect additional freight charges the shipment.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-68
MILITARY SEALIFT COMMAND,
DEPARTMENT OF THE NAVY

v.

MATSON NAVIGATION COMPANY, INC.

DOCKET NO. 79-67 - IMUA BUILDER SERVICES, LTD.;
DOCKET NO. 80-84 - EAGLE DISTRIBUTORS, INC.;
DOCKET NO. 80-85 - WAIPUNA TRADING COMPANY, INC.;
INFORMAL DOCKET NOS.
707(F) - UNITED STATES COLD STORAGE OF CALIFORNIA;
729(F) - RICHARD T. FUKUDA;
730(F) - GENERAL FOODS INTERNATIONAL.,
A DIVISION OF GENERAL FOODS CORP.;
740(F) - OSCAR MAYER & CO., INC.;
754(F) - YELLOW FORWARDING CO.,
YELLOW FREIGHT INTERNATIONAL DIV.;
856(F) AND 857(F) - SEARS, ROEBUCK AND CO.;
944(F) - GRAY DISTRIBUTING COMPANY, LTD.;
984(F), 985(F) AND 986(F) — HAWAIIAN ISLANDS
FREIGHT ASSOC.;
994(F) - CATHERINE S. KANE AND JOHN M. RYAN,
DOING BUSINESS AS FIRE MOUNTAIN POTTERY;
1000(F) - CONTINENTAL MECHANICAL;
1001(F) - HUNTERS, INC.;
1002(F) - METALCRAFT PRODUCTS;
1003(F) - E. E. BLACK COMPANY;
1004(F) - SERVCO PACIFIC CORPORATION;
1005(F) - AMFAC DISTRIBUTION COMPANY;
1006(F) - BUILDERS PRODUCT CORPORATION;
1007(F) - BACON UNIVERSAL COMPANY;
1008(F) - FAMCO CORPORATION;
1009(F) - HONOLULU ROOFING COMPANY:

1010(F) - HAWAIIAN FLOUR MILLS;
1011(F) - OCCIDENTAL CHEMICAL COMPANY;
1012(F) - CITY MILL COMPANY, LTD.;
1013(F), 1014(F), 1015(F), 1017(F), AND 1018(F) - CASTLE & COOKE FOODS DIVISION OF CASTLE & COOKE, INC.
1021(F) - CONSTRUCTION MATERIALS HAWAII;
1022(F) - ATLAS ELECTRIC COMPANY;
1023(F) - BREWER CHEMICAL CORPORATION;
1024(F) - HAWAIIAN DREDGING COMPANY;
1034(F) - CASTLE & COOKE FOODS DIVISION OF CASTLE & COOKE, INC.;
1053(F) - GENERAL ELECTRIC COMPANY;
1054(F) - FOODLAND SUPER MARKET, LIMITED;
1095(F) AND 1096(F) - MCKESSON WINE & SPIRITS

v.

MATSON NAVIGATION COMPANY, INC.

NOTICE

January 18, 1983

Notice is given that no appeal has been taken to the December 17, 1982 dismissal of complaints in these proceedings and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the dismissal has become administratively final.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-68

MILITARY SEALIFT COMMAND,
DEPARTMENT OF THE NAVY

v.

MATSON NAVIGATION COMPANY, INC.

DOCKET NO. 79-67 - IMUA BUILDER SERVICES, LTD.;
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856(F) AND 857(F) - SEARS, ROEBUCK AND CO.;
944(F) - GRAY DISTRIBUTING COMPANY, LTD.;
984(F), 985(F) AND 986(F) — HAWAIIAN ISLANDS
FREIGHT ASSOC.;
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DOING BUSINESS AS FIRE MOUNTAIN POTTERY;
1000(F) - CONTINENTAL MECHANICAL;
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1005(F) - AMFAC DISTRIBUTION COMPANY;
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1007(F) - BACON UNIVERSAL COMPANY;
1008(F) - FAMCO CORPORATION;

1009(F) - HONOLULU ROOFING COMPANY:
1010(F) - HAWAIIAN FLOUR MILLS;
1011(F) - OCCIDENTAL CHEMICAL COMPANY;
1012(F) - CITY MILL COMPANY, LTD.;
1013(F), 1014(F), 1015(F), 1017(F), AND 1018(F) - CASTLE & COOKE FOODS DIVISION OF CASTLE & COOKE, INC.
1021(F) - CONSTRUCTION MATERIALS HAWAII;
1022(F) - ATLAS ELECTRIC COMPANY;
1023(F) - BREWER CHEMICAL CORPORATION;
1024(F) - HAWAIIAN DREDGING COMPANY;
1034(F) - CASTLE & COOKE FOODS DIVISION OF CASTLE & COOKE, INC.;
1053(F) - GENERAL ELECTRIC COMPANY;
1054(F) - FOODLAND SUPER MARKET, LIMITED;
1095(F) AND 1096(F) - MCKESSON WINE & SPIRITS

v.

MATSON NAVIGATION COMPANY, INC.

SETTLEMENT APPROVED; COMPLAINTS DISMISSED

Finalized January 18, 1983

By motion, filed December 15, 1982, Matson Navigation Company, Inc., the respondent in this consolidated proceeding encompassing forty-three individual reparation cases, requests approval of the terms of an agreement settling all of those cases.

In my judgment, the settlement should be approved.

BACKGROUND AND HISTORY

This proceeding has its genesis in Docket No. 76-43, *Matson Navigation Company - Proposed Rate Increases in the United States Pacific Coast/Hawaii Domestic Offshore Trade.* Docket No. 76-43 was an investigation into the justness and reasonableness of a 3.5 percent general rate increase on nearly all cargoes carried by Matson in the trade described in the title of that proceeding. In the Report and Order deciding Docket No. 76-43,[1] the Commission determined that Matson

[1] *Matson Navigation Company - Proposed Rate Increases in the United States Pacific Coast/Hawaii Domestic Offshore Trade,* 21 F.M.C. 532 (1978).

should be allowed a maximum rate of return on equity of 13 percent for the test year beginning August 1, 1976, and ending July 31, 1977. It was found that, on a projected basis, Matson would earn 12.75 percent on rate base and 13.98 on common equity. Applying those factors, the Commission held that 2.8 percent of the increase was justified and the remainder was unreasonable.

Matson and Military Sealift Command (MSC) [2] petitioned for reconsideration of the decision in Docket No. 76-43. Matson asked for a finding that the rate increase was just and reasonable in its entirety. Among other things, MSC asked the Commission to fashion a remedy so that shippers could recover the portion of charges found to be unjust. The Order on Reconsideration [3] denied Matson's petition and granted MSC's petition, in part.

Briefly, the Order on Consideration determined that any shipper paying the unjust rates had a cause of action for reparation under section 22 of the Shipping Act, 1916,[4] and postulated that this cause of action did not accrue until the date when the Commission found the rates to be unjust and unreasonable.[5]

Thereafter, these forty-three proceedings were initiated. As the titles in the caption indicate, four were filed as formal complaint proceedings and thirty-nine were filed under the provisions of the Commission's Rules of Practice and Procedure for adjudication of small claims.[6] Matson objected to the handling of the latter under informal procedures and requested that they be processed under formal procedure, in coordination with the other formal complaints. Under the rules, this request was granted.

In accordance with pertinent portions of the Report and Order and Order on Reconsideration in Docket No. 76-43, each of the forty-three complaints sought reparation for .007 [7] of freight charges paid during the period from August 2, 1976, through July 30, 1977.[8] Two of the complaints [9] added second causes of action based on the contention that the unreasonable portion of the 3.5 percent rate increase continued to be charged as an incremental part of subsequent rate increases put into effect by Matson. In its individual answers to all forty-three com-

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[2] MSC was a party in Docket No. 76-43. It is the complainant in Docket No. 79-68, the lead docket in this consolidated proceeding.

[3] *Matson Navigation Company - Proposed Rate Increases in the United States Pacific Coast/Hawaii Domestic Offshore Trade*, 21 F.M.C. 987 (1979).

[4] 46 U.S.C. 821.

[5] December 12, 1978, the date when the Report and Order in Docket No. 76-43 was issued, became the date the cause of action accrued.

[6] Subpart S - Informal Procedure for Adjudication of Small Claims, 46 CFR 502.301 et seq.

[7] The complaint in Docket No. 79-67 erroneously sought damages calculated at .07 of freight charges, but the correct rate of .007 has been applied to the settlement.

[8] The complaint in the lead docket, 79-68, inadvertently extended the period to July 31, 1977. This was corrected.

[9] Docket Nos. 79-68 and 80-84.

plaints, Matson denied liability for reparation and asserted eight separate affirmative defenses.[10]

Inasmuch as the MSC complaint in Docket No. 79-68 sought the greatest amount of damages and included all of the issues raised in the other proceedings, the complainants in the other proceedings consented to a procedure whereby their proceedings would be held in abeyance pending the determination, in Docket No. 79-68, of certain legal issues pertaining to particular affirmative defenses and to the second cause of action.

Accordingly, in Docket No. 79-68, the legal issues raised by the affirmative defenses and the second cause of action were severed from the issue of the amount of damage and Matson and MSC filed briefs addressed to those legal issues. However, after those briefs were filed, Matson filed another petition in Docket No. 76-43, seeking modification of certain findings and conclusions contained in the Commission's Report and Order and Order on Reconsideration. By Order, issued May 2, 1980, the Commission denied Matson's petition for modification but added that it would be appropriate for Matson to introduce evidence of events subsequent to the Docket No. 76-43 test year as equitable defenses to ancillary actions for reparations.

I treated the briefs filed by Matson and MSC, in Docket No. 79-68, as cross-motions addressed to the pleadings whereby MSC was asking for dismissal of particular affirmative defenses and Matson was asking for dismissal of the second cause of action. Thereafter, I issued a ruling on the cross-motions.[11] Among other things, I determined that: (1) Matson would not be precluded from asserting its affirmative defense addressed to the statute of limitations. This meant that I disagreed with what I viewed as dicta in the Order on Reconsideration concerning the date of accrual of the first cause of action; (2) Matson would not be precluded from asserting its affirmative defense involving equitable considerations. This meant that Matson could introduce evidence showing that its earnings in test years before and after the Docket No. 76-43 test year were depressed; (3) MSC's second cause of action based on presumed inherent defects in Matson's rates, subsequent to the Docket No. 76-43 test year, should be dismissed. However, I preserved MSC's right to proceed with the second cause of action on the basis of proof (as opposed to presumption) of unreasonableness.

MSC appealed the ruling. By Order of January 26, 1982, the Commission affirmed and adopted the ruling as to the second cause of

[10] With respect to the two complaints alleging second causes of action, Matson denied that its rates were excessive after July 30, 1976, and averred that there was nothing contained in either the Report and Order or Order on Reconsideration in Docket No. 76-43 which would support the allegations of unreasonableness subsequent to that date.

[11] Order Affecting (1) Particular Affirmative Defenses Asserted By Respondent and (2) The Second Cause of Action Alleged in the Complaint; served May 8, 1981.

action and Matson's equitable affirmative defense, but the Commission adhered to the views it expressed in the Order on Reconsideration in Docket No. 76-43 and reversed as to the statute of limitations.

Subsequent to the Order of January 26, 1982, Matson moved for consolidation of the forty-three cases. This was granted by Order of Consolidation served May 20, 1982. Thereafter, Matson commenced settlement negotiations with MSC, alone, at first, and then with the other complainants, simultaneously.

THE SETTLEMENT

Matson opened up negotiations to settle with MSC about the time the cases were consolidated. On June 29, 1982, Matson submitted an offer of settlement, in writing, to MSC. As pertinent, Matson offered to settle MSC's claim on the basis of 50 percent of the damages alleged in MSC's first cause of action,[12] together with interest thereon from December 12, 1978. Interest would be calculated in accordance with Rule 253 of the Commission's Rules of Practice and Procedure. [13] The settlement was made contingent upon acceptance by the other complainants[14] and approval by the Commission. By letter dated July 14, 1982, MSC accepted Matson's offer. (The pertinent portion of Matson's letter containing the offer and MSC's letter of acceptance are attached as Appendix I.)

Matson informed me of the contingent agreement with MSC and sought approval to communicate the details to the other complainants together with similar offers patterned on the MSC agreement. After reviewing Matson's proposed letter to the other complainants, I authorized its transmission. The authorized mailing was sent to the complainants on August 25, 1982. (A copy of the letter and its attachments, except for the service list, is attached as Appendix II.) One of the attachments to Matson's letter (Exhibit A) apprised every claimant of the details of the offers made to all the complainants.

Each of the complainants in the other forty-two cases accepted the offer.[15]

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[12] In each of the forty-three cases, the complainants submitted freight bills to Matson. Matson verified those bills and does not dispute the amounts claimed. Fifty percent of the MSC claim for reparation amounts to $29,500.

[13] 46 CFR 502.253. Under that rule, which prescribes the rate of interest to be awarded in cases arising under section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817(b)(3) (except special docket cases under 46 CFR 502.92), and section 2 of the Intercoastal Shipping Act, 1933, 46 U.S.C. 844, interest will be calculated by averaging the monthly rates on six-month U.S. Treasury bills commencing with the rate for the month that freight charges were paid and concluding with the latest available monthly Treasury bill rate at the time reparation is awarded. It should be emphasized that an award of interest lies within the discretion of the Commission.

[14] Two complaints were filed by single instance shippers. The offer proposed that those claims be paid in full.

[15] The written acceptances will be filed with the Secretary of the Commission.

DISCUSSION, CONCLUSION AND ORDER

It is well settled that legislative and Commission policy foster the settlement of administrative proceedings. The right to seek settlement of administrative proceedings carries the same Congressional mandate as the right to submit proposed findings of fact and legal arguments.[16] The Commission has implemented its mandate by rule [17] and thereafter emphasized "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).

In furtherance of this policy the Commission has authorized settlements of administrative proceedings on the basis of a compromised reparation payment absent admissions or findings of violation of the Shipping Act.[18] *Com-Co Paper Stock Corporation v. Pacific Coast-Australasian Tariff Bureau*, 21 F.M.C. 62 (1978); *Robinson Lumber Co., Inc. v. Delta Steamship Lines, Inc.*, 21 F.M.C. 354 (1978); *Old Ben Coal Co. v. Sea-Land Service, Inc.*, 21 F.M.C. 505 (1978); *Organic Chemicals v. Atlanttrafik Express Service*, 18 SRR 1536a (1979); Docket No. 81-62, *Westinghouse Electric Corporation v. Delta Steamship Lines, Inc.*, 25 F.M.C. 488 (1982).

I find it in the public interest to approve the settlement.

This has been a strenuously contested proceeding, at least insofar as MSC and Matson are concerned. Absent a settlement, if the past is a guide to the future, the promise of lengthy evidentiary hearings in Honolulu, Los Angeles, and San Francisco is real. This is so because Matson's equitable defense concerning depressed rates during the years 1978 through 1981, inclusive, would entail complete financial data and rate of return evidence for each of those years. In effect, if not in fact, the record would then consist of four separate rate cases. Under the theory of Matson's defense, the results of those four rate cases would have to be balanced against the overpayments in Docket No. 76-43.

The sum of all these claims is $137,022.75. The settlement, which includes payment of 50 percent of the face amount of the claims, together with interest, calls for a payout of about $100,000.00. It is

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[16] Section 5(b)(1) of the Administrative Procedure Act, 5 U.S.C. 554(c)(1), provides: "The agency shall give all interested parties opportunity for—(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit;"

[17] Rule 91 of the Commission's Rules of Practice and Procedure, 46 CFR 502.91, provides in pertinent part: "Where time, the nature of the proceeding, and the public interest permit, all interested parties shall have the opportunity for the submission and consideration of facts, argument, offers of settlement or proposal of adjustment. . . ."

[18] It may be argued that, technically or inferentially, the various decisions and order in Docket No. 76-43 and the order of January 26, 1982, in Docket No. 79-68, subsume a finding of violation of section 18(a) of the Shipping Act, 1916, 46 U.S.C. 817(c). However, this is not conceded by Matson within the framework of the settlement agreement.

clear that the potential cost of litigation (trial and appeal) before the Commission would dilute the value of the judgment, whichever side wins. Moreover, there is a continuing likelihood of judicial review of certain issues, notably Matson's statute of limitations and equitable defenses and MSC's second cause of action. This would mean even more expense, greater uncertainty over the outcome, and a more protracted course to finality.

In settling with the one-time shippers [19] for 100 percent of their claims, Matson has not departed from the mandate of section 14 Fourth (c) of the Shipping Act, 1916, 46 U.S.C. 812. That section proscribes unfair treatment of or unjust discrimination against a shipper by a common carrier in adjusting or settling claims. Matson could not have asserted its allowable equitable defense against those two shippers because that defense is based upon continuing carriage at depressed rates, a fact not present in the case of single use. Cf. Docket No. 79-11, *Del Monte Corporation v. Matson Navigation Company*, 22 F.M.C. 365 (1979). Moreover, although aware of these differing offers, none of the forty-one complainants accepting 50 percent has objected to the terms of settlement with respect to these two shippers.

I find the settlement is a bona fide and realistic means of resolving all elements of the dispute between all parties and that the settlement will not result in any violation of the Shipping Act nor does it appear to do violence to any aspect of the regulatory scheme. The settlement merits approval.

Accordingly, it is ordered that the settlement be approved. Matson shall make payment of the principal amount agreed upon, together with interest thereon, in accordance with the calculations prescribed in Rule 253, to the date when payment is made. The date of payment shall be the date when Matson's remittance is placed in the United States mail. Complaints dismissed.

(S) SEYMOUR GLANZER
Administrative Law Judge

[19] Docket Nos. 729(F) and 994(F).

APPENDIX I

June 29, 1982

Milton J. Stickles, Jr., Esq.
Counsel
Military Sealift Command
4228 Wisconsin Avenue, N.W.
Washington, D. C. 20390

Re: FMC Docket No. 79-68, MSC v. Matson Navigation Company

Dear Mr. Stickles:

* * * * *

I have been authorized to offer settlement of this matter on the basis of 50 percent (*i.e.*, $29,500) of the first count of MSC's complaint with interest from December 12, 1978 calculated in accordance with Rule 253 of the Commission's Rules of Practice and Procedure. This is a final and non-negotiable offer because Matson believes that it would better to litigate than to offer more. In view of the equities in Matson's favor as set forth in my letter of April 28, it is more than a fair offer. I hope MSC will see fit to accept it. If it is accepted by MSC, I will make the same offer to all but two of the other claimants.* As you know, the Commission will have to approve any settlement. If the offer is not accepted, Matson will request an opportunity to present its evidence on the equitable issues.

YOURS VERY TRULY,

DAVID F. ANDERSON
Counsel

*Two small claims involve noncontinuing shippers. They would be paid in full.

David F. Anderson, Esq.
Matson Navigation Company
333 Market Street
P.O. Box 3933
San Francisco, California 94119

MSC v. Matson, FMC Docket 79-68

Dear Mr. Anderson:

Receipt of your letter of June 29, 1982 regarding the above-entitled matter is acknowledged.

* * * * *

Be that as it may, the Military Sealift Command is prepared to accept your settlement proposal provided that it receives the approval of the Federal Maritime Commission.

SINCERELY YOURS,

MILTON J. STICKLES, JR.
Counsel

APPENDIX II

August 25, 1982

To All Parties of Record in Federal Maritime Commission
Docket No. 79-68 and 42
Related Reparation Complaint Proceedings*

Gentlemen:

The complaint of Military Sealift Command in Docket No. 79-68 and the 42 other. complaint proceedings based on the Federal Maritime. Commission's Orders of December 12, 1978 and April 27, 1979 in Docket No. 76-43, have been consolidated for further proceedings. Matson has the right to offer evidence in support of its equitable defenses set forth in its answers to the complaints, and is prepared to do so. In the meantime, however, Matson and Military Sealift Command have negotiated a settlement on the basis of 50% of the principal amount demanded in the first count of MSC's complaint plus interest since December 12, 1978. That is the date of the FMC Order determining Matson's rates to have been excessive to the extent of .7 of one percent for the test year August 1, 1976 - July 31, 1977 in Docket No. 76-43.*

Matson is willing to extend its offer to settle for 50% plus interest from December 12, 1978 to all parties, subject to approval by the Federal Maritime Commission. The basis for Matson's offer is set forth below.

The FMC decisions in general rate increase proceedings establish that Matson's rates were reasonable for several years prior to the test year in Docket No. 76-43. The Commission found Matson's rates to be excessive for the test year August 1, 1976 - July 31, 1977 by only .7 of one percent. The ceiling was fixed by the FMC for that test year at a rate of return of 13% on common equity. On the basis of the data presented in the proceeding, that was equivalent to a rate of return on rate base of 12%.

At any evidentiary hearing in these complaint proceedings, Matson will offer evidence to show that its rates of return on common equity and rate base during the years 1978 through 1981 were well below those authorized in Docket No. 76-43 and far below those authorized for carriers in the Puerto Rico trade.

Specifically, Matson will show that its actual rates of return on common equity and rate base (computed in accordance with Matson's

*Docket numbers, names of complainants and representatives of complainants are shown on attached service list.

understanding of the FMC rules for each year) were as follows for the years 1978 through 1981:

	1978	1979	1980	1981
Rate of Return on Common Equity	8.16%	7.12%	5.61%	5.64%

	1978	1979	1980	1981
Rate of Return on Rate Base	8.28%	8.09%	7.89%	8.59%

The further rate increases Matson would have needed to bring its earnings up to the level of 13% on common equity for the years in question are as follows:

	1978	1979	1980	1981
Rate of Return on Common Equity	3.23%	4.22%	5.64%	8.41%

To bring the earnings up to the level of 12% on rate base, Matson would have needed the following rate increase:

	1978	1979	1980	1981
Rate of Return on Rate Base	5.81%	6.49%	7.60%	8.01%

Matson would further show that each of the complainants (with two exceptions which will be explained below) continued to ship via Matson during the years 1978 through 1981 and in fact received the full benefit of Matson's depressed rates in those years.

If you apply the percentages shown above by which Matson's rates were below the level permitted in Docket No. 76-43, to the total freight charges paid Matson in those subsequent years, it is apparent that all complainants (with two exceptions) have benefited because Matson's rates were depressed. Those benefits exceed by many times the amount of excessive freight charges each complainant paid during the test year 1976 - 1977. In short, Matson's voluntary action in holding rates down went far beyond any rollback order the FMC could lawfully have entered. It is Matson's position that under these circumstances the Commission ought not to allow reparations and that each complaint should be dismissed.

Matson makes this offer to settle for 50% plus interest to avoid further, possibly lengthy proceedings in these matters for the presentation and evaluation of Matson's evidence in support of its equitable defenses. Further proceedings for judicial review are probable if the FMC does not uphold Matson's defenses.

This is a final and non-negotiable offer. In Matson's view, the Shipping Act, 1916 requires that settlement on the same basis be made with all parties having similar claims. If all parties agree to this offer and the settlement is approved by the Federal Maritime Commission, payment will be made as full and final settlement.

For your convenience, the attached Exhibit A (Settlement Offer) sets forth the case name and number, 50% of the principal amount of the claim,** interest as provided for in the FMC Rules of Practice (i.e., averaging the monthly rates on six month U.S. Treasury bills) from December 12, 1978 through July 1982, and the total amount. Interest will be extended up to the date of payment.

The foregoing letter was submitted to Judge Glanzer in advance of mailing. Judge Glanzer has authorized me to include this and the following paragraph in this letter.

Judge Glanzer offered no objections to the form or context of the letter, however, this should not be construed to mean that the terms of settlement have been approved. Judge Glanzer will not rule on the terms of settlement until a formal motion for approval is submitted to him.

I will prepare and submit the motion upon return of the acceptances.

If you accept this offer, please so indicate by executing the acceptance at the foot of the duplicate copy of this letter, having a notary public take an acknowledgment of your signature (unless an attorney-at-law signs as counsel of record) and returning it to me.

See the following pages for Acknowledgment forms for corporation, partnership and individual. Please use the one appropriate for you.

YOURS VERY TRULY,

DAVID F. ANDERSON

cc: Honorable Seymour Glanzer

**MSC and Eagle Distributors amounts are based on the first counts of their complaints. In Matson's view, the FMC Order of January 26, 1982 effectively disposes of the issues raised by the second count. The Fire Mountain Pottery and Richard Fukuda claims will be paid in full because they were not continuing shippers.

ACCEPTANCE

The foregoing offer is hereby accepted.

_____
(Name of Claimant)

By: _____
Title: _____
Date: _____

CERTIFICATE OF ACKNOWLEDGMENT (Individual Form)

STATE OF _____)
COUNTY OF _____) ss.

On this _____ day of _____ in the year 1982 before me, a Notary Public, personally appeared _____, known to me (or proved to me on the oath of _____) to be the person whose name is subscribed to the within instrument and acknowledged that he (she or they) executed the same.

_____
Notary Public

CERTIFICATE OF ACKNOWLEDGMENT (Corporate Form)

STATE OF _____)
COUNTY OF _____) ss.

On this _____ day of _____ in the year 1982 before me, a Notary Public, personally appeared _____, known to me (or proved to me on the oath of _____) to be the person who executed the within instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same.

_____
Notary Public

CERTIFICATE OF ACKNOWLEDGMENT (Partnership Form)

STATE OF _____)
COUNTY OF _____) ss.

On this _____ day of _____ in the year 1982 before me, a Notary Public, personally appeared _____ _____, known to me (or proved to me on the oath of _____) to be one of the partners of the partnership that executed the within instrument and acknowledged to me that such partnership executed the same.

_____
Notary Public

EXHIBIT A (SETTLEMENT OFFER)

Docket Number and Name	50% of Principal Amount	Interest	Total
1. 79-67, Imua Builders Services, Ltd.	[1] $43.85	$18.90	$62.75
2. 79-68, Military Sealift Command	29,500.00	12,712.44	42,212.44
3. 80-84, Eagle Distributors, Inc.	4,549.22	1,960.40	6,509.62
4. 80-85, Waipuna Trading Company, Inc.	1,453.51	626.36	2,079.87
5. 707(F), United States Cold Storage of California	1,953.11	841.65	2,794.76
6. 729(F), Richard T. Fukuda	[2] 8.94	3.85	12.79
7. 730(F), General Foods International, a Division of General Foods Corp.	1,667.48	718.57	2,386.05
8. 740(F), Oscar Mayer & Co., Inc.	489.86	211.10	700.96
9. 754(F), Yellow Forwarding Co., Yellow Freight International Div.	743.58	320.43	1,064.01
10. 856(F), Sears, Roebuck & Company	2,480.37	1,068.87	3,549.24
11. 857(F), Sears, Roebuck & Company	2,458.39	1,059.39	3,517.78
12. 944(F), Gray Distributing Company, Ltd.	317.84	136.97	454.81
13. 984(F), Hawaiian Island Freight Assoc.	168.42	72.58	241.00
14. 985(F), Hawaiian Island Freight Assoc.	2,363.25	1,018.40	3,381.65
15. 986(F), Hawaiian Island Freight Assoc.	1,472.94	634.73	2,107.67
16. 994(F), Catherine S. Kane & John M. Ryan, d/b/a Fire Mountain Pottery	[2] 171.13	73.75	244.88
17. 1000(F), Continental Mechanical	154.45	66.56	221.01
18. 1001(F), Hunters, Inc.	236.71	102.01	338.72
19. 1002(F), Metalcraft Products	101.19	43.61	144.80
20. 1003(F), E. E. Black Company	50.66	21.83	72.49
21. 1004(F), Servco Pacific Corporation	605.95	261.12	867.07
22. 1005(F), Amfac Distribution Company	365.45	157.48	522.93
23. 1006(F), Builders Product Corporation	126.65	54.58	181.23
24. 1007(F), Bacon Universal Company	81.08	34.94	116.02
25. 1008(F), Famco Corporation	12.15	5.23	17.38
26. 1009(F), Honolulu Roofing Company	212.68	91.65	304.33
27. 1010(F), Hawaiian Flour Mills	543.59	234.25	777.84
28. 1011(F), Occidental Chemical Company	293.64	126.54	420.18
29. 1012(F), City Mill Company, Ltd.	869.33	374.62	1,243.95
30. 1013(F), Castle & Cooke Foods Division of Castle & Cooke, Inc.	197.27	85.01	282.28
31. 1014(F), Castle & Cooke Foods Division of Castle & Cooke, Inc.	88.24	38.03	126.27
32. 1015(F), Castle & Cooke Foods Division of Castle & Cooke, Inc.	1,159.60	499.71	1,659.31
33. 1017(F), Castle & Cooke Foods Division of Castle & Cooke, Inc.	1,898.23	818.00	2,716.23
34. 1018(F), Castle & Cooke Foods Division of Castle & Cooke, Inc.	908.10	391.33	1,299.43
35. 1021(F), Construction Materials Hawaii	911.83	392.93	1,304.76
36. 1022(F), Atlas Electric Company	27.56	11.87	39.43
37. 1023(F), Brewer Chemical Corporation	1,350.46	581.95	1,932.41
38. 1024(F), Hawaiian Dredging Company	119.45	51.47	170.92
39. 1034(F), Castle & Cooke Foods Division of Castle & Cooke, Inc.	2,170.35	935.27	3,105.62

EXHIBIT A (SETTLEMENT OFFER)—Continued

Docket Number and Name	50% of Principal Amount	Interest	Total
40. 1053(F), General Electric Company	1,559.94	672.22	2,232.16
41. 1054(F), Foodland Super Market Limited	2,460.73	1,060.40	3,521.13
42. 1095(F), McKesson Wine & Spirits	606.58	261.39	867.97
43. 1096(F), McKesson Wine & Spirits	1,647.65	710.02	2,357.

[1] This complainant erroneously multiplied total freight charges by .07 rather than .007. Number shown is 50% of correct amount ($87.69).
[2] Full amount.

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-28

TRANSPORTACION MARITIMA MEXICANA, S.A.

v.

BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS

Charge on cargo stored in transit areas beyond the expiration of the free time period found unreasonable in violation of section 17 of the Shipping Act, 1916, because calculated on the basis of the length of the vessel calling for the cargo.

Kenneth H. Volk, Wade S. Hooker, Jr. and *Geoffrey W. Crawford* for Complainant.
Edward J. Sheppard for Respondent.

REPORT AND ORDER

January 28, 1983

BY THE COMMISSION: (ALAN GREEN, JR., *Chairman*; JAMES J. CAREY and JAMES V. DAY, *Commissioners.*)*

This proceeding was initiated upon the complaint of Transportacion Maritima Mexicana, S.A. (TMM), which alleged that the Board of Commissioners of the Port of New Orleans' (the Port) "penalty dockage" tariff provisions were in violation of section 17 of the Shipping Act, 1916 (46 U.S.C. § 816). In an Initial Decision served April 6, 1982, Administrative Law Judge William Beasley Harris found the tariff provisions to violate section 17. The proceeding is now before the Commission upon Exceptions filed by the Port, to which TMM has replied.

BACKGROUND

Although there is some disagreement concerning particular factual allegations, the basic events giving rise to this proceeding are generally clear and undisputed. A TMM vessel, M/V GELA, was scheduled to arrive at the Thalia Street wharf at the Port on May 29, 1980. Although cargo had begun accumulating at the wharf several days beforehand, the proposed call of M/V GELA was cancelled the day it was due to arrive. More cargo accumulated at the wharf until mid July,

* Vice-Chairman Moakley's concurring and dissenting opinion is attached.

1980. At that time M/V RISHI AGASTI, also operated by TMM, docked at Thalia Street and loaded all the TMM cargo.

As a result of TMM's delay in picking up the cargo, the Port assessed TMM charges under Item 15-K, Section 3(b) of its tariff, which states:

> Dockage charges shown in Section (4) of this item shall be assessed the vessel beginning on the first day after the expiration of the free time for assembling outward cargo [excepting certain categories of cargo] . . ., if the vessel has not arrived at her inward and/or outward berth . . . .

Section (4) refers to Column 1 of Item 20, which sets forth rates based on "vessel over-all length." The charges assessed on the accumulated cargo were based on the RISHI AGASTI's length and amounted to $22,099.

DISCUSSION AND CONCLUSIONS

The Port's Exceptions allege both substantive and procedural errors in the Initial Decision. In the interest of clarity, each exception, any reply to the exception and the Commission's discussion and disposition thereof will be presented *seriatim.*

The four alleged "errors in substantive findings" in the Initial Decision are as follows:

1. The Port excepts to the suggestions in the Initial Decision that the tariff is ambiguous, that it does not clearly notify users of the charges to be assessed, and that it is faulty for containing "no definition of penalty dockage or penal-level charges." The Port argues that there is no requirement that each and every item in the the tariff be defined. The Port further argues that the penalty dockage provision is clearly set forth in the tariff and was well understood by TMM.

TMM does not explicitly refer to this Exception. However, previous pleadings indicate that TMM does not dispute that the charge was correctly computed in accordance with the tariff.[1] The record indicates that there was never any confusion by either party as to whether and how the charges applied to TMM's cargo. The Commission concludes that the Port's exception is well founded.

2. The Port objects to the Presiding Officer's conclusion that the penalty dockage charge is a charge for the storage of cargo and that it is unreasonably high. The Port explains that the charge is "a penalty to *discourage* the storage of cargo in the Board's transit sheds," and that

[1] TMM's Opening Brief charged disparities in the tariff's application, in that the tariff excepted several categories of cargo from the 15-day free time allowance for assembling outward cargo, providing 30 or 90 days instead, and "adjusted demurrage" thereafter. The "disparate application" charge appears to have been abandoned because neither party has raised the issue subsequent to the Initial Decision. In any event, the Commission's ultimate disposition in this proceeding renders unnecessary further consideration or this matter.

under the standards of *West Gulf Maritime Association v. Federal Maritime Commission,* 21 F.M.C. 244 (1978), the charge is legitimate because it is (1) otherwise lawful, (2) not excessive, and (3) reasonably related, fit and appropriate to the ends in view. The Port argues that penalty dockage charges are necessary to deter prolonged storage of cargo on wharves; they are in widespread use in other ports, though under various names; [2] and their existence was found to be necessary by the Commission in *Free Time and Demurrage Charges on Export Cargo,* 13 F.M.C. 207 (1970).

