UNITED STATES MARITIME COMMISSION

No. 542

GILL GLASS AND FIXTURE COMPANY

v.

AMERICAN CARIBBEAN LINE, INC.

Submitted March 19, 1940. Decided April 23, 1940

Defendant's measurement rate on glass lamp globes not shown to be unjust or unreasonable as alleged. Complaint dismissed.

C. A. Gill for complainant.
W. H. Griffin for defendant.

REPORT OF THE COMMISSION

BY THE COMMISSION:

This case was presented under shortened procedure. No exceptions were filed to the examiner's proposed report. His recommendations are adopted herein.

By complaint filed June 27, 1939, it is alleged that defendant's rate on 57 cartons of glass lamp globes shipped from New York, N. Y., March 18, 1938, to St. Thomas, Virgin Islands, was unjust and unreasonable, in violation of section 18 of the Shipping Act, 1916. Reparation and a reasonable rate for the future are requested.

The shipment weighed 872 pounds and measured 238.25 cubic feet. Applicable thereto was defendant's tariff item [1] "Weight Goods, N. O. S.," stating a rate per 100 pounds of 60 cents and "Measurement Goods, N. O. S.," stating a rate per cubic foot of 30 cents, subject to a rule [2] published in the tariff providing, in part, that "When both weight and measurement rates are shown for an item, the basis producing the greater revenue will apply." The measurement rate of 30 cents per cubic foot was assessed on the shipment, and complainant paid freight charges thereon of $71.50.[3]

[1] Item No. 25, American Caribbean Line Tariff SB No. 3.
[2] Rule 1 (b).
[3] Overcharge, 2 cents.

Complainant's position is that the rate charged was and is unreasonable to the extent freight charges thereat exceed $5.23 which would have accrued at defendant's weight rate of 60 cents per 100 pounds. Complainant shows that the value of the shipment was $195.32, that defendant's charge represented approximately 37 percent of that value and was approximately 14 times the amount of a charge computed at defendant's weight rate contained in the particular tariff item. It contends that the measurement rate results in a prohibitive price for glass lamp globes in the Virgin Islands, and that there is not a proper relation between defendant's measurement and weight rates. A mere comparison between weight and measurement rates on a commodity is not conclusive that they are improperly related.

Defendant points out that the commodity rate on glass chimneys, common glassware, and plate and window glass from New York to St. Thomas is 30 cents per cubic foot, and that the rates of other carriers from New York to neighboring West Indies and Caribbean ports on glass lamp globes approximate the rate under attack.

Where, as in the trade concerned, transportation rates are assessed on a weight or measurement basis whichever yields a greater revenue to the carrier, it is the established practice to assess the rate on the principle that a weight ton is the equivalent of 40 cubic feet. Defendant's rates applicable to glass lamp globes under its tariff item and rule here concerned accord with this practice, $12 being defendant's revenue per weight ton of 2,000 pounds or per measurement ton of 40 cubic feet. Although the freight charges on glass lamp globes at the measurement rate is 13.7 times the charges at the weight rate, it is to be noted also that complainant's shipments measure 13.7 times their weight. The fact that defendant's measurement rate of 30 cents per cubic foot represents approximately 37 percent of the value of the shipment is not persuasive that the rate charged was unreasonable. At the weight rate contended for by complainant, defendant's revenue for transporting 40 cubic feet of glass lamp globes would be 88 cents, which obviously is inadequate as compensation for the service rendered. No facts are presented in the instant case which prove the measurement rate here assailed to be unjust or unreasonable.

We conclude and decide that the rate in issue has not been shown to be unjust or unreasonable in violation of section 18 of the Shipping Act, 1916, as alleged. An order dismissing the complaint will be entered.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION held at its office in Washington, D. C., on the 23rd day of April A. D. 1940.

No. 542

GILL GLASS AND FIXTURE COMPANY

v.

AMERICAN CARIBBEAN LINE, INC.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission, on the date hereof, having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof;

It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed.

By the Commission.

[SEAL] (Sgd.) W. C. PEET, Jr.,
Secretary.

UNITED STATES MARITIME COMMISSION

No. 541

GILL GLASS AND FIXTURE COMPANY

v.

ALASKA STEAMSHIP COMPANY

Submitted March 25, 1940. Decided April 23, 1940

Defendant's measurement rate on glass lamp globes or shades not shown to be unjust or unreasonable as alleged. Complaint dismissed.

C. A. Gill for complainant.

Edward G. Dobrin for defendant.

REPORT OF THE COMMISSION

BY THE COMMISSION:

This case was presented under shortened procedure. No exceptions were filed to the examiner's proposed report. His recommendations are adopted herein.

By complaint filed June 27, 1939, it is alleged that defendant's rate on 117 cartons of glass lamp globes or shades shipped from Seattle, Wash., to Ketchikan, Alaska, January 22, 1938, was unjust and unreasonable, in violation of section 18 of the Shipping Act, 1916. Reparation and a reasonable rate for the future are requested.

The shipment weighed 1,752 pounds and measured 504 cubic feet. Applicable thereto was defendant's tariff item [1] "Freight, NOS," stating a rate per 100 pounds of 39 cents and a rate per cubic foot of 19.5 cents, subject to a rule [2] published in the tariff providing, in part, that "Where rates are stated in cents per 100 pounds and per cubic foot, charges will be computed by weight or measurement as one mode or the other will yield the greater revenue." The measurement rate of 19.5 cents per cubic foot was assessed on the shipment, and complainant paid freight charges thereon of $98.28.

[1] Item No. 250, Alaska Steamship Company Tariff SB F. No. 56.
[2] Rule 1 (a).

Complainant's position is that the rate charged was and is unreasonable to the extent the freight charges exceed $6.83 which would have accrued at defendant's weight rate of 39 cents per 100 pounds. It shows that defendant's charge was approximately 14 times the amount of a charge computed at defendant's weight rate contained in the particular tariff item. It contends, without production of any supporting facts, that the measurement rate results in a prohibitive price for glass lamp globes or shades in Alaska, and that there is not a proper relation between defendant's measurement and weight rates. A mere comparison between weight and measurement rates on a commodity, without more, is not conclusive that they are improperly related.

Defendant refers to the bulk of complainant's shipments of glass lamp globes or shades as compared with their weight, reviews generally the importance of shipboard space displacement in connection with rate making for transportation by water, and directs attention to regulatory decisions by the Commission and its predecessor, the United States Shipping Board, which recognize the propriety of rates by weight or by measurement dependent upon whichever method yields the more revenue to the carrier.

Where, as in the trade concerned, transportation rates are assessed on this alternative weight or measurement basis, it is the established practice to compute the rate on the principle that a weight ton is the equivalent of 40 cubic feet. Defendant's tariff item and rule here concerned accord with this practice, $7.80 being defendant's revenue per weight ton of 2,000 pounds or per measurement ton of 40 cubic feet. Although, as shown by complainant, the freight charge on glass lamp globes or shades as shipped by complainant at the measurement rate is 14.4 times a charge computed at defendant's Freight, NOS, weight rate, it is to be noted also that complainant's shipments measure 14.4 times their weight. At the weight rate contended for by complainant, defendant's revenue for transporting 40 cubic feet of the article involved would be 54.2 cents which patently is inadequate for the service rendered. No facts are presented in the instant case which prove the measurement rate here assailed to be unjust or unreasonable.

We conclude and decide that the rate in issue has not been shown to be unjust or unreasonable in violation of section 18 of the Shipping Act, 1916, as alleged. An order dismissing the complaint will be entered.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION held at its office in Washington, D. C., on the 23d day of April, A. D. 1940.

No. 541

GILL GLASS AND FIXTURE COMPANY

v.

ALASKA STEAMSHIP COMPANY

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission, on the date hereof, having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof;

It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed.

By the Commission.

[SEAL] (Sgd.) W. C. PEET, Jr.,
Secretary.

UNITED STATES MARITIME COMMISSION

No. 543

FRANKFORT DISTILLERIES, INC.

v.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, ET AL.[1]

Submitted February 21, 1940. Decided April 25, 1940

Rate on alcoholic liquors from Baltimore, Md., to Pacific coast ports, as applied alike to shipments in glass in cases and in bulk in barrels, not shown to be unduly prejudicial. Complaint dismissed.

George D. Rives and *M. F. Chandler* for complainant.

M. G. de Quevedo, Harry S. Brown, William M. Carney, Frank Lyon, J. A. Stumpf, Gerald A. Dundon, and *Charles J. Maley* for defendants.

Norman J. Morrison, Charles W. Braden, and *Edward Gusky* for interveners.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions were filed by complainant to the examiner's proposed report and oral argument was had. The findings recommended by the examiner are adopted herein.

The complaint, as amended, alleges that defendants' rate of $1.54½ [2] per 100 pounds, minimum 30,000 pounds, on alcoholic liquors from Baltimore, Md., to Pacific coast ports, as applied alike to shipments in glass in cases and in bulk in barrels, is unduly prejudicial and disadvantageous to shippers in glass in cases, in violation of section 16, and unreasonable in violation of section 18 of the Shipping Act,

[1] (Arrow Line) Sudden & Christenson, Baltimore Mail Steamship Company (Panama Pacific Line), Calmar Steamship Corporation, Isthmian Steamship Company, McCormick Steamship Company, Pacific Coast Direct Line, Inc. (Weyerhaeuser Line), (Quaker Line) Pacific-Atlantic Steamship Company, States Steamship Company (California-Eastern Line).

[2] On November 3, 1939, in *Westbound Alcoholic Liquor Carload Rates,* 2 U. S. M. C. 198, reduction of the rate here involved to $1.41 was found justified.

1916. A lawful rate for the future is sought. The allegation of unreasonableness was withdrawn at the hearing. Rates will be stated in amounts per 100 pounds unless otherwise indicated.

Complainant ships whiskey in glass in cases to the Pacific coast via rail from Louisville and also via defendant lines from Baltimore. Several years ago some of its competitors began shipping in bulk in barrels, the movement usually being by barge line from the producing States of Illinois, Indiana, Ohio, and Kentucky to New Orleans, La., thence by intercoastal lines to destination. There appears to be no competitive bulk movement from North Atlantic ports.

Bulk whiskey is of a high proof [3] and is mixed either with distilled water or diluted grain alcohol to obtain a greater quantity of a lower proof whiskey. For example, a quart of 110 proof reduced to 90 proof by the addition of distilled water produces approximately 22 percent more whiskey. If diluted alcohol instead of water is added the increase is even greater. The latter type, called a spirit blend, is not shipped by complainant west of the Mississippi River. Complainant's cases contain three gallons packed in any one of a number of size bottles, the average gross weight being 50 pounds. As whiskey weighs about eight pounds a gallon, a 50-pound case of three gallons is about half whiskey and half container and packing. The ordinary whiskey barrel contains 50 gallons, the contents weighing about 400 pounds and the barrel about 85 pounds. Thus the container represents less than 20 percent of the gross weight. The rate under attack amounts to 25.7 cents a net gallon on glass shipments and 12.26 cents on bulk shipments. Bulk shippers can reduce their costs by selling the empties on the Pacific coast while glass shippers cannot sell or refill their bottles.

It is complainant's view that the rate should be based either upon the "proof" of the liquor or upon the net contents of the container, and that in the latter case a proper differential for whiskey in glass in cases would be 20 or 25 percent under the rate on whiskey in bulk in barrels. Under the Western Classification, by which defendants' tariffs are governed, the same rate applies on alcoholic liquors whether in glass in cases or in bulk in barrels. We are referred to no instances where bulk shipments have been assessed a higher rate than glass shipments, whereas testimony on behalf of one intervener is to the effect that there are no rates on glass shipments lower than on bulk shipments. This is in accord with the general rule that the rate on the commodity applies as well to the container.

[3] "Proof" scale is graduated from zero to 200, the degrees proof being twice the percentage by volume of alcohol.

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Whiskey in bulk cannot be classed as a finished product inasmuch as it must be rectified, bottled, and labeled before sale to the consuming public. Bulk shipments may be made from distillery bonded warehouse to bottling plant or to other bonded warehouse, the tax [4] thereon being deferred until bottling takes place. Except where it has been bottled in bond prior to tax payment, whiskey in glass in cases is tax-paid before bottling and therefore is of higher value than similar whiskey in barrels.

Although complainant is of the opinion that its sales in California decreased during the last half of 1938 because of the rate, there is no evidence that its losses are the result of the alleged discrimination.

Upon this record we find that the same rate, applied alike on alcoholic liquors in glass in cases and in bulk in barrels, is not shown to be unduly prejudicial to the former description of traffic or unduly preferential of the latter description.

An order dismissing the complaint will be entered.

[4] $2.25 a proof gallon, which is a wine gallon (standard U. S. gallon) at 100 proof.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION held at its office in Washington, D. C., on the 25th day of April, A. D. 1940.

No. 543

FRANKFORT DISTILLERIES, INC.

v.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, ET AL.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission, on the date hereof, having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof;

It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed.

By the Commission.

[SEAL] (Sgd.) W. C. PEET, Jr.,
Secretary.

UNITED STATES MARITIME COMMISSION

No. 547

COSMOPOLITAN SHIPPING COMPANY, INC., AND A/S J. LUDWIG MOWINCKELS REDERI (COSMOPOLITAN LINE)

v.

BLACK DIAMOND LINES, INC., ET AL.

No. 548

A/S J. LUDWIG MOWINCKELS REDERI (COSMOPOLITAN LINE)

v.

UNITED STATES LINES COMPANY (UNITED STATES LINES) ET AL.

Submitted March 6, 1940. Decided April 26, 1940

Just and reasonable cause for defendants' refusal to admit A/S J. Ludwig Mowinckels Rederi to conference membership not shown.

Defendants' refusal to admit Mowinckels found unjustly discriminatory and unfair as between complainant Mowinckels and defendants and to subject Mowinckels to undue and unreasonable prejudice and disadvantage. If full and equal conference membership not accorded, consideration will be given to disapproval of conference agreements.

Horace M. Gray, *Charles E. Wythe* and *Lyle F. O'Rourke* for complainants.

J. Sinclair for North Atlantic Continental Freight Conference and North Atlantic French Atlantic Freight Conference.

Roger Siddall and *William Lage* for defendant United States Lines Company.

J. Newton Nash for defendant Compagnie Maritime Belge, S. A.

M. G. de Quevedo for defendant Black Diamond Lines, Inc.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Defendants filed exceptions to the report proposed by the examiners to which complainants replied. Our conclusions agree with those recommended by the examiners.

These cases involve similar issues and although not heard together, testimony of a number of witnesses in No. 547 was stipulated into the record in No. 548. Both cases will be disposed of in this report.

Complainant Cosmopolitan Shipping Company, Inc., hereinafter referred to as "Cosmopolitan," is the representative in the United States for complainant A/S J. Ludwig Mowinckels Rederi, hereinafter referred to as "Mowinckels." Defendants[1] are named as members of the North Atlantic Continental Freight Conference (Docket No. 547) and of the North Atlantic French Atlantic Freight Conference (Docket No. 548).

Complainants in No. 547 allege that defendants' refusal to admit either or both of them to membership in the North Atlantic Continental Freight Conference (Conference Agreement No. 4490), and the effect of exclusive patronage contracts between members of the conference and shippers, which coerce shippers from patronizing other carriers including complainants and threaten retaliation against shippers that patronize any nonconference carriers, subject complainants to undue, unjust, and unreasonable prejudice and disadvantage, all in violation of sections 14, 15, 16, 17, and 18 of the Shipping Act, 1916, as amended. We are asked to require defendants to admit complainants, or one of them, to membership in the conference or, in the event of their failure to do so, to withdraw the approval heretofore given the conference agreement under section 15 and to condemn as unlawful the contract rate system and practices thereunder. As section 18 relates solely to interstate commerce, the allegations thereunder will not be considered.

The stated purpose of North Atlantic Continental Freight Conference is "to promote commerce from North Atlantic ports of the United States and Canada, in the Hampton Roads/Montreal range, to ports in Belgium, Holland, and Germany (excluding German Baltic * * *." The agreement "covers the establishment and maintenance of agreed rates, charges and practices, for or in connection with the transportation of all cargo, except as may be otherwise provided * * * in vessels owned, controlled, chartered, or

[1] *Docket No. 547,* Black Diamond Lines, Inc. (Black Diamond Lines); Canadian Pacific Steamships, Ltd.; Compagnie Maritime Belge (Lloyd Royal) S. A.; County Line, Ltd. (County Line); Ellerman's Wilson Line, Ltd. (Ellerman's Wilson Line); Hamburg-Amerikanische Packetfahrt Aktien Gesellschaft (Hamburg American Line); Norddeutscher Lloyd (North German Lloyd); Osaka Syosen Kaisya; United States Lines Co. (United States Lines); N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij (Holland-America Line).

Docket No. 548, United States Lines Company (United States Lines); Compagnie Generale Transatlantique (French Line); Cosmopolitan Shipping Company, Inc., and County Line, Ltd. (County Line).

operated by the members in the trade covered by this Agreement." Article 9 provides that—

> Any person, firm, or corporation engaged in operating vessels regularly in this trade may be admitted to membership in the Conference upon agreeing to conform to this agreement and such rules and regulations as are adopted by the Conference pursuant thereto, and such admission shall not be denied by the member lines of the Conference, except for just and reasonable cause.
>
> Application shall be made to the Conference office in writing outlining the corporate and trade name of the Line, the service contemplated and such other information as the Conference may require. Copy of the application shall be sent to all members and shall be considered at the next meeting following receipt.

Cosmopolitan, incorporated in 1915, operated its own and chartered cargo vessels in transatlantic trade until 1919. It also acted as agent for private owners and for the governments of France and Switzerland. From 1919 until August 1939, when its agency agreement expired, it was the agent for the United States Government's America France Line, in operation between United States North Atlantic ports and French Atlantic and Channel ports, namely, Bordeaux, St. Nazaire, Havre, and Dunkirk. The last ship this company sent to Antwerp was in 1920, but it was active in the trade to Rotterdam until the end of 1924. Since the latter year its sole activities have been as managing agents of the America France Line. Until October 19, 1939, Cosmopolitan neither owned nor had any vessels under charter, but Mowinckels, a substantial shipowner, will be either the owner or the charterer of the vessels to be operated under the trade name "Cosmopolitan Line," and will be liable under issued bills of lading.

On July 24, 1939, Cosmopolitan applied for admission to the North Atlantic Continental Freight Conference, stating that in October 1939, a regular service to Antwerp, via Havre, would be inaugurated from United States North Atlantic ports, with sailings from New York every ten days and at frequent and regular intervals from certain outports;[2] also that the conference agreement, tariff rates, and all rules and regulations of the conference would be observed. On July 27, 1939, in reply to requests for additional information, the conference was advised that vessels in the Cosmopolitan Line service were or would be owned or chartered by Mowinckels; that Cosmopolitan would act as general agent in the United States; and that service would be maintained with Norwegian flag vessels of from 13.5 to 14 knots speed and of approximately 8,000 deadweight tons.

On August 3, 1939, complainant was notified its application was not approved. In response to a request for reasons in support of the

[2] U. S. North Atlantic ports other than New York.

conference action, the conference chairman on August 7, 1939, advised complainant of his lack of authority to state reasons for the actions, but he did state without prejudice that "your application does not appear to be an application of the owner." Thereafter, on August 9, 1939, Cosmopolitan again addressed the conference quoting an authorization received from Mowinckels reading:

> We authorize you apply membership conferences our name if necessary.

This letter further stated:

> Accordingly, the application of July 24, 1939, is confirmed as made by us for ourselves as general agents and/or for and on behalf of A/S J. Ludwig Mowinckels Rederi, whichever is required under your Conference rulings.
>
> With this information before you, please give us your immediate decision on our application, as it is our desire to avoid any rate disturbance.

Subsequently, in response to a request of the conference chairman another communication dated August 14, 1939, which restated facts regarding the proposed service and reaffirmed the intention of the Cosmopolitan Line to observe all rates, rules, regulations, and practices of the conference, requested the admission of Mowinckels as a conference member. The previous application of Cosmopolitan for membership independently of its principal, however, was not withdrawn. The applications of Cosmopolitan and of Mowinckels were denied at a special meeting of the conference held August 23, 1939.

No. 548 involves defendants' refusal to admit Mowinckels to membership in the North Atlantic French Atlantic Freight Conference (Conference Agreement No. 185). Allegations of unlawfulness under the Shipping Act, 1916, as amended, in respect to such denial are substantially the same as those heretofore stated in respect to No. 547. Application for conference membership had been submitted by letter dated July 26, 1939.

On August 24, 1932, the United States Shipping Board approved Conference Agreement No. 185, which established—

> a Conference to be known as North Atlantic French Atlantic Freight Conference, which will embrace the steamship trade for carriage of freight from North Atlantic ports of the United States and Canada to French Atlantic ports, the purpose of which is to agree on reasonable minimum freight rates, uniform as between such lines and in all such ways as may be proper to endeavor to stabilize and otherwise improve the steamship and export trade.

Article 6 thereof provided that—

> any other common carrier steamship line operating vessels regularly in this trade shall be admitted to membership in the Conference upon undertaking to conform with this agreement and to abide by such rules and regulations as may be adopted from time to time by the Conference. Eligibility for continued membership shall automatically cease when service is abandoned. If no notice of such abandonment is given the Conference, failure to maintain service for a period of three or more consecutive months shall be regarded as abandonment.

The application was discussed at conference meetings held August 4 and 10, 1939, but no definite action was taken. Minutes of those meetings indicate that the French Line and United States Lines desired further information regarding participation of Cosmopolitan Line in westbound conferences on equal terms. By letter dated August 23, 1939, the conference chairman advised Cosmopolitan that—

* * * some of tbe members, also members of the Westbound Conference, advised by telephone that until the Westbound Conference is satisfied regarding membership on equal terms, they are not prepared to deal further with the Eastbound application of Mowinckels * * *

There is also involved in Docket No. 548 a contention that, because of Cosmopolitan's conference affiliation prior to the termination of its agency agreement relating to the America France Line, and the fact that no resignation from conference membership had been submitted by Cosmopolitan, its alleged conference membership in its own right continues to exist. This contention is evidenced by repeated attempts during the period July 24 to August 26, 1939, to have the Cosmopolitan Line service announced to shippers through circulars issued by the conference. In respect to this contention defendants take the position that Cosmopolitan's participation in the conference was solely on behalf of the United States, the owner of the America France Line. At the time the conference agreement was approved, that line was being operated by Cosmopolitan pursuant to a so-called lump-sum contract, under which, defendant United States Lines admit on brief, there may have been a joint common carrier relationship sufficient to entitle Cosmopolitan to membership in its own right. However, the conference agreement was executed by Cosmopolitan as Managing Agents for an owner-principal. Subsequent changes in the operating agreements clearly reflect the existence of an agency relationship only. In support of its position, Cosmopolitan also relies upon the fact that through 1937 the America France Line and Cosmopolitan were named as carriers in conference contracts with shippers. But in 1938, the contract form was modified and thereafter the name of Cosmopolitan appeared only as agents for America France Line. There appears to have been no doubt regarding the relationship between Cosmopolitan and America France Line immediately prior to the termination of that relationship, for on July 29, 1939, a communication addressed to Cosmopolitan by the Commission's Director, Division of Operations and Traffic, stated in part as follows:

* * * we have learned that it is your intention, upon tbe termination of your Managing Agency Agreement, to operate foreign flag vessels in the North Atlantic-French Atlantic trade. In view of this and a possible conflict of the respective interests of your company and the Commission, we believe that

it would be more satisfactory to you and to ourselves if Conference matters affecting the America France Line were left in our hands. Therefore, we wish to advise that from this date until the effective date of your withdrawal as Managing Agent of the America France Line, all Conference matters affecting the America France Line are to be handled by either Mr. F. M. Darr, Chief of Traffic, or by Mr. H. Gieb, Traffic Representative, New York.

Conference Agreement No. 185, when originally approved, included as members America France Line, Baltimore Mail Steamship Company, Inc., Compagnie Generale Transatlantique, County Line (Inter-Continental Transport Services, Ltd.) and United States Lines. Article 6 thereof restricts additional membership to "any other common carrier steamship line * * *." As heretofore shown, Cosmopolitan has not operated in the trade as a common carrier since the formation of the conference. It was never eligible for membership, and cannot now be regarded as a conference member.

In No. 547 complainant Cosmopolitan applied for membership in the North Atlantic Continental Freight Conference independently of its principal Mowinckels. Article 9 of the conference agreement provides that any person, firm, or corporation engaged in "operating vessels" may be admitted to membership. Vessel operation referred to in the agreement necessarily means operation by a common carrier principal, and the operating common carrier in this instance is Mowinckels. Votes in matters relating to Cosmopolitan Line will be those of Mowinckels even though actually voiced by Cosmopolitan as agent. Cosmopolitan therefore can have no legitimate interest other than that of its principal and hence no necessity exists for separate membership. Consequently, no further consideration will be given to the application of Cosmopolitan.

The Cosmopolitan Line service was announced first through advertisements in Europe, and during August 1939 in New York. The first sailing vessel from Antwerp to New York was Mowinckels' S. S. *Ronda*, which vessel was also scheduled to sail eastbound from New York October 3, 1939. The *Ronda*, however, struck a mine September 13, 1939, and was destroyed. Thereafter eastbound sailings from New York at approximately 10-day intervals were scheduled and advertised as follows: October 13, 1939—*Anna Odlund;* October 24, 1939—*Molda;* November 5, 1939—*Ogna* and *Troma;* November 15, 1939—*Lista;* and November 25, 1939—*Heina.* Subsequent to the inauguration of service sailing schedules were constantly disrupted. The charter of the *Anna Odlund* to Mowinckels was cancelled. The *Molda*, while enroute to the United States, was fixed for a voyage to South America. The *Ogna* was under construction in Bremen, Germany. The *Troma*, substituted for the *Ogna*, was reassigned to carry grain for the Norwegian Government. Eastbound cargo had been solicited and secured by Cosmopolitan, but

when scheduled sailings were cancelled cargo bookings were cancelled. It is clear from the foregoing that at the time of hearing there had been no sailing of Cosmopolitan Line eastbound. But two vessels were then advertised to go on berth, the *Lista* and *Heina*, scheduled to sail from New York November 15 and November 25, respectively. Cargo solicitation for these sailings at conference rates or higher was in progress, and some cargo had been booked. Originally other than conference rates had been quoted.

The conferences in these cases are among those involved in Docket No. 513,[3] and in the *Waterman Steamship Corporation cases*,[4] and in respect to the contract rate system its operation generally, excluding peculiar features discussed in the report in Docket No. 513 applicable to ports on the Great Lakes, is the same as therein stated. Specific testimony of complainant and defendants here involved is that most shippers of commodities which move in large volume in the Continental and French Atlantic eastbound trades have signed the exclusive patronage contracts. Some shippers stated they would prefer not to sign the contracts, but that they desired the greater frequency in sailings of conference lines, and that to refuse would create difficulty in meeting competition of other manufacturers. Testimony of the conference chairman is that approximately 75 percent of the cargo, other than grain, moves under such contracts. Cosmopolitan Line's representative also stated that when soliciting eastbound cargo he had been told by shippers under contract that the line could not expect to obtain any business from them unless it was a member of the conference with the privilege of participation in the contracts.

Defendants' position generally is that Mowinckels has never been engaged in operating vessels regularly in the trade, is not therefore established in the trade and consequently has not met the condition precedent to its right to conference membership. Such a requirement in an approved agreement, however, is not binding on the Commission when deciding questions of contested eligibility. Even though required, establishment in a trade as a condition precedent, is not susceptible of sufficient definiteness to warrant its use in determining membership rights. Agreements Nos. 4490 and 185 herein involved require the "operation" of vessels. Facts of record, viz, (a) that subsequent to the filing of the complaints in these proceedings a state of war has existed in Europe; (b) that transportation conditions are not normal; (c) that in the trade to Antwerp and Rotterdam serious delays have resulted from the right of search on the high seas; (d)

[3] *Contract Routing Restrictions under Agreements Nos. 16, 147, 185, and 4490*, decided November 30, 1939, 2 U. S. M. C. 220.

[4] Dockets Nos. 519, 520, and 521, decided December 19, 1939, 2 U. S. M. C. 238.

that ships have been destroyed by mines; (e) that schedules of all lines serving Continental Europe have been disrupted; and (f) that all services to German ports have stopped entirely, are such as to raise serious question whether that requirement, if too strictly construed, is warranted. The record shows that Cosmopolitan Line began operations by advertising its service, and soliciting freight which resulted in securing contracts from shippers and in definite booking of cargo. The provision in the conference agreements requiring vessel operation has not been adhered to strictly by defendants; in fact enforcement thereof has been demonstrated to be optional, for absence of prior service in the Continental trade proved to be no barrier to the admission of Osaka Syosen Kaisha to the North Atlantic Continental Freight Conference in July 1938. Its first sailing from New York in the trade, however, was in August 1938. Announcement of service, publication of sailing schedules, and solicitation of cargo resulting in common-carrier commitments are sufficient to qualify an applicant to submit an application; otherwise modification of the agreements should be required.

Defendants stress as a primary reason for denying the applications for membership in the eastbound conferences the unwillingness of Mowinckels to apply for membership in Continental and French Westbound Conferences on equal terms with other members. The record discloses that on August 14, 1939, an application was submitted to the Continental North Atlantic Westbound Freight Conference on behalf of Mowinckels by Agence Maritime de Keyser Thornton, General Agent at Antwerp, requesting admission "subject to arranging satisfactory terms and subject to immediate acceptance of the Cosmopolitan Line as a member of the eastbound conference." On August 16, 1939, application was made by Consortium Maritime Franco-Americain for representation of Cosmopolitan Line in the French North Atlantic Westbound Conference. This application stated that "we should consider it as quite normal to be authorized by your conference to charge the conference tariff after deduction of a differential." A representative of Cosmopolitan stated at the hearing that conference membership westbound on terms set forth in Conference Agreements Nos. 70-1 and 5920 would not be satisfactory; that on eastbound voyages its vessels would call at Havre first, would discharge and load cargo there, and proceed to Antwerp also to discharge and load cargo. The vessel would then sail for New York. Based on its past experience in the trade, Cosmopolitan also stated that many exports from France are luxury commodities which move by vessels of greater speed than the cargo vessels and that cargo carried by America France Line under its management was principally lower class com-

modities such as chalk, rags, and pebbles, and that it had always operated on a differential westbound.

Effective October 3, 1939, the America France Line was chartered to defendant United States Lines by the Commission. The United States Lines, therefore, is a member of the eastbound and westbound French Conferences. Although vessels of United States Lines in its Hamburg service did not call at Antwerp, its interest was in respect of cargo destined to interior European ports that could move via Antwerp or Hamburg. At the time this company voted against complainants' application for admission to the eastbound Continental Conference, it was informed that Mowinckels and/or Cosmopolitan Lines were underquoting the United States Lines' rates in the U. K. trade via Antwerp. Its position is that complainants cannot cooperate with conference lines eastbound while antagonizing them in westbound operations. "All that we wanted them to do and still want them to do is to come into the westbound conferences on equal terms with all the lines in the trade." That is expressly stated as being the only objection of the United States Lines to complainants' admission to the eastbound conference. This is amplified by counsel's statement that an application to the eastbound Continental and French Atlantic Conferences should be contingent upon membership in the westbound Continental and French Conference, or in other words, "if you get in one you should get in four."

The eastbound Continental and French Atlantic Conferences were organized to promote commerce from United States ports to European ports. The approved conference agreements refer to "the trade covered by this agreement," and the conferences are to be governed by rules and regulations within the purpose and scope of the approved agreements. Requirements for admission have been herein noted. Although it is defendants' position that because the same ships generally are used to transport eastbound and westbound cargo there is but a single trade, and that uniform rates, rules, regulations, and practices in each direction should be observed, the agreements do not so provide, and no rule or regulation has been promulgated which requires an applicant for eastbound conference admission to become a member of conferences operating westbound.

Defendant Black Diamond Lines, Inc., in support of a contention that the trade was overtonnaged, shows that the total tonnage transported by that company eastbound during 1938 represented 65.72 percent of the deadweight and 63.24 percent of the cubic capacity available for cargo. During the period June 15 to September 15, 1939, the percentage of deadweight capacity occupied by cargo was 46.35 percent. Belgian Line's carryings eastbound for 1938 were 65 and 41

percent, respectively, and for the period July through September 1939, were 44 and 31 percent, respectively.

The claim that the trade was overtonnaged was advanced in support of the action of these conferences upon applications for admission of Waterman Steamship Corporation. In rejecting this claim we said:

> * * * this factor cannot be controlling for the reason if adequacy of existing service is to prevent new lines from engaging in the trade, carriers already in the service could perpetuate their monopoly by the simple and expedient method of continuing to maintain adequate service.

In June 1939, Arnold Bernstein Line and Red Star Line discontinued operations, although Black Diamond Lines and Belgian Line by increasing their sailing schedules to a weekly basis supplied to shippers the equivalent of the services withdrawn. Subsequently, the services of Hamburg American Line and North German Lloyd were discontinued. Viewed in the light of conditions as disclosed at the hearing, the contention as to overtonnage is without merit.

No violation of section 14 or 17 of the Shipping Act, 1916, as amended, has been shown.

We find on the record in these cases that complainant A/S J.Ludwig Mowinckels Rederi (Cosmopolitan Line) is entitled to membership in the North Atlantic Continental and the North Atlantic French Atlantic Freight Conferences on equal terms with each of the defendants; that defendants' denials of membership to Mowinckels have been without just and reasonable cause; that such denials while at the same time maintaining exclusive patronage contracts with shippers create unjust discrimination and operate unfairly as between complainant Mowinckels and defendants, thus subjecting Conference Agreements Nos. 4490 and 185 to disapproval under section 15 and in complainant Mowinckels being subjected to undue and unreasonable prejudice and disadvantage, in violation of section 16 of the Shipping Act, 1916, as amended. Defendants will be allowed 30 days within which to admit complainant Mowinckels to full and equal membership in each of the two conferences, failing which consideration will be given to the issuance of orders disapproving the conference agreements.

By the Commission.

[SEAL] (Sgd.) W. C. PEET, Jr.,
Secretary.

2 U. S. M. C.

UNITED STATES MARITIME COMMISSION

No. 566

WAREHOUSE DELIVERIES OF WOOL AND MOHAIR AT BOSTON, MASS.

Submitted March 18, 1940. Decided April 30, 1940

Schedules eliminating free delivery within the switching limits of Boston, Mass., on wool and mohair from Texas ports and New Orleans, La., found justified. Suspension order vacated and proceeding discontinued.

Julian M. King, F. C. Tighe, J. R. Bell, T. D. O'Brien, R. B. Wallace, T. P. Bartle, C. L. Davis, J. E. Andrews, George C. Bledsoe, and *R. L. Lockhead* for respondents.

Richard D. Chase for protestant Boston Wool Trade Association.

Walter W. McCoubrey and *Hugo Oberg* for intervener Boston Port Authority.

Joseph Crehan for American-Hawaiian Steamship Company.

REPORT OF THE COMMISSION

BY THE COMMISSION:

By schedules filed to become effective January 31, 1940, and later, respondents [1] proposed to eliminate free delivery to certain warehouses located at railroad sidings within the switching limits of Boston, Mass., on wool and mohair from Texas ports and New Orleans, La.; also to railroad terminals served by railroad sidings within those limits except when the rates of connecting lines include transfer from pier on traffic moving beyond those limits. Upon protest of Boston Wool Trade Association the schedules were suspended to May 31, 1940. Boston Port Authority intervened at the hearing on behalf of protestant. The proceeding was heard jointly with proceedings before the Interstate Commerce Commission, its Docket No. I. & S. 4764, which involves similar tariff provisions. Rates will be stated in amounts per 100 pounds.

[1] Agwilines, Inc., Lykes-Coastwise Line, Inc., Mooremack Gulf Lines, Inc., Pan-Atlantic Steamship Corporation, Eastern Steamship Lines, Inc., and Merchant and Miners Transportation Co.

Respondents' port-to-port carload rate on wool in grease and mohair, in sacks or bales, from Texas ports and New Orleans to North Atlantic ports, is 86 cents per 100 pounds, minimum 24,000 pounds. The rate applies on shipments originating at interior Texas and Eastern New Mexico points on traffic moving to the Gulf ports by rail, and on shipments originating at interior Texas points and trucked to the ports. The service to Boston may be direct or by transshipment at New York or Philadelphia, and the carriers have the option of delivering by means of truck, rail switch, or lighter. Boston, Philadelphia, and Camden are the only ports where "uptown" delivery is given. It was testified by one of the respondents in the Interstate Commerce Commission proceeding that the absorption at Philadelphia and Camden has been allowed to remain by error and will be eliminated if the suspension is lifted in that proceeding. Should respondents herein prevail and if free delivery is eliminated at Philadelphia and Camden, all North Atlantic ports will be on a parity. Furthermore, those consignees not now accorded free delivery will be on a parity with those who have been receiving the privilege. Protestant contends, however, that the rate should be reduced to the extent of the switching charge if the suspension orders are vacated as the effect would be to increase the rate to that extent.

Prior to May 30, 1930, respondents had no joint through rates or direct service from Gulf ports to Boston, the rates used being the ocean rates to other North Atlantic ports plus local or proportional rates of rail or water carriers beyond. Effective on that date, a joint through commodity rate of 97½ cents, not subject to this Commission, was established from Galveston and Houston to Boston, and where the traffic was delivered by Eastern or Merchants and Miners the Boston rail siding charges were absorbed in order to compete with the New York, New Haven & Hartford Railroad. From that time various transportation services, direct or otherwise, all-water or water-rail, have been furnished. On July 22, 1937, the routes in connection with the rail carriers were cancelled. The rates via routes affording rail haul are now on a combination basis or through fourth class basis, and are considerably higher than the 86-cent rate. Since no competitive reason remains therefor, respondents feel that the abnormal practice of free delivery at Boston should be eliminated. See *Boston Wool Trade Association* v. *Merchants and Miners Transportation Co.*, 1 U. S. S. B. 24, and *Boston Wool Trade Association* v. *Eastern Steamship Lines, Inc.*, 1 U. S. S. B. 36.

Intervener's witness named fourteen commodities moving over some of the respondents' lines from New Orleans to North Atlantic ports, the rates on which include delivery by rail, drayage, or lighterage at destination, but the witness had no knowledge of the shipping

characteristics or transportation circumstances which might justify their free delivery.

Wool and mohair are light-weight commodities with a high stowage factor, and respondents' exhibit shows a revenue therefrom of 9.7 cents per cubic foot as compared with a higher revenue from eleven other commodities on which the stowage factors and rates are lower. There was no evidence, however, of the volume of movement, value or other transportation characteristics of the other commodities. While a general statement was made that labor, fuel, and other costs have increased, no figures were given.

The 97½-cent rate established on May 30, 1930, from Galveston and Houston to Boston, heretofore referred to, was the same as the fourth class rate between the same points, and represented 57½ percent of the first-class rate of $1.69½. Since that time the rate has fluctuated. Effective July 10, 1937, following approval thereof by the Interstate Commerce Commission in *Grain Products from Gulf Ports to Atlantic Seaboard*, 222 I. C. C. 705, 715, a rate of 82 cents was published. The decision in that case was based upon prior cases prescribing a rate of 55 percent of first class on wool from western producing territory to the East. The present 86-cent rate is the result of the 5-percent increase authorized by the Interstate Commerce Commission in *Fifteen Percent Case, 1937–1938*, 226 I. C. C. 41. A corresponding increase was permitted by this Commission on March 12, 1938, by special permission. In the *Consolidated Southwestern Cases*, 211 I. C. C. 601 and 222 I. C. C. 229, there was prescribed a first-class rate of $1.70 from Galveston and Houston to the piers at North Atlantic ports, and on traffic for rail-delivery points in Boston the rate prescribed was $1.93. Except on articles for which commodity rates related to first class were prescribed, class rates governed by the Western Classification were prescribed as maximum reasonable rates. As wool and mohair are subject to fourth class in the current Western Classification, the maximum reasonable rates prescribed therefor from Galveston and Houston docks to Boston would be 94 cents to the piers and $1.06 for rail delivery, exclusive of the 5-percent increase already referred to.

On this record we find that the suspended schedules have been justified. An order vacating the order of suspension and discontinuing this proceeding will be entered.

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ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 30th day of April A. D. 1940.

No. 566

WAREHOUSE DELIVERIES OF WOOL AND MOHAIR AT BOSTON, MASS.

It appearing, That by order dated January 30, 1940, the Commission entered upon a hearing concerning the lawfulness of new and joint regulations and practices affecting rates and charges in the schedules enumerated and described in said order, and suspended the operation of said schedules until May 31, 1940;

It further appearing, That investigation of the nature and things involved has been had, and that the Commission, on the date hereof, has made and filed a report containing its conclusions and decision thereon, which report is hereby referred to and made a part hereof, and has found that the schedules under suspension have been justified;

It is ordered, That the order heretofore entered in this proceeding, suspending the operation of said schedules, be, and it is hereby, vacated and set aside as of May 31, 1940, and that this proceeding be, and it is hereby, discontinued.

By the Commission.

[SEAL] (Sgd.) W. C. PEET, Jr.,
Secretary.

UNITED STATES MARITIME COMMISSION

No. 471

IN THE MATTER OF RATES, FARES, CHARGES, REGULATIONS, AND PRACTICES OF INTER-ISLAND STEAM NAVIGATION COMPANY, LTD., BETWEEN POINTS IN THE TERRITORY OF HAWAII

Submitted May 3, 1940. Decided June 4, 1940

Proceeding discontinued upon receipt of additional evidence showing respondent's net income for 1939 was less than fair return on rate base. Original report 2 U. S. M. C. 253.

Appearances as heretofore noted.

SUPPLEMENTAL REPORT OF THE COMMISSION

BY THE COMMISSION:

In the original report herein, 2 U. S. M. C. 253, wherein it was determined that respondent's rate structure as a whole was not unreasonable, we found that respondent was entitled to a return of 7 percent on a rate base of $6,565,000; and that annual revenues, estimated at $313,127, produced a return of only 4.77 percent. In this connection we stated: "The task of calculating future revenues and expenses was complicated by the reduction in passenger fares and the strike (in 1938). Therefore, the proceeding will be held open for the incorporation of evidence showing the actual net income for the calendar year 1939."

The evidence submitted indicates that the actual net income from common carrier operations for the calendar year 1939 was $274,234.78 which represents a return of 4.18 percent on the rate base. We will, therefore, enter an order discontinuing this proceeding.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 4th day of June A. D. 1940

No. 471

IN THE MATTER OF RATES, FARES, CHARGES, REGULATIONS, AND PRACTICES OF INTER-ISLAND STEAM NAVIGATION COMPANY, LTD., BETWEEN POINTS IN THE TERRITORY OF HAWAII

This proceeding, instituted by the Commission on its own motion, having been duly heard, and full investigation of the matters and things involved having been had, and the Commission, on January 4, 1940, and the date hereof having made and entered of record reports stating its conclusions and decision thereon, which reports are hereby referred to and made a part hereof;

It is ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission.

[SEAL] (Sgd.) W. C. PEET, Jr.,
Secretary.

UNITED STATES MARITIME COMMISSION

No. 565

REDERIET "OCEAN" A/S

v.

YAMASHITA KISEN KABUSHIKI KAISHA ET AL.

Submitted June 28, 1940. Decided July 11, 1940

Found that as a result of the cessation of operation by complainant due to the European War, the issues presented herein have become moot. Under agreement of parties, complaint dismissed without prejudice to complainant's right to petition for reopening of the proceeding and to use, in connection therewith, the record heretofore made.

S. W. Schaefer for complainant.
Roger Siddall and *George F. Foley* for defendants jointly.
Ira L. Ewers and *A. F. Chrystal* for Moore-McCormack Line, Inc.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Complainant, a Danish corporation, is a common carrier by water in foreign commerce, operating, at time of hearing, between Atlantic ports of the United States and various ports on the east coast of South America. Defendants, also common carriers by water in foreign commerce, operate in the same trade under Conference Agreement No. 59 known as the River Plate and Brazil Conferences.

By complaint filed January 23, 1940, complainant alleges that defendants' refusal to admit it to membership in the above-mentioned conferences and defendants' exclusive patronage contracts with shippers of cargo in the respective trades, create an undue and unreasonable preference or advantage to certain shippers, subject complainant to undue and unreasonable prejudice and disadvantage and are in violation of sections 15, 16, and 17 of the Shipping Act, 1916, as amended, and of the anti-trust laws, U. S. Code, title 15, sections 1 to 7.

We are asked to order defendants to cease and desist from the alleged violations of law and to admit complainant to full and equal membership in the above-mentioned conferences. If it is not admitted, complainant requests an order canceling the agreement.

On February 15, 1940, the defendants, in addition to entering a general denial, answered further that complainant's ships were not serviceable for the trade inasmuch as they were fully refrigerated ships and that the tonnage moving was general cargo. Refrigerated cargo is specifically exempted from the scope of the agreement.

At the hearing beginning March 8, the date for filing briefs by all parties was fixed as April 11. Subsequent to the hearing Denmark was invaded by Germany which action subjected complainant's ships to the possibility of being seized as prize by opposing belligerents, whereupon complainant ceased operations. Its attorney from time to time has asked for extension of the brief date. The last two requests have been objected to by attorneys for the defendants. The last extension granted was to July 1, 1940, and a request was then made to grant a further extension to August 1. Inasmuch as defendants' attorneys objected to the granting of this extension of time on the ground that the unsettled condition of this case resulted in unfavorable relations as between the conferences and shippers, all parties were requested to state whether they would agree to the entry of an order dismissing this proceeding without prejudice to complainant's right to petition for reopening in the event that it was in a position later to operate in the trade. Upon reopening the right to use the record heretofore made insofar as it might be applicable was to be preserved. All parties agreed that the proceeding should be dismissed on this basis.

An order will be entered dismissing the complaint without prejudice to complainant's right to petition for reopening if and when they are in a position to operate as a common carrier in this trade and without prejudice to the rights of all parties to use the record heretofore made insofar as it may be applicable.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 11th day of July A. D. 1940.

No. 565

REDERIET "OCEAN" A/S

v.

YAMASHITA KISEN KABUSHIKI KAISHA ET AL.

This case being at issue upon complaint and answer on file, and having been duly heard and the issues herein having been rendered moot by the cessation of operation by complainant, and the parties having agreed that the complaint be dismissed;

It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed without prejudice to complainant's right to petition for reopening upon the resumption of operation, and the right of all parties to use the record heretofore made insofar as applicable.

By the Commission.

[SEAL] (Sgd.) W. C. PEET, Jr.,
Secretary.

UNITED STATES MARITIME COMMISSION

No. 568

WOOL RATES TO ATLANTIC PORTS

Submitted June 3, 1940. Decided July 12, 1940

Proposed increased rates on eastbound wool from Pacific coast ports to Atlantic coast ports, not shown unlawful. Order of suspension vacated and proceeding discontinued.

H. S. Brown, *W. M. Carney*, and *M. G. de Quevedo* for respondents.

Ormand R. Bean, *Calvin L. Blaine*, *Charles E. Blaine*, *H. R. Brashear*, *J. G. Bruce*, *John H. Carkin*, *Willis Crane*, *J. W. Cornell*, *A. M. Geary*, *L. C. Jones*, *I. H. Pfaffenberger*, *L. G. Reif*, *Charles A. Root*, *C. B. Sexton*, *Ralph L. Shepherd*, *E. T. Taylor*, *Alex. A. Tennant*, *J. Richard Townsend*, *Martin G. White*, and *R. H. Young* for protestants.

REPORT OF THE COMMISSION

BY THE COMMISSION:

By schedules filed to become effective March 16, 1940, respondents,[1] common carriers by water in intercoastal commerce, proposed to increase the any quantity rates 25 cents per 100 pounds for the transportation of wool and mohair, in grease and scoured, in bags and

[1] American-Hawaiian Steamship Company; (Arrow Line) Sudden & Christenson; Babbidge & Holt, Inc.; Bay Cities Transportation Company; Berkeley Transportation Company; The Border Line Transportation Company; California Eastern Line, Inc.; The California Transportation Company; Calmar Steamship Corporation; Coastwise Line; The Consolidated-Olympic Line; Crowley Launch & Tugboat Co.; Erikson Navigation Company; Hammond Shipping Company Ltd.; Isthmian Steamship Company; A. B. Johnson Lumber Company; Luckenbach Steamship Company, Inc.; McCormick Steamship Company; Marine Service Corporation; Northland Transportation Company; (Panama Pacific Line) (Baltimore Mail Steamship Company, United States Lines Co., General Agents; Puget Sound Navigation Company; Puget Sound Freight Lines; (Quaker Line) Pacific-Atlantic Steamship Co.; Richmond Navigation & Improvement Co.; Roamer Tug & Lighterage Company; Sacramento & San Joaquin River Lines, Inc.; Schafer Bros. Steamship Lines; Shaver Forwarding Company; Skagit River Navigation & Trading Company; States Steamship Company; Weyerhaeuser Steamship Co.

bales, from Pacific to Atlantic coast ports. Upon protests of Public Utilities Commission of the State of Idaho, the Secretary of Agriculture, Arizona Corporation Commission, Public Utilities Commissioner of Oregon, Board of Railroad Commissioners of Montana, National Wool Growers Association and numerous state and county wool growers and marketing associations, farm organizations, and individual wool growers and dealers, the operation of the schedules was suspended until July 16, 1940.

"Wool in the grease" is the commercial designation of wool before removal of the grease, dust, and other foreign substances which, in western territory, comprise about two-thirds of the weight. It is called "fleece" wool when obtained by shearing the live animal and "pulled" wool when removed from the pelt of a dead animal by chemical process or sweating. Wool from which the grease, dirt, etc., has been cleaned is known as "scoured" wool. Scoured wool is assorted and graded, and made ready for the spinner by carding and combing.

Mohair is goat hair. It takes the same rates as wool and will be included in the term wool in this report. Evidence of record is confined almost wholly to wool.

The wool in question is produced in all of the States including and west of Montana, Wyoming, Colorado, and New Mexico. On the Pacific coast California produces more than Oregon and Washington combined. In 1939 California produced more than any of the western states except Wyoming. The principal ports of origin are, in the order named, San Francisco (including east bay ports, Sacramento and Stockton), Portland, Los Angeles Harbor, and Seattle. Most of the wool is delivered at Boston. Respondents American-Hawaiian and Luckenbach transport over 90 percent of all east-bound intercoastal wool, the heaviest movement of which is between April and July.

Witness for respondents testified that wool in grease is shipped in bags 6 feet 7 inches long, 2 feet 4 inches wide, and 2 feet thick, measuring an average of 30.8 cubic feet. The average weight per bag was said to be 288 pounds reflecting a density of 214.66 cubic feet per ton without making allowance for broken stowage which is 10 percent and more. The stowage factor used by the trade is 225 cubic feet per ton.

Scoured wool is stated to be packed in bags of the same dimensions as wool in grease, with a stowage factor of 550 cubic feet. A bale of scoured wool is described as measuring 2 feet 3 inches by 2 feet 9 inches by 4 feet, equal to 26.8 cubic feet per bale. It weighs generally upwards of 300 pounds.

The record contains many figures showing the value of wool during the past 20 years. Values vary with the grades and producing localities and are influenced by imported wools from Australia, South America, and other world-producing centers. It is conjectural what effect the present European war will have on Boston prices of wool and on foreign demands. According to an exhibit of record issued by the United States Department of Agriculture the estimated average local market prices of shorn wool in 1938 and 1939 were 19.2 cents and 22.3 cents per pound respectively. Claims for loss and damage are negligible. Rates will be stated in cents per 100 pounds.

Respondents' present east-bound any quantity rates on wool are $1.18, in grease, in bags; $1.10, in grease, in bales compressed to a density of 12 pounds per cubic foot; $2.25, scoured, in bags; and $1.30, scoured, in bales compressed to density of 10 pounds per cubic foot. They propose to increase each of these rates 25 cents which amounts to percentage increases ranging from 11.2 percent on scoured wool in bags to 22.8 percent on wool in grease, in bales. The latter moves in greatest volume.

Respondents trace the history of east-bound wool rates since June 26, 1922, when the rate was $1.25 on wool in grease, in bags. They take the position that the rate was later forced down by a succession of rate wars and that the present proposals are an attempt to fix wool rates on a sound basis. They show that bagged wool requires unusual care in handling and stowing. Damp or wet wool is susceptible to self heating and spontaneous combustion and requires careful inspection when tendered for shipment. American-Hawaiian gives each bag a thermometer test before loading. Wool in grease will contaminate such commodities as dried fruit, sugar, and flour.

Respondents compare estimated costs of loading and discharging wool with those of such heavy moving commodities as canned goods, dried beans, green hides, flour, woodpulp, sugar, lumber, and dried fruit. The lowest estimate of cost of loading wool in bags is given as $2.63 per ton of 2,000 pounds. The highest estimates of cost of loading the other listed commodities range from 59 cents per ton for woodpulp to $1.67 for hides. The discharging costs appear to be about on the same ratio except that one respondent witness estimates cost of discharging lumber at $1.32 per ton compared to $1.65 for wool. Of the stated commodities all can be loaded or discharged more rapidly than wool which it is said loads only about 10 tons per hour. According to respondents' figures 14 tons of canned goods and as much as 38 tons of flour can be loaded per hour. They stress various special services accorded wool such as stenciling of bags, storing and accumulating lots for shippers and advancement of

freight charges for transportation from interior points to the wharves. The record is convincing that because of its bulk in either bags or bales, and its contamination of foodstuffs wool is difficult to stow efficiently and economically. Using a stowage factor of 225 cubic feet, the proposed rate of $1.43 on wool in grease would yield 12.7 cents per cubic foot. According to an exhibit of record the yield per cubic foot on canned goods is 22.9 cents, dried fruit in boxes, 27.6 cents, cotton 11 cents, and green salted hides 27.5 cents at the rates in effect at the time of hearing. Using the all-rail transcontinental rates as a ceiling respondents compare the relationship thereto of the proposed $1.43 rate and their rates on other commodities. For example, the transcontinental carload commodity rate prescribed by the Interstate Commerce Commission is said to be $2.70 on wool in grease in bags. The proposed rate would be 50.3 percent of that rate. It is testified that the intercoastal carload rates on canned goods, tires, lumber, drugs, dried beans, dried fruit, woodpulp, wine, and green salted hides range from 50 percent on canned goods to 72.2 percent on dried beans of the contemporaneous all-rail transcontinental carload rates. It is also testified that the competitive joint rail-and-water rates applying from California terminals to Atlantic piers through Great Lakes and Gulf ports are generally made on the basis of the all-rail rates to Chicago.

Protestants rely mainly upon the poor economic status of the wool-growing industry, stating that the producers who pay the freight cannot bear an increase of ¼ of 1 cent per pound, equivalent to about 2 cents per head of sheep. According to figures compiled by the Department of Agriculture reflecting a survey of Arizona, California, Idaho, Montana, Nevada, Oregon, Utah, and Washington, the average cash income from wool sales during the 10-year period 1930–1939 was 31.6 percent lower than during the previous 10-year period. One protestant witness testified that the average cost of raising sheep in Oregon during the past 5 years has increased 34 percent while the gross returns from the sale of sheep and wool has increased only 9.4 percent. Wages, taxes, supplies, and range were stated to be the principal items of increased cost of producing wool. Such testimony was typical of that of other witnesses from all of the western wool-producing States. They call attention to various incidental charges such as wharfage and insurance which they pay in addition to the ocean freight. Exclusive of war-risk insurance, the incidental charges are said to average about 19.5 cents per 100 pounds on wool from Portland to Boston. Protestants also stress the fact that the proposed increases will result in loss of traffic by respondents to railroads since the rate-breaking line between the transcontinental

routes and the intercoastal route will move westward. They instance five rate increases on wool made by respondents since 1931 and contend that American-Hawaiian and Luckenbach, which carry practically all the wool, are not in financial need. They assert that the record fails to show recent increased transportation costs or other changed conditions justifying increased rates on wool. Many of respondents' figures and estimates of stowage factors and loading costs are assailed.

Conceding that some of respondents' analyses are faulty, it must be remembered that stowage factors are not constant. They vary with types of vessels and space used thereon. Nor can loading costs be reduced to mathematical certainty to fit each voyage and port. On the whole, the proposed rates are not excessive considering the characteristics of wool as outlined above. What we said in *Eastbound Intercoastal Lumber*, 1 U. S. M. C. 608, 623, with respect to the economic distress of the lumber industry applies with equal force here: "We cannot require of carriers the establishment of rates which assure to a shipper the profitable conduct of his business."

The record in this case does not warrant a finding that the suspended schedules are unlawful. An order will be entered vacating the order of suspension and discontinuing this proceeding.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 12th day of July, A. D. 1940

No. 568

WOOL RATES TO ATLANTIC PORTS

It appearing, That by order dated March 12, 1940, the Commission entered upon a hearing concerning the lawfulness of the rates, charges, regulations, and practices in the schedules enumerated and described in said order and suspended the operation of said schedules until July 16, 1940;

It further appearing, That investigation of the matters and things involved has been had, and that the Commission, on the date hereof, has made and filed a report containing its conclusions and findings thereon, which report is hereby referred to and made a part hereof, and has found that the schedules under suspension have been justified;

It is ordered, That the order heretofore entered in this proceeding, suspending the operation of said schedules, be, and it is hereby, vacated and set aside, and that this proceeding be, and it is hereby, discontinued.

By the Commission.

[SEAL] (Sgd.) W. C. PEET, Jr.,
Secretary.

UNITED STATES MARITIME COMMISSION

No. 512

CARGO TO ADRIATIC, BLACK SEA, AND LEVANT PORTS

Submitted September 13, 1939. Decided July 16, 1940

Practice of quoting rates differentially under rates of other carriers in the trade found to be a condition unfavorable to shipping in the foreign trade.

Drastic reduction of rate on flour from U. S. North Atlantic ports to Adriatic, Black Sea, and Levant Ports found unreasonable and detrimental to commerce of the United States.

Payment of commission by common carriers by water in foreign commerce to agents who are also shippers or who have an interest in the cargo transported found to be in violation of section 16 of the Shipping Act, 1916, as amended.

Rules and regulations under authority of section 19 of the Merchant Marine Act, 1920, not promulgated due to present conditions in the foreign trade resulting from the European war which have rendered this issue moot.

R. H. Hallett for United States Maritime Commission.

Roscoe H. Hupper, *James Sinclair*, and *C. R. Andrews* for respondent members of Adriatic, Black Sea, and Levant Conference; and *Charles S. Belsterling*, *Thomas F. Lynch* for Isthmian Steamship Company, and *Charles W. Lowack* for United States and Levant Line Ltd., conference members.

James W. Ryan for Isbrandtsen-Moller Company, Inc.

Roger Siddall for Ellerman-Bucknall Steamship Co., Ltd., and Strick-Ellerman Joint Service.

Herman Goldman, *Elkan Turk*, *Michael D. F. O'Dowd*, and *Leo E. Wolf* for Kerr Steamship Company, Inc.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions were filed by certain respondents to the report proposed by the examiner and oral argument was had. Our findings differ in part from those recommended by the examiner.

This proceeding was instituted by us upon our own motion by order dated February 17, 1939, as amended, requiring carriers[1] parties to the Adriatic, Black Sea, and Levant Conference (Conference Agreement No. 133), as well as other[2] common carriers by water in the trade between North Atlantic ports of the United States and Adriatic, Black Sea, and Levant ports to show cause why some of their competitive practices should not be found to be unfavorable to shipping in the foreign trade; and why the conference agreement should not be disapproved, modified, or canceled.

At the hearing the matters in issue were defined as: (1) The lawfulness of the practice of establishing rates below the prevailing rates—the method and the justification therefor; (2) the lawfulness of the reduction made by the conference members in the rate on flour from 40 cents to 10 cents per hundred pounds; and (3) the employment by a carrier of an agent having an interest in the cargo transported over its lines.

Agreement No. 133, which was approved February 26, 1930, is a cooperative arrangement for the purpose of stabilizing rates on traffic from North Atlantic ports of the United States to Adriatic, Black Sea, and Levant ports. Respondents are all the known common carriers operating direct services in the trades involved in this proceeding. Isbrandtsen also has an indirect service via European ports. During 1938 there were approximately 153 conference and 25 nonconference sailings. On a prorated basis the sailings in 1939 have increased, due in part to the additional services inaugurated by Isbrandtsen and Kerr.

In November 1938, prior to entry in this trade, Isbrandtsen, who operates foreign flag vessels, issued a notice to the shipping public that it was establishing a direct service. This notice reads in part as follows:

> You will find us, as to the Far East and Europe, most willing to cooperate in providing reasonable freight rate—assisting you in realizing worthwhile savings and meeting competition.
>
> Since our independent steamship competition will benefit every shipper and receiver in this trade, in your own interest you will naturally want to support it in every way possible. We therefore urge you to check and mail the attached card for full details before signing any transportation contracts.

It was testified by Isbrandtsen's Vice President that, although there were exceptions, it was the general policy of the company to

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[1] American Export Lines, Inc., Compagnie Generale de Navigation a Vapeur (Fabre Line), Fern Line (Joint Service of Fearnley & Eger and A. F. Klaveness & Co., A/S), Isthmian Steamship Company, "Italia" Societa' Anonima di Navigazione (Italian Line), Lines Sud Americana, Inc. (Gardiar Lines), United States and Levant Line, Ltd.

[2] Isbrandtsen-Moller Company, Inc., Kerr Steamship Company, Inc., Ellerman & Bucknall Steamship Co., Ltd., Strick Ellerman Joint Service, and States Marine Corporation.

quote rates differentially lower by ten to fifteen percent than the established rates in the trade whenever it met conference competition. It appeared of record that there was no instance in which Isbrandtsen entered a trade wherein they were not confronted with this conference competition. The witness further testified that the one restriction on this general policy was that a rate would not be quoted if it failed to produce a profit. The record is not clear as to the method used by this company in determining what constitutes a profit. An examination of exhibits introduced at the hearing substantiates the testimony that Isbrandtsen's rates, as a general rule, were quoted on a percentage basis differentially lower than the rates of other carriers in the trade.

Other exceptions to the general rule occurred but they need not be considered here. The issues involved in the instant proceedings are concerned with the general rate making policy and do not pertain to the exceptions thereto.

The order of investigation, among other things, directed Isbrandtsen to show cause why the competitive methods or practices as outlined in the order, namely, the solicitation of cargo in the trade by offers to under-quote rates of the conference carriers and employment of agents and payment of commissions to them when, at the same time, they are shippers or receivers of cargo, should not be found to be unfavorable to shipping in the foreign trade. Isbrandtsen's Vice President, under subpoena by us, in justification of the system, testified that such a system of rate making was made necessary by the need of shippers for lower rates, conference competition, and the use of slow vessels by his company. The fact that a carrier chooses to employ slow vessels is no justification for indulgence in a practice otherwise unlawful. No showing was made that speed was essential to this trade; in fact, in connection with flour shipments it was testified that speed was not essential. This is borne out by the fact that the Italian Line, which has the fastest vessels in the trade, carries practically no flour. Other nonconference carriers appear to be able to operate without indulging in such practice.

Before establishing a rate on flour Isbrandtsen conferred with the shippers and found that flour was moving in substantial volume, though decreasing in amount, at a rate of 40 cents per 100 pounds, and that some shippers were interested in an independent service at rates which could be readily adjusted to meet foreign competition. As the result of these discussions with shippers, Isbrandtsen felt justified in quoting differential rates on flour lower by a fixed percentage than the conference rates.

The quotation of rates on a percentage basis below the rate of another carrier makes it impossible for shippers to know the applicable rate until the current rate of other carriers is first ascertained. The shipper is thus obliged to know all rate changes that occur before he can actually determine the rate applicable via Isbrandtsen. The failure to quote specific rates opens the door to abuses and discriminations. There is nothing unlawful *per se* for a carrier to charge a rate different from that of another, and we have no authority to prevent rate reductions as such in the foreign trade, but the practice of making rates lower by a fixed percentage than those of other carriers is detrimental to the commerce of the United States inasmuch as it is contrary to one of the principal purposes of the Shipping Act, which is to prevent destructive carrier competition. Moreover, the practice affords only temporary benefit to a particular shipper and to Isbrandtsen, and destroys that stability in rates which the record shows is advantageous to American shippers.

We have heretofore condemned these practices of foreign-flag nonconference carriers: quotation of rates openly or secretly on a basis lower by fixed percentages or amounts than the established rates of other carriers, either American or foreign, establishment of rates without consideration for the usual rate-making factors, and attempts to compel other carriers to make concessions by threatening to make unwarranted rate reductions. *Section 19 Investigation, 1935*, 1 U. S. S. B. B. 470, 501. See also *In the Matter of Rates, Charges and Practices of Yamashita Kisen Kabushiki Kaisha and Osaka Syosen Kabusiki Kaisya*, 2 U. S. M. C. 14. Similar expressions were made by the Secretary of Commerce in *Intercoastal Investigation, 1935*, 1 U. S. S. B. B. 400, 430–431, and in *Intercoastal Rates of Nelson Steamship Co.*, 1 U. S. S. B. B. 326, 334. These cases dealt with rates and practices in intercoastal commerce, and were adopted prior to the granting of the minimum rate power.

We find that Isbrandtsen's practice of quoting rates differentially lower than the rates of other carriers in the trade without giving proper weight to usual rate-making factors, is detrimental to the commerce of the United States, and creates a condition unfavorable to shipping in foreign trade arising from the competitive methods and practices of vessel operators. This finding does not in any way concern the reduction of rates based on fair competitive methods, nor the quantum of the flour rate hereinafter discussed.

Flour shippers are confronted with various forms of competition from shippers in Canada and Europe, and from millers at destination ports. The latter purchase grain in bulk in this country and Canada and mill it into flour. The Palestinian Government has

gradually decreased the flour quota in recent years and increased the quota on grain. Further, the tariff rate, which is based upon the set-down cost of the flour, has been increased. Flour is revalued, as a rule, every three months, but immediately after the inauguration of the cut rate on flour the valuation was adjusted to compensate whatever advantage may have been gained by shippers resulting from this rate. Due to actual or threatened charter tonnage, grain moves as an "open" rate commodity, each line being free to quote its own rates.

The conference has contract and noncontract rates, the former usually being about 20 percent below the latter. A shipper is accorded the contract rate provided he agrees to ship all commodities over the conference lines even though the commodities are not specifically set forth in the contract. The contract rate for flour in 1938 was 40 cents per 100 pounds. During and prior to that year practically all flour shippers had signed contracts. Flour moves in substantial volume at regular intervals, approximately 26,000 tons being transported in 1938, principally to Egypt and Palestine. The conference was endeavoring to have flour shippers execute 1939 contracts at the 40-cent rate when Isbrandtsen announced its service and quoted a reduced rate. Several of the large shippers refused to sign the contracts, giving as their reasons the announcement of the service by Isbrandtsen at the reduced rate, coupled with the statement that it would offer differentially lower rates to obtain the business; the fact that all flour shippers had not signed the contracts; and the existence of a differential in rates between flour and bulk grain.

Pillsbury Flour Mills Co., the largest flour shipper in this trade, employs E. Ch. Dilaveri & Co., of Alexandria, Egypt, as its agent for that territory. Dilaveri is presently the agent for Isbrandtsen, having previously been the agent of Gardiaz Lines. Dilaveri has the routing of all Pillsbury's flour, the latter company following Dilaveri's instructions in order to retain its business. Dilaveri requested shipment over conference lines until the end of 1938, at which time, having been appointed Isbrandtsen's agent, it requested Pillsbury not to sign a new contract and to ship all flour via Isbrandtsen. This was given by Pillsbury as a further reason for not signing a conference contract for 1939.

As a result of Isbrandtsen's reduced rate and the request of Dilaveri, the conference found that it had lost the principal part of its flour business. The conference to meet this competition reduced its flour rate to 10 cents.

Although under the circumstances the conference felt that it had to take some action, this fact alone is not sufficient to justify the action taken, if detrimental to the commerce of the United States.

A rate may be so low as to be unreasonable, and as one of the purposes of the conference agreement is the establishment of reasonable rates, this reduction is a violation of the agreement and constitutes a condition unfavorable to shipping in the foreign trade. Inasmuch as the conference has restored the rate to 60 cents no order with respect thereto will be entered.

All respondents have agents at most of the destination ports. In order to obtain the services of a reliable agent it generally is necessary to employ one who is engaged in other businesses, usually merchandising, sometimes importing. The evidence shows that practically all the lines pay their agents a flat fee to handle each ship entered, ranging from $25 to $125, varying according to the amount of inward cargo discharged. Some companies pay a commission on their inward cargo in lieu of a flat fee. On outgoing cargo a commission generally is paid. With the exception of one small shipment via Isthmian, upon which the freight amounted to $46, no company reported any instance in which the agent was also the consignee. Isbrandtsen pays Dilaveri at Alexandria an attendance fee for performing certain duties in connection with the handling of each ship, and in addition thereto 2½ percent of the freight on all inbound cargo and 5 percent on outbound cargo. Dilaveri also receives 2½ percent commission from Pillsbury on the laid-down price of the flour for his promotional work. Dilaveri is therefore in a preferred position in the flour market in that territory. It appears, that although purchased on a C. & F. or C. I. F. basis, that Dilaveri was, as a matter of fact, purchaser of all Pillsbury's flour, all of which was routed over Isbrandtsen on Dilaveri's instructions. The law does not prohibit a steamship company from employing an agent merely because he is at the same time an importer or merchant. But clearly, the paying to Dilaveri of a commission on his own cargo in addition to a fee for handling the ship results in a violation of section 16.

There is no evidence that the practices of Ellerman & Bucknall, Strick-Ellerman Line, Kerr Line, and States Marine Corporation are unlawful, detrimental to the commerce of the United States, or create a condition unfavorable to shipping in the foreign trade, nor is there evidence that the agents of these companies are shippers or receivers of cargo, although they have been, in certain instances, merchants as well as steamship agents. Such a relationship, without more, is not a violation of law. The investigation will be dismissed as to these respondents, but as some of them, since the hearing in this case, have become members of the conference, they will be subject to the conclusions herein with respect to conference practices.

The Examiner's proposed report in this proceeding recommended that rules and regulations be promulgated under authority of section 19 of the Merchant Marine Act, 1920, to meet the conditions found therein to be detrimental to shipping in the foreign trade. Since the issuance of this proposed report, conditions in the trade have materially changed as a result of the present European war. At the present time service has been discontinued by practically all carriers including Isbrandtsen-Moller. In view of this fact the issues in this case have become moot. Rules and regulations under the authority of section 19 of the Merchant Marine Act, 1920, will not, therefore, be promulgated, and an order will be entered discontinuing the proceeding.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 16th day of July, A. D. 1940

No. 512

CARGO TO ADRIATIC, BLACK SEA, AND LEVANT PORTS

This case, instituted by the Commission by order dated February 17, 1939, as amended, pursuant to section 19 of the Merchant Marine Act, 1920, having been duly heard and full investigation of the matters and things involved having been had, and the Commission on the date hereof having made and filed a report finding that conditions unfavorable to shipping in the foreign trade between ports on the Atlantic coast of the United States and Adriatic, Black Sea, and Levant ports exist as a result of competitive methods and practices employed by owners, operators, agents, or masters of vessels of foreign countries, which said report is hereby referred to and made a part hereof.

It is ordered, That the order heretofore entered in this proceeding on February 17, 1939, as amended, be, and it is hereby, vacated and set aside and that this proceeding be discontinued.

By the Commission.

[SEAL] (Sgd.) W. C. PEET, Jr.,
Secretary.

UNITED STATES MARITIME COMMISSION

No. 546

UNITED BOTTLE SUPPLY COMPANY, INC.

v.

SHEPARD STEAMSHIP COMPANY

Submitted June 10, 1940. Decided July 18, 1940

Rate charged on one shipment of second-hand bottles, in open top crates, from Oakland, Calif., to New York, N. Y., found inapplicable. Applicable rate not shown to have been unreasonable. Reparation awarded.

Benjamin Zuckerman for complainant.
Otis N. Shepard and *E. J. Martin* for defendant.

REPORT OF THE COMMISSION

BY THE COMMISSION:

No exceptions were filed to the examiner's proposed report on further hearing. Our conclusions differ from those recommended by the examiner.

Complainant corporation alleges that the rate charged on a shipment of empty second-hand glass bottles, in open-top wooden crates, made December 8, 1938, from Oakland, Calif., to New York, N. Y., was unduly prejudicial, unjustly discriminatory, and unreasonable in violation of sections 16, 17, and 18, respectively, of the Shipping Act, 1916. Reparation and a lawful rate for the future are sought. No evidence of undue prejudice or unjust discrimination was offered. Rates are per 100 pounds.

The shipment consisted of 613 crates of 16-ounce one pint glass bottles weighing 37,749 pounds. They were packed in two tiers per crate, those on the bottom standing neck upright and those on the top inverted with necks fitting between the lower rows. They protruded above the open tops of the crates and, being of uniform size, formed a flat top surface. The crates were not of uniform size. The value of the bottles is said to have been 87 cents per 100 pounds.

Prior to the time of shipment complainant requested defendant and other intercoastal carriers to quote the applicable rate on second-hand bottles moving from Oakland to New York. Defendant quoted a rate of 50 cents and the other carriers quoted 63 cents. When the shipment was tendered defendant at Oakland, a rate of $1.25 was demanded and collected from the consignor. Complainant seeks reparation based upon the difference between the rates quoted and charged.

The $1.25 rate charged is named in Item 215 of defendant's east-bound tariff, and applies on "carriers, empty, returning, prepaid or guaranteed, on or under deck, ship's option, viz:" Under that general heading are included "bottles, glass, empty, second-hand (not syphon bottles), in crates or in boxes, O. R. B."[1] As the bottles in question were not "returned" bottles, Item 215 obviously did not apply.

Item 165 of defendant's east-bound tariff, which complainant seeks to have applied, names a 50-cent carload rate on common bottles, owner's risk of breakage, and released to a valuation not exceeding $5 per 100 pounds for shortage and to be so expressed on the bill of lading. That tariff contains no specific commodity rate on bottles unreleased, but Rule 55 provides for the application of the west-bound rate when a specific commodity rate is not named. Item 1480 of the west-bound tariff provides a carload rate of $1, minimum 24,000 pounds, on "bottles * * *, common, unreleased." Since there was no release of valuation in this case, the 50-cent rate in Item 165 is not applicable, and the $1 rate in Item 1480 should have been charged.

Complainant relies solely upon the misquotation of the rate and the contention that the rate on second-hand bottles should not exceed that on new bottles, erroneously assuming that the 50-cent rate would have applied on new bottles shipped under the same conditions. The applicable rate of $1 would have applied on new bottles not shipped at a released valuation. Nor is there any evidence that the 63-cent rate quoted by other carriers would have applied under the same conditions. Complainant asserts that the transcontinental railroad rate was $1.21, but the record does not show whether that rate applied subject to a released valuation and on bottles packed in open crates. Complainant has shipped no other bottles intercoastally eastbound since 1932 or 1933.

Defendant has carried few shipments of bottles. It maintains that any rate less than the applicable rate is unremunerative and that bottles require careful handling to avoid breakage. The stowage fac-

[1] Owner's risk of breakage.

tor is given as about 200 cubic feet per ton. Heavy commodities cannot be stowed on top of bottles.

It is well settled that misquotation of an applicable rate by a carrier affords no basis for a finding that the rate is unreasonable or for an award of reparation. The fact that a 50-cent rate applied on bottles shipped under a released value is not proof that the applicable rate was unreasonable.

On this record we find that the rate charged was inapplicable, that the applicable rate was $1, and that the applicable rate is not shown to have been unreasonable or otherwise unlawful. We further find that complainant received the shipment as described, bore the charges thereon, that it was damaged thereby and is entitled to reparation in the sum of $94.37. An appropriate order will be entered.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 18th day of July A. D. 1940

No. 546

UNITED BOTTLE SUPPLY COMPANY, INC.

v.

SHEPARD STEAMSHIP COMPANY

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission, on the date hereof, having made and entered of record a report stating its conclusions, decision, and findings thereon, which report is hereby referred to and made a part hereof;

It is ordered, That the defendant, Shepard Steamship Company, be, and it is hereby, authorized and directed to pay to complainant, United Bottle Supply Company, Inc., New York, N. Y., on or before 30 days after the date hereof, the sum of $94.37 as reparation on account of inapplicable charges collected for the transportation of 613 crates of empty, second-hand glass bottles from Oakland, Calif., to New York, N. Y., in December 1938.

By the Commission.

[SEAL] (Sgd.) W. C. PEET, Jr.,
Secretary.

UNITED STATES MARITIME COMMISSION

No. 552

GREEN COFFEE ASSOCIATION OF NEW ORLEANS

v.

SEAS SHIPPING COMPANY, INC., ET AL

Submitted June 12, 1940. Decided July 18, 1940

Violations alleged of sections 15, 16, and 17 of the Shipping Act, 1916, as amended, in respect to proposed rate on shipments of green coffee of African origin to New Orleans via New York higher than on shipments to New York, not shown.

Louis A. Schwartz for complainant.

Frank V. Barns, *Daniel Flynn*, *Bailey M. Clark*, *Arthur E. D'Herete*, *Harold L. Boihem*, and *L. A. Parish* for defendants.

Charles R. Seal for Port of New York Authority, Shippers Conference of Greater New York, Boston Port Authority, and Baltimore Association of Commerce; *Rene A. Stiegler* for Board of Commissioners of Port of New Orleans, St. Louis Chamber of Commerce and Mississippi Valley Association; *J. D. Youman* for Public Belt Railroad; and *E. H. Thornton* and *C. A. Mitchell* for New Orleans Joint Traffic Bureau, interveners.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions filed to the examiner's proposed report by complainant and certain of defendants and interveners, were orally argued. Our conclusions differ somewhat from those recommended by the examiner.

Complainant is an association of companies at New Orleans, La., importing green coffee from British African colonies and Belgian Congo. Shipments move principally through the port of Mombasa, East Africa.

Defendants Seas Shipping Company, Inc., and American South African Line, Inc., hereinafter referred to as Robin Line, and A. S. A.

Line, respectively, or as the ocean lines, are common carriers by water engaged in direct service between ports in South and East Africa and North Atlantic ports of the United States. Defendants Seatrain Lines, Inc., Mooremack Gulf Lines, Inc., Pan Atlantic Steamship Corporation and Southern Pacific Steamship Lines (Morgan Line), hereinafter called coastwise lines, operate as common carriers by water between North Atlantic ports and South Atlantic and Gulf ports of the United States. The ocean lines have joined with coastwise lines in approved through route agreements [1] covering transportation of general cargo under through bills of lading from Mombasa and other African ports to designated Gulf ports of the United States, including New Orleans, with transshipment at a North Atlantic port.

In October 1939, the ocean lines notified shippers that on shipments of green coffee from South and East Africa to New Orleans transshipped at New York a rate $3 higher per ton of 2,240 pounds than the New York rate would be charged. Prior thereto the through rate via that route was the same as that charged on shipments consigned to importers at New York. Complainant alleges that the discontinuance of rate parity is in violation of section 15 of the Shipping Act, 1916, as amended; that it will result in unjust discrimination and undue and unreasonable preference and prejudice prohibited by sections 17 and 16 thereof; and that the contemplated action is unjust and unreasonable under section 18 of that act. The Board of Commissioners of the Port of New Orleans, the New Orleans Joint Traffic Bureau, The New Orleans Public Belt Railroad, the St. Louis Chamber of Commerce, and the Mississippi Valley Association intervened on behalf of complainant. The Port of New York Authority, Shippers Conference of Greater New York, Baltimore Association of Commerce, and Boston Port Authority intervened on behalf of defendants.

Complainant and supporting interveners state they are interested principally in maintaining rate parity with New York and not particularly in the level of the rate charged. No necessity exists, therefore, for considering allegations of unreasonableness under section 18.

Agreements Nos. 6457, 6473, 6415, and 7028 provide that through rates, to be named by the ocean lines, on traffic within the scope of any approved conference agreement will be no lower than the applicable rate established under such conference agreement, and that

[1] Nos. 6457, 6473, 6415, and 4734 between Robin Line and Pan-Atlantic S. S. Corp., Southern Pacific Steamship Lines (Morgan Line), Mooremack Gulf Lines, and Seatrain Lines, Inc., respectively. Nos. 7028, 3611, and 4972 between American South African Line and Pan-Atlantic S. S. Corp., Southern Pacific Steamship Lines (Morgan Line), and Seatrain Lines, Inc., respectively.

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on traffic not within the scope of a conference through rates will be those filed with the Commission by the parties. Agreements Nos. 4972, 3611, and 4734 provide, in substance, only that through rates will be no lower than conference rates or rates for direct shipment. All agreements provide that through rates, also transshipment and other expenses will be apportioned 60 percent to the originating carrier and 40 percent to the connecting coastwise on-carrier.

Defendant A. S. A. Line is a member of the South Africa/U. S. A. Conference and a party to Conference Agreement No. 3579, approved October 22, 1934, which includes transportation from ports in Africa (Mombasa to Lobito, both inclusive) * * * to New York or other United States ports (from Galveston, Tex., to Portland, Maine, both inclusive). There is no direct line service to New Orleans. With the exception of traffic to Brownsville, Port Isabel, and Corpus Christi, Tex., no traffic can move under the transshipment agreements which is not within the scope of the conference. The only tariff of record covering the homeward trade is a conference tariff which names no rates from Mombasa.

Shipments to New Orleans during 1938 aggregated 27,772 bags of 190 pounds each. Through October 1939, 23,651 bags had been received. Shipments to New York during the same periods aggregated 134,504 and 93,921 bags, respectively, of corresponding weight. Shipments to New Orleans have moved via New York under the transshipment agreements mentioned and via ocean lines to Port of Spain, Trinidad, and thence by Aluminum Line. Facilities at Trinidad for transshipping are said to be hazardous, but notwithstanding that alleged disability the bulk of the movement to New Orleans during 1938 and 10 months of 1939 has been transshipped there. The rate via that route has been the same as the direct-line rate to New York. Shipments to Canada also have been transshipped there to Canadian or British vessels to permit Canadian importers to obtain a customs advantage.

Green coffee is sold to roasters located at interior points. A carload shipment usually consists of the various grades used in making different blends. Territory considered as naturally tributary to New York and New Orleans is generally divided by the lines of the Chicago, Indianapolis and Louisville Railroad from Chicago through Indianapolis, and the Cleveland, Cincinnati, Chicago and St. Louis Railway to Cincinnati. Certain points on or adjacent to the line and in Central Freight Association territory are stated to be highly competitive. Differentials in rail rates from New York and New Orleans to principal competitive points stated below range from 1 to 12 cents per 100 pounds in favor of the latter port. The net

result, in cents per 100 pounds, of the protested change to New Orleans importers is shown by the following tabulation:

Interior destination	Rail rates from—		Rail differential favoring New Orleans	Ocean differential against New Orleans	Thru-rate differential against New Orleans
	New York	New Orleans			
Milwaukee, Wis.	44	43	1	13.4	12.4
Chicago, Ill	44	41	3	13.4	10.4
Cincinnati, Ohio	39	35	4	13.4	9.4
Louisville, Ky	44	35	9	13.4	4.4
St. Paul, Minn	66	54	12	13.4	1.4
Minneapolis, Minn	66	54	12	13.4	1.4
Duluth, Minn	60	60		13.4	13.4

New Orleans importers claim that if compelled to pay an ocean rate $3 per ton higher than is charged on shipments to New York, the above-mentioned markets will be closed to them; that the loss of these markets to New York competitors will result in the loss of business in noncompetitive markets, since New Orleans cannot handle grades of coffee not readily saleable; that a decline in sales of coffee from other origins will also result because it will be impossible to carry sufficient stocks to supply noncompetitive territory if denied the opportunity to compete in the principal markets; and that if roasters are unable to obtain African coffee for blending from New Orleans, orders for other grades of coffee also will be placed elsewhere.

The average gross maximum profit to importers is approximately 15 cents per 100 pounds. Importers controlling branch offices at New Orleans in some instances maintain branches or separate companies at New York, and can supply purchasers at competitive interior points from New York. By shrinking their profit somewhat, others who do not have that advantage can meet the competition of the New York importer in at least four of the seven principal interior markets. Dependent upon the availability of a route to New Orleans via Trinidad at the same rate as that charged on shipments direct to New York, there will be opportunity for all New Orleans importers to compete. Defendants, through counsel, indicate that the differential also will apply via Trinidad. The level of the rate via that route is not in issue. The distance from Mombasa to New Orleans is slightly greater than to New York, and the cost of transshipment also may be somewhat more at Trinidad than at New York, but such differences do not appear to warrant a higher rate than at New York. Defendants infer that the route via Trinidad heretofore available and actually used to effect deliveries at New Orleans, may be discontinued. However, as long as shipments to Canada are

transshipped there, New Orleans shipments could not reasonably be refused.

Defendants feel that parity of rates to New York and New Orleans cannot be continued because of the expense to them of transshipment and on-carriage. A. S. A. Line, for instance, shows that the actual cost of transshipment amounts to $8.05 per ton, consisting of $7.31 paid to the coastwise on-carrier and 74 cents interchange cost at New York which leaves only $8.45 as its gross revenue—slightly more than 50 percent of the $16.50 gross revenue received on shipments to New York. No recent increase in transshipment cost was shown, and complainant contends that since the situation in respect to transshipment cost is not now materially different than when rate parity was voluntarily established, there is no reason for an increase in the through rate. Complainant also points to other trades wherein there is rate parity to New Orleans and other United States ports on shipments of green coffee via direct or transhipment routes. Specifically mentioned are shipments from Brazil, Colombia, and Haiti; from Ecuador to New Orleans and San Francisco transshipped at the Canal Zone, the distance to San Francisco being 600 miles greater than to New Orleans; also shipments from Dutch East Indies to New York and to New Orleans via New York. The contention is made that a similar practice should prevail in this trade. Defendants do not operate in such other trades and no inconsistency of practice can be attributed to them. Also, the required similarity of transportation conditions in the compared trades has not been shown. For the same reason the decisions relied upon by complainant are not controlling.

It also appears that A. S. A. Line, as an operating convenience, sometimes transships at New York cargo destined to Boston, Baltimore, Philadelphia, and Newport News, the cost of on-carriage from New York to the destination port being absorbed by that carrier; and that as to traffic which ordinarily would move through Boston to an interior point, shipments are sometimes forwarded to the interior point from New York, the ocean carrier absorbing the difference in cost between the inland rail rate from Boston to the interior point and from New York to such point. Robin Line observes similar practices. In such instances carriers feel that costs incident to direct service to all destination ports would greatly exceed amounts absorbed by them and that the present practices result in economies not otherwise possible. Complainant contends that shipments billed to New Orleans should be accorded similar treatment. Distances from New York to other North Atlantic ports do not exceed a few hundred miles. The distance from New York to New

Orleans is 1,703 miles. Ocean carriers hold out direct-line service to all North Atlantic ports whereas only a transshipment service is offered to New Orleans. The geographical relationship between New York and New Orleans is not comparable with that between ports within the North Atlantic range. Carriers are willing to accord rate parity with New York if and when direct-line service is established, but we would not be warranted in compelling rate parity on shipments via New York under the circumstances shown.

Allegations involving section 15 are based upon a contention that the change in the through rate covering transportation under transshipment agreements should be filed and approved before it may become effective. The necessity for approval is urged particularly because the change in rate involved disturbs prior rate practices. Defendant Robin Line contends that, since the traffic is within the scope of the South Africa/U. S. A. Conference and the agreements provide only that the rate charged shall not be less than the rate of the conference, there is no rate-filing obligation upon it. The position of A. S. A. Line is not clear. It, as a member of the conference, has engaged in transporting coffee from Mombasa to both New York and New Orleans. Since Mombasa is within the scope of the conference agreement, the rates from that port should be published in the conference tariff.

There remains for consideration the question whether an obligation to file the through rate also rests upon parties to the transshipment agreements. Except in the case of approved conferences, and in a recent proceeding involving nonconference lines, *In the Matter of Rates, Charges and Practices of Yamashita, and O. S. K.*, 2 U. S. M. C. 14, the filing of rates covering import traffic has not generally been required. In the latter case the filing requirement was pursuant to a rule or regulation prescribed under authority of Section 19 of the Merchant Marine Act, 1920. Coastwise carriers publish and file a local rate on green coffee from New York to New Orleans. Such carriers did not name or participate in the naming of the through rates on shipments moving under the transshipment agreements. That cargo originated at ports thousands of miles away and was subject to conditions of which they, as coastwise carriers in the United States, could be expected to have little, if any, knowledge. In this respect the situation of these carriers is no different than that of the great majority of coastwise carriers participating in the through movement of shipments originating overseas. They are aware in a general way of the rate levels prevailing in the various trades and that the economies of transportation ordinarily will not permit such rates to drop to a level where the agreed percentage accruing to the delivering lines would be unremunerative. To avoid

a similar result with respect to individual commodities the delivering lines in many instances specify in their transshipment agreements that in no event shall the net revenue accruing to such carriers be less than a stated minimum. This protective provision has been incorporated in all but one of the agreements involved in this proceeding. In *Section 15 inquiry*, 1 U. S. S. B. 121, the filing requirement of Section 15 was interpreted as not to include routine operations relating to current rate changes and other day-to-day transactions. While the establishment of the through routes and the bases of the apportionment of the earnings on traffic moving over such routes are fixed by the agreements and therefore are not routine, establishment and, revision of the rates, by the terms of the agreements, are left to the parties. We have not heretofore held that such routine operations under the agreements need approval under Section 15. This record does not justify departure from the present procedure.

The contention also is made that because of a provision in Robin Line's operating-differential subsidy contract, executed October 14, 1938, pursuant to provisions of the Merchant Marine Act, 1936, which requires, among other things, the establishment of rates and practices on a basis satisfactory to the Commission, the proposed change in rate must be approved before it may become effective. So broad an interpretation of the contract provision was neither contemplated nor intended. In 1935 a rate war in the South African trade, in which both Robin and A. S. A. Line participated, depressed rates to an unreasonably low level. *Seas Shipping Company* v. *American South African Line, Inc., et al*, 1 U. S. S. B. B. 568. Operating-differential or other subsidy contracts executed under authority of the Merchant Marine Act, 1936, do not augment statutory regulatory procedure in respect to rates, charges, regulations, or practices of common carriers. The purpose of the contract provision mentioned was to prevent, if possible, the use of subsidy payments under the contract to offset losses resulting from destructive competition between American-flag carriers operating in the same trade. No occasion has yet arisen requiring action by us to invoke the rate control provision of the contract with Robin Line to which our attention has been directed.

We find that alleged violations of sections 15, 16, and 17 of the Shipping Act, 1916, as amended, have not been shown. An order dismissing the complaint will be entered.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION held at its office in Washington, D. C., on the 18th day of July A. D. 1940

No. 552

GREEN COFFEE ASSOCIATION OF NEW ORLEANS

v.

SEAS SHIPPING COMPANY, INC., ET AL.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission, on the date hereof, having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof;

It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed.

By the Commission.

[SEAL] (Sgd.) W. C. PEET, Jr.,
Secretary.

UNITED STATES MARITIME COMMISSION

No. 511

NEW AUTOMOBILES IN INTERSTATE COMMERCE

Submitted May 27, 1940. Decided September 4, 1940

Agreements of certain respondents engaged in transportation on the Great Lakes found to be subject to section 15 of the Shipping Act, 1916. Practices thereunder found not to result in departures from their tariffs in violation of section 2 of the Intercoastal Shipping Act, 1933, as amended, or to create undue preference in violation of section 16 of the Shipping Act, 1916.

Persons operating hulk freighters renting deck space to subject common carriers for the transportation of automobiles found not to be common carriers subject to the Shipping Act, 1916, as amended.

Proceeding discontinued.

Merrill Shepard, *E. S. Ballard*, *W. F. Price*, and *A. R. Sheff* for Minnesota-Atlantic Transit Company; *Nuel D. Belnap* and *A. L. Crandall* for Western Transit Company; *Frank W. Sullivan* for Great Lakes Transit Corporation; *Milton P. Bauman* and *S. S. Eisen* for Nicholson Universal Steamship Company; *Roy Van Beckum* for Wisconsin and Michigan Steamship Company; *Arvid B. Tanner* and *L. W. Patterson* for Detroit & Cleveland Navigation Company; *L. A. Larzelere* for Luckenbach Gulf Steamship Company, Inc.; *M. G. de Quevedo* and *W. M. Carney* for members of the Intercoastal Steamship Freight Association, except Isthmian Steamship Company; *Alexander Gawlis* for Merchants & Miners Transportation Company; *Julian M. King* for Agwilines, Inc., Mooremack Gulf Lines, Inc., Pan-Atlantic Steamship Corporation, Lykes Coastwise Line, Inc., Southern Pacific Steamship Lines "Morgan Line," and Southern Steamship Company; *Parker McCollester*, *Nicholas Kelley, Jr.*, *N. J. Brennan*, and *C. E. Bell* for Chrysler Corporation; *Elmer W. Cart* and *J. C. Winter* for Board of Railroad Commissioners of North Dakota and Chamber of Commerce of Fargo, North Dakota; *Harry Ames* for National Automobile Transporters Association; *C. R. Scharff*, *E. F. Stewart*, and *Denton Jolly* for General Motors Corporation; *H. C. Barron*, *L. N.*

Bradshaw, and *R. E. Wedekind* for various rail carriers; *Everett B. Lackie* for K. U. K. Auto Transit and K. & C. Transport Company; *Allen Dean* for Detroit Board of Commerce; *H. J. Wagner* for Norfolk Port-Traffic Commission; *Robert Quirk* for Automobile Contract Holders Association; and *R. P. Paterson* for Pere Marquette Railway Company.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions were filed to the report proposed by the examiner, and the case was orally argued. Our conclusions differ somewhat from those recommended by the examiner.

This is an investigation upon our own motion to determine the lawfulness of the rates, charges, rules, regulations, and practices of carriers subject to the Shipping Act, 1916, as amended, for and in connection with the transportation of automobiles, set up, on the Great Lakes, including the use by one carrier or person of vessel space of another in carrying on the business of a common carrier; and to determine the status of such carriers and of carriers owning the vessel space so furnished. Subsequently, the scope of the proceeding was enlarged to determine the lawfulness of the rates, charges, rules, and regulations of carriers subject to the Shipping Act, 1916, as amended, for and in connection with the transportation of new automobiles, set up, from and to all ports in the continental United States, other than the territory of Alaska. Thus broadened, it more nearly coincided with the extent of the investigation initiated by the Interstate Commerce Commission under its Docket No. 28190. Hearings in the two proceedings have been held together and separately. The matters dealt with in this report were heard separately and pertain only to the transportation of automobiles on the Great Lakes.

The respondents principally concerned are Minnesota-Atlantic Transit Company, Great Lakes Transit Corporation, Western Transit Company, and Nicholson Universal Steamship Company, hereinafter designated Minnesota-Atlantic, Great Lakes Transit, Western Transit, and Nicholson Universal, respectively. Minnesota-Atlantic operates between Buffalo, Detroit, and Duluth; Great Lakes Transit operates between Buffalo, Erie, Cleveland, Detroit, and Lake Michigan and Lake Superior ports; Nicholson Universal operates between Detroit, Buffalo, Cleveland, Green Bay, Milwaukee, and Duluth; and Western Transit operates between Detroit, Duluth, and Milwaukee. The first two transport package freight, such as dairy products, flour and miscellaneous manufactured goods, and automobiles, while the latter two transport automobiles only. Carriers engaged primarily in the transportation

of ore or other commodities in bulk which provide vessel space, also are named as respondents.

It is a common practice on the Great Lakes for common carriers by water receiving automobiles for transportation to have the actual carriage performed on vessels which they neither own nor control. It is the lawfulness of this practice and of the status of all carriers involved which will be considered in this report.

Minnesota-Atlantic has been in operation since 1923. It ordinarily employs five package-freight steamers, each capable of carrying about 2,800 tons of package freight and approximately 40 automobiles. In 1925 or 1926, being in need of additional vessel space, it made arrangements to use the spar decks of bulk freighters operating on the Great Lakes to accommodate some of the automobiles tendered to it for transportation. These freighters, which carry iron ore or other bulk commodities in their holds, have space on deck for from 50 to 140 automobiles each. Though not always available to transport automobiles, they provided a means of appreciably supplementing Minnesota-Atlantic's carrying capacity and have since been employed by all of the respondents mentioned above.

Western Transit is said to have engaged in transportation as a common carrier of automobiles for many years. It has dock space under lease at Detroit and Duluth, loads and unloads the automobiles, furnishes the chain hold-downs and wooden wheel blocks used by it in making the automobiles secure on deck, issues bills of lading, assumes liability for cargo loss and damage during the course of transportation, has joint rates with carriers by rail, highway, and water, and files tariffs with the Interstate Commerce Commission as well as this Commission. Western Transit has no ships of its own and relies upon space on bulk freighters, except for such space as it may be able to secure under an arrangement with Great Lakes Transit, described below. In this respect its operations are similar to those of Consolidated Olympic Line, which recently was held to be a common carrier in Agreements *6210, 6210–A, 6210–B, 6210–C, and 6105*, 2 U. S. M. C. 166.

The operators of the bulk freighters referred to do not hold themselves out to transport automobiles as a public employment. They do not serve automobile manufacturers or dealers, or enter into any arrangements with shippers or receivers of the automobiles transported. They publish no tariffs, issue no bills of lading, assume no responsibilities for the safe carriage of the automobiles, and perform no labor in connection with the loading and unloading. Such transportation of automobiles as they undertake for other water carriers depends upon the schedule permitted by the movement of their bulk cargo and is the subject of special and individual contracts or arrangements between

them and such other carriers. In *Intercoastal Charters*, 2 U. S. M. C. 154, we found that the owner which chartered his ship to a shipper under a time or voyage charter must file his rates but that he need not do so when chartering the ship under a similar charter arrangement to a carrier which has filed its regularly established rates. Similarly, we conclude here that the bulk freighters on the Great Lakes which do not hold themselves out to serve the public, which have no contacts with shippers, and which lease part of their vessel space to subject common carriers, are not common carriers as defined in section one of the Shipping Act, 1916, as amended, and that the transportation of automobiles by them for carriers so subject does not result in violation of the Shipping Act, 1916, or the Intercoastal Shipping Act, 1933, as amended. Common carriers, however, should file their charter parties with the Commission as a matter of information.

But certain agreements under which the transportation is performed by subject carriers present a different situation. On March 30, 1939, Minnesota-Atlantic and Great Lakes Transit entered into an agreement, which was approved by the Commission as Agreement No. 6834, whereby each undertook to operate a minimum of three vessels in regular service in the carriage of package freight and automobiles between Duluth and other Lake Superior ports, on the one hand, and Detroit and Buffalo and other Lake Erie ports, on the other hand, the sailings from Duluth of vessels of one line to alternate with those of vessels of the other line, and additional service to be furnished by the operation of a mutual vessel or mutual vessels, so called. They further agreed, among other things, that each, to the extent of the capacity unused in the transportation of its own cargo, would transport, at the request of the other, such of the latter's cargo in excess of available vessel space as might be awaiting transportation. Prior to the 1938 season each carrier had operated five vessels on regular schedules from Duluth to Buffalo. Faced with continuing deficits in 1938 they entered into an agreement similar to No. 6834 in an endeavor to curtail expenses without loss of tonnage or impairment of service. Under this agreement they were able to reduce the number of vessels to four each, handle the same tonnage, and give approximately the same service. Under Agreement No. 6834 it was agreed that in the case of automobiles the rates to each other from Detroit to Duluth would range from $7 to $11 per vehicle, depending upon the overall measurement, and that the rate to each other from Detroit to Buffalo would be $4.50 per vehicle, regardless of size. Subsequently, by an agreement approved as No. 6834–1, the rate from Detroit to Duluth was made $9.50 per automobile. The local tariff rates of Minnesota-Atlantic and Great Lakes Transit filed with the Commission on automobiles from Detroit to Duluth range from $21 per vehicle upward,

and the local tariff rates of Great Lakes Transit filed with the Commission from Detroit to Buffalo range from $14.50 per vehicle upward. Minnesota-Atlantic has canceled its local tariff rates on automobiles from Detroit to Buffalo.

Great Lakes Transit has also entered into agreements with Nicholson Universal and Western Transit, approved as Nos. 7079 and 6754, respectively, whereby, among other things, the two latter respondents agree to pay to it for transportation from Detroit to Milwaukee all of their tariff rate in excess of $3.35 per automobile when such rate is $12, or, if the rate exceeds that figure, one-half of the excess over $12 in addition, or, if the rate be less than $12, $8.65 per automobile minus one-half of the difference between $12 and the lower rate. Nicholson Universal and Western Transit's tariff rate is $15 per automobile. Great Lakes Transit therefore receives from either of them a rate of $10.15 per vehicle. Great Lakes Transit's local tariff rate also is $15. These two agreements, unlike Agreement No. 6834, do not provide for reciprocal transportation. They contain no provision for the transportation of automobiles by Nicholson Universal or Western Transit for Great Lakes Transit.

The importance of the agreements in effecting economies is emphasized. It is testified that there are times when as many as 400 or 500 automobiles per day are tendered to Minnesota-Atlantic for transportation and other times when the number received may be less than 30 or 40. Thus, it is pointed out, if it operated vessels sufficient to give prompt service to shippers during the peaks of movement, it would have a large amount of surplus vessel space on hand when the movement was slack. On the other hand, with no additional space to supplement its minimum requirements, it would be unable to meet the demands of shippers when traffic was at its peak without delay to the shipments tendered. The agreements provided a means of taking care of cargo overflow without operating more vessels. Under Agreement No. 6834, for instance, if Minnesota-Atlantic had 40 automobiles on hand and could accommodate only 30, the excess could be turned over to Great Lakes Transit and move forward perhaps the next day. Nicholson-Universal suggests that the agreements are also desirable in instances where automobiles are offered in insufficient number to warrant the dispatch of a boat to lift them.

While automobiles are the only traffic involved in this proceeding, Minnesota-Atlantic and Great Lakes Transit call attention to the fact that they are engaged in the carriage of general cargo and that the agreements between them relate to package freight as well as automobiles. They assert that dairy products provide a principal source of revenue and that it would not be possible for them to retain this

business if they were unable to give the dairy shipper the fast and frequent service which the agreements make possible.

The rates of compensation specified in the agreements on automobiles were arrived at by adding to the rates of bulk carriers the cost of insurance and such other sums as were acceptable to the parties. That they differ from the tariff rates on file is readily admitted. It is urged by respondents that agreements between common carriers by water giving or receiving special rates or providing for exclusive, preferential, or cooperative working arrangements are expressly recognized by section 15 of the Shipping Act, 1916, and that the agreements here involved are essential to the making of vitally necessary reductions in operating costs. Section 15 is compared with section 5 (1) of the Interstate Commerce Act, which empowers the Interstate Commerce Commission to approve and authorize the division of traffic and earnings between carriers, and our attention is called to a number of arrangements approved under the latter section. Also referred to are arrangements between express companies and common carriers by railroad, rail-carrier arrangements for the division of joint rates over through routes, and switching arrangements between rail carriers. Section 2 of the Intercoastal Shipping Act, 1933, as amended, provides that no subject carrier shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith than the rates, fares, and/or charges which are specified in its schedules filed with the Commission and in effect at the time. The purpose of this section was to give publicity to the rates charged, to prevent prejudice and discrimination in the charges made, and to prevent rebates which would result from lack of publicity. Here, no prejudice or discrimination results from the charges assessed against the shippers of automobiles. The amounts retained by the respective carriers are in the nature of divisions of the through rates published and filed with us. The arrangement is one which is specifically authorized by section 15 of the Shipping Act, 1916, which, subject to prior approval by us, permits common carriers to apportion traffic and to enter into cooperative working arrangements. In our opinion section 2 of the Intercoastal Shipping Act, 1933, as amended, must be interpreted in the light of the specific provisions of section 15 of the Shipping Act, 1916. Here, the agreements outlining the arrangements were submitted by the carriers and were approved by us under that section.

We find that Minnesota-Atlantic and Great Lakes Transit in transporting automobiles for each other under Agreement No. 6834, as amended by No. 6834-1, and Great Lakes Transit in transporting automobiles for Nicholson Universal and Western Transit under Agreements Nos. 7079 and 6754, respectively, do not depart from their

respective applicable tariff rates on file in violation of section 2 of the Intercoastal Shipping Act, as amended.

Other agreements referred to of record have expired by their terms or have been canceled, but it is stated that Minnesota-Atlantic and Great Lakes Transit intended to revive or renew No. 6801 which provided that Great Lakes Transit would place and maintain in service for the navigation season of 1939, or such part or parts thereof as might be agreed upon, a vessel or vessels acceptable to Minnesota-Atlantic and to it, when available, for their joint use in the transportation of automobiles and other freight between Buffalo and Detroit and between Buffalo or Detroit and Duluth upon terms and conditions therein specified; and that among other things, such mutual vessel or vessels would be operated by officers and crew selected and paid by Great Lakes Transit, but at the joint expense of the parties as therein detailed. This agreement is similar in principle to those hereinbefore discussed and may be revived subject to approval by us under section 15 of the Shipping Act, 1916.

An order discontinuing the proceeding will be entered.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 4th day of September A. D. 1940

No. 511

NEW AUTOMOBILES IN INTERSTATE COMMERCE

This case, which was instituted by the Commission on its own motion, having been duly heard, and full investigation of the matters and things involved having been had, and the Commission, on the date hereof, having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof;

It is ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission.

[SEAL] (Sgd.) R. L. McDONALD,
Assistant Secretary.

UNITED STATES MARITIME COMMISSION

No. 522

GRAYS HARBOR PULP & PAPER COMPANY

v.

A. F. KLAVENESS & CO., A/S, ET AL.

Submitted November 1, 1939. Decided September 10, 1940

Defendants' rates on printing paper from Grays Harbor, Wash., to ports in the Orient found unduly prejudicial and unjustly discriminatory but not otherwise unlawful.

De Forest Perkins for complainant.

Joseph J. Geary, *Gilbert C. Wheat*, and *Theodore M. Levy* for defendants.

REPORT OF THE COMMISSION

BY THE COMMISSON:

Exceptions were filed by defendants to the report proposed by the examiner, complainant replied, and the case was orally argued. Our conclusions differ from those recommended by the examiner.

Complainant is engaged in the operation of a paper mill at Hoquiam, Grays Harbor, Wash. Defendants [1] are some of the members of the Pacific Westbound Conference, an association of common carriers whose conference agreement embraces the trades from Pacific coast ports of North America to the Philippine Islands, China, Japan, Korea, Formosa, Siberia, Manchuria, and Indo-China.

Complainant alleges that defendants' rates and minimum-tonnage basis on printing paper from Grays Harbor to the Orient are unduly prejudicial, unjustly discriminatory, unreasonable, and in violation of section 205 of the Merchant Marine Act, 1936. It seeks the same rates on printing paper from Grays Harbor to the Orient as defendants charge on such traffic from Seattle or Tacoma, Wash., to

[1] A. F. Klaveness & Co., A/S, a corporation doing business under the name of Klaveness Line; Rederi A–B Pulp and Rederi A–B Jamaica, corporations doing business under the name of Salen Line, and Statea Steamship Company.

the Orient, defendants to be permitted to load at docks in Grays Harbor at their discretion. Rates and charges will be stated in cents per 100 pounds or in dollars per net ton.

Defendants contest our jurisdiction to determine the reasonableness of the rates involved. Section 18 of the Shipping Act, 1916, requires just and reasonable rates to be established, observed, and enforced by every "common carrier by water in interstate commerce," which term is defined by section 1 of the act to mean "a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States * * *." The chief movement of complainant's printing paper is to Manila, P. I. Defendants contend that the Philippine Islands are not a State, Territory, District, or possession of the United States and that, therefore, by engaging in transportation between a State of the United States and the Philippines, they are not common carriers by water in interstate commerce. Our findings herein make it unnecessary to pass upon the jurisdictional question.

Complainant's paper mill represents an investment of approximately $3,000,000, has a capacity of about 20,000 to 22,000 tons of printing paper per year, and employs about 240 men. It has been in operation since 1929. Adjacent to the mill, complainant maintains a private dock. For calls at this dock for printing paper destined to the Orient defendants require the payment of an arbitrary of $4.90, in addition to a rate of $9,[2] which is the rate applicable over their lines from Seattle or Tacoma to the Orient, or $13.90. Calls at complainant's dock are also subject to a requirement that a minimum of 500 tons of cargo be available when vessel is ready to load or that freight charges be paid on the basis of such minimum. The arbitrary is equivalent to the sum of a rail rate of 17 cents from Hoquiam to Tacoma or Seattle and a car-unloading charge, a handling charge, and a wharfage charge of 2.5 cents each. Inasmuch as the amount of the arbitrary applicable to shipments made from Grays Harbor is the same as the cost of carriage to shipside at Tacoma or Seattle and since complainant does not usually have 500 tons of cargo to move at one time, it ships over the lines of defendants and other members of the conference from the two latter ports, where the minimum-tonnage basis does not apply.

Complainant's shipments constitute more than 20 percent of the printing paper moving from the Pacific Northwest over the lines of

[2] This is a contract rate. The noncontract rate is $12.

the conference. In 1938, complainant shipped to the Orient, principally to Manila, approximately 2,300 tons of printing paper and in four months in 1939 approximately 1,000 tons, or about 12 percent of its total volume, the remainder being shipped to domestic markets and to Havana, Cuba. In the domestic trade from Pacific to Atlantic coast ports, intercoastal carriers do not maintain either a minimum-tonnage requirement or an arbitrary on printing paper from Grays Harbor, and complainant has the privilege, of which it takes advantage, of shipping by way of San Francisco at the same rate as applies on direct shipments from Grays Harbor. Complainant states that there likewise is no such arbitrary or tonnage requirement maintained by the conference in the trade from Grays Harbor to Europe. However, there is no movement of printing paper in the latter trade.

Complainant's shipments of printing paper to the Orient move regularly and average about 200 tons per month. Pursuant to an agreement between complainant and members of the Pacific Westbound Conference, such shipments are confined to the lines of defendants and other members of the conference. If the arbitrary were eliminated and the minimum-tonnage basis reduced to accommodate complainant, the latter would ship to the Orient directly from Grays Harbor instead of through Seattle or Tacoma.

Vessels of defendants have been in Grays Harbor when complainant was shipping printing paper to the Orient by way of Tacoma or Seattle. They pass complainant's dock. In fact, they stop at complainant's dock to lift wood pulp when the required minimum quantity is available. Klaveness Line's vessels call at Grays Harbor about once a month; the other defendants call there occasionally. Vessels of Klaveness Line call on their way from Portland to Seattle and Tacoma. They go into Grays Harbor to lift lumber. To shift a vessel from the lumber dock to the dock of complainant requires from 30 minutes to 2 hours, the average time being less than an hour. The expense involved in such a shift for pilot, linemen, insurance and social-security tax amounts to $23.85, straight time, or about $28, overtime. Klaveness Line allows two days for a call at Hoquiam. If it loaded printing paper in addition to lumber, it would have to allow, in most cases, an extra day. The ship's time is worth approximately $400 a day. The revenue from 200 tons of printing paper at a rate of $9 would be $1,800.

There is no arbitrary or minimum-tonnage requirement applicable to lumber. Nor is there an arbitrary on wood pulp, which, as stated, is lifted at complainant's dock when the required minimum quantity is available. Printing paper is loaded about as fast as wood pulp, that is, from 25 to 40 tons per hour per gang, and faster than lumber,

which is loaded at a rate of from 10,000 to 16,000 feet per hour per gang or from 15 to 24 tons per hour per gang. Printing paper is worth between $90 and $100 per ton, this being more than twice the value of wood pulp, which in turn has a greater value than lumber. No claims for damage have resulted from complainant's shipments. The evidence is that printing paper is desirable cargo. The cost to defendants is no more for shipments of printing paper from Grays Harbor to the Orient than for shipments from Seattle or Tacoma to the Orient, and defendants' witness states that his company, Klaveness Line, would be willing to carry printing paper from Grays Harbor to the Orient at a rate of $9, eliminating the arbitrary, were it not for instability in the trade that might result if other members of the conference serving Seattle and Tacoma were deprived of the opportunity to share in the traffic. By sacrificing some of this traffic, defendants apparently obtain business or other benefits that otherwise would not be secured, the conference being, as this witness puts it, a matter of give and take.

With respect to the allegations of unjust discrimination and undue prejudice, defendants stress the fact that there are no competitors of complainant at any of the ports served by them. They also point out that although a competitor of complainant at Salem, Oregon, has available to it the same rates from Portland as apply from Seattle and Tacoma, it incurs the same charges to shipside as does complainant, except that a rail rate of 9 cents applies from Salem to Portland, whereas complainant pays a rail rate of 17 cents to Seattle or Tacoma. Defendants have blanketed their rates from Seattle, Tacoma, Portland and other ports on the Pacific coast, but have shown no justification for maintaining higher rates from Grays Harbor. It is clear from the evidence of record that the circumstances and conditions surrounding shipments of printing paper from these ports are not substantially different from those surrounding like shipments from Grays Harbor, and, in compliance with the requirements of sections 16 and 17 of the act, there should be an equality of rates for the substantially similar services performed. The disparity against Grays Harbor prevents the movement of shipments through that port, is unduly prejudicial, in violation of section 16, and unjustly discriminatory, in violation of section 17. The allegation of unreasonableness is not sustained.

Section 205 of the Merchant Marine Act, 1936, alleged to be violated by defendants, reads as follows:

> Without limiting the power and authority otherwise vested in the Commission, it shall be unlawful for any common carrier by water, either directly or indirectly, through the medium of an agreement, conference, association, under-

standing, or otherwise, to prevent or attempt to prevent any other such carrier from serving any port designed for the accommodation of ocean-going vessels located on any improvement project authorized by the Congress or through it by any other agency of the Federal Government, lying within the continental limits of the United States, at the same rates which it charges at the nearest port already regularly served by it.

That Grays Harbor comes within the purview of this provision is not questioned and the evidence in this connection need not be reviewed. Complainant bases its allegation on the fact that defendants, being members of the Pacific Westbound Conference, are required to observe the conference tariff, which provides for the arbitrary and minimum-tonnage basis in issue. Defendants' witness testified they are willing to serve Grays Harbor at the same rates and minimum-tonnage basis as applies from other ports. They assert, however, that maintenance of the rates and minimum-tonnage basis assailed has been voluntary. Other members of the conference do not serve Grays Harbor and are not named as defendants. The question raised affects not only the other members of this conference but members of other conferences serving United States ports. The question is so far reaching that it should not be determined on a record to which other interested carriers are not parties. Moreover, our findings make it unnecessary to consider the question in disposing of this case.

We find that defendants' rates on printing paper from Grays Harbor to the ports within the scope of the Pacific Westbound Conference agreement are, and for the future will be, unduly prejudicial and unjustly discriminatory to the extent that they exceed or may exceed their rates contemporaneously maintained on printing paper from Seattle, Tacoma, or Portland to such ports, calls to load at docks in Grays Harbor to be made at defendants' discretion.

An appropriate order will be entered.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 10th day of September A. D. 1940.

No. 522

GRAYS HARBOR PULP & PAPER COMPANY

v.

A. F. KLAVENESS & CO., A/S, ET AL.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission, on the date hereof, having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof;

It is ordered, That the defendants herein, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist on or before November 1, 1940, and thereafter to abstain, from publishing, demanding, or collecting for the transportation of printing paper from Grays Harbor, Wash., to the ports within the scope of the Pacific Westbound Conference agreement rates which exceed those on like traffic to the same ports from Seattle or Tacoma, Wash., or Portland, Oreg.

By the Commission.

[SEAL] (Sgd.) W. C. PEET, JR.,
Secretary

UNITED STATES MARITIME COMMISSION

No. 564

LORA S. GALLEGHER

v.

CUNARD WHITE STAR LIMITED

Submitted August 28, 1940. Decided September 10, 1940

Request to withdraw complaint denied. Complaint dismissed.

No appearance for complainant.
Joseph Mayper for defendant.

REPORT OF THE COMMISSION

BY THE COMMISSION.

By complaint filed January 22, 1940, it is alleged that on an around-the-world cruise of defendant's vessel *Franconia* beginning at New York, N. Y., in January, 1939, and ending at that port in May, 1939, the complainant, a passenger on the cruise, was subjected to payment of fare for transportation and for services which were unduly prejudicial in violation of section 16 of the Shipping Act, 1916, as amended. Reparation in the amount of $1,100 is requested.

Answer was duly filed and served, and the case was assigned for hearing. Complainant did not appear. Subsequently the complainant filed request for withdrawal of the complaint.

Complainant's request for withdrawal is denied, and the complaint will be dismissed. An appropriate order will be entered.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 10th day of September A. D. 1940.

No. 564

LORA S. GALLEGHER

v.

CUNARD WHITE STAR LIMITED

This case, at issue upon complaint and answer on file, and complainant having requested permission to withdraw the complaint, and the Commission having on the date hereof made and entered of record a report containing its conclusions and decision thereon, which report is hereby referred to and made a part hereof;

It is ordered, That the request for withdrawal be, and it is hereby, denied, and that the complaint in this proceeding be, and it is hereby, dismissed.

By the Commission.

[SEAL] (Sgd.) W. C. PEET, Jr.,
Secretary.

UNITED STATES MARITIME COMMISSION

No. 577

IN RE GRACE LINE, INC., AND WEST COAST LINE POOLING AGREEMENT NO. 5893, AS AMENDED

Submitted August 16, 1940. Decided September 19, 1940

Under present conditions pooling agreement No. 5893, as amended, found to be unjustly discriminatory and unfair as between the parties thereto, and disapproved.

W. F. Cogswell for Grace Line, Inc.

Stanley W. Schaefer and *James M. Estabrook* for Wessel Duval & Company, Inc., and J. Lauritzen.

Roger Siddall for Compania Sud Americana de Vapores.

Ralph H. Hallett for United States Maritime Commission.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions to the report proposed by the examiner were filed by certain of the parties and oral argument was had. Our conclusions differ somewhat from those recommended by the examiner.

By order of June 4, 1940, we instituted this investigation on our own motion requiring Grace Line, Inc., Wessel Duval & Company, Inc., and J. Lauritzen (West Coast Line) to show cause on or before June 17, 1940, why an order should not be entered disapproving or modifying pooling agreement No. 5893, as amended; and making Compania Sud Americana de Vapores a party to the proceeding.

All vessels in the service of the West Coast Line on April 5, 1940, were Danish flag freighters supplied by Lauritzen, a Danish partnership. On April 10, 1940, these vessels were immobilized as a result of the German invasion of Denmark and the West Coast Line has had no sailing since that date until June 9. Grace Line informed the Commission under date of April 29, 1940, that as a result of the inability of Danish freighters to operate as per schedule, a major change had taken place that affected operations under the pooling agreement and that Wessel Duval as representatives of the West Coast Line had been

notified that settlements under the pooling agreement would be stopped as of the sailing of Grace Line's S. S. *Santa Ana* on April 12, 1940. Wessel Duval and Lauritzen expressed disagreement with this action in a letter to the Commission dated May 7, 1940, taking the position that the effort of Grace Line to terminate the pooling agreement by a letter to the Commission was without any effect.

In a note dated May 8, 1940, the Ambassador from Chile informed the Secretary of State that the Chilean Line, i. e., the Compania Sud Americana de Vapores, which in September 1939 had established a regular maritime service with motorships between New York and Valparaiso, has been placed, by reason of pooling agreement No. 5893, in an unequal competitive position which is directly prejudicial. The Secretary was requested to intercede before the Maritime Commission for the purpose of having the approval of the pooling agreement withdrawn and thus end a situation which the Chilean Government considers discriminatory and damaging to valuable Chilean interests. A conference was held in Washington on May 27, 1940, at which representatives of all interests were present. Thereafter, on June 1, 1940, Grace Line notified the Commission of the parties' inability to arrive at any solution of their difficulties and on June 4 this proceeding was initiated.

Agreement No. 5893 was entered into on May 19, 1937, and was approved under section 15 of the Shipping Act, 1916, on July 1, 1937. It provides that except for a tolerance of 10 percent one way or the other, Grace Line, Inc., shall maintain 56 passenger and/or freighter sailings per annum and Wessel Duval & Company, Inc., and J. Lauritzen,[1] jointly known as the West Coast Line, shall maintain 26 freighter sailings per annum from ports on the Atlantic coast of the United States to ports on the West coast of Colombia, Ecuador, Peru, and Chile. All gross earnings accruing to each vessel out of its freight operations, on all cargo originating in the United States, carried therefrom on a vessel of one of the parties and destined for ports on the West Coast of South America, shall be divided 75 percent to Grace Line and 25 percent to West Coast Line, after deducting $4 per revenue ton, except on motorcars and trucks on which this deduction shall be $15 per unit. Settlements are to be made at the end of each three-month period and should in future the trade necessitate additional or larger vessels, 75 percent of such additional tonnage shall be provided for by Grace Line and 25 percent thereof by West Coast Line. The agreement was entered into on condition that the West Coast Line be permitted to become a member of the Atlantic,

[1] Grace Line, Inc., will be referred to hereafter as Grace Line; Wessel Duval & Company, Inc., as Wessel Duval; J. Lauritzen as Lauritzen; and Compania Sud Americana de Vapores as CSAV.

Gulf and West Coast South America Conference, and be allowed to charge a 10 percent differential under the tariff of express passenger vessels, except on certain specified commodities. The agreement is for a four-year period from the date of approval and from year to year thereafter unless either party gives six months' notice in writing to the other to terminate the same. Either party has the right to terminate the agreement after it has been in effect two and one-half years by giving such notice at least six months before such two and one-half years have elapsed. Membership in the conference became effective August 2, 1937.

The position of Wessel Duval and Lauritzen is that the procedure followed in this case violated their Constitutional rights. This is said to have resulted because the order of June 4, 1940, put on them the burden of proving four negatives in showing cause why Pooling Agreement No. 5893, as amended, should not be cancelled (1) as against the public interest; (2) as detrimental to the commerce of the United States; (3) as unfair and unjustly discriminatory as between Grace Line and Wessel Duval and Lauritzen; and (4) as unfair and unjustly discriminatory to the Chilean Line. Further contentions advanced are that the order failed to give particulars, details, or specifications as to any of the issues which were to be tried; that the order left undetermined any question as to what the Commission proposed to do with damages; that all of these matters required preparation for proof by Wessel Duval and Lauritzen; that the show cause proceeding was contrary to the statute; that by the order of June 4, received June 6, Wessel Duval and Lauritzen had but eleven days actual notice of the hearing scheduled to be held on June 17, 1940; that a petition of Wessel Duval and Lauritzen dated June 10, 1940, requesting additional information as to the scope of the hearing was denied by the Commission's letter of June 14, received June 15, advising them that the issues were defined by the letters that had been exchanged, by the discussions that had been held, and by section 15 of the Shipping Act, 1916; that a motion for similar relief urged at the start of the hearing was not granted.

The matter to be determined here was whether under the existing extraordinary and emergent conditions, the pooling agreement should be disapproved or modified and not whether any party thereto should recover damages. Wessel Duval and Lauritzen in their exceptions to the proposed report express their accord with Grace Line that if money be owing to any of the parties under the pooling agreement, a court is the place to settle that. The order of June 4 was not contrary to the statute but amply acquainted all concerned with the subjects to be considered in determining the status of the pooling agreement. The matter was assigned for public hearing to

insure that everyone should know upon what facts and arguments our decision and action were to be founded. Although the motion for additional information as to the scope of the hearing was not granted, Wessel Duval and Lauritzen were informed that the hearing would proceed, and if, at its termination, it was felt that issues had been raised which could not be met at that time, application for an adjourned or further hearing in order to allow such time as might be needed would be entertained. The hearing continued for three days; all parties had opportunity to present formally any evidence they chose to offer and all parties had opportunity to test the proof offered by the others on the issues involved. The examiner's proposed report was served on all parties; exceptions thereto and replies to such exceptions were filed; evidence of actions subsequent to the hearing has been allowed by stipulations and we have heard the parties in oral argument. A full hearing has thus been had.

Pooling of revenues under Agreement No. 5893 began August 2, 1937, and the agreement has been satisfactory to all parties up to April 5, 1940. All pooling accounts up to and including January 31, 1940, are fully settled subject to any corrections which may later be necessary. On April 8, 1940, the West Coast Line was advertising six vessels for future sailings at weekly intervals, which, except for the invasion of Denmark, probably would have sailed and their proportion of the revenue paid into the pool. Since the departure of its S. S. *Helga* from the United States on April 5, 1940, West Coast Line has had no vessels in the trade until the S. S. *Malantic*, under charter to Wessel Duval, sailed on June 9, 1940. Net revenue thereon of $37,364.99 was reported to Grace Line, pursuant to the terms of the pooling agreement. To take care of the demands of the trade after the immobilization of West Coast Line's vessels Grace Line rearranged its schedule, added a chartered vessel and scheduled additional sailings. From April 12 through June 13, 1940, it has had 13 sailings with net revenue in excess of $800,000. During the pool year starting August 1, 1939, West Coast Line had 27 sailings to and including April 5, 1940, and Grace Line to that date had 51 sailings. West Coast Line therefore contends it has already had the required number of sailings for the year. It contends further that on all sailings of Grace Line down to and including June 17, 1940, the earnings should be credited to the pool and divided 75 percent to Grace Line and 25 per cent to West Coast Line.

Since the pooling agreement was entered into in May 1937, two major changes have occurred in the trade:

(1) The war, resulting in withdrawal of Danish tonnage, and

(2) Entrance of CSAV in the trade with approximately fortnightly sailings of combination passenger and freight vessels under the Chilean flag.

These changed conditions have made the continued operation of the pooling agreement unsatisfactory to Grace Line, and the agreement, in the opinion of Grace Line, has become detrimental to the commerce of the United States because:

(a) Grace Line is handicapped in taking the necessary steps to adequately serve the trade, by the existence of an agreement by which the West Coast Line claims they can go back in the service at any time and share in Grace Line's gross revenue;

(b) It is important that one be free to make prompt decisions and to take any action necessary to meet day-to-day changed conditions;

(c) West Coast Line's interpretation of the agreement to the effect that although not contributing to the sailings, it is entitled to 25 percent of Grace Line's revenue of more than $800,000 for the period after April 5 to June 17, 1940, is equivalent to a heavy burden on the trade, and is similar to an increase in operating expenses which would necessarily have to be met by an increase in freight rates;

(d) If this contribution from Grace Line's revenue has to be made, resulting in the necessity of increasing freight rates, it will make it much more difficult for American manufacturers and exporters to meet their European, Japanese and other competition.

The pooling agreement is considered by Grace Line to be unfair to it now because:

(a) It ties Grace Line to an associate who has ceased to pull his weight in the boat;

(b) It imposes on Grace Line the burden of serving the trade, or in the alternative, neglecting or abandoning the trade to its competitors;

(c) It prevents Grace Line from taking the necessary action to provide properly for the trade themselves and on the other hand prevents Grace Line from joining with CSAV to do so.

(d) Under existing extraordinary and emergency conditions it places on Grace Line the burden of serving the trade under all these handicaps.

Predecessors of Wessel Duval have been in the West Coast South America trade since 1825. The present company was incorporated in 1931. It never owned any ships, nor to the knowledge of its witness, had a ship on a bare-boat charter basis, its operations being those of time chartered owners or as agents. The agency for two Lauritzen steamers was taken in 1934, these being operated in conjunction with two vessels Wessel Duval had under time charter. Sailings at intervals of 20 days were made alternately with the Lauritzen ships and, being outside the governing conference,[2] rates below those fixed by the conference were charged. Two additional steamers especially built for this trade, were subsequently placed in service by Lauritzen and early in 1937 Wessel Duval were operating four Lauritzen steamers and two time-chartered vessels on a

[2] See *Wessel Duval and Company, Inc.* v. *Colombian Steamship Company, Inc., et al.*, 1 U. S. S. B. B. 390.

fortnightly schedule. About April 1937 it was agreed that Lauritzen would place additional tonnage in this trade with Wessel Duval as agents, and the time chartering ceased. Direct services between U. S. Atlantic and West Coast South America ports were being maintained by Grace Line, the Wessel Duval-Lauritzen ships and by Compania Chilena de Navegacion Inter-oceanica.[3] The rate level had dropped to a low and unprofitable basis and in order to bring about stability negotiations were had between officials of Grace Line, W. R. Grace and Company, and Wessel Duval. These resulted in the present pooling agreement and in the admission of Wessel Duval and Lauritzen operating jointly as the West Coast Line, to the Atlantic and Gulf West Coast of South America Conference. Additional vessels of Lauritzen were added from time to time, and as of April 5, 1940, 10 such vessels were available for the trade.

West Coast Line says the pooling agreement benefits the public interest

(a) By guaranteeing to shippers a minimum of 82 sailings in the trade, and by providing that if there is any general increase in business requiring additional vessels, extra tonnage will be made available.

(b) The pooling agreement has resulted in more direct sailings by the West Coast Line than would normally be made to the minor ports (those ports to which there is very little cargo going) if there were no pooling agreement. Competition with Grace Line would necessitate quick turn-arounds and consequently many of these minor calls would be eliminated.

West Coast Line contends that the pooling agreement has not been unfair or unjustly discriminatory to Grace Line from April 10 to June 18, 1940, because Grace Line has carried many thousands of tons of cargo which normally would have been carried by West Coast Line. While pooling the revenues of this period would be unfavorable to Grace Line, it is the opinion of West Coast Line that that does not make the agreement unjust or unfair or discriminatory because Grace Line has operated in a very favorable position under the agreement up to April 10. On the other hand, disapproval of the pooling agreement would be considered unfair or unjust to West Coast Line because it has, up to June 18, 1940, had 28 sailings, the pooling period runs to July 31, 1940, and it is the intention of West Coast Line to observe its agreement. West Coast Line's witness asserts that the pooling agreement is not unfair or unjustly discriminatory to the CSAV as up to this time it has not been a factor in the trade. Its vessels which had been operating between Chile and Europe were put in the service from New York to Chile in October 1939, as a result of the war. This company does

[3] The C. C. N. I. had approximately monthly sailings of Chilean flag freighters from January to July 1937, one sailing in December 1937, and none thereafter.

not serve the Republic of Colombia and the witness did not believe that on performance a regular service in the trade has been operated. An exhibit of record shows this company had 14 sailings from New York to the West Coast of South America from October 20, 1939, to June 2, 1940, at intervals of from 7 to 30 days. According to this witness, CSAV as a member of the Atlantic and Gulf West Coast of South America Conference, has every advantage that any other conference member has. All of the shippers have signed agreements to patronize conference lines exclusively, and CSAV is entitled to carry any of the cargo on the same basis of rates. Probably five percent of the shippers know of the existence of the present pooling agreement.

Since Danish vessels could not be operated in the trade, Wessel Duval time chartered the American flag steamers *Malantic* and *Wind Rush*, on May 20 and June 7, 1940, respectively, each for one round trip from New York to West Coast of South America and return. These and other ships to be chartered are to be used to maintain the service of the West Coast Line until such time as the ships of Lauritzen heretofore employed in the service may sail without interference by the British and French authorities. On June 7, 1940, Wessel Duval and Lauritzen agreed, subject to approval of the Commission,[4] that such chartered ships should be operated on a basis of sharing profits and losses, and similarly, if under pooling agreement 5,893 sums accrue or become payable by reason of the operation of these vessels such accrued or payable sums shall be equally divided when determined.[5] When they are released, Wessel Duval intends to operate the Lauritzen vessels in the trade the same as before the invasion. Lauritzen's representative feels that whenever that happens, participation in the pool will also be resumed irrespective of the steps Grace Line may have been compelled to take in the meantime. Operation of chartered vessels under the joint-venture agreement is admitted by Wessel Duval and by Lauritzen to be different from the scheme under which the Lauritzen vessels were operated

[4] This agreement, designated No. 7293, was approved on June 28, 1940.

[5] Subsequent to the hearing the parties stipulated of record that the *Wind Rush* sailed from New York on June 30, 1940; that Wessel Duval chartered the S. S. *Carolyn* from A. H. Bull Steamship Co., Inc.; that on July 8, 1940, Wessel Duval agreed with Lauritzen that the *Carolyn* would be operated on the same basis as the *Malantic* and *Wind Rush*; that the *Carolyn* sailed from New York on July 20, 1940; that on July 31, 1940, Wessel Duval chartered the S. S. *Evelyn* from A. H. Bull Steamship Co., Inc., for one round voyage in the trade, and on the same day agreed to share profits and losses of operations of the *Evelyn* with Lauritzen, which agreement was approved by the Maritime Commission on or about August 2, 1940; that the *Evelyn* was delivered, pursuant to the charter, on August 14, 1940, and is scheduled to sail on August 22, 1940; that on July 26, 1940, Wessel Duval and Lauritzen reported to Grace Line $22,230.47 as "the pool figures on the steamship *Carolyn*, sailing July 20, 1940"; that Grace Line has had 10 sailings in the period June 10–August 9, 1940, inclusive, and has 4 sailings scheduled in the period August 16–August 30, 1940, inclusive.

and upon which the parties recognized the West Coast Line. Accordingly, it is Grace Line's position that the *Malantic* and vessels subsequently chartered are not being operated by the West Coast Line within the meaning of the pooling agreement.

CSAV, a Chilean corporation, has been engaged in the operation of steamships since 1872. From 1922 until 1931 it had two vessels in the trade here involved. Before the war broke out, it was operating three Chilean flag combination passenger and cargo motor ships between Chile and Liverpool, Antwerp and Hamburg under a contract with the Government of Chile to furnish refrigerated space to Hamburg for three fruit seasons. Four return voyages from Europe to Chile were made via New York and Baltimore in 1938–1939. After war was declared in September 1939, service between Chile and the United States was reestablished with the three passenger and cargo motor ships and the first sailing from New York was on October 20, 1939. The company also operates one freight steamer in conjunction with the motor ships and intends to continue permanently in this service.

A director of the company testified that while CSAV has the capacity to carry about 30 percent of the south-bound cargo, it carries less than 20 percent. According to computations by this witness covering the 6-month period ending April 1, 1940, Wessel Duval had about 80 percent of its capacity filled, Grace Line about 68 percent, and CSAV 56 percent. Cargo for Chile in this period constituted between 70 and 80 percent of the total south-bound cargo carried by CSAV. Grace Line's carryings to Chile normally amount to about 51 percent of its south-bound volume. Competition of the pool is asserted to compel CSAV to carry lower paying cargo than the pooling lines. The pool, by permitting the members to agree upon extra shipping requirements, makes it possible to arrange sailings and establish schedules with better knowledge of the cargo. Shippers are said to always prefer to deal with pool members because of their greater number of ships and consequently more attractive service than that offered by the line outside the pool. The advantages accruing to Grace Line and West Coast Line are claimed to thus operate against CSAV. CSAV was admitted to full membership in the Atlantic and Gulf West Coast of South America Conference on October 3, 1939, participates in the conference's exclusive patronage contracts with shippers and has never been refused any cargo because of the pooling agreement. There has been a gradual increase in the line's passenger business since October 1939 up to the immobilization of the Danish vessels but despite growing familiarity to the trade, its freight business south-bound has not improved. Some additional business was obtained as a natural result of the stoppage of the Danish vessels, but

this is regarded as unusual. The north-bound cargoes differ from south-bound tonnage and the vessels of CSAV are always nearly full north-bound. As the pooling agreement does not apply to south-bound passenger traffic nor to north-bound cargo, the adverse effects on this line's south-bound business are attributed to the existence of the pooling agreement and motivate this company to seek its cancellation as being detrimental to commerce between the United States and Chile. Its witness assumes that if the pooling agreement be cancelled and if the Danish vessels again operate and if CSAV has the same proportion in tonnage, CSAV will be in a better position because it is a Chilean company. Furthermore it is felt that the competition of Grace Line and West Coast Line in combination is worse than would be the competition of those lines operating separately.

The matter of bringing CSAV into the pool has been discussed, but Grace Line is opposed to its inclusion and thereby making it a three-way pool. The cubic capacity of the vessels of CSAV is considerably greater than the cubic capacity of the vessels West Coast Line has been operating, and to give CSAV a percentage would reduce the other percentages to such an extent that it would not be a satisfactory operation. With the increased capacity provided by Grace Line, primarily by substituting large vessels for small ones, and with the additional vessels Grace Line has provided to take care of the trade, it does not believe a pool with three lines would be workable and satisfactory in the trade.

West Coast Line's position is that having had its required minimum number of sailings in less than the full pool year and because it intends to and has had further sailings within the pool year, it is entitled to have Grace Line continue to pool the earnings of all vessels sailed during the pool year, such earnings to be divided 75 percent to Grace Line and 25 percent to West Coast Line. As shown by exhibits, revenues from all sailings of each party to the pool up to and including April 5, 1940, have been pooled. The purpose of the pooling agreement was to arrange as nearly as possible the carriage by Grace Line of 75 percent of the cargo and the carriage by West Coast Line of 25 percent of the cargo with corresponding division of revenues. The pooling agreement also provides that should the trade necessitate additional or larger vessels 75 percent of such additional tonnage shall be provided for by Grace Line and 25 percent thereof by the West Coast Line. There is evidence that the trade has necessitated additional tonnage, especially after April 5, 1940, and the record shows that of such additional tonnage required up to the end of the pool year Grace Line provided approximately 86 percent and West Coast Line 14 percent on a deadweight tonnage basis. West Coast Line has accordingly not completely

fulfilled this part of its agreement. Participation by West Coast Line in the pool on a 25 percent basis notwithstanding its failure to provide its proportionate share of the additional tonnage requirements creates a condition which is discriminatory and unfair to Grace.

The fact that vessels have been time-chartered for a single round voyage each, and that they have departed from New York at intervals of 21, 20 and (scheduled) 33 days, gives no assurance that continuation of the pooling agreement would result in regular sailings, as argued on behalf of West Coast Line. It is also urged that the pooling agreement guarantees 82 sailings a year, 10 percent more or less, but that without the pooling agreement there would be no guarantee by contractual relationship between the parties of any sailings at all to the American public and to the American shipper. We are convinced, however, that under the circumstances of this case, self-interest of the carriers will be as adequate a guarantee of service as a contractural relationship would be.

We conclude and decide that under the changed circumstances disclosed of record, Pooling Agreement No. 5893, as amended, is unjustly discriminatory and unfair as between the carriers party thereto. An order will be entered disapproving Pooling Agreement No. 5893, as amended.

TRUITT, *Commissioner*, dissenting:

This case arises from an investigation instituted by the Commission on its own motion. By order of June 4, 1940, Grace Line, Inc., Wessel Duval & Co., Inc., and J. Lauritzen (the two persons last named, being referred to as West Coast Line) were ordered to show cause why Pooling Agreement No. 5893, as amended, should not be disapproved or modified. Compania Sud Americana de Vapores was made a party to the proceedings. The order to show cause recites as the grounds for the institution of the proceedings the following:

That in view of existing extraordinary and emergent conditions, said Agreement under present circumstances is opposed to the public interest, is unjustly discriminatory and unfair as between the carriers parties thereto and to Compania Sud Americana de Vapores, and operates to the detriment of the commerce of the United States.

Hearings were held before Examiner Gray and a report was proposed by him recommending disapproval of the agreement on the grounds that by reason of changed circumstances it had become discriminatory as between the carriers parties thereto, and operated to

the detriment of the commerce of the United States. The examiner further recommended that disapproval be made effective as of April 10, 1940. This is the date on which the Danish vessels controlled by J. Lauritzen could no longer be employed in the West Coast Line services by reason of their immobilization. Such immobilization was caused by the inability of the owners to make satisfactory arrangements with certain belligerent governments for the continued operation of the vessels.

In the report of the Commission the contention that the agreement operates to the detriment of the commerce of the United States was abandoned as a ground for disapproval. Neither did the report follow the recommendation of the examiner that disapproval be made effective as of April 10, 1940, in which conclusion I am in entire accord.

This leaves as the sole issue decided the question of disapproval on the ground that the agreement under changed conditions is unjustly discriminatory and unfair as between the carriers parties thereto. The finding of the Commission is contained in the final paragraph of its report and reads as follows:

> We conclude and decide that under the changed circumstances disclosed of record, Pooling Agreement No. 5893, as amended, is unjustly discriminatory and unfair as between the carriers party thereto.

In my opinion the conclusion thus reached is unwarranted, first, because it is based on assumptions as to the interpretation of this agreement as to which no findings are made; and second, because the record, in my opinion, does not support a finding that present operations under the agreement are "unjustly discriminatory and unfair as between the carriers party thereto."

At the outset I wish to point out that the question as to whether or not the Pooling Agreement is dissolved as a matter of law because of the impossibility of further performance is not before the Commission. Questions of this nature or of a similar nature, such as whether or not breach of the agreement on the part of one of the contracting parties entitles the other to rescind the agreement, are not among the statutory grounds upon which the Commission is authorized to disapprove agreements previously approved under Section 15 of the Shipping Act, 1916, as amended. They are more naturally questions to be decided by the usual courts of law in litigation between the parties. But there are a few principles underlying the so-called doctrine of frustration of contracts to which it is appropriate in this case to allude. One is the fact that supervening circumstances, which make performance of a promise more difficult and expensive or the counterperformance of less value than the parties

anticipated when the contract was made, will ordinarily not excuse nonperformance (*The Harriman*, 9 Wall. U. S. 161). Another principle is that a temporary impossibility which is removed within a reasonable time cannot be used to snap a discharge of the contract (*Andrew Millar & Co.* v. *Taylor & Co.* [1916] 1 K. B. 402). Finally, it is well settled law that where alternative methods of performance are permissible under the contract the fact that one method of performance becomes impossible does not dissolve the contract (Restatement of Contracts, par. 469).

To a certain extent the legal principles referred to above have application to the proceedings before us in determining discrimination as between the parties thereto and detriment to the commerce of the United States. If the effect of the Pooling Agreement between the carriers is to give one of the parties a substantial and permanent advantage not justified by differences in their respective services rendered under the agreement, then I think the Commission would be justified in condemning the agreement as being discriminatory between the parties thereto. I believe, however, in this case that while Grace Line, Inc., is, to a substantial extent perhaps, unable to make the profit from operations which it might make if it were free from the restrictions of the Pooling Agreement, the record does not show to any satisfactory extent that its own operation under the Pooling Agreement, even though increased by the necessity of providing the additional tonnage required to replace immobilized Danish vessels, results in such diminution of earnings as restricts or hampers its ability to provide service on a reasonably compensatory basis. Nor do I think that, unless the contract is to be interpreted along the lines contended for by Grace Line, Inc., viz, performance by Wessel Duval through the use of chartered vessels is not permissible under the agreement, the interruption of service by West Coast Line is necessarily permanent. The record shows that both Wessel Duval and Grace Line, Inc., have in the past in maintaining these services used some chartered vessels.[6] To be sure, service by chartered vessels as distinguished from owned vessels is different, as stated in the report of the Commission, but I fail to see in what respect the difference has any significance from the point of view of the Commission.

Furthermore, in my judgment, it is not possible to say that interruptions to the service were not generally within the contemplation of the parties. The Pooling Agreement dealt with the required

[6] This fact is brought out in several places in the record, but particularly in the cross-examination of J. W. Chapman, vice president of Grace Line, by counsel for the Commission. (Rec., pp. 90, 91. See also Rec., pp. 55–57.)

amount of performance each year which the respective parties were obligated to perform, namely 26 voyages to be made by West Coast Line and 56 voyages to be made by Grace Line annually with a 10% tolerance in each case. It is to be noted that there was no requirement as to regularity of sailing and while the argument may be made that this omission was inadvertent, it seems to me equally open to inference that the failure to provide for regularity of service was intentional.[7] Interruptions to service by reason of strikes either here or in foreign countries are not unlikely occurrences. Such interruptions may, as we all know, be serious and prolonged and may affect either of the parties to the Agreement. The Agreement fairly interpreted seems to me to mean that the parties would carry each other during periods of interrupted service with the contractual safeguard, however, that each of them should make the stipulated number of voyages per annum. Since, as indicated above, the general possibility of interruptions to the service might well have been in the contemplation of the parties I do not think it is sufficient ground for what is in effect a dissolution of the Pool to rely upon the fact that one particular cause of interruption to the service might not have been within such general contemplation.

Finally, it is my judgment based on a perusal of the record here that the chronology of events indicates that Grace Line, Inc., is interested above all in escaping from its obligations under the Pooling Agreement and with what appears to me to be unseemly haste.

As has been stated before, the Danish vessels became immobilized on April 10, 1940. About this time, the record being not entirely clear as to the exact date, discussions took place looking toward Wessel Duval taking over the agency of the Chilean vessels, which vessels would then enter into the trade in place of the Danish vessels, thereby eliminating the vessels of J. Lauritzen from the pooling arrangements. It was contemplated that the Chilean company and Grace Line, Inc., would enter into a new pooling agreement in which Wessel Duval & Co. was to have a certain interest. The record indicates that partly because of the unwillingness of Wessel Duval thus to sever its relationship with Lauritzen, except on terms agreeable to it and partly because of the efforts which were being made to free the Danish vessels, which efforts were to a certain extent assisted by the State Department,[8] little progress was made in carry-

[7] Looking both at the language of the contract itself and the surrounding circumstances, it is impossible to say that interruption to service, thereby preventing performance at least temporarily, was so improbable as to be outside any contingency which, had the parties been faced with it, they would have agreed that the promissor should be excused (see *The Poznan*, 276 Fed. 421).

[8] Rec., pp. 378–380 *et seq.*

ing out this plan. Grace Line, Inc., on April 29, 1940, notified the Commission that because of changed circumstances, payments under the Pooling Agreement would be stopped as of the sailing of the Grace Line's *Santa Ana* on April 12. This letter was apparently delivered to the Commission on May 3, 1940. It is to be inferred that the actual delivery of this letter followed upon the inability of the parties to get together at a meeting which was held in the office of Grace Line on either May 2 or May 3. West Coast Line protested and took the position in a letter to the Commission dated May 7, 1940, that this attempt of Grace Line to terminate the Pooling Agreement by a letter addressed to the Commission was without effect.

Following the occurrences related above, efforts to free the Danish vessels still continued. Apparently these efforts came to a standstill about May 25, 1940. In the meantime Wessel Duval chartered other tonnage to replace the Lauritzen vessels, beginning the latter part of May 1940, and continuing during the course of these proceedings. Grace, however, refused to acknowledge that these chartered vessels could under the agreement be placed in the trade. In this connection it should be noted that prior to April 10, 1940, both Wessel Duval and Grace Line, Inc., had placed chartered vessels in the services without objection.[9]

About the time that the efforts to free the Danish vessels came to a standstill, representations were made to the Commission on behalf of the Chilean company as to the detrimental effect of the agreement upon that line. This resulted in a conference[10] being held by a representative of the Commission with all of the parties in which they were informed that unless they could arrive at a satisfactory arrangement among themselves by June 3, 1940, the Commission would issue an order to show cause why the agreement should not be disapproved. The parties having failed to come to an agreement by the stipulated time the order to show cause issued. It seems to me that a fair inference to be drawn from the foregoing statement of facts is that Grace Line, Inc., was using the immobilization of the Danish fleet as a vehicle of escape from its obligations under the Pooling Agreement. The difficulty of temporarily taking care of the services previously furnished by the Danish vessels and the diminished profit due to its obligations under the Pooling Agreement, although not to be minimized, did not constitute insuperable difficulties in carrying out the provisions of the Pooling Agreement. They seemed to be more in the nature of excuses for seeking dissolu-

[9] See footnote 6, *supra*.
[10] Rec., Exhibit 26.

tion of the agreement, which agreement in the past had operated considerably in favor of Grace Line, Inc., but now appeared to be less advantageous than possible new arrangements with the Chilean line or increasing its own services without obligation to make pool payments.

Since the Commission failed to find that the changed circumstances have rendered the Pooling Agreement detrimental to the interests of the commerce of the United States, the only effect of its decision may be to aid Grace Line, Inc., in its efforts to rid itself of an agreement which Grace Line no longer likes but which, in my judgment, it is impossible to say on the record here operates seriously and permanently in a discriminatory manner as between the carriers party thereto.

The only evidence of unfairness—and this seems insufficient—is that during the period subsequent to April 10, 1940, the contributions of Grace Line to the pool have been in excess of the 75% that it can draw. Pooling agreements must invariably result in one party or the other temporarily contributing more than its share. Rather, the questions is whether the balance over the entire period of the Agreement is or probably will be unfair. At the present time, at least, I am not satisfied that on the record such unfairness exists. It should further be noted in this connection that the Pooling Agreement can be terminated on June 30, 1941, upon either party giving six months' prior notice and that the question as to payments for the period subsequent to April 10, 1940, is a matter of interpretation of the contract which the Commission has properly left to be decided by the courts. For like reasons, the Commission should have also left the question of the continued existence of this Agreement to the courts.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 19th day of September, A. D. 1940

No. 577

IN RE GRACE LINE, INC., AND WEST COAST LINE POOLING AGREEMENT NO. 5893, AS AMENDED

It appearing, That by order of June 4, 1940, the Commission entered upon a hearing concerning the lawfulness of Pooling Agreement No. 5893, as amended;

It further appearing, That a full investigation of the matters and things involved has been conducted and that the Commission, on the date hereof, has made and filed a report containing its conclusions and decision thereon, which said report is hereby referred to and made a part hereof;

It is ordered, That Pooling Agreement No. 5893, as amended, be, and it is hereby, disapproved.

By the Commission.

[SEAL] (Sgd.) W. C. PEET, JR.,
Secretary.

UNITED STATES MARITIME COMMISSION

No. 465

IN THE MATTER OF DOLLAR-MATSON AGREEMENTS
(Nos. 1253 and 1253–1)

Submitted January 24, 1940. Decided September 25, 1940

Prior report and order (1 U. S. M. C. 750) affirmed as amended. Agreement also found to be unfair as between carriers.

Additional appearances:

Reginald S. Laughlin and *Robert A. Grantier* for American President Lines, Ltd.

Bon Geaslin for United States Maritime Commission.

REPORT OF THE COMMISSION ON FURTHER HEARING

BY THE COMMISSION:

This is a further hearing concerning an agreement between Matson Navigation Company, and certain affiliated companies, which will be referred to as Matson, and Dollar Steamship Lines Inc., Ltd. (now American President Lines, Ltd.), and certain affiliated companies, which will be referred to as Dollar, regulating competition between Matson and Dollar. In the original report herein (1 U. S. M. C. 750), the Commission, with two Commissioners dissenting, found the agreement to be detrimental to the commerce of the United States and in violation of Section 15 of the Shipping Act, 1916, as amended. By order dated August 17, 1938, the agreement was disapproved and the parties to the agreement were forbidden from making further payments thereunder.

Matson petitioned for rehearing September 24, 1938, asserting various errors of fact and law in our original report. Particularly, it challenged the findings that its Philippine service was intended merely as a threat and that a mail contract was necessary to make it profitable, and the finding that the 50 percent of the gross tariffs on Hawaiian business which Dollar retained was not compensatory; and excepted to the failure to find that Matson gave adequate con-

sideration for the agreement. Error was also assigned in that we construed section 15 as not recognizing the desirability of monopoly in water transportation. Furthermore, Matson argued that our interest in Dollar (and particularly our acquisition of 90 percent of the stock thereof during the pendency of this proceeding) disqualified the Commission from judging the case and that a determination by the Commission would therefore deprive Matson of its property without due process of law. By order dated December 6, 1938, the proceeding was reopened for further hearing, and further evidence was introduced.

The jurisdictional question will be considered at the outset.

Matson urges that the Commission is now disqualified from acting on the agreement by reason of its acquisition of 90 percent of the stock of American President Lines, Ltd., and because of its interest under the operating-differential subsidy agreement. (At the oral argument this contention appears to be directed to the propriety of the Commission's acting rather than to the strict legal disqualification.) The objection to our jurisdiction is not tenable. The interest of the Commission is the interest of the United States, and was acquired in furtherance of the purposes expressed in the Merchant Marine Act, 1936, creating the Commission, and of the Shipping Act, 1916, conferring the regulatory powers here challenged. Neither the Commission nor any of the Commissioners has any personal or private interest. See *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 158 (1886). The interest of the Commission in behalf of the public is not such as to disqualify the Commission from acting. *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347, 353 (1894); *Puget Sound Co.* v. *Seattle*, 291 U. S. 619, 624 (1934). Furthermore, and particularly as to the propriety of the Commission's acting, the refusal of the Commission to act on the grounds of a supposed inconsistent interest would result in the agreement being without the scope of any effective regulation. Disqualification will not be permitted to destroy the only tribunal with power in the premises. *Brinkley* v. *Hassig*, 83 F. (2d), 351, 357 (C. C. A., 10th Ct., 1936). See also *Evans* v. *Gore*, 253 U. S. 245, 247 (1920); *Gordy* v. *Dennis*, 5 Atl. (2d) 69, 70 (Md., 1939).

Matson also urges that the Commission has no jurisdiction to disapprove an agreement previously approved, unless a change of conditions requiring such disapproval is established. In support of this contention certain language used by the Shipping Board in *In re Rates in Canadian Currency*, 1 U. S. S. B. 264, 281, is cited. The language in that case goes no further than to say that, where an agreement has been approved, it should not be disapproved except

upon an adequate showing to justify such disapproval. In view of the conclusions of the Commission, however, as to changes in conditions, and the effect thereof insofar as the agreement in question is concerned, it is unnecessary to consider the objection further.

The evidence before us, as introduced upon the original hearing and the further hearing, reveals the following facts:

The Pacific Mail Steamship Company, a predecessor of Dollar, was engaged in the trans-Pacific trade via Honolulu for a number of years prior to 1913, in which year it ceased to operate in the trade. Dollar itself commenced operations between San Francisco and Honolulu, westbound, on its round-the-world service in January 1924. Two years later, the trans-Pacific service was added, between San Francisco and Manila by way of Honolulu and ports in Japan and China. The two services provided a weekly service westbound and a fortnightly service eastbound between San Francisco and Honolulu.

The Matson service between the Pacific coast and the Hawaiian Islands was inaugurated in 1891 by Captain Matson, first with sailing ships, and later with steamships. Since the establishment of the Matson Navigation Company in 1901, there has been no interruption of service to and from the Islands, and with each advance in facilities for ocean transportation, vessels operated on the route have been improved, or replaced by new vessels especially designed for the trade. Fifteen island ports are served, with regular and frequent sailings from San Francisco and Los Angeles. Other sailings are made as required, particularly of lumber carriers, and sufficient suitable tonnage is available at all times to handle estimated peak demands. In addition, Matson has established direct and through transshipment services to Atlantic coast ports of the United States via the Panama Canal. Matson owns 100 percent of the stock of Oceanic Steamship Company, which operates to Australia and New Zealand (via Honolulu) under an operating-differential subsidy agreement with the Commission.

In July 1929, Matson established a direct service between San Francisco and Manila with two 13-knot vessels, which service was from 7 to 10 days faster than the service then offered by Dollar via Japan and China. As a protective measure, Dollar inaugurated a direct parallel service to the Philippines. Both services showed substantial losses, the 8 voyages of Matson resulting in a loss of $163,813.55,[1] and Dollar's 11 voyages resulting in a loss of $362,277.88. It is conceded that the direct Manila service would not—

[1] Revenues, $323,207.78; expenses, $487,021.33 ($376,842.26 voyage and vessel expense, $66,650.32 depreciation, and $43,528.75 repairs).

at least for several years—have been profitable without a mail contract.

Matson made application for the certification of the direct route to Manila as an ocean mail route under the Merchant Marine Act 1928, and was successful (over the protest of Dollar) in having the Postmaster General certify such route (F. O. M. 50), to be served by vessels of the same character as the vessels which Matson was using in such service.

Some time before the date for receipt of bids for the service, a suggestion was made to Matson by a relative of one of the Dollars, that the two make some arrangement to avoid the competitive struggle between them. After some negotiation, the agreement here in question was executed on April 23, 1930, and was approved by the Shipping Board on April 29, 1930. There is nothing in the record, therefore, beyond the mere approval of the agreement.

It is urged by Dollar that the agreement was in effect an agreement to refrain from bidding on the mail contract, and therefore illegal from its inception. This is a matter for the courts to decide. The Commission must, of course, consider whether an agreement is prima facie valid; but, such prima facie validity being established (and we think it is in this case), the grounds upon which we may disapprove and thereby render the agreement unlawful are specifically enumerated in section 15, namely that the agreement is unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or between exporters from the United States and their foreign competitors, or that the agreement operates to the detriment of the commerce of the United States, or is in violation of the Shipping Act, 1916. The agreement was made lawful when approved; and it remained lawful until disapproved. Though we have no doubt that the Commission has power to withdraw its approval *ab initio* where such approval has been obtained by fraud, we find nothing in the record to justify such an inference here.

The agreement provides in effect as follows:

1. Matson will not engage in service between mainland United States and Asiatic ports, including the Philippines and Guam; and Dollar as "exclusive agent" will receive 50% of the gross passage money for local passengers to Oriental ports carried on Matson cruise ships;

2. Dollar will not solicit passenger or freight traffic between mainland ports of the United States and the Hawaiian Islands (with certain exceptions not material) and will not engage in service with Oceania;

3. Dollar will carry passengers and freight between Pacific ports of the United States and the Hawaiian Islands only as "agents" for Matson at tariffs not less than those in effect on Matson vessels, and will pay to Matson 50% of the gross receipts for such transportation;

4. Each of the parties will cooperate with the other to the end that both will prosper in their respective territories;

5. Provision is made for reformation (in case of partial invalidity) of the agreement and for settlement of disputes by arbitrators; and

6. The agreement is to remain in effect for 10 years and thereafter until the arbitrators shall decide that the necessity for or desirability of the agreement "as measured by the conditions existing at the time it was made," shall have ceased to exist.

The record establishes a number of changed conditions in the light of which the conclusion becomes inescapable that the agreement is unfair to Dollar.

There has been a substantial increase in costs of operation—vessel wage costs increasing 85 to 92 percent, and longshoremen's wages 30 percent, both accentuated by a decrease in efficiency, and costs of materials increasing 20 percent—with no commensurate increase in rates.

Competition with Dollar in the Oriental trade has substantially increased. In 1930 its competitors in that trade numbered 13, with 229 scheduled sailings yearly. In 1938, 404 sailings were scheduled by 21 competitors, some of which have newer and faster vessels. The effect of the increased competition is accentuated by virtue of Japan's control over Chinese commerce.

Dollar now receives an operating-differential subsidy, which is substantially less than the payments under the ocean mail contract previously held by it. Furthermore, this subsidy is subject to reduction under the Merchant Marine Act, 1936, in an amount which bears the same ratio to the subsidy otherwise payable as the gross revenue from its domestic operations bears to the gross revenue from the entire voyage. Dollar must therefore pay to Matson 50 percent of its gross revenues from its Hawaiian business, and in addition must repay to the Government a portion of its subsidy based not upon the revenues which it might retain under the agreement but on its gross revenues prior to such payment.

Since execution of the agreement, Matson has eliminated third-class accommodations from its own vessels, as well as from the vessels formerly operated by Los Angeles Steamship Company, and acquired by Matson in 1930. As a result, Dollar is required under the agreement to pay 50 percent of the revenues from this traffic, though there

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is no longer any possibility of competition between the two. Matson urges that its tourist accommodations are competitive with the third-class accommodations of Dollar, and argues that the variation between rates in one class are in some cases greater than the difference between Dollar's third-class and Matson's tourist-class rates. We find nothing in the record to justify a conclusion that the accommodations are comparable.

Matson submits in partial justification for the agreement the necessity for protection against rate cutting by Dollar and points to threats made during 1929 and 1930 by Dollar to establish rates considerably lower than the conference rates then in effect. The possibility of such rate cutting is materially affected, if not entirely eliminated, by the 1938 amendment to the Intercoastal Shipping Act of 1933, extending the power of the Commission to prescribe minimum rates.

In the light of the foregoing, it is difficult to come to any other conclusion than that the agreement is now unfair as between carriers within the meaning of section 15 of the Shipping Act, 1916. A consideration of the actual results of the agreement down to the time of the hearings confirms this conclusion.

Dollar has paid to Matson the sum of $1,003,767, and there had accrued by August 17, 1938, the additional sum of $244,838.42. Matson has paid Dollar the sum of $7,031.65.

As against the great weight of the payments by Dollar, Matson refers to substantial benefits which Dollar has received under the agreement in the way of additional freight carried by reason of Matson's assistance and cooperation.

The sums paid by Dollar, averaging more than $150,000 per annum, may be considered largely as clear profit to Matson. On a conservative basis it would require something more than $3,000,000 gross revenue annually to yield the average annual payment. To justify a conclusion that the benefits of the agreement were reciprocal as between the parties, Matson's contribution to Dollar, through reference of business and otherwise, should have approximated that amount.

The supposed benefits to Dollar, however, are for the most part conjectural, and in no event sufficient to justify the payments which Dollar has been called upon to make under the agreement. The most important single item to which reference is made appears to be certain gunnies, which are shipped from Calcutta to Hong Kong and there transshipped for carriage to Honolulu. It was testified at the original hearing that this business amounted to $50,000 or $100,000 a year. Upon rehearing, based upon exact statements of such traffic, the revenues were shown to average between $30,000 and

$40,000 per year, and the increase in revenues after execution of the agreement was not more than $10,000 per year. Matson points out that, although solicited to do so, it has refrained from establishing through rate or fare arrangements with foreign lines and to its cooperation with Dollar in developing Oriental passenger business. It points to cargo from New Zealand to the Orient obtained through its influence, and to the transportation of laborers from the Philippines to Hawaii (business that had become negligible by 1938). We conclude from the testimony herein that the gross revenues derived by Dollar from business directly attributable to the agreement would not at the present time be substantially, if at all, in excess of $100,000 per year.

Matson urges its "irrevocable" withdrawal from the Philippine service. While the evidence on further hearing does not support the charge that Matson's inauguration of the Philippine service was intended merely as a threat to Dollar, it discounts the benefits claimed to have accrued to Dollar from the discontinuance of such service. In no event are they sufficient to justify the payments Dollar has been called upon to make.

There is no merit in Matson's argument that the agreement should not be disapproved because, as partial consideration for the agreement, Matson "irrevocably" changed its position by abandoning its direct Manila service. It is clear that this change of position was Matson's voluntary act performed in the light of statutory provisions that the agreement might be disapproved subsequent to its original approval. The Shipping Board by its approval did not and could not abdicate its functions for itself or its successors, and neither the Shipping Board's approval nor changes of position by the parties to the contract can operate to prevent the Commission from performing its legitimate functions and its obvious duty.

The agreement is also most unfair in requiring Dollar to pay 50 percent of its revenues on business which Matson could not carry. This is most marked in the case of third-class passengers, in view of Matson's ceasing to provide such accommodations; but it also is brought out by the cases where Matson referred shippers or passengers to Dollar, but was still able to collect its 50 percent because it had not made "specific written request" of Dollar to carry the traffic.

We also find that the agreement, in the light of the changed conditions, operates to the detriment of the commerce of the United States.

A word should be said at the outset concerning agreements regulating competition. We cannot condemn too severely those (such as the present) that attempt to do so in perpetuity. The Dollar-Matson agreement is to remain in effect for 10 years and thereafter until the

arbitrators shall decide that the necessity for, or desirability of, the agreement "as measured by the conditions existing at the time it was made" shall have ceased to exist. In other words, the agreement may be interpreted by the arbitrators so that it is to remain in effect until the arbitrators shall determine, 10 years or more after execution of the agreement, that the agreement should not have been made in the first place. As we stated in the original report herein, agreements restricting competition should, of necessity, be of definite duration and for relatively short periods, so that the parties and the Commission may have an opportunity from time to time to observe the impact of changing conditions on their undertakings. This agreement is doubly to be condemned because it may extend in perpetuity without consideration by the Commission and because by its terms it attempts to exclude all question of changing conditions from consideration in fixing the duration.

At the time of execution of the agreement, Matson had substantial American flag competition from Los Angeles Steamship Company, which had been operating in the trade since 1921, and had carried approximately 36 percent of the passengers between California ports and the Hawaiian Islands during the years 1923 to 1929. This competition was eliminated by the acquisition of Lassco by Matson 6 months after the execution of this agreement. The agreement, in preventing effective competition by Dollar, thus operates to eliminate the only American flag competition in the trade, and confirms a practical monopoly of transportation between continental United States and Hawaii.

We cannot concur with Matson's contention that the Shipping Act, 1916, recognizes that monopoly is desirable in water transportation. While under certain circumstances, agreements which would otherwise violate the antitrust laws will be given legal clearance, it does not follow that such agreements must be approved or are desirable in all cases. In the light of the provisions of the Merchant Marine Act, 1936, protecting Matson against unfair advantage by subsidized lines, and the provisions of the Intercoastal Shipping Act, 1933, as amended in 1938, providing effective regulation against rate cutting, the situation is not substantially different from that which confronted our predecessors in the matter of *Gulf Intercoastal Contract Rates*, 1 U. S. S. B. 524, and considered by the Supreme Court in *Swayne & Hoyt* v. *U. S.* 300 U. S. 297 (1937).

The agreement is detrimental to commerce in requiring Dollar to carry all Hawaiian traffic at less than a compensatory rate. The re-

sults of Dollar's Hawaiian operations for the years 1937 and 1938 are summarized in the following table:

	1937			1938		
	Freight	Passenger	Total	Freight	Passenger	Total
Revenue	$35,522.61	$246,631.26	$282,153.87	$15,823.06	$119,398.80	$135,221.80
Less 50%	17,761.30	123,315.63	141,076.93	7,911.53	59,699.40	67,610.93
Net	17,761.31	123,315.63	141,076.94	7,911.53	59,699.40	67,610.93
Expenses:						
Direct	25,539.88	41,742.35	67,282.23	12,419.02	22,008.43	34,427.45
Indirect [1]	21,259.48	147,603.23	168,862.71	10,815.15	81,609.78	92,424.93
Total	46,799.36	189,345.58	236,144.94	23,234.17	103,618.21	126,852.38
Vessel operating loss	29,038.05	66,029.95	95,068.00	15,322.64	43,918.81	59,241.45
General and administrative expenses [2]	4,680.00	18,934.00	23,614.00	1,532.26	4,391.88	5,924.14
Loss [3]	33,718.05	84,963.95	118,682.00	16,854.90	48,310.69	65,165.59

[1] Indirect vessel operating expenses are prorated on basis of revenue from the various services.
[2] General and administrative expenses, which actually amounted to 13 percent of vessel operating expenses are estimated at 10 percent thereof.
[3] No allowance included for depreciation.

Although admitting that the purpose of the 50 percent clause was to diminish Dollar's profit on Hawaiian traffic to the point where the business would be unattractive, Matson nevertheless insists that the amount retained is adequate to pay for the additional costs incurred in handling the business and return a profit. It contends that it is improper to include expense for advertising and brokerage on passenger tickets because Dollar was not permitted under the agreement to solicit Hawaiian business. The inclusion of port charges at Honolulu is also said to be improper because such charges would be incurred regardless of the carriage of any Honolulu cargo or passengers. We do not subscribe to this theory of rate making. However, the question is of little importance since the exclusion of these charges (approximately $23,000 in 1937 and $12,000 in 1938) would not convert the losses into a profit. Matson errs also in omitting indirect vessel operating expenses and general and administrative expenses.

During the period prior to the institution of this proceeding on November 22, 1937, Dollar's financial condition changed materially; by that date its condition had become desperate, and the line was on the verge of bankruptcy. By reason of Dollar's financial troubles, its fleet had deteriorated to the danger point, and, due to lack of funds to make required repairs, it was necessary to lay up a number of vessels for a total of 2,707 days in the latter part of 1937 and the early part of 1938. Whatever other causes there may have been, it cannot be doubted that the agreement, by depriving Dollar of revenues of

approximately $1,000,000 from the Hawaiian service, contributed in substantial measure to Dollar's financial plight. The agreement, for the reasons pointed out being unduly burdensome upon Dollar, has resulted, and can only result in hampering it in carrying on its functions as an instrumentality of commerce, and in obstructing the rehabilitation of the Dollar service as a vital part of the American merchant marine, and therefore operates to the detriment of our commerce.

CONCLUSION

Upon this record the Commission finds that the agreement is unfair as between carriers and affirms its finding that the agreement operates to the detriment of the commerce of the United States.

Both Matson and Dollar seek clarification of that portion of the order of August 17, 1938, which forbids the parties to the agreement "from making further payments thereunder." Matson contends that if the order means that the payment of sums which accrued prior to the date of disapproval is prohibited, the order is beyond the jurisdiction of the Commission; and if it is not intended to prohibit the payment of such sums, the order should be amended to show that such prohibition relates only to transactions subsequent to disapproval. Dollar maintains that no further payments, even including past accruals, can lawfully be made under the agreement after its disapproval, relying upon that portion of section 15 which states that "after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement." It suggests that the order be amended specifically to refer to and include past accruals.

Whether the contract is invalid in its inception on grounds of fraud or public policy other than as expressed in section 15 is a matter for the courts to decide. The grounds upon which the Commission may disapprove and thereby render the agreement unlawful are those specifically enumerated in section 15. Under that section, the agreement became lawful when approved; and remained so until disapproved. In short, the function of the Commission in this proceeding is either to disapprove or not disapprove the agreement. Going beyond that step is either to trespass upon the contractual rights of the parties or to issue a gratuitous command to refrain from violating laws which the Commission does not administer.

Therefore, the order will be amended to eliminate reference to further payments.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 25th day of September A. D. 1940.

No. 465

IN THE MATTER OF DOLLAR-MATSON AGREEMENTS
(Nos. 1253 and 1253-1)

This case being at issue on further hearing, and having been duly heard, and full investigation of the matters and things having been had, and the Commission, on the date hereof, having made and entered of record a report on further hearing stating its conclusion and decision thereon, which report is hereby referred to and made a part hereof;

It is ordered, That the order entered herein of August 17, 1938, be, and it is hereby, modified to eliminate the provision of said order which forbids the parties to Agreement No. 1253 from making further payments thereunder, and confirmed as modified.

By the Commission.

[SEAL] (Sgd.) W. C. PEET, Jr.,
Secretary.

UNITED STATES MARITIME COMMISSION

No. 578

Intercoastal Cancellations and Restrictions

Submitted August 19, 1940. Decided October 1, 1940

Motion to vacate suspension order granted in part. Minimum tonnage restriction found justified except as to Richmond, Calif.

M. G. de Quevedo, *Walter Shelton*, and *N. S. Laidlaw* for respondents.

H. E. Manghum, *Hugh B. Bradford*, *J. Francis O'Shea*, *J. H. Anderson*, *W. G. Stone*, *Eugene A. Read*, *Ralph L. Shepherd*, *Edwin G. Wilcox*, *Harvey B. Hart*, *C. A. Hodgman*, *J. Richard Townsend*, *B. C. Allin*, *C. O. Burgin*, *Ernest Gribble*, *Nels Weborg*, *J. C. Sommers*, *Irving F. Lyons*, *Leonard R. Keith*, *E. A. McMillan*, *M. H. Gates*, and *C. D. Penniman* for protestants.

Merritt D. McCarl and *W. Reginald Jones* for interveners on behalf of respondents.

Report of the Commission

By the Commission:

By schedules filed to become effective June 5, 1940, and later, respondents[1] proposed to cancel direct-line and joint through rates for transportation of freight between various Atlantic and Pacific coast ports and to place minimum tonnage restrictions upon service to several of the ports involved. Upon protests of port authorities, shippers, and other interested parties, the schedules were suspended until October 5, 1940.

At the hearing counsel for respondents moved that the suspension order be vacated as to the Luckenback Steamship Company, Inc., and the Weyerhaeuser Steamship Company as neither carrier participated in the suspended schedules. This motion is granted. Motions were also filed to vacate the suspension order entirely on the

[1] American-Hawaiian Steamship Company, American President Lines, Ltd., (Arrow Line), Sudden & Christenson, California Eastern Line, Inc., Calmar Steamship Corp., Isthmian Steamship Co., Luckenbach Steamship Co., Inc., McCormick Steamship Co., Pacific Coast Direct Line, Inc. (Weyerhaeuser Line), (Panama Pacific Line) (Baltimore Mail Steamship Co., United States Lines Co., General Agents), (Quaker Line) Pacific-Atlantic Steamship Co., States Steamship Co. (California-Eastern Line) and Weyerhaeuser Steamship Co.

ground that we were without authority to require respondents to maintain service, and further that we had no authority to suspend the operation of schedules, the effect of which was merely to withdraw service. Respondents introduced no evidence with respect to the question of service, contending that it is entirely a question of law and cite in support of their position, *Lucking* v. *Detroit and Cleveland Navigation Company*, 265 U. S. 346; *McCormick Steamship Company* v. *United States*, 16 Fed. Sup. 45; and *Routing From Southwest to East and New England* 91 I. C. C. 455.

In the *McCormick case* a permanent injunction was sought against an order of the Secretary of Commerce requiring certain common carriers by water in intercoastal commerce to continue serving the ports of Berkeley and Emeryville, Calif. In that case respondents operating between Atlantic and Pacific coast ports had filed terminal rates applicable between Berkeley and Emeryville and Atlantic coast ports. After 6 weeks the schedules withdrawing the service were filed and these were suspended. The court found that the Shipping Act conferred no authority on the regulatory body to compel carriers to continue service, but in so doing they stated:

> None (cases cited by defendant to establish preference and prejudice) suggests that in the absence of the specific provisions of section 20 of the Interstate Commerce Act (49 U. S. C. A. section 20) a six weeks' service to a certain locality, upon which no industry or trade was shown to be established and which was undertaken in reprisal in a shipping competition, to whose uncontrolled and often destructive vigor the Government offered no protection, must continue merely because it momentarily had conferred on the locality in question the benefit of overcoming the natural disadvantage of its shallow waters.

It is the position of the Sacramento protestants that we have authority to order the removal of undue preference and prejudice created by the withdrawal of service. In support of their contention they introduced evidence to show the effect of the carriers' action upon the shippers located there and upon the on-carrying River Lines.

We have carefully examined the cases cited by respondents in the instant proceeding and the arguments thereon, but find no reason to depart from the view expressed in *Westbound Intercoastal Rates to Vancouver*, 1 U. S. M. C. 770. In that case intercoastal carriers proposed to cancel their through routes and joint rates to Vancouver, Wash. Respondents questioned our jurisdiction to order cancellation of the schedules in question. We said:

> Notwithstanding such absence,[2] pertinent provisions of the Shipping Act to which respondents are amenable are absolute. For example, section 16 of

[2] Provision in Shipping Act, 1916, similar to paragraph 18, section 1 of Interstate Commerce Act making unlawful abandonment of rail transportation service unless authorized by Interstate Commerce Commission.

that Act forbids respondents, without qualification, to subject any locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Whenever in a given case the facts show undue and unreasonable prejudice and disadvantage, it is our duty, under the Act, to order its removal.

It should be added here that such an order should only be issued when undue preference and prejudice has been shown by the most clear and convincing proof.

Sacramento is some 94 nautical miles from San Francisco Harbor and, except in the rainy season, is only accessible to shallow-draft vessels routed over inland bays and rivers, whereas the competitive ports are accessible to ocean-going vessels and are, therefore, accorded direct service. Thus a different competitive situation exists at these other ports. The burden of the difficulties attendant upon Sacramento's position cannot be made to fall upon respondents. Some of the competitive ports are accorded transshipment service, but this is a result of direct-line competition. Furthermore, even though respondents' costs of transshipment to Sacramento in some instances may be lower than that to the competitive ports, no showing was made as to the cost of the direct service accorded at these latter ports. The law does not contemplate the equalization of natural advantages and disadvantages through an adjustment of freight rates, and the fact that a shipper may encounter economic and geographical disadvantages in selling his produce in a given market does not establish the unlawfulness of the practice of the carrier in connection with the transportation of the shipper's commodity. *The Paraffin Companies, Inc.* v. *American-Hawaiian SS Co., et al.*, 1 U. S. M. C. 628, 629.

Transshipping services at terminal rates were first established to Sacramento in 1901 but were discontinued in 1915 and again established in 1933 by an intercoastal carrier not a respondent in this proceeding. In 1934 respondents established terminal rates to Sacramento to meet the competition thus offered. Respondents continue to serve Sacramento east-bound with transshipment service at terminal rates and some of the respondents, notably American President Lines and Baltimore Mail Steamship Company, still continue such west-bound service.

The testimony of a shipper witness located at Sacramento, which was adopted through stipulation by 21 other shippers, is typical. He stated that his business had increased principally due to the application of terminal rates and that in reliance thereon he had invested considerable capital for plant improvements. The increases in this witness's business coincided as well with the general increases in business throughout the country as it did with the application of terminal rates. Further it appeared that even during those periods

when the terminal rates were not applicable this shipper was able to compete although at a reduced profit. That a shipper does not realize as large a net profit as formerly may be a factor in determining reasonableness but it is not conclusive. Our only duty with respect to rates alleged to be unlawful is to inquire whether they are in accordance with the provisions of the various shipping acts. We cannot require carriers to establish rates which assure to a shipper the profitable conduct of his business. A carrier may not impose an unreasonable transportation charge merely because the business of the shipper is so profitable that he can pay it nor conversely can the shipper demand that an unreasonably low rate be accorded him simply because the profits of his business shrink to a point where they are no longer sufficient. *Alaskan Rate Investigation*, 1 U. S. S. B. 1, 7, *Eastbound Intercoastal Lumber*, 1 U. S. M. C. 608, 623. In this connection it should be pointed out that the witness was unable to state anything with respect to his own or his competitors' transportation costs for delivery at the consuming points. On the other hand, respondents showed that the Los Angeles receivers, in addition to their steamship costs, incurred the expense of transportation from Los Angeles Harbor to their places of business in Los Angeles. In view of the above, the effect of the withdrawal of the terminal rates is difficult to determine.

Evidence was introduced showing the west-bound movement to Sacramento and competitive ports of typical commodities for the years 1938 and 1939.

	Los Angeles	San Francisco	Alameda	Oakland	Richmond	Sacramento	Stockton	Portland	Seattle
1938 [1]	713, 759	405, 943	42, 760	75, 289	17, 226	21, 902	13, 804	105, 106	149, 813
1939 [1]	892, 063	517, 577	53, 020	82, 233	25, 555	21, 793	17, 221	128, 480	185, 748

[1] Tons of 2,240 pounds.

There is testimony to the effect that the proposed action will jeopardize the terminal property of the city of Sacramento (representing an investment of $3,000,000) which is leased to the River Lines. That carrier estimates that it stands to lose 50 percent of its traffic if the transshipment service is canceled. This is, of course, highly speculative inasmuch as the future prosperity of this carrier will depend upon the service it renders and the charges it makes therefore, together with the ability of its patrons to hold their markets as against their competitors using other modes of transportation.

All preference and prejudice is not prohibited by law but only that which is unjust and undue. *Associated Jobbers and Manufacturers* v. *American-Hawaiian SS Co. et al.*, 1 U. S. S. B. 161, 167. As has

been pointed out the evidence must clearly demonstrate unlawfulness to sustain the entry of an order. Similarity of transportation conditions is a necessary element of undue preference and prejudice. From the evidence set forth hereinabove it is clear that the transportation conditions prevailing at Sacramento are materially different from those at the competitive ports. While the evidence establishes that the proposed withdrawal of service will be detrimental to the interests at Sacramento, it falls short of proof of unlawfulness. Moreover, consideration must be given to the interests of respondents who in their managerial wisdom have seen fit to discontinue service. Considering these conflicting interests, the difference in volume of movement and other dissimilarities in transportation conditions mentioned above, we conclude that the proposed cancellation of service will not result in undue preference and prejudice.

The remaining question concerns the lawfulness of minimum tonnage requirements for calls at certain ports. This requirement generally has been fixed at 250 tons. Respondents' witnesses testified that a minimum was necessary in order to enable them to hold their competitive position in the trade since the maintenance of schedules is of primary importance. They state that unrestricted terminal rates were accorded to small ports as a result of competitive pressure, that many of these ports do not supply sufficient tonnage to justify unrestricted service, consideration being given to cost, and that the reestablishment of this tonnage requirement is merely a return to good steamshipping practice and an endeavor upon their part to operate at a profit which they have not been able to do heretofore. The minimum in question is the smallest quantity which can be handled economically on an intercoastal ship in a day's time so as to get the full benefit of the services of a stevedoring gang and the reasonable use of ship's gear. We conclude, therefore, that the minimum tonnage requirements under suspension have been justified except as shown hereinafter.

Richmond, Calif., located on San Francisco Bay, is shown to be competitive with other San Francisco Bay ports. Respondents offer service not only to one or two piers in San Francisco proper without restriction but serve from one to four piers in Oakland, in addition to according unrestricted service to Alameda. If consideration is given to the private piers served by respondents at these latter ports, the number will run as high as six in some cases. A Richmond shipper testified that he was in direct competition with shippers at Oakland and Alameda and that the curtailment of service at Richmond would necessitate his using these competitive ports at an additional expense. The minimum tonnage requirement at Richmond has not been justified.

The evidence with respect to Vancouver shows that no substantial volume of traffic moved over the lines of respondents. A witness for the on-carrying River Line did not recollect having had any shipments over these lines with the possible exception of McCormick. His interest in the maintenance of unrestricted terminal rates was the hope of obtaining business in the future. It was testified that practically all the eastbound tonnage from Vancouver moved over the American-Hawaiian Steamship Company and the Luckenbach Steamship Company, neither of whose schedules covering service to Vancouver are here in issue. Consequently an order against these carriers cannot be entered in this proceeding. The establishment of the minimum tonnage requirement at Vancouver has been justified.

The representative of Longview admitted that that port does not have sufficient general cargo to entitle it to service of all respondents, but that there is sufficient tonnage to justify service by a few of the lines and that the port interests would be satisfied with such service. The establishment of rates and service is a question in the first instance for the managerial discretion of respondents. We have no authority to make a finding under these circumstances with respect to some of the respondents and not with respect to the others. Likewise, we are without authority in the instant proceeding to allocate ports as requested by the witness. A witness for respondent admitted that this was the solution of the problem but stated that to date the carriers had been unable to agree among themselves as to the ports to be served by each and that consequently no action in this direction had been taken. It is the duty of common carriers by water to consider the needs of shippers. Inability of carriers to agree is not a justification for a neglect of this duty. We believe the carriers and the shippers should work out a plan so as to accord service to all ports under reasonable rates, rules, regulations and practices commensurate with the needs at the ports. It was suggested that the inability of the carriers to agree in this case was the result of the difference in the amount of revenue tons otainable as between the various ports. If this is the only objection to an equitable agreement, it would appear that it would be to the advantage of all parties concerned for the carriers to again avail themselves of the privileges of section 15 by establishing a pooling agreement or some other such device which would enable them to obtain a reasonable revenue and accord reasonable service.

On this record the minimum tonnage requirement at Longview has been justified.

Respondents discontinued service at ports in addition to Sacramento. Little or no evidence was introduced to show that the cancellation of service at these other ports will result in undue preference

and prejudice. Upon this record we conclude that these cancellations will not result in undue preference and prejudice.

We find that respondents' schedules fixing a minimum tonnage requirement at Richmond, Calif., have not been justified but that in all other respects schedules suspended by our orders of June 4, 1940, and June 11, 1940, have been justified. An order will be entered vacating the orders of suspension in accordance with this finding and discontinuing this proceeding.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 1st day of October A. D. 1940.

No. 578

INTERCOASTAL CANCELLATIONS AND RESTRICTIONS

It appearing, That by orders dated June 4, 1940, and June 11, 1940, as amended by order dated June 21, 1940, the Commission entered upon a hearing concerning the lawfulness of the rates, charges, regulations and practices stated in the schedules enumerated and described in said orders, and suspended the operation of said schedules until October 5, 1940;

It further appearing, That a full investigation of the matters and things involved has been had and that said Commission on the date hereof has made and filed a report containing its conclusions and decision thereon, which said report is hereby referred to and made a part hereof;

It is ordered, That the respondents herein be, and they are hereby, notified and required to cancel said schedules insofar as they establish a minimum applicable at Richmond, Calif., on or before October 5, 1940, upon notice to this Commission and to the general public by not less than one day's filing and posting in the manner prescribed in section 2 of the Intercoastal Shipping Act, 1933;

It is further ordered, That in all other respects our orders of June 4, 1940, and June 11, 1940, be, and they are hereby, vacated and set aside as of October 5, 1940, and this proceeding is hereby discontinued.

By the Commission.

[SEAL] (Sgd.) W. C. PEET, Jr.,
Secretary.

UNITED STATES MARITIME COMMISSION

No. 545

UNITED CAN COMPANY [1]

v.

SHEPARD STEAMSHIP COMPANY ET AL.

Submitted August 4, 1940. Decided October 17, 1940

Rates charged on tinplate tops and bottoms from Philadelphia, Pa., to Los Angeles, Calif., found unreasonable. Reparation awarded.

Vincent M. Smith for complainant.

E. J. Martin for defendants.

REPORT OF THE COMMISSION

BY THE COMMISSION:

This case was presented under the shortened procedure. No exceptions were filed to the examiner's proposed report. Our conclusions differ in part from those proposed by the examiner.

Complainant corporation alleges by complaint filed July 21, 1939, that the rates charged on 12 shipments of tinplate tops and bottoms, hereinafter called ends, shipped between January 5, 1937, and February 9, 1938, from Philadelphia, Pa., to Los Angeles Harbor, Calif., over defendant Shepard Steamship Company were unreasonable. General Steamship Corporation, Pacific coast agent of Shepard, was named defendant, but the record fails to show any cause of action as to that company and the complaint, as to it, will not be considered. Reparation is sought. The complaint as to 7 of the shipments is barred under section 22 of the Shipping Act, 1916. Rates will be stated in cents per 100 pounds.

Tinplate ends are reclaimed ends of tin cans. They are washed, dried, polished and flattened before shipment and are packed in cartons measuring 19¼ by 13 by 7 inches weighing about 50 pounds. The value is said to be $14.00 per ton of 2,000 pounds, f. o. b. docks,

[1] Complainant's name has been changed to Val Vita Food Products Company.

Philadelphia. Three shipments, weighing 21,900, 22,560 and 105,700 pounds, respectively were shipped prior to October 15, 1937. The applicable carload rate was 55.5 cents, minimum weight 24,000 pounds. Charges were collected in the amount of $833.40 at the 55.5-cent rate, actual weight. The first two shipments were undercharged $11.65 and $7.99 respectively. Effective October 15, 1937, the rate became 60 cents. After that date, two shipments were made, weighing an aggregate of 134,700 pounds, on which applicable charges of $808.20 were collected.

Reparation is sought to the basis of rates of 33.5 cents and 35 cents contemporaneously in effect on tinplate sides, a commodity shipped by complainant on the same bills of lading with ends and consisting of the sides of tin cans from which the ends have been reclaimed. Effective February 22, 1938, Shepard reduced the rate on ends to 35 cents, minimum 36,000 pounds, and since that date has accorded ends and sides rate parity. On June 15, 1940, the rate became 40 cents.

Tinplate sides are shipped in cartons measuring 19¼ by 7 by 7¼ inches, weighing 200 pounds each and are valued by complainant at $39.00 per ton of 2,000 pounds. There is no evidence of damage claims on either sides or ends. Complainant points to the fact that carriers parties to Alternate Joseph A. Wells' westbound intercoastal tariff have, for a period of years, maintained equal rates on ends and sides and that at the time of movement those rates were lower than the assailed rates. Between October 3, 1935, and May 6, 1937, Wells published a B line rate of 36 cents and an A line rate of 38.5 cents on the commodities in question. Effective May 7, 1937, the B and A line rates became 38 cents and 40.5 cents respectively. Under our minimum rate order of April 9, 1940, *Intercoastal Rate Structure*, 2 U. S. M. C. 285, the 38-cent rate became the minimum in westbound intercoastal commerce. On May 1, 1940, Wells established B and A line rates on sides and ends of 43 cents and 45.5 cents respectively. Complainant shows that on certain commodities Shepard maintains lower rates than those named by Wells. Such evidence is of no probative value in so far as the issue here is concerned and has not been considered. Nor can any weight be given complainant's assertion that it was without knowledge that, at the time of movement, the Wells rates were lower than Shepard's since complainant is presumed to have notice of rates of common carriers legally published and filed.

Shepard takes the position that its 35-cent rate effective February 22, 1938, was unreasonably low and was compelled by the competitive rate of Wells. It states that ends stow 44.5 cubic feet per ton and should yield not less than $9.02 per ton. At that figure, the rate

would be 45 cents. Indicating that the assailed rates charged had no influence on the movement, Shepard stresses the fact that it enjoyed a regular and substantial volume of business during the period its rates exceeded the Wells rates and that since the reduction the volume has not increased.

Complainant's contention that ends and sides should be on a rate parity appears sound. However it does not follow that the 33.5-cent and 35-cent rates applicable on sides at the time of movement were maximum reasonable rates. As heretofore stated, the prescribed minimum on both commodities is 38 cents.

We find that the rates of 55.5 and 60 cents charged were unreasonable in violation of section 18 of the Shipping Act, 1916, to the extent they exceeded 45 cents, minimum weight 36,000 pounds; that complainant paid and bore the charges on the shipments involved and has been damaged to the extent of the difference between the charges paid and those which would have accrued at the rate herein found reasonable; and that it is entitled to reparation in the sum of $296.47. An order awarding reparation will be entered.

Defendant Shepard Steamship Company should collect the outstanding undercharges.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION held at its office in Washington, D. C., on the 17th day of October A. D. 1940.

No. 545

UNITED CAN COMPANY

v.

SHEPARD STEAMSHIP COMPANY ET AL.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission, on the date hereof, having made and entered of record a report stating its conclusions, decision, and findings thereon, which report is hereby referred to and made a part hereof;

It is ordered, That the defendant Shepard Steamship Company be, and it is hereby, authorized and directed to pay to complainant, United Can Company (Val Vita Food Products Company, Inc.) of Fullerton, California, on or before 30 days after the date hereof, the sum of $296.47 as reparation on account of unreasonable charges collected on the shipments involved herein.

By the Commission.

[SEAL] (Sgd.) W. C. PEET, Jr.,
Secretary.

UNITED STATES MARITIME COMMISSION

No. 563

THE PEOPLE OF PUERTO RICO

v.

WATERMAN STEAMSHIP CORPORATION AND LYKES BROS. STEAMSHIP COMPANY, INC.

Submitted July 26, 1940. Decided October 22, 1940.

Upon settlement of issues by parties request for withdrawal of complaint granted and proceeding discontinued.

William Cattron Rigby for complainants.

Roscoe H. Hupper and *Burton H. White* for respondents.

E. H. Thornton for New Orleans Joint Traffic Bureau and *Rene A. Stiegler* for Board of Commissioners of the Port of New Orleans, New Orleans Joint Traffic Bureau and St. Louis Chamber of Commerce, interveners.

REPORT OF THE COMMISSION

BY THE COMMISSION:

The complaint, as amended, alleged that the following tariff note published [1] on behalf of defendants was, among other things, unjust and unreasonable and unduly and unreasonably prejudicial and disadvantageous in violation of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933:

> Cargo will only be accepted for these ports [2] when there is offered for loading on one vessel sufficient cargo, destined to any one of them, to yield, in the aggregate, to the carrying vessel not less than $1,500 ocean freight revenue. Also, carriers reserve the right, when necessity arises, to effect discharge at

[1] Tariff U. S. M. C. No. 1 of Agent T. J. Lennon; now Tariff U. S. M. C. No. 1, of Agent G. A. Meyer.

[2] Arecibo, Arroyo, Fajardo, Jobos, Guanica, Guayanilla, Humacao, and Yabucoa.

the most convenient port and to transship cargo at carrier's expense to destination at rates and under conditions which would have applied if vessel had discharged directly at the destination port intended.

Except at Guanica and Jobos, at which there are small private piers maintained by sugar centrals, no piers are available at any of the outports involved. Practically all such ports are on open roadsteads, and vessels are required to anchor while cargo is lightered. Lighterage charges apply in addition to published rates. Defendants claim the revenue obtainable from cargo offered for transportation to an outport is frequently insufficient to cover the cost incident thereto, and that weather conditions delay and often prevent discharging. Complainants are aware of such conditions but feel that, because of unfavorable economic conditions in Puerto Rico, consignees require greater service than that accorded under the note attached. They recognize, however, that traffic conditions might not warrant the same service to all outports.

Subsequent to hearing each defendant agreed to schedule two sailings each month to Arecibo, one sailing each month to Arroyo, and one sailing every two months to Fajardo, Humacao, and Jobos. No service is provided for Guanica, Guayanilla, or Yabucoa. In consideration of the foregoing complainants have requested that we permit the complaint to be withdrawn and that the proceeding be discontinued without prejudice. Pursuant to the aforementioned adjustment the following tariff provision has been published and filed in lieu of the note attached, effective October 18, 1940:

> Vessels scheduled to call * * * will accept cargo for such ports but at its option may discharge such cargo at another port for transshipment, at vessel's risk and expense, to bill of lading destination provided, however, that consignees shall pay to the vessel an amount equal to the lighterage charge which would have accrued for account of cargo had the vessel discharged at bill of lading destination port.

It should be noted that few, if any opportunities exist for interport transportation in Puerto Rico by water, and consequently, except in rare instances, on-carriage will be by truck or rail.

The voluntary adjustment herein evidenced should result in service from Gulf ports which, with some exceptions, corresponds with the service of other carriers from ports on the Atlantic coast of the United States under tariff provisions which also establish alternative routes, when necessity arises, at the same aggregate charge to shippers as for direct service and with substantially similar provisions for absorption of expense incident to on-carriage.

We have neither prescribed nor approved tariff provisions of this nature. Tariffs should provide means for effecting delivery at bill of

lading destination, but whether the substitute note is in compliance with all statutory requirements will be left for future consideration. Complainants will be permitted to withdraw the complaint and the proceeding will be discontinued without prejudice to any subsequent regulatory proceeding upon complaint or otherwise. An appropriate order will be entered.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 22nd day of October, A. D. 1940.

No. 563

THE PEOPLE OF PUERTO RICO

v.

WATERMAN STEAMSHIP CORPORATION AND LYKES BROS. STEAMSHIP COMPANY, INC.

This case, at issue upon complaint and answer on file, having been duly heard, and subsequent thereto the issues involved having been voluntarily adjusted and complainants having requested that they be permitted to withdraw the complaint and that an order be entered discontinuing the proceeding; and the Commission, on the date hereof, having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof;

It is ordered, That the request for permission to withdraw the complaint be, and it is hereby, granted, and that the proceeding be, and it is hereby, discontinued, without prejudice to any subsequent regulatory proceeding upon complaint or otherwise.

By the Commission.

[SEAL] (Sgd.) W. C. PEET, Jr.
Secretary.

UNITED STATES MARITIME COMMISSION

No. 553

GULF-PUERTO RICO RATES VIA THE NEW YORK AND PORTO RICO STEAMSHIP COMPANY

Submitted January 18, 1940, Decided November 7, 1940.

Cancellation by New York & Porto Rico Steamship Co. of service from Gulf ports of the United States to Puerto Rico not unlawful. Proceeding discontinued.

Burton H. White for respondent.

William Cattron Rigby for the Government of Puerto Rico and Department of the Interior; *Rene A. Stiegler* for Board of Commissioners of the Port of New Orleans and St. Louis Chamber of Commerce; *E. H. Thornton* for New Orleans Joint Traffic Bureau; and *J. D. Youman* for New Orleans Public Belt Railroad, protestants.

REPORT OF THE COMMISSION

BY THE COMMISSION:

This case involves the lawfulness of the cancellation by respondent of its entire service and rates from Gulf ports of the United States to Puerto Rico.

On September 1, 1939, through an agreement with Waterman Steamship Corporation respondent announced its determination to discontinue its common carrier service from Gulf ports of the United States to Puerto Rico for a period of 10 years, beginning on or about October 15, 1939. That agreement also covered an alleged sale of good will for a consideration aggregating $300,000, payable in ten annual installments.[1] On September 19, 1939, a tariff schedule[2] was filed by which respondent sought to cancel its service and rates from Gulf ports effective October 19, 1939. Upon protest of The Government of Puerto Rico, The Department of the Interior,

[1] The status of the agreement under section 15 of the Shipping Act, 1916, is in issue in No. 556, an investigation on our own motion instituted by order entered November 21, 1939.

[2] Fifth revised page No. 5 to Agent T. J. Lennon's Tariff, U. S. M. C., No. 1.

and the Board of Commissioners of the Port of New Orleans, the operation of the schedule was suspended pending investigation concerning its lawfulness. The suspension period expired February 19, 1940, and the schedule became effective by operation of law.[3]

At a hearing held December 20, 1939, at New Orleans, La., respondent, appearing specially, declined to offer evidence and moved that the hearing be suspended. The motion was denied. The burden of justifying a suspended schedule rests upon the carrier or carriers named respondent [4] and, in the absence of carrier evidence, the schedule ordinarily would be found not justified and an order requiring its cancellation issued. Such action, however, in this instance is not warranted, because the facts requiring discontinuance of this proceeding are clear. Service by The New York and Porto Rico Steamship Company has been canceled. Protestants offered no evidence of undue prejudice. Prior to the agreement aforementioned, the service and rates of both respondent and Waterman were identical under a common agency tariff. Waterman's service thereafter continued under the same tariff with no immediate change in either service or rates.

In *Lucking* v. *Detroit Navigation Co.*, 265 U. S. 346, decided in 1924, the right of a common carrier by water operating on the Great Lakes to discontinue its service was upheld. The case turned upon the distinction between the power of the Interstate Commerce Commission, flowing from its authority to issue certificates of public convenience and necessity, to compel continuance of railway service and the absence of such power over common carriers by water. The court said:

> The duty to furnish reasonable service while engaged in business as a common carrier is to be distinguished from the obligation to continue in business. * * * No duty to continue to operate its boats on the * * * route is imposed by * * * the common law or federal statutes.

See also *McCormick Steamship Co.* v. *United States of America et al.* 16 Fed. Sup. 45, decided August 14, 1936. Legislation subsequently enacted confers no additional authority upon us on the point involved. An order discontinuing the proceeding will be entered.

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[3] Decision was deferred pending the outcome of a petition and complaint for a declaratory judgment filed by respondent December 19, 1939, in the District Court for the Eastern District of the State of New York. On April 15, 1940, a motion to dismiss was denied (32 Fed. Sup. 538). While a motion for a writ of prohibition filed in the United States Circuit Court of Appeals, Second Circuit, was denied on July 3, 1940, the court stated that "* * * it appears clear that the District Court lacks jurisdiction * * *." Upon reargument October 10, 1940, before the District Court the Commission's motion to dismiss the petition and complaint was granted.

[4] Puerto Rican Rates, 2 U. S. M. C. 117; Section 2, Public 259, 76th Congress, approved August 4, 1939.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 7th day of November A. D. 1940

No. 553

GULF-PUERTO RICO RATES VIA THE NEW YORK AND PORTO RICO STEAMSHIP COMPANY

It appearing, that by order entered October 17, 1939, this Commission entered upon a hearing concerning the lawfulness of the tariff schedule described in said order, and suspended the operation thereof until February 19, 1940; and no decision having been issued prior to the expiration of the suspension period provided by law the said schedule became effective; and full investigation of the matters and things involved having been had and the Commission on the date hereof having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof;

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

By the Commission.

[SEAL] (Sgd.) W. C. PEET, Jr.,
Secretary.

UNITED STATES MARITIME COMMISSION

No. 562

ACME NOVELTY COMPANY

v.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY ET AL.

Submitted August 1, 1940. Decided November 7, 1940.

Rates charged on canes from New York, N. Y., and Philadelphia, Pa., to Los Angeles Harbor, Calif., found not unreasonable. Complaint dismissed.

Earl W. Cox for complainant.

W. M. Carney and *M. G. de Quevedo* for defendants.

REPORT OF THE COMMISSION

BY THE COMMISSION:

This case was presented under the shortened procedure. Exceptions were filed by complainant to the report proposed by the examiner, whose findings are adopted herein.

Complainant corporation alleges by complaint filed January 2, 1940, that the rates charged on canes, in less than carloads, shipped over defendants' lines from New York, N. Y., and Philadelphia, Pa., to Los Angeles Harbor, Calif., during July and August 1938, were unreasonable and in violation of section 14 of the Shipping Act, 1916. Defendants are American-Hawaiian Steamship Company, Luckenbach Steamship Company, Inc., and Panama Pacific Line (Baltimore Mail Steamship Company), common carriers by water in intercoastal commerce. The allegation as to section 14 was abandoned and has not been considered. Reasonable rates for the future and reparation are sought. Rates will be stated in amounts per 100 pounds.

Three shipments are involved. The first consisted of 50 cartons of canes invoiced as "parade canes, finished," weighing 5,000 pounds and moved over American-Hawaiian from Philadelphia to Los Angeles July 6, 1938. Charges in the amount of $200 were collected at the first class rate of $4, then in effect. The second shipment, con-

sisting of 35 cartons of finished canes weighing 3,500 pounds and 15 cartons of unfinished rough canes weighing 1,230 pounds, moved over Luckenbach from Philadelphia to Los Angeles July 29, 1938. Charges in the amount of $154 were collected on the finished canes at the first-class rate of $4.40, effective July 29, 1938. On the unfinished rough canes charges of $38.62 were collected on basis of the third-class rate of $3.14. The third shipment, consisting of 10 cartons of finished ladies' swagger canes weighing 475 pounds, moved over Panama Pacific from New York to Los Angeles August 13, 1938. Charges of $20.90 were collected at the first-class rate of $4.40. The last shipment was originally billed as wood toy canes at a rate of $1.47, but upon inspection by an agent of the carrier at Los Angeles the billing was revised before the freight charges were paid.

Reparation is sought on the basis of a commodity rate of $1.40 applicable on toys and games prior to July 29, 1938. On that date the rate on toys and games was increased to $1.47.

Complainant contends the shipments were overcharged since the canes in question were parade canes to be used for amusement and should be rated as toys and games. Defendants assert that canes or walking sticks have never been classified as toys by either water or rail carriers and that movement of canes in less than carloads at commodity rates is unknown to them. No kind of cane is included in the tariff item listing specified articles upon which the commodity rates on toys and games apply. There is no evidence that any manufacturer or shipper of parade canes has ever classified them as toys. It is an established rule in tariff interpretation that the terms must be taken in the sense in which they are generally understood and accepted commercially. The rates charged were applicable.

No evidence was offered as to the reasonableness of the classification of parade canes or the class rates charged. We find that the rates charged have not been shown to be unreasonable. An order dismissing the case will be entered.

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ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 7th day of November A. D. 1940

No. 562

ACME NOVELTY COMPANY

v.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY ET AL.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission, on the date hereof, having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof;

It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed.

By the Commission.

[SEAL] (Sgd.) W. C. PEET, Jr.,
Secretary.

UNITED STATES MARITIME COMMISSION

No. 554

AGREEMENTS OF NICHOLSON UNIVERSAL STEAMSHIP COMPANY AND SPOKANE STEAMSHIP COMPANY WITH DULUTH TRANSIT COMPANY AND CLARENCE L. HOLT

Submitted May 27, 1940. Decided November 15, 1940.

Nicholson Universal Steamship Company found to have allowed Holt Motor Company to obtain, and Holt Motor Company found to have knowingly and willfully obtained, transportation of automobiles from Detroit, Mich., to Duluth, Minn., at less than the legally applicable rate, in violation of section 16 of the Shipping Act, 1916, as amended, and section 2 of the Intercoastal Shipping Act, 1933, as amended.

Nicholson Universal Steamship Company found to have given Holt Motor Company an undue preference, in violation of said section 16.

Nicholson Universal Steamship Company found to have knowingly disclosed and permitted to be acquired, and Duluth Transit Company and Holt Motor Company found to have knowingly received, information, in violation of section 20 of the Shipping Act, 1916. No violation of section 14 or 15 of the Shipping Act, 1916, found to have been established.

Milton P. Bauman and *S. S. Eisen* for Nicholson Universal Steamship Company and Spokane Steamship Company and *Samuel H. Maslon* for Holt Motor Company and Clarence L. Holt.

R. H. Hallett for United States Maritime Commission.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions were filed to the report proposed by the examiner, and the case was orally argued. Our conclusions agree with those which the examiner recommended.

This is a proceeding instituted by us upon our own motion to determine whether section 14, 15, 16, or 20 of the Shipping Act, 1916, as amended, or section 2 of the Intercoastal Shipping Act, 1933, as amended, had been violated as a result of two agreements entered into by Nicholson Universal Steamship Company[1] and Spokane

Steamship Company with one Clarence L. Holt and Duluth Transit Company, respectively.

Nicholson Universal is a common carrier by water engaged in the transportation of automobiles from Detroit, Mich., to Buffalo, N. Y., Cleveland, O., Milwaukee and Green Bay, Wis., and Duluth, Minn. It owns Spokane Steamship Company, a common carrier by water engaged in the transportation of automobiles from Detroit to Green Bay. The latter uses Nicholson Universal's boats and both engage space on the spar decks of bulk freighters operating on the Great Lakes.

Nicholson Universal began serving Duluth in 1933. In the same year, due to a lack of business, its operations to that port were suspended. Upon resumption of service in the spring of 1936, it entered into an arrangement with one E. W. Wiley to unload automobiles from its vessels at Duluth, to reload them into freight cars where necessary, and to unload from freight cars and make store-door delivery of such of them as moved by railroad from Duluth to Minneapolis or St. Paul, Minn. On automobiles that moved by rail from Duluth to Minneapolis or St. Paul, Wiley received $5.34 per automobile, of which sum $1 was for the unloading from boat, $2.17 was for the loading into freight cars, and $2.17 was for store-door delivery. On automobiles for western destinations, he received $1 per automobile for unloading from boat and $12.75 per carload (4 automobiles) for loading into freight cars. On automobiles delivered at Duluth and driven off, he received $1 per automobile for the unloading from boat and delivery to consignees. Wiley soon found the arrangement to be unprofitable, and in June 1936 it was canceled. Nicholson Universal then entered into a similar arrangement with one S. W. Randolph, except that Randolph did not undertake to make store-door deliveries at Minneapolis and St. Paul. This arrangement likewise proved to be unprofitable for Randolph, and with the close of the 1936 season of navigation it was terminated.

In 1936, Nicholson Universal carried only 687 automobiles to Duluth. However, it informed Randolph that it expected to increase that figure to about 2,000 in 1937, but even this estimate and an offer to double his compensation, which are not shown to have been inadequate to yield a fair profit, failed to induce him to continue his services. Nicholson Universal then gave consideration to performing its own stevedoring at Duluth but discarded the plan. It also made an investigation to ascertain whether there were any other stevedores available to it in Duluth and found none. Thereupon, the arrangement with Holt was made.

Holt is president of the Holt Motor Company, a corporation which he organized in July 1925 and which has since been engaged at Minne-

apolis as a dealer and distributor of Chrysler and Plymouth automobiles. He also at one time was an officer of Spokane Steamship Company. Upon being informed that Nicholson Universal was going to discontinue operating to Duluth on account of its inability to obtain the services of a stevedore, Holt suggested that he would establish his brother-in-law, Russell Van Horn, in the stevedoring business if an agreement as to compensation could be reached, but indicated that the amount offered Randolph would be unsatisfactory. Some negotiation ensued, which resulted in an agreement being made and entered into by and between Nicholson Universal and Holt on February 11, 1937.[2]

After stating that Nicholson Universal had dock facilities at Duluth and certain equipment used in connection therewith for the unloading of automobiles and trucks from its vessels, the agreement set forth the desire on the part of Nicholson Universal to engage Holt's services in the unloading and delivery of, and the collection and remittance of freight charges on, automobiles and trucks transported by Nicholson Universal to Duluth, and provided that Holt would organize a company to act as stevedore which would furnish stevedore services to Nicholson Universal and act as its agent upon the conditions and for the considerations therein recited. Holt agreed that he would, at his own expense, furnish an agent and night watchman at the Duluth dock and that he would unload from Nicholson Universal's vessels and deliver to consignees or their agents automobiles and trucks arriving at such dock, load into railroad box cars wherever required automobiles and trucks so unloaded and purchase such Evans equipment as might be required therefor, collect and remit freight moneys due and owing to Nicholson Universal for the transportation of the automobiles and trucks so unloaded, keep and maintain telephone service at the dock, provide workmen's compensation and public liability insurance to cover his operations, and, in general, do such work and perform such duties as were necessary or required properly to discharge the business of a steamship agent and stevedore. Nicholson Universal agreed that it would, at its own cost and expense, keep and maintain the dock and other facilities to be furnished by it for Holt's use in good order and state of repair, that it would pay to Holt all costs and charges incurred by him in the performance of services under the agreement for light, heat, local telephone calls and dock rental, and that it would assume the risk of loss or damage to automobiles or trucks by fire or theft while on the dock or in Holt's possession in the performance of the agreement and keep and maintain adequate insurance therefor so as fully to protect both parties. It was further stipulated that Holt would have

[2] The agreement was between Nicholson Universal and Spokane Steamship Company, on one hand, and Holt, on the other. Spokane Steamship Company ceased serving Duluth long prior to the execution of the agreement and may be disregarded.

the sole and exclusive right to handle and sell such gasoline, oils or other products as might be necessary or required in the performance of the services provided for in the agreement and as might be sold upon the dock facilities to be used by Holt in his operations, all profits accruing therefrom to be the sole and exclusive property of Holt, who was to bear the expense incurred for tanks, their maintenance and repair. It was agreed that Holt's rates for the storage of automobiles and trucks unloaded pursuant to the provisions of the agreement should be the same as were contemporaneously charged by other boat lines at Duluth and that all net profits that might accrue from such storage should be divided equally between the parties. It was further agreed that Holt should have the sole and exclusive right to unload all automobiles and trucks transported to Duluth by Nicholson Universal and that, commencing with the opening of navigation for the season of 1937, Nicholson Universal's boats en route to Duluth should clear the Detroit docks at least three times a week so as to assure Holt at least three dockings per week at Duluth, Holt reserving the right, in the event of default in this respect, to cancel and terminate the agreement on written notice to Nicholson Universal. It was mutually understood and agreed that the solicitation of automobiles for transportation on Nicholson Universal's boats would be handled by Gwatkin and Gillespie, agents of Nicholson Universal, under arrangements then existing; that Holt would lend such assistance as he could to Gwatkin and Gillespie in the securing of automobiles and trucks for transportation to Duluth in vessels of Nicholson Universal, but that nothing contained in the agreement should be construed as imposing an obligation on Holt to procure any automobiles or trucks to be so transported.

In consideration of the services to be performed by Holt, Nicholson Universal agreed to pay him varying rates of compensation. For automobiles, including Chryslers and Plymouths, unloaded from its boats and reloaded into freight cars for movement to destinations other than Minneapolis or St. Paul, compensation at a rate of $10.75 per carload was provided. For Chrysler and Plymouth automobiles unloaded from its boats and reloaded into freight cars for shipment to Minneapolis or St. Paul, the compensation ranged from $2.09 to $6.92 per automobile, depending upon the through freight rate. For automobiles, including Chryslers and Plymouths, unloaded from its boats and not reloaded into freight cars, the compensation ranged from $5 to $9.50 per automobile, depending upon the freight rate. The compensation to be paid was made subject to a proviso that, if Nicholson Universal should reduce or increase the freight rates to be charged by it for transportation to Duluth, the compensation should be reduced or increased proportionately.

Holt reserved the right to organize a corporation for the performance of the terms, covenants, and conditions of the agreement to be performed on his part and to assign the agreement to such corporation. Without performing any service or receiving any compensation under the agreement, he assigned it to Duluth Transit Company, a Minnesota corporation, upon the organization of that corporation by him in April 1937. Thus assigned, the agreement continued in effect during the 1937 season of navigation. On November 29, 1937, Nicholson Universal and Duluth Transit Company entered into a new agreement,[3] and the agreement of February 11, 1937, was canceled.

The two agreements were substantially the same except in respect of the rates of compensation. The agreement of November 29, 1937, which, also, is now canceled, provided that Nicholson Universal would pay to Duluth Transit Company $12.75 per carload on automobiles, including Chryslers and Plymouths, unloaded from its boats and reloaded into freight cars for movement to destinations other than Minneapolis or St. Paul. On Chrysler and Plymouth automobiles unloaded from its boats and reloaded into freight cars for shipment to Minneapolis or St. Paul, the compensation ranged from $2.09 to $6.92 per automobile, depending upon the through freight rate. On automobiles, including Chryslers and Plymouths, unloaded from its boats by Duluth Transit Company and reloaded into freight cars for shipment to Minneapolis or St. Paul by a company other than Duluth Transit Company, compensation of $2 per automobile was provided. On automobiles, including Chryslers and Plymouths, unloaded from its boats and not reloaded into freight cars, the compensation ranged from $5.05 to $10.05 per automobile, depending upon the freight rate. As in the agreement of February 11, 1937, the compensation to be paid was made subject to a proviso that, if Nicholson Universal should reduce or increase the freight rates to be charged by it for transportation to Duluth, the compensation should be reduced or increased proportionately.

With the agreements in force, Nicholson Universal enjoyed a considerable increase in traffic. From 687 automobiles carried by it to Duluth in 1936, there was an increase to 7,654 in 1937, which was an exceptionally good year for the automobile business, 3,927 in 1938, and 4,049 in 1939. Automobiles consigned to Holt Motor Company were mainly responsible for the increase. In 1936, Holt Motor Company did not patronize Nicholson Universal, but in the three succeeding years there were consigned to it for itself and its dealers, who are said to control the routing of the automobiles to be turned

[3] Spokane Steamship Company also was a party to this agreement.

over to them, 6,121 of the 7,654 automobiles transported by Nicholson Universal to Duluth in 1937, 2,596 of the 3,927 so transported in 1938, and 2,570 of the 4,049 so transported in 1939. The great majority of the automobiles so consigned were driven or towed from Duluth by Holt Motor Company and its dealers' own crew; therefore, Duluth Transit Company received a much greater compensation than it would have received had they been reloaded into freight cars for movement by railroad.

For each of the three years 1937–1939, more than 90 percent of Duluth Transit Company's compensation under the agreements was derived from automobiles unloaded and driven or towed away. In 1939, it received on these automobiles $22,670.46, which was approximately 91 percent of its total compensation, and in 1938 and 1937 the proportion was about the same. The compensation, as indicated, was not based on the cost of performing the services involved. Though the cost to Duluth Transit Company was less on automobiles that it did not reload into freight cars than it was on those which it reloaded, its compensation for the former was considerably greater. The compensation was based on the measure of the freight rate, and even with the freight-rate bases higher under the agreement of November 29, 1937, than under the one of February 11, 1937, the compensation remained unchanged on Chrysler and Plymouth automobiles reloaded into freight cars for shipment to Minneapolis or St. Paul, but was increased on automobiles not so reloaded but driven or towed away.

In the first year, 1937, Duluth Transit Company made a net profit of $12,900.56, in addition to which $1,500 was donated by Holt, and it paid out as dividends $13,833.56. Its net profit in 1938 was $780.29, and in 1939 it was $1,635.32. Holt is general manager of the company, receiving in that position an annual salary of $7,500; Van Horn as president receives $5,000 per annum; one Leonard L. Kvam is vice president without salary, and one W. M. Shirley is secretary and treasurer at $2,500 per annum. Van Horn, Kvam, and Shirley are directors of the company. Kvam and Shirley also are secretary-treasurer and assistant to the president of Holt Motor Company, respectively.

The capital stock of Duluth Transit Company consists of 25 shares of common stock of the par value of $100 per share. Certificates for 15 and 5 shares were issued to Holt on April 30, 1937, and June 15, 1937, respectively; a certificate for 2 shares was issued to Kvam on June 5, 1937; and on the latter date 3 certificates for 1 share each were issued to Shirley, Van Horn, and a Dr. Spencer, respectively. Prior to the issuance of the certificate for 5 shares to Holt on June 15, 1937, the 15 shares held by him were reduced to 8, and of the

remaining 7 shares, Spencer acquired 4 and Kvam, Shirley, and Van Horn 1 each. At the time of hearing, therefore, Holt had 13 shares; Spencer had 5; Kvam had 3; Shirley had 2, and Van Horn had 2.

Holt, Kvam, and Shirley, as stated, are president, secretary-treasurer, and assistant to the president of Holt Motor Company, respectively. They also are directors of the company. Spencer is vice president and a director, but is engaged in the practice of dentistry and does not work for the company. Of the company's 845 shares of capital stock, Holt owns 312 shares; Kvam owns 75 shares; Shirley owns 25 shares; Spencer owns 33 shares; and 400 shares originally owned by Holt are held by Shirley as trustee for members of Holt's family. Thus, a controlling interest in Holt Motor Company is held by those having control and ownership, for all practical purposes, of the Duluth Transit Company. With the corporate veil removed, the two companies appear substantially as one. Hence, if the compensation paid by Nicholson Universal under the agreements was more than was just and reasonable Holt Motor Company was given an indirect concession from the transportation rate. See *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457.[4]

Counsel for Holt and Holt Motor Company asserts that there is no justification for the removal of the corporate veil between Duluth Transit Company and Holt Motor Company. Citing *Fletcher Cyclopedia of Corporations*, Section 44, he urges that the courts will remove the corporate veil and disregard the corporate fiction only where fraud is found to exist as a fact or the separate corporate entity is availed of for the purpose of perpetrating a fraud or violating a statutory commandment. Such is also the position of counsel for Nicholson Universal, who call our attention to *United States* v. *Milwaukee Refrigerator Transit Co. et al.*, 142 Fed. 247, 255, where it was said:

> If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.

Bearing in mind that it is a deliberate violation of law that is in question here, we think that to disregard the corporate entity and

[4] In *United States* v. *Milwaukee Refrigerator Transit Co. et al.*, 145 Fed. 1007, referred to by counsel, the situation appeared to be merely that a majority of the stock of the refrigerator company was owned by persons who also owned brewing-company stock. The majority of the brewing-company stock was owned by persons who had no interest in the refrigerator company. It may be added that control of the traffic was "as absolute in the refrigerator company as if it were owner," and the decree was entered against it and the railroad companies.

look at the substance of the matter would be in accord rather than in conflict with the authorities cited. But it is urged that the parties to the agreements acted in good faith and that indicative of their good faith is the fact that the agreements involved were submitted for our approval. Suffice it to say in this respect that nothing in the agreements discloses the situation that is now uncovered.

We think that the corporate veil may be removed for the purposes of this case, and so we come to a consideration of the reasonableness of the compensation in question.

For the services of a stevedore in unloading automobiles at Milwaukee and Green Bay, Nicholson Universal pays $1 per automobile, the same amount as it paid to Wiley and to Randolph at Duluth. But it is said that, at Milwaukee, National Terminals Company, which performs the services there, is not confined in its activities to serving Nicholson Universal but engages in a general warehousing business and acts as stevedore for vessels other than those of Nicholson Universal. At Green Bay, likewise, the stevedore, Randolph, is not restricted to serving Nicholson Universal. It is testified by the traffic manager of Minnesota-Atlantic Transit Company, which is engaged in transporting automobiles and package freight on the Great Lakes, that it cost his company $9,262.80 to handle 5,976 automobiles at Duluth in 1938, or $1.55 per automobile, exclusive of officers' salaries, maintenance, and return on investment, and that if, like Nicholson Universal, it handled only automobiles, the cost would have been higher. An employee of Western Transit Company, which company, like Nicholson Universal, engages in the transportation of automobiles exclusively, but, unlike the latter, owns none of the vessels employed in such transportation, testifies that direct labor alone, exclusive of officers' salaries, maintenance, and return on investment, cost his company $.995 per automobile for handling 10,074 automobiles at Duluth in 1937, $1.33 per automobile for handling 3,995 automobiles at Duluth in 1938, and $1.27 per automobile for handling 4,502 automobiles at Duluth in 1939. It is clear, therefore, that a compensation of $1 per automobile cannot be considered as the maximum permissible for the services rendered by the Duluth Transit Company in connection with the unloading of automobiles under the agreements. On the other hand, since $2.09 per automobile was agreed upon for unloading Chryslers and Plymouths from vessel and reloading them into freight cars for shipment to Minneapolis or St. Paul, it is obvious that for those so unloaded but not reloaded, a lesser service and cost being involved, the compensation should have been less than $2.09. As pointed out above, for automobiles unloaded under the agreement of November 29, 1937, where the reloading into freight cars

was to be done by a company other than Duluth Transit Company, the compensation provided was $2 per automobile. This also was the maximum amount offered to Randolph and was higher than the rate paid Wiley where reloading by them into freight cars at Duluth was not required.

Counsel for Nicholson Universal point out that after deducting the cost figure of $1.55, above, from a compensation of $2 per automobile there would be left 45 cents per automobile for officers' salaries, maintenance, and return on investment. They state that in figuring stevedoring costs for the years 1936 and 1937 and thereafter important consideration must have been given to the actual 1936 tonnage as well as the potential 1937 volume and that 45 cents per automobile is obviously too low when it is considered that it would have produced only $309.15 in 1936. But the reason that it appears to be low is that it would have been inadequate to pay the officers' salaries and other expenses of the costly organization of Duluth Transit Company, not that it would have been insufficient to provide just compensation for services actually performed. The handling of automobiles at Duluth, especially only 687 automobiles in 1936, was but a small part of Nicholson Universal's operations and did not require an elaborate organization. This seems to have been recognized by Nicholson Universal in the employment of Wiley and Randolph. And, so far as any substantial investment in fixed plant is concerned, counsel for Holt and Holt Motor Company states that the functions of Duluth Transit Company were primarily those of a service corporation requiring no such investment. True, there is testimony that, in addition to acting as stevedore, Duluth Transit Company engaged in the solicitation of business, and it is on this ground that the measure of the compensation in question is chiefly defended, but that was not a transportation service, and no compensation therefor could be allowed. *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 444. While in the case cited, as stated by counsel, the person receiving the compensation was a shipper, we have shown the common control of Duluth Transit Company and Holt Motor Company, and the latter was consignee. Moreover, the agreements placed no obligation upon Duluth Transit Company to do soliciting, and it cannot be said that one rate of compensation under the agreements any more contemplated the solicitation of traffic than another. Nor is the cost of solicitation established. Most of the business, as stated, consisted of consignments to Holt Motor Company and although they included automobiles for other dealers who are said to have had control of the routing, this control apparently was surrendered to Holt Motor Company, for the record shows that it, not the dealers, was consignee.

It is contended by counsel for Holt and Holt Motor Company that all items of service provided for in the agreements should be taken into consideration and that, if this be done, the rates of compensation on automobiles not reloaded into freight cars would be offset by the lower rates of compensation on other items. The lack of merit in this contention is apparent from the fact that, as pointed out by counsel for Nicholson Universal, for each of the three years 1937–1939 more than 90 percent of the compensation under the agreements was paid for automobiles unloaded and driven or towed away.

The compensation paid by Nicholson Universal to Duluth Transit Company under the agreements on automobiles unloaded at Duluth and not reloaded into freight cars, therefore, should not have exceeded $2 per automobile. By the payment of more than that amount, Holt Motor Company was given a concession, which was not justified by Nicholson Universal's judgment that to perform the services itself would be unwise. And there is no escape from the conclusion that the agreements were entered into with the primary purpose and intent of securing a concession for Holt Motor Company and Holt Motor Company's patronage for Nicholson Universal. The excess compensation, which, in most cases, ranged from $3 to $4.80, went far to remove the differences between Nicholson Universal's local rates on automobiles shipped to Holt Motor Company and lower proportional rates applicable on automobiles. For instance, effective September 21, 1938, local rates of $23.50, $24, and $24.50 per automobile, depending upon the over-all measurement, were applicable on the greater number of automobiles transported by Nicholson Universal from Detroit to Duluth and consigned to Holt Motor Company. On automobiles so transported and subsequently shipped by a common carrier to Minneapolis, Minnesota Transfer, or St. Paul, there was contemporaneously applicable a rate of $16 per automobile. In the amount of the excess compensation, Nicholson Universal allowed Holt Motor Company to obtain, and Holt Motor Company knowingly and willfully obtained, transportation for property at less than the legally applicable rate, in violation of section 16 of the Shipping Act, 1916, as amended, and section 2 of the Intercoastal Shipping Act, 1933, as amended.

In addition to the automobiles consigned to Holt Motor Company for itself and its dealers, Duluth Transit Company unloaded from Nicholson Universal's vessels 1,533, 1,331, and 1,479 automobiles in 1937, 1938, and 1939, respectively, for other dealers. Competition between automobile dealers is rather severe, and, in granting the concession to Holt Motor Company, Nicholson Universal also gave

it an undue preference in violation of section 16 of the Shipping Act, 1916.

The concession is not shown to have constituted a deferred rebate as defined in section 14 of the Shipping Act, 1916, and no violation of that section appears of record. As to section 15, there is no indication that Duluth Transit Company is a common carrier by water, and, although it performed the terminal services under the agreements, it appears that the terminal facilities used in the performance of those services in connection with the vessels of Nicholson Universal, except some warehouse equipment used for stevedoring purposes, were furnished by the latter. Section 1 of the Shipping Act, 1916, defines an "other person subject to this act" as "any person not included in the term 'common carrier by water', carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water." The record does not warrant a finding that Duluth Transit Company is such an "other person."

In respect of the automobiles for others than Holt Motor Company and its dealers, Nicholson Universal necessarily disclosed to Duluth Transit Company, and so permitted Holt Motor Company, its officers and employees, to acquire, information concerning the nature, kind, quantity, destinations, consignees, and routing of such automobiles. It is suggested that, since Holt was well known in the area served by Nicholson Universal through the port of Duluth and endeavored to obtain business there for Duluth Transit Company, the information concerning transactions of shippers or consignees which he received from Nicholson Universal should be considered as obtained with the shippers or consignees' implied consent. This position fails to take into account that the protection sought to be provided by section 20 of the Shipping Act, 1916, was intended for all. The information improperly disclosed business transactions of automobile dealers to a competitor, and the information also may have been used to the detriment or prejudice of shippers, consignees, and carriers. Nicholson Universal, by knowingly disclosing the information to Duluth Transit Company and thus permitting it to be acquired by Holt Motor Company, its officers and employees, and Duluth Transit Company and Holt Motor Company, by knowingly receiving the information, violated section 20 of the Shipping Act, 1916.

We find that Nicholson Universal allowed Holt Motor Company to obtain, and Holt Motor Company knowingly and willfully obtained, transportation for property at less than the legally applicable rate, in violation of section 16 of the Shipping Act, 1916, as amended,

and section 2 of the Intercoastal Shipping Act, 1933, as amended; that Nicholson Universal gave an undue preference to Holt Motor Company, in violation of said section 16; that Nicholson Universal knowingly disclosed and permitted to be acquired, and Duluth Transit Company and Holt Motor Company knowingly received, information in violation of section 20 of the Shipping Act, 1916, and that no violation of section 14 or 15 of the Shipping Act, 1916, is established. Inasmuch as the agreements have been canceled, no order for the future, except to discontinue the proceeding, is necessary. The violations of law found to exist will be certified to the Department of Justice for prosecution.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 15th day of November A. D. 1940

No. 554

AGREEMENTS OF NICHOLSON UNIVERSAL STEAMSHIP COMPANY AND SPOKANE STEAMSHIP COMPANY WITH DULUTH TRANSIT COMPANY AND CLARENCE L. HOLT

This case, which was instituted by the Commission on its own motion, having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission, on the date hereof, having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof;

It is ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission.

[SEAL]

(Sgd.) W. C. PEET, JR.,
Secretary.

UNITED STATES MARITIME COMMISSION

No. 561

IN THE MATTER OF RATES, CHARGES, AND PRACTICES OF CARRIERS ENGAGED IN TRADES FROM JAPAN TO UNITED STATES

Submitted October 15, 1940. Decided November 15, 1940.

Respondents named allow persons to obtain transportation at less than their regular rates and charges by means of false billing, unduly and unreasonably prefer and unduly and unreasonably prejudice particular persons, and collect rates and charges which are unjustly discriminatory between shippers, in violation of section 16 "Second," section 16 "First," and section 17 of the Shipping Act, 1916, respectively.

Cease and desist order entered.

William G. Symmers and *Samuel D. Slade* for the Commission.

A. A. Alexander, *Robert A. Grantier*, *Edward A. Jaggie*, and *Reginald S. Laughlin* for American President Lines, Ltd.; *E. J. Martin* for Daido Kaiun Kabushiki Kaisha; *J. Franklin Fort*, *Joseph J. Geary*, *Roscoe H. Hupper* and *Burton H. White* for Mitsui Bussan Kaisha, Nippon Yusen Kaisya, and Yamashita Kisen Kabushiki Kaisha; *Joseph J. Geary*, *Edward Huth, Jr.*, *Hans Isbrandtsen*, and *J. Timmer* for A. P. Moller; *R. A. Condy* and *E. C. Trainer* for Nippon Yusen Kaisya; *Maurice Storch* for Osaka Syosen Kaisya; *Allan A. Baillie* and *George C. Sprague* for Kawasaki Kisen Kabushiki Kaisha, Kokusai Kisen Kabushiki Kaisha, and Osaka Syosen Kaisya; *Chalmers G. Graham* for Kawasaki Kisen Kabushiki Kaisha and Osaka Syosen Kaisya; *Joseph J. Geary* and *William J. Tracy* for Kokusai Kisen Kabushiki Kaisha; *Joseph J. Geary*, *Herman Goldman*, *Perry Newcomb*, *Elkan Turk*, *Leo. E. Wolf*, and *James Bergin Young* for Wilhelm Wilhelmsen.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions to the examiner's proposed report were filed by certain respondents and the issues were orally argued. The findings recommended in the proposed report are adopted herein.

This is an investigation instituted by orders of the Commission concerning the lawfulness under sections 16, 17, and 15 of the Shipping Act, 1916, of rates, charges, and practices of carriers engaged in transportation of freight from Japan to the United States. Respondents [1] are members of the Japan-Atlantic Coast Freight Conference and/or the Trans-Pacific Freight Conference of Japan, which conferences function under authority of agreements [2] filed and approved pursuant to section 15 of the Shipping Act, 1916.

By the terms of these conference agreements the respondents are required strictly to observe the minimum rates for transportation set forth in their tariffs. Their effective tariffs, Nos. 14 and 15,[3] were filed with this Commission on July 13, 1938, and April 11, 1940, respectively. Provisions of each of the conference agreements (paragraphs 4 and 5a) forbid acceptance of freight by any respondent at less than the actual gross weight or measurement thereof, and tariff Rule D requires that all rates are to be applied according to gross weight or measurement of the freight except where rates upon ad valorem [4] or other basis are specified for application in the tariff. This tariff rule requires further that when an item specifies weight, measurement and/or ad valorem rates, the rate furnishing the respondents the largest amount of revenue will apply. Tariff rule F provides that all cargo is to be weighed and/or measured by appointed sworn measurers and that no shipper's figures are to be accepted.[5] Paragraph 6 of each of the conference agreements provides that the sworn measurers referred to are to be employed and compensated by respondents.

In cooperation with the United States Bureau of Customs personnel, Commission investigators during January, February, March, and April 1940, examined customs files covering shipments from Japanese ports discharged from vessels of American President Lines

[1] American President Lines, Ltd., Daido Kaiun Kabushiki Kaisha, Kawasaki Kisen Kabushiki Kaisha, Kokusai Kisen Kabushiki Kaisha, Mitsui Bussan Kaisha, A. P. Moller, Nippon Yusen Kaisya, Osaka Syosen Kaisya, Wilhelm Wilhelmsen, Yamashita Kisen Kabushiki Kaisha, members of Japan-Atlantic Coast Freight Conference and Trans-Pacific Freight Conference of Japan; Canadian Pacific Steamships, Ltd., The China Mutual Steam Navigation Company, Ltd., and The Ocean Steam Ship Company, Ltd. (Blue Funnel Line), and States Steamship Company, members of Trans-Pacific Freight Conference of Japan.

[2] Japan-Atlantic Coast Freight Conference Agreement No. 3103, as amended, and Trans-Pacific Freight Conference of Japan Agreement No. 150, as amended.

[3] Trans-Pacific Freight Conference of Japan and Japan Atlantic Coast Freight Conference Joint Tariffs Nos. 14 and 15, issued June 20, 1938, and December 1, 1939, respectively.

[4] Rates on commodities specified in the tariff which, because their value exceeds a stated amount per 40 cubic feet or 2,000 pounds, are chargeable upon a stated percentage of their value, or at their commodity rate plus a stated percentage of their value.

[5] "All cargo is to be weighed and/or measured only at the official receiving hatobas by appointed sworn measurers, and no cargo is to be weighed and/or measured in shippers' godowns, nor are shippers' figures to be accepted. Exceptions to this rule: At Nogoya and Yokkaichi weighing and/or measuring will be permitted in godowns of the steamship companies receiving the cargo."

at San Francisco and Los Angeles, of Kokusai, Moller, O. S. K. and Wilhelmsen at New York and Los Angeles, and of Kawasaki, Mitsui, N. Y. K. and Yamashita at New York, San Francisco and Los Angeles, during the period from April 1938 to March 1940, inclusive. A further similar examination was conducted at New York in June 1940, in connection with shipments discharged at that port from vessels of Kawasaki, Kokusai, Mitsui, Moller, N. Y. K., O. S. K., Wilhelmsen and Yamashita during the period from April 1940 to June 1940, inclusive.[6] The papers examined included bills of lading and ships' manifests, consular invoices, customs entries, and customs entry permits.[7]

The bills of lading are in most instances prepared by the exporter-shippers in Japan on respondents' bill of lading forms, and are signed by the respondents' agents when the goods are offered for transportation. In all instances where not so prepared they are prepared by the respondents' agents from memoranda furnished respondents by the shipper. The ship's manifest for the particular voyage is prepared from the bills of lading and contains a description of the merchandise as it is described in the bills of lading.

A copy of the consular invoice, the customs entry, and the customs entry permit, which are presented by the importer in the United States to the collector of customs, comprise what are hereinafter collectively termed for the purposes of this proceeding the entry papers. It is the practice of the customs authorities to open and inspect at appraisers' stores the contents of approximately one case or package of every ten imported, and the penalty for furnishing false information in

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[6] No evidence was presented in this proceeding against Canadian Pacific Steamships, Ltd., The China Mutual Steam Navigation Company, Ltd., and The Ocean Steam Ship Company, Ltd. (Blue Funnel Line), Daido Kaiun Kabushiki Kaisha, or States Steamship Company, and the term "respondents" as hereinafter used in this report will not apply to these carriers.

[7] Consular invoices for shipments from Japan to the United States herein concerned are prepared by the exporter and presented by him to the United States consul located at the point of shipment. The invoice as to each shipment, certified to by the consul, is a declaration by the exporter that the particular merchandise has been sold and that it is intended to make entry of it in the United States. Foremost of its contents are an exact and detailed description of the goods to be shipped, and statement of the price at which they have been sold to the United States importer. This price is thereafter referred to by customs authorities, respondents, and consignors and consignees, as the value of the goods.

The entry is a customs document prepared and verified by the importer and presented by him to the collector of customs at the United States port of discharge of the goods. It customarily contains a description of the goods in correspondence with their description in the consular invoice, and includes a statement of their value.

The entry permit, required in connection with all dutiable imports, is also prepared and verified by the importer and presented by him to the collector. As to shipments entered at New York this permit is a carbon copy of the descriptive portion of the entry, but does not include the statement of value of the goods shown in the entry. At San Francisco and Los Angeles the permit is not ordinarily a copy of the entry, and its description of the goods is usually a statement of the number of cases in the shipment and their markings, followed by, for example, "Cotton Goods, Etc."

entry papers is severe and such cases are actively prosecuted. Erroneous description or statement of value of merchandise in these papers is rare.

Upon payment of customs duty by the importer and compliance with any other customs regulations which may be involved in the entry of the particular merchandise into the United States, the customs inspector on the steamship pier checks the number of cases or packages in the shipment and their markings with the corresponding information shown on the customs permit, and designates as released from customs the merchandise cleared for entry. This release of a shipment, or of so much thereof as has not been reserved for inspection at customs appraisers' stores, is to the steamship company. To insure that merchandise pending entry shall not be delivered before release from customs supervision is completed, each of respondents is under a term bond to the collector of customs in an amount up to $50,000. As a general practice on piers at New York and on some piers at San Francisco, respondents' delivery clerks initial or mark the customs permit in acknowledgment of the information it contains respecting the release to respondent of the portion of the shipment for delivery to the importer and as to the portion thereof ordered to appraisers' stores. At practically all piers in Los Angeles Harbor papers supplementary to the permits which serve to convey such information are in use. On all of the piers at each of the three ports concerned the permits are at all times while on the pier freely available to respondents' delivery clerks or other representatives for examination and for consultation with the inspector. The desks of the inspectors and respondents' delivery clerks are in the same or adjoining buildings, and in the case of some respondents, in the same office room.

In receiving shipments at Japanese ports, respondents make no effort to check or inquire into the nature, weight, measurement, or value of the shipment appearing in the bill of lading prepared by the shipper or in the shipper's memorandum from which respondents prepare the bill of lading. Notwithstanding their tariff rule providing that all cargo is to be weighed and/or measured by their appointed sworn measurers and that no shipper's figures are to be accepted, many of the bills of lading in evidence contain stamped notations on their faces reading "Shipper's Weight" or "Shipper's Measurement." Moreover, in delivering shipments upon release from customs in the United States respondents make no effort, through their delivery clerks or otherwise, to check the description of the goods in the bill of lading and manifest with the description in the entry permit; nor to check the weight or measurement of the shipment with the weight or measurement stated in the bill of lading and manifest. Similarly, in delivering shipments billed

under various tariff items involving the value of the commodity,[8] there is not even a casual effort to inquire into the shipment's value to insure collection of applicable rates; nor in delivering shipments billed under a general descriptive phrase[9] is there exercise of any precaution by them to insure the collection of proper tariff rates. As hereinafter noted, in many instances labels or stencilled inscriptions on the cases of merchandise themselves clearly indicate the contents of the cases to be other than stated in the bills of lading and manifests. In exception to the above statement in the examiner's report, respondent Moller refers to assertion of its United States general agent that on two occasions cargo was "checked out," and that "there were some quite unimportant differences, and we were altogether satisfied that things were as they should be." One of such occasions was recent and the other was "some years ago." Also, that "in a few cases," when claims on shipments were filed by shippers, the description of the goods on ship's manifest was checked by this agent with the claims. In view of the large number of false billings of important character via this respondent disclosed in the instant investigation, it is apparent that the checkings upon which the exception is based could not have been of any substantiality.

No customs duty is assessed on raw silk imported into the United States, and thus it is not ordinarily weighed at entry. For the purposes of the instant investigation, however, customs inspectors weighed shipments of raw silk discharged during January and February 1940, from vessels of American President Lines and N. Y. K. at San Francisco and of Kokusai, Mitsui, Moller, N. Y. K., O. S. K., Wilhelmsen and Yamashita at New York and Los Angeles. The differences between the weights certified to by the inspectors and the weights stated in the bills of lading on which respondents collected transportation charges at rates per 100 pounds of $3 to the Pacific coast and $6 to the Atlantic coast are shown in appendix A. Notwithstanding respondents' tariff rule F heretofore mentioned, providing for weighing of cargo by respondents' appointed sworn

[8] Such as item 170 (metalware—value not exceding $175 per 40 cubic feet, Atlantic coast $14 M), under which are billed and carried shipments of metal slide fasteners greatly exceeding in value $175 per 40 cubic feet, and to which item 330 (articles not otherwise specified, Atlantic coast $20 W/M) is applicable; or item 27 (bristles, Atlantic coast $20 M or 2½ percent AV), under which are billed and carried shipments of bristles of value requiring application of the ad valorem rather than the measurement rate applied—for example, shipment of 107 cubic feet of bristles of a value of $8,785 on which the transportation charge collected was $53.50 instead of the applicable charge of $219.63.

[9] "Dry Goods." There being no tariff item specifying dry goods, silk goods are billed and carried under item 330 (articles, not otherwise specified, Pacific coast $10 W/M), rather than under applicable item 237 (silk goods, not otherwise specified, Pacific coast $20 M plus ½ percent AV) or item 255 (silk goods, fuji and pongee and spun, value not exceeding $350 per 100 pounds, Pacific coast $18 M).

measurers and that shippers' figures will not be accepted, many of the bills of lading for the raw silk shipments exhibited contain stamped or printed notations stating the bill of lading weights to be shippers' weights.

The conditioned weights shown in the appendix are for all practical purposes the standard net weights upon which original sales of raw silk are based. The recurring instances in which this conditioned or net weight is the same or approximately the same as the bill of lading weight show that shippers bill the approximate net weights as the gross weights, and that they totally or partially disregard the tare. The possibility that this is the practice of shippers is conceded on behalf of one respondent. A departure from this practice is indicated by the instances in which the gross weight of a shipment is arbitrarily billed by the shipper at the convenient round figure of 130 pounds per bale, in disregard both of the tare and of the actual weight of the raw silk itself.

Whatever the explanation of the manner in which the bill of lading weights are arrived at by the shippers, the fact is that such bill of lading weights are false. This fact is not controverted by respondents except for argument, predicated upon misinterpretation of statement in evidence and upon the discredited conclusions of a sales pamphlet, that while en route the raw silk may accumulate sufficient weight in the form of moisture to explain the differences shown in appendix A.

In the case of raw silk from China, the gross weight of the bale is stencilled on each bale before shipment. Along with the shipments of Japanese raw silk discharged at Los Angeles and included in appendix A, a customs inspector weighed approximately 300 bales of Chinese raw silk contemporaneously discharged at that port from the same vessels. His testimony is that "invariably" the bale weights he obtained "never varied a pound" from the stencilled weights. There is no showing or indication of different susceptibility to moisture between Japanese and Chinese raw silk.

Upon the record the conclusion that the bill of lading weights concerned are false is amply established.

The examination of customs files covering shipments of commodities other than raw silk consisted of a "spot check", that is, following a general examination of ships' manifests and selection of a group of different commodities considered to afford instances in which differences between commodity descriptions in the bills of lading and in the entry papers could be readily shown, the documents for only a few shipments of each commodity in the group were segregated and examined. This course of examination was also followed in connection with various commodities described simi-

larly in the bills of lading and entry papers, but whose values as shown by the consular invoices and entries required exaction of higher rates under respondents' tariff than those applied. The investigators' repeated testimony is that the exhibits prepared by them are merely illustrative of a great number of other similar false billings which their examinations disclosed. No effort was made by them to select for exhibit shipments which would display the greatest amount of saving in transportation charges to the consignor or consignee due to the false billing concerned, nor, except in one instance, to select for exhibit the shipments of any particular shipper or consignee.

In addition to the examination of documents of a substantial number of shipments photographs of labelled cases were taken and pencilled sketches of case labels and of stencilled case inscriptions descriptive of the contents of the case were made.[10] In some instances the investigators inspected the merchandise contained in loose or torn wrappings and in opened cases.[11] These photographs and sketches presented in evidence, and the investigators' testimony relative to visual inspections, abundantly corroborate the facts of false billing established by comparisons of bills of lading with entry papers.

In connection with a few of the exhibits showing shipments of commodities other than falsely billed raw silk, whose values required billing under different items and at higher rates than those applied, respondents question the accuracy of the investigators' tariff interpretation, directing attention to stamped notations on the bills of lading reading, for example, "Metalware, value not exceeding $175 per 40 cubic feet." Although conceding the true 40-cubic foot value of the shipment to exceed that stated in the notation, respondents' contention is that such notation serves to justify the lower tariff rate charged on the theory that the shipper released the shipment's value to obtain the lower rate. No tariff provision authorizes released value rates by respondents in the case of the shipments covered by these exhibits, and at most such notations have no other effect than to restrict the shipper to the value stated in the event of claims for loss or damage. Moreover, the bills of lading contain no such notation on many shipments of the class concerned.

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[10] As, for example, shipments billed as cotton goods ($10 M), the case labels or inscriptions of which conspicuously indicate the contents of the cases to be woolen goods, i. e., "gloves and mittens, woolen knitted" ($22 M). Numerous trade associations sponsored by the Japanese Government inspect and certify to the contents of cases of export merchandise. An extensive practice by these associations is to paste one or more labels indicating, in the English language, the contents of the case on the ends thereof.

[11] Shipments of bamboo blinds ($13 M), billed as bamboo poles ($10 M) or bamboo ware ($10 M), and imitation pearl beads ($20 M) billed as glassware ($11 M).

Respondents question the accuracy of the investigators' interpretations and conclusions in connection with exhibits presented on various other argumentative grounds. Analysis of these grounds, in relation to the exhibits set forth in appendix B, shows them to be patently untenable, and discussion thereof would unnecessarily lengthen this report.

There is no doubt that the false billings of raw silk and other commodities exhibited and considered in this report are merely disclosed instances of an habitual billing practice knowingly and willfully engaged in by many shippers in the two trades concerned for the gain accruing to them and their consignees from the difference in transportation charges and the resultant advantage over their competitors. Reference is made by respondents to the fact that some of the exhibits show this gain or undercharge to be small, and the argument is advanced that the exhibited false billings as a whole are therefore due to mistake and of such unimportance as to relieve respondents of any statutory culpability. This argument fails of persuasion, however, in view of the substantial differences in transportation charges in the case of the majority of the shipments exhibited, and the cumulative rewards resulting to the shippers and consignees from their persistent pursuit of the unlawful billing practice engaged in by them. The per shipment undercharges on the raw silk shipments exhibited and shown in appendix A range in amount up to $153.24. The bills of lading of many shipments of commodities other than raw silk fail to segregate the measurements of different commodities comprising the shipment, and, since the customs duty is assessed according to value, neither do the entry papers furnish this measurement information concerning the falsely billed portion or portions of the shipment. For these reasons the amounts of undercharges due to the false billing concerned in the case of such shipments are not ascertainable. The undercharges range up to slightly more than $258 per shipment on the shipments exhibited in appendix B on which these amounts are ascertainable.

Respondents disclaim knowledge of any false billings, and seek to explain this by assertions that in the routine receipt and delivery of cargo they are confined by practical difficulties to the representations stated by their shipper-patrons in the bills of lading brought to them for signature, or in the shippers' memoranda furnished them for preparation of the bills of lading. Briefly, these practical difficulties are stated to be confusion on the pier if cargo were to be checked with its billing, limited time within which cargo may be kept on the pier, intense activity on the pier at time of vessel arrivals, necessity for undelayed deliveries of shipments to importers, and unfamiliarity of respondents' delivery clerks and checkers with respondents' joint tariff. Respondents stress the fact that they do not see the consular invoices or the

customs entries, and that the customs permits do not show the commodity values. They admit that comparison by them of a copy of the consular invoice with the bill of lading at the time of shipment in Japan or at the time of delivery in the United States would completely prevent false billing, but they assert that consular invoices are confidential and therefore are not available to them. This is not a fact controlling persons in interest, of which a transporting carrier is one, nor persons to whom the shipper or consignee may give or display a copy. Suggestion that respondents establish a weighing and inspection agency to guard against false billings, such as other groups of carriers maintain, and that the expense of maintaining such an agency would be compensated for by the prevention or recovery of losses in their transportation charges, is replied to on their behalf by statements that such an effort by them would not be practical.

The facts and circumstances of record show that for a considerable length of time respondents have had little or no concern for the accuracy of billings under their tariffs, and that they have complacently disregarded the fact that by law[12] they are charged with the duty of exercising every reasonable diligence in this connection. This duty is in no sense lessened because reasonable adherence to it entails difficulty and may be burdensome. Their disregard for this duty is particularly evidenced by the false billing of shipments delivered by them after the receipt of the Commission's order of investigation of December 29, 1939, and by exhibits presented at the further hearing in New York on June 21 and 22, 1940, covering shipments carried subsequent to the close of the New York hearing March 21, 1940. Their persistent failure to inform or even attempt to inform themselves through the media of entry papers, inquiries of shippers, customs officers or importers, labels, stencils, visual observation, or by other means which normal business resource and acumen should dictate, is proof that they knowingly and willfully keep themselves in ignorance of the false billings concerned. The reason for this course of conduct by respondents is that each of them is aware that any effort on its part to insist upon true billing would immediately result in loss of patronage to another respondent. As stated on behalf of one respondent in this connection, while misbilling in the trade "certainly calls for carrier action in the future, no one line can hope to put into effect stringent precautionary measures without putting itself in a bad competitive position," and "it would be ruinous for one line to attempt to weigh and in-

[12] Shipping Act, 1916, section 16 "Second," providing that it shall be unlawful for any subject carrier "to allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means."

spect cargo where others are not following the same practice." A principle sanctioned by reason and adopted by law is that one charged with a duty who purposely keeps himself in ignorance in order to deny actual knowledge is estopped to deny knowledge of what he could learn by his exercise of reasonable diligence. *Spurr* v. *United States*, 174 U. S. 728, 735; *Armour Packing Company* v. *United States*, 209 U. S. 56; *C. St. P. M. & O. Rwy. Co.* v. *United States*, 162 Fed. 835, 212 U. S. 579; *United States* v. *I. C. R. Co.*, 303 U. S. 239; *United States* v. *Wishnatzki*, 7 Fed. Supp. 313, 317, 77 Fed. (2d) 357.

By exhibits it is shown and by stipulation it is admitted that shipments of the same commodities as those falsely billed by some shippers are accurately billed by other shippers, and that the higher applicable tariff transportation rates and charges are collected from the latter shippers. Thus for the same transportation services performed under similar circumstances and conditions the record is that different rates and charges are paid by the two classes of shippers. There is, accordingly, undue and unreasonable preference and undue and unreasonable prejudice between persons and unjust discrimination between shippers for which respondents are responsible and answerable for violation of section 16 "First" and section 17 of the statute.[13]

Concerning the issue of violation of section 15 of the Shipping Act, 1916, the record is that no attempt has ever been made or considered by respondents at any time during the several years of the existence of their conference agreements to enforce important provisions thereof.[14] Indeed, the view is warranted that in allowing false

[13] Section 16 "First," providing that it shall be unlawful for any subject carrier "to make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever"; section 17, providing, in part, that no subject carrier "shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers."

[14] Clause 4. "In the event of any party to this agreement granting any of the concessions mentioned hereafter (5a, acceptance of freight at less than the actual gross weight or measurement) to shippers directly or indirectly, or in the event of any party committing a breach of faith or performing any act or causing the performance of any act which is in any way contrary to the spirit and letter of this agreement, or which in any way or manner or method has for its object the subversion of the purposes and intentions of this agreement * * * then the remaining lines may if they so decide declare the defaulting line to have ceased to be a member."

Clause 7. "Each party to this agreement hereby pledges himself to faithfully adhere to and fulfill the provisions of this agreement * * * and further will not seek to subvert or evade any of the terms of this agreement."

Clause 10, of Agreement No. 150. "Inasmuch as it will be impossible to ascertain or measure the amount of damages which the parties hereto will suffer by reason of the breach of this agreement, the parties hereto expressly agree that the damages suffered thereby by each party hereto shall be, and they hereby are, liquidated at a pro rata part, based on the number of parties hereto not including the party committing the breach, of a sum equal to four times the amount of the freight, or other compensation, which the

billing there may be concurrence by respondents pursuant to a tacit understanding between them differing from the express provisions of their conference agreements and joint tariff, and in derogation thereof. Upon the instant record, however, we are not prepared to conclude that the common disregard by respondents of their conference provisions and joint tariff, and their common allowance of false billings, establish as a fact that there is an agreement between them to so disregard and allow.

Much of respondents' argument is addressed to the absence and asserted need of regulations by us which would make the false billings concerned impossible. This argument even approaches a position on the part of respondents that they are free of condemnation for violation of section 16 or 17 unless and until such regulations are prescribed. They urge that the instant proceeding be dismissed for lack of proof of violation, and offer to cooperate "in any reasonable manner" in the promulgation of appropriate regulations.[15] In this connection admission is made on behalf of several of respondents that steps might be taken by them to clarify the joint tariff by making classifications more specific, by clarifying tariff rules, and avoiding unnecessary valuation questions; that existing joint tariff items are ambiguous or insufficient and should be enlarged in number and scope, and, in effect, that certain of their tariff items and rules should be revised to conform to workable practice. Additionally, it is clear upon the record that changes should be made by respondents to effect conformity between their tariff rules and their bill of lading provisions. A mixed shipment rule in their tariff made applicable to

party committing such breach shall receive for transportation of any cargo with respect to which such breach shall occur, providing, however, that the maximum damages for any one breach shall be ¥25,000."

[15] Such appropriate regulations, respondents suggest, should provide that "in some way" they should be given "the benefit of the consular invoice," although it is stated that "if only the production of the invoice were required, there might be unequal treatment accorded to shippers by the several lines"; that under "the ample power of the Commission" there should be prescribed by it regulations effecting "the remedy," which remedy "should be a practical one and should avoid to the maximum extent any obstruction to the normal and rapid flow of import merchandise into this country"; that "the Commission" should "require the respondents" to set up a weighing, measuring, and inspection bureau, and that "if the carriers are to enter into a comprehensive program" of checking bills of lading and customs documents "the Commission" should set "a minimum limit below which a carrier should not have to go in collecting additional freight." As respects raw silk shipments over their lines, a suggestion by one respondent is that in connection with any regulation laid down "by the Commission, it should obtain from the Bureau of Standards or some other reliable source a statement of the possible extent of the moisture absorption and allow the possible variation as leeway from the bill of lading weight." Statements in such suggestions are "We consider that in this proceding the objects of the carriers and the Commission are identical: To establish practices whereby misbilling of all sorts may be discouraged and the revenues of the carriers protected"; that "Upon the full record developed in the course of these hearings the Commission should be able to prescribe uniform rules for the guidance of all carriers in the detection and prevention of the abuses disclosed," and "we are willing to leave the prescription of rules for the future to the informed judgment of the Commission."

shipments in one container is desirable. By tariff rule respondents should require, as a condition of the contract of transportation, that a copy of the consular invoice be furnished or displayed to them. Reasonably adequate personnel and means for checking, weighing, measuring, and inspecting cargo to insure compliance with their statutory obligations should at all times be provided for by them.

Respondents' conference agreements when filed and approved manifestly contemplated every proper effort on their part to accomplish the details of management through adequate tariff items and rules, and, if and as found necessary by them, through amendments to the conference agreements themselves. Their problems in this connection are not more difficult than those encountered and solved by other carriers. In their conference capacity the respondents collectively have even more extensive opportunities available to them in this conection through joint and relatively economical means and methods found feasible by carriers in other trades. The duties and responsibilities placed upon carriers by sections 16 and 17 are not to be transferred to the regulatory body, and respondents will be expected to promulgate their own regulations. Any assistance of the Commission applied for and actually shown by them to be necessary will be given.

We conclude and decide that each of respondents, namely, American President Lines, Ltd., Kawasaki Kisen Kabushiki Kaisha, Kokusai Kisen Kabushiki Kaisha, Mitsui Bussan Kaisha, A. P. Moller, Nippon Yusen Kaisya, Osaka Syosen Kaisya, Wilhelm Wilhelmsen and Yamashita Kisen Kabushiki Kaisha, is shown upon the record in this proceeding to allow persons to obtain transportation for property at less than the regular rates and charges currently established and enforced by it by means of false billing, in violation of section 16 "Second" of the Shipping Act, 1916, as amended; to give undue and unreasonable preference to particular persons and to subject particular persons to undue and unreasonable prejudice, in violation of section 16 "First" of that act, as amended; and to charge and collect rates and charges which are unjustly discriminatory between shippers, in violation of section 17 of that act, as amended. An order will be issued requiring respondents to cease and desist from the aforesaid violations.

APPENDIX A

AMERICAN PRESIDENT

Entry No.	Port of origin and bill of lading date	Destination (of water carriage) and approximate date of arrival	Number of bales in shipment	Gross weight as stated in bill of lading	Conditioned weight as shown in entry papers	Gross weight as shown by customs weight return	Total discrepancy between bill of lading gross weight and customs weight return gross weight
				Pounds	*Pounds*	*Pounds*	*Pounds*
IT 3402	Yokohama, 12/22/39	San Francisco, 1/6/40	30	4,070	(1)	4,201	131
Free entry, 03523	Kobe and Yokohama, 12/19/39, 12/20/39, 12/21/39, 12/22/39	do	850	108,834	108,380	112,685	3,851

KOKUSAI KISEN KAISHA

Free entry, 339026	Yokohama, 12/16/39	New York, 1/23/40	10	1,357	1,354	1,381	24
Free entry, 336066	Yokohama, 12/7/39	New York, 1/8/40	30	4,123	4,042	4,172	49
Free entry, 336261	Kobe, 12/5/39	do	20	2,695	2,695	2,778	83
Free entry, 336175	Yokohama, 12/8/39	do	150	20,050	19,975	21,017	967
Free entry, 335990	Kobe and Yokohama, 12/5/39, 12/8/39	do	40	5,316	5,378	5,510	194
Free entry, 03022	Kobe and Yokohama, 12/15/39	Los Angeles, 1/9/40	40	5,295	5,295	5,526	231

MITSUI BUSSAN KAISHA

Free entry, 337824	Yokohama, 12/15/39	New York, 1/17/40	265	35,775	35,356	37,035	1,260
Free entry, 338050	Kobe and Yokohama, 11/30/39, 12/1/39	do	40	5,445	5,346	5,575	130
Free entry, 337817	Yokohama, 12/15/39	do	260	35,204	35,201	36,210	1,006
Free entry, 338009	Kobe and Yokohama, 11/30/39, 12/4/39	do	495	67,107	65,919	68,915	1,808
Free entry, 338637	Kobe and Yokohama, 12/11/39, 12/12/39, 12/15/39	New York, 1/19/40	240	32,590	32,008	33,540	950
Free entry, 338636	Yokohama, 12/12/39	do	50	6,800	6,674	6,967	167
Free entry, 03480	Kobe and Yokohama, 1/20/40, 1/22/40, 1/25/40, 1/26/40	Los Angeles, 2/12/40	470	64,188	62,510	65,784	1,596
Free entry, 03472	Kobe and Yokohama, 1/9/40, 1/11/40, 1/12/40, 1/13/40	Los Angeles, 2/2/40	1,350	185,057	185,057	187,684	2,627

[1] No customs documents which serve to show conditioned weight are filed with the immediate transportation (in transit) entries.

APPENDIX A—Continued

A. P. MOLLER

Entry No.	Port of origin and bill of lading date	Destination (of water carriage) and approximate date of arrival	Number of bales in shipment	Gross weight as stated in bill of lading	Conditioned weight as shown in entry papers	Gross weight as shown by customs weight return	Total discrepancy between bill of lading gross weight and customs weight return gross weight
				Pounds	*Pounds*	*Pounds*	*Pounds*
Free entry, 337681	Kobe, 12/9/39	New York, 1/17/40	30	4,060	4,053	4,224	158
Free entry, 337684	Yokohama, 12/12/39	do	60	8,041	8,012	8,363	322
Free entry, 337680	Yokohama, 12/7/39, 12/8/39, 12/11/39	do	480	64,772	63,963	67,326	2,554
Free entry, 343371	Yokohama, 1/10/40	New York, 2/14/40	130	17,573	17,332	18,062	489
Free entry, 03293	Yokohama, 1/9/40, 1/12/40, 1/13/40	Los Angeles, 1/26/40	340	45,956	45,956	47,694	1,738
Free entry, 03473	Yokohama, 1/22/40, 1/24/40	Los Angeles, 2/9/40	250	33,750	33,750	34,658	908
Free entry, 03229	Kobe and Yokohama, 12/20/39, 12/21/39	Los Angeles, 1/10/40	675	90,954	89,891	94,514	3,560
		NIPPON YUSEN KAISYA					
Free entry, 339021	Yokohama, 12/20/39	New York, 1/23/40	230	31,160	31,158	32,027	867
Free entry, 339007	Yokohama, 12/14/39, 12/16/39	do	130	17,695	17,341	18,074	379
Free entry, 339006	Yokohama, 12/18/39	do	300	40,500	39,934	41,828	1,328
Free entry, 03673	Kobe and Yokohama, 12/23/39, 12/26/39, 12/27/39, 12/28/39	San Francisco, 1/11/40	495	67,181	67,182	69,224	2,043
Free entry, 04389	Kobe and Yokohama, 1/22/40, 1/23-24/40, 1/25/40, 1/26/40	San Francisco, 2/9/40	840	115,086	115,086	117,023	1,937
Free entry, 03950	Kobe and Yokohama, 12/28/39, 12/29/39, 12/30/39, 1/4/40	San Francisco, 1/20/40	100	13,195	13,195	14,054	859
IT 3917	Kobe, 12/29/39	do	130	17,730		18,264	534
IT 3922	Kobe, 12/28/39	do	150	20,452		21,051	599
IT 3926	Kobe, 12/29/39	do	20	2,733		2,819	86
IT 3920	do	do	60	7,800		8,374	574
IT 3925	Kobe, 12/28/39	do	10	1,362		1,396	34
IT 3921	Kobe, 12/29/39	do	20	2,600		2,818	218
IT 3923	Yokohama, 12/29/39	do	10	1,370		1,404	34
IT 3924	Yokohama, 1/4/40	do	30	3,900		4,265	365
IT 3918	Kobe, 12/28/39	do	100	13,636		14,030	394
IT 3919	Kobe, 12/30/39	do	10	1,300		1,412	112
Free entry, 03225	Kobe, 12/16/39	Los Angeles, 1/8/40	10	1,365	1,365	1,410	45
Free entry, 03440	Kobe and Yokohama, 1/15/40, 1/17/40, 1/18/40, 1/19/40, 1/22/40, 1/23/40.	Los Angeles, 2/7/40	730	99,108	99,078	101,662	2,554

OSAKA SYOSEN KAISYA

Free entry, 340052	Yokohama, 12/19/39, 12/20/39	New York, 1/26/40	355	47,925	47,314	49,443	1,518
Free entry, 339737	Kobe, 12/16/39	do	50	6,824	6,702	7,003	179
Free entry, 339020	Yokohama, 12/19/39	do	390	52,772	52,770	53,974	1,202
Free entry, 337683	Kobe and Yokohama, 12/9/39, 12/11/39, 12/12/39	New York, 1/16/40	480	64,386	64,152	66,885	2,499
Free entry, 337688	Kobe and Yokohama, 12/7/39, 12/11/39	do	170	22,850	22,651	23,731	881
Free entry, 337679	Yokohama, 12/12/39	do	185	24,978	24,704	25,785	807
Free entry, 337770	Yokohama, 12/11/39	do	10	1,350	1,334	1,382	32
Free entry, 03000	Yokohama, 12/18/39, 12/19/39	Los Angeles, 1/9/40	20	2,680	2,650	2,818	138

WILHELM WILHELMSEN

Free entry, 340518	Yokohama, 12/26/39, 12/27/39	New York, 1/27/40	210	28,350	27,916	29,552	1,202
Free entry, 340560	Yokohama, 12/23/39	do	130	17,645	17,243	17,943	298
Free entry, 340556	Kobe and Yokohama, 12/22/39, 12/23/39	do	260	35,445	34,814	36,364	919
Free entry, 340519	Yokohama, 12/27/39	do	60	8,100	7,983	8,291	191
Free entry, 03230	do	Los Angeles, 1/11/40	10	1,350	1,350	1,380	30
Free entry, 03515	Yokohama, 1/29/40, 1/30/40	Los Angeles, 2/12/40	430	58,260	58,260	59,559	1,299

YAMASHITA KISEN KABUSHIKI KAISHA

Free entry, 337981	Kobe and Yokohama, 11/30/39, 12/4/39, 12/5/39	New York, 1/17/40	595	80,175	79,446	82,999	2,824
Free entry, 03060	Kobe, 12/18/39	Los Angeles, 1/12/40	50	6,500	6,650	6,984	484
Free entry, 03519	Kobe, 1/24/40, 1/26/40	Los Angeles, 2/14/40	40	5,406	5,320	5,608	142
Free entry, 03591	Kobe and Yokohama, 1/24/40, 1/25/40, 1/29/40	do	325	44,010	44,010	45,376	1,366

APPENDIX B

AMERICAN PRESIDENT LINES

[M=40 cubic feet, gross measurement. W=2,000 pounds. AV=ad valorem]

Exhibit No.	Bill of lading date	Port of shipment and discharge	Commodity as stated by bill of lading [1]	Commodity as shown by entry papers [1]	Rate charged	Applicable tariff rate
217	June 21, 1939	Yokohama to San Francisco	Dry goods (70)	Fuji silk pajamas (255)	$10 M	$18 M.
218	July 19, 1939	do	do	do	$10 M	$18 M.
219	Aug. 5, 1939	do	Cheap toys (293)	Wood panels (314)	$6 M	$10 M.
223	Apr. 27, 1939	Kobe to San Francisco	Provisions (220)	50 cases canned fish (42) 15 cases canned vegetables (43)	$8 M	$8.50 M.
224	Jan. 17, 1939	do	Cheap toys (293)	1 case silk and rayon mixed handkerchiefs (330) 9 cases wooden spoons and forks (314)	$6 M	$10 W/M.
225	Mar. 30, 1939	Yokohama to San Francisco	Dry goods (70)	1 case scarfs silk (257) 1 case ladies' silk blouses (257)	$10 M	$20 M and ½% AV.
226	Mar. 1, 1939	do	Toys (293)	Wooden necktie racks (314)	$6 M	$10 M.
300	Sept. 14, 1939	Kobe to Los Angeles	Rayon goods, etc. (228)	Silk cloth and silk thread (257)	$11 M	$20 M and ½% AV.
			KAWASAKI KISEN KAISHA			
137	Dec. 26, 1938	Kobe to New York	Chungking bleached bristles (27)	Chungking bleached bristles (27)	$20 M	2½% AV.
138	do	do	do	do	$20 M	2½% AV.
139	Jan. 11, 1939	do	Glassware (104)	Imitation pearl glass beads (15)	$11 M	$20 M.
140	June 30, 1939	do	do	Glass lenses for spectacles (value exceeding $125 per 40 cubic feet) (330).	$11 M	$20 W/M.
141	Jan. 27, 1939	Dairen to New York	White manchurian bristles (27)	Manchurian bristles (27)	$20 M	2½% AV.
142	Dec. 26, 1938	Kobe to New York	Metal ware (170)	Metal slide fasteners (330), value in excess of $125 per 40 cubic feet.	$14 M	$20 W/M.
143	do	do	13 cases metalware (170) 5 cases glassware (104)	13 cases metal slide fasteners (330), value $985 per 40 cubic feet. 5 cases imitation pearl beads (15)	$14 M $11 M	$20 W/M. $20 M.
144	Dec. 15, 1938	Dairen to New York	Manchurian black bristles (27)	Manchurian black bristles (27)	$20 M	2½% AV.
145	Dec. 28, 1938	Yokohama to New York	Cotton goods (70)	Cotton and rayon mixed goods (229)	$20 M	$22 M.
146	Dec. 30, 1938	do	4 cases cheap toys (293) 2 cases glassware (104)	4 cases phonograph needles (330) 2 cases glass beads (15)	$12 M $11 M	$20 W/M. $20 M.
227	July 3, 1939	Yokohama to San Francisco	Bamboo ware (12)	Bamboo blinds (10)	$4.50 M	$6.50 M.
231	Mar. 3, 1939	do	Lacquerware (144) Cheap toys (293) Woodenware (314)	Wooden fire screens (314) Wooden pipe stands (314) Pongee silk pajamas (255)	$7.50 M $6 M $10 M	$10 M. $10 M. $18 M.
232	June 1, 1939	do	Toys (293)	Window cleaners with wire handles (330)	$6 M	$10 W/M.
293	Mar. 28, 1940	Kobe to Los Angeles	26 bales bambooware (12)	26 bales bamboo blinds (10)	$5.50 M	$8 M.
349	May 1, 1940	Kobe to New York	6 cartons toys (293) Glasswares (104)	6 cartons cotton wearing apparel (70) Imitation pearl beads (15)	$7.50 M $13 M	$12 M. $24 M.

[1] Figures in parentheses are tariff item numbers.

350	....do	....do	....do	....do	$13 M	$24 M.
351	Apr. 30, 1940	....do	....do	Spectacle lenses (330), value $358 for 10 cubic feet.	$13 M	$25 W/M.
352	May 1, 1940	....do	....do	Imitation pearl beads (15)	$13 M	$24 M.
353	....do	....do	....do	....do	$13 M	$24 M.
354	Apr. 30, 1940	....do	Bambooware (12)	Bamboo blinds (10)	$13 M	$15 M.
355	....do	....do	Cotton goods (70)	Cotton and rayon tablecloths (229)	$24 M	$26 M.
356	....do	Osaka to New York	Damask tablecloths (70)	Cotton and rayon table damask (229)	$24 M	$26 M.
357	....do	Kobe to New York	Rug rugs (235)	Wool hooked rugs (236)	$12 M	$14 M.

KOKUSAI KISEN KAISHA

23	Dec. 19, 1938	Yokohama to New York	Cotton goods (70)	Silk handkerchiefs (257)	$20 M	$36 M or 2% AV.
28	Dec. 28, 1938	....do	Cheap toys (293)	7 cases cotton pincushions (70) 1 case oilskin pouches with chromium slide fasteners (330). 1 case metal spring tape measures in tin cases (170).	$12 M $12 M $12 M	$20 M. $20 W/M. $14 M.
29	Dec. 25, 1938	Kobe to New York	Glasswares (104)	Imitation pearl beads (15)	$11 M	$20 M.
30	....do	....do	Toys (293)	9 cases needles and threaders (170)	$12 M	$14 M.
31	....do	....do	Hooked rugs (235)	Wool hooked rugs (236)	$10 M	$12 M.
32	....do	....do	Bamboo poles (11)	Bamboo blinds (10)	$10 M	$13 M.
33	Dec. 26, 1938	Nagoya to New York	69 cases porcelain ware (toys) (218).	69 cases bisque dolls (293)	$10 M	$12 M.
34	Dec. 23, 1938	Kobe to New York	Bristles (27)	Bristles (27)	$20 M	2½% AV.
35	....do	....do	Bleached chungking bristles (27) Artificial bristles (27)	Bleached chungking bristles (27) Artificial bristles (27)	$20 M $20 M	2½% AV. 2½% AV.
37	Dec. 24, 1938	....do	Bristles (27)	Bristles (27)	$20 M	2½% AV.
38	Dec. 25, 1938	....do	Glasswares (104)	Hollow crystal glass beads (15)	$11 M	$20 M.
40	....do	....do	Cheap toys (293)	Artist brushes (28)	$12 M	$20 M.
41	....do	....do	....do	Celluloid handle tooth brushes (28) Celluloid sacks for tooth brushes (49)	$12 M $12 M	$20 M. $16 M.
290	June 22, 1939	Nagoya to Los Angeles	Glassware (104)	Imitation pearl beads (15)	$5.50 M	$11 M.
329	May 10, 1940	Yokohama to New York	Metalware (170)	Metal slide fasteners (330), value $695 for 48 cubic feet.	$16 M	$25 W/M.
330	May 7, 1940	Kobe to New York	Cheap metal (170)	Metal slide fasteners (330), value $1,826 for 60 cubic feet.	$16 M	$25 W/M.
331	....do	....do	Toys (292)	Needles and needle cases (metalware) (170)	$14 M	$16 M.
332	....do	Osaka to New York	Cheap toys (292)	Artist brushes (28)	$14 M	$24 M.
334	....do	Kobe to New York	Bamboo ware (12)	308 bales bamboo porch screens (blinds) (10)	$13 M	$15 M.
335	....do	....do	Cheap toys (292)	Artist brushes (28)	$14 M	$24 M.
337	....do	....do	Metalware (170)	Metal slide fasteners (330), value $4,046 for 128 cubic feet.	$16 M	$25 W/M.
339	....do	....do	3 cases metalwares (170) 3 cases glasswares (104)	Slide fasteners (330), value $326 for 12 cubic feet. Imitation pearl beads (15)	$16 M $13 M	$25 W/M. $24 M.
341	....do	....do	Glassware (104)	....do	$13 M	$24 M.
343	....do	Osaka to New York	Damask tablecloths and towels (70).	12 packages cotton and rayon mixed goods (229).	$24 M	$26 M.
344	....do	Kobe to New York	Bamboo (11)	Bamboo porch blinds (10)	$12 M	$15 M.
345	....do	Osaka to New York	Cotton goods (70)	Cotton and rayon mixed goods (229)	$24 M	$26 M.

APPENDIX B—Continued

KOKUSAI KISEN KAISHA—Continued

Exhibit No.	Bill of lading date	Port of shipment and discharge	Commodity as stated by bill of lading	Commodity as shown by entry papers	Rate charged	Applicable tariff rate
346	Mar. 26, 1940	Kobe to New York	Cotton goods (70.)	Rayon goods (228)	$24 M	$26 M.
				Rayon and cotton goods (229)	$24 M	$26 M.
				Cotton and woolen goods (316)	$24 M	$26 M.
347	May 7, 1940	do	Metalware (170)	Metal zippers (330), value $2,058 for 232 cubic feet.	$16 M	$25 W/M.
			MITSUI BUSSAN KAISHA			
60	Jan. 25, 1940	Yokohama to New York	Cotton goods (70)	Woolen gloves and rayon and cotton mixed gloves (316; 229).	$24 M	$26 M.
89	Jan. 22, 1940	Kobe to New York	Cheap toys (293)	Wooden toothpicks (314)	$14 M	$16 M.
			Woodenware (314)	Brushes (28)	$14 M	$24 M.
				do	$16 M	$24 M.
			Cheap celluloid toys (292)	"Sanitary" crystal celluloid toothbrush holders (49).	$14 M	$18 M.
			Celluloid goods (49)	Brushes (28)	$18 M	$24 M.
			Cheap toys (293)	Infants', rubber hot water bottles (234)	$14 M	$17 M.
98	Oct. 29, 1938	Yokohama to New York	Cotton goods (70)	12 cartons silk handkerchiefs (257)	$20 M	$36 or 2% AV.
				1 carton woolen goods (316)	$20 M	$22 M.
				10 bales cotton and rayon mixed goods (229)	$20 M	$22 M.
				11 cartons rayon goods (228)	$20 M	$22 M.
				18 cartons woolen and rayon goods (316)	$20 M	$22 M.
102	July 30, 1938	do	do	35 cartons silk handkerchiefs (257)	$20 M	$36 or 2% AV.
				40 cartons woolen goods (316)	$20 M	$22 M.
				4 bales cotton and rayon mixed goods (229)	$20 M	$22 M.
103	do	do	Cheap toys (293)	Cotton friction tapes (70)	$12 M	$20 M.
105	Sept. 10, 1938	do	Cotton goods (70)	12 cartons silk goods (257)	$20 M	$36 M or 2% AV.
				82 cartons woolen goods (316)	$20 M	$22 M.
				24 bales cotton and rayon mixed goods (229)	$20 M	$22 M.
				6 cartons rayon goods (228)	$20 M	$22 M.
107	Sept. 13, 1938	do	Toys (293)	Cotton friction tapes (70)	$12 M	$20 M.
108	Sept. 10, 1938	Kobe to New York	Metalware (170)	Metal slide fasteners (330), value exceeding $175 M.	$14 M	$20 W/M.
109		Dairen to New York, Sept. 29, 1938.	Bristles (27)	Black manchurian bristles (27)	$20 M	2½% AV.
110	July 9, 1938	Dairen to New York	Black bristles (27)	do	$20 M	$2½% AV.
111	July 20, 1938	Yokohama to New York	Cotton goods (70)	12 cartons silk handkerchiefs (257)	$20 M	$36 or 2% AV.
				90 cartons woolen goods (316)	$20 M	$22 M.
				13 bales cotton and rayon mixed table covers (229).	$20 M	$22 M.
				9 cartons rayon goods (228)	$20 M	$22 M.

112	July 18, 1938	Kobe to New York	Hooked rugs (235)	Wool hooked rugs (236)	$10 M	$12 M.
113	July 16, 1938	do	Cotton goods (70)	8 cartons woolen goods (316)	$20 M	$22 M.
				85 cartons cotton and rayon mixed goods (229)	$20 M	$22 M.
114	do	do	Cheap toys (293)	Metalware (170)	$12 M	$14 M.
115	Aug. 8, 1938	Dairen to New York	Black bristles (27)	Black manchurian bristles (27), value $1,980 for 58 cubic feet.	$20 M	2½% AV.
116	do	do	Bristles (27)	Bristles (27), value $6,512	$20 M	2½% AV.
118	Jan. 23, 1939	Kobe to New York	Cotton hosiery goods (70)	Cotton and Rayon socks (229)	$20 M	$22 M.
119	Sept. 10, 1938	do	Metalware (170)	Metal slide fasteners (330), value $696 for 24 cubic feet.	$14 M	$20 W/M.
236	July 2, 1939	Nagoya to San Francisco	Dry goods (330)	Silk wearing apparel (257), 152 cubic feet, value $363.	$10 M	$20+½% AV.
298		Yokohama to Los Angeles	Toys (293)	Wooden nut bowls, with hammers (314)	$6 M	$10 M.
358	Apr. 28, 1940	Kobe to New York	Glasswares (104)	Imitation pearl beads (15)	$13 M	$24 M.
359	Apr. 27, 1940	Osaka to New York	do	do	$13 M	$24 M.
360	do	do	do	do	$13 M	$24 M.
361	Apr. 16, 1940	Yokohama to New York	Cotton goods (70)	Woolen gloves (316)	$24 M	$26 M.
363	do	do	do	Cotton and rayon mixed goods (229)	$24 M	$26 M.
366	Apr. 12, 1940	Kobe to New York	17 cases metalware (170)	17 cases metal zippers (330), value $2,206 for 110 cubic feet.	$16 M	$25 M.
			2 cases glassware (104)	2 cases sunglasses (330), (value $139 for 15 cubic feet).	$13 M	$25 M.
367	do	do	Cotton goods (70)	Rayon and woolen goods (229); and woolen goods (316).	$24 M	$26 M.

A. P. MOLLER

147	Feb. 5, 1939	Kobe to New York	Cotton goods (70)	Cotton and rayon goods (229)	$20 M	$22 M.
	Feb. 8, 1939	Yokohama to New York	Dry goods (70)	Silk goods (257)	$20 M	$36 or 2% AV.
148	Jan. 14, 1939	do	Cotton goods (70)	Cotton and rayon mixed goods (229)	$20 M	$22 M.
149	Feb. 5, 1939	Kobe to New York	Metalware (170)	Metal slide fasteners (330) value exceeding $1,000 per 40 cubic feet.	$14 M	$20 W/M.
151	Jan. 11, 1939	do	Glasswares (104)	Alabaster glass beads (15)	$11 M	$20 M.
152	Feb. 7, 1939	Yokohama to New York	Cotton goods (70)	Cotton and rayon tablecloths (229)	$20 M	$22 M.
153	Feb. 5, 1939	Kobe to New York	do	do	$20 M	$22 M.
154	do	do	Glasswares (104)	Glass buttons (330), value exceeding $125 per 40 cubic feet.	$11 M	$20 W/M.
156	Feb. 22, 1939	Yokohama to New York	Cotton goods (70)	1 case rayon goods (228)	$20 M	$22 M.
			Dry goods (70)	18 cases cotton and rayon goods (229)	$20 M	$22 M.
				1 case silk goods (257)	$20 M	$36 M or 2% AV.
291	July 11, 1939	Yokohama to Los Angeles	Rayon goods (228)	Printed habutae silk handkerchiefs (257), value $383 for 14 cubic feet.	$11 M	$20+½% AV.
292	Sept. 25, 1939	do	Cotton goods (70)	Cotton and rayon tablecloths (229)	$10 M	$11 M.
324	do	do	Dry goods (330)	2 cases rayon wearing apparel (228)	$10 M	$11 M.
				2 cases silk wearing apparel, etc., (257)	$10 M	$20+½% AV.
327	Mar. 25, 1940	Kobe to New York	Cotton goods (70)	Cotton and rayon goods (229)	$24 M	$26 M.

APPENDIX B—Continued

NIPPON YUSEN KAISHA

Exhibit No.	Bill of lading date	Port of shipment and discharge	Commodity as stated by bill of lading	Commodity as shown by entry papers	Rate charged	Applicable tariff rate
				Imitation pearl beads (15)	$11 M	$20 M.
164	July 3, 1939	Kobe to New York	Glassware (104) and cheap toys (292; 293).	Celluloid shaving sets with mirrors (nickel-plated wire easels) (330).	$12 M	$20 W/M.
				Metal-framed mirrors (330)	$12 M	$20 W/M.
				Imitation leather brief cases (147)	$12 M	$14 M.
165	do	do	Glassware (104)	Magnifying glasses (330), value exceeding $125 per 40 cubic feet.	$11 M	$20 W/M.
			Metalware (170)	Sunglass lenses (330), value exceeding $125 per 40 cubic feet.	$14 M	$20 W/M.
				Steel crochet hooks (330), value exceeding $175 per 40 cubic feet.	$14 M	$20 W/M.
167	Mar. 8, 1939	do	Glassware (104)	Imitation pearl beads (15)	$11 M	$20 M.
168	do	do	do	do	$11 M	$20 M.
169	Apr. 28, 1938	Mukden to New York (via Dairen).	Black manchurian bristles (27)	Black manchurian bristles (27), value $4,954.95	$20.50 M	2½% AV.
170	Mar. 2, 1939	Dairen to New York	Manchurian bristles (27)	Black manchurian bristles (27), value $5,308.75	$20.50 M	2½% AV.
172	Mar. 8, 1939	Kobe to New York	Glassware (104)	Imitation pearl beads (15)	$11 M	$20 M.
173	do	do	do	do	$11 M	$20 M.
174	Jan. 21, 1939	do	Cotton goods (70)	Cotton and rayon mixed goods (229)	$20 M	$22 M.
175	Dec. 28, 1938	do	do	Cotton and rayon socks (229)	$20 M	$22 M.
176	Mar. 8, 1939	do	Glassware (104)	Spectacle lenses (330), value $666 for 33 cubic feet.	$11 M	$20 W/M.
177	Dec. 28, 1938	do	Cotton goods (70)	Cotton and rayon tablecloths (229)	$20 M	$22 M.
178	June 30, 1938	Dairen to New York	Bristles (27)	Bristles (27), value $7,321.60 for 182 cubic feet	$20.50 M	2½% AV.
	June 27, 1938	Mukden to New York	do	Bristles (27), value $9,226.72 for 150 cubic feet	$20.50 M	2½% AV.
179	Dec. 28, 1938	Kobe to New York	Glassware (104)	Imitation pearl beads (15)	$11 M	$20 M.
180	Dec. 29, 1938	Osaka to New York	Cotton hosiery goods (70)	Cotton and rayon mixed hosiery goods (229)	$20 M	$22 M.
181	Dec. 28, 1938	Kobe to New York	Metalware (170)	Metal slide fasteners (330), value $2,144 for 74 cubic feet.	$14 M	$20 W/M.
242	May 10, 1939	Yokohama to San Francisco	Dry goods (330)	Fuji silk wearing apparel (255)	$10 M	$18 M.
243	Apr. 5, 1939	do	do	do	$10 M	$18 M.
244	May 31, 1939	do	do	do	$10 M	$18 M.
245	July 5, 1939	do	do	Fuji silk goods (225)	$10 M	$18 M.
246	Feb. 22, 1939	Kobe to San Francisco	Rayon goods (228)	Silk wearing apparel and evening bags (257)	$11 M	$20+½% AV.
247	Feb. 7, 1939	Yokohama to San Francisco	Dry goods (30)	Fuji silk wearing apparel (255)	$10 M	$18 M.
248	Mar. 7, 1939	do	do	do	$10 M	$18 M.
249	Dec. 27, 1938	Kobe to San Francisco	Chip goods (87)	Bentwood chairs (veneer wooden seats) (95)	$4.50 M	$11 M.
251	July 6, 1939	Yokohama to San Francisco	Cheap toys (293)	Wooden spoons and wooden salad sets (314)	$6 M	$10 M.
252	Dec. 28, 1938	do	Lacquered ware (144)	Silk handkerchiefs (257)	$7.50 M	$20+½% AV.
				2 cases wooden spoons, forks, trays (314)	$7.50 M	$10 M.
253	June 10, 1939	Kobe to San Francisco	Toys (293)	Camel hair artist brushes (28)	$6 M	$13.50 M.
254	May 11, 1939	Tokyo to San Francisco	Printed matters	Periodicals (Government publications) (23)	$8 M	$9.50 W/M.

284	Sept. 22, 1939	Yokohama to Los Angeles	Cheap toys (293)	1 carton woolen goods (316)	$6 M	$12 M.
				10 cartons wool and rayon mixed goods (330)	$6 M	$10 W/M.
285	Sept. 30, 1939	Yokohama to Chicago	12 cartons paper ware	12 cartons rice paper (204)	$7 M	$10 M.
287	Sept. 20, 1939	Yokohama to Los Angeles	Cotton goods (70)	2 cases silk wearing apparel (257)	$10 M	$20+½% AV.
			Dry goods (330)	3 cases rayon wearing apparel (228)	$10 M	$11 M.
				1 case rayon and cotton goods (229)	$10 M	$11 M.
288		do	Toys (293)	Varnished wooden bowls (314)	$6 M	$10 M.
368	May 5, 1940	Kobe to New York	Bamboo ware (12)	Bamboo porch blinds (10)	$13 M	$15 M.
369	do	Osaka to New York	Glassware (104)	Imitation pearl beads (15), value, $1,370 for 37 cubic feet.	$13 M	$24 M.
370	Apr. 23, 1940	Kobe to New York	Cotton goods (70)	23 cartons rayon gloves (228), 12 cartons cotton and rayon gloves (229).	$24 M	$26 M.

OSAKA SYOSEN KAISYA

122	Oct. 30, 1938	Kobe to New York	Toys (293)	2 cases metal needle books (170)	$12 M	$14 M.
				1 case metal bobby pins (170)	$12 M	$14 M.
				5 cases wooden toothpicks (314)	$12 M	$14 M.
				5 cases bamboo dryers (95 or 118)	$12 M	$30 M.
124	Oct. 29, 1938	do	Glasswares (104)	Imitation pearl beads (15)	$11 M	$20 M.
125	Oct. 30, 1938	do	do	10 cases imitation pearl beads (15)	$11 M	$20 M.
126	Nov. 4, 1938	Yokohama to New York	Cheap toys (293)	Rubber erasers (234)	$12 M	$15 M.
127	Aug. 8, 1938	Kobe to New York	Metalwares (170)	Papier mâché masks (206)	$12 M	$14 M.
				Metal slide fasteners (330), value exceeding $175 M.	$14 M	$20 M.
128	Oct. 30, 1938	do	Cotton goods (70)	Cotton and rayon table cloth and napkin sets (229).	$20 M	$22 M.
130	May 13, 1939	Osaka to New York	Cheap toys (293)	4 cases celluloid brooches (19)	$12 M	$16 M.
				2 cases glass buttons (330), value exceeding $125 per 40 cubic feet.	$12 M	$20 W/M.
				2 cases imitation pearl glass necklaces (15 or 330).	$12 M	$20 M.
131	do	Kobe to New York	Glassware (104)	Imitation pearl beads (15)	$11 M	$20 M.
133	do	do	Rag rugs (235)	Wool hooked rugs (236)	$10 M	$12 M.
134	do	do	Glasswares (104)	Imitation pearl beads (15)	$11 M	$20 M.
135	Oct. 30, 1938	do	Cotton piece goods (70)	Cotton and rayon printed table covers and napkins (229).	$20 M	$22 M.
286	Sept. 7, 1939	Husan to Los Angeles	Electric bulbs (104)	Electric bulbs (330), value exceeding $125 M.	$5.50 M	$10 M.
294	Sept. 14, 1939	Yokohama to Los Angeles	Dry goods (330)	Silk wearing apparel (257)	$10 M	$20+½% AV.
295	Sept. 13, 1939	Kobe to Los Angeles	Chip goods (87)	Rice paper, first quality (204)	$4.50 M	$10 M.
296	Sept. 14, 1939	Yokohama to Los Angeles	5 cases dry goods (330)	3 cases rayon goods (228)	$10 M	$11 M.
328	Feb. 23, 1940	Yokohama to New York	Cotton goods (70)	2 cases silk wearing apparel (257)	$10 M	$20+½% AV.
				Cotton and rayon goods (229)	$24 M	$26 M.

WILHELM WILHELMSEN

2	Jan. 30, 1940	Yokohama to New York	Cotton goods (70)	Woolen gloves (316)	$24 M	$26 M.
3	Jan. 27, 1940	Kobe to New York	10 cases glassware (104)	10 cases glass and imitation pearl beads (15)	$13 M	$24 M.
			4 cases metalwares (170)	4 cases metal zippers (330)	$16 M	$25 W/M.

APPENDIX B—Continued

WILHELM WILHELMSEN—Continued.

Exhibit No.	Bill of lading date	Port of shipment and discharge	Commodity as stated by bill of lading	Commodity as shown by entry papers	Rate charged	Applicable tariff rate
5	Jan. 27, 1940	Kobe to New York	Glassware (104)	Glass beads (15)	$13 M	$24 M.
6	Jan. 27, 1939	do	Cotton goods (70)	Mixed cotton and rayon goods (229)	$20 M	$22 M.
7	Jan. 28, 1939	Yokohama to New York	do	Mixed rayon and cotton goods (229)	$20 M	$22 M.
8	Jan. 27, 1939	Kobe to New York	Glassware (104)	Imitation pearl beads (15)	$11 M	$20 M.
9	do	do	do	do	$10 M (minimum).	$20 M.
10	do	do	do	First quality solid glass charms with brass wire (330 or 15), valuc $270 M.	$11 M	$20 M.
11	do	do	do	Imitation pearl and alabaster beads (15)	$10 M	$20 M.
12	Jan. 30, 1939	Yokohama to New York	Cotton goods (70)	Mixed rayon and cotton (229)	$20 M	$22 M.
13	Jan. 27, 1939	Kobe to New York	Bleached chinese refined bristles (27).	Bristles (27), value $6,471 for 76 cubic feet	$20 M	2½% AV.
14	do	do	Glassware (104)	Beads (15)	$11 M	$20 M.
15	do	do	Hooked rugs (235)	Wool hooked rugs (236)	$10 M	$12 M.
16	Jan. 28, 1939	Nagoya to New York	Earthenware	14 cases dolls (293)	$10 M	$12 M.
17	Dec. 27, 1938	Kobe to New York	Cotton goods (70)	Mixed cotton and rayon goods (229)	$20 M	$22 M.
18	Dec. 29, 1938	Yokohama to New York	do	Cotton and rayon mixed goods (229)	$20 M	$22 M.
19	do	do	do	7 bales cotton and rayon mixed goods (229) 2 cases rayon goods (228) 1 case silk handkerchiefs (257)	$20 M $20 M	$22 M. $36 M or 2% AV.
20	Dec. 28, 1938	Nagoya to New York	Cheap toys (293)	Wooden spoons and forks (314)	$12 M	$14 M.
21	Dec. 29, 1938	Yokohama to New York	Glassware (104)	3 cases wooden pin trays (314)	$11 M	$14 M.
279	July 28, 1939	Yokohama to Los Angeles	Dry goods (330)	1 case rayon crepe pajamas (228) 2 cases silk crepe jackets (257)	$10 M $10 M	$11 M. $20+½% AV.
281	Sept. 28, 1939	Kobe to Los Angeles	Chip goods (87)	Rice paper (204)	$4.50 M	$10 M.
282	July 28, 1939	do	do	do	$4.50 M	$10 M.
373	Mar. 28, 1940	Kobe to New York	Metalware (170)	Metal zippers (330), value $728.55 for 46 cubic feet.	$16 M	$25 W/M.

YAMASHITA KISEN KABUSHIKI KAISHA

42	Mar. 7, 1939	Kobe to New York	Cotton goods (70)	23 cases mixed cotton and rayon table cloths (229). 37 cases rayon gloves (228)	$20 M $20 M	$22 M. $22 M.
43	do	Osaka to New York	Bedspreads (70)	6 cases cotton and rayon mixed bedspreads (229).	$20 M	$22 M.
	Mar. 9, 1939	Yokohama to New York	Table cloths (70) Table damask sets (70)	6 cases cotton and rayon mixed table cloths (229). 6 cases cotton and rayon table damask sets (229)	$20 M $20 M	$22 M. $22 M.

44	Mar. 7, 1939	Osaka to New York	Glassware (104) Metalware (170)	Imitation pearls and glass beads (15) Metalware (zippers) (330), value $1,046 M	$11 M $14 M	$20 M. $20 W/M.
48	Jan. 30, 1939	Yokohama to New York	Cotton goods (70)	8 cases woolen gloves (316) 22 cases silk handkerchiefs (257) 5 cases cotton and rayon mixed table covers (229)	$20 M $20 M $20 M	$22 M. $36 M or 2%. $22 M.
50	Apr. 18, 1939	Kobe to New York	12 cases glassware (104; 331)	12 cases glass lens for spectacles (330), value $1,159 for 36 cubic feet.	$10 minimum	$20 W/M.
51	....do	....do	Metalware (170)	Metal zippers (330), value $1,025 M	$14 M	$20 W/M.
52	....do	....do	Cheap celluloid toys (292) Woodenware (314) Paper articles (205)	1 case celluloid tooth brush holders (49) ("Klean Bright" wooden hairbrushes (28) ("Klean Bright" wooden nailbrushes (28) 100 dozen genuine leather covered 5 year diaries with brass lock and key (23).	$12 M $14 M $14 M $14 M	$16 M. $20 M. $20 M. $18 W/M.
53	Apr. 20, 1939	Yokohama to New York	Cotton goods (70)	Cotton and rayon tablecloths (229)	$20 M	$22 M.
54	Apr. 18, 1939	Osaka to New York	Metalware (170)	6 cases metal zippers (330), value $686 for 24 cubic feet.	$14 M	$20 W/M.
55	Jan. 27, 1939	Kobe to New York	Glassware (104) Metalware (170)	Imitation pearl beads (15) Metalware (330) value exceeding $1,000 M	$11 M $14 M	$20 M. $20 W/M.
57	....do	....do	Bleached white chungking bristles (27).	23 cases bleached white chungking bristles (27)	$20 M	2½% AV.
318	Dec. 11, 1938	Moji to Los Angeles	Bamboo wares (12)	136 bales bamboo shades (blinds) (10)	$4.50 M	$6.50 M.
319	Oct. 22, 1939	Yokohama to Los Angeles	Dry goods (330)	Silk satin pajamas (257)	$13 M	$24 M+½% AV.
321	Aug. 24, 1939	....do	Dry goods (330)	3 cases silk wearing apparel (257) 2 cases rayon goods (228)	$10 M $10 M	$20+½% AV. $11 M.
374	May 11, 1940	Kobe to New York	Bamboo ware (12)	70 bales bamboo blinds (10)	$13 M	$15 M.
375	....do	....do	Glassware (104)	Artificial pearl beads (15), value $771 for 21 cubic feet.	$13 M	$24 M.
376	....do	....do	Glassware (104)	Imitation pearl beads (15) value $3,288 for 95 cubic feet.	$13 M	$24 M.
377	....do	....do	Damask tablecloth sets (70)	Cotton and rayon tablecloth sets (229)	$24 M	$26 M.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 15th day of November A. D., 1940

No. 561

IN THE MATTER OF RATES, CHARGES, AND PRACTICES OF CARRIERS ENGAGED IN TRADES FROM JAPAN TO UNITED STATES

By its orders of December 29, 1939, and June 13, 1940, the Commission having instituted a proceeding into and concerning the lawfulness under sections 16, 17, and 15 of the Shipping Act, 1916, as amended, of rates, charges and practices of carriers made respondents by said orders, and full investigation of the matters and things involved in said proceeding having been conducted, and the Commission on the date hereof having made and filed a report containing its conclusions and decision thereon, which said report is hereby referred to and made a part hereof;

It is ordered, That respondents American President Lines, Ltd., Kawasaki Kisen Kabushiki Kaisha, Kokusai Kisen Kabushiki Kaisha, Mitsui Bussan Kaisha, A. P. Moller, Nippon Yusen Kaisya, Osaka Syosen Kaisya, Wilhelm Wilhelmsen, and Yamashita Kisen Kabushiki Kaisha be, and each of said respondents is hereby, notified and required to cease and desist, and hereafter abstain, from the violations by them of section 16 "Second," section 16 "First," and section 17 of the Shipping Act, 1916, as amended, herein found.

By the Commission.

[SEAL] (Sgd.) W. C. PEET, Jr.
Secretary.

UNITED STATES MARITIME COMMISSION

No. 559

S. H. KRESS & CO.

v.

BALTIMORE MAIL STEAMSHIP COMPANY (PANAMA PACIFIC LINE), ET AL.[1]

Submitted June 13, 1940. Decided December 10, 1940

Rate charged on candy from New York, N. Y., to ports in Hawaii found unreasonable. Reparation awarded and reasonable rate for future prescribed.

Albert H. Nelson and *Albert J. Freese* for complainant.

M. G. de Quevedo, *Robert A. Lauckhardt*, and *George E. Talmage, Jr.*, for defendants and intervener Atlantic and Gulf/Hawaii Conference.

S. H. Richter for Roosevelt Steamship Co.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Complainant filed exceptions to the report proposed by the examiner. Our conclusions differ somewhat from those recommended by him.

The complaint, filed November 29, 1939, alleges that defendants' rate on candy from New York, N. Y., to ports in Hawaii is in violation of sections 16 and 18 of the Shipping Act, 1916. Reparation and a reasonable rate for the future are requested.

Defendant American President Lines, which participates in the tariff publishing the assailed rate, moved to dismiss the complaint on the ground that none of the shipments involved moved over its line. This motion is denied inasmuch as rates for the future are in issue.

The shipments, seven in number, consisted of hollow mold candy, moved in February 1939, weighed 14,067 pounds, measured 2,023 cubic feet, and were released to a value not exceeding 25 cents per

[1] Matson Navigation Company and American President Lines, Ltd.

pound. They were transported by Panama Pacific Line under refrigeration to San Francisco, Calif., and Matson Navigation Company under ordinary stowage to Hawaii. Charges were collected based on a rate of $21 per 40 cubic feet, that is, $14 per ton weight or measurement, plus 50 percent or $7 per ton for refrigeration to San Francisco, applicable on candy and confectionery released to a value not exceeding 25 cents per pound.

Complainant seeks reparation to the basis of a joint through rate which would have applied on the shipments had they moved under refrigeration to Hawaii, namely, $55 per ton of 2,000 pounds on refrigerated cargo, n. o. s. Had the shipments moved locally to San Francisco and beyond, the applicable combination rate would have been $23 per weight ton refrigerated to San Francisco and $6.75 per ton, weight or measurement, ordinary stowage beyond, plus a transfer charge stated to be 16½ cents per 100 pounds. The charges collected, $1,062.09, compare with $386.85 at the $55 rate sought and $526.36 at the combination rate plus transfer charges. The local refrigerated rate to San Francisco is $2 per ton higher than the local unrefrigerated rate whereas the differential of $7 per ton applied for the same service at the through rate under attack.

In explanation of the lower combination rate, defendants maintain that the local rate of $23 per weight ton to San Francisco is depressed by rail and rail-water competition, comparing it with carload rates on candy ranging from $29.80 rail-water to $42.20 rail, and a less-than-carload unrefrigerated rate of $82.60, applying from eastern seaboard territory to San Francisco. They also point out that the candy item embraces all types of candy in relation to which the hollow mold variety is but a small portion; that hollow mold candy is bulky and light, measuring 7 times its weight; and contend that if the $55 rate sought were applied to all of complainant's shipments of candy, the revenue thereon would be greater than that derived from the rate charged. This contention is without merit. During 1938 and 1939 candy shipments made by complainant to Hawaii via defendants, on which the assailed rate was charged, weighed 88,054 pounds, measured 5,964 cubic feet, and yielded $3,137.30 revenue. Charges at the $55 rate would have been $2,421.49. Effective May 25, 1939, after complaints were received by defendants, this rate was changed to $40 weight or measurement, on basis of which the charges would have been $5,964.

Without question, service which includes refrigeration of a shipment throughout its entire route is superior to service according refrigeraaion over only a part of the route. The rate sought of $55 per weight ton was voluntarily established, has been applied to certain shipments of complainant, and in the absence of convincing evidence to the con-

trary it must be presumed to be reasonable. Ordinarily, n. o. s. rates are among the highest in the tariff and there is nothing of record to justify the fact that the specific commodity rate here assailed is on a higher level.

No proof of undue preference or prejudice was presented.

Upon this record we find that the rate assailed was, and for the future will be, unreasonable to the extent it exceeded, or may exceed, $55 per ton of 2,000 pounds; that complainant made the shipments above described; that it paid and bore the charges thereon and has been damaged thereby to the extent of the difference between the charges paid and those which would have accrued at the rate herein found reasonable; and that it is entitled to reparation in the sum of $675.24. An order awarding reparation will be entered.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 10th day of December A. D. 1940.

No. 559

S. H. KRESS & CO.

v.

BALTIMORE MAIL STEAMSHIP COMPANY (PANAMA PACIFIC LINE), ET AL.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission, on the date hereof, having made and entered of record a report stating its conclusions, decision, and findings thereon, which report is hereby referred to and made a part hereof;

It is ordered, That defendant Baltimore Mail Steamship Company (Panama Pacific Line) be, and it is hereby, authorized and directed to pay to complainant, S. H. Kress & Co., New York, N. Y., on or before 30 days after the date hereof, the sum of $675.24 as reparation on account of the unreasonable charges collected on the shipments involved herein; and

It is further ordered, That defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist on or before February 1, 1941, and thereafter to abstain from publishing, demanding, or collecting for the transportation of eandy as described herein, from New York, N. Y., to ports in the Territory of Hawaii, a rate in excess of $55 per ton of 2,000 pounds.

By the Commission.

[SEAL]

(Sgd.) W. C. PEET, Jr.,
Secretary.

UNITED STATES MARITIME COMMISSION

No. 556

IN THE MATTER OF THE NEW YORK AND PORTO RICO STEAMSHIP COMPANY—WATERMAN STEAMSHIP CORPORATION AGREEMENT

Submitted January 18, 1940. Decided December 13, 1940

Agreement between The New York and Porto Rico Steamship Company and Waterman Steamship Corporation found subject to section 15 of the Shipping Act, 1916. Carrying out such agreement without approval as required by section 15 found in violation of that section.

Burton H. White for respondents.

William Cattron Rigby for Government of Puerto Rico and Department of the Interior; *Rene A. Stiegler* for Board of Commissioners of the Port of New Orleans and St. Louis Chamber of Commerce; *E. H. Thornton* for New Orleans Joint Traffic Bureau and *J. D. Youman* for New Orleans Public Belt Railroad, protestants.

REPORT OF THE COMMISSION

BY THE COMMISSION:

This proceeding was instituted upon protests[1] on our own motion by order entered November 21, 1939, to determine the status of respondents, The New York and Porto Rico Steamship Company, hereinafter called Porto Rico Line, and Waterman Steamship Corporation, hereinafter called Waterman, under Section 15 Shipping Act, 1916, as amended, in connection with an agreement executed September 1, 1939; the status of said agreement; and, if subject to our jurisdiction, the lawfulness thereof. Provisions of the agreement requiring consideration are as follows:

Whereas, the party of the first part has determined to withdraw from its Gulf-Puerto Rican southbound general freight service, including some passenger service, for the period of ten years beginning on or before October 15th, 1939,

[1] Filed on behalf of The Government of Puerto Rico, The Department of the Interior, and Board of Commissioners of the Port of New Orleans. New Orleans Joint Traffic Bureau and New Orleans Public Belt Railroad intervened, supporting protestants.

in which business over a period of years it has built up a good will of substantial value equal at least to the amount hereinbelow specified; and,

Whereas, the party of the second part, which also has operated for a period of years a Gulf-Puerto Rican service, desires to purchase said good will for the amount hereinbelow specified and to have and obtain for itself all of the benefits which will naturally result from such purchase;

Now, therefore, it is agreed by and between the said parties as follows:

The party of the first part hereby sells, assigns, transfers, and sets over absolutely unto the party of the second part, its successors and assigns, and the party of the second part hereby purchases from the party of the first part, the good will of the party of the first part in its aforesaid Gulf-Puerto Rican southbound service for the period of ten years beginning on or before October 15th, 1939, for the consideration of Three Hundred Thousand Dollars ($300,000.00), of which Thirty Thousand Dollars ($30,000.00) is paid on the signing of this agreement and the balance of which is to be paid in annual installments of Thirty Thousand Dollars ($30,000.00) each, on September 1st of each year beginning with 1940. Provided that if the party of the first part or some subsidiary, affiliate, or associated organization of the party of the first part should enter the said service before the expiration of said ten year period then the said annual payments shall cease and the party of the second part shall not be further obligated therefor.

In recognition of respondents' right to submit the agreement for approval, our order also contemplated an inquiry into and concerning its lawfulness. Respondents, however, have not exercised that right; consequently we will consider only the status of the agreement and of the parties.

Section 15 contemplates that every agreement between common carriers by water, or modification thereof, among other things "controlling, regulating, preventing, or destroying competition" shall be filed with us for approval. If objectionable for certain stated reasons, any agreement may be disapproved, cancelled or modified.

At a hearing at New Orleans, La., December 20, 1939, respondents appeared specially, stating that on December 19 a petition for a declaratory judgment to set aside our order of investigation was filed in the United States District Court, Eastern District of New York, based on jurisdictional and other grounds, and moved that the hearing be deferred, pending the decision of that court. The request was denied.[2] Respondents offered no testimony in their own behalf nor did they have witnesses available from whom information concerning the agreement could be obtained.

The subject matter first came to our attention when an agreement executed May 22, 1939 was filed for approval pursuant to Section 15,

[2] The issuance of a report determining the status of the agreement was, however, deferred. After a decision of the District Court denying the Commission's motion to dismiss (32 Fed. Sup. 538) application was made by the Commission to the United States Circuit Court of Appeals, Second Circuit, for a writ of prohibition. On July 3, 1940, the latter court refused the writ, although expressing its view that "it appears clear that the District Court lacks jurisdiction." Upon rehearing of the motion to dismiss before the District Court on October 10, 1940, respondents' petition was dismissed.

wherein Porto Rico Line undertook to discontinue its common-carrier service from the Gulf for a period of ten years in consideration of payments by Waterman of a minimum of $30,000 annually; at the end of each annual period, based on an annual volume of cargo aggregating 140,000 tons, with provision for additional compensation on a sliding scale basis if cargo transported exceeded 140,000 tons. Waterman also was accorded the privilege of discontinuing service should traffic fall below 100,000 tons annually and, if subsequently service was resumed, of extending the ten-year term by whatever period of time it did not operate. If the term were extended an adjustment of compensation upon a prescribed formula would be made. That agreement contained admissions of competition, insufficient cargo for two separate services, heavy financial losses, and specific provisions restricting competition.[3] The agreement also provided that if approval was not granted on or before July 1, 1939, or by such later date as may be agreed upon, "parties shall stand relieved" of all obligations thereunder. Hearing thereon was held (Docket No. 535) June 23, 1939. The limitation of time was extended to August 5, 1939. On August 7, counsel requested that action be deferred pending further advices. Thereafter,

[3] The pertinent provisions are as follows:

Whereas, each of said parties is operating a steamship service, with weekly competitive sailings, from ports of the Gulf of Mexico to Puerto Rico; and,

Whereas, due to the fact that the obtainable cargo is not sufficient to support the said two separate services, each of said companies is sustaining a heavy financial loss in maintaining its said service; and,

* * * * * * *

Now, therefore, * * * subject to approval by the United States Maritime Commission, the said parties do hereby agree together as follows:

1. The party of the first part covenants and agrees to cease all steamship operations southbound from the Gulf of Mexico to Puerto Rico for a period of ten years beginning five weeks after the approval hereof by the United States Maritime Commission, * * *, *Provided, however,* That if the Lykes Line now operating from certain Gulf ports to Puerto Rico should operate during the said ten-year period a steamship service between the Atlantic ports north of Hatteras and any of the Puerto Rican ports, then the party of the first part shall have the privilege of establishing and maintaining services between Puerto Rico and such of the Gulf ports as then are served by the said Lykes Line, which privilege shall continue only so long as the Lykes Line shall operate between the north Atlantic ports and Puerto Rico. In connection with said cessation of its operation, the party of the first part shall turn over and deliver to the party of the second part as far as is reasonably feasible the good will and patronage of the service so to be terminated.

2. The party of the second part agrees not to operate any steamship services during the ten-year period between the Atlantic ports north of Hatteras and Puerto Rico, unless some line or lines presently operating between Atlantic ports and Puerto Rico should become a competitor of the party of the second part in its service between the Gulf ports and Puerto Rico, in which event the party of the second part shall stand released from its foregoing obligation to abstain from operating between the north Atlantic ports and Puerto Rico. As long, during said ten-year period, as the party of the first part is engaged in transporting raw sugar from Puerto Rico to the Gulf, the party of the second part shall carry said commodity only in its regular liner service and at regular liner rates.

3. Each of the parties hereto agrees that the herein appearing restrictions upon competitive operations by it shall apply to and include not only its operations but also the operations of all of its subsidiaries, affiliates, and associated organizations, and, further, that any infringement by any such subsidiary, affiliate or associated organization shall have the same effect as if it had been by such party.

the following letter from counsel, dated September 8, 1939, transmitting copy of the agreement now under investigation, was received:

> I send you herewith as information true copy in duplicate of an agreement dated September 1, 1939, whereby The New York and Porto Rico Steamship Company has sold to Waterman Steamship Corporation the good will of its Gulf-Puerto Rican southbound service for the sum of $300,000, of which $30,000 was paid on signing, with the balance to be covered by nine annual installments of $30,000 each.
>
> The agreement between these two companies dated May 22, 1939, which was the subject matter of hearing in Docket 535, has expired by its own limitations, by reason of which it would appear to be in order to mark that proceeding terminated on your records, inasmuch as the subject matter thereof no longer exists.

The service of Porto Rico Line was terminated with its last sailing on or about September 9, 1939. Prior thereto, with some exceptions, vessels of each respondent had sailed from New Orleans on the same day of each week. Protestants claimed that such service did not best serve the interests of either shippers or carriers, and that they sought, without success, a staggering of sailings by each line. Refusal, it was said, was influenced by the keen competition for traffic which existed between respondents. It was also said that between May 22 and September 1, Porto Rico Line's carryings had decreased materially; that the traffic of Waterman had increased; and that insofar as Porto Rico Line was concerned, its alleged good will was of doubtful value. It should be noted that under the latter agreement, as in the first one, the withdrawal of service covered only a period of ten years, and that the withdrawal left Waterman without any competition from the ports it served.

The agreement of May 22 appears to have been predicated upon the competition between respondents and the insufficiency of cargo to support two separate services which resulted in alleged financial losses by both carriers. Insofar as Waterman is concerned, the elimination of competition, the prospect of more cargo, and an increase in its gross revenue were primary objectives. The withdrawal of its only competitor would be of inestimable value. Porto Rico Line naturally sought compensation. That agreement also indicated a desire to transfer to Waterman "as far as is reasonably feasible the good will and patronage of the service so to be terminated." The value to be attributed to good will was thus minimized. That counsel should later claim the agreement of September 1 involved only a sale of good will not subject to our jurisdiction is anomalous. Certain of the restrictive provisions of the first agreement were omitted from the second one, but the objectives accomplished under the latter are identical with those originally sought. While the proceeding in Docket No. 535 was dismissed, 2 U. S. M. C. 215, negotiations concerning the

subject matter of the agreement therein involved continued and were concluded by the execution of the latter agreement. Assuming good will only was involved, the contract would be of doubtful validity without an express or implied agreement or understanding not to compete within the specified term. In *Gehl* v. *Hebe Co.*, 276 Fed. 271, it was said that good will would not be transferred if the grantor remained at liberty to carry on and contend for the very business as to which the good will of the former owner had, by its conveyance, passed to another. In *Metropolitan Bank* v. *St. Louis Dispatch Co.*, 149 U. S. 436, the Supreme Court of the United States recognized good will as an asset and therefore of value, but said that it is "tangible only as an incident, as connected with a going concern or business having locality or name, and is not susceptible of being disposed of independently." See also *Sommers* v. *Commissioners of Internal Revenue*, 63 Fed. (2d) 551; *Pfleghar Hdwr. Specialty Co.* v. *Blair*, 30 Fed. (2d) 614; in re *Leslie-Judge Co.*, 272 Fed. 886. No tangible property of any description passed to Waterman. Porto Rico Line withdrew as a common carrier from the Gulf. The good will which it had built up and which attached to the business through its name or through the company's personal contacts was lost to it as long as it stayed out of the trade. Were it not for its undertaking to stay out of the trade there would be a serious question whether there had been a lack of consideration for the cash payments by Waterman. The installment method of payment and the specific provision for cessation of payments by Waterman if the vendor, or some subsidiary, affiliate, or associated organization, should enter the service before the expiration of the ten-year period, further indicate that a primary objective of the agreement was the elimination of competition and that these payments were to be considered compensation to Porto Rico Line during the time it refrained from operating on the route.

We find that the agreement of September 1, 1939, is one which controls, regulates, prevents, and destroys competition in the Puerto Rican trade and that the said agreement is subject to our jurisdiction under section 15 of the Shipping Act, 1916, as amended. We further find that respondents carried out portions of the said agreement before approved by us as required by section 15; and that their failure to secure such approval was in violation of that section. Respondents will be expected immediately to submit the agreement for action under that section. Pending compliance, the record will be held open.

UNITED STATES MARITIME COMMISSION

No. 540

IN RE INLAND WATERWAYS CORPORATION AND MISSISSIPPI VALLEY BARGE LINE COMPANY

Submitted May 2, 1940. Decided December 17, 1940

Respondents are common carriers by water in intercoastal commerce and are engaged in the transportation of passengers or property on a through route as defined in section 2 of the Intercoastal Shipping Act, 1933. Reduction in rate on alcoholic liquors not shown to be unlawful. Order entered discontinuing this proceeding.

David E. Scoll for the Commission.

Nuel D. Belnap, *H. J. Niemann*, and *W. A. Oliphant*, for Inland Waterways Corporation, operating the Federal Barge Lines.

Harry C. Ames, *Sr.*, and *M. C. Pearson*, for Mississippi Valley Barge Line Company.

Frank Lyon and *J. A. Stumpf* for American-Hawaiian Steamship Company. *Joseph J. Geary* for members of the Gulf Intercoastal Conference. *M. G. de Quevedo* and *W. M. Carney* for members of the Intercoastal Steamship Freight Association, and *R. H. Specker* for Luckenbach Gulf Steamship Company, Inc.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions were filed by respondents to the examiner's proposed report and oral argument was had. The findings recommended by the examiner are adopted herein.

By order dated July 7, 1939, we instituted this investigation to determine whether the respondents Mississippi Valley Barge Line Company and the Inland Waterways Corporation, operating the Federal Barge Line, common carriers by water, are subject to our jurisdiction in so far as they engage in the transportation of cargo between New Orleans, La., and Mississippi, Ohio and Missouri River points when such cargo is received from or is destined to Pacific

Coast ports via Gulf intercoastal carriers and moves under proportional rates and should therefore file their rates under section 2 of the Intercoastal Shipping Act, 1933, as amended; and if the respondents are so subject to our jurisdiction, whether the reduction made by them in their proportional rates on alcoholic liquors, n. o. s., carloads, destined to Pacific Coast ports, is reasonable.

Respondents transport general cargo in barges between New Orleans and various ports on the Mississippi River and its tributaries. They publish local port-to-port, and proportional rates, between the ports served by them, which are not on file with us; and joint through commodity rates to and from Pacific Coast ports in connection with intercoastal carriers which are on file. The proportional rates, generally lower than the corresponding local rates, apply to or from shipside at New Orleans when the goods are destined to or received from Pacific coast ports. Local bills of lading are prepared by the shipper on forms furnished by the carrier, the name of the on-carrier being shown as the consignee and the ultimate consignee indicated by notation.

Shipments moving under proportional rates receive the same physical handling as those moving under joint through rates, and respondents either receive the goods at, or deliver them to, the intercoastal steamship companies' docks or absorb the cost of transfer between their docks and those of the steamship companies. Arrival notices are issued by the originating carrier to the on-carrier and, in many instances, the freight charges of one are collected by the other and remitted after each shipment or on a weekly basis. The shipper is required to arrange for the carriage beyond. In advertising and soliciting business the shipper is advised by the carriers that through transportation is available under a combination of port-to-port rates of the Gulf lines, and proportional barge line rates. In short, the only differences between cargo moving under proportional rates and that moving under joint through rates are in the billing, and the fact that the shipper must arrange for the on-carriage prior to its receipt from the originating carrier when cargo moves under proportional rates. In neither case is any physical intervention of the shipper required at the transshipping points. Proportional rates are established for competitive reasons to move through traffic, and the fact that determines their applicability is the final destination of the goods If transportation terminates at New Orleans local rates are assessed but if it continues to Pacific coast ports proportional rates are applied.

Respondents contend that there is no agreement or understanding with the Gulf lines with respect to the establishment of these proportional rates or for the transshipment of this traffic. On the con-

trary, it appears that the two groups fix these rates, after discussion with each other, at a level where the through charges are competitive with other forms of transportation between the same origin and destination points. Inasmuch as our order of July 7 did not allege section 15, no finding of a violation thereof will be made at this time. However, it should be borne in mind by respondents that they are subject to the provisions of this section without the necessity of any previous finding by us.

Respondents clearly are subject to our jurisdiction with respect to shipments billed through under joint rates and the questions presented are whether they are subject with respect to shipments billed to or from New Orleans at proportional rates, and whether the proportional rates must be filed with us. Section 1 of the Shipping Act, 1916, as amended, insofar as pertinent, reads as follows:

> The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port-to-port between one state, territory, district, or possession of the United States, and any other state, territory, district, or possession of the United States, or between places in the same territory, district, or possession.

The pertinent parts of sections 1 and 2 of the Intercoastal Shipping Act, 1933, reads as follows:

> The term "common carrier by water in intercoastal commerce" for the purposes of this Act shall include every common and contract carrier by water engaged in the transportation for hire of passengers or property between one State of the United States and any other State of the United States by way of the Panama Canal.
>
> SECTION 2. That every common carrier by water in intercoastal commerce shall file with the United States Shipping Board and keep open to public inspection schedules showing all the rates, fares, and charges for or in connection with transportation between intercoastal points on its own route; and if a through route has been established, all the rates, fares, and charges for or in connection with transportation between intercoastal points on its own route and points on the route of any other carrier by water.

Respondents contend that the words "high seas" apply only to the term "common carrier" and not to the words "transportation of passengers or property," and therefore that they do not come within the scope of section 1 of the 1916 Act, inasmuch as their vessels do not actually travel upon the "high seas." Respondents further contend that the filing requirements of section 2 of the 1933 Act do not apply since the transportation involved does not constitute a through route as defined in that section. They state that a distinction should be made between a through route and a through movement and contend that the former is synonymous with "common arrangement" as used in the Interstate Commerce Act. We frequently have held that carriers need not actually go upon the high seas or the Great Lakes

to be subject to our jurisdiction. *Intercoastal Rates to and from Berkeley and Emeryville, Calif.*, 1 U. S. S. B. B. 365; *Intercoastal Investigation 1935*, 1 U. S. S. B. B. 400. Similar decisions have been made by the courts in cases involving other Federal statutes. In *Foster* v. *Davenport et al.*, 22 How. 234, the Supreme Court held that a tugboat operating entirely within the territorial waters of the State of Alabama was engaged in the foreign and coastwise trade because it assisted vessels engaged in those trades. Respondents contend that they are not within the scope of section 1 of the Shipping Act, 1916, but no decision thereon is necessary in view of our findings herein.

At the oral argument one of the attorneys for respondents stated that he did not believe respondents' vessels were licensed in the coastwise trade, and that if the findings recommended by the examiner were carried to a logical conclusion these vessels would have to be licensed. He stated further that he considered this factor controlling and that if the vessels were not licensed in the coastwise trade they could not be considered as a prolongation of a voyage on the high seas. By letter received after argument, which by agreement was made a part of the record, we were advised by respondents that all of their towboats have been granted licenses in the coastwise trade.

The Interstate Commerce Commission in dealing with similar situations, has consistently held that an intrastate carrier by rail becomes subject to its jurisdiction by transporting cargo moving in interstate commerce. Such decisions have been sustained by the Supreme Court on numerous occasions. *Baer Bros.* v. *Denver and R. G. R. R. Co.*, 233 U. S. 479; *Cinn. N. O. and Tex. Pac. Ry.* v. *Int. Com. Comm.*, 162 U. S. 184; *U. S.* v. *Erie R. Co.* 280, U. S. 98.

In *Intercoastal Investigation 1935*, *supra*, it was said:

> If there is an original and continuing intention to ship goods by water from one State of the United States to another by way of the Panama Canal, as appears to be here the case, the commerce is intercoastal and its character, as such, is not changed by the mere accidents or incidents of billing, or number of lines participating in the transportation. It is well settled that the intention of the shipper as to the ultimate destination at the time the cargo starts is the test of its character, though broken, transported by more than one carrier, or moving on through or local bills of lading * * *.
>
> As has been shown hereinbefore, it is a requirement of law that every carrier engaged in intercoastal transportation shall publish, post and file with the department its rates and charges for or in connection with such transportation. For this reason an understanding between carriers for interchange of traffic does not and cannot make the line of one carrier to the understanding a mere continuation, extension or agency of the other. To permit this would tend to defeat the purpose of the act that carriers not otherwise subject to the act shall, when participating in intercoastal transportation, become subject to the act. Every route must have a published rate on file with the department. If a single carrier performs the entire transportation service between two points the rate is a "terminal rate." However, if a through route has been

established, and two or more carriers perform the transportation service, as is here the case, the rate is a "through rate," which may be the sum of separately established factors, or an amount jointly published by all the participating carriers.

Respondents at the oral argument pointed out that the order instituting this investigation fails specifically to allege violation of section 1 of the 1933 act and that consequently they cannot be made subject to an order based on that section. Our order of July 7, 1939, which instituted the investigation contained the following paragraph:

It is ordered, That under authority of section 22 of the Shipping Act, 1916, the Commission, on its own motion, hereby institutes a proceeding of investigation to inquire into the facts concerning the status of the above-mentioned carriers and the lawfulness of their rates, rules and regulations applicable on alcoholic liquors from various ports served by these carriers to New Orleans when destined to Pacific Coast ports, to establish such facts and argument of record and to make such order or orders respecting compliance by said companies with said statutory requirements and the Commission's tariff regulations as may be warranted;

A preceding paragraph of the order recited the fact that it appeared that respondents "are common carriers by water in interstate commerce within the meaning of section 1 of the Shipping Act, 1916, as amended." The Intercoastal Shipping Act, 1933, defines the term "common carrier by water in intercoastal commerce" as including every common and contract carrier by water engaged in the transportation for hire of passengers or property between different states of the United States by way of the Panama Canal. Any doubt concerning the scope of the investigation clearly is dispelled by the wording of the paragraph of the order quoted above.

It cannot be doubted that respondents are engaged in intercoastal transportation. *Intercoastal Rates to and from Berkeley and Emeryville, California*, *supra* and *Intercoastal Investigation, 1935*, *supra*.

Respondents premise their second contention that there is no through route, on *U. S.* v. *Munson Steamship Line*, 283 U. S. 443, seeking to distinguish cases such as *B. & O.* v. *Settle*, 260 U. S. 166, and other railroad cases. The *Munson Case* dealt with a shipment which moved by rail to a port and by water beyond. The Supreme Court found that the transportation did not constitute "a common arrangement" under section 1 of the Interstate Commerce Act. There is no requirement that there must be a common arrangement in the shipping acts. That case, therefore, is not in point. The test here is whether there is a through route. The wording of the two acts leads to the inescapable conclusion that there is a difference in the nature of the arrangement or transportation contemplated in each case. Our predecessor has defined a through route as an arrangement, expressed or implied, between connecting carriers for the continuous

carriage of goods from an originating point on the line of one carrier to destination on the line of another, *Intercoastal Investigation, 1935*, supra. A similar definition was adopted by the Interstate Commerce Commission in *Through Routes and Through Rates*, 12 I. C. C. 163, where it was found that a through route is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. Through carriage implies a through rate. This through rate it not necessarily a joint rate. It may be merely an aggregation of separate rates fixed independently by the several carriers forming the through route; such as in this case where the through rate is the sum of the locals on the several connecting lines or is the sum of lower rates otherwise separately established by them for through transportation.

This latter case has been cited with approval by the Supreme Court in *St. Louis S. W. Ry Co.* v. *United States*, 245 U. S. 136. While the existence of an agreement is emphatically denied by respondents, it is obvious there is an implied arrangement within the meaning of the above definition.

Effective in June 1939, a reduction of 6 cents per 100 pounds was made in respondents' proportional rate on alcoholic liquors destined to the Pacific Coast. It appears that the reduction was made after conference with the Gulf carriers after which the latter reduced their local port-to-port rates 10 cents and respondents reduced their rate 6 cents, or a total reduction of 16 cents, which equalized a reduction made in the transcontinenttal rail rate from the various points served by respondents. We suspended the reduction made by the Gulf Lines and similar reductions made by the Atlantic carriers and after investigation found them not unlawful. *Westbound Alcoholic Liquor Rates*, 2 U. S. M. C. 198. No evidence was introduced in the present proceeding to show that the reduction in the rates on alcoholic liquors made by respondents was unreasonable or otherwise unlawful.

We conclude and decide that respondents are common carriers in intercoastal commerce; that a through route as defined in section 2 of the 1933 Act has been established; and that the reduction in the rate on alcoholic liquors has not been shown to be unlawful. Since the Transportation Act, 1940, will require rates of respondents concerning their interstate operations on inland waters to be on file on and after January 1, 1941, an order with respect thereto will not be issued. An order discontinuing the proceeding will be entered.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 17th day of December A. D. 1940

No. 540

IN RE INLAND WATERWAYS CORPORATION AND MISSISSIPPI VALLEY BARGE LINE COMPANY

This proceeding, instituted by the Commission on its own motion, having been duly heard and full investigation of the matters and things involved having been had, and the Commission, on the date hereof, having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof;

It is ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission.

[SEAL]

(Sgd.) W. C. PEET, Jr.,
Secretary.

UNITED STATES MARITIME COMMISSION

No. 597

EMBARGO ON CARGO BETWEEN NORTH ATLANTIC AND GULF PORTS

Submitted December 20, 1940. Decided December 23, 1940

Embargo by Agwilines, Inc. (Clyde-Mallory Lines) on all commodities offered for transportation between United States North Atlantic ports and United States ports on the Gulf of Mexico found unreasonable and ordered canceled.

Charles P. Reynolds for respondent.

REPORT OF THE COMMISSION

BY THE COMMISSION:

This is a proceeding on the Commission's own motion concerning the lawfulness of an embargo by respondent Agwilines, Inc. (Clyde-Mallory Lines), a common carrier by water in interstate commerce, on all commodities offered for transportation between or via Atlantic coast ports on the one hand and Houston and Brownsville, Texas, on the other. By our order of December 18, 1940, herein, respondent is required to show cause under sections 16 and 18 of the Shipping Act, 1916, as amended, why, in the public interest, the embargo should become effective.

The embargo is in the nature of a circular dated December 17, 1940, at New York, N. Y., effective December 26, 1940, and on later sailing dates. The cause of the embargo is stated in the circular to be suspension of service. It also announces "same service as in the past will be maintained between New York and the ports of Charleston, Jacksonville, Miami, Key West, and Tampa." At the hearing it developed that respondent proposes by means of the embargo to completely abandon service to and from the Gulf. It has filed no tariff supplement canceling the rates for the transportation of commodities between the ports involved. It participates in joint through rates with railroads and neither it nor railroads have filed cancelation of rates with the Interstate Commerce Commission.

Respondent submitted figures showing heavy financial losses over a period of years and very little profit at any time on its Gulf operations. It justifies withdrawal of service on that ground alone and takes the position that the Commission has no jurisdiction to compel it to maintain service between the ports in question. It asserts that it is a common practice in the coastwise trade to issue embargoes withdrawing service.

An embargo is an emergency measure to be resorted to only where there is a congestion of traffic, or when it is impossible to transport freight offered because of physical limitations of the carrier. *Boston Wool Trade Association* v. *M. & M. Transportation Company*, 1 U. S. S. B. 32. No such condition has been shown in this case. Even if an embargo were the proper medium of abandoning service the short prior notice given by the embargo in question works an unreasonable hardship on the public.

Section 2 of the Intercoastal Shipping Act, 1933, governing common carriers in the coastwise trade, provides that such carriers shall file and post schedules showing all their rates, fares and charges for or in connection with transportation; that no change in such rates, fares and charges shall be made except by the publication, filing and posting of new schedules which shall become effective not earlier than 30 days after date of posting and filing; and that no carrier shall engage in service as a common carrier by water unless and until schedules as provided in the section have been duly and properly filed and posted. While the foregoing provisions do not specifically require that such schedules shall be canceled upon withdrawal of service or before withdrawal of service, they clearly contemplate that such schedules shall serve as notice to the Commission and the public of the services maintained and the charges therefor. It follows that the maintenance by common carriers of schedules of rates for services they do not perform cannot be justified. *Intercoastal Investigation, 1935*, 1 U. S. S. B. 400, 449. Since no changes in rates duly filed may be made on less than 30 days' notice, except by special permission of the Commission for good cause shown, withdrawal of service without the filing of schedules with statutory notice canceling the rates therefor is an unreasonable practice.

We find that the embargo by respondent is unreasonable. An order requiring its cancelation will be entered. Respondent should file schedules canceling its rates for the services to be withdrawn upon statutory notice or upon such shorter notice as may be authorized by us.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 23rd day of December A. D. 1940.

No. 597

EMBARGO ON CARGO BETWEEN NORTH ATLANTIC AND GULF PORTS

This case being at issue, and having been duly heard, and full investigation of the matters and things having been had, and the Commission, on the date hereof, having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof;

It is ordered, That respondent be, and it is hereby, notified and required to cancel, effective on or before December 26, 1940, its embargo dated December 17, 1940, on all freight offered for transportation between or via Houston and Brownsville, Tex., on the one hand and Atlantic ports on the other.

By the Commission.

[SEAL]

(Sgd.) W. C. PEET, Jr.
Secretary.

UNITED STATES MARITIME COMMISSION

No. 549

JOS. G. NEIDINGER CO.

v.

AMERICAN-HAWAIIAN STEAMSHIP CO.

Submitted December 9, 1940. Decided January 14, 1941

Rate charged on teasels, in less carloads, shipped from San Francisco, Calif., to Philadelphia, Pa., found unreasonable. Reparation awarded.

Harry P. Mulloy and *James S. Benn* for complainant.
J. A. Stumpf and *M. G. de Quevedo* for defendant.

REPORT OF THE COMMISSION

BY THE COMMISSION.

A proposed report was waived by the parties.

By complaint filed September 7, 1939, it is alleged that the double first-class rate of $8 per 100 pounds, charged by defendant on a shipment of teasels weighing 5,397 pounds forwarded July 12, 1937, from San Francisco, Calif. to Philadelphia, Pa., on which the charges were paid September 7, 1937, was unreasonable. Reparation is sought on basis of an any-quantity rate of $2.50 per 100 pounds which was subsequently established. Rates will be stated in cents per 100 pounds.

After complaint was filed but prior to the hearing, defendant filed a special docket application seeking authority to pay reparation on basis of a less-carload commodity rate of $3.49 contemporaneously applicable via transcontinental rail lines. This application, which was denied, was incorporated in the record herein by stipulation.

Teasels are a vegetable growth used in making Christmas wreaths. They are valued at 19 cents per pound, f. o. b. California; are packed in wooden boxes 7 x 7 x 8 feet; and have a stowage factor of approximately 150 cubic feet.

Complainant, in addition to relying upon the contemporaneous rail rate, makes a comparison with rates on similar commodities

moving in the same trade. For instance, on a dried flower known as "babies' breath", the rate ranged from $2.26½ in 1936 to $2.60 at date of hearing. It is used for the same ornamental purposes as teasels and weighs about the same; but it is more susceptible to damage and is about 2½ times as valuable. Tobacco stems are accorded the same rate as "babies' breath".

Defendants are willing to pay reparation on basis of the contemporaneous rail rate of $3.49. That rate is now $3.72, and defendant's present commodity rate on teasels is $2.60, any-quantity. Defendant's witness testified that both the rate on "babies' breath" and the present rate on teasels are depressed by rail competition.

Upon this record we find that the rate assailed was unreasonable to the extent it exceeded a rate of $3.49 per 100 pounds; that complainant received the shipment above described; that it paid and bore the charges thereon and has been damaged thereby to the extent of the difference between charges paid and those which would have accrued at the rate herein found reasonable; and that it is entitled to reparation in the sum of $243.40. An order awarding reparation will be entered.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION held at its office in Washington, D. C., on the 14th day of January 1941 A. D.

No. 549

JOS. G. NEIDINGER CO.

v.

AMERICAN-HAWAIIAN STEAMSHIP CO.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission, on the date hereof, having made and entered of record a report stating its conclusions, decision, and findings thereon, which report is hereby referred to and made a part hereof;

It is ordered, That the defendant American-Hawaiian Steamship Co. be, and it is hereby, authorized and directed to pay to complainant, Jos. G. Neidinger Co. of Philadelphia, Pennsylvania, on or before 30 days after the date hereof, the sum of $243.40 as reparation on account of unreasonable charges collected on the shipment involved herein.

By the Commission.

[SEAL] (Sgd.) W. C. PEET, Jr.,
Secretary.

UNITED STATES MARITIME COMMISSION

No. 579

LONE STAR BAG & BAGGING COMPANY, INC.

v.

SOUTHERN STEAMSHIP COMPANY AND MOOREMACK GULF LINES, INC.

Submitted December 14, 1940. Decided January 14, 1941

Rate charged on old bags and bagging from Philadelphia, Pa., to Houston, Texas, found not subject to the Commission's jurisdiction. Complaint dismissed.

James J. Shaw and *M. S. Lindsay* for complainant.

Robert Eikel, Julian M. King, T. D. O'Brien, and *R. B. Wallace* for defendants.

REPORT OF THE COMMISSION

BY THE COMMISSION:

No exceptions were filed to the report proposed by the examiner, and his recommendations are adopted herein.

By complaint filed June 24, 1940, it is alleged that the rate of 32 cents per 100 pounds on old bags and bagging from Philadelphia, Pa., to Houston, Texas, between April 27, 1938, and March 18, 1939, was unreasonable and unduly prejudicial in violation of sections 18 and 16, respectively, of the Shipping Act, 1916. Reparation is sought. Rates will be stated in cents per 100 pounds.

At the hearing complainant introduced evidence concerning one shipment, stating that it was typical of all the shipments involved. The paid freight bill covering this shipment separates the 32-cent rate charged into ocean charge (29.277 cents), loading charge (1.75 cents), and switching charge (.973 cents). The shipment was delivered to consignee's premises by Houston Belt & Terminal Railroad. The rate charged was a joint ocean-rail rate concurred in by the rail line, and was filed with the Interstate Commerce Commission. The tariff provided that shipments for Houston would be billed for rail

delivery unless instructions to the contrary were received prior to loading in or on cars at Houston docks. The bill of lading covering the shipment had no instructions for dock delivery.

We find that the assailed rate is not subject to our jurisdiction, and an order dismissing the complaint will be entered.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 14th day of January A. D. 1941

No. 579

LONE STAR BAG & BAGGING COMPANY, INC.

v.

SOUTHERN STEAMSHIP COMPANY AND MOOREMACK GULF LINES, INC.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission, on the date hereof, having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof;

It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed.

By the Commission.

[SEAL] (Sgd.) W. C. PEET, Jr.,
Secretary.