DECISIONS OF THE
U.S. MARITIME COMMISSION, FEDERAL MARITIME BOARD, AND MARITIME ADMINISTRATION DEPARTMENT OF COMMERCE

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U.S. MARITIME COMMISSION, FEDERAL MARITIME BOARD, AND MARITIME ADMINISTRATION DEPARTMENT OF COMMERCE

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UNITED STATES MARITIME COMMISSION

No. 653

THE EAST ASIATIC COMPANY, LIMITED

v.

AKTIEBOLAGET SVENSKA AMERIKA LINIEN (SWEDISH AMERICAN LINE) ET AL.[1]

Submitted November 20, 1946. Decided January 9, 1947

Respondents' refusal to admit complainant to conference membership found to be unjustly discriminatory and unfair as between complainant and respondents, and to subject complainant to undue prejudice and disadvantage.

If complainant be not admitted to full and equal membership in the conference, consideration will be given to disapproval of the conference agreement.

Failure of the conference to advise the Commission of the record vote upon the denial of complainant's application for membership, with a full statement of the reasons therefor, found to be a violation of the conference agreement, and respondents instructed to comply therewith in the future.

Charles S. Haight for complainant.

Cletus Keating and *David P. Dawson* for respondents Aktiebolaget Svenska Amerika Linien (Swedish American Line), Aktiebolaget Svenska Amerika Mexiko Linien (Swedish America Mexico Line), Det Forenede Dampskibs-Selskab, Copenhagen (Scandinavian-America Line), Moore-McCormack Lines, Inc. (American Scantic Line), and Rederiaktiebolaget Transatlantic (Transatlantic Steamship Company, Ltd.).

[1] Aktiebolaget Svenska Amerika Linien (Swedish American Line), Aktiebolaget Amerika Mexiko Linien (Swedish America Mexico Line), Compagnie Maritime Belge (Lloyd Royal) S. A., Cunard White Star Limited, Den Norske Amerikalinje A/S Oslo (Scandinavian-America Line), Ellerman's Wilson Line, Limited (Wilson Line), Gdynia America Shipping Lines, Ltd. (Gdynia America Line), Moore-McCormack Lines, Inc. (American Scantic Line), N. V. Nederlandsch-Amerikaansche Stoomvaart Maatschappij (Holland American Line) "Holland Amerika Lijn," Rederiaktiebolaget Transatlantic (Transatlantic Steamship Company, Ltd.), United States Lines Company (United States Lines), and North Atlantic Baltic Freight Conference.

Report of the Commission

By the Commission:

Exceptions to the examiner's proposed report were filed by certain of the respondents, and the matter was argued orally. Our conclusions agree with those of the examiner.

Complainant alleged that it has been refused admittance to North Atlantic Baltic Freight Conference (U. S. Maritime Commission Agreement No. 7670), which governs the parties thereto in the transportation of cargo from North Atlantic ports of the United States, either direct or via transshipment, to ports in Danzig Free State, Denmark, Estonia, Finland, Iceland, Latvia, Lithuania, Norway, Poland, Sweden, and continental and Russian ports served via the Baltic. We are asked to order responents to admit complainant to full and equal membership in the conference, and in the event we lack such jurisdiction, that (1) the conference be adjudged a monopoly and combination in restraint of trade in violation of the anti-trust laws of the United States, and in violation of sections 14, 15, and 16 of the Shipping Act, 1916, and (2) that an order be entered disapproving the conference agreement.

Before discussing the basic merits of the case we shall dispose of two collateral issues raised by respondents. It is contended, first, that an agreement between complainant and respondent Gdynia America Line disqualifies complainant for membership in the conference and for equitable relief from the Commission. On March 19, 1946, complainant wrote Gdynia America Line, at the latters' request, assuring that line that complainant, aside from UNRRA cargo, would not take commercial cargo to or from Polish ports, and that under such circumstances it was complainant's understanding that Gdynia America Line would support complainant's application for membership in the conference. The Gdynia America Line never opposed complainant's admission, either before or after this letter was written. Complainant's witness testified that as early as 1939, when it was decided to resume service between New York and Copenhagen, it was complainant's intention to serve Copenhagen only.