TMM argues in response that even if intended to be a penalty, the dockage charge is unlawful because it is assessed on an arbitrary basis. TMM cites *Volkswagenwerk A.G. v. Federal Maritime Commission,* 390 U.S. 261 (1968), in which the Court ruled that "the proper inquiry under § 17 is . . . whether the charge levied is reasonably related to the service rendered." 390 U.S. at 282.[3]

The nomenclature assigned to the charge cannot disguise its admitted nature and purpose - it is an assessment designed to discourage storage of cargo on wharves beyond the free time period.[4] It is not a "dockage" charge in the traditional sense of the term; it is triggered by the arrival of cargo, and was applied here 38 days before the RISHI AGASTI arrived at the dock. It is not a "berthing charge," in which the length of the vessel would be relevant. Application of the charge to its evident and admitted purpose - to discourage the storage of cargo in transit areas - demonstrates that, as written, the charge is not reasonably related to that end. A relatively small amount of cargo stored at the Port's transit sheds and picked up by a large vessel could be assessed a higher fee than an enormous load picked up by a small vessel. Although intended to deter the clogging up of wharf areas with cargo, the penalty dockage formula does not include volume, tonnage, or square footage as a factor. Counsel for the Port conceded at oral argument that if TMM had accumulated only 1,001 tons of cargo instead of the over 5,000 tons which actually accumulated, its charge would have been the same. The formula also fails to take into account whether the stored cargo accumulated gradually, whether the entire volume was present from the outset, or whether the bulk of the cargo arrived only one day before the vessel.

The Port does not contest these disparities or defend the appropriateness of this particular formula. It emphasizes instead that this is a *penalty* charge, and that because it would discourage storage of cargo

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[2] *E.g.,* "demurrage," "wharfage demurrage," "pier demurrage," or "storage" charges.

[3] The Port argues that the *WGMA* test is the appropriate standard for judging a penalty dockage system, rather than *Volkswagenwerk's* cost-benefit analysis.

[4] The charge in issue might be more appropriately called a "penalty demurrage" charge, but it will be referred to in this Order as a "penalty dockage" charge because this is the name which has been used throughout this proceeding.

in transit space, it is therefore "reasonably related, fit and appropriate to the ends in view." Using that rationale, the fee would be equally related, fit and appropriate if it were calculated on the basis of random figures established by chance.

The tests in *WGMA* and *Volkswagenwerk* are not significantly different; the Port's penalty dockage fee fails under either one. It is not reasonably related, fit and appropriate to the ends in view within the meaning of *WGMA*, and it is not reasonably related to the service rendered under *Volkswagenwerk*.

There is no apparent logic to the Port's argument that because the fee in issue is a penalty charge and not a compensatory charge, a different standard applies. The *level* of penalty charges can be expected to be higher than that of compensatory assessments. *See Free Time, supra.* However, there must still be a rational nexus between the fee itself and that which is being penalized. There is no reasonable relation between a fee based upon the length of a vessel and the prolonged storage of cargo. The Port's penalty dockage fee is therefore unreasonable and in violation of section 17.[5] The Port's exception on this point will be denied.

3. The Port alleges that the Presiding Officer erred in ruling that the "tariff must be construed from its four corners," and in "refusing to consider" evidence of custom and practice of penalty dockage at the Port as well as at other Gulf Coast terminals.

The Port's evidence of the history and necessity of penalty charges on prolonged storage of cargo would have been relevant had the issue in this proceeding been whether such penalty charges are lawful. That is not the issue, however; the issue is whether the Port's method of computing the charge used in its penalty dockage system is lawful. The propriety of penalty demurrage in principle is well established. Thus, the Port's evidence on this point was indeed irrelevant.

Evidence of the custom and practice of vessel length-related demurrage charges at other ports might have been relevant, but no such similarly calculated charge was presented. In fact, the Port's evidence that four other Gulf ports assess penalty charges for cargo stored beyond the free time period underscores the defect in the Port's fee; the ports of Galveston, Houston, Mobile and Tampa all base their penalty charges on cargo tonnage, not on vessel length. The Port's exception will be denied.

4. The Port excepts to the Presiding Officer's finding that TMM caused no impediment to the Port's use of the Thalia Street wharf. The Port relies on uncontroverted evidence that drastically reduced volumes of cargo moved on the wharf during the relevant 40-day period

[5] The Commission does not concur, however, with the Presiding Officer's conclusion that the charge is unreasonably high. *See* discussion, *Infra.*

compared with the same period in several preceding and subsequent years.[6] TMM argues that the Port produced no evidence of congestion due to the TMM cargo's presence.

The Presiding Officer's failure to find that the TMM cargo impeded the Port's usage of the wharf is supported by the record, and the Port's exception will therefore be denied. The Port established no causal relationship between the decline in cargo movement and the presence of TMM cargo on the wharf. The decrease in cargo movement could have resulted from a lull in vessel calls or from other possible factors, rather than from the storage of the TMM cargo. There was no evidence of congestion or of vessels being turned away. The record simply does not support a finding that the TMM cargo impeded the Thalia Street operation.

More significantly, the matter is irrelevant. The issue before the Commission is use of vessel length as a factor in the computation of a penalty demurrage charge. Whether, in this particular instance, the storage of cargo beyond the free time period created discernible problems is not to the point. The length of the RISHI AGASTI is not alleged to be a factor in the alleged impediment caused by the TMM cargo. The matter has no bearing on the issues to be considered in this proceeding.

The Port's remaining exceptions involve allegations that the Presiding Officer made several procedural errors.

The Port objects to the Presiding Officer's finding that TMM sustained its burden of proof.[7] It argues that TMM's only evidence was that of a Mr. Varuso, who presented confused and erroneous written testimony, particularly on the issue of wharf congestion, and that TMM failed to prove that the Port's charge is unreasonable.

TMM responds that the only matter in issue is a question of law, and that no presentation of proof was therefore necessary.[8]

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[6] The 1977-1981 average (excluding 1980) for the period was 17,525 tons; only either 3413 tons or 4903 tons (the parties disagree) moved in the same period in 1980.

[7] Specifically, the Port excepts to a paragraph in the Initial Decision's concluding section, which, the Port argues, is unfounded in fact and irrelevant to the determination that TMM met its burden of proof. The paragraph reads in full:

> The Presiding Administrative Law Judge finds and concludes he agrees with the complainant that the lack of correlation between the benefits conferred and the dockage charged, have been admitted in the respondent's answer. The Presiding Judge finds and concludes that the admissions of the respondent in its answer to the complaint, the opportunity for the respondent to ask at the hearing for the production of a witness for cross-examination (which was not asked for), as well as the respondent's failure to have any witnesses at the hearing, provide a basis for inferring the complainant had produced with the respondent's admissions, the material on file, the record herein, sufficient to meet its burden of proof. [underscoring in the original]

[8] TMM also argues that its witness' testimony was sufficient to establish that there was no wharf congestion. TMM does not attempt to explain or defend the particular paragraph in the Initial Decision cited by the Port.

It is unclear why the Port characterizes its argument that TMM has not established the unreasonableness of the Port's tariff provision as a "procedural" issue. At any rate, Mr. Varuso's testimony concerning other vessels' activities at the Thalia Street wharf is entirely irrelevant for the reason heretofore mentioned; whether particular impediments were created by the TMM cargo is not germane to the issue in this proceeding. The Commission therefore has disregarded the Varuso testimony in its entirety.

The Varuso testimony constituted the sole evidence presented by TMM. What remains of TMM's case is its Complaint, which establishes a *prima facie* case of unreasonableness under the standard enunciated in *Volkswagenwerk*. The question before the Commission is one of law. Upon careful review of the submissions of both parties, the Commission concludes that the fee formula has not been justified by the Port in responding to TMM's case. The Commission does not adopt the specific findings and conclusions of the Presiding Officer in the paragraph which is the object of the Port's exception,[9] except for his ultimate conclusion that TMM has met its burden of proof.

The Port alleges that it was denied its right to cross-examine TMM's affiant, Mr. Varuso. TMM replies that the Presiding Officer offered to permit cross-examination of Mr. Varuso through written interrogatories, an offer which the Port rejected. The record also indicates that the Port eventually objected to live testimony and oral cross-examination of Mr. Varuso.[10] As the Port rejected opportunities to cross-examine Mr. Varuso both by interrogatories and orally, and as the Varuso testimony has been struck by the Commission as irrelevant, the Port's exception will be denied.

The Port alleges that the Presiding Officer improperly denied all prehearing discovery. The Presiding Officer gave the following oral explanation for not issuing a ruling on the Port's motion to compel TMM to respond to its discovery request:

> JUDGE HARRIS: Because the hearing is today, and under the rules, as you well know, discovery does not have to be completed before there is a hearing.

TMM points out in response that the Port served its discovery request 50 days after the publication of the Complaint in the *Federal Register*.

The Commission's Rules of Practice and Procedure provide that discovery "shall be commenced no later than 30 days" after publication, "unless otherwise ordered by the presiding officer for good cause

[9] To this extent, the Port's exception is granted.

[10] When the Presiding Officer determined *sua sponte* to reopen the proceeding and hold a hearing with live witnesses, the Port objected, stating that cross-examination of Mr. Varuso would serve no purpose, and that "his testimony goes only to marginal matters which will not affect the outcome of the controversy." The Presiding Officer then cancelled the proposed hearing.

shown." 46 C.F.R. § 502.201(b)(2). The Port's discovery request was untimely under Rule 201, and could therefore be properly ignored by TMM absent the Presiding Officer's finding of "good cause" for tardiness. Although the Presiding Officer perhaps should have articulated the inappropriateness of a motion to compel this discovery request, his failure to grant that motion was not error. The Port's exception is therefore without merit and is denied.

The Port excepts to the Presiding Officer's having twice granted requests made by TMM without having waited for a Port reply. One request was that written interrogatories be substituted for oral cross-examination of Mr. Varuso. The second was TMM's Motion for Leave to File a Substitute Affidavit (of Mr. Varuso). The Port also excepts to the Presiding Officer's refusal to allow it to introduce an affidavit from a Mr. Parker to rebut Mr. Varuso's first affidavit. TMM responds that the Port's objections were mooted when it declined an opportunity to cross-examine Mr. Varuso orally and to present live testimony from Mr. Parker.

Because the Varuso testimony has been struck, the Port's exceptions must be denied.

Finally, the Port excepts to its being denied the opportunity to respond on brief to TMM's case, pursuant to the presiding Officer's briefing schedule, which provided for simultaneous opening briefs by both parties, but a reply brief by only TMM. The Port requested by motion an opportunity also to file a reply brief, but this motion was denied.[11] TMM argues that there was nothing left to argue, that "there were not surprises lurking in the briefs of either side," and that the Port's Exceptions evidence the fact that there were "no fresh arguments" which might have been made to the Presiding Officer.

The Commission's Rules do not specify that there is any "right" to file a reply brief.[12] Because imbalance in opportunity to be heard can, in certain circumstances, be considered unfair, the better course of action in this proceeding would have been to provide each party an equal number of chances to present its case and to respond to that of its adversary. That opportunity has been provided in the current stage of this proceeding. Each party has now had equal opportunity to make its arguments before the Commission and to rebut those of its opponent.[13] The Commission has heard oral argument. Moreover, the record in this case has been carefully reviewed by the Commission *de novo* in order to reach a determination absent consideration of evidence and arguments

[11] In its motion, the Port suggested that it and not TMM be the sole party to file a reply brief.

[12] Rule 221 states only that the presiding officer shall fix the time and manner or filing briefs. 46 C.F.R. § 502.221. Rule 74, dealing generally with replies, merely refers back to Rule 221 on the subject of reply briefs. 46 C.F.R. 502.74(a).

[13] That is, the Port in its Exceptions and TMM in its Reply were able to respond fully to all previous arguments made in this proceeding.

found to be irrelevant.[14] Any disadvantage allegedly accruing to the Port by virtue of the briefing schedule has now been remedied.

Although not stated in the pleadings in this proceeding, counsel for TMM informed the Commission at oral argument that TMM has paid the Port the entire $22,099 assessed as a result of this incident.[15] The relief sought by TMM did not include award of reparation pursuant to section 22 of the Shipping Act, 1916 (46 U.S.C. § 821),[16] nor would award of reparation appear to be warranted.

The relief provided by section 22 is clearly discretionary and permissive, and is not automatic following a finding of a violation of the Shipping Act. *Consolo v. Flota Mercante Grancolombiana,* 383 U.S. 607, 621-22 (1965); *United States v. Columbia Steamship Company, Inc.,* 17 F.M.C. 8, 9-10 (1973). Equitable considerations existing here militate against the award of reparations.

TMM has made no showing that the amount assessed pursuant to the unlawful tariff rule is itself unreasonably high. In fact, evidence presented by the Port suggests that the sum assessed TMM for the storage of its cargo in the Port's transit sheds may be in line with if not lower than what a reasonable penalty demurrage fee might be. Moreover, the record indicates that assessment of the fee came as no surprise to TMM. TMM was forewarned of the charges but made no effort to take action which may have avoided their assessment. Finally, to allow TMM to make use of the Port's transit facilities for the extended storage of its cargo without payment of any charges would bestow upon that carrier an unwarranted windfall. *See Parsons & Whittemore, Inc. v. Johnson Line,* 7 F.M.C. 720, 732 (1964).[17] Section 22 relief is not intended to yield inequitable results. With regard to the actual payment of charges, therefore, the Commission will leave the parties as it found them.

THEREFORE, IT IS ORDERED, That the Exceptions of the Board of Commissioners of the Port of New Orleans are granted to the limited extent indicated and denied in all other respects; and

IT IS FURTHER ORDERED, That Item 15-K, Section 3(b) of the Board of Commissioners of the Port of New Orleans Dock Department Tariff is cancelled; and

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[14] The Commission is not adopting the Initial Decision, although it reaches the same ultimate conclusion that the penalty dockage fee violates section 17.

[15] The Presiding Officer apparently shared our impression that the contested charges had not been paid, for the ordering language of the Initial Decision is in terms of what the Port "may collect". It is not clear why counsel for either side made no attempt to disabuse the Commission of the impression that charges were not paid, until asked directly at oral argument.

[16] The Complaint did request the Commission "to issue such other and further orders as the Commission shall deem appropriate."

[17] Counsel for TMM indicated at oral argument that the Commission should allow the Port to assess only actual dockage charges, reflecting the three days the RISHI AGASTI was docked at Thalia Street.

IT IS FURTHER ORDERED, That the Board of Commissioners of the Port of New Orleans file an amended tariff within 30 days, deleting Item 15-K, Section 3(b); and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

FRANCIS C. HURNEY
Secretary

Vice Chairman Moakley, concurring and dissenting.

I concur with the result reached by the majority in this proceeding that permits the Port of New Orleans to retain the charges at issue but would take an entirely different path in arriving at that result.

I cannot find on the basis of the record before me that complainant TMM has carried its burden of proof in establishing that the Port's penalty dockage provision violates section 17 of the Shipping Act, 1916.[1]

While acknowledging that TMM has produced no relevant evidence in this proceeding, the majority has concluded that, as a matter of law the Port's penalty dockage provision is unreasonable because, "There is no reasonable relation between a fee based upon the length of a vessel and the prolonged storage of cargo." (Majority Opinion pp. 6, 7). Later, the majority reiterates that "The issue before the Commission is use of vessel length as a factor in the computation of a penalty demurrage charge." (Majority Opinion pp. 8, 9).

These statements, in my opinion, indicate a misperception of both the tariff and the issue in this case.

The issue to be resolved is whether the Port's penalty dockage charge is reasonably related, fit and appropriate to the end for which the Port has established the charge,[2] i.e., to discourage a carrier from tying up its breakbulk facilities. The complainant must therefore establish that the penalty dockage charge is not reasonably related to that end. It has not done so.[3]

The tariff provision in question is a dockage charge, not a demurrage charge, as the majority have characterized it. It states, in essence, that a carrier may begin to assemble outbound cargo in a transit shed adjacent to a breakbulk wharf for up to 15 days prior to a vessel's scheduled arrival. However, dockage for the vessel that picks up the cargo commences on the 16th day, whether or not the vessel has actually arrived.

While other U.S. Gulf Ports have chosen to impose a cargo demurrage charge to discourage the extended use of their pier facilities, New Orleans has continued, for over fifty years, to utilize this "penalty dockage" charge to achieve the same purpose. The majority seem troubled by this fact that the charge in question is apparently unpar-

[1] It is beyond dispute that the burden of proof is upon the complainant in this proceeding. If the burden is not met, the complaint must be denied. *Port of Houston Authority v. Lykes Bros. SS Co., et al.* 19 FMC 192, 200 (1976).

[2] *West Gulf Maritime Association v. Port of Houston Authority*, 21 FMC 244, 248 (1978); *Investigation of Free Time Practice - Port of San Diego, Cal.* 9 FMC 525, 547, (1966). If the level of charges were at issue in this proceeding, which is apparently not the case, the level would also have to be reasonably related to the service performed, or the benefit conferred. See *Volkswagenwerk A.G. v. F.M.C.*, 390 U.S. 261, 282 (1968).

[3] The majority also have concluded that TMM's complaint in this proceeding established a *prima facie* case of unreasonableness of the Port's tariff. A reading of that complaint indicates that TMM failed to mention the tariff item which has been found unreasonable.

alled in other port tariffs. But as the Commission stated in a similar case:

> "The Shipping Act does not require all carriers or all ports to offer identical services or engage in the same practices. Competition and innovation are encouraged. Local differences are permitted up to the point they unfairly injure shippers, ports or other persons protected by the Act." [4]

I would find that TMM has not carried its burden of establishing that the Port's penalty dockage charge is unreasonable and dismiss this complaint.

[4] *Port of Houston Authority v. Lykes Bros. SS Co., et al,* note 1 *supra* at 200, 201.

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-1
CALIFORNIA CARTAGE COMPANY, INC.

v.

PACIFIC MARITIME ASSOCIATION

DOCKET NO. 82-10
CONTAINERFREIGHT TERMINALS COMPANY, ET AL.

v.

PACIFIC MARITIME ASSOCIATION

An assessment agreement which effectively alters a prior agreement so as to provide for the funding of collectively bargained fringe benefit obligations on a tonnage rather than man-hour basis is subject to the Commission's jurisdiction under section 15 of the Shipping Act, 1916, as amended.

Persons who neither directly nor indirectly pay assessments under an "assessment agreement" and allege only a secondary competitive injury resulting therefrom lack standing to file a complaint under section 15, fifth paragraph of the Shipping Act, 1916.

Louis E. Wolcher, Thomas P. Burke and *David W. Slaby* for Complainant California Cartage Co., Inc.

John M. Skonberg and *Richard Harding* for Complainants Containerfreight Terminals Co., Hawaiian Pacific Freight Forwarding, and Richmond Transfer and Storage Co.

R. Frederic Fisher, Alf R. Brandin, Charles L. Coleman and *Harry Pfeifer* for Respondent Pacific Maritime Association.

Norman Leonard for Intervener International Longshoremen's and Warehousemen's Union.

REPORT AND ORDER

January 31, 1983

BY THE COMMISSION: (ALAN GREEN, *Chairman;* JAMES JOSEPH CAREY and JAMES V. DAY, *Commissioners*) *

This proceeding arose upon the filing of a complaint by California Cartage Company, Inc. (CalCartage) against the Pacific Maritime Association (PMA). Another complaint, raising the same factual and legal issues, was filed against PMA by Containerfreight Terminals Company

* Vice Chairman Thomas F. Moakley's concurring and dissenting opinion is attached.

(Containerfreight), Hawaiian Pacific Freight Forwarding (Hawaiian), and Richmond Export Service (Richmond). The International Longshoremen's and Warehousemen's Union (ILWU) intervened in the proceedings which were subsequently consolidated.

The complaints attack the legality of Section V of a PMA/ILWU agreement filed with the Commission on July 2, 1981, designated Agreement No. LM-81 (Agreement or LM-81). Implementation procedures for the Agreement were filed on September 29, 1981 and the Agreement was deemed approved by the Commission on October 8, 1981, pursuant to section 15, of the Shipping Act, 1916 (46 U.S.C. § 814).[1] The complaints allege that the Agreement violates sections 15, 16 and 17 of the Shipping Act, 1916 (46 U.S.C. §§ 814, 815 and 816), and, alternatively, that the Commission lacks jurisdiction over the Agreement. Should the Commission determine that it has jurisdiction, Complainants request that we issue a cease and desist order prohibiting further actions under the Agreement and order retrospective assessment adjustments.

Administrative Law Judge Joseph N. Ingolia (Presiding Officer) issued an Initial Decision (I.D.) on October 26, 1982, finding that Agreement No. LM-81 did not fall within the Commission's jurisdiction. PMA and ILWU have filed Exceptions to the Initial Decision. CalCartage has filed Replies to these Exceptions.[2]

INITIAL DECISION

The Presiding Officer found that the Commission lacked jurisdiction over Agreement No. LM-81 because the Agreement does not expressly provide for the funding of fringe benefits. He held that the Commission's authority must be clearly and unambiguously indicated from the specific agreement which is the subject of a complaint. He added that any doubts should be resolved in favor of a finding of no jurisdiction.

The Presiding Officer characterized LM-81 as an assessment agreement which imposes a "tax" on containers and distributes these funds to ILWU-manned CFS stations in proportion to the man-hour assessments made under a previous assessment agreement, Agreement No. LM-80. He rejected arguments that the two agreements be read together and that, so read, the net economic effect was the funding of fringe benefits on other than a man-hour basis. Instead, he restricted his analysis to the provisions of LM-81 and found that its stated purpose and economic

[1] The pertinent provision of section 15 is as follows:

> Assessment agreements, whether part of a collective bargaining agreement or negotiated separately, to the extent they provide for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized, shall be deemed approved upon filing with the Commission.

[2] Containerfreight and Hawaiian also filed a Reply to Exceptions. However, this pleading, which was filed after its due date, merely adopts the CalCartage Replies to Exceptions and attaches a copy of Complainants' Reply Brief.

effect were to reverse the trend of CFS work leaving the on-dock facilities of PMA members. The Presiding Officer also found that the Agreement was conditional, in that if other PMA-ILWU "work preservation" agreements became operative, LM-81 would become null and void. This reinforced his determination that the Agreement was for cost reimbursement purposes and not for the funding of fringe benefits.

In reaching his jurisdictional finding, the Presiding Officer relied on the legislative history of the Maritime Labor Agreements Act of 1980 (MLAA).[3] He found that the underlying purpose of this Act was to take the Commission out of the collective bargaining process by removing from its jurisdiction agreements which were the result of collective bargaining; that the MLAA subjects to Commission jurisdiction only those agreements which impose assessments to provide for the funding of fringe benefits, and only if those assessments are levied on an "other than man-hour basis;" and that Commission consideration of assessment agreements is for the limited purpose of determining the fairness of the assessments as between shippers, carriers and ports and whether those agreements are otherwise detrimental to commerce.

POSITIONS OF THE PARTIES

PMA

PMA argues that the Presiding Officer erred in confining his jurisdictional analysis to the literal language of LM-81 without regard to the economic result achieved by that Agreement's interaction with LM-80. It maintains that the Agreement need not *expressly* direct the payment of funds to a fringe benefit plan to fall within the Commission's jurisdiction if its effect is to shift cost allocations of a pre-existing agreement to an "other than man-hour" basis.

The Presiding Officer also allegedly erred in relying on the union motives underlying the Agreement and ignoring its economic effects. PMA contends that the "work preservation" motive does not alter the fact that the effect of the Agreement is to shift fringe benefit funding from a man-hour assessment to a tonnage assessment. PMA states that LM-81 is not a limited fund, but is directly proportional to man-hour assessments under LM-80 and achieves a reallocation of costs within the container sector.

PMA also challenges the Presiding Officer's finding that the MLAA overruled *Volkswagenwerk*.[4] The MLAA allegedly removed only the "public interest" standard and the pre-implementation approval requirements of section 15 for collective bargaining agreements that did not fall within the then existing "labor exemption." PMA argues that the

[3] The MLAA (P.L. 96-325, 94 Stat. 1021) modified sections 1 and 15 and added a section 45 to the Shipping Act, 1916 to provide for the separate treatment of maritime labor agreements.

[4] *Volkswagenwerk Aktiengesellschaft v. F.M.C.*, 390 U.S. 261 (1968).

MLAA upheld the Commission's jurisdiction over assessment agreements and collectively bargained assessment agreements except those involving man-hour assessments. All other assessment agreements are said to be subject to the standards of section 15, fifth paragraph.

Exception is taken to many of the characterizations of the Agreement made by the Presiding Officer. Challenged is the Presiding Officer's finding that the conditional nature of LM-81 affects jurisdiction on the ground that the future expiration or shift in assessment methods does not affect jurisdiction over the current method. Moreover, that LM-80 funds fringe benefits allegedly does not alter the fact that LM-81 shifts the funding obligations and therefore itself "provides" for "funding" within the meaning of the MLAA.

PMA further argues that it was error for the Presiding Officer to compare the Agreement with other work preservation rules previously instituted by PMA but enjoined by the court. It insists that LM-81 is distinguishable in that it does not impose a tax only on non-ILWU stuffed containers, is not isolated to "hot cargo" and does not contain a "no subcontract" clause. PMA also challenges the finding that PMA "established" the CFS Program Fund Implementation Procedures. PMA claims that it only drafted these procedures, which themselves were the product of collective bargaining, agreed to by the ILWU.

Finally, PMA states that the Presiding Officer erred in failing to dismiss the subject complaints for failure to state a cause of action under the MLAA. It argues that the MLAA was intended only to provide a remedy for persons paying assessments, which Complainants here did not.

ILWU

ILWU argues that the Presiding Officer should have found that Complainants' wage and benefits rates are inferior to those provided by the ILWU-PMA contract, that container traffic has increased dramatically over the years and that ILWU productivity has also dramatically improved in the same period of time. On the other hand, the ILWU insists that it was error for the Presiding Officer to find that the CFS Program Fund was a "result" of the ILA Work Incentive Program. The Fund allegedly resulted from ILWU's own demand for a shift from a man-hour assessment to a tonnage assessment in order to preserve CFS work and accommodate PMA's demand for efficiency and productivity improvements at CFS stations.[5]

CalCartage

CalCartage notes that the Presiding Officer did not make a finding that the actual purpose of LM-81 was limited to "work preservation."

[5] The balance of ILWU's Exceptions are basically the same as PMA's.

Therefore, it views the Initial Decision as not ruling out a finding in another forum that the intent of LM-81 was to capture work not previously done by the ILWU. CalCartage considers the ILWU's wage rate and container traffic growth exceptions to be irrelevant to the jurisdictional finding made in the Initial Decision. It also supports the Presiding Officer's finding that PMA established the CFS Program Fund.

CalCartage supports the Presiding Officer's jurisdictional determinations. It adds, however, that if the Commission reverses the Initial Decision and finds that it has jurisdiction over LM-81, it should also (1) find that Complainants have "standing" to sue under the MLAA, and (2) remand the proceedings for a decision on the merits.

CalCartage considers itself a "person" entitled to file a complaint under section 22 of the Shipping Act, 1916 (46 U.S.C. § 821) and therefore having the requisite "standing." It does not view the provisions of section 22 and those of the MLAA as being mutually exclusive. Allegedly, only the *remedies* of the two sections conflict, and this is no impediment here because Complainants seek only a cease and desist order and prospective assessment adjustments. CalCartage argues that it has suffered injury in fact and stands within the zone of protection of the MLAA.

Complainants allege that they are not arguing antitrust violations but rather violations of sections 15, 16 and 17 of the Shipping Act. It is argued that the criteria stated in *Volkswagenwerk* apply here and that PMA and ILWU have failed to show that the benefits inuring to those paying the assessments are proportional to the level of their assessment. CalCartage maintains that the assessments are intentionally unrelated to the amount of ILWU man-hours utilized by the assessed entities. PMA and ILWU have also allegedly failed to put forward any justification for shifting fringe benefit obligations other than that of buying labor peace, which CalCartage views as being beyond the scope of FMC review under the MLAA. In the event it may be found to be within the scope, however, CalCartage adds that LM-81 does not meet the Commission's "labor exemption" and therefore traditional antitrust considerations would be relevant.

DISCUSSION

Jurisdiction

The Commission has determined that LM-81 falls within its jurisdiction over assessment agreements under the MLAA. In effect, LM-81 operates to impose an assessment for the funding of fringe benefits on other than a man-hour basis and is the proper subject of complaints under section 15, fifth paragraph of the Shipping Act, 1916. Accordingly, the Initial Decision issued in this proceeding will be reversed.

Admittedly, LM-81 does not by its terms provide for the funding of fringe benefits. LM-80 is the agreement which funds fringe benefits and imposes these funding obligations on PMA members, predominantly on a man-hour basis. However, LM-81 imposes a tonnage assessment on containerized cargo handled by PMA members and reimburses PMA's CFS operators on the basis of the man-hour assessments made under LM-80. The clear net effect of the two agreements, therefore, is to provide for fringe benefit funding by CFS operators on a tonnage rather than a man-hour basis.

Section 45 of the Shipping Act (46 U.S.C. § 841c) provides a broadly worded exemption from Shipping Act jurisdiction for "maritime labor agreements," except for those which provide "for the funding of fringe benefit obligations on other than a uniform man-hour basis." While the legislative history of the MLAA suggests that it was intended to provide a broad immunity from section 15 requirements for collective bargaining agreements,[6] the "assessment agreements" exception should not be read so narrowly as to exclude labor agreements from Commission jurisdiction merely because the agreement document itself does not contain an express provision providing for the funding of fringe benefits. Such an interpretation would lead to a result which is inconsistent with the legislative compromise reflected in the MLAA.

Several interests, including the Commission, had argued before Congress that those entities which bear the costs of maritime labor agreements should have a forum to hear complaints concerning the fairness and equity of the assessments made under those agreements.[7] A strict interpretation of the fringe benefit funding exception would largely defeat this purpose. It would in essence allow the drafters of assessment agreements to determine whether those bearing the assessments will have access to the Commission. Although this case does not involve such a situation because PMA, for its own reasons, seeks the Commission's assertion of jurisdiction and no parties paying assessments have filed a complaint, the possibility cannot be ignored. Jurisdictional determinations should not depend on the motives and tactics of individual parties in a particular case.[8]

Ultimately, the meaning of a statute is determined by the language of the statute and the intent of Congress.[9] While the language of the statute is, of course, the first consideration in statutory construction,[10] the Commission will not interpret the MLAA in a manner which defeats its legislative purpose.[11] Any determination regarding Commis-

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[6] *See, e.g.,* I.D. at 22; H.R. REP. NO. 96-876, 96th Cong., 2d Sess. 2.
[7] *See, e.g.,* S. REP. NO. 96-854, 96th Cong., 2d Sess. 10.
[8] *Swift & Co. v. Hocking Valley R. Co.,* 243 U.S. 281 (1917).
[9] *See, e.g., U.S. v. General Motors Corp.,* 518 F.2d 420, 438 (D.C. Cir. 1975).
[10] *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 197 (1976).
[11] *National R.R. Passenger Corp. v. National Ass. of R.R. Passengers,* 414 U.S. 453, 458 (1974).

sion jurisdiction under the MLAA must take into consideration the purposes of the statute. The MLAA does not limit the scope of the Commission's jurisdictional inquiry to the specific wording of an "assessment agreement" document. Nor does it preclude a jurisdictional analysis based on the agreement's ultimate operation and economic effect. The Commission will therefore construe the MLAA in a manner that will best achieve its purposes. To this end, we find that LM-81 operates in a manner that Congress intended to be subject to Commission scrutiny, and accordingly falls within the jurisdiction conferred upon this agency by the MLAA.

Sufficiency of Complaints and Standing

PMA's Exceptions challenge the sufficiency of the complaints, the standing of Complainants [12] and the order in which these matters were addressed by the Presiding Officer.

We cannot find that the Presiding Officer erred in first addressing the question of jurisdiction.[13] Having found no jurisdiction there was no need for him to consider the legal sufficiency of the complaints or the right of Complainants to sue. Given the Commission's jurisdictional finding above, however, it now becomes necessary to address these two remaining threshold issues. Because these are essentially legal issues, not requiring the resolution of factual disputes, they can be considered by the Commission directly, without a remand to the Presiding Officer.

Sufficient allegations of possible Shipping Act violations exist to overcome arguments that the complaints should be dismissed on grounds of lack of legal sufficiency.[14] Complainants allege discrimination in the assessments and disbursements method of LM-81 and also allege that the charges assessed bear no reasonable relationship to the benefits obtained under the Agreement.[15] Apart from the question of standing, the complaints on their face therefore state a cause of action regardless of whether the standards ultimately found to govern the legality of the Agreement are limited to those of section 15, fifth paragraph, or also include those of sections 16 and 17.

Complainants' standing to bring an action under the MLAA in this proceeding turns upon whether the complaint procedures of section 22 of the Act apply. If they do, then Complainants must be found to have the requisite standing as they clearly come within the term "any person", as section 22 defines the universe of those entitled to file complaints under that section.[16] The MLAA itself is silent on whether

[12] *See* PMA Exceptions at pp. 49-50.

[13] *See Jackson v. U.S.*, 428 F.2d 844, 847-848 (Ct. Cl. 1970).

[14] *See Carton-Print v. Austasia Container Express*, 20 F.M.C. 31, 33 (1977).

[15] Complaint of CalCartage at 8-9; Complaint of Containerfreight, et al., at 10-11.

[16] *See F.M.C. v. Zim Israel Navigation Co.*, 263 F.Supp. 618 (S.D.N.Y. 1967); *Isthmian S.S. Co. v. United States*, 53 F.2d 251 (S.D.N.Y. 1931).

section 22 governs causes of action arising under it. It does provide, however, that to the extent that its operative provision, *i.e.*, section 15, fifth paragraph, may conflict with section 22, the former shall control.[17] The question then becomes whether the complaint procedures of section 22, and, specifically, its liberal standing provision, are consistent with the provisions of section 15, fifth paragraph. We find that they are not.

A reading of the provisions of the MLAA, particularly that provision which added section 15, fifth paragraph, to the Shipping Act, and an examination of its legislative history convinces us that the MLAA contemplates a separate complaint procedure from that provided in section 22 of the Act. Section 15, fifth paragraph, has its own time limitation on both the filing of a complaint and issuing a decision, states substantive standards to be applied, and identifies available remedies.[18] That provision also expressly identifies the classes of entities intended to receive the protection of the statute against discriminatory or unfair assessments, to wit: "carriers, shippers, or ports." It would therefore appear to be inconsistent with the scheme of the MLAA to find that "any person", regardless of how remotely associated with a given assessment agreement, may utilize the carefully circumscribed complaint procedures of the MLAA.

This conclusion also comports with the overall legislative history of the MLAA. That history at various places speaks of affording "affected" or "aggrieved" parties the right to challenge assessment agreements.[19] Complainants might qualify as aggrieved parties if this were the only consideration determining standing under the statute.[20] However, the injury upon which Complainants rely as a basis for standing is not one that is addressed by the substantive requirements and affirmative remedies contained in the MLAA.

The overall purpose of the MLAA complaint procedure was to afford a forum to those who directly or indirectly pay assessments to challenge their fairness.[21] Section 15, fifth paragraph, permits the Commission to inquire whether an assessment agreement "operate[s] to the detriment of the commerce" or is "unjustly discriminatory or unfair as between shippers, carriers or ports." As so stated, section 15 clearly does not contemplate an inquiry into the impact of an assessment agreement on the competitive positions of other third parties. That antitrust considerations are beyond the scope of inquiry intended by section 15, fifth paragraph, is further indicated by the fact that the

[17] 46 U.S.C. § 814, paragraph 5; P.L. 96-325 § 4.

[18] *Id.*

[19] *See* S. REP. NO. 96-854, *supra* at 11.

[20] *See Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130, 138 (D.C. Cir. 1977).

[21] This is reflected not only in the legislative history of the MLAA, S. REP. NO. 96-854, *supra*, at 14, but also in the method established for providing remedies for successful complainants. *Id.*

"public interest" standard, which embodies antitrust considerations and which governs the acceptability of *other* agreements under section 15, was intentionally not made applicable to assessment agreements.[22]

Complainants' alleged injury is not caused by an assessment obligation directly or indirectly placed upon them by the challenged Agreement. Rather, and at best, it is an economic effect of the assessment on their competitive standing vis-a-vis those who *are* subject to assessment obligations, *i.e.,* PMA members. Congress did not intend such a remote consequence to form the basis of a complaint seeking disapproval of a collectively bargained assessment agreement under the MLAA.[23] Parties so removed from the operative effects of an assessment agreement are outside the classes of interests protected by the statute, and, as such, not intended to be beneficiaries of its remedies.[24] The Commission therefore concludes that Complainants lack standing to file a complaint against LM-81 under section 15, fifth paragraph, of the Shipping Act, 1916.

THEREFORE, IT IS ORDERED, That the Exceptions to the Initial Decision filed by the Pacific Maritime Association and the International Longshoremans' and Warehousemans' Union are sustained to the extent indicated above and denied in all other respects;

IT IS FURTHER ORDERED, That the complaints filed in this proceeding are dismissed; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

FRANCIS C. HURNEY
Secretary

[22] *See* S. REP. NO. 96-854, *supra,* at 14.

[23] Complainants do have available to them, however, section 22 complaint procedures against any matter required to be set forth in a tariff on file with the Commission which may be in violation of other sections of the Shipping Act, 1916. *See* 46 U.S.C. § 845; P.L. 96-325 § 5.

[24] *See* S. REP. NO. 96-854, *supra,* at 14. *Compare Association of Data Processing Service Org. v. Camp,* 397 U.S. 150, 154-155 (1970) *with Tax Analysts and Advocates v. Blumenthal, supra,* at 138-145.

Vice Chairman Moakley, concurring and dissenting.

I do not agree with the majority's conclusion that LM-81 is subject to the Commission's jurisdiction. However, assuming *arguendo,* that the agreement is subject to FMC jurisdiction, I concur with the majority that the complainants lack standing to bring these actions.

By enacting the Maritime Labor Agreements Act (MLAA), Congress succeeded in extracting this Commission from a very difficult position following the Supreme Court's *PMA* decision.[1] That decision was the culmination of a series of more and more expansive interpretations of the Commission's jurisdiction over labor agreements and left this Commission in the untenable posture of having to consider the Shipping Act ramifications of maritime collective bargaining agreements before they could be implemented.

At the Commission's urging, therefore, the 96th Congress was proposing to remove all collective bargaining and related agreements from the Commission's section 15 jurisdiction. However, certain shippers and ports raised concerns over the possibility of unfair and discriminatory assessments of fringe benefit obligations and the lack of protection from such assessments under other laws. Litigation over such assessments had been a prominent feature of the maritime labor scene for the decade prior to that legislation. Heeding these concerns, Congress carved out a narrow class of labor agreements which would remain subject to limited FMC jurisdiction. This class was defined as:

> Assessment agreements, whether part of a collective bargaining agreement or negotiated separately, to the extent they provide for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis.[2]

The agreement before us in this case, LM-81, clearly does not provide for the funding of collectively bargained fringe benefit obligations. It is only by combining the provisions of this agreement with another agreement, LM-80, which does provide for the funding of such benefits, that an argument can be made that the two agreements together meet the jurisdictional test. But, as the Administrative Law Judge articulated clearly in his initial decision, these two agreements are distinct, with separate lives and separate purposes. The assessment agreement to fund fringe benefits, LM-80, is in effect and will remain in effect no matter what happens to LM-81.[3]

Moreover, the Commission's jurisdiction to scrutinize such agreements is triggered only by *complaint.* Under the terms of the MLAA, the Commission cannot investigate assessment agreements on its own motion. Only LM-81 is the subject of the instant complaints.

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[1] *Federal Maritime Commission v. Pacific Maritime Association,* 435 U.S. 40 (1978).

[2] Public Law 96-325, 94 Stat 1021, Sec. 4.

[3] Initial Decision at 45.

I do not share the majority's concern that we would be leaving section 15 jurisdiction to the discretion of the drafter by declining jurisdiction over LM-81. Potential exposure to antitrust penalties is sufficient incentive to discourage any cavalier disregard of section 15.

The majority's decision here expands that class of labor agreements which Congress left to our jurisdiction and leaves the door ajar for further incursions into the labor field. This is exactly the PMA dilemma from which Congress extricated this Commission by enacting the MLAA. I therefore dissent from that portion of the majority order.

FEDERAL MARITIME COMMISSION

46 C.F.R. CHAPTER IV

DOCKET NO. 82-14

NOTICE OF INQUIRY REGARDING REGULATION OF THE DOMESTIC OFFSHORE TRADES

February 3, 1983

ACTION: Discontinuance of Inquiry

SUMMARY: The Commission instituted this inquiry by Notice published March 5, 1982 (47 F.R. 10600) to seek public comment on the effectiveness of regulation of the domestic offshore trades under the Intercoastal Shipping Act, 1933 (46 U.S.C. § 843) and the regulatory and legislative changes necessary to improve the system. The Commission, having reviewed the comments filed in this Inquiry and having transmitted an appraisal of regulation in the domestic offshore trades to appropriate committees of Congress, hereby discontinue this Inquiry. The Commission wishes to express its appreciation to commentators for their assistance in analyzing and developing a revised approach to shipping in these trades.

SUPPLEMENTARY INFORMATION: None

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-14
NOTICE OF INQUIRY REGARDING
REGULATION OF THE DOMESTIC OFFSHORE TRADES

Finalized February 3, 1983

ACTION: Notice of Inquiry

SUMMARY: This solicits public comments on the deregulation of rates in the domestic offshore trades.

DATES: Comments on or before May 10, 1982.

AUTHORITY: Intercoastal Shipping Act, 1933; Shipping Act, 1916.

SUPPLEMENTARY INFORMATION:

The Commission, pursuant to the Shipping Act, 1916 (46 U.S.C. § 801 *et seq.*), and the Intercoastal Shipping Act, 1933 (46 U.S.C. § 843 *et seq.*), is charged with regulating rates and charges assessed by ocean carriers operating in the U.S. domestic offshore trades, namely: Hawaii, Alaska, Puerto Rico, Guam, Virgin Islands, American Samoa and the Northern Mariana Islands.

The purpose of these statutes is to ensure fair, reasonable, and nondiscriminatory transportation rates in these trades. In determining the propriety of these rates, the Commission has traditionally applied the public utility standard and limited the overall revenues of carriers to a reasonable return on investment. In theory, this approach allows the regulated carriers sufficient profit to maintain their financial viability while at the same time ensuring the movement of cargoes at reasonable rates.

Affected interests have contended that the Commission's method of regulation fails to account for efficiency, does not consider the long range viability of the carriers, overly emphasizes cost plus return on investment, discourages entry, and rate competition, and creates unnecessary costs. It is claimed that the existence of competitive forces in the domestic offshore trades would, if freed from regulation, achieve the goal of stable and efficient transportation service underlying the Intercoastal Shipping Act.

Competitive conditions vary substantially in the various domestic offshore trades subject to the Federal Maritime Commission's jurisdiction. However, to the extent there exists substantial competition among carriers serving a given trade, it may well be that the purposes of the Intercoastal Shipping Act could be served by subjecting the rate practices of carriers to competitive forces. A brief synopsis of the number

of vessel operators and the existence of market dominance in each trade is presented below.[1]

1. *Alaskan Trade*

In 1980, 14 carriers in the Alaskan trade filed financial reports with the FMC, none of which accounted for more than 15 percent of FMC regulated traffic gross trade revenues. The Commission does not have jurisdiction over the preponderance of cargo carried by the two largest carriers serving Alaska, both of which publish through rates and are thus subject to the jurisdiction of the Interstate Commerce Commission. There have been few rate investigations in this trade in the past several years.

2. *American Samoa Trade*

In 1980, three vessel operators in the American Samoa trade filed final reports with the FMC. Each of the three carriers accounted for approximately one-third of gross trade revenues.

There have been no rate investigations in this trade in the past several years.

3. *Guam Trade*

In 1980, two vessel operators in the Guam trade filed financial reports with the FMC, one of which accounted for two-thirds of gross trade revenues. There have been few rate investigations in this trade in the past several years.

4. *Hawaiian Trade*

In 1980, five vessel operators in the Hawaiian trade filed financial reports with the FMC. One operator accounted for over 75 percent of gross trade revenues. There have been a number of rate investigations in this trade in the past several years.

5. *Northern Mariana Islands Trade*

The Northern Mariana Islands trade is a recent addition to the domestic offshore jurisdiction of the Commission. There is presently no carrier financial data available for this trade. Five vessel operators serve this trade.

6. *Puerto Rican Trade*

In 1980, five vessel operators in the Puerto Rican trade filed financial reports with the FMC. One operator accounted for over

[1] The number of vessel operators serving a trade has been determined on the basis of those carriers filing fiscal year 1980 data with the FMC pursuant to General Order 11. In most trades, the number of carriers maintaining a tariff on file with the FMC exceeds the number of carriers filing financial data with the FMC.

50 percent of overall gross trade revenues.[2] There have been a number of rate investigations in this trade in the past several years.

7. *Virgin Islands Trade*

In 1980, the Virgin Islands was served by direct vessel call from ports in Florida and by transshipment from Puerto Rico. Two vessel operators offered direct calls between Florida and the Virgin Islands. One of these carriers accounted for the majority of trade revenues. Gross trade revenues were evenly divided between the two vessel operators offering a transshipment service in the trade. There have been several rate investigations in this trade in the past several years.

The Commission has recently made efforts to reduce or eliminate unnecessary or overly burdensome regulations affecting carriers serving the domestic offshore trades. These include: (1) eliminating virtually all financial reporting requirements for the 141 non-vessel operating common carriers in these trades; (2) eliminating the filing of annual company-wide financial and operating data of vessel operating carriers; and (3) exempting vessel operating carriers earning less than $10 million annual revenues from filing detailed financial reports concerning domestic offshore operations.

In order to meaningfully evaluate the existing system of regulation, the Commission is seeking comments on a number of issues. The Commission encourages statements on any methodologies or concepts that would enhance the efficiency of regulation of the domestic offshore trades, particularly when accompanied by relevant factual and economic data. After receipt of comments the Commission may schedule public hearings for the presentation and examination of responsible and feasible proposals.

The Commission is not soliciting comments regarding amendments to the provisions of the Jones Act which restrict entry into the domestic offshore trades to U.S. flag vessels. The implementation of that statute is outside the statutory jurisdiction of the Commission.[3] Appropriate issues for comment are:

Legislative Proposals

1) Should the Commission recommend to Congress that its regulatory authority in the U.S. domestic offshore trades be eliminated or reduced? What would be the impact of a reduction or elimination of regulatory authority in the domestic offshore trades?

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[2] Recently, one of these carriers cancelled its FMC tariffs and filed through rate tariffs with the ICC.

[3] Section 27, Merchant Marine Act, 1920 (46 U.S.C. § 883). However, we will accept suggestions and comments which require an explanation of the effects of the U.S. cabotage laws in order to understand the impact of a possible modification of FMC regulatory authority.

2) Does the reduction of regulation in the domestic offshore trades require amendment or repeal of the Intercoastal Shipping Act, 1933?

3) If so, what form should such amendments take and should they permit the FMC to distinguish between competitive and non-competitive trades? Should the Commission have the flexibility to exempt from rate regulation particular trades which are served by a number of competing carriers?

Regulatory Proposals

4) How should competitive uniformity in rates in the domestic trades be considered in Commission rate investigations? What is the impact of such a pricing policy in the domestic trades?

5) Should the Commission adopt a dominant carrier methodology whereby the dominant carriers in a trade would serve as the basis for determining the reasonableness of rates in that particular trade? How should dominance be defined?

6) Should the Commission adopt a dominant carrier methodology whereby the most efficient carrier in a trade (defined in terms of lowest costs per unit of output) would serve as the basis for determining the reasonableness of rates in that particular trade? Under this methodology, rate increases of the most efficient carrier in the trade would be subject to intense scrutiny and an appropriate rate of return developed for that carrier. The rate of return deemed appropriate for the most efficient carrier would then serve as the maximum level which other carriers in the trade would be allowed to earn.

7) If the Commission is given statutory authority to exempt competitive trades from rate regulation, what should be the criteria for determining the number of carriers and their market shares which would allow the exercise of such exemption authority?

8) Should the Commission adopt a constructed carrier methodology, whereby an average rate of return for the trade would be constructed with carriers limited to earning no more than that average rate?

9) In evaluating a carrier's revenue requirements, should a methodology other than return on rate base (i.e., either the fixed charges coverage ratio or some other financial ratio) be utilized in assessing a firm that is tax exempt, totally debt financed, and publicly owned?

10) What other methods could the Commission implement to effectively carry out its responsibility to the public in regulating the domestic offshore trades and yet eliminate ineffective or counter-productive regulatory practices?

An original and 15 copies of each comment should be directed in writing to the Secretary, Federal Maritime Commission, Washington, D.C. 20573.

By the Commission March 5, 1982.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

46 C.F.R. PARTS 503, 542, 543 AND 544

[G.O. 22; AMDT. 12, G.O. 37; AMDT 2, G.O. 40; AMDT. 1, G.O. 41; AMDT. 1]

DOCKET NO. 82-32

February 3, 1983

ACTION: Final Rule

SUMMARY: Fees for public information, financial responsibility for water pollution and financial responsibility for oil pollution are amended to reflect current costs incurred by the Commission in providing such services.

DATE: Effective March 10, 1983

SUPPLEMENTARY INFORMATION:

On July 6, 1982, the Commission published a Notice of Proposed Rulemaking in the *Federal Register* (47 F.R. 29280) which proposed to update its fees schedule to remedy the disparity between costs incurred and revenues collected for certain special services, even though total costs would not be recovered.

Comments were submitted by Senator Slade Gorton, Chairman of the Merchant Marine Subcommittee of the Senate Committee on Commerce, Science and Transportation; Annelise Anderson, Associate Director for Economics and Government, Office of Management and Budget; and Hollywood Marine Incorporated. Both Senator Gorton and Associate Director Anderson support the proposed rule. Hollywood Marine is opposed to the proposed rule contending that proposed increases would act as another factor working against the barge and towing industry at a time when the industry needs to eliminate as many economic burdens as possible. Hollywood Marine requests reconsideration of the proposed rule wherein, if it cannot be deleted in its entirety, at the least it would be postponed to a time when the economy and the barge and towing industry are in a much more stable economic situation. General comments opposing increased fees in both this docket and Docket No. 82-33 are addressed in 82-33.

The Commission does not deem it appropriate to delay implementation of or eliminate the proposed fee schedule to suit one segment of the maritime industry suffering from economic problems. Postponing the proposed rule or eliminating it entirely will not save the barge and towing industry from idle capacity due to declining shipments, high

interest rates, and rising fuel prices. Accordingly, the Commission has decided to adopt a final rule which is unaltered from its proposed rule.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. § 601 *et seq.*), the Commission certifies that adoption of this final rule will not have a significant economic impact on a substantial number of small entities.

List of subjects in 46 C.F.R. Maritime Carriers, Freight Forwarders, Practice and Procedure, Fees and User Charges.

Therefore, pursuant to 5 U.S.C. § 553, section 43 of the Shipping Act, 1916 (46 U.S.C. § 841a), and Title V of the Independent Offices Appropriations Act of 1952 (31 U.S.C. § 483a), the Federal Maritime Commission is amending Title 46 of the Code of Federal Regulations as follows:

1. Part 503 - *Public Information* is amended in the following respects.

In § 503.43 *Fees for services*, in paragraph (b), "$3" is amended to read "$5"; in paragraph (c)(1) "$5" is amended to read "$7"; in paragraph (c)(3) "$5" is amended to read "$7"; in paragraph (c)(4) "$1" is amended to read "$2.50"; paragraph (c)(5) is deleted; in paragraph (d)(1) "$175" is amended to read "$195"; in paragraph (d)(2) "$50" is amended to read "$120"; in paragraph (d)(3) "$12.50" and "$2" are amended to read "$16.50" and "$8.25" respectively; in paragraph (g) "$2.50" and "$1.50" are amended to read "$4.25" and "$4" respectively; and in paragraph (h) "$10" is amended to read "$13."

In § 503.69 (b)(2) "$2" is amended to read "$5."

2. Part 542 - *Financial Responsibility for Water Pollution* is amended in the following respects.

In § 542.13 *Fees*, the references in paragraphs (d) and (e) to "$100" and "$20" are amended to read "$75" and "$40" respectively and in paragraph (f) the reference to "$10" is amended to read "$20." Additionally, the first sentence of paragraph (d) is amended to read as follows.

§ 542.13 Fees

* * * * *

(d) Each applicant who submits Application Form FMC-321 for the first time shall pay an initial, nonrefundable application fee of $75.

3. Part 543 - *Financial Responsibility for Oil Pollution - Alaska Pipeline* is amended in the following respects.

In § 543.9 *Fees*, the references in paragraphs (d) and (e) to "$100" and "$20" are amended to read "$75" and "$40" respectively and in paragraph (f) the reference to "$10" is amended to read "$20."

4. Part 544 - *Financial Responsibility for Oil Pollution - Outer Continental Shelf* is amended in the following respects.

In § 544.12 *Fees,* the references in paragraphs (d) and (e) to "$100" and "$20" are amended to read "$75" and "$40" respectively and in paragraph (f) the reference to "$10" is amended to read "$20."

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

46 C.F.R. PARTS 502, 531, 536 AND 540
[G.O. 13, AMDT. 13, G.O. 16, AMDT. 43, G.O. 20, AMDT. 8 AND G.O. 38, AMDT. 4]
DOCKET NO. 82-33
FILING AND SERVICE FEES

February 3, 1983

ACTION : Final Rule

SUMMARY: New fees are being established for filing complaints, petitions for declaratory orders and general petitions, special dockets, informal adjudication of small claims, conciliation services, tariff special permission applications (domestic and foreign), and applications for passenger vessel certification. It is necessary to establish new fees to transfer the cost burden of providing services from the general taxpayer to the recipient of the services. This action will require that all applicants who request these Commission services will have to pay for them.

DATE: Effective March 10, 1983

SUPPLEMENTARY INFORMATION:

On July 6, 1982, the Commission published a Notice of Proposed Rulemaking in the *Federal Register* (47 F.R. 29278) which proposed to establish several new fees for services provided by the Commission. The services selected were those which were readily identifiable and which provided value and utility to a recipient at its request. The Commission assigned to each a fair and equitable assessment based on the cost to the Commission of providing the service.

Comments to the Notice were submitted by: Senator Slade Gorton, Chairman of the Merchant Marine Subcommittee of the Senate Committee on Commerce, Science and Transportation; Annelise Anderson, Associate Director for Economics and Government, Office of Management and Budget; Pacific Coast European Conference (PCEC); Virginia Port Authority and Traffic Board, North Atlantic Ports Association (VPA/NAPA); Latin America/Pacific Coast Steamship Conference and Pacific Coast River Plate Brazil Conference (LAP/PCRPB); North European Conferences (NEC); Puerto Rico Maritime Shipping Authority (PRMSA); Associated Latin American Freight Conferences (ALAF); and International Committee of Passenger Lines (ICPL).

Senator Gorton and Ms. Anderson support the proposed rule without qualification. The other commenting parties oppose the rule for various reasons. The opposition to the rule is discussed below in terms of (1) legal requirements, (2) general comments and (3) comments on specific fee applications.

I. *Legal Requirements*

Four commentators, LAP/PCRPB, NEC, PRMSA, and ALAF, generally contend that the Commission's proposed charges are not justified under the principles established by the courts in interpreting Title V of the Independent Offices Appropriations Act, (IOAA) 31 U.S.C. § 483a, and OMB Circular No. A-25. The Commission disagrees, and believes that its application of Title V and Circular No. A-25 is consistent with these principles.

In two companion cases, the Supreme Court addressed the IOAA and set forth the following guidelines for its implementation:

1. an agency performing a service at the request of an applicant may exact a fee for such service if it bestows a benefit on the applicant not shared by others in society;

2. the proper measure of such a fee is the "value to the recipient;"

3. a charge for a service should be made only to an identifiable recipient who derives a special benefit therefrom; and

4. no charge should be made for services rendered when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public. *National Cable Television Association v. United States*, 415 U.S. 336 (1974); *Federal Power Commission v. New England Power Co.*, 415 U.S. 345 (1974).

Subsequently, courts of appeal have refined these guidelines by the addition of the following:

1. the fee assessed may not exceed the cost to the agency in rendering the service;

2. the fee assessed should include only those expenses which are necessary to service the applicant;

3. an agency may recover the full cost of providing a service to an identifiable beneficiary, regardless of the incidental public benefits which may flow from the service; and

4. an agency may charge for services which assist a person in complying with statutory duties. *Electronic Industries Association v. Federal Communications Commission*, 554 F.2d 1109 (D.C. Cir. 1976); *see also, Mississippi Power & Light Co. v. U.S. Nuclear Regulatory Commission*, 601 F.2d 223 (5th Cir. 1979); *National Cable Television Association v. Federal Communications Commission*, 554 F.2d 1094 (D.C. Cir. 1976).

A number of specific requirements have been set to implement the above principles:

1. the agency must justify the assessment of a fee by a clear statement of the particular service or benefit for which it expects to be reimbursed;

2. the agency must calculate the cost basis for each fee by including:

   a. an allocation of the specific expenses of the cost basis of the fee to the smallest practical unit;

   b. the exclusion of expenses that serve an independent public interest; and

   c. a public explanation of the specific expenses included on the cost basis for a particular fee, and an explanation of the criteria used to include or exclude particular items; and

3. the fee must be set to return the cost basis at a rate that reasonably reflects the cost of the service performed and value conferred on the payor.

Electronic Industries Association v. F.C.C., 554 F.2d at 1117.

The Commission used these guidelines in developing its proposed fees in this proceeding, and has likewise used them in adopting the fees contained in this final rule. These fees therefore comport with all relevant statutory and judicial requirements.

Analyses were conducted by the Commission on the direct and indirect costs associated with services performed for which fees are being established. The availability of justification for the fee bases was made known in the Notice of Proposed Rulemaking and summary fee schedules were made available to all parties requesting justification data on how the fees were established.[1] The fees assessed include only those costs necessary to service an applicant and do not exceed the cost to the Commission in providing such services. The Commission has also identified the recipient which receives a benefit from its services which are conferred in exchange for fees collected. The Commission has thus met the requirements set out by Title V, Circular A-25 and Court decisions.

Questions have arisen over the concept of value to the recipient in terms of which party receives the benefit, and over whether costs were fully inclusive on the one hand or overly inclusive on the other. The opponents of the rule assert value to the recipient flows to the shipping public or the public at large rather than the applicant for a specific service, and thus the benefit to the applicant is indirect. The Commission finds that the value to the recipient flows to the applicant, and thus the benefit to the applicant is direct. An applicant who will not benefit from filing an application or requesting a Commission service will not

[1] Some opponents of this proposed rule erroneously stated in their comments that no analysis was performed by the Commission. Such incorrect assertions tend to confuse the issues, and serve no useful purpose in the establishment of fair and equitable fees.

request any action that would require payment of the fee. If an applicant desires to request services on behalf of another party, the applicant has to make a commercial decision regarding the value to be derived from the request. If a filing or service fee is not worthwhile in this circumstance, an application or request for service will not be filed with the Commission. The services for which the Commission is assessing fees are not the types which can be considered as primarily benefitting the general public, although incidental public benefits may flow from the provision of these specifically requested services.

Opponents of the proposed rule have stated that indirect benefits to the public should not be included in the cost bases of the fees and that actual costs should be used in determining fees. The Commission agrees and has taken both of these issues into account in arriving at the proposed fees. The fees were derived from processing costs which are incurred for processing applications or providing services. The costs are related to employee activities which are necessary to perform the specified services and include an appropriate increment for overhead costs without including regulatory activity costs. Moreover, in determining the proposed fees, the Commission did not include the total cost of items because to do so would in some cases make the fees extremely high.

The opponents of the proposed rule also refer to the fees in the rule as "penalties" or "taxes" rather than fees. These opinions notwithstanding, the Commission has not established fees above the costs for services provided nor has it intended that the fees be penalties. The Commission does not influence the number of complaints or petitions filed nor does it control the number of special permission applications which are received annually. The Commission is required to process applications and provide other services when requested and it is proper to charge a fee for those services.

VPA/NAPA, NEC, PRMSA, ALAF and ICPL further dispute the level of fees proposed in the rule. The fees were developed by the Commission from 1982 cost data for providing the services identified in the proposed rule. Reductions in fees would establish arbitrary fees having no basis in fact and which would not provide any basis for future fee changes which may be necessary. The Commission has rejected this approach because it removes the cost basis of the fees from the requirements under Title V and it obscures the value-to-the-recipient requirement which is necessary to establish fees.

The Commission has been careful in selecting services which qualify for fee assessment and it has also been careful in observing the requirements of Title V in considering value to the recipient, direct and indirect cost to the Government, public policy or interest served, and other pertinent facts. The fees in the final rule are established to remedy the disparity between costs incurred for services provided to a

user of the service and the lack of revenue to offset these costs. These services and accompanying fees benefit the applicant directly to the extent services would not be requested from the Commission if there was no reason for the applicant to make a request. Indirect benefits to the applicant are subject to interpretations which could never be resolved in a fee schedule nor have they been shown to flow to a large segment of public to the extent that no fees should be charged for services rendered.

II. *General Comments*

PCEC opposes the proposed rule on the general principle that one who is involuntarily subject to regulation for reasons of public policy should not be assessed special charges for complying with such regulation. It also contends that carriers do not obtain licenses to act as carriers and thus do not receive special benefit from the Commission which could properly call for an appropriate fee. In addition, PCEC is also concerned about the suggestion in the preamble to the proposed rule that charges for filing section 15 agreements and section 14(b) dual rate contracts might be added to the filing and service fees list at some later time. PCEC ultimately suggests that this proceeding should be dismissed.

VPA/NAPA objects to the exclusion of assessments or agreements from the proposed rulemaking because of proposed changes in legislation without similar exclusion of complaints and petitions for declaratory orders which could also be affected by proposed changes in the law.

In establishing the specific fees, the Commission has distinguished between services which are justified for reimbursement and those which are not. The Commission has also concluded that carriers, conferences and other persons do benefit from the Commission's regulation in advance of and in addition to Commission regulation benefitting the shipping public. The fees for complaints and petitions for declaratory orders are included within the rule because the processing steps are not likely to change in the near future.

III. *Comments on Specific Fee Applications*

Exceptions to specific parts of the proposed rule were submitted by VPA/NAPA, LAP/PCRPB, NEC, PRMSA, ALAF and ICPL. These exceptions and comments are set forth below in the order of the Code of Federal Regulations parts and subparts to which they apply.

A. *Complaints, Petitions for Declaratory Orders and Special Dockets Complaints (Part 502, § 502.62 and § 502.182) and Petitions for Declaratory Orders (Part 502, § 502.68)*

VPA/NAPA asserts that precedential value from Commission decisions in complaint proceedings can extend to the entire shipping industry and the effects from the decisions could further filter down to the

consuming public. VPA/NAPA therefore argues that the recipients of benefits of FMC complaint proceedings are not readily identifiable. It further claims that the negative impact of a $25 or $50 filing fee can be a major burden to small shippers in addition to being a disincentive to use the FMC as a forum for resolution of disputes.

The Commission is aware of the precedential values of its decisions. However, the direct value to a complainant or petitioner does not change by virtue of publication of the decision. The proposed rule would establish processing fees for specific services provided and the direct benefit to be gained must be evaluated by the applicant as to whether or not the service is worthwhile. The Commission views the applicant as the readily identifiable recipient of the benefits of the services provided.

Complaint and petition filing fees should not be a major burden to small shippers because of their nominal amount. Moreover, these administrative processing fees do not cover the full cost to the Commission of handling petitions. It is unlikely that a $25 or $50 filing fee for processing complaints or petitions will result in reduced use of the FMC as a forum for resolution of disputes.

Special Docket Applications (Part 502 § 502.92)

VPA/NAPA and LAP/PCRPB both commented on special docket applications. VPA/NAPA points out that this procedure, whereby carriers can refund or waive freight charges where there is an error in a tariff of a clerical, administrative or technical nature, was instituted as an alternative to costly formal proceedings and should not be burdened with the obstacle of a filing fee. LAP/PCRPB allege that shippers, not carrier applicants, are the beneficiaries of the waivers and refunds granted pursuant to such applications. They contend that a charge against the carrier for this procedure is unfair and improper because the carriers will have been charged for something of "special benefit," not to themselves, but to the shippers.

The Commission does not believe the filing fee for special dockets is so costly that it will force applicants to revert to more costly formal proceedings. Nor does the Commission believe that carriers in no way benefit from making such applications on behalf of their customers. Carriers benefit from the good will shown to their customers and they have the opportunity to retain customer business by utilizing the special docket procedure. Moreover, control over the filing of rates and charges in tariffs rests with carriers and they are able to correct their own errors through this procedure. Strong administrative controls by the carriers could eliminate, or at least reduce, the need to seek special docket refund or waiver authority from the Commission.

New fees under Part 502 remain unchanged from the proposed rule because they are reasonable charges for the services provided.

B. *Non-exclusive Transshipment Agreements (Part 524, § 524.4)*

Non-exclusive transshipment arrangements will soon be proposed for exemption from filing requirements. The Commission has removed the proposed filing fee from this final rule and has determined this matter will remain open until further notice.

C. *Special Permission Applications in Domestic Offshore Commerce (Part 531, § 531.18) and Foreign Tariffs Special Permission Applications (Part 536, § 536.15)*

PRMSA, LAP/PCRPB, and NEC protest the proposed $90 special permission application fee.

PRMSA protests the imposition of a $90 fee for filing special permission applications in the domestic offshore trade, and contends that the proposed fee would impose a significant burden on carriers without consideration of economic inefficiencies harmful to the public interest. PRMSA says it filed approximately 50 special permission applications in 1981. It further claims that the direct costs of the proposed charges would represent only part of the potential expense and, in conjunction with special permission applications, the entire cost of reviewing the application, preparing a recommendation, and making a determination is assigned to the applicant without consideration of possible public benefit. PRMSA thus argues that the proposed fees will introduce transaction costs which are contrary to sound economic policy and the underlying purposes of special permissions. PRMSA takes the position that the fee should be withdrawn.

LAP/PCRPB comments that: (1) the impetus for a special permission application mostly comes from a shipper seeking a new rate, (2) the benefit would seem in such cases to flow equally to the shipper or the shipping public at large, and (3) the legislative history of the applicable portion of section 18(b)(2) of the Shipping Act makes it clear that broad public interests were to be served and not the limited interests of the carriers.

NEC does not object to the establishment of a fee for filing special permission applications. NEC contends, however, that the proposed fee is excessive and does not reflect the value of the service to the recipient. NEC states that the Commission has historically and consistently exercised discretion to grant special permission authority for good cause shown and where real merit is demonstrated on the basis of anticipated public benefits - not where special benefits would be obtained by a few companies or persons rather than the general public. It further claims that the Commission has not distinguished the number of special permission applications granted or denied and there is obviously no value conferred on the applicant whose special permission is denied. NEC does not contend there is no value to the special permission application services; rather, the relationship between the fee and the

service is more appropriately reflected by the figure of $25. NEC urges the Commission to amend its proposed rule to reduce the fee from $90 for all applications down to $25 for those special permission applications which are granted.

The Commission has considered the public benefit of instituting a filing fee for processing special permission applications. The purpose of a special permission is to waive tariff filing requirements upon a showing of good cause. The carrier applicant seeks to obtain a benefit for itself or its customer through the special permission procedure. Though the general public might benefit from the procedure, its benefit is speculative and incidental to the benefit conferred on the applicant carrier.

The Commission incurs special permission application processing costs regardless of the determination to grant or deny the permission. The grant or denial of the application is provided to the applicant carrier or conference, not the shipper providing the impetus for the request. During fiscal year 1982, the Bureau of Tariffs received 294 special permission applications. Each individual grant of special permission directly affects the applicant carrier and possibly affects its shipping customer. If there is absolutely no benefit to be gained by the carrier, it will not file an application for special permission.

The Commission believes the proposed fee is reasonable in relation to the costs it incurs for processing special permission applications. Limiting the fee to apply to only those instances where special permission is granted would give the appearance of applicants buying approval from the Commission. When an application for special permission is received, it is immediately processed. Special permission applications require special processing to take into account special services or arrangements which are not normally available in tariffs. The application processing costs are the same regardless of the final determination. The Commission believes it is appropriate to charge the requesting parties for the services provided at a rate near but no higher than that which is experienced in servicing the request. Establishing the filing fee shifts the application processing fee burden from the general taxpayer to the applicant without transferring the regulatory costs of ensuring that the special permission is used for its intended purpose. The Commission is not withdrawing nor reducing the filing fee for special permission applications.

D. *Temporary Tariff Filing Fee (Part 536, § 536.10)*

Temporary tariff filing fees are removed from this final rule. New electronic tariff filing methods could make temporary tariff filings unnecessary and because suspension of temporary tariff filings is pending in Docket No. 80-56, this matter is being held open until further notice.

E. *Passenger Vessel Certification Fees (Part 540, § 540.4 and § 540.23)*

The International Committee of Passenger Lines (ICPL) states that applications filed for certification pursuant to 46 C.F.R. Part 540 should not be subject to any fee because the beneficiaries of P.L. 89-777 (46 U.S.C. § 817) are travellers embarking at United States ports, not the passenger lines filing the applications. ICPL notes that foreign passenger lines are entitled to transport passengers between the United States and foreign ports under general principles of maritime law and treaties of friendship, navigation and commerce. It claims that nothing in P.L. 89-777 took away this right of carriage or remotely suggested that charges should be assessed for the Commission performing its duties. ICPL contends that since the statute was enacted to protect passengers against nonperformance of prepaid voyages and to ensure funds are available to meet personal injury and death claims, the only benefits are to provide security for protection of the public; and compliance with statutory requirements of P.L. 89-777 is a burden rather than a benefit to the passenger carrier. Moreover, ICPL notes that the Civil Aeronautics Board exempts foreign air carriers from payment of all filing and license fees (14 C.F.R. § 389.24).

ICPL further states that the Commission's functions apply to certification and not licensing of passenger vessels. It contends that the detailed cost analyses in support of the proposed rule are far from enlightening and it is unlikely that any more staff effort is involved in verifying casualty certificate P & I Club guarantees and surety bonds than in the case of evidence of financial responsibility required for pollution certificate applications under 46 C.F.R. Part 542. The casualty certificate fee is more than five (5) times that of the pollution certificate. It also appears to ICPL that no extra effort is needed to process performance certificates where the applicant provides the maximum $10 million security specified in 46 C.F.R. § 540.9(j). ICPL contends that nothing in the Commission's figures explains the amount of costs or why an application backed by regular guarantees or surety bonds cost approximately $1,691 to process.

The Commission consumes extensive amounts of time and effort in processing passenger vessel certificates. The Office of Vessel Certification receives the application, records and reviews it, discusses it with the applicants, determines the amount of financial responsibility, reviews other pertinent agreements and charters, develops notice of application to be published in the *Federal Register*, reviews evidence of financial responsibility, prepares a recommendation after research is completed, coordinates with other bureaus and offices as appropriate to ensure comments are incorporated in the recommendation, reproduces copies of the recommendation and has the matter placed on the agenda of the Commission for approval. Upon approval, certificates are issued and the notice of approval is published in the *Federal Register*. Audit requirements are then established, and the *Federal Register* is reviewed

for publication and to obtain a copy of the published notice of approval. Audit reports and unearned passenger revenues are reviewed to ensure adequacy of evidence of financial responsibility. The time and efforts required to process these passenger vessel certificates vary greatly from the routine functions associated with certifying financial responsibility for pollution liability.

Moreover, the fees set forth in the proposed rule do not include costs to the Commission of conducting field audits, processing activities carried out by bureaus and offices other than the Office of Vessel Certification, or other costs associated with monitoring the passenger cruise lines to ensure compliance with the statute. The direct beneficiaries of the services provided by the Commission are the passenger carriers which are able to do business in the United States upon obtaining the required certificates. The indirect beneficiaries of the services are the passengers receiving the protection required by the statute. In the normal commercial environment, the carriers determine whether or not the fee is going to prohibit them from carrying passengers. If the filing fee is paid and the fares increase for that reason, the passengers who are being protected are thereby paying for the services they are using. The benefit could then flow from the carrier to the passenger and the cost of providing the service would be removed as a burden on the general public. The Commission is not withdrawing nor reducing the casualty and performance certification application fees, nor is it exempting foreign passenger carriers from the rule's requirements, since to do so would be discriminatory to U.S. flag carriers.

The Commission has reviewed all comments submitted by the parties responding to the Commission's notice of proposed rulemaking. The comments are pertinent in many instances, and irrelevant in others because they make assumptions which cannot be verified or which bear no direct relationship to the actual cost criteria from which the proposed filing fees were developed. The Commission is not taxing users of its services, nor is the Commission recovering the costs of regulating the parties subject to Commission authority. The filing and application fees in this rule are based upon direct and indirect costs of providing services which are requested by applicants. The fees are also set to recover the cost of providing services while being careful not to exceed these costs. The fees are being established to recover costs "to the full extent possible" in a manner which is, "fair and equitable taking into consideration direct and indirect cost to the government, value to the recipient, public policy or interest served and other pertinent facts."

Pursuant to the Regulatory Flexibility Act (5 U.S.C. § 601 *et seq.*), the Commission certifies that adoption of the proposed rule will not have a significant economic impact on a substantial number of small entities.

List of subjects in 46 C.F.R. Maritime Carriers, Freight Forwarders, Practice and Procedure, Fees and User Charges.

Therefore, pursuant to 5 U.S.C. § 553, section 43 of the Shipping Act, 1916 (46 U.S.C. § 841a), and Title V of the Independent Offices Appropriations Act of 1952 (31 U.S.C. § 483a), the Federal Maritime Commission is amending Title 46 of the Code of Federal Regulations as follows:

1. Part 502 - *Rules of Practice and Procedure* is amended in the following respects.

a. In § 502.62 the title is amended and a new sentence is added reading as follows:

§ 502.62 Complaints and fee.

* * *

The complaint shall be accompanied by remittance of a $50 filing fee.

b. In § 502.68 the title is amended and a new sentence is added to paragraph (a) reading as follows:

§ 502.68 Declaratory orders and fee.

(a) * * * Petitions shall be accompanied by remittance of a $50 filing fee.

c. In § 502.69 the title is amended and a new sentence is added reading as follows:

§ 502.69 Petitions - general and fee.

* * *

Petitions shall be accompanied by remittance of a $50 filing fee.

d. In § 502.92 the title is amended and a new sentence is added to paragraph (a)(3) reading as follows:

§ 502.92 Special docket applications and fee.

* * *

(a)(3) * * * The application for refund or waiver must be accompanied by remittance of a $25 filing fee.

e. In § 502.182 the title is amended and a new sentence is added reading as follows:

§ 502.182 Complaint and memorandum of facts and arguments and filing fee.

* * *

The complaint shall be accompanied by remittance of a $50 filing fee.

f. In § 502.304 the title is amended and a new sentence is added to paragraph (b) reading as follows:

§ 502.304 Procedure and filing fee.

* * *

(b) * * * Such claims shall be accompanied by remittance of a $25 filing fee.

g. In § 502.404 the title is amended and a new sentence is added to paragraph (a) reading as follows:

§ 502.404 Procedure and fee.

(a) * * * The request shall be accompanied by remittance of a $25 service fee.

2. Part 531 - *Publishing, Filing and Posting of Tariffs in Domestic Offshore Commerce* is amended by adding a new subparagraph (3) to § 531.18(a) as follows:

§ 531.18 Applications for special permission.

(a) * * *

(3) An application for special permission shall be accompanied by a $90 filing fee.

3. Part 536 - *Publishing and Filing Tariffs by Common Carriers in the Foreign Commerce of the United States* is amended in the following respects.

In § 536.15 a new sentence is added to paragraph (b) reading as follows:

§ 536.15 Applications for special permission.

* * *

(b) * * * Such applications shall be accompanied by a filing fee remittance of $90.

4. Part 540 - *Security for the Protection of the Public* is amended in the following respects.

a. In § 540.4 a new sentence is added to paragraph (b) reading as follows:

§ 540.4 Procedure for establishing financial responsibility.

* * *

(b) * * * An application for a Certificate (Performance) shall be accompanied by a filing fee remittance of $1,600.

b. In § 540.23 a new sentence is added to paragraph (b) reading as follows:

§ 540.23 Procedure for establishing financial responsibility.

* * *

(b) * * * An application for a Certificate (Casualty) shall be accompanied by a filing fee remittance of $800.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-29

BATON ROUGE MARINE CONTRACTORS, INCORPORATED

v.

CARGILL, INCORPORATED

NOTICE

February 4, 1983

Notice is given that no appeal has been taken to the December 28, 1982, dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-29

BATON ROUGE MARINE CONTRACTORS, INCORPORATED

v.

CARGILL, INCORPORATED

DISMISSAL OF PROCEEDING

Finalized February 4, 1983

Cargill, Incorporated, and Baton Rouge Marine Contractors, Inc., have agreed to settle their controversy on the following terms:

a. Cargill will maintain its Baton Rouge service and facility charge (Item 5, Subsection D, Section III, Port Allen Tariff No. 10), at a level not to exceed 11 cents per ton for two years from October 1, 1982.

b. Cargill will refund to BRMC the amount of $75,000.00 and BRMC will make no refund to Cargill.

c. Each party will release the other from all liability with respect to the service and facility charge in accordance with the mutual release set forth in Attachment A.

d. The existing court proceeding between the parties, *Baton Rouge Marine Contractors, Inc. v. Cargill, Inc.*, E.D. La. No. 75-698, shall be dismissed with prejudice in accord with the Stipulation of Dismissal which is Attachment B hereto.

On the basis of the foregoing, both sides have moved for dismissal of this proceeding with prejudice. Since neither side wishes to pursue its interests in the case there is no alternative to dismissal. Of course, should the Commission desire a resolution to any of the questions raised in the case, it may institute a proceeding on its own motion.

The proceeding is dismissed with prejudice.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

(46 C.F.R. PARTS 534 AND 536; GENERAL ORDERS 10 AND 13; DOCKET NO. 82-42) GREEN HIDE WEIGHING PRACTICES; AND PUBLISHING AND FILING TARIFFS BY COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES

February 9, 1983

ACTION: Final Rule

SUMMARY: This removes unnecessary duplicating regulations which were originally promulgated to ensure a uniform method of declaring shipping weights on green salted hides for export in the foreign commerce of the United States. The result of this action will not change the original regulations in any manner, except as to provide a single codification of the regulation which is now published in the Commission's G.O. 13, 46 C.F.R. 536.5(d)(17).

DATE: Effective February 14, 1983

SUPPLEMENTARY INFORMATION:

On September 15, 1982, the Commission published a notice of proposed rulemaking requesting comments on the proposed removal of Part 534 of Title 46 of the Code of Federal Regulations (29 F.R. 5887) and the amendment of 46 C.F.R. § 536.5(d)(17) to delete reference to 46 C.F.R. Part 534 therein.

The proposed rulemaking incorrectly indicated in the preamble, as well as in paragraph 3 on page 2 and the last paragraph on page 3, reference to "46 C.F.R. § 536.5(c)(17)." The correct reference should have read "46 C.F.R. § 536.5(d)(17)." There is no section "536.5(c)(17)" in § 536.5.

One response was received from the Inter-American Freight Conference. The commentator agreed that there is no need for 46 C.F.R. Part 534. The Conference, however, rationalized that the effect of the proposed modification of section 536.5(d)(17) appeared to increase, not decrease, the regulatory burden upon conferences and carriers. The Conference maintained that the effect of deleting the phrase ". . . in accordance with Part 534 of the Commission's rules . . ." would be to require every tariff to include a rule relating to the weighing of hides even if there were no commodity rates covering green salted hides. This contention represents a misinterpretation of the intent of the Com-

mission's rulemaking, which is simply to provide one single regulation under 46 C.F.R. § 536.5(d)(17) relating to the transportation of green salted hides.

The same regulations applicable to the carriage of green salted hides will continue to be effective for all common carriers. Consequently, if a carrier elects not to provide common carriage on green salted hides, the tariff rule 17 shall continue to indicate such fact by a simple notation "not applicable," as is the current practice with any other tariff rule which fails to have any application in a given tariff.

The present duplicating provisions published in 46 C.F.R. Part 534 and section 536.5(d)(17) will be eliminated by the action proposed herein with no resulting regulatory impact whatsoever. This action will simply codify currently effective regulations under the Commission's General Order 13, § 536.5(d)(17).

List of subjects in 46 C.F.R.

THEREFORE, IT IS ORDERED, That pursuant to 5 U.S.C. § 553 and sections 14(b), 15, 16, 17, 18(b) and 43 of the Shipping Act, 1916 (46 U.S.C. 813(a), 814, 815, 816, 817(b) and 841(a)) the Code of Federal Regulations is amended as follows:

1. 46 C.F.R. Part 534 is rescinded; and

2. The first sentence of 46 C.F.R. 536.5(d)(17) is amended by deleting the phrase: ". . . in accordance with Part 534 of the Commission's rules. . . ."

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-43
IN THE MATTER OF BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS, DOCK DEPARTMENT TARIFF FMC T-NO. 1, ITEM 145-0

ORDER

February 22, 1983

The Board of Commissioners of the Port of New Orleans (hereafter, the Port) has filed a Petition for Declaratory Order regarding a dispute between it and Kerr Steamship Company, Inc. over the interpretation and lawfulness of a Port tariff provision.[1] The Port seeks a Commission order declaring that the tariff provision (1) holds a vessel berthing agent liable for collection and payment of inbound demurrage charges, and (2) is lawful, in particular under sections 16 and 17 of the Shipping Act, 1916 (46 U.S.C. §§ 815, 816).

Kerr replied to the Petition, and Petitions to Intervene and accompanying Replies were also submitted by the West Gulf Maritime Association, the Association of Ship Brokers and Agents (ASBA), 19 steamship agencies, filing jointly, and the Commission's Bureau of Hearing Counsel. Additionally, the Port filed a Motion for Leave to File Pleading Out of Time [2] and an accompanying Opposition to Petitions for Leave to Intervene, to which Kerr and ASBA have objected.[3]

The circumstances giving rise to this proceeding commenced with Kerr's having applied to the Port for a berth assignment for the M/V VIDRARU. On April 13, 1981, the vessel was unloaded and a shipment of steel plates remained on the wharves long after the expiration of the 15-day free time period provided in the Port tariff. Citing its tariff, the Port sent demurrage invoices in the amount of $214,729.18 to Kerr. $30,000 of the bill has apparently been paid by a stevedoring

[1] At issue is the following Port tariff provision:

> Any portion of said cargo discharged from a vessel remaining on the public wharves after the expiration of free time allowed as set forth in Item 130 shall incur demurrage charges indicated below. Said demurrage charges shall apply immediately following the expiration of the specified free time allowed. The owner, charterer and agent of the vessel discharging the cargo are responsible for the payment to Board of the demurrage charges which are due and payable before the cargo incurring same is removed from the public wharves.

[2] The Port's Motion is granted. The Port's pleading is not, as characterized by Kerr, a reply to a reply, but is a reply to the Petitions to Intervene.

[3] Kerr's request that a portion of the Port's pleading be stricken is denied. *See* note 2, *supra*. ASBA's submission is stricken because it constitutes a reply to a reply. *See* 46 C.F.R. § 502.74(a).

company. The Port is attempting to collect the remaining $184,729.18 from Kerr.

The Port brought suit against Kerr and several other parties in federal district court in Louisiana. *Board of Commissioners of the Port of New Orleans v. Kerr Steamship Co., Inc., et al.*, E.D. La., C.A. No. 81-4691. Kerr filed a complaint with the Commission (Docket No. 82-15 25 F.M.C. 330 (1982)), but withdrew it on August 10, 1982, citing the existence of the court proceeding. The instant Petition for Declaratory Order was filed on August 18, 1982.

In *Lease Agreement No. T-3753 Between Maryland Port Administration and Atlantic & Gulf Stevedores, Inc.*, 24 F.M.C. 500 (1981), *reconsid. denied*, 24 F.M.C. 792 (1982), the Commission denied a Petition for Declaratory Order which went to the interpretation of a term in a lease agreement previously approved by the Commission. The Commission explained:

> There is no indication . . . that the instant case requires the unique technical expertise of this agency any more than the judgment of the court in which this matter is currently pending litigation.

24 F.M.C. 500.

This consideration is applicable to the instant Petition. The Commission does, of course, have jurisdiction to decide both questions raised in the Port's Petition. However, the threshold issue—whether Tariff Item No. 145-0 covers berthing agents—is an issue which the federal court is as competent to decide as is the Commission. Although the court has been requested by the Port to stay the proceeding pending Commission action, it has declined to do so. Moreover, the court has not sought the Commission's assistance. To rule on the interpretation issue at this time would be duplicative of the court's effort.

Tariff interpretation is often a matter which requires the technical knowledge of an expert body. We do not hold that the pendency before the courts of this or any other issue related to the Shipping Act will deter us from ruling on matters which require such expertise. We simply are of the view that the issue of the applicability of Tariff Item 145-0 is a matter which can be efficiently disposed of by the court without our intervention.

The remaining issue—whether vessel agent liability for inbound demurrage is lawful under the Shipping Act—is one which appears subject to the Commission's primary jurisdiction. However, to initiate a proceeding on that issue, before it has been determined whether the tariff on its face applies to a berthing agent, would be a premature and possibly unnecessary exercise at this time.

The Commission has therefore determined to defer to the court litigation already under way on the issue of the tariff provision's inter-

pretation, and to deny the Port's Petition without prejudice.[4] If any Shipping Act issues remain after the resolution of that issue in the judicial forum, the Commission may address them in response to a section 22 (46 U.S.C § 821) complaint or a subsequent petition under Rule 68 (46 C.F.R. § 502.68).

THEREFORE, IT IS ORDERED, That the Petition for Declaratory Order of the Board of Commissioners of the Port of New Orleans is denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[4] *The Petitions to Intervene are therefore dismissed as moot.*

FEDERAL MARITIME COMMISSION

46 C.F.R. PART 536
GENERAL ORDER 13, AMENDMENT NO. 10
DOCKET NO. 80-56
PUBLISHING AND FILING TARIFFS BY COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES

February 28, 1983

ACTION: Final Rule

SUMMARY: The Commission is providing for 24-hour receipt of permanent tariff filings, including the use of electronic filing methods, in lieu of accepting temporary tariff filings. This will eliminate what has become an unnecessary burden on the Commission's staff and resources and will also simplify the use of foreign commerce tariffs by shippers, carriers and other interested persons. Providing for the receipt of permanent tariff filings on an around-the-clock basis, including those filed by electronic modes, should benefit carriers, conferences and shippers by enabling them to meet commercial exigencies.

DATE: Effective May 30, 1983

SUPPLEMENTARY INFORMATION:

On September 3, 1981, the Commission stayed its Final Rule in this proceeding (46 F.R. 44190). That rule would have precluded the filing of temporary amendments to tariffs published by carriers or conferences of carriers in the foreign commerce of the United States, effective September 8, 1981 (46 F.R. 35092). The stay was requested by various conferences which sought an additional period for commenting on the rationale employed by the Commission in arriving at this decision.

By notice served December 28, 1981, the Commission granted interested parties an opportunity to comment on the basis for its rule (46 F.R. 62669). This notice also proposed a new procedure which would permit the receipt of permanent tariff amendments before and after the Commission's normal business hours, including weekends and holidays.

Comments were received from fourteen commentators on behalf of twenty-three conferences, two ocean carriers, three shippers and four tariff publishing services. Seven of the commenting conferences support

the Commission's proposed discontinuance of the temporary tariff filing privilege,[1] while fifteen conferences object to it.[2]

Other commenting parties support the Commission's proposal, but request that it be expanded to allow the permanent filing of tariff pages by electronic modes, on a 24-hour basis.[3] This suggestion has merit and has been adopted. Also a definition of electronic tariff filing is added to the Commission's tariff filing regulations to recognize such filings as a type of permanent tariff filing. The Commission will receive tariff material 24 hours a day. Material submitted after normal working hours will be stamped in a mail drop in the lobby of the Commission's Washington, D.C. office. The procedure for the receipt of electronic tariff filings will be through the use of a date/time device on receiving machines which are presently, or may in the future be, located in the Commission's public file facilities.[4]

Certain commenting parties request that the Commission expand the rulemaking proceeding to permit the 24-hour filing privilege for tariffs which are filed in the domestic offshore commerce under the requirements of the Commission's General Order 38.[5] Such a request is beyond the scope of this proceeding, which relates only to tariffs filed in the foreign commerce of the United States.

The Commission has also been urged to: (1) continue the telex filing privilege without restriction; (2) allow foreign based filers continued use of telexes, with or without a limit on the number of such messages; (3) provide further justification before eliminating the temporary tariff filing privilege; (4) provide for the use of temporary filings when filed with sequential numbers; (5) assess a fee for the use of temporary tariff filings; (6) allow tariffs to be filed in the Commission's field offices; and

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[1] North Atlantic United Kingdom Freight Conference; North Atlantic French Atlantic Freight Conference; North Atlantic Continental Freight Conference; North Atlantic Baltic Freight Conference; Scandinavia Baltic/U.S. North Atlantic Westbound Freight Conference; Continental North Atlantic Westbound Freight Conference; and North Atlantic Westbound Freight Association.

[2] North Europe-United States Pacific Coast Freight Conference; Sections B and C of the Pacific Coast River Plate Brazil Conference; The "8900" Lines, Greek/U.S. Atlantic Agreement, Iberian/U.S. North Atlantic Westbound Freight Conference, Italy, South France, South Spain, Portugal/U.S. Gulf and Island of Puerto Rico Conference; Marseilles North Atlantic U.S.A. Freight Conference; Mediterranean-North Pacific Coast Freight Conference; North Atlantic Mediterranean Freight Conference; U.S. Atlantic & Gulf/Australia-New Zealand Conference; The West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference; Trans-Pacific Freight Conference of Japan/Korea; Japan/Korea-Atlantic and Gulf Freight Conference; Thailand/Pacific Freight Conference; and Thailand/U.S. Atlantic and Gulf Conference.

[3] Pacific Westbound Conference; Sea-Land Service, Inc.; and Pacific Coast Tariff Bureau.

[4] An acceptable tariff filing made by an electronic mode is any tariff amendment which has all the characteristics of a permanent tariff amendment. The basic difference between an electronic mode tariff filing and a mail or hand delivered permanent filing is the method of transmission. In other words, electronic filing is electronic mail. The equipment used to compile, send, and/or receive electronic tariff filings is commercially controlled by the tariff filers, with the Commission providing the space for the receiving (printer) machines.

[5] Sea-Land Service, Inc.; Crowley Maritime Corporation; International Tariff Services, Inc.; Pacific Coast Tariff Bureau; and Jim Pitzer, Transportation Consultant.

(7) pursue legislative modifications to the Shipping Act to permit filings to be made within a certain period after contracts of affreightment are concluded.[6] Some of these comments [7] have already been considered during the course of this rulemaking proceeding while others are inconsistent with the intent of this rulemaking and therefore merit no further consideration.

The decision to eliminate temporary tariff filings may be inconvenient to some. However, there are means by which tariff changes considered time sensitive can be transmitted to the Commission for immediate effectiveness. Present tariff filing regulations already contain specific language to permit telephonic special permission applications where "emergency situations" appear to exist (*See* 46 C.F.R. § 536.15(c)). Further, carriers and conferences can still request a waiver of the Commission's permanent tariff page filing requirements if good cause can be shown.

The provisions of the Regulatory Flexibility Act (5 U.S.C. § 601 *et seq.*) do not apply to this Final Rule. The Commission's prior certification that the rule, if implemented, would not have any significant economic impact on a substantial number of small entities was made to the Chief Counsel for Advocacy of the Small Business Administration on January 20, 1982 and published in the *Federal Register* on January 28, 1982.

List of subjects in 46 C.F.R. Part 536

Maritime carriers, Reporting and recordkeeping requirements.

THEREFORE, IT IS ORDERED, That pursuant to 5 U.S.C. § 553, and sections 18(b), 22 and 43 of the Shipping Act, 1916 (46 U.S.C. §§ 817(b), 821 and 841(a)), 46 C.F.R. Part 536 is amended as follows:

1. 536.2 Definitions (Amended). A new paragraph is added to section 536.2 which reads as follows:

   536.2 (p) Tariff filing, Electronic.

   The transmission of tariff filings to the Commission through the use of commercial data processing terminals. The data processing receiving terminal(s) are to be located in the Commission's Washington, D.C. offices. Tariff material filed electronically must conform to all the regulations applicable to permanent tariff filings, except as follows:

   (1) electronically filed tariff pages received from data processing terminals may be used for filing with the Commission; and

[6] C. H. Dexter Division, the Dexter Corporation; Air Products and Chemicals, Inc.; World Tariff Services, Inc.; North Europe/U.S. Pacific Freight Conference, except Sea-Land Service, Inc.; Sections B and C of the Pacific Coast River Plate Brazil Conference; Trans-Pacific Freight Conference of Japan/Korea, *et al.*; The "8900" Lines, except Sea-Land Service, Inc.; Waterman Steamship Corp.; and E. I. du Pont de Nemours and Company.

[7] *See* 45 F.R. 58385, September 3, 1980.

(2) electronically filed tariff matter shall be accompanied by an electronically filed letter of transmittal; and

2. Paragraph (a) of section 536.3 is redesignated as subparagraph (a)(1); and a new subparagraph is added to section 536.3 which reads as follows:

536.3(a)(2) Receipt of Tariffs - The Commission will receive tariff filings on an around-the-clock basis. Receipt of tariff filings during other than normal business hours will be time stamped at a tariff mail drop in the lobby of the Commission's Washington, D.C. offices. Electronic tariff filings transmitted to the Commission by electronic modes will be receipted by a date/time device on the receiving machine; and

3. Paragraph (c) of section 536.10 is deleted; and

IT IS FURTHER ORDERED, That the stay previously issued in this proceeding on September 3, 1981, is hereby rescinded.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-46
GENERAL MOTORS CORPORATION

v.

COSTA LINE CARGO SERVICES, INC. AND
COSTA ARMATORI, S.p.A.

NOTICE

February 28, 1983

Notice is given that no exceptions have been filed to the January 19, 1983, 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, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-46
GENERAL MOTORS CORPORATION

v.

COSTA LINE CARGO SERVICES, INC. AND COSTA ARMATORI, S.p.A.

Reparation awarded to complainant.

Dennis J. Helfman and *Benson T. Buck*, attorneys for Complainant; *Otis M. Smith*, General Counsel of General Motors Corporation, of Counsel.

William F. Burns, Vice President, Costa Line Cargo Services, Inc., General Agents for Costa Line, for Respondent.

INITIAL DECISION [1] OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

Finalized February 28, 1983

This is a proceeding, by consent of the parties and with approval of the Presiding Administrative Law Judge, conducted under shortened procedure without oral hearing, pursuant to Rule 181 et seq. of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.181 et seq.

The complainant alleges the respondents have subjected it to an overcharge of rates for ocean transportation, for which reparation in the sum of $47,176.36 plus interest is sought and such other relief deemed proper in the premises.

From the materials supplied in this proceeding the Presiding Administrative Law Judge finds the following facts:

FACTS

The complainant General Motors Corporation is a Delaware corporation, with offices at 3044 West Grand Boulevard, Detroit, Michigan, 48202. General Motors Corporation operates through various wholly-owned, incorporated subsidiaries including General Motors Componentes, S.A., located in Cadiz, Spain. Componentes is engaged in the construction and operation of automotive components manufacturing plants in Spain.

[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 C.F.R. 502.227).

The respondent Costa Line Cargo Services, Inc., is General Agent for respondent Costa Armatori S.p.A. (Costa Line), a common carrier by water engaged in transportation from the North Atlantic ports of the United States to all Spanish ports and a party to U.S. North Atlantic Spanish Freight Agreement No. 10117, Freight Tariff No. 1, FMC-1. Respondents are subject to the provisions of the Shipping Act, 1916.

In a letter dated April 16, 1981, from Laurence A. Steinseifzer, Staff Assistant, Rate Analysis and Negotiations, Logistic Operations, General Motors Corporation, addressed to Mr. J. S. Moskal, Secretary of the U.S. North Atlantic Spanish Freight Agreement, the member lines were requested to establish a project rate of $92.00 W/M with heavy lift items being discounted less 50 percent, plus any applicable tariff charges, for transportation of supplying machinery and equipment for on site manufacturing purposes of two automotive component manufacturing factories at Cadiz, Spain, with such rate being in effect through about *May 1, 1980,* and conclude March 1982 (shipping period). (Emphasis supplied.)

It was estimated that during the shipping period (May 1, 1980 and concluded March 1982) General Motors Componentes, S.A., a wholly owned subsidiary of General Motors Corporation, located at Puerto de Santa Maria, Cadiz, Spain, and responsible for constructing and operating automotive component manufacturing plants in Spain, in the process of doing so, ordered a large amount of machine tools and other heavy machinery from North American vendors for use in a new automotive component manufacturing plant under construction in Cadiz, Spain. It was estimated that the value of the material moved would be in excess of $20 million, that while a portion of the freight would have to move on a breakbulk basis, it would be an intent to ship via container to the maximum whenever possible.

The proposed project rate for Cadiz was accepted by the U.S. North Atlantic Spanish Freight Agreement and became effective on May 1, 1981. The project rate was published on Original Page 130-0 of U.S. North Atlantic Spanish Freight Agreement No. 10117 Freight Tariff No. 1, FMC-1.

Commodity Description and Packaging	Rate Basis	Rates
Automotive Component Manufacturing Factories Machinery, Equipment and Supplies for Automotive Component Manufacturing Factories		
To Spanish Base Ports	WM	110.00
Minimum 600 cft per 20 ft. H/H Container	WM	92.00
Minimum 900 cft per 35/40 ft. H/H Container	WM	92.00

Commodity Description and Packaging	Rate Basis	Rates
(Less 25% for Heavy Lift Charges) Bill of Lading to bear the following notation: "All above described materials are of a wholly proprietary nature and may not be resold or otherwise placed in commercial channels for re-sale." (Less 25% for Heavy Lift Charges) Original Page 130-0—effective date—May 1, 1981 First Revised Page 130-0, effective May 11, 1981 June 1, 1981 on W/M—thru 5/31/81 $92.00, Eff. 6/1/81 $101.00 WM (Less 50% for Heavy Lift Charges) 3rd Revised Page 130-0, effective October 1, 1981 Rate Basis $123.25 W/M (Less 50% for Heavy Lift Charges) 5th Revised Page 130-0, effective May 28, 1982—rate W/M $123.25 The pages from the Original 130-0 on state the foregoing rates and charges are subject to any general rate increases, increased accessorial charges, or surcharges, subsequently established and in effect at time of shipment.		

Under date of November 23, 1981, Vapores Suardiaz sent a telex to General Motors Componentes, Puerto de Santa Maria, Cadiz, Spain, confirming having a fixed vessel *Acro Geica* Roll-on-Roll-off vessel for carriage of the cargo. Port of loading: Baltimore. Port of discharge: Cadiz.

Cargo:	1 piece 9, 10 x 3, 30 x 4, 10M	-	weighing 97 tons
	1 piece 9, 75 x 3, 50 x 3, 40M	-	weighing 67 tons
	1 piece similar measures	-	weighing 51 tons
	Plus about 12 tons smaller pieces	-	$120,000 lump sum terms

General Motors Componentes, S.A., Cadiz, Spain, replied to Vapores Suardiaz, stating, Re your telex 23 Nov. 1981 we hereby accept your offer for ocean transportation of above machinery in the terms and conditions stated by you.

Costa Line negotiated ocean rates with Vapores Suardiaz; lump sum of $120,000, 50 percent discount when shipped in containers; no specific provision for breakbulk heavy lifts.

Effective June 1, 1981, the special project rate of $92.00 W/M was established and published on 1st Rev. page 130-0 of U.S. North Atlantic Spanish Freight Agreement No. 10117, Freight Tariff No. 1, FMC-1. Changes were the rate as Spanish Base Ports thru September 30, 1981, would be W/M 92.00 thru 5/31/81 effective 6/1/81 $101.00 WM when shipped in containers.

Under Costa Line Cargo Service, Inc., Bill of Lading No. 1, dated at Detroit, Michigan (no date shown), General Motors Corporation on December 14, 1981, at Baltimore, Md., loaded on board the vessel *Cortina* for transportation to Cadiz:

	Gross Weight	Measurement
1 Box of machinery, equipment and supplies for automotive component mfg. factories	175500	3651'
1 Box of Machinery, Equipment and supplies for automotive component mfg. factories	156300	2870.0
1 Box of Machinery, Equipment and supplies for automotive component mfg. factories	101000	2334.0'
Freight to be paid		
Measurement		Freight
O/F Lump Sum		90,000.00
Total U.S. Currency		90,000.00

The Bill of Lading does not bear the notation, "all above described material are of a wholly proprietary nature and may not be placed in commercial channels for resale."

The 27th Revised Page 103 of Freight Tariff No. 1, FMC-1, effective December 9, 1981 ((R) Per telex to FMC 12/7/81) - Automobile Manufacturing - consisting of shipments as follows:

1 pc. weighing approx. 101,000 lbs. and measuring approx. 2,334 cu. ft.

1 pc. weighing approx. 165,000 lbs. and measuring approx. 3,205 cu. ft.

1 pc. weighing approx. 144,820 lbs. and measuring approx. 2,902 cu. ft. (not subject to H/L and E/L charges) thru Jan. 9, 1982

Rate Basis L.S. Rates 90,000.00

Parts for above - minimum 11,000 cft. (not subject to H/L and E/L charges) thru Jan. 9, 1982 W/M $120,000

Under Costa Line Cargo Services, Inc., Bill of Lading No. 2 dated at Detroit, Michigan (not date shown), General Motors Corporation loaded on board the vessel *Cortina* on December 14, 1981, at Baltimore, Md., for transportation to Cadiz:

	Gross Weight	Measurement
36 Boxes of Machinery, Equipment and supplies for automotive component mfg. factories	297,890#	15,247'
Freight to be paid		
Measurement	Rate	Freight
O/F 15,247 cft.	120.00	45,741.00

The Bill of Lading does not bear the notation "all above described material are of a wholly proprietary nature and may not be placed in commercial channels for resale."

Both of the above freight charges have been collected by the respondents; the charges were paid by complainant.

The Federal Maritime Commission's Office of Energy and Environmental Impact under date of September 27, 1982, served the following:

> The OEEI has examined Docket No. 82-46 and has determined that section 547.4(a)(22) of the Commission's "Procedures for Environmental Policy Analysis" applies. No environmental analysis needs to be undertaken nor environmental documents prepared in connection with this docket.
>
> (S) E. R. MEYER

DISCUSSION, REASONS, FINDINGS AND CONCLUSIONS

The complainant in its amended complaint received November 10, 1982, asserts that the lump sum charge of $90,000.00 as published on Page 103 of Freight Tariff No. FMC-1, is inapplicable, excessive and unreasonably high in violation of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. § 817(b)(3)) and should be declared unlawful. In response thereto, the respondents counter the lump sum charge of $90,000.00 was published in Freight Tariff No. 1, at the request of General Motors through their agent Vapores Suardiaz, and is therefore applicable.

The complainant in its Memorandum of Argument attached to the complaint herein which was served September 22, 1982, argues the proper rate applicable on the freight in question was the $92.00 W/M in the U.S. North Atlantic Spanish Freight Conference to Cadiz, Spain. Complainant argues that where two tariffs are appropriate, the shipper is entitled to have applied the one specifying the lower basis of charges, citing *United States v. Gulf Ref. Co.*, 268 U.S. 542, 546 (1925); *U.S. Borax & Chem. Corp. v. Pacific Coast European Conf.*, Docket No. 66-63 and Docket No. 67-27, 11 F.M.C. 451, 463 (1968). In adhering to this doctrine, the Commission has held that the lowest rate voluntarily established automatically becomes the lawful rate, citing *Contract Rates-Port of Redwood City*, Docket No. 629, 2 U.S.M.C. 727, 742 (1945).

The respondents in their December 21, 1982, Memorandum of Response and Arguments to the General Motors Complaint, served Sep-

tember 22nd, state, among other things, the lump sum rate of $90,000.00 for three heavy lifts and the weight or measurement rate of $120.00 for parts was established and published in the Spanish Eastbound Freight Agreement Tariff No. 1, FMC No. 1 at the specific request of General Motors and its subsidiary through their appointed brokers. If General Motors or its subsidiary intended that this cargo be shipped under the project rate established for them, it would not have been necessary to specifically request Costa Line's freight quotation. The lump sum offered by Costa Line was $90,000.00 and not $120,000.00. During the negotiations, the broker in Spain did not clearly state that the principals involved in this shipment were General Motors or its subsidiary. Costa Line submitted the request to the membership, rather than take independent action. The lump sum and weight-measurement rate for parts was unanimously approved by the membership.

Complainant in a rebuttal statement subscribed and sworn to January 7,. 1983 (received January 10, 1983), asserts, *inter alia*, respondents in claiming no awareness that movement was for account of General Motors admits they made a mistake, but it provides no reason why General Motors is not entitled to have freight charges assessed on the basis of the project rate. Complainant says the respondents have presented nothing to dispute or rebut applicability of the project rate.

The Presiding Administrative Law Judge does not find the parties absolved of mistakes, for example, the bills of lading involving the shipments do not contain the language the tariff calls for.

Of course, strict adherence to filed tariffs is mandatory. The principle is firmly established that the rate of the carrier as duly filed is the only lawful charge. *Ocean Freight Consultants, Inc. v. The Bank Line Limited*, Docket No. 1185, 9 F.M.C. 211, 215 (1966). Complainant's claim for reparation is dependent upon the conclusion that of the two rates contained in the U.S. North Atlantic Spanish Freight Agreement No. 10117, Freight Tariff No. 1, FMC-1, the lower or project rate was the only applicable rate to its shipments during the period in question. An ambiguity was created. While there was apparent agreement to the "Lump Sum" rate, it was higher than the project rate. The shipper in such an ambiguity situation is entitled to the lower rate. Since it has been deemed herein that the shipments are composed of commodities that come under the project rate, the project rate is the applicable rate. Project shipment is typically composed of materials intended to be used for foreign construction projects such as the plants in this case. See *Free Time and Demurrage Charges on Export Cargo*, Docket No. 68-9,

13 F.M.C. 207, 224 (1970). The effective tariff is the project rate found in the 3rd Revised Page 130-0 of the applicable tariff. The rate in this effective tariff affords the only legal basis upon which freight charges may be collected, any agreement, in this case the lump sum rate, to the contrary notwithstanding.

Note that despite the statement requesting that the project rate of $92.00 W/M with heavy lift items being discounted less 50 percent, plus any applicable tariff charges, with such rate being in effect through about May 1, 1980, and conclude March 1982, the Original Page 130-0 in Freight Tariff No. 1, FMC-1, effective May 1, 1981, setting up the project rate did not provide for the concluding March 1982 date and only provided for less 25 percent for Heavy Lift charges. It was provided further, (1) Bill of Lading to bear the following notation: "All above described materials are of a wholly proprietary nature and may not be sold or otherwise placed in commercial channels for re-sale."; (2) "The foregoing rates and charges are subject to any general rate increases, increased accessorial charges, or surcharges, subsequently established and in effect at the of shipment."

The change in the tariff from less 50 percent for Heavy Lift charges from 25 percent was made in 1st Rev. Page 130-0, effective May 11, 1981, and June 1, 1981. The rate was raised to $123.25 W/M in the 3rd Rev. Page 130-0, effective October 1, 1981. The date for rates to Spanish Base Ports thru March 31, 1982, was added in the 4th Rev. Page 130-0, effective January 1, 1982 and thru June 30, 1982, in the 5th Rev. Page 130-0, effective March 24, 1982.

From the material supplied herein, the Presiding Administrative Law Judge finds and concludes the project rate of $92.00 W/M with heavy lift items being discounted 50 percent, plus any applicable tariff charges was established, effective May 1, 1981, as published on Original Page 130-0 of U.S. North Atlantic Spanish Freight Agreement No. 10117, and was subsequently changed.

The involved shipments moved December 14, 1981. At that time the project rate tariff was up to $123.25 W/M and still in effect per 3rd Revised Page 130.0 effective October 1, 1981, was in effect with a rate base W/M 123.25. The commodity description was as to Automotive Components Manufacturing Factories. Also the 27th Revised Page 103 of the Freight Tariff No. 1, FMC-1, effective December 9, 1981, for the commodity Automobile Manufacturing, as indicated above under facts, with a Rate Basis of Lump Sum of $90,000.00. The Original Page 130-0 of the tariff had the commodity description of Automotive Component Manufacturing Factories. It is deemed that the involved shipments moved under the project rate status in effect at the time.

Upon consideration of the above, the Presiding Administrative Law Judge *finds* and *concludes* that the project rate—W/M 123.25 as shown in the 3rd Revised Page 130.0 of the North Atlantic Spanish Freight

Agreement No. 10117 was the applicable tariff herein. He also *finds* and *concludes* that General Motors Corporation is entitled under section 18(b)(3) of the Shipping Act, 1916, to reparation from the respondents, in the amount of $47,176.36 with interest as provided for in Rule 253 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.253.

Wherefore, it is *ordered*, subject to review by the Commission as provided in the Commission's Rules of Practice and Procedure that:

(A) The respondents Costa Line Cargo Services, Inc., and Costa Armatori, S.p.A., shall make reparation to the complainant General Motors Corporation in the amount of $47,176.36 with interest as provided in Rule 253 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.253.

(B) The parties shall inform the Commission how and when the above reparation is made.

(C) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-39
W. R. GRACE & CO., DAVISON CHEMICAL DIVISION
v.
C. N. LLOYD BRASILEIRO

DOCKET NO. 82-40
W. R. GRACE & CO., DAVISON CHEMICAL DIVISION
v.
COMPANHIA MARITIMA NACIONAL

DOCKET NO. 82-41
W. R. GRACE & CO., DAVISON CHEMICAL DIVISION
v.
DELTA STEAMSHIP LINES, INC.

NOTICE

March 4, 1983

Notice is given that no appeal has been taken to the January 25, 1983, withdrawal of complaints in these proceedings and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the withdrawal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-39

W. R. GRACE & CO., DAVISON CHEMICAL DIVISION

v.

C. N. LLOYD BRASILEIRO

DOCKET NO. 82-40

W. R. GRACE & CO., DAVISON CHEMICAL DIVISION

v.

COMPANHIA MARITIMA NACIONAL

DOCKET NO. 82-41

W. R. GRACE & CO., DAVISON CHEMICAL DIVISION

v.

DELTA STEAMSHIP LINES, INC.

WITHDRAWAL OF COMPLAINTS

Finalized March 4, 1983

W. R. Grace & Co., the complainant, after "receiving the arguments advanced by the several respondents [and] the entire file in this matter," has withdrawn the complaints in these proceedings. They are hereby dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-51
COMPANHIA SIDERURGICA NACIONAL
(BRAZILIAN NATIONAL STEEL CO.)

v.

MOORE-MCCORMACK LINES, INC.

DOCKET NO. 82-53
COMPANHIA SIDERURGICA NACIONAL
(BRAZILIAN NATIONAL STEEL CO.)

v.

NETUMAR LINES

NOTICE

March 4, 1983

Notice is given that no appeal has been taken to the January 28, 1983, dismissal of the complaints in these proceedings and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-51
COMPANHIA SIDERURGICA NACIONAL
(BRAZILIAN NATIONAL STEEL CO.)

v.

MOORE MCCORMACK LINES, INC.

DOCKET NO. 82-53
COMPANHIA SIDERURGICA NACIONAL
(BRAZILIAN NATIONAL STEEL CO.)

v.

NETUMAR LINES

COMPLAINTS DISMISSED

Finalized March 4, 1983

The two proceedings captioned above [1] began with the filing of two complaints by the same shipper, Companhia Siderurgica Nacional (Brazilian National Steel Co.) in which complainant alleged that the two carriers named above as respondents, Moore McCormack Lines, Inc. and Netumar Lines, had failed to grant complainant a project rate discount of 20 percent on various shipments of machinery and equipment destined for a project involving expansion of complainant's steel mills in Brazil. This conduct by respondents allegedly was contrary to respondents' tariffs and consequently would be in violation of section 18(b)(3) of the Shipping Act, 1916. The complaint in No. 82-51, which was filed on October 29, 1982, alleged that complainant was overcharged on seven shipments (actually on 14 bills of lading) in the total amount of $12,477.93. The complaint in No. 82-53, which was filed on November 2, 1982, alleged that complainant was overcharged on seven shipments in the total amount of $941.96. In support of the complaints, complainant attached to them itemized tables of alleged overcharges drawn from the relevant bills of lading, tariff pages relating to the

[1] Because the two proceedings involve the same shipper, the same tariff, and the same project rate discount, I am, by designation of the Chief Judge, consolidating the two proceedings for purposes of this ruling on the requests for dismissal. See Rule 148, 46 C.F.R. 502.148.

alleged project, and the relevant bills of lading with commercial invoices.

Although apparently it was not clear at the time of filing the complaints as to the status of the claims, it appeared later that both respondent carriers had honored the claims prior to the filing of the complaint and had satisfied the claims in Brazil. In No. 82-53, respondent Netumar Lines informed the Secretary's office eight days after service of the complaint that it had issued correction notices and would corroborate the fact that it had paid the claims in Brazil. On December 1, 1982, Netumar furnished corroboration showing payments in Brazil at various times during 1980 and 1981 in satisfaction of the claims. Accordingly, Netumar requested that the complaint be dismissed as having been satisfied, which request complainant has not opposed. In No. 82-51, respondent Moore McCormack filed no answer to the complaint although I granted additional time for it to do so on my own initiative in case it had a plausible explanation for its failure to file its answer.[2] It later developed that Moore McCormack filed no answer because it had, like Netumar, honored the claims apparently before the complaint was filed, a fact as to which complainant's New York counsel were unaware at the time of filing the complaint. Accordingly, on learning of this fact, complainant's counsel advised that the complaint had been satisfied and requested an order granting withdrawal of the complaint.[3]

Rule 93 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.93, states that "[s]atisfied complaints will be dismissed in the discretion of the Commission." The rule usually comes into play when a complaint which was not satisfied before filing is satisfied after filing. In the instant case it seems that the two complaints were improvidently filed because of a lack of communication from Brazil which caused

[2] See my ruling in No. 82-51, served November 30, 1982. At the time I issued this ruling I was not aware that the claims had been paid in Brazil before the complaint was filed. This fact probably explains why respondent Moore McCormack felt no need to file an answer and relied instead on complainant to advise me that the complaint had been satisfied.

[3] See letter addressed to me from complainant's counsel in No. 82-51, dated December 7, 1982. Complainant's counsel (Mr. Kirsch) has since orally advised that the complaints in both cases had indeed been satisfied in Brazil before the complaints were filed but that the events in Brazil had not been communicated to New York counsel prior to the filing of the complaints. I requested counsel to confirm this advice in writing for the record and was advised that a confirming letter was mailed from New York on January 24, 1983. I have deferred ruling on the requests for dismissal which were originally submitted in early December of 1982 because of the pendency of a third complaint (since dismissed) apparently involving the same project, this time filed against an agent of a third carrier known as Lloyd Brasileiro in Docket No. 82-55, and for other reasons relating to the statute of limitations in section 22 and arithmetic problems. However, since I have discovered that the complaints were satisfied before they were even filed, further pursuit of such matters seems unnecessary. Moreover, dismissal of these two complaints does not prejudice a respondent in any other case any more than settlements can be used as evidence of violations of law. Cf. *Broadway & Ninety-Sixth St. Realty Corp. v. Loew's, Inc.*, 23 F.R.D. 9 (S.D.N.Y. 1958); Annotation: 3 A.L.R. Fed. 569, 584-586 (1970). See also *Organic Chemicals v. Atlantrafik Express*, 21 F.M.C. 1082 (1979) (settlement by shipper with one carrier did not determine merits of case against the other carrier); Federal Rule of Evidence 408, 28 U.S.C.A. (evidence of offer of compromise or offer to pay not admissible to prove validity of claim).

complainant's New York counsel to believe that the claims had not been honored in Brazil.

Although there may be occasions when a complainant's rights to withdraw a complaint voluntarily and terminate litigation may not be absolute as, for example, when respondent's rights are thereby adversely affected or when a proceeding has progressed into late stages and a decision on the merits is warranted,[4] such is not the case here. Nor do the present cases involve settlement agreements which the Commission treats somewhat differently, requiring certain supporting statements of *bona fides* and inability to acquire facts, such as those present in cases like *Organic Chemicals v. Atlanttrafik Express Service*, 18 S.R.R. 1536a (1979). Nor are these cases even similar to those in which complaints are satisfied in full rather than settled but which were not satisfied when the complaints were initially filed. See, e.g., *Ingersoll Rand Co. v. Waterman Steamship Corporation*, 21 S.R.R. 1372 (ALJ 1982); Docket No. 81-52, 81-53, *Abbott Hospitals, Inc. v. PRMSA, et al.*, 24 F.M.C. 1055 (1982).

The present cases, as noted, were apparently filed under a misunderstanding which has now been corrected and the parties desire the complaints to be dismissed. I see no reason to compound the initial misunderstanding with technical burdens and requirements and see nothing in the record thus far presented to me to cause me to question the propriety of the decision of the two respondents that these particular claims had merit.[5]

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[4] For a discussion of such cases, see 9 Wright and Miller, *Federal Practice and Procedure*, § 2364, pp. 165-172. Of course, if the complainant seeks dismissal with prejudice, it has been held that courts must grant the requests since a complainant cannot be forced to go to trial if complainant believes it has no valid case. 9 Wright and Miller, cited above, p. 163.

[5] Thus, in the normal case of a satisfaction, Rule 93 would require sworn statements giving detailed information as to the satisfaction and promises to make like adjustments with other persons similarly situated. However, the present cases involve unique project shipments to the shipper's steel mills in Brazil, no other shippers are involved and, as noted, the shipper's claims had been paid in Brazil before the complaints were filed. Moreover, the Commission has recently encouraged carriers to handle meritorious claims without involving the Commission needlessly and in this regard has stated that "[i]ndeed, the Commission has utmost confidence in carriers' ability to resolve overcharge claims satisfactorily. . . ." Docket No. 81-51, *Time Limit for Filing Overcharge Claims*, Order on Reconsideration, January 5, 1983, p. 7. Had it not been for a misunderstanding, these complaints would never have been filed and both carriers' decisions to honor the claims would not have been questioned. Finally, in Docket Nos. 81-52, 81-53, *Abbott Hospitals, Inc. v. PRMSA, et al.*, cited above, Chief Judge Cograve observed that fulfillment of all the literal requirements of Rule 93 was unnecessarily burdensome in that case and that the Commission could examine records required to be kept available if the Commission felt that a carrier's decision to satisfy a complaint was improper. Such records are available in the present record if the Commission is concerned but, as noted, the claims had been honored in Brazil before the complaints were filed, they do not appear to be frivolous, and the Commission has expressed confidence in carriers' judgments when they deal with overcharge claims.

Accordingly, both complaints are dismissed.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-55
COMPANHIA SIDERURGICA NACIONAL
(BRAZILIAN NATIONAL STEEL CO.)

v.

LLOYD BRASILEIRO

NOTICE

March 4, 1983

Notice is given that no appeal has been taken to the January 24, 1983, dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-55
COMPANHIA SIDERURGICA NACIONAL
(BRAZILIAN NATIONAL STEEL CO.)

v.

LLOYD BRASILEIRO

COMPLAINT DISMISSED

Finalized March 4, 1983

This is a proceeding begun by the filing of a complaint with the Commission on November 29, 1982. Complainant, Companhia Siderurgica Nacional (Brazilian National Steel Co.), alleged that respondent Norton, Lilly & Co., Inc. (which apparently is an agent for a carrier known as Lloyd Brasileiro), had engaged in transportation between New York and Rio de Janeiro and had overcharged complainant on a number of shipments of machinery, parts, and other materials carried on respondent's vessels to Brazil contrary to the governing tariff. If so, such conduct would constitute a violation of section 18(b)(3) of the Shipping Act, 1916.

Since the complaint was served on December 1, 1982, an answer was due to be filed within 20 days, i.e., on or before December 21, 1982, as provided by Rule 64, 46 C.F.R. 502.64. Instead of an answer by the respondent named in the complaint, Norton, Lilly, a motion to dismiss the complaint was filed by attorneys for Lloyd Brasileiro on December 16, 1982, the attorneys entering a special appearance so as to limit their participation to the issue of the Commission's jurisdiction over the agent, Norton, Lilly. In its motion Lloyd contended that the complaint did not name Lloyd as a respondent and that it was served on Norton, Lilly, which is only an agent for carriers and does not carry cargo, publish its own tariff, or belong to conference agreements. Accordingly, Lloyd moved to dismiss the complaint on the ground that the Commission lacks jurisdiction over agents as opposed to common carriers and other persons subject to the Act.

Complainant filed no reply to Lloyd's motion. Instead, by letter dated January 13, 1983, complainant advised that it was withdrawing the complaint and submitting a new complaint in the interest of expedi-

tion rather than engaging in legal debates. Complainant also stated that counsel for Lloyd agreed to this procedure.[1]

The motion to dismiss filed by Lloyd raised a number of interesting legal questions pertaining to service of defective complaints and notice as well as the question of the Commission's jurisdiction over agents. In an earlier ruling, I discussed these problems in relation to the peculiar facts of the case and advised complainant that failure to reply to the motion to dismiss could result in dismissal of the complaint with prejudice. (See Order to Show Cause Why Complaint Should Not be Dismissed, January 10, 1983.) Complainant, as noted above, however, probably before receipt of the ruling, had decided not to spend time litigating the variety of legal questions presented by the motion and has preferred simply to withdraw the complaint and file a new complaint presumably in the hope of removing the legal problems presented by the original complaint. (In fact, a new complaint, this time naming Lloyd Brasileiro as the carrier-respondent, was filed on January 14, 1983, and served on January 18, 1983, in Docket No. 83-6 (25 F.M.C. 663 (1983)).

I am aware of no authority which does not permit a complainant to withdraw its complaint under the existing circumstances. Under the comparable federal rules of civil procedure, specifically, Rule 41(a)(1) 28 U.S.C.A., a plaintiff may have its complaint dismissed at any time before service of the adverse party's answer or motion for summary judgment without permission of the court and can do so merely by filing a timely notice of dismissal. Furthermore, unless otherwise stated in the plaintiff's notice, the dismissal is without prejudice. Rule 41(a)(1). Indeed, it has been held that a court has no authority to deny such dismissal or attach conditions, determine merits, or dismiss with prejudice provided that the plaintiff serves its notice before an answer or motion for summary judgment is filed. See, e.g., *Williams v. Ezell*, 531 F.2d 1261, 1263-1264 (5th Cir. 1976); *American Cyanamid Company v. McGhee*, 317 F.2d 295, 297 (5th Cir. 1963); *D.C. Electronics, Inc. v. Nartron Corp.*, 511 F.2d 294, 296-298 (6th Cir. 1975).

In the instant case complainant has, in effect, served a notice of withdrawal before an answer or motion for summary judgment has been filed.[2] There is no Commission rule of procedure identical to

[1] On January 17, 1983, counsel for Lloyd clarified its position. Counsel stated that it was Lloyd's position that Lloyd would not oppose dismissal of the complaint and that complainant could withdraw its complaint without the consent of Lloyd because Lloyd was not named as a respondent and was not served in the proceeding. (See letter of that date addressed to me from Peter J. King.)

[2] The filing of a motion to dismiss is not considered to be the same thing as filing an answer or motion for summary judgment. Therefore, under Federal Rule 41(a), the complainant would still possess the absolute right to withdraw its complaint. See 9 Wright and Miller, *Federal Practice and Procedure*, § 2363, p. 155. There is some authority which holds that a plaintiff loses the absolute right to withdraw its complaint if the merits of a controversy have in fact been reached without regard to the

Continued

federal rule 41(a).[3] In such circumstances the Commission has stated that it will follow the federal rules. See Docket No. 78-51, *Agreement No. 10394*, Order, April 19, 1979, p. 4, unreported but cited in *Rohm & Haas Co. v. Italian Line*, 24 F.M.C. 429, 431 n. 8, where the Commission stated:

> Where the Commission's Rules are not dispositive of a question of procedure, the Commission normally will look to the rules and practices applicable in civil proceedings in the District Courts of the United States.

Since complainant wishes to withdraw its complaint in this proceeding rather than argue over the matters raised in Lloyd's motion to dismiss, it has a right to do so. Accordingly, the complaint is dismissed and since no party has mentioned withdrawal with prejudice, under customary rules, the dismissal is without prejudice.[4]

(S) NORMAN D. KLINE
Administrative Law Judge

filing of answers or motions for summary judgment. 9 Wright and Miller, cited above, pp. 156-158. Under such authority it is possible that complainant's right to dismissal is no longer absolute but has become subject to approval of the Commission. Even if so, however, Lloyd, which is not even a party to the proceeding, according to its own contentions, has not objected to dismissal of the complaint and the named respondent, Norton, Lilly, has not filed anything.

[3] The closest Commission rule appears to be Rule 93, 46 C.F.R. 502.93. Rule 93 deals with dismissal of complaints which have been satisfied and states that such complaints "will be dismissed in the discretion of the Commission."

[4] In my earlier ruling of January 10, 1983, cited above, I discussed various legal matters which the motion to dismiss and the facts presented such as the peculiar way in which the complaint was served and in which Lloyd Brasileiro, which was not named as a respondent in the complaint, became involved in the proceeding and some cases dealing with service of defective complaints and corrections of such complaints, effect of the two-year statute of limitations (section 22 of the Act), lack of Commission jurisdiction over agents, etc. Since complainant has stated that it does not wish to argue these matters but prefers simply to withdraw the complaint and file a new one, I do not reach the merits of Lloyd's various contentions. In case any problem arises because of the dismissal without prejudice, however, I think I should point out that the courts hold that a dismissal without prejudice does not toll the running of the statute of limitations and the earlier complaint is treated as never having been filed for purposes of that statute. See *Moore v. St. Louis Music Supply Co., Inc.*, 539 F.2d 1191, 1194 (8th Cir. 1976); *Hall v. The Kroger Baking Company*, 520 F.2d 1204, 1205 (6th Cir. 1975); *Cleveland v. Douglas Aircraft Company*, 509 F.2d 1027, 1030 (9th Cir. 1975); 9 Wright and Miller, cited above, pp. 186-187.

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-47
AGREEMENT NO. 10266 - AGREEMENT BETWEEN INTERCONTINENTAL TRANSPORT B.V. AND COMPAGNIE GENERALE MARITIME

ORDER GRANTING MOTION TO DISMISS

March 25, 1983

The Commission, pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. § 814), instituted this proceeding by Order served October 6, 1982. That Order directed the parties to Agreement No. 10266, as amended (Agreement), Intercontinental Transport B.V. (ICT) and Compagnie Generale Maritime (CGM) (Proponents), to show cause why their Agreement should not be modified to clarify the limits of its container cargo carrying authority. The Commission's Order to Show Cause limited the proceeding to the submissions of affidavits of fact and memoranda of law.

Proponents have filed a memorandum of law and the affidavit of an ICT official. Proponents have also filed a motion to dismiss the proceeding and offered a proposed amendment to Agreement No. 10266 which would allegedly remove the controversy at issue.[1] Reply memoranda and responses to Respondents' motion to dismiss have been submitted by Sea-Land Service, Inc. and the Commission's Bureau of Hearings and Field Operations (Hearing Counsel). Lykes Bros. Steamship Co., Inc. filed only a reply memorandum and United States Lines (USL) responded only to the dismissal request.

BACKGROUND

Agreement No. 10266-2 was conditionally approved by the Commission in its Order Partially Adopting Initial Decision issued in Docket No. 77-7, *Agreement No. 9929-2, et al. and Agreement Nos. 10266, et al.*, 21 F.M.C. 1030 (1979).[2] In that Order the Commission concluded, *inter alia*, that certain modifications, beyond those ordered by the Administrative Law Judge in his Initial Decision, were required before Agreement No. 10266-2 could be approved. Included among those modifications were: (1) a change in the title of the Agreement from "Joint Marketing Agreement" to "Joint Service Agreement"; and (2) an 800

[1] The amendment itself has not been filed and is not before the Commission.

[2] Agreement No. 10266 and 10266-1 were withdrawn during the course of the proceedings in Docket No. 77-7 and replaced by Agreement No. 10266-2.

TEU per week limitation on the carriage of containerized cargo. The modified version of Agreement No. 10266-2, required to be submitted to the Commission, was to be designated "FMC Agreement No. 10266-3." Agreement No. 10266-3 was filed within the prescribed time and approved on December 28, 1979.

Upon petition for review filed by Sea-Land, a protestant in Docket No. 77-7, the Court of Appeals for the District of Columbia Circuit found, *inter alia*, that the TEU limitation imposed by the Commission *appeared* "to have expanded Proponents' authority and, as such, should have been the subject of prior notice and opportunity for comment." *Sea-Land Service, Inc. v. F.M.C.*, 653 F.2d 544 (D.C. Cir. 1981). The Court recognized the Commission's statutory authority to modify proposed agreements, but determined that modifications which enlarge upon the anticompetitive authority contemplated by the parties to an agreement must be preceded by notice and hearing "through which interested parties can air their views as to the competitive implications of an agreement and the Commission can gain sufficient information to make a reasoned decision as to the competitive impact of that agreement." 653 F.2d 552. After noting that the actual "practical implications" of the TEU provision specifically at issue there "are not readily apparent," the Court remanded the proceeding in Docket No. 77-7 to the Commission for further hearings on that provision.

By Order on Remand served October 9, 1981, the Commission reopened the proceeding in Docket No. 77-7 and directed the parties to that proceeding to address, *inter alia*:

> Whether Agreement No. 10266 should include a provision limiting the amount of containerized cargo which may be carried by ICT and CGM under the Agreement should Agreement No. 10374 [3] be terminated, and, if so, the proper level of such a limitation.

The purpose of the Order on Remand was to ascertain the positions of the parties on the issues remanded by the Court and to determine the need for, and scope of, any further formal proceedings. Proponents, Sea-Land, Lykes, USL and Hearing Counsel responded to the order. Subsequently, the Commission, based on those responses and pursuant to the Court's remand, instituted this proceeding to limit Proponents' container cargo carrying authority under Agreement No. 10266 apart from Agreement No. 10374.

DISCUSSION

The Commission, after consideration of the record in this proceeding, has determined to grant Proponents' Motion to Dismiss on the basis of

[3] Agreement No. 10374, a container agreement between ICT, CGM and Hapag Lloyd A/G, was approved at the same time as Agreement No. 10266-2.

the modification to Agreement No. 10266, as amended, which they proposed to submit. That modification would delete the 800 TEU provision from Agreement No. 10266 and further modify that Agreement to require 120 days' advance notice of any termination of Agreement No. 10374 (except in cases of *force majeure*) at which time Proponents would propose an amendment to Agreement No. 10266 to limit the number of containers the parties may carry in the trade. During any interim between the termination of Agreement No. 10374 and a Commission determination on the amendment establishing the number of containers to be carried, Proponents would be authorized, under the proposal, to continue to operate their service subject to an 800 TEU per week limitation.[4]

We cannot say whether future events will justify the need for authority to operate if Agreement No. 10374 is terminated but Proponents have not demonstrated that there is any present need for authority in Agreement No. 10266 to operate apart from Agreement No. 10374. The Commission believes that the elimination of the 800 TEU provision in Agreement No. 10266 will clarify that the Agreement does not authorize Proponents to offer container service apart from Agreement No. 10374 for so long as Agreement No. 10374 continues in effect.

In the event that Agreement No. 10374 is terminated, the provision suggested by Proponents should provide adequate protection from any interruption in service. None of the other parties to the proceeding object to these contingency provisions. The proposed amendment offered by Proponents should not only serve to remove the controversy among the parties to the proceeding but also to satisfy the Court's concern regarding the Commission's enlargement of Proponents' authority under Agreement No. 10266. The Commission will therefore accept Proponents' offered amendment to Agreement No. 10266 and dismiss this proceeding on the basis thereof. The acceptance of this amendment, when actually filed, however, is without prejudice to the Commission's right and obligations under section 15 of the Act, to modify those provisions at any time, after notice and hearing, to accommodate changed conditions in the trade.

THEREFORE, IT IS ORDERED, That this proceeding is dismissed 30 days from the date of this Order if, within that time, Proponents file with the Secretary of the Commission an amendment revising Articles 1 and 9 of Agreement No. 10266 to read as follows:

> 1. Vessels and Sailings. The parties shall undertake the joint marketing of cargo space available on the container, break-

[4] Proponents' concern appears to be that if Agreement No. 10374 were cancelled, they might become embroiled in a lengthy proceeding in order to obtain authority to carry container cargo under Agreement No. 10266, apart from Agreement No. 10374. This, it is feared, would result in a lapse of service.

bulk, or combination breakbulk/containerships operated by or available to the parties in the trade described above, provided, that, the parties shall not 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 least one U.S. port not otherwise receiving direct service from the parties.

9. Notice of Termination. The parties shall notify the Federal Maritime Commission of termination of FMC Agreement No. 10374 (or some similar agreement specifying their container carryings in the trade encompassed by this Agreement) 120 days prior to the effective date of such termination, provided, however, that the parties are excused from this notice requirement only to the extent that such termination is caused and such notice is precluded by reasons of force majeure, which, as used herein, shall mean and include strikes, accidents, lockouts, fire, marine disaster, acts of God or public enemy, embargoes, riots, civil commotions, laws, government request or any other causes beyond the control of either party. If such termination is due to reasons of force majeure, the parties shall give notice of termination as promptly as possible considering such force majeure. In the event that Agreement No. 10374 (or some similar agreement) is terminated within 120 days of the date it would expire by its own terms, the parties shall notify the Federal Maritime Commission thereof, provided that such notice shall not extend the effective terms of Agreement No. 10374 (or some similar agreement) beyond its scheduled expiration. The parties shall include in any such notice of termination an amendment to this agreement, based on trade conditions, setting forth the number of containers the parties may carry in this trade, provided, however, that nothing in this Agreement shall be construed to prevent the parties from carrying up to 800 TEU's per week, averaged quarterly, in each direction of containerized cargo during the pendency of consideration by the Federal Maritime Commission of any such amendment.

FURTHER, IT IS ORDERED, That the amendment to Agreement No. 10266 set forth above will stand approved under section 15 of the Shipping Act, 1916, on the date it is actually received by the Secretary.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-6
COMPANHIA SIDERURGICA NACIONAL
(BRAZILIAN NATIONAL STEEL CO.)

v.

COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO

NOTICE

March 28, 1983

Notice is given that no appeal has been taken to the February 18, 1983, dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-6
COMPANHIA SIDERURGICA NACIONAL
(BRAZILIAN NATIONAL STEEL CO.)

v.

COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO

COMPLAINT DISMISSED

March 28, 1983

This is a proceeding begun by the filing of a complaint with the Commission on January 14, 1983. Complainant, a Brazilian shipper, alleged that it had been overcharged on a number of shipments of machinery and parts destined for a project involving expansion of complainant's steel mills in Brazil. More specifically, complainant alleged that respondent, Companhia de Navegacao Lloyd Brasileiro, a common carrier by water subject to the provisions of the Shipping Act, 1916, had failed to accord complainant a 20-percent discount which was published in respondent's tariff for this project. Therefore such conduct would violate section 18(b)(3) of the Act. In support of its complaint, complainant submitted various documents consisting of relevant tariff pages, bills of lading for each shipment, commercial invoices, and an itemized table of the alleged overcharges.

Since the complaint was served on January 18, 1983, respondent was permitted to file an answer within 20 days, as provided by Rule 64, 46 C.F.R. 502.64. However, following service of the complaint, respondent determined that the claims were generally valid and, with some modifications, decided that the complaint merited satisfaction. Therefore, instead of filing an answer to the complaint, respondent, joined by complainant, filed a letter explaining that respondent wished to satisfy the complaint under Rule 93, 46 C.F.R. 502.93. In the letter, the parties stated that there was no dispute of material facts between the parties, that the shipments, with one exception, were carried by respondent, that freight was paid by complainant, that the shipments were destined for the project in question for which respondent's tariff provided the discount as complainant had alleged, and that the failure to grant the discount to complainant had occurred because complainant's freight forwarder had neglected to notate the project rate agreement number on the relevant bills of lading.

DISCUSSION AND CONCLUSIONS

This appears to be the last of a series of complaints which complainant has filed involving alleged overcharges on shipments to complainant's project in Brazil. Previously, complainant had filed complaints alleging similar overcharges against two other carriers. (See Docket No. 82-51, *Companhia Siderurgica Nacional (Brazilian National Steel Co.) v. Moore McCormack Lines, Inc.* and Docket No. 82-53, *Companhia Siderurgica Nacional (Brazilian National Steel Co.) v. Netumar Lines.*) In those two previous cases, the complaints were also satisfied by both respondents. (See 25 F.M.C. 650 (1983.)) [1]

Because the parties have submitted a joint statement explaining that there is no dispute regarding the merits of the claims and that respondent therefore decided that it wished to satisfy the complaint, the joint request for approval of the satisfaction and dismissal of the complaint is governed by the provisions of Rule 93, 46 C.F.R. 502.93. That rule, in substance, provides that the Commission may dismiss satisfied complaints in its discretion upon the filing of a verified statement, which may be by letter, explaining how the complaint has been satisfied and that similar adjustments will be made by respondent with other persons similarly situated. The parties have filed such a statement and have furnished proof of payment of the satisfaction.[2] The parties' request for approval of the satisfaction and for dismissal of the complaint would therefore appear to be valid. See, e.g., *Ingersoll Rand Co. v. Waterman Steamship Corporation*, 21 S.R.R. 1372 (ALJ 1982); Docket Nos. 81-52, 81-53, *Abbott Hospitals, Inc. v. PRMSA, et al.*, 24 F.M.C. 1055 (1982); Docket Nos. 82-51 and 82-53, cited above.

The only matter requiring further explanation concerns the amount of satisfaction, which is $17,606 already paid by respondent, instead of the amount originally demanded in the complaint, $19,392.32, plus interest. However, as the record shows, that amount is justified by the fact that of the 22 shipments and bills of lading mentioned in the complaint, one was apparently included by mistake since the bill of lading was not for a Lloyd vessel and three others appear to be so old as to fall outside the two-year period of limitations set forth in section 22 of the Act. Deduction of the alleged overcharges on these four

[1] One other complaint was filed in this series but it named a carrier's agent, Norton Lilly & Co., Inc., as respondent instead of the carrier, Lloyd Brasileiro. This complaint ran into hot water as a result of the naming of the agent and was voluntarily withdrawn by complainant in favor of the present complaint. See Docket No. 82-55, *Companhia Siderurgica Nacional (Brazilian National Steel Co.) v. Lloyd Brasileiro*, 25 F.M.C. 655 (1983).

[2] Rule 93 also requires the submission of data on a special form "insofar as such said form is applicable." The form is not published in the rule. However, the data apparently required concerns specific details about each shipment together with an itemized list of overcharges. See Docket Nos. 81-52, 81-53, *Abbott Hospitals, Inc. v. PRMSA et al.*, 24 F.M.C. 1055 (1982). Such data were submitted with the complaint in this case and they show, together with the other materials submitted in support of the complaint, that the various claims generally appear to have merit.

shipments leaves a balance of $17,606, as satisfaction of the apparently valid and compensable claims.[3]

The record in this case shows that respondent has satisfied a complaint, which gave the appearance of validity generally, in a reasonable fashion and that the parties have complied with Rule 93 in seeking dismissal of the complaint. The satisfaction appears to corroborate the Commission's recent expression of confidence in carriers' abilities to deal with overcharge claims without needless Commission involvement. See Docket No. 81-51, *Time Limit for Filing Overcharge Claims*, Order on Reconsideration, January 5, 1983, 25 F.M.C. 554, 557 (". . . the Commission has utmost confidence in carriers' ability to resolve overcharge claims satisfactorily . . ."). Accordingly, the complaint is dismissed as requested.

(S) NORMAN D. KLINE
Administrative Law Judge

[3] The amount of alleged overcharges on the four bills of lading which are of doubtful validity totals $1,786.32. (See table attached to complaint, bills of lading Nos. 60, 23, 58, and 77.) This sum, subtracted from the original total of $19,392.32, leaves $17,606. The three Lloyd bills of lading which appear to fall outside the two-year period are Nos. 60, 58, and 77, and are dated in November and December of 1980. This complaint was filed on January 14, 1983. Thus, to establish a valid claim that could be subject to an award of reparation under section 22 of the Act, complainant would have had to establish that date of payment on these bills occurred on or after January 14, 1981. See *TDK Electronic Co., Ltd. v. Japan Lines, Ltd.*, 22 F.M.C. 769, 770 n. 4 (1980) (cause of action accrues at time of shipment or payment of freight, whichever is later). Complainant has not shown that the three bills were paid within the requisite time period. The Commission has held that the right to reparation as well as the remedy vanishes once the two-year statute has run. See *Aleutian Homes, Inc. v. Coastwise Line*, 5 F.M.B. 602, 612 (1959). Hence, if approval of the proffered satisfaction arrangement required a showing that every claim could be valid as a matter of law, that requirement has become irrelevant since the parties have dropped those claims affected by the statute from the list. In Docket Nos. 81-52, 81-53, Dismissal of Proceedings, cited above, there were also substantial downward adjustments to the original claims which were approved as part of the satisfaction arrangement.

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-45
CUTTERS EXCHANGE, INC.

v.

CARGO INTERNATIONAL INC., ET AL.

NOTICE

March 31, 1983

Notice is given that no appeal has been taken to the February 22, 1983, dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-45
CUTTERS EXCHANGE, INC.

v.

CARGO INTERNATIONAL INC., ET AL.

COMPLAINT DISMISSED

Finalized March 31, 1983

This proceeding began with the filing of a complaint on September 10, 1982. Complainant, a shipper known as Cutters Exchange, Inc., located in Nashville, Tennessee, is seeking the sum of $3,922.33, which it alleges it paid to respondent, Cargo International, Inc., which had operated in Tennessee as a freight forwarder licensed by the Commission. Complainant alleges that Cargo International failed to pay this money to an ocean carrier for payment of transportation services and that complainant has not been able to recover this money despite making demands upon the three individual respondents who were officers, shareholders, or directors of Cargo International. Complainant alleges that the three individual respondents conspired to violate section 44 of the Shipping Act, 1916, by representing to the Commission that two of the individuals, Mr. Adams and Mrs. Harrison, would be personally responsible for any obligations of Cargo International when Cargo International lost its surety bond and that Cargo International was merely a sham corporation which each of the individual respondents had utilized to conduct his or her business transactions.[1]

The proceeding experienced considerable delay because of difficulty in obtaining correct addresses of certain individual respondents and obtaining service on the corporate respondent. The complaint had to be served on one or more respondents on September 14, October 13, December 1, and December 30, 1982, until the process was finally successful. However, only one respondent, Mr. Carl E. Adams, Jr.,

[1] In a letter dated November 26, 1982, complainant's counsel averred that two individual respondents, Mr. Adams and Mrs. Harrison, made themselves sureties for Cargo International, Inc., and that the Commission would have jurisdiction over these persons as sureties. Counsel also averred that even if they had not become sureties, they had made a contract with the Commission and Cargo International, Inc. so that complainant became a third-party beneficiary to that contract. In the same letter counsel also objected to certain observations I had made concerning the complex nature of the Shipping Act theory he was employing and suggested my recusal. In view of the present motion seeking dismissal, it is unnecessary for me to rule upon the matter.

filed an answer to the complaint, and Mr. Adams denied most of the material allegations in the complaint.

When service of the complaint was finally completed, the proceeding became ripe for establishment of a prehearing schedule under customary procedure. However, before any action could be taken in that direction, complainant filed a Motion for Voluntary Dismissal on January 31, 1983. In the motion, complainant moves for leave to dismiss its complaint without prejudice so that complainant can refile its claim in another forum. Complainant also advises that it has filed a similar action in the Chancery Court for Davidson County, Tennessee, in the interest of judicial economy and wishes to consolidate the present action in the Tennessee court. No respondent has filed a reply to the motion.

DISCUSSION AND CONCLUSIONS

There is no specific Commission rule of practice and procedure which governs motions by complainants for voluntary dismissal of their complaints. The closest rule seems to be Rule 93, 46 C.F.R. 502.93, which deals with dismissal of complaints which have been satisfied and states that such complaints "will be dismissed in the discretion of the Commission." Otherwise the motion appears to fall under Rule 73, 46 C.F.R. 502.73, the rule governing motions generally, and Rule 147, 46 C.F.R. 502.147, the rule setting forth the functions and powers of presiding officers including the power to "hear and rule upon motions."

In practice, the desire of a complainant to withdraw its complaint and discontinue bearing the cost and burden of litigation has been honored by presiding officers on the ground that the Commission cannot very well compel a complainant to put on a case but can, if it chooses, investigate any matter on its own authority under section 22(b) of the Shipping Act, 1916, 46 U.S.C. section 821(b). However, if problems arise in dealing with complainants' requests to withdraw their complaints, the Commission can draw guidance from the rules of civil procedure applicable in federal district courts as the Commission has done in the past. *See, e.g. Rohm & Haas Co. v. Italian Line*, 24 F.M.C. 429, 431 n. 8.[2]

The comparable federal rule concerning voluntary dismissal is Rule 41(a), 28 U.S.C.A. Under that rule, a plaintiff has virtually an absolute right to withdraw its complaint before an answer or motion for summary judgment has been filed by a defendant merely by filing a notice of dismissal with the court. However, if an answer or a motion for

[2] In the case cited, the Commission referred to an earlier case in which the Commission had stated: Where the Commission's Rules are not dispositive of a question of procedure, the Commission normally will look to the rules and practices applicable to civil proceedings in the District Courts of the United States. Docket No. 78-51, *Agreement No. 10394*, Order, April 19, 1979, p. 4, (unreported).

summary judgment has been filed, dismissal is subject to such terms and conditions as the court deems proper. If an answer has been filed, plaintiff's motion for voluntary dismissal may still be granted without prejudice unless the court finds that defendant's rights are seriously prejudiced or defendant has expended time and money on the case for which some reimbursement is warranted or other peculiar circumstances exist justifying the imposition of terms and conditions to protect defendants' rights. *See* 9 Wright and Miller, *Federal Practice and Procedure*, section 2364; 2366; *Therrien v. New England Tel. & Tel. Co.*, 102 F. Supp. 350 (D.C. N.H. 1951); *Colonial Oil Co. v. American Oil Co.*, 3 F.R.D. 29 (D.S.C. 1943). Under the cited rule, however, the fact that a plaintiff may bring a new action in the same or another court, may gain a tactical advantage, or may avoid an adverse statute of limitations does not preclude a plaintiff from having its complaint dismissed without prejudice. Such facts are not considered by the courts to be that type of prejudice or harm that warrants denial of plaintiff's motion. *See, e.g., Le Compte v. Mr. Chip, Inc.*, 528 F. 2d 601, 604 (5th Cir. 1976); *Holiday Queen Land Corporation v. Baker*, 489 F. 2d 1031 (5th Cir. 1974); *Klar v. Firestone Tire & Rubber Co.*, 14 F.R.D. 176 (S.D.N.Y. 1953). There are, moreover, numerous cases in which federal courts have permitted voluntary dismissals of complaints so that plaintiffs could file their cases in state courts. *See, e.g., Grivas v. Parmalee Transp. Co.*, 207 F. 2d 334 (7th Cir. 1953); *Burgess v. Atlantic Coast Line R. Co.*, 39 F.R.D. 588 (D.C.S.C. 1966); *Eaddy v. Little*, 234 F. Supp. 377 (D.C.S.C. 1964); cases collected in 9 Wright and Miller, *Federal Practice and Procedures*, cited above, section 2364, p. 168 n. 75.

As the court stated in *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 15 F.R.D. 14, 18 (S.D.N.Y. 1953):

> But the mere fact that a party will be faced with another litigation does not of itself constitute prejudice; otherwise an initial error of judgment on the part of his counsel may preclude a determination of a claim upon its facts and merits. Undue vexatiousness, undue burden to a litigant in presenting his defense or claim in another jurisdiction, excessive and duplicitous expense of a second litigation, the extent to which any judgment in the new action would be conclusive as to issues and parties as contrasted to a final determination in the pending suit, the extent to which the current suit has progressed, are some of the factors to be considered in deciding whether prejudice will result to the opposing party.

In the instant case complainant has advised that it has already filed a complaint in the Chancery Court for Davidson County, Tennessee, against the various respondents in this case in the interest of judicial economy and the interest of the litigants themselves. The fact that all parties are located in the Nashville, Tennessee or surrounding area, the

difficulty of service of the complaint experienced by the Commission's Secretary in this case, the lack of answer by three of the individual respondents, the complex nature of the case under the Shipping Act theory of recovery which probably would require costly hearings and briefing compared to the relatively small amount of the claim, all confirm complainant's determination that litigation in a state court would be more economical and convenient. The case essentially involves a claim for money which complainant alleges was unlawfully taken from complainant and misappropriated and has not progressed very far in this forum. Moreover, it would appear easier for all parties to make their claims and defenses before a state court in Tennessee, and one would expect that a judgment by that court having all the parties conveniently before it would be conclusive. If one applies the factors set forth by the court in *Harvey Aluminum, Inc. v. American Cyanamid Co.*, cited above, it appears obvious that ample grounds exist to grant complainant's request for voluntary dismissal of the complaint and, as provided by Rule 41(a)(2), the dismissal may be without prejudice, as complainant requests.

Accordingly, the complaint is dismissed without prejudice.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-29
PHILLIPS-PARR, INC.

v.

EMPRESA LINEAS MARITIMAS ARGENTINAS, S.A.

NOTICE

April 8, 1983

Notice is given that no exceptions have been filed to the February 28, 1983, 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, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-29
PHILLIPS-PARR, INC.

v.

EMPRESA LINEAS MARITIMAS ARGENTINAS, S.A.

Complainant, a carrier's agent, being sued by respondent E.L.M.A. in federal court for freight allegedly due in connection with a shipment of Chilean hardboard which E.L.M.A. carried from Tampico, Mexico to New Orleans to complete a voyage begun by complainant's principal in Chile, alleges that E.L.M.A. operated as a common carrier between Tampico and New Orleans without a tariff, violating sections 18(b), 16, and 17 of the Shipping Act, 1916. Complainant seeks a cease and desist order preventing E.L.M.A. from pursuing the court action and reparation for costs of defending the court suit as well as any freight for which complainant may be found liable to E.L.M.A. Respondent E.L.M.A. claims complainant is merely trying to avoid payment under a guaranty it executed for E.L.M.A.'s benefit. Complainant obtained a stay in court to allow the Commission to determine the Shipping Act issues. It is *held*:

(1) That the evidence of record utterly fails to show that E.L.M.A. operated as a common carrier by water between Mexican and U.S. Gulf ports before, during, and after the time E.L.M.A. lifted the Chilean hardboard out of Tampico, there being no evidence of regular routes, advertising, general holding out, etc. The record rather shows that E.L.M.A. carried the shipment out of Tampico as an isolated instance to enable the shipment to be delivered to New Orleans as originally intended.

(2) Since the record shows E.L.M.A. not to have operated as a common carrier in the relevant trade, the Commission lacks jurisdiction over the matter in question and the complaint must be dismissed, leaving the parties free to resume their litigation in the federal district court.

Edward S. Bagley for complainant.

David A. Brauner for respondent.

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

Finalized April 8, 1983

This proceeding began with the filing of a complaint on June 10, 1982. Complainant, Phillips-Parr, Inc., is an agent of a carrier known as Navimex Line and operates its business at the port of New Orleans, Louisiana. Allegedly Navimex had begun to carry a shipment of hardboard from Chile to New Orleans on June 29, 1979, but carried the

[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 C.F.R. 502.227).

shipment only as far as Tampico, Mexico when Navimex's charter on its ship expired. The shipment was thereafter placed on a vessel operated by another carrier, respondent Empresa Lineas Maritimas Argentinas, S.A. (E.L.M.A.) which carried it the remainder of the way to New Orleans under an E.L.M.A. bill of lading marked "prepaid" in Mexico allegedly under an E.L.M.A. tariff (No. 1 N.B. (F.M.C. No. 17)) which had been cancelled by the Commission on February 6, 1978. Allegedly E.L.M.A. delivered the cargo to the consignee, received payment of freight on the original Navimex bill of lading, and through E.L.M.A.'s agent, Strachan Shipping Company, Inc., made payment to Phillips-Parr, which remitted this money to Navimex. E.L.M.A. did this without notifying Phillips-Parr that any freight was due on the portion of the transportation between Tampico and New Orleans. However, on May 27, 1981, E.L.M.A. filed suit in the United States District Court for the Eastern District of Louisiana, seeking to recover freight allegedly due to E.L.M.A. on the Tampico to New Orleans leg, claiming that Phillips-Parr owed E.L.M.A. $16,186.86 in freight.[2] (Phillips-Parr's principal, Navimex, S.A., allegedly became insolvent and no longer served New Orleans.) On motion by Phillips-Parr, the district court stayed the suit on July 28, 1982, on the ground that the matter was within the primary jurisdiction of the Commission.

Phillips-Parr apparently because of its concern that it might suffer judgment against it in the court proceeding, in its complaint asks the Commission for "reparations for any amount which it may be adjudged liable to E.L.M.A.," together with costs, attorneys' fees and expenses incurred by it in defending against E.L.M.A.'s claims in court. Moreover, Phillips-Parr is asking the Commission to issue a cease and desist order against E.L.M.A. which would prevent E.L.M.A. from pursuing its action in the court seeking recovery of freight. Phillips-Parr alleges that it is entitled to such protection and compensation because E.L.M.A. is seeking to recover charges without having a tariff on file with the Commission, in violation of section 18(b)(1) of the Shipping Act, 1916, and in violation of sections 16 First and 17 of the Act.

In answer to the complaint, E.L.M.A. essentially admits that it carried the subject hardboard from Tampico to New Orleans under its own bill of lading, delivered it to the consignee named on the Navimex bill of lading, and remitted freight to Phillips-Parr as agent for Navimex. E.L.M.A. admits that its tariff had been cancelled but contends that it was not operating as a common carrier in the trade between Tampico, Mexico and New Orleans, a fact which would deprive the

[2] Actually, as some documents submitted in connection with discovery requests indicate, suit was begun by E.L.M.A. in a state court on May 11, 1981, and, upon motion of Phillips-Parr, was removed to the federal court on May 26 or 27, 1981. (See exhibit "E" attached to complainant's request for admissions, served July 28, 1982.)

Commission of jurisdiction over the subject matter of the proceeding. E.L.M.A. also contends that Phillips-Parr suffered no injury, that even if E.L.M.A. violated the Shipping Act, Phillips-Parr is not entitled to free transportation between Tampico and New Orleans, and finally, that Phillips-Parr did not file the complaint in good faith but is really collaterally attacking the court proceeding and attempting to avoid a guaranty it executed in order to obtain release of the cargo.

PREHEARING PROCEDURES AND DEVELOPMENT OF THE RECORD

The evidentiary record, as I note below, consists essentially of stipulated facts, an affidavit of an E.L.M.A. official, E.L.M.A. vessel manifests, bills of lading, answers to interrogatories, and assorted documents proffered with discovery requests. The parties agreed to develop the record in this fashion in lieu of conducting trial-type hearings in view of the nature of the central issue which concerns the question whether E.L.M.A. operated as a common carrier between Tampico, Mexico and New Orleans during the time of the shipment in question. Since determination of E.L.M.A.'s status depends upon a careful examination of its vessel operations, it was felt that examination of the manifests covering the vessel which was involved in the shipment in question as well as consideration of other evidence concerning E.L.M.A.'s holding out and service between the two ports would yield sufficient information on which its status could be determined. Because of the limited issue and size of the evidentiary record, furthermore, I ruled that no legal briefs need be filed. This procedure was adopted at a telephonic prehearing conference held on December 16, 1982, which itself was held to promote the interest of economy and reduce litigation costs. (See Notice of Schedule Established and Rulings Made at Prehearing Conference, December 17, 1982.) [3]

SUMMARY OF THE FACTS

As mentioned above, the record consists of a stipulation of facts, an affidavit of an E.L.M.A. official (Mr. Enrique Landa, General Delegate in the United States for E.L.M.A.), vessel manifests for voyage 22 of

[3] As a result of a series of prehearing rulings which I issued, the parties clarified their positions prior to the telephonic prehearing conference. (See Order to Show Cause why Complainant Should not be Dismissed Without Prejudice, September 23, 1982; Notice of Prehearing Conference; Ruling on Possible Dismissal of Complaint Deferred...November 24, 1982.) In response to my inquiries contained in these rulings, complainant explained that it had obtained a stay of the proceeding against it in the federal court to allow the Commission to determine the merits of its Shipping Act contentions and was seeking to recover injury resulting from costs of defending the suit brought by E.L.M.A. in court. Complainant also urged a speedy determination of its claim that E.L.M.A. had operated as a common carrier subject to Commission jurisdiction by means of documents, affidavits, answers to interrogatories, etc. E.L.M.A. explained its contention that Phillips-Parr was merely attempting to avoid payment of freight, that E.L.M.A. had merely engaged in a single shipping transaction, not common carriage between Tampico and New Orleans, and that the controversy should have remained with the court.

the *M/V Rio Neuquen*, answers to interrogatories, and assorted documents attached to discovery requests. Since the parties agree that it is necessary to concentrate on the jurisdictional issue concerning E.L.M.A.'s status when it handled the shipment of Chilean hardboard, the stipulation and evidence focus on E.L.M.A.'s operations on the critical voyage of the *M/V Rio Neuquen*. However, it is necessary to understand the background to the controversy so as to understand the context in which Phillips-Parr filed its complaint and why Phillips-Parr is asking the Commission to order E.L.M.A. to cease and desist from seeking to recover freight allegedly due and is seeking to recover certain costs arising out of Phillips-Parr's defense in the suit brought by E.L.M.A. in court. Therefore, the following summary is divided into two sections: first, a background and second, a detailed exploration of E.L.M.A.'s operations on voyage 22 of the *M/V Rio Neuquen*. It should be noted, however, that the background facts were not stipulated and were not fully proven in the traditional way although not necessarily disputed. They were, however, sworn to in the complaint, were supported to some extent by documents, were not necessarily disputed, and were the subject of a request for admissions. Since they are helpful for background purposes only and the decision hinges on the second section containing a detailed exploration of E.L.M.A.'s operations on voyage 22 of the *M/V Rio Neuquen*, I have made findings of fact as to these background facts although technically in some instances they rely upon documents attached to a request for admissions that E.L.M.A. did not specifically accept.[4]

[4] For purposes of making necessary background findings and findings regarding E.L.M.A.'s carrier operations on the critical voyage, I am admitting in evidence certain materials. These are: 1) a stipulation of facts and agreement of counsel signed by counsel for both parties (2 pp.); 2) an affidavit of Mr. Enrique Landa, General Delegate of E.L.M.A. (2 pp.); 3) manifests and summary sheets concerning voyage 22 of the *M/V Rio Neuquen* showing details of the voyage, including cargo carried between various South American, Mexican, and U.S. Gulf ports broken down by bills of lading; 4) discovery materials consisting of answers to interrogatories filed by E.L.M.A. and documents attached to complainant's Request for Admissions consisting of bills of lading issued by Navimex Line and E.L.M.A. covering the shipments of Chilean hardboard; Phillips-Parr's Petition in the U.S. District Court for the Eastern District of Louisiana seeking removal of the action from the state court; E.L.M.A.'s petition in the state court commencing action against Phillips-Parr; a letter from Phillips-Parr to Strachan Shipping Company styled as a "Guarantee" and dated 9/17/79. I have previously advised the parties that the E.L.M.A.'s answers to interrogatories and the bills of lading would be considered as part of the evidentiary record unless the parties made valid objections. (See Notice of Schedule Established and Rulings Made at Prehearing Conference, December 17, 1982, p. 2 n. 1.) As for the remaining court documents, I find them admissible under broad standards of admissibility prevailing in administrative law for the limited purpose of supporting certain background facts and not for the purpose of supporting any legal conclusions argued by the parties in the documents.

BACKGROUND

1. On June 29, 1979, a carrier known as Navimex Line received two shipments [5] of skids of Chilean hardboard for transportation from the port of Lirquen, Chile to New Orleans, Louisiana. Navimex issued two bills of lading for the shipments, freight collect in the United States.

2. Navimex carried the two shipments from Chile to Tampico, Mexico, on its vessel, the *M/V London Cavalier*. Navimex thereafter transshipped the shipments to the *M/V Rio Neuquen*, a vessel operated by E.L.M.A., which sailed from Tampico to New Orleans on September 3, 1979. The reason for the transshipment purportedly was the expiration of the Navimex charter on the *M/V London Cavalier*.

3. E.L.M.A. issued two bills of lading to Navimex, S.A., the owner and operator of Navimex Line, which were stamped or typed "freight prepaid." Both bills were consigned to the order of Phillips-Parr, Inc.

4. E.L.M.A. carried the shipments of hardboard from Tampico to New Orleans. E.L.M.A. did not file a tariff between the two ports, its previous tariff (No. 1 N.B. (FMC No. 17)) having been cancelled by the Commission on February 6, 1978.[6]

5. At the port of New Orleans, E.L.M.A. effectuated delivery of the cargo to the consignees through E.L.M.A.'s agent, Strachan Shipping Company, Inc. E.L.M.A., through Strachan, collected freight due under the Navimex bills of lading, and remitted the freight collected to Phillips-Parr, Navimex's agent in New Orleans.

6. On September 17, 1979, Phillips-Parr had executed a so-called "Guarantee" addressed to E.L.M.A.'s agent in New Orleans, Strachan Shipping. The document stated that in consideration of delivery of the hardboard to Phillips-Parr, Phillips-Parr would "undertake and agree to indemnify you and hold you and said vessel and owners harmless from all consequences and to pay on demand any claim, loss and/or expense that may arise, including attorneys [sic] fees."

7. On May 11, 1981, E.L.M.A. brought suit in the Civil District Court in and for the Parish of Orleans, State of Louisiana, seeking to recover the sum of $16,186.86, which E.L.M.A. alleged was freight due for the shipments which it had carried from Tampico to New Orleans. The suit was removed to the United States District Court, Eastern District of Louisiana, on motion of Phillips-Parr, on or about May 26

[5] Throughout the factual and legal discussion that follows, I have treated the subject shipments of Chilean hardboard as two rather than one shipment because two bills of lading were issued, although the shipper was the same and they were both consigned to the order of Phillips-Parr when they left Tampico. The parties discuss the cargo as one shipment, however. It is not critical whether they are considered as one or two shipments. The hardboard was carried on a total of 271 skids, 143 on one bill of lading and 128 on the other.

[6] This was done by the Commission in Docket No. 77-35, *Publication of Inactive Tariffs*, 20 F.M.C. 433 (1978). As that decision and the Order to Show Cause (July 11, 1977) which began that proceeding show, the tariff was cancelled because E.L.M.A. was not believed to be engaged in common carriage and the tariff was considered to be inoperative.

or 27, 1981. This suit was later stayed by court order issued on July 28, 1982, upon motion of Phillips-Parr, which had argued that the controversy lay within the primary jurisdiction of the Federal Maritime Commission.

E.L.M.A.'S CARRIER OPERATIONS IN THE GULF

8. E.L.M.A. is a carrier which engages in common carriage by water in certain foreign trades of the United States.

9. As far as the subject shipments of Chilean hardboard are concerned, E.L.M.A. operated only one voyage, voyage 22 of the *M/V Rio Neuquen*. From the period March 1, 1979 to and including December 31, 1982, E.L.M.A. carried no cargo between Mexican and U.S. Gulf ports except in the one instance on voyage 22 of the *M/V Rio Neuquen* which carried two shipments of hardboard from Tampico, Mexico to New Orleans on September 3, 1979.

10. Manifests of the *M/V Rio Neuquen* for voyage 22 show that E.L.M.A. carried a number of shipments for numerous shippers between South American and U.S. Gulf ports and between South American and two Mexican ports, Tampico and Vera Cruz. The voyage began on July 21, 1979 when the *M/V Rio Neuquen* sailed out of Buenos Aires, Argentina, northbound. She sailed out of various Brazilian ports (Rio Grande, Paranagua, Santos, Salvador) on July 25, 28, 30, and August 4, respectively. She sailed out of various U.S. Gulf ports (Tampa and Mobile) on August 15 and 17, respectively, and out of the Mexican ports of Vera Cruz and Tampico on August 30 and September 3. Finally she sailed out of Houston and New Orleans heading south on September 10 and 17, 1979.

11. A breakdown of the shipments carried both northbound and southbound on voyage 22 shows the following: northbound from Buenos Aires and various Brazilian ports to U.S. Gulf ports - 61 total shipments (bills of lading); northbound from Buenos Aires and Salvador, Brazil to Vera Cruz and Tampico, Mexico - 109 total shipments (bills of lading); southbound from U.S. Gulf ports to Buenos Aires - 290 total shipments (bills of lading); southbound from Vera Cruz and Tampico, Mexico to Buenos Aires - 52 total shipments (bills of lading). From Tampico, Mexico to New Orleans, Louisiana - 2 shipments (bills of lading) (the shipment of Chilean hardboard transshipped from the Navimex vessel).

12. E.L.M.A. published no advertisements or notices by which it offered vessels for the carriage of cargo between U.S. Gulf ports and East Coast Mexican ports for at least approximately six months before and after the particular carriage of the Chilean hardboard from Tampico to New Orleans, or a period running from March 1, 1979 through February 29, 1980.

DISCUSSION AND CONCLUSIONS

It is clear that continuation of the controversy before the Commission raised by the complaint depends entirely on the question of the Commission's jurisdiction over E.L.M.A. in connection with E.L.M.A.'s carriage of the Chilean hardboard from Tampico, Mexico to New Orleans. Thus, if the record does not establish that E.L.M.A. operated as a "common carrier by water" in its operations between Tampico and New Orleans, there is no point to further consideration of allegations that E.L.M.A. violated section 18(b)(1) of the Act by failing to file a tariff or section 16 First by subjecting anyone to undue or unreasonable disadvantage or section 17, second paragraph, by observing unreasonable practices.[7] All of these statutory provisions are applicable only to common carriers by water.

Very briefly, Phillips-Parr claims that E.L.M.A. had operated as a common carrier by water when it picked up the Chilean hardboard in Tampico and carried it to New Orleans. E.L.M.A. claims, on the other hand, that this was simply a single operation and that E.L.M.A. did not hold out or engage in common carrier operations between the two ports during that time.

Common carrier determinations can be made under a few critical principles which are discussed and explained in several leading Commission decisions such as *Activities, Tariff Filing Practices and Carrier Status of Containerships, Inc.*, 9 F.M.C. 56 (1965), and *Investigation of Tariff Filing Practices*, 7 F.M.C. 305 (1962). In *Containerships, Inc.*, the Commission found that a carrier which had engaged in the carriage of automobiles for leading automobile manufacturers under forward booking contracts was a common rather than a contract carrier. The Commission explained that the common carrier mentioned in the Shipping Act was the common carrier at common law. (7 F.M.C. at 62.) The essential characteristic of a common carrier is that such a carrier "by a course of conduct holds himself out to accept goods from whomever offered to the extent of his ability to carry." (7 F.M.C. at 62.) Or, as the Commission stated (7 F.M.C. at 62):

> The essential characteristics of the common carrier at common law are that he holds himself out to the world as such; that he

[7] Since the parties have concentrated on the threshold issue of jurisdiction, there has been no elaboration of complainant's allegations concerning the nature of the Shipping Act violations nor, even if they were proven, whether the Commission would award reparation, and the parties have not filed briefs addressing these matters. Thus, it is not clear whether Phillips-Parr would have to prove that a competitor received an advantage under section 16 First under applicable case law. Also, if section 17, second paragraph, is invoked by complainant, it appears that more than a single incident would have to be shown to constitute an unreasonable practice. Also, even if complainant showed a violation of section 18(b)(1) case law holds that a shipper must still pay reasonable freight charges to the carrier. These and other problems are unnecessary to resolve, however, since the record does not show that E.L.M.A. operated as a common carrier between the critical ports. (See discussion of these legal problems in my ruling of November 24, 1982, in this case.)

> undertakes generally and for all persons indifferently to carry goods for hire.

As the Commission noted, furthermore, included in the concept of the carrier's holding out are such factors as solicitation, advertising, tariff filing, and contractual limitations. (7 F.M.C. at 62 n. 7.) However, the Commission explained that common carrier status could not necessarily be determined by any one factor, such as solicitation, number of shippers served, regular schedules, or types of shipping contracts utilized since a carrier could be common even without advertisements, solicitation, or regular schedules. (7 F.M.C. at 63-64.) The Commission stated that "the question in final analysis requires *ad hoc* resolution . . . [A] carrier's status is determined by the nature of its service offered to the public and not upon its own declarations. A close look at its activities is necessary." (7 F.M.C. at 64.)

In summary, the Commission stated (7 F.M.C. at 65):

> The determination of a carrier's status cannot be made with reference to any particular aspect of its carriage. The regulatory significance of a carrier's operation may be determined by considering a variety of factors-the variety and type of cargo carried, 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 absence of one or more of these factors does not render the carrier noncommon, and common carriers may partake of some or all of these enumerated characteristics in varying combinations. A carrier may be clothed with one or more of the characteristics mentioned and still not be classified a common carrier. It is important to consider all the factors present in each case to determine their combined effect.

If one applies the various factors and definitions discussed by the Commission above, it is apparent that this record fails utterly to show that E.L.M.A. was operating as a common carrier between Tampico, Mexico and New Orleans at the time E.L.M.A. lifted the Chilean hardboard at Tampico. Indeed, the record fails to show that E.L.M.A. operated as a common carrier between any Mexican port and U.S. Gulf Coast ports. Instead, examination of the only E.L.M.A. vessel involved in the Gulf, the *M/V Rio Neuquen*, indicates that E.L.M.A.'s common carrier operations were conducted between U.S. Gulf ports and ports in South America and perhaps between Mexican ports and ports in South America. All that the manifests of the *M/V Rio Neuquen* seem to show is that E.L.M.A. agreed to lift the Chilean hardboard at one time on or about September 3, 1979, since the *M/V Rio Neuquen* was in Tampico at the right time to assist Navimex and Phillips-Parr in completing the shipment of hardboard which had originated in Chile bound for New

Orleans. As the vessel manifests show, however, the *M/V Rio Neuquen* had called at Tampico as part of the itinerary of voyage 22 with numerous shipments carried in the Mexican-South American trade. There is no evidence in the record that any E.L.M.A. vessel carried any shipments between Mexican ports and U.S. Gulf ports during the period March 1, 1979 through December 31, 1982, except for the hardboard shipments carried for Phillips-Parr on September 3, 1979 out of Tampico. There is similarly no evidence of any notices or advertisements or other solicitation efforts by which E.L.M.A. offered to carry cargo between Mexican and U.S. Gulf ports during this period of time, and, as Phillips-Parr has alleged, E.L.M.A. does not publish and file a tariff applicable between such ports. Nor is there any evidence that E.L.M.A. maintained any regular route or schedules between Mexican and U.S. Gulf ports. Although the Commission indicated in *Containerships, Inc.* that no one factor could determine a carrier's status, it did recognize that maintenance of a regular schedule between fixed termini was "the initial and most important prerequisite of Commission jurisdiction: the one explicitly set forth in section 1 - 'on regular routes from port to port.' " 7 F.M.C. at 65.

It appears that E.L.M.A. carried the hardboard shipments out of Tampico under its own bills of lading as the manifests show. It may even be that E.L.M.A. assumed some sort of liability akin to common carriers under such bills of lading, although the record does not show this, nor does the record show how E.L.M.A. determined what rates it would charge. It is also true that a carrier may, by a course of conduct, be found to be holding itself out as a common carrier even though it maintains no regular schedules and does not advertise or solicit, as the Commission recognized in *Containerships, Inc.* However, this record does not establish, even under the lenient standard of proof prevailing in administrative law, namely, a preponderance of the evidence,[8] that E.L.M.A. had been operating as a common carrier between Tampico or Mexican ports and U.S. Gulf ports when it lifted the hardboard and the *M/V Rio Neuquen* sailed out of Tampico on September 3, 1979, bound for New Orleans. As E.L.M.A. has contended, it appears that E.L.M.A. carried the hardboard shipments between Tampico and New Orleans on only one occasion and had no ongoing cargo-carrying operations of any kind between Mexican and U.S. Gulf ports for at least six months prior to the Tampico incident and for over three years afterwards. There is simply no way in which the evidence in this record can enable anyone to conclude that E.L.M.A. was engaging in a course of conduct holding itself out to accept goods from whoever

[8] *See Steadman v. Securities and Exchange Commission*, 450 U.S. 91, 102 (1981); *Sea-Island Broadcasting Corp. of S.C. v. F.C.C.*, 627 F.2d 240, 243 (D.C. Cir. 1980), cert. den. 449 U.S. 834 (1980). The more stringent standards are, of course, clear and convincing evidence and beyond a reasonable doubt.

offered between Mexican and U.S. Gulf ports. On the contrary the preponderance of the evidence shows that E.L.M.A. lifted the hardboard out of Tampico for New Orleans delivery as a one-shot matter at a time when its vessel happened to be in port. Such a one-shot operation is insufficient to establish a course of common-carrier conduct even if E.L.M.A. were operating a common-carrier business in other trades. *See Ship's Overseas, Inc. v. Federal Maritime Commission*, 670 F.2d 304 (D.C. Cir. 1981).[9] Furthermore, as the Commission noted in *Publication of Inactive Tariffs*, cited above, 20 F.M.C. at 436, when it cancelled a number of inactive tariffs including E.L.M.A.'s, which had applied from Mexican to U.S. Gulf ports, a carrier is not engaged in common carriage with a proper tariff on file if it fails to demonstrate an intention to move cargo under a proffered tariff within a reasonable period of time subsequent to filing or if "there has been an extended period within which no common carrier service has been provided in the subject trades." Of course, as I have noted, the record in this case shows such an extended period of time in which no E.L.M.A. vessel carried cargo between Mexican and U.S. Gulf ports both before and after the time of the subject hardboard shipments.

ULTIMATE CONCLUSIONS

I conclude, therefore, that this record utterly fails to show that E.L.M.A. operated as a common carrier by water when it lifted a shipment or shipments of Chilean hardboard on one occasion on or about September 3, 1979, at the port of Tampico, Mexico and delivered the shipment at New Orleans, Louisiana. Consequently, the Commission has no jurisdiction over this one-shot operation and the complaint alleging violations of the Shipping Act, 1916, in connection with E.L.M.A.'s attempts to recover freight allegedly due on the shipment, must be dismissed.

(S) NORMAN D. KLINE
Administrative Law Judge

[9] In the case cited, the court set aside a Commission decision finding Ship's Overseas, Inc. to be a non-vessel operating common carrier because the record showed that Ship's Overseas, Inc. had served a shipper on a single occasion, i.e., had provided a "single shot" service and had not engaged in a course of conduct showing common carrier operations. The court so held even though Ship's Overseas, Inc. had otherwise been in the shipping business and had handled shipments for various customers as part of its lighterage and brokerage business. The court specifically noted that "[t]he cases characterizing entities as common carriers rely on a course of conduct rather than on a transportation service shown to have occurred only once." *Ship's Overseas, Inc. v. Federal Maritime Commission*, cited above, 670 F.2d at 308 n. 15. Had E.L.M.A. been calling at Tampico or other Mexican ports in order to pick up shipments bound for U.S. Gulf ports periodically so as to show a pattern of conduct resembling the holding out of a common carrier, for example, by customarily "topping off" at Mexican ports when it had space available on its ships, such conduct might qualify as common carriage. However, that is far from the one-shot operation that occurred in this case.

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-59
GENERAL ELECTRIC COMPANY

v.

MOLLER STEAMSHIP COMPANY, INC.

NOTICE

April 8, 1983

Notice is given that no appeal has been taken to the February 28, 1983, dismissal of the complaint and approval of settlement in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-59
GENERAL ELECTRIC COMPANY

v.

MOLLER STEAMSHIP COMPANY, INC.

DISMISSAL OF COMPLAINT AND APPROVAL OF SETTLEMENT

Finalized April 8, 1983

The complainant and the respondent jointly move that the complaint in this proceeding be dismissed with prejudice, and that the accompanying settlement agreement be approved.

By complaint filed December 8, and served on December 10, 1982, the complainant, General Electric Company, alleged that it was overcharged $62,132.47 on a number of shipments described on the bills of lading as "synthetic resin," shipped from New York to Singapore, from December 5, 1980, to June 12, 1981.

The respondent, Moller Steamship Company, Inc., charged the "synthetic resin N.O.S." rates of $172 and $191 per cubic meter, plus bunker surcharges.

GE by its complaint sought the rate of $122 (W) on polymerization and copolymerization resins, synthetic. Moller disputed this contention as to the proper identification of the shipments.

Neither side is prepared to concede the proper identification of the shipments. If the matters were fully litigated, it might require expert witnesses and substantial legal expenses. The parties have negotiated an arms-length settlement, representing a compromise amount of $31,066 to be paid by Moller to GE within 21 days after approval by the Commission of the proposed settlement.

The settlement figure approximates the so-called "general" synthetic resins rate, which is lower than the "N.O.S." rates charged, and which also is higher than the polymerization and copolymerization rate sought by the complainant.

Commission policy favors settlements. The proposed settlement appears to be a *bona fide* attempt to terminate the controversy and not a device to circumvent the law; and the facts critical to the resolution of the dispute apparently are not reasonably ascertainable without considerable expense and litigation. The proposed settlement figure appears to

fall within a zone of reasonableness, and is a commercially justifiable compromise, considering the rates at issue.

Good cause appearing, the proposed settlement is approved, and the complaint in this proceeding is dismissed with prejudice.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-23
IN THE MATTER OF RATES APPLICABLE TO OCEAN SHIPMENTS VIA AMERICAN PRESIDENT LINES

NOTICE

April 20, 1983

Notice is given that no exceptions have been filed to the March 10, 1983 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, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-23
IN THE MATTER OF RATES APPLICABLE TO OCEAN SHIPMENTS VIA AMERICAN PRESIDENT LINES

Five shipments of boats properly classified as "Plastic Inflatable Boats".

R. J. Cinquegrana and *Paul J. Lambert* for American President Lines.
Frank L. Bridges for Norwood Industries, Inc.

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

Finalized April 20, 1983

In October of 1981, Norwood Industries, Inc., filed a complaint against American President Lines, Ltd., in the Boston Municipal Court, Department of the Trial Court of the Commonwealth of Massachusetts. Norwood's complaint sought recovery of an alleged overcharge on five shipments of boats carried by APL for Norwood. APL, without objection from Norwood, removed Norwood's action to the U.S. District Court for the District of Massachusetts.

In April of 1982 APL filed this petition for declaratory order and in May the Court stayed its proceedings pending Commission action on the petition. In August 1982 the Commission referred the proceeding to the Office of Administrative Law Judges and at the same time restricted the initial proceedings to the filing of affidavits and memoranda. Subsequent to the filing by APL of its opening memorandum, Mr. Donald J. Orkin, Esq., then attorney for Norwood, withdrew his appearance in the case noting that any further representation of Norwood would be by the firm of Widdett & Glazier who had been appointed assignee of an Assignment for Benefit of Creditors. Following an extension of time to allow the new attorneys to familiarize themselves with the case, a Mr. Frank L. Bridges, by letter, informed that Norwood did not "intend to offer any evidence, by way of affidavit or otherwise to controvert the evidence introduced by American President Lines in this proceeding." Further, Norwood did not intend to file a memorandum of law in opposition to any assertions made by APL in its opening memorandum.

[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 C.F.R. 502.227).

The issue presented here is whether the "boats" comprising the five shipments in question were properly classified as "Plastic Inflatable Boats" under Item No. 9520 of the Trans-Pacific Freight Conference of Japan/Korea Tariff; or whether as Norwood contended, they should have been classified as "Sporting Goods (Synthetic Rubber Boats)" under Item 5920.

The documentary evidence submitted by APL in support of its opening memorandum clearly establishes that the shipments in question were properly rated under Item 9520 as Plastic Inflatable Boats. Norwood's own catalogue states that the boats are made of "Hydra-Lon PVC vinyl". PVC or polyvinyl chloride is a "thermoplastic resin" (*Webster's Third Int'l Dictionary*) or a "white water insoluble thermoplastic resin" (*Random House Dictionary*, 1978 ed.).[2] The five shipments in question were properly rated as "Plastic Inflatable Boats" under Item 9520 of the Transpacific Freight Conference of Japan/Korea Tariff. The proceeding is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

[2] See also *Chemical Technology: An Encyclopedic Treatment*, Vol. VI, pp. 534 *et seq.* for a discussion of the plastic PVC.

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-5
WORLDWIDE TECHNICAL SERVICES CO., INC.

v.

MAERSK LINE

NOTICE

April 20, 1983

Notice is given that no appeal has been taken to the March 11, 1983, dismissal of the complaint 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 dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-5
WORLDWIDE TECHNICAL SERVICES CO., INC.

v.

MAERSK LINE

COMPLAINT DISMISSED AS SATISFIED

Finalized April 20, 1983

The parties here have filed a "Notice of Satisfaction of Complaint Pursuant to Rule 93." The complaint was satisfied with the payment by respondent of $80,768.83 in overcharges which resulted from the complainant's freight forwarder's use of an incorrect measurement of the actual space utilized in respondent's containers.

Rule 93 provides for the satisfaction and dismissal of complaints in the discretion of the Commission, upon the filing of a statement explaining how the complaint was satisfied and that similar adjustments will be made for persons similarly situated. The Rule also requires the submission of details of each shipment on a special form "insofar as such form is applicable." [1]

The information called for is only that which would establish the validity of the particular claims and the amount of reparation sought. Apparently, the form was thought to be a convenient way of submitting the required data. In this case, the complainant requested the use of the shortened procedure under Subpart K of the Rules of Practice and Procedure (46 C.F.R. 181 *et seq.*). Consequently, complainant submitted its documentary evidence with its complaint. That evidence consisting of bills of lading, invoices from the freight forwarder, packing lists, export declarations and copies of checks showing payment of the freight charges establishes the validity of complainant's claim for reparation.

Complainant's Exhibit A is a recap of the 27 shipments involved. The exhibit shows the vessel and voyage number, the bill of lading number, description, incorrect measurement and the incorrect ocean freight, the correct measurement and the correct freight and the amount of the overcharge. This exhibit satisfies the requirements of Rule 93. The

[1] The form is actually incorrectly cited in Rule 93 and is not published in the current edition of the Commission's Rules of Practice and Procedure (46 C.F.R. 93). In *Abbott Hospitals v. PRMSA, et al.*, Dockets 81-52, 81-53, Dismissal of Proceedings, 24 F.M.C. 1055 (1982).

respondent has agreed to make a like adjustment for other persons, if any, similarly situated.

The requirements of Rule 93 have been met and the complaint is dismissed as satisfied.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-10
AGREEMENT NO. 10440

NOTICE

April 20, 1983

Notice is given that no appeal has been taken to the March 14, 1983, dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-10
AGREEMENT NO. 10440

ORDER OF DISMISSAL

Finalized April 20, 1983

By Order of Investigation and Hearing (Order) served February 22, 1983, the Commission instituted this proceeding to determine whether Agreement No. 10440 should be approved, disapproved or modified after consideration of the factual and legal issues enumerated in the Order.

Agreement No. 10440, between Lykes Brothers Steamship Co., Inc., and Lineas Navieras Bolivianas S.A.M. (Linabol) was filed for approval pursuant to section 15 of the Shipping Act, 1916, 46 U.S.C. 814. As paraphrased in the Order, the agreement provides for Linabol to charter space on Lykes' vessels serving the trade between United States ports in the Gulf of Mexico and Bolivia via the West Coast ports of South America. Each party would have associate line status (equal access authority) under Bolivia's cargo preference laws and would operate as Conference carriers. The Agreement permits Lykes and Linabol to determine itineraries, frequency and number of sailings and vessel capacity levels.

Lykes and Linabol were named proponents in the proceeding. The Conference referred to in the previous paragraph—the Atlantic and Gulf - West Coast of South America Conference—and one of its members, Compania Sud-Americana de Vapores (CSAV), were named protestants in the proceeding. Hearing Counsel was made a party to the proceeding.

A prehearing conference was scheduled for March 9, 1983. On March 8, 1983, I received a telex message from counsel for Lykes. As pertinent, the message read:

> This is to advise you that Lykes Bros. Steamship Co., Inc., and Lineas Navieras Bolivianas, the parties to Agreement 10440, jointly withdraw their application for approval of the Agreement pursuant to section 15 of the Shipping Act, 1916, and request that the proceeding in Docket 83-10 be dismissed at the prehearing conference. . . .

The request contained in the telex message was treated as a motion to dismiss the proceeding. At the prehearing conference, the motion was granted. This order, then, confirms that, the application having been

withdrawn by the proponents, the motion to dismiss the proceeding is granted.

There is a further comment. At the prehearing conference, counsel for the Conference moved that the record reflect the following clarification of the Order instituting the proceeding, i.e., Lykes and Delta Steamship Lines, Inc., members of the Conference, have disassociated themselves from the protest in this proceeding. This motion is granted.

(S) SEYMOUR GLANZER
Administrative Law Judge

FEDERAL MARITIME COMMISSION

[46 C.F.R. PART 536]

GENERAL ORDER 13 REVISED; DOCKET NO. 82-13

EXEMPTION OF BULK CARGO MOVING IN THE FOREIGN COMMERCE OF THE UNITED STATES FROM THE TARIFF FILING REQUIREMENTS OF SECTION 18(B) OF THE SHIPPING ACT

April 22, 1983

ACTION: Discontinuance of Proceeding

SUMMARY: This discontinues the rulemaking instituted to consider the exemption of certain bulk commodities loaded and carried in containers, trailers, rail cars or similar intermodal equipment from the tariff filing requirements of the Shipping Act, 1916, and the alternative proposal to exempt other or all such bulk commodities from the tariff filing requirements.

DATE: Effective April 28, 1983

SUPPLEMENTARY INFORMATION:

In Docket 80-70; *Status of Bulk Commodities with Respect to the Tariff Filing Requirements of Section 18(b) of the Shipping Act, 1916*, the Commission issued an interpretative rule which provided that bulk cargo loaded into a container or similar intermodal equipment (except LASH or Seabee barges) is "loaded with mark or count" and, therefore, is subject to the tariff filing requirements of section 18(b)(1) of the Shipping Act, 1916 (46 U.S.C. § 817(b)(1)). It was further determined in that proceeding, however, to stay the effective date of the interpretative rule pending a consideration of the feasibility of exempting from the tariff filing requirements all or some of the bulk commodities found subject to those requirements.

Therefore, by notice published in the *Federal Register* (47 F.R. 10862), the Commission proposed to exempt from tariff filing under section 35 of the Act (46 U.S.C. § 833a) bulk cargo loaded in intermodal equipment. The proposed rule defined "bulk cargo" as "those commodities which are in a loose, unpackaged form, have homogeneous characteristics and are unprocessed or not further manufactured." The Commission further gave notice that, alternatively, it would consider the exemption of "other or all bulk cargo" carried in intermodal equipment.

The proposal prompted 30 replies from independent carriers, conferences and shippers. A majority of the commentators was opposed to both proposed rules, while the remaining commentators generally tended to favor the exemption of *all* bulk commodities from the tariff filing requirements.

Commentators which opposed the proposed rules argued that if an exemption were granted, whether for all or for specific bulk commodities, the result would substantially impair effective Commission regulation and could be unjustly discriminatory and detrimental to commerce. They further contended that the exemption would require *each* excepted commodity to be specifically identified for effective regulation. These commentators also argued that the Commission should not except the transportation of bulk cargoes simply for the purpose of achieving competitive parity between specialized, tramp or contract carriers because competition between these carriers for such cargoes has diminished. Further, it was alleged that shippers will be confused and possibly discriminated against if they are unable to verify liner cargo rates on exempt cargoes.

Most of the commentators who opposed the proposed interpretative rule generally favored the alternative of exempting *all* bulk commodities regardless of the method of transport. Because a tariff exemption could lead to discrimination and because it allegedly would be difficult to draw a clear line between bulk and non-bulk commodities, these commentators suggested that, in lieu of listing exempt commodities, a blanket exemption be adopted. This approach would allegedly eliminate the need to determine which bulk commodities would fall into an exempt status.

One commentator opposing the proposed rule maintained that, whether the cargo is processed or unprocessed, if it is loaded and carried in containers it assumes the characteristics of being marked and counted and thus should continue to be subject to the tariff filing requirements.

Those commentators favoring the proposed rule, as well as some of those opposed, would require that a list of exempt commodities be provided specifically identifying those exempted.*

Section 35 provides, in part, that the Commission may, upon application or on its own motion, exempt any specified activity from any requirement of the Shipping Act, 1916, where it finds that such exemption will not substantially impair effective regulation, be unjustly discriminatory, or be detrimental to commerce. Inherent in this section is the requirement that certain findings be made for an exemption to be granted, unless the Commission determines that a particular require-

*Obviously, this would be a formidable task in view of the number of separately described cargo items that might warrant exemption in various trades.

ment, on its face, serves such a minor regulatory purpose as to constitute an unjustified burden upon the regulated party.

No compelling reason has been presented or found for an exemption of all or a class of bulk commodities carried in containers from the tariff filing requirements of section 18(b). In fact, it is quite possible that any such exemption could operate in a discriminatory manner. Therefore, the Commission concludes that a waiver in the present filing regulations applicable to bulk cargo in containers is not warranted. This conclusion is without prejudice to the right of any party to apply to the Commission for exemption from the tariff filing requirements of a particular bulk commodity.

Therefore, this proceeding is hereby discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-28
TRANSPORTACION MARITIMA MEXICANA, S.A.

v.

BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS

ORDER ON RECONSIDERATION

May 3, 1983

By Report and Order served January 28, 1983, the Commission found unlawful a provision in the tariff of the Board of Commissioners of the Port of New Orleans (the Port), which would assess charges on cargo left in transit areas beyond the expiration of the free time period on the basis of the length of the vessel which eventually calls for the cargo. The Commission, however, determined not to award Complainant Transportacion Maritima Mexicana, S.A. (TMM) reparations because TMM failed to establish that the charges it had paid were unreasonably high.

TMM has now filed a Petition for Reconsideration pursuant to Rule 261 of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.261), seeking a reversal of the determination not to award it reparations. The Port has replied in opposition. For the reasons set forth below, TMM's Petition will be denied.

One alleged ground for reconsideration is that the Commission's Order contains two substantive errors of material fact.[1] TMM cites as error the Commission's statement that an award of reparation in favor of TMM would be a "windfall." TMM also characterizes as "substantive error" the Commission's conclusion that "equitable considerations . . . militate against the award of reparations." [2]

[1] Rule 261(a)(2) provides that a petition for reconsideration will be subject to summary rejection unless it "identifies a substantive error in material fact contained in the decision or order."

[2] TMM claims it has incurred substantial expenses in litigating this proceeding and that it deserves reparations for bringing the matter of the Port's tariff to the Commission's attention. On the basis of the equities, TMM argues, it should receive reparations because the Port extracted payment from TMM under duress.

As noted by the Port in its Reply, TMM has not identified factual errors, but rather expresses disagreement with the Commission's ultimate conclusions.[3]

TMM's second ground for reconsideration is that the Commission's Report and Order contains findings and conclusions not addressed in the briefs or arguments of the parties.[4] Specifically, TMM argues that the "equities" were not addressed by either party. This argument is without merit. The "equities" of the situation are inherently in issue in determining the reasonableness of the tariff provision and the possibility of reparations. The parties could and in fact did address the equities without the Commission specifically inviting them to address what would be right and what would be wrong.

TMM also contends that the issue of a reasonable alternative charge was not previously addressed. Again, TMM's argument is not persuasive. If reparations were not specifically addressed in the course of this proceeding, it is because TMM and the Port chose not to inform the Commission that payment of the contested charges had been made. At any rate, the consideration of reparations is consistent with the relief generally sought by TMM in its Complaint: that the Commission "issue such other and further orders as the Commission shall deem appropriate." As the purpose of TMM's Complaint is to avoid paying the contested charge, and as payment turns out to have been made already, it is clearly appropriate for the Commission to consider relief in terms of reparation. That any relief would necessarily vary in form according to whether TMM made payment is immaterial, and the variance in the form of possible appropriate relief does not constitute a new matter within the meaning of Rule 261(a)(3). Moreover, TMM was specifically questioned at oral argument about what a "fair charge" would be.[5] Thus, TMM has had every opportunity to comment on actual relief and has in fact done so.[6]

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[3] Furthermore, these conclusions were and are well founded. Reparation, if awarded, would indeed result in a windfall to TMM because TMM would then have benefitted from a considerable amount of cargo storage in the Port's transit areas free of charge. Moreover, the Commission does not reward successful complainants with reparations solely to thank them for bringing illegal activities to its attention.

The payment of the charges "under protest" or "duress" is not a significant factor. Had no payment been made, as was represented by the parties until oral argument, the Commission might well have levied an alternative charge to compensate the Port. The fact that reimbursement has since been made in an amount not shown to be unreasonable obviated the need for any such levy. That the payment was made "under protest" is not, therefore, material.

[4] Rule 261(a)(3) prescribes as an alternative criterion for a petition for reconsideration that it "addresses a finding, conclusion or other matter upon which the party has not previously had the opportunity to comment or which was not addressed in the briefs or arguments of any party."

[5] Counsel responded: "I really am not prepared to give a figure." Tr., at 13. Later, counsel described the kind of charge TMM would be willing to pay.

[6] TMM errs in other aspects of its Petition. TMM characterizes the Commission's determination not to award reparations as a decision that the amount of the charge was a reasonable figure. TMM then

Continued

The Commission concludes that TMM has failed to meet the procedural requirements of Rule 261. TMM seeks merely to reargue points already fully addressed and considered by the Commission. There has been presented no reason for the Commission to amend its original determination in this proceeding. TMM's Petition will therefore be denied.

THEREFORE, IT IS ORDERED, That the Petition for Reconsideration of Transportacion Maritima Mexicana, S.A. is denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

argues that some lower alternative charge would be appropriate. However, the Commission did not determine that the amount of the charge paid by TMM was reasonable. Rather, it found that TMM failed to meet its burden of proving that the amount assessed was unreasonably high.

TMM also objects that the Order's observation that TMM had notice of and might have avoided the contested charge was irrelevant to the purpose of determining its validity. That observation, however, was made not in the context of determining the reasonableness of the contested charge, but in the context of determining whether to award reparations.

*Vice Chairman Moakley takes no position on this Petition since it pertains to an action of the majority from which he dissented.

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-38
HERMANN LUDWIG, INC.

v.

THE SOUTH AFRICAN MARINE CORPORATION STEAMSHIP COMPANY

(1) Where a complainant seeks to have certain equipment designated as sugar cane and hay loaders so as to qualify for a lower rate under the tariff, the burden of proving what was shipped is on the complainant.

(2) Where the bills of lading did not contain any reference to the cargo as sugar cane or hay loaders, and where the cargo was originally designated as log loaders, and the export documents so indicated, the letter of the manufacturer's sales representative stating the cargo was used to load sugar cane and hay, coupled with inconclusive photos, is insufficient to sustain the burden of proving that the cargo was in fact sugar cane or hay loaders. There is no indication that, even assuming the statement was accurate, the equipment was used exclusively for the loading of sugar cane or hay, or even primarily for that purpose.

Kay Ahiskali and *Dieter Trautmann* for complainant.

David A. Brauner for respondent.

INITIAL DECISION [1] OF JOSEPH N. INGOLIA, ADMINISTRATIVE LAW JUDGE

Finalized May 11, 1983

PRELIMINARY MATTERS

On October 13, 1981, Hermann Ludwig, Inc. (Ludwig), sent a letter to the Commission's Secretary applying for a reduction in rates on two shipments of cargo by the South African Marine Corporation (N.Y.). It was advised by the Secretary in a letter dated November 13, 1981, that a formal complaint had to be filed, that Ludwig needed an assignment of the claim from the payor of the ocean freight, and that the respondent named might not be the actual carrier. By letter dated January 14, 1982, Magon Agencies (PTY) Ltd., ostensibly authorized Ludwig "to apply to the Federal Maritime Commission for a refund," which letters were transmitted to the Secretary on February 5, 1982.

On March 5, 1982, the Secretary returned the February 5, 1982, submissions noting that Ludwig had ignored the direction that it file 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 C.F.R. 502.227).

formal complaint, and again was advised to file such complaint. On April 30, 1982, Ludwig filed a complaint but was advised by the Secretary in a May 14, 1982, letter that since Magon Agencies appeared to be a true party in interest an assignment of that interest might be necessary. The Secretary provided a copy of a proper assignment. On July 7, 1982, Ludwig received an assignment from Magon Agencies (PTY) Ltd., of its rights, title, interest, claims and demands, "arising out of the assignor's shipment on the Safmarine 'Amphian' from the Port of New York to the Port of Durban on the 16 April 1981. . . ." Later, a complaint was filed and the facts set forth below ensued. Both parties relied on documents filed and there was no oral testimony or filing of briefs.

FINDINGS OF FACT

1. On August 9, 1982, Hermann Ludwig, Inc., filed a complaint with the Commission against The South African Marine Corporation Steamship Company. The complaint alleges that (1) the ocean freight was incorrectly applied to two shipments made from New York to Durban, in that the rate of $239.50M^3$ was applied rather than the rate of $110.00M^3$ and that as a result, (2) the complainant suffered damages of $13,866.34. (Complaint)

2. On April 16, 1981, a shipment of two "Barko Model 40" and four "Barko Model 80R" was made aboard the *Amphion* and on May 8, 1981, six "Model 80R Barko Loaders" were shipped aboard the *Lontue*. The cargo moved from New York to Durban and the vessels were operated by South African Marine Corporation Ltd. (Bills of Lading Nos. 165 and 180)

3. The parties agree that the cargo described in paragraph (2) above moved under a tariff duly filed with the Commission and that the rate charged was an N.O.S. rate of $239.50M^3$, and that the same tariff contained a rate for Sugar Cane and Hay Loaders of $110.00M^3$. (Entire Record)

4. Export Packing Lists describing the Barko Model 80R state, "complete with 22'4"boom and (2) 1/4 Cord log & pulp bypass grapples (P/N 154-00002) and all accessories." The Export Packing List for the Barko Model 40BC contains the language "AND ALL ACCESSORIES." (Export Packing Lists).

5. In letters dated June 24, 1981, and October 5, 1982, to Ludwig, the Sales Secretary of Barko Hydraulics, Inc., indicated that, "the machines that were shipped to Magon Agencies . . . are used as agricultural implements, and are used as cane or hay loaders."

DISCUSSION AND CONCLUSIONS

In its answer the respondent argues that, (1) the complaint is jurisdictionally defective because "The South African Marine Corporation" is not the proper respondent or a "common carrier by water," (2) the

complainant lacks standing because it "is neither the shipper nor consignee of the subject shipments" and Magon is nothing more than one of two "notify parties," (3) the assignment from Magon to Ludwig is defective in that it only applies to the shipment aboard the *Amphion*.

As to the merits the respondent argues that when the shipment was delivered the claimant advised the carrier orally that the equipment was "log loaders" for use in the lumber industry. He urges that, "the carrier is not under any duty to go beyond the shipper's own description in rating the cargo. (*Ocean Freight Consultants v. Royal Netherlands SS Company*, 17 F.M.C. 143)." He further argues that there is a "heavy burden of proof" on the claimant "to establish the actual nature of the goods shipped . . . (*Johnson and Johnson International v. Venezuelan Lines*, 16 F.M.C. 84, *Ocean Freight Consultants, Inc. v. Italpacific Line*, 15 F.M.C. 314)." The respondent stresses that the record is devoid of any evidence that the equipment "is *principally utilized* for agricultural purposes" (emphasis supplied) and that the law requires such a holding citing *CSC International Inc. v. Lykes Brothers SS Co., Inc.*, 20 F.M.C. 560.

The parties in this case agree as to the date of the shipments, the tariff and rates involved and the amount of reparation due should the complainant be successful. The only real question involved is a narrow, factual one, i.e., what was actually shipped. It is well-settled that reparation overcharges are based on a determination of what is actually shipped and that the burden of proof is on the complainant. *Western Publishing Co. v. Hapag Lloyd A.G.*, 13 S.R.R. 16 (1972); *Ocean Freight Consultants, Inc. v. Italpacific, supra*. Here, the record shows that the bills of lading are silent as to the specific description of the cargo in terms of the tariff. Nowhere do they contain any reference to agricultural use or to the loading of cane or hay. The export declarations also do not contain any reference to agricultural use but they do indicate that there at least are "cord log and pulp bypass grapples and all accessories." The documents, therefore, do lead to the conclusion that the loaders were used for "logging" which is without the tariff description the complainant would have us apply. However, the record does contain a statement from the manufacturer's sales representative that the loaders were used as cane or hay loaders, and based on that statement and some photographs which are not sufficiently identified or related to the shipments in question, the complainant would have us hold the loaders were sugar cane and hay loaders. No other material evidence is presented.

Based on the record made in this case we must hold that the complainant has failed to sustain its burden. While admittedly it may be a "heavy burden" in that proof of what was shipped may be difficult to obtain after the shipment takes place, the Commission has recognized that difficulty and has nevertheless required such proof. *Sanrio Compa-*

ny Ltd. v. Maersk Line, 23 F.M.C. 150, 203 (1980) (Informal Docket No. 681(F)). Here, there is little question the loaders were designated as log loaders at the time the shipments took place. While they may have been used to load cane and hay, as the sales representative noted, even assuming her personal knowledge, there is no indication the use was exclusive or even primary. Further, the pictures submitted add little to the complainant's case. In short, the record is simply insufficient to establish that the loaders came under the heading of cane or hay loaders as required by the tariff.

The holding that the complainant has failed to sustain its burden makes it unnecessary to decide the issues relating to jurisdiction, standing and the effect of the assignment from Magon to Ludwig, and we do not do so here. However, it does appear that some of the points made by the respondent are not without merit.

In view of the above and the entire record, the reparations sought in the complaint by the complainant are hereby denied and this matter discontinued.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-52
DYNAMIC INTERNATIONAL FREIGHT FORWARDERS, INC.

ORDER DISCONTINUING PROCEEDING

May 12, 1983

By an Order of Investigation served on November 4, 1982, this proceeding was instituted to determine (1) whether respondent Dynamic International Freight Forwarders, Inc. (Dynamic) had violated section 44(a) of the Shipping Act, 1916 (the Act) (46 U.S.C. § 841b(a)) by engaging in ocean freight forwarding without having been licensed to do so by the Commission; and if so (2) whether civil penalties should be assessed against Dynamic for such violations; and (3) whether Dynamic should be ordered to cease and desist from carrying on the business of forwarding without a license. The proceeding was initially limited to the exchange of affidavits of fact and memoranda of law by Dynamic and the Commission's Bureau of Hearing Counsel.

On March 30, 1983, the Commission filed a complaint against Dynamic in U.S. District Court in Detroit, Michigan. The complaint requested the Court to enforce, pursuant to section 29 of the Act (46 U.S.C. § 828), the Commission's order in Docket No. 80-5 assessing a civil penalty of $2,500 against Dynamic for previous violations of section 44(a). *Dynamic International Freight Forwarder, Inc. - Independent Ocean Freight Forwarder License Application and Possible Violation of Section 44, Shipping Act, 1916*, 23 F.M.C. 537 (1981). By separate motion, the Commission also sought a preliminary injunction against Dynamic forbidding it from engaging in any further unlicensed forwarding. Such an injunction would have been in force during the pendency of Docket No. 82-52.

On April 14, 1983, a hearing was held in Detroit on the Commission's motion for a preliminary injunction. The Court proposed a settlement designed to bring to a swift and orderly conclusion all the pending actions against Dynamic. This settlement had three elements.

First, Dynamic would be obliged to pay within 30 days the $2,500 civil penalty assessed against it by the Commission in Docket No. 80-5. This penalty has been outstanding since January 1981.

Second, Dynamic would be *permanently* enjoined from engaging in any further unlicensed freight forwarding. This injunction would forbid Dynamic to complete any current forwarding contracts or to accept any new business. Dynamic would retain its right to apply to the

Commission for a forwarder license at some point in the future. If such an application was approved, the injunction would be dissolved.

Third, the Commission would discontinue Docket No. 82-52 without reaching a decision on the merits. Dynamic would therefore avoid further penalties for any illegal forwarding subsequent to the Commission's decision in Docket No. 80-5.

Counsel for both sides agreed to present this proposal to their respective clients. In the interim, the Commission asked that Dynamic be temporarily restrained from accepting any new forwarding business. This request was granted. The 10-day temporary restraining order took effect immediately. On April 22, 1983, the Court extended the order through May 4, 1983.

The Commission determined to accept the Court's proposal, on condition that Evelyn Gene, Dynamic's president, also be permanently restrained from unlicensed forwarding. This condition was accepted by Dynamic and Ms. Gene. Accordingly, a judgment and order was entered by the Court on April 27, 1983, implementing the settlement described above. The injunctions against Dynamic and Ms. Gene went into effect at 5 p.m. on Friday, April 29, 1983. To fulfill its obligation under the settlement, the Commission is issuing this order discontinuing Docket No. 82-52 and setting forth its reasons for accepting the Court's proposal.

The chief advantage of the settlement is that Dynamic and Ms. Gene are permanently enjoined from any further unlicensed freight forwarding. The injunction against Dynamic is broader than the temporary restraining order in that it covers *current* forwarding business as well as new business. Dynamic must inform its current clients that it cannot forward their shipments or accept payment in anticipation of services to be rendered.

If the Commission issued a decision in Docket No. 82-52, it could include its own cease and desist order against Dynamic. However, Dynamic's persistent illegal forwarding and its failure to pay the civil penalty assessed against it in Docket No. 80-5 indicate that a court order, with the accompanying threat of contempt, may be a more effective sanction.* The Commission would also have the option of returning to the District Court and asking for a permanent injunction. However, allowing for normal decision-making time in Docket No. 82-52 and for the 60-day appeal period under 28 U.S.C. § 2344, such a motion probably would not be filed until next September. This settlement gives the Commission the ultimate relief of permanently removing Dynamic and Ms. Gene from any illegal participation in ocean freight forwarding now, rather than several months from now.

* The inclusion of a separate injunction against Ms. Gene is a significant advantage of the settlement, since she is not a named respondent in this proceeding.

As noted above, the Order of Investigation in this proceeding included the issue whether further penalties should be assessed against Dynamic. The pleadings filed by the parties show that Dynamic concedes that it continued to forward without a license on at least 35 shipments after the issuance of the Commission's January 1981 order in Docket No. 80-5. The only matter in dispute is whether penalties should be assessed for those violations. Hearing Counsel request that a penalty of $10,000 be assessed although the maximum penalty would be considerably higher.

However, under the circumstances of this case, including the possibility that a second court action would be necessary to enforce an assessment order against Dynamic, the permanent injunctions obtained against Dynamic and Ms. Gene represent a more efficient method of enforcing Congress's intent that only persons duly licensed by the Commission may provide ocean freight forwarding services. It should be noted in the event of a future application for a forwarder's license filed by Dynamic, or by Ms. Gene personally, or by another corporation with Ms. Gene acting as qualifying officer, the record developed by Hearing Counsel in this proceeding will be available to the Commission in its consideration of such an application.

THEREFORE, IT IS ORDERED, That this proceeding is hereby discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-7
AGREEMENT NOS. 9929-6,
10266-3 AND 10374

ORDER OF APPROVAL OF AGREEMENT NO. 10374-4

May 16, 1983

This proceeding was remanded to the Commission by the United States Court of Appeals for the District of Columbia Circuit for hearings, *inter alia*, on the voting provision authorized by the Commission's Order approving Agreement No. 10374, which allows all parties to the Agreement [1] one vote each, rather than one single vote per service, in any conference or rate agreement. *Sea-Land Service, Inc. v. F.M.C.*, 353 F.2d 544 (D.C. Cir. 1981). By Order on Remand served October 9, 1981, the Commission, in response to the Court's decision, reopened the proceeding in Docket No. 77-7 and directed the parties to that proceeding to address, *inter alia*:

> Whether, in light of its own structure and the structure of Agreement Nos. 9929-6 and 10266-3, Agreement No. 10374 should provide that Hapag-Lloyd, on the one hand, and ICT/CGM, on the other hand, shall exercise separate votes in conferences or rate agreements with respect to their respective container services, and the impact on competition in the trades of such a provision.

The proceeding on remand was limited to the submission of affidavits of fact and memoranda of law on the impact on the voting provisions. The purpose of the Order on Remand was to ascertain the positions of the parties on the issues remanded by the Court and to determine the need for, and scope of, any further formal proceedings. After reviewing the submissions of the parties, the Commission concluded that further evidentiary hearings were required.

Accordingly, by Order of Further Investigation and Hearing served October 6, 1982 (25 F.M.C. 371), the Commission instituted the present proceeding in Docket No. 77-7 to determine, pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. § 814), whether Agreement No. 10374 should be modified to provide that its parties collectively can

[1] The parties to Agreement No. 10374 are Hapag-Lloyd, A.G. (Hapag-Lloyd), Intercontinental Transport (ICT) and Compagnie Generale Maritime (CGM), hereinafter referred to as "Proponents".

exercise only a single vote in any conference or rate agreement in the trades covered by that Agreement.

On December 15, 1982 Proponents moved to dismiss (discontinue) the proceeding on the basis of an amendment which they offered to eliminate the controversy at issue. The amendment, which upon filing was designated Agreement No. 10374-4, provides that whenever the votes of the two services of Hapag-Lloyd and of ICT/CGM are the same, their votes will be counted as only one vote. Sea-Land Service, Inc., United States Lines, Inc., and the Commission's Bureau of Hearing Counsel have agreed to the termination of the proceeding upon approval of the amendment. Lykes Bros. Steamship Co., Inc. opposes the amendment but believes that no further hearing is necessary.

On March 28, 1983 Administrative Law Judge Charles E. Morgan granted Proponents' Motion and discontinued the proceeding. No exceptions were filed to this ruling and the Commission determined not to review it *sua sponte.**

Notice of Agreement No. 10374-4 appeared in the *Federal Register* on February 28, 1983. The only party responding to the Notice was Sea-Land, which supports the amendment.

Agreement No. 10374 not only represents an appropriate settlement of this proceeding, which avoids the time and expense of further litigation, but it also adequately resolves the matter put at issue in this proceeding. Moreover, because there is nothing before the Commission that indicates that approval of Agreement No. 10374-4 would be contrary to the standards of section 15,

IT IS THEREFORE ORDERED, That Agreement No. 10374-4 is approved.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

* Editor's Note: Final Notice was served May 6, 1983.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-7
AGREEMENT NOS. 9929-6, 10266-3 AND 10374

MOTION TO DISMISS (DISCONTINUE) GRANTED

Finalized May 16, 1983

By ruling served January 19, 1983, the proponents' motion to dismiss (discontinue) the subject proceeding was granted tentatively, subject to later reconsideration, based upon any further facts and comments to be offered, and subject to the filing of a proposed amendment limiting voting.

The said amendment has been duly filed and noticed in the *Federal Register*. The proponents have filed further comments, as directed, regarding how to determine whether a quorum is present at conference meetings. Two of the Agreements (conferences) contain no quorum requirements, and the other three Agreements provide that a quorum is to consist of two-thirds or a simple majority of the members eligible or entitled to vote. The proponents state that the vote-*counting* compromise reflected in their proposed amendment to Article 12 can have no impact on quorum composition. No further comments or replies have been received relative to this matter of whether a quorum is present.

Regarding the tentative ruling on the motion to dismiss, United States Lines, Inc., adheres to its position supporting the motion, and Lykes Bros. Steamship Co., Inc., adheres to its prior position, opposing the proposed amendment to Agreement No. 10374, insofar as it would accord the proponents only one vote when their positions coincided.

Essentially, nothing new has bean offered concerning the motion to dismiss, since the tentative ruling was made granting such motion. Accordingly, for good cause shown, for the reasons as stated in the tentative ruling served January 19, 1983, the motion of proponents to dismiss (discontinue) the proceeding hereby is granted, with the understanding that the approval of an amended voting rights provision in Agreement No. 10374, limiting such rights, is applicable only to the present proceeding, and is not to be considered as precedent in other proceedings, consistent with the statement of the Commission regarding the indicia of single carrier status in *Johnson Scanstar Service Voting Provision*, 21 F.M.C. 218, 226.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-3

ARCO INTERNATIONAL OIL & GAS COMPANY

v.

MAERSK LINE

NOTICE

May 16, 1983

Notice is given that no appeal has been taken to the April 7, 1983, dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-3
ARCO INTERNATIONAL OIL & GAS COMPANY

v.

MAERSK LINE

COMPLAINT DISMISSED AS SATISFIED

Finalized May 16, 1983

The parties have filed a "Notice of Satisfaction of Complaint Pursuant to Rule 93." The complaint was satisfied with the payment by respondent of $13,981.20 in overcharges which resulted from the complainant's freight forwarder's use of an incorrect measurement of the actual space utilized in respondent's containers.

Rule 93 provides for the satisfaction and dismissal of complaints in the Commission's discretion, upon the filing of a statement explaining how the complaint was satisfied and that similar adjustments will be made for persons similarly situated. The Rule also requires the submission of the details of each shipment on a special form "insofar as such form is applicable." [1]

The information called for by Rule 93 is that which would establish the validity of the particular claims and the amount of reparation sought. Apparently the form was thought to be a convenient way of submitting the required information. The complainant here requested the use of the shortened procedure under Subpart K of the Rules of Practice and Procedure and, consequently, the complainant submitted its documentary evidence with its complaint. That evidence, consisted of bills of lading, invoices from the freight forwarder, packing lists, export declarations and copies of checks showing payment of the freight charges.

Complainant's Exhibit A is a recap of the shipments involved. The exhibit shows the vessel and voyage number, the bill of lading number, description, incorrect measurement and ocean freight and the correct measurement and ocean freight, and the amount of the overcharge. This exhibit satisfies the requirements of Rule 93. The respondent has

[1] The form is actually incorrectly cited in Rule 93 and is not published in the current edition of the Commission's Rules of Practice and Procedure (46 C.F.R. 93). See *Abbott Hospitals v. PRMSA, et al.*, Dockets 81-52, 81-53, Dismissal of Proceedings, 24 F.M.C. 1055 (1982).

agreed to make a like adjustment for other persons, if any, similarly situated.

The requirements of Rule 93 have been met, and the complaint is dismissed as satisfied.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-64
MIDLAND PACIFIC SHIPPING CO., INC. -
INDEPENDENT OCEAN FREIGHT FORWARDER
LICENSE NO. 1299
LEYDEN SHIPPING CORPORATION -
INDEPENDENT OCEAN FREIGHT FORWARDER
LICENSE NO. 829
PERSON & WEIDHORN, INC. -
INDEPENDENT OCEAN FREIGHT FORWARDER
LICENSE NO. 112

Edward Schmeltzer and *George J. Weiner* for Respondents.
Janet F. Katz for the Commission's Bureau of Hearing Counsel.

REPORT AND ORDER

May 25, 1983

BY THE COMMISSION: (ALAN GREEN, *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; JAMES JOSEPH CAREY and JAMES V. DAY, *Commissioners*)

This proceeding was instituted by an October 8, 1981 Order of Investigation and Hearing, to determine (1) whether Midland Pacific Shipping Co., Inc. (Midland), Leyden Shipping Corp. (Leyden Shipping), and Person & Weidhorn, Inc. (P&W) (collectively, Respondents) violated section 44(e) of the Shipping Act, 1916 (46 U.S.C. § 841b) and the Commission's General Order 4 (46 C.F.R. Part 510 (1980)) in the course of their forwarding practices; (2) whether Respondents are fit to retain their forwarding licenses; and (3) whether civil penalties should be assessed.

The proceeding is now before the Commission upon the Exceptions of Respondents and the Commission's Bureau of Hearing Counsel to the Initial Decision of Administrative Law Judge William Beasley Harris which finds Respondents fit but assesses civil penalties in the total amount of $60,000. A proposed settlement agreement between Hearing Counsel and Respondents which, *inter alia*, provided for penalties in a lesser amount was rejected by the Presiding Officer.

Oral argument before the Commission was heard on April 7, 1983.

FACTUAL BACKGROUND

The parties agreed that over a two-year period, Midland collected compensation on 1,074 shipments which were moved by an NVO, Transocean Shipping Co., Inc., and procured by Traffic Routing International (TRI), without Midland having performed any of the freight forwarder services on those shipments. Midland retained $47,700 of the $116,755 it received as compensation, the rest going to TRI.

Over a several month period, Leyden Shipping used the name Brisley Ocean Transport, Ltd. in place of the shipper on the bills of lading for which Leyden Shipping performed the ocean freight forwarding services. Brisley, an NVO owned by Brian Leyden, was not actually involved in any of these shipments. Leyden Shipping collected $8,278.72 on a total of 84 shipments for which the name of the client/shipper did not appear.

Midland, Leyden Shipping and P&W failed to notify the Commission of facts called for in their Form FMC-18 (freight forwarder license application). Respondents have since submitted revised forms indicating space-sharing arrangements and corporate relationships.

Since the date Brisley filed an NVO tariff, Respondents failed to certify on the "line copy" of the bill of lading that Brisley did not act as an NVO on those shipments on which Respondents collected freight forwarder compensation. Respondents did not receive compensation from underlying ocean carriers on shipments on which Brisley did act as an NVO.

The three Respondents are largely or wholly owned by Brian Leyden and his father, Bernard Leyden.[1] Brisley, Midland, Leyden Shipping and P&W all occupy the same suite of offices in the World Trade Center in New York. Midland's net assets as of October 31, 1981, consisted of its retained earnings in the amount of $8,637.

THE PROPOSED SETTLEMENT

Under the terms of the Proposed Settlement the Commission would receive $8,500 from Midland, $17,500 from Leyden Shipping, and $1,000 from P&W. Midland would surrender its forwarder license, and Leyden Shipping and P&W would submit to four audits over the next two years. As part of the Proposed Settlement, Respondents admitted they engaged in conduct which "may be violative" of section 44(e) and Commission General Order 4 (G.O. 4.)

The Presiding Officer withheld consent to the stipulations and refused to approve the settlement, on the grounds that there were some

[1] Brian Leyden owns 45 percent of Leyden Shipping. Leyden Shipping in turn owns all of the stock of Midland. Bernard Leyden owns 55 percent of the stock of Leyden Shipping and 50 percent of the stock of Leyden Customs Expediters, Inc. The other half of the stock of Leyden Customs Expediters, Inc. is owned by Harold Dichter. Leyden Customs Expediters, Inc. in turn owns all of the stock of P&W. Harold Dichter is President and Bernard Leyden is Vice President of P&W.

factual matters not addressed to his satisfaction and that the settlement was too lenient. Over the parties' objections, the Presiding Officer then proceeded to conduct a full evidentiary hearing, and issued his Initial Decision based thereon.

INITIAL DECISION

In his Initial Decision, the Presiding Officer found that:

1) Leyden Shipping violated 46 C.F.R. 510.24(a) and 510.23(d) by listing "Brisley as Agent" in lieu of the actual shippers on bills of lading and collecting compensation on said shipments;

2) All three Respondents violated 46 C.F.R. 510.22(c) in not certifying that no related person acted as common carrier on shipments for which they collected forwarder compensation;

3) All three Respondents violated 46 C.F.R. 510.5(c) in not informing the Commission of changes in space-sharing arrangements;

4) Midland violated section 44(e) in collecting compensation on shipments on which it did not perform forwarder services.

The Presiding Officer imposed civil penalties in the amounts of $30,000 on Midland, $25,000 on Leyden Shipping, and $5,000 on P&W. However, he found all Respondents to be fit and did not revoke any licenses. He ordered that a certified audit of each Respondent as well as a certified financial net worth statement of each shareholder be submitted to the Commission. He also announced that he was piercing Respondents' corporate veil.

EXCEPTIONS TO THE INITIAL DECISION

Respondents' Exceptions relate to nearly every aspect of the proceeding and of the Initial Decision. They object to the Presiding Officer's rejection of the stipulations and settlement, claiming that he was bound by those stipulations once he agreed to the parties' use of stipulations, and that he had no valid reason to deny approval of the settlement. Respondents argue that the Presiding Officer's ultimate conclusions that Respondents violated G.O. 4 were not adequately supported or explained, and specifically object to his findings that Leyden Shipping provided false information to carriers in connection with the "Brisley as Agent" shipments [2] and that all three Respondents were required to file the related NVO certification.[3] They contend that the Presiding Officer's decision to "pierce the corporate veil" was insupportable but a harmless error.

[2] Respondents' position here is that listing Brisley as agent was not inaccurate and does not constitute knowingly imparting false information. Thus, Respondents defend against the allegation of a section 510.23(d) violation (imparting false information) but not the section 510.24(a) violation (not disclosing the shipper).

[3] Respondents argue that there is no evidence indicating that they are sufficiently related to Brisley to require the filing of a certificate.

Respondents argue that the Presiding Officer imposed excessive civil penalties ($60,000 altogether) without consideration of such factors as ability to pay, furtherance of agency enforcement policy, degree of culpability, history of prior offenses, and presence of accidental or technical violations. They also object to his requiring audits and net worth statements from Respondents and their shareholders, and to his threat to suspend all three licenses absent submission of these statements. Respondents request that the stipulated record and Proposed Settlement be approved, but that the $27,000 total penalty amount prescribed in the settlement would be excessive because of the expenses Respondents have been put through subsequent to rejection of the settlement.[4] Midland reiterates its willingness to surrender its license.

Hearing Counsel's Exceptions are much more limited in scope. They agree with Respondents that piercing their corporate veil was inappropriate. Hearing Counsel supports the Presiding Officer's findings as to violations by Respondents but disagrees with his conclusion that Midland is fit to retain its license. It further argues that the rejection of the Proposed Settlement was erroneous and that the Commission should approve the settlement, including the $27,000 total penalties and the surrender of Midland's license.

DISCUSSION AND CONCLUSIONS

Upon full consideration of the record, it appears that the Presiding Officer's dissatisfaction with the parties' factual stipulations was unwarranted. The stipulations of fact, which the Presiding Officer found inadequate, are not materially different from the facts which emerged from the hearings. Moreover, this proceeding has not turned on any controversy in factual matters. The Commission has determined to accept and rely upon the stipulations of fact as the factual record in this proceeding.

Both Hearing Counsel and Respondents urge that the terms of the Proposed Settlement be reinstated by the Commission, except that Respondents argue for the reduction or elimination of the civil penalty amounts. The Commission considers that the surrender of Midland's license and the submission to audits by Leyden Shipping and P&W, as prescribed in the Proposed Settlement, are appropriate. The remaining issue is what civil penalty amounts should be assessed on each of the Respondents. The Commission concludes that the seriousness of the offenses and the furtherance of the Commission's enforcement policy

[4] Respondents state:

> [I]t is unnecessary here to impose any further penalties. In any event, imposition of the penalty amounts previously agreed upon would now be inequitable, and . . . Respondents submit that if any penalties are assessed they should not exceed $8,637 for Midland [*i.e.*, Midland's total assets], $3,000 for Leyden and $1,000 for P&W.

justify the imposition of penalties in the amounts prescribed in the Proposed Settlement.

The Commission is not persuaded by Respondents that a lesser amount would be appropriate at this stage of the proceeding in recognition of Respondents' post-settlement litigation expenses. The prescription of fair penalty amounts is not an exact science. There is a relatively broad range within which a reasonable penalty might lie.

The Commission declines to adopt the suggestion that a fair penalty assessment at this time can be calculated by subtracting what Respondents represent to be their legal fees from the originally proposed penalties. This suggestion presupposes not only that the $27,000 settlement was a reasonable settlement but that it constituted the *only* reasonable penalty. Moreover, such action would, in the Commission's opinion, place undue emphasis on a variable and potentially arbitrary factor—the particular legal fees a party claims it has been or will be billed. The Commission's action herein is not an attempt to leave the parties where they would be had the Presiding Officer approved the Proposed Settlement, but is, rather, a determination that the terms of that agreement provide an appropriate resolution to the proceeding at present. It is unnecessary, therefore, to address the remaining Exceptions of the parties relating to the specific findings, conclusions and sanctions in the Initial Decision, and those Exceptions are denied as moot.

THEREFORE, IT IS ORDERED, That the Exceptions of Midland Pacific Shipping Co., Inc., Leyden Shipping Corporation, Person & Weidhorn, Inc., and the Bureau of Hearing Counsel are granted to the extent indicated above and denied in all other respects; and

IT IS FURTHER ORDERED, That Midland Pacific Shipping Co., Inc. shall, within 30 days of the date of this Order, pay to the Federal Maritime Commission the monetary amount of $8,500 and return its ocean freight forwarder license (No. 1299) to the Commission; and

IT IS FURTHER ORDERED, That Leyden Shipping Corporation and Person & Weidhorn, Inc. shall, within 30 days of the date of this Order, pay to the Federal Maritime Commission the monetary amounts of $17,500 and $1,000, respectively; and

IT IS FURTHER ORDERED, That Leyden Shipping Corporation and Person & Weidhorn, Inc. shall *each* submit four semi-annual reports to the Commission identifying freight forwarding clients who are non-vessel operating common carriers or who are shippers known not to have a beneficial interest existing in the goods at the time of shipment. As to each such client, the report will show the kinds of freight forwarding services performed, where they are performed, whether fees are received from such shippers in accordance with itemized invoices, special contract or some other arrangement for shipper payment, and whether compensation is claimed on the shipments of that

customer. Each report will be submitted according to the following schedule:

Report	Submission Date	Period Covered
No. 1	7 months after date of Order	First six months after date of Order
No. 2	13 months after date of Order	Second six months after date of Order
No. 3	19 months after date of Order	Third six months after date of Order
No. 4	25 months after date of Order	Fourth six months after date of Order

and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-7

AGREEMENT NOS. 9929-6, 10266-3, AND 10374

ORDER OF CLARIFICATION

June 3, 1983

By Order of Approval served May 16, 1983 (May Order) (25 F.M.C. 709), the Commission approved the voting provisions contained in Article 12 of Agreement No. 10374-4 which provide that in any conference or rate agreement whenever the votes of Hapag-Lloyd A.G. and Intercontinental Transport/Compagnie General Maritime are the same, their votes will be counted as a single vote.

Agreement No. 10374-4 contains various other provisions unrelated to the voting issue that were ordered deleted by the Commission's Order of April 25, 1983 (April Order)*, which addressed several amendments to Agreement Nos. 10266 and 10374. The Commission's May Order should not be construed to in any way modify the Commission's April Order or to extend approval to those provisions of Agreement No. 10374-4 which do not relate to the voting issue.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

* Editor's Note: The April Order was not made part of the record in this proceeding but is included in the files of the Secretary.

FEDERAL MARITIME COMMISSION

46 C.F.R. PARTS 542, 543 AND 544
FINANCIAL RESPONSIBILITY FOR WATER POLLUTION
(GENERAL ORDERS 40, 37 AND 41; DOCKET NO. 83-13)

June 8, 1983

ACTION: Discontinuance of Proceeding

SUMMARY: The Commission instituted this proceeding by Notice of Proposed Rulemaking published March 7, 1983 (48 FR 9543). The purpose of the rule was to delete from appropriate Commission General Orders reference to the Panama Canal as being within the navigable waters of the United States. Since publication of the notice, responsibility for establishment of financial responsibility for water pollution has been transferred to the United States Coast Guard, Department of Transportation by the President. (See Executive Order 12418 signed May 5, 1983.) Accordingly, the Commission no longer has the authority to issue rules concerning financial responsibility for water pollution and, therefore, this proceeding is discontinued.

SUPPLEMENTARY INFORMATION: None.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-17
PETITION OF PACIFIC WESTBOUND CONFERENCE AND OOCL-SEAPAC SERVICE FOR DECLARATORY ORDER

ORDER

June 21, 1983

The Pacific Westbound Conference (PWC) and OOCL-Seapac Service (OOCL), a member line, have filed a Petition for Declaratory Order pursuant to Rule 68 of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.68).

At issue is the cancellation of certain tariff items by OOCL which unintentionally and without notice resulted in an immediate increase in rates on 17 of 20 affected shipments, in contravention of the notice requirements of section 18(b)(2) of the Shipping Act, 1916 (46 U.S.C. § 817(b)(2)). Petitioners seek a Commission order excusing them from adherence to the rate increases published in their tariffs. A Petition for Leave to Intervene and an accompanying Reply have been submitted by the Commission's Bureau of Hearing Counsel.

BACKGROUND

In 1981, OOCL established, by independent action, special per container rates for certain resins to Japan Base Ports and Manila. In February, 1982, OOCL discontinued and deleted these special rates without prior notice to shippers.[1] Petitioners had erroneously believed that the substitution of PWC per ton rates on resins would result in a reduction of freight rates. However, the effect of the rate discontinuances was a rate increase on 17 of the 20 affected shipments on less than 30 days' notice, in contravention of section 18(b)(2).[2] Petitioners' attempt to remedy the situation through the Commission's special docket procedures was unsuccessful.[3]

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[1] The Japan Base Ports rate was deleted on February 1, 1982. The Manila rate was deleted February 22, 1982.

[2] Section 18(b)(2) reads in pertinent part:

> No change shall be made in rates . . . which result in an increase in cost to the shipper . . . except by the publication, and filing, . . . of a new tariff or tariffs which shall become effective not earlier than thirty days after the date of publication. . . .

[3] Petitioners' Special Docket Application (Special Docket No. 958) was withdrawn and the proceeding terminated when the presiding administrative law judge found the application to be jurisdictionally defective.

In the instant Petition, the parties argue that relief is necessary to protect the shippers involved from this unfair and "potentially" unlawful situation, and note their own dilemma of choosing between adherence to their tariff and compliance with section 18(b)(2). Absent the requested relief, Petitioners argue, the affected shippers would have no recourse but to file a multiplicity of reparations complaints before the Commission. Petitioners seek an order stating that OOCL's original per container rates were the lawful and effective rates during the 30 days following their discontinuance and deletion.[4]

Hearing Counsel seeks to intervene in the interest of all the affected shippers. Hearing Counsel generally concurs with the Petition with respect to those shipments in which the rates were increased, but argues that a problem remains regarding the three shipments in which OOCL's action resulted in a rate reduction. Section 18(b)(2) permits rate reductions to become effective immediately upon publication.[5] The relief now sought by Petitioners, Hearing Counsel asserts, would nevertheless counteract the rate reductions experienced by the three shippers. Thus, Hearing Counsel suggests that the Commission issue a declaratory order establishing that during the 30-day notice period, the lawful and applicable rate was OOCL's original per container rate *or* the PWC per ton rate, "whichever results in the lowest cost to the shipper."[6]

DISCUSSION

The Commission has determined to grant Hearing Counsel's Petition for Leave to Intervene in the interest of the shippers affected by OOCL's rate action. The Commission has also concluded that the instant situation is appropriately resolved by way of declaratory order procedures. Declaratory relief would enable Petitioners to resolve their problem and to "act without peril upon their view" within the meaning of Rule 68. It should also serve to provide relief for the shippers involved without the necessity of their instituting complaint proceedings.

A short-notice rate increase can be given no effect for thirty days. *E.I. du Pont de Nemours and Co. v. Sea-Land Service, Inc.*, 22 F.M.C. 525, 540-541 (1980). *See also Chicago, M. St. P. & P. R. Co. v. Alouette Peat Products*, 253 F.2d 449 (9th Cir. 1957). During that period, the previous rate in effect must be applied to affected shipments. A complicating factor in the instant situation, however, is that the short-notice rate change resulted in a rate increase for some shipments and a rate

[4] *I.e.*, until March 3, 1982 for the Japan Base Ports rate and until March 24, 1982 for the Manila rate.

[5] "Any changes in the rates . . . which results [sic] in a decreased cost to the shipper may become effective upon the publication and filing with the Commission."

[6] In their Reply to Petition of Hearing Counsel for Leave to Intervene, Petitioners express their full concurrence with Hearing Counsel's position.

reduction for others. The question then arises whether section 18(b)(2)'s prohibition of short-notice rate increases entirely invalidates OOCL's cancellation of per container rates (*i.e.*, as to all 20 shipments) because it resulted in some rate increases, or whether it invalidates the rate change only to the extent that rate increases were brought about (*i.e.*, only as to 17 of the shipments).

The Commission concludes that section 18(b)(2) proscribes short-notice rate changes only to the extent that they result in increased rates. Thus, OOCL's rate cancellations should be considered ineffective as to those shipments during the 30-day period for which there resulted a rate increase. For these 17 shipments, OOCL's per container rate would apply. However, the rate cancellations are effective as to those shipments for which the cancellations resulted in rate reductions. For these three shipments, the PWC per ton rate applies.

THEREFORE, IT IS ORDERED, That the Petition of Pacific Westbound Conference and OOCL-Seapac Service for Declaratory Order is granted to the extent indicated herein; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

* Commissioner Setrakian did not participate.

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-4

WESTINGHOUSE ELECTRIC CORPORATION

v.

DELTA STEAMSHIP LINES, INC.

NOTICE

June 27, 1983

Notice is given that the time within which the Commission could determine to review the May 19, 1983 discontinuance of the complaint in this proceeding has expired. No such determination has been made and accordingly, the discontinuance has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-4

WESTINGHOUSE ELECTRIC CORPORATION

v.

DELTA STEAMSHIP LINES, INC.

SETTLEMENT OF COMPLAINT

Finalized June 27, 1983

By complaint filed February 28, 1983, the complainant alleged that it had been overcharged $34,970 on a shipment of 378 packages of electrical devices, equipment and materials from Baltimore, Md., to Rio Hania, the Dominican Republic, shipped on or about December 6, 1980.

The respondent demanded and collected $61,115.78 of freight charges based on the class 55 rate of $167 per 40 cubic feet, on Electrical Apparatus, N.O.S. The complainant sought to be assessed freight charges of $26,145.78 based on the commodity rate of $64.50 per 40 cubic feet, on Electrical Devices, Equipment and Materials in minimum lots of 1600 cubic feet. The $167 rate was reduced on the Delta invoice paid by the complainant to $160.50 based on a project rate discount of $6.50; and pursuant to the same tariff item the sought rate of $64.50 would be reduced to $60.50.

The complainant sought reparation of $34,970, plus interest from December 29, 1980.

The parties have agreed to settlement of their dispute. Delta will refund a total sum of $23,500, which includes an allowance for interest, to be paid within 30 days after an order discontinuing this proceeding becomes administratively final.

This settlement is a bona fide effort to terminate the controversy, and not a device to obtain transportation at other than applicable rates and charges. Certain facts remain genuinely in dispute, particularly relating to the exact description and true nature of the cargoes shipped. Commission policy favors settlement of disputes to avoid costly litigation.

On its face the proposed settlement appears reasonable under the circumstances.

The proposed settlement agreement of the parties hereby is approved. The complaint is dismissed, and the proceeding is discontinued.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-19
FARRELL LINES INCORPORATED

v.

SEA-LAND SERVICE, INC.

NOTICE

June 28, 1983

Notice is given that the time within which the Commission could determine to review the May 23, 1983, discontinuance of the complaint in this proceeding has expired. No such determination has been made and accordingly, the discontinuance has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-19
FARRELL LINES INCORPORATED

v.

SEA-LAND SERVICE, INC.

MOTION TO WITHDRAW COMPLAINT GRANTED; PROCEEDING DISCONTINUED

Finalized June 28, 1983

Complainant Farrell Lines Incorporated has filed a Motion to Withdraw Complaint. Farrell states that it "hereby requests leave to withdraw its complaint in this proceeding" and furthermore states that counsel for respondent Sea-Land Service, Inc. has advised that Sea-Land does not oppose the motion.

In its complaint Farrell had alleged that Sea-Land had submitted bids for carriage of military rate cargo to Mediterranean ports where Sea-Land's vessels do not call, quoting rates which Sea-Land uses for North European ports with a substitute service overland to points in Italy. Farrell further alleged that such rates were below Sea-Land's fully distributed costs and that the overland charges were also below costs, that the ocean rates were much lower than any commercial rate, and that Sea-Land would carry up to 75 percent of all military cargo to the subject Mediterranean ports under such rates. Farrell alleged that such conduct violated sections 16 First, 17, 18(b)(3), and 18(b)(5) of the Shipping Act, 1916, as well as a Commission regulation forbidding duplicating or conflicting tariffs, 46 C.F.R. 536.6(k). Farrell sought full reparation for alleged injury in an unspecified amount and a cease and desist order.

Respondent Sea-Land filed an answer to the complaint, denying any violations of law and, among things, specifically denying that its rates were below costs, and raised several affirmative defenses concerning the Commission's jurisdiction over the matters in issue. The Military Sealift Command petitioned for leave to intervene, which petition was granted.[1]

[1] After the time for replies had expired, Sea-Land filed a motion seeking leave to file a late reply in which Sea-Land asked that the petition be denied or, alternatively, that MSC's participation in the proceeding be limited to certain issues. In view of Farrell's decision to withdraw its complaint, ruling on Sea-Land's motion becomes unnecessary. MSC has, furthermore, advised me orally that it does not oppose Farrell's motion.

DISCUSSION AND CONCLUSIONS

The Commission has no specific rule dealing with voluntary dismissals of complaints such as Federal Rule of Civil Procedure 41(a), 28 U.S.C.A. However, complainants' motions seeking leave to withdraw their complaints can be handled under Rule 73, 46 C.F.R. 502.73, the rule governing motions generally, and Rule 147, 46 C.F.R. 502.147, the rule setting forth the functions and powers of presiding officers including the power to "hear and rule upon motions."

In practice the desire of a complainant to withdraw its complaint has been honored since the Commission cannot compel a complainant to put on a case but can, if it chooses, investigate any matter on its own authority under section 22(b) of the Shipping Act, 1916, 46 U.S.C. section 821(b). Under the federal rule cited, once an answer has been filed, as in this case, a complainant may nevertheless withdraw its complaint subject only to such terms and conditions as the court deems proper. These terms and conditions, however, usually concern situations in which a defendant's rights would be prejudiced or a defendant is entitled to some reimbursement because of the time and money spent on the case or some other peculiar circumstance exists. See 9 Wright and Miller, *Federal Practice and Procedure*, sections 2364, 2366. However, even under the federal rules a court does not compel a complainant to litigate a case if complainant does not choose to do so. *See, e.g., Smoot v. Fox*, 340 F.2d 301 (6th Cir. 1964). Furthermore, courts can permit voluntary dismissals of complaints even if there has been an answer filed and some discovery has commenced, as in this case. *Tyco Laboratories, Inc. v. Koppers Co.*, 627 F.2d 54 (7th Cir. 1980); 9 Wright and Miller, *Federal Practice and Procedure*, section 2364, p. 169 ("If the motion is made at an early stage of the case, before much happened, it is more likely to be granted.")

In the instant case, which is in its very early stages, Farrell simply wishes to withdraw its complaint, and respondent Sea-Land has no objection to such withdrawal. Under such circumstances the motion should be granted and the proceeding discontinued. It is so ordered.

(S) NORMAN D. KLINE
Administrative Law Judge