The letter in question, the existence of which was unknown to respondents until produced at the hearing, is characterized by respondents' attorney as a "bribe" and a "fraud," and as a "secret and illegal agreement" which should have been filed with the Commission pursuant to section 15 of the Shipping Act, 1916. Furthermore, it is urged that the conference was entitled to know of the understanding as it would have had an important bearing on complainant's application. Suffice it to say that the conference agreement contains no provision limiting the member lines to any specific port or ports, and

the conference therefore cannot either limit the service of its members to certain ports or insist upon its members serving all ports within the conference range. It follows that even if the conference had known of the letter from complainant to Gdynia America Line there would have been no legal justification, in the absence of other factors, for respondents refusing to admit complainant to the conference.

We are of the opinion that the letter referred to above was merely a confirmation of the original and continuing intention of complainant to serve Copenhagen only, and was not an agreement contemplated by section 15 of the Shipping Act, 1916.

The second contention is that the examiner erred in refusing to direct complainant to produce the contract covering the sale of Baltic-America Line, complainant's subsidiary, to Gdynia America Line about 1930. The purpose of the request to examine the sales agreement was to determine whether there was any provision restricting complainant from thereafter operating in the U. S. North Atlantic/Baltic trade. The sales agreement is immaterial, however, inasmuch as the possible violation thereof was a matter of concern to Gdynia America Line only and not to the conference. As already stated, Gdynia America Line has never opposed complainant's application.

The East Asiatic Company, Limited, was incorporated in Denmark in 1898, and is a commercial organization as well as a common carrier. A subsidiary, Russian-American Line, operated between U. S. North Atlantic ports and Baltic ports from 1907 to 1917, and another subsidiary, Baltic-America Line, resumed such service in 1920 and operated until the line was sold about 1930 to respondent Gdynia America Line, a Polish company, as already stated. In 1939, complainant decided to reenter the trade when conditions warranted. As the result of the war in Europe, complainant did not inaugurate a direct New York/Copenhagen service but decided to have its vessels operating in the U. S. Pacific coast/Baltic trade call at New York in each direction. This was discontinued when Denmark was invaded on April 10, 1940.

The first of complainant's vessels to lift cargo at New York in 1940 was the *Amerika*, which carried about 50 tons when she sailed on February 27. Between 100 and 150 tons were booked for the *Europa* on her scheduled sailing of April 13, 1940, but the sailing was canceled because of the invasion of Denmark. The commencement of the New York/Copenhagen service in 1940 was advertised in the United States in English and Danish newspapers, by press releases, and in bulletins to travel agencies throughout the country. In addition, receptions were held on board the vessels at New York.

Although the advertising was directed to passenger traffic, cargo was solicited by telephone from shippers and forwarding agents.

Respondents maintain that the transportation of the 50 tons of cargo of the *Amerika* in February 1940 cannot constitute a regular service. This, of course, presupposes that the booking of the cargo for the *Europa* should not be considered inasmuch as that vessel never sailed. Although the conference agreement in effect in 1940 (U. S. M. C. Agreement No. 147) provided for the admission of only such carriers as were operating regularly in the trade, Article 7 of the present agreement provides that an applicant is eligible for membership if (1) he is engaged in a regular service, or (2) presents reasonable evidence of intention and ability to engage in a regular service.

Complainant's fleet consists of 16 vessels, and 3 more are building. These, it is stated, are sufficient for all of complainant's various services, and additional vessels will be chartered if justified by increased traffic. An experienced staff is maintained at New York and a pier is leased in Hoboken, N. J. At the close of the calendar year 1945, complainant's assets totalled $50,000,000. Up to the date of hearing, complainant had made 4 sailings from New York to Copenhagen with combination cargo and passenger vessels, and 8 additional sailings were scheduled for the remainder of the year.

It is contended by respondents, however, that complainant's service is a stop-gap pending the revival of trade in other areas served by it, and that it will cease after shipments of UNRRA cargo to Poland are discontinued. This is denied by complainant, although it is readily admitted that UNRRA cargo is being carried in large quantities. United Maritime Authority (UMA), which controlled Allied shipping during the war period, handled relief cargo to Europe until the return of most of the vessel tonnage to its owners on March 2, 1946. When its first application for membership in the conference was filed on July 3, 1945, complainant had no way of knowing what the situation would be as to UNRRA cargo after UMA ceased to function, and it was not until approximately March 2, 1946, that consideration was given to the possibility of obtaining UNRRA cargo for Gdynia.

The fact that all staterooms on complainant's vessels are outside is an indication to respondents that the vessels were designed for use in tropical waters. Another point made is that the passenger accommodations are in excess of the normal requirement for the New York-Copenhagen run. Considerable stress is laid upon the further fact that complainant did not solicit cargo between the time of its application in July 1945 until after the middle of June 1946. The reason given by complainant is that it considered it to be improper to solicit

cargo until it was admitted to the conference. Furthermore, after the third application for membership was denied on March 20, 1946, complainant began negotiations with respondent Scandinavian-America Line with a view toward having the latter withdraw its objection to complainant's admission to the conference. Advertising in trade papers and journals was begun when the negotiations were unsuccessful.

Complainant became a member of the Trans-Atlantic Passenger Conference (U. S. M. C. Agreement No. 120) and of the Atlantic Conference (U. S. M. C. Agreement No. 7840) early in 1946, and has agreed to maintain a regular service between U. S. North Atlantic ports and Baltic ports. It should be observed, also, that the principal office of complainant's United States agent, the wholly-owned East Asiatic Co., a California corporation, has been moved from California to New York City.

We are convinced, and so find, that complainant has presented reasonable evidence of its intention and ability to engage in a regular service between U. S. North Atlantic ports and Copenhagen. Our conclusion makes it unnecessary to decide whether complainant was engaged in a regular service in that trade prior to the war.

As there are no contract rates in the trade at the present time, respondents claim that complainant is not prejudiced by not being admitted to the conference, and that it can meet the competition of the conference lines on equal terms. Although it is true that there are no contract rates in the trade at the present time, our records show that there were such rates up to September 7, 1939. Based upon its experience as a shipper as well as a carrier, complainant states that shippers always have contract rates in mind and ordinarily will not patronize non-conference lines because they desire stability in the trade. Complainant believes, therefore, that membership in the conference would increase its business. We find that complainant is being subjected to undue and unreasonable prejudice and disadvantage in violation of section 16 of the Shipping Act, 1946.

One of respondents' objections to complainant's admission to the conference is that the lines already in the trade can handle all the cargo normally moving, and that there is no reason to hope for an increase in traffic in the near future. Complainant takes a more optimistic view and maintains that world conditions will increase the movement of cargo. Respondents' exhibits show that the present movement is in excess of the pre-war volume. We have held, however, that adequacy of existing service is not sufficient reason to justify refusal of admission to a conference as otherwise the existing lines could perpetuate a monopoly by continuing to maintain adequate service.

Waterman S. S. Corp. v. *Arnold Bernstein Line*, 2 U. S. M. C. 238. As complainant's operations between New York and Copenhagen are already established, admission to the conference will not increase the vessel tonnage in the trade.

Article 9 of the conference agreement requires the conference to advise the Commission of the record vote where application for membership is denied, with a full statement of the reasons therefor. This was not done in complainant's case, and the secretary of the conference admitted that it is never done. This is a clear violation of the agreement, and the conference will be expected to conform to the terms of the agreement in the future.

We find: (1) that complainant is entitled to membership in the conference under consideration on equal terms with the respondents; (2) that the agreement is unjustly discriminatory and unfair as between complainant and respondents, and subjects complainant to undue prejudice and disadvantage, in violation of section 16 of the Shipping Act, 1916, and in contravention of section 15 thereof; and (3) that the failure of the conference to advise the Commission of the record vote when complainant's application for membership was denied, with a full statement of the reasons therefor, was a violation of the conference agreement. No violation of section 14 of the Act has been shown.

Respondents will be allowed 30 days within which to admit complainant to full and equal membership in the conference, failing which consideration will be given to the issuance of an order disapproving the agreement.

By the Commission.

[SEAL] (Sgd.) A. J. WILLIAMS,
Secretary.

WASHINGTON, D. C., *January 9, 1947.*

UNITED STATES MARITIME COMMISSION

No. 652

RATES BETWEEN PLACES IN ALASKA

Submitted May 14, 1947. Decided October 14, 1947

Respondents, in so far as they furnish ship-to-shore and shore-to-ship services at vessel anchorages in Alaska, are subject to the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, where they do not perform or participate in the line haul of the ocean carrier.

Matter remanded for further proceedings.

S. J. Wettrick for respondent Lomen Commercial Company.

David E. Scoll for Alaska Development Board and Territory of Alaska, *Ralph J. Rivers* for Territory of Alaska, *George Rogers* for Price Administrator, *Omar O. Victor* for United States Smelting Refining and Mining Company, and *Ralph L. Shepherd* for Seattle Traffic Association, interveners.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions were filed by intervener Alaska Development Board to the examiner's proposed report, and the matter was argued orally. Our conclusions differ from those recommended by the examiner.

We instituted this investigation on our own motion into and concerning the lawfulness of respondents'[1] rates, fares, charges, regulations, and practices relating to or connected with the transportation of property between places within the Territory of Alaska. Lomen Commercial Company, hereinafter referred to as Lomen, was the only respondent to appear at the hearing. Alaska Development Board, Territory of Alaska, Price Administrator, United States Smelting Refining and Mining Company, and Seattle Traffic Association intervened.

[1] Lomen Commercial Company, Kotzebue Sound Lighterage Company, Northern Commercial Company, Shishmaref Native Lighterage, Kuskokwim Freight Service, Sarah Sumi Freighting Service, Chas. A. Traeger, Kobuk Navigation Company, and Alaska Rivers Navigation Company.

In so far as the particular question here under consideration is concerned, the operations of Lomen will be taken as representative of all the respondents where they perform ship-to-shore and shore-to-ship service and do not perform or participate in the line haul of the ocean carrier.

Lomen is an Alaskan corporation engaged in various activities, among which is the holding out of itself to the public as a carrier between anchorages adjacent to Nome and other places on the Seaward Peninsula, on the one hand, and those towns, on the other hand. The traffic handled is principally cargo transported by Alaska Steamship Company from Seattle, Washington, destined for Nome. At Nome the water is so shallow that the vessels of the ocean carrier anchor from about 1½ to 3 miles from shore, and at other places the distance is as much as 9 miles. Cargo unloaded at the Nome anchorage is placed in Lomen's barges, which are towed by Lomen's tugs to a revetment at the mouth of the Snake River and adjacent to Lomen's warehouses. Lomen unloads the barges and delivers the cargo to the consignees. Cargo located at Nome or other outports and destined outbound by water is transported by Lomen to the respective anchorages for transshipment to the ocean carrier.

Under its tariffs and bills of lading the common carrier obligations of Alaska Steamship Company begin and cease at the end of ship's tackle at anchorage on southbound and northbound traffic respectively, and its rates do not include any costs beyond that point. Alaska Steamship Company is not a party to the proceeding and no contention is made that it has any obligation to perform the ship-to-shore service.

Upon discharge of the cargo from its vessels the ocean carrier delivers to Lomen the freight bills or copies thereof for the haul from Seattle to anchorage, the charges usually being prepaid. Where they have not been prepaid Lomen collects and remits to the ocean carrier its charges. There is an understanding between the ocean carrier and Lomen that the latter will perform the ship-to-shore service where a shipper does not instruct otherwise, and there is an agreement between them as to the manner in which cargo losses, damages, and shortages are to be borne under certain conditions. Lomen has established a schedule of rates by quoting a certain percentage, with exceptions applicable to specific commodities, of the rates published in the ocean carrier's tariff covering the transportation from Seattle to anchorage. Lomen's rates include not only the transportation between ship and shore but also the terminal handling prior or subsequent to delivery.

The examiner found that the operations under discussion were lighterage, and that we had no jurisdiction over them inasmuch as

the legislative history of the Shipping Act, 1916, shows that Congress purposely excluded lighterage from the definition in section 1 of "other person subject to this act," which is as follows: "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."

As originally worded, section 1 of the bill which eventually became the Shipping Act, 1916, included lighterage in the definition of "other person subject to this act." This type of operation was eliminated, however, upon protests of concerns engaged in such business in the port of New York, where lighterage was primarily from railroad piers in Jersey City to warehouses in New York and subsequent lighterage from such warehouses to piers located on both the New York and the New Jersey portions of New York harbor. Congress thus did not intend to give us jurisdiction over those who perform the separate and distinct service of lighterage for or on behalf of common carriers or in connection with common carriers. On the other hand, our jurisdiction is plenary over common carriers irrespective of whether accessorial services ordinarily rendered by an "other person subject to this act" may be performed by the common carrier. It must be determined, therefore, whether Lomen is "a common carrier by water in interstate commerce," which is defined in section 1 of the 1916 act as follows: "a common carrier engaged in the transportation by water of passengers or property on the high seas * * * on regular routes from port to port between one State, Territory, District, or possession of the United States and any other * * * Territory, District, or possession of the United States, or between places in the same Territory * * *".

Neither the fact that Lomen uses facilities called lighters or that its services are limited in their geographical scope is determinative of Lomen's status, which can be appraised only by an examination of what it does. Lomen holds itself out to transport any commodity for the general public on regular routes between ship and shore. It makes its own contracts of charges or rates which are entirely separate from any control by the ocean carrier, and it assumes liability to shippers for loss of or damage to cargo. The fact that Lomen has a joint agreement with the ocean carrier as to the disposition of such claims does not change its relations with the public. Also, merely because Lomen performs the business of furnishing wharfage, dock, warehouse, or other terminal facilities does not preclude it from being a common carrier by water. The Intercoastal Shiping Act, 1933, contemplates the performance of such services by common carriers by water and requires

them, in filing their schedules, to "state separately each terminal or other charge, privilege, or facility granted or allowed * * *".

The evidence is conclusive that there are two services jointly accomplishing the carriage between Seattle and Nome or the other outports. The entire transaction constitutes transportation on a regular route, on the high seas, and between a port in the State of Washington and a port in Alaska. Each of these services is common law carriage. Considering Lomen's service alone, it is regular (*Alaskan Rates*, 2 U. S. M. C. 558, 580) and the routes between ship and shore are on the high seas. *In Re Thames River Line* (1931), 1 U. S. S. B. 217; *American Peanut Corp. v. M. & M. T. Co. et al.* (1925), 1 U. S. S. B. 90. See also *Manila Prize* Cases (1903), 188 U. S. 254.

In defining "a common carrier by water in interstate commerce", Congress made a distinction between transportation between States and other States, Territories, Districts, and possessions, on the one hand, and intraterritorial transportation, on the other hand. As to the former the transportation must be between "ports", whereas in the latter it is between "places". This distinction must be given its full meaning. Congress was aware of the lack of ports and of the different kind of transportation to be encountered in the territories and possessions, and intentionally used a term which would be all-inclusive It was realized that there would be transshipment at places with destinations at ports or other places.

Lomen performs common carrier operations between two places within the Territory of Alaska, and under the facts disclosed we find that it is a common carrier by water in interstate commerce as that term is defined in section 1 of the Shipping Act, 1916, and therefore subject to our jurisdiction.

An appropriate order will be entered, remanding the case to the trial examiner for a supplemental report consistent with this decision.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 14th day of October, A. D. 1947

No. 652

RATES BETWEEN PLACES IN ALASKA

This proceeding having been instituted by the Commission on its own motion and without formal pleading, 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 preliminary report containing its conclusions and decision as respects jurisdiction in the matter, which report is hereby referred to and made a part hereof;

It is ordered, That this matter be, and it is hereby, remanded to the trial examiner for a supplemental report consistent with the report hereinabove referred to.

By the Commission.

[SEAL] (Sgd.) A. J. WILLIAMS,
Secretary.

UNITED STATES MARITIME COMMISSION

No. 648

PACIFIC COAST EUROPEAN CONFERENCE AGREEMENT
(AGREEMENTS NOS. 5200 AND 5200–2)

Submitted September 12, 1947. Decided January 12, 1948

Agreement No. 5200–2 increasing the admission fee from $250 to $5,000 is disapproved.

The retroactive penalty provisions of respondents' contract rate system found to be unlawful. The balance of the system found to be lawful.

The unanimous voting rule in Agreement No. 5200 found to be lawful.

Chalmers Graham for respondents.

Wendell Berge, *Wallace Howland*, *James E. Kilday*, *William H. Henderson*, *Henry H. Foster*, *Jr.*, *Walter P. Combs*, and *Don H. Banks* for Antitrust Division, United States Department of Justice, *Charles B. Bowling*, *Richard F. McCarthy*, *Charles W. Bucy*, and *Henry A. Cockrum* for United States Department of Agriculture, *Harold H. Young*, *James C. Nelson*, and *Paul M. Zeis* for United States Department of Commerce, and *Robert C. Neill* for California Fruit Growers Exchange, interveners.

R. F. Ahern for Rosenberg Bros. Co., *George S. Beach* and *Robert J. Marsh* for Canners League of California, *John C. Duckwall* for Oregon-Washington Horticultural Export Council Rate Committee, *J. R. Harper* for Dried Fruit Association of California, *Harry Helferich* for American Fruit Growers, *Robert K. Hunter* for Board of State Harbor Commissioners of the State of California, *Calhoun E. Jacobsen* for Los Angeles Chamber of Commerce, *Leonard R. Keith* for California Packing Corporation, *James A. Keller*, for Pacific Coast Cement Institute, *H. A. Leatart* for American Potash & Chemical Corporation, *J. A. Montgomery* and *Earl S. Williams* for California Growers and Shippers Protective League, *C. W. Mount* for California Grape Growers and Shippers Association and Di Giorgia Fruit Corporation, *Robert L. McGill* for Mutual Orange Distributors, *M. J.*

McCarthy for Pacific Coast Customs & Freight Brokers Association, *Eugene A. Reed* for Oakland Chamber of Commerce, and *Walter A. Rohde* for San Francisco Chamber of Commerce.

Joseph J. Geary and *Allan E. Charles* for Pacific Westbound Conference, intervener, *Parker McCollester* for Havana Steamship Conference and other conference interveners, *Roscoe H. Hupper* and *Burton H. White* for Trans-Atlantic Associated Freight Conferences.

John B. Jago and *Paul D. Page* for the Commission.

Report of the Commission

By the Commission:

Exceptions were filed to the examiner's proposed report by the Maritime Commission's Solicitor, Department of Agriculture, Department of Commerce, and the Department of Justice, and the matter was argued orally. Our conclusions differ somewhat from the recommendations of the examiner.

This is an investigation instituted upon our own motion to determine (1) whether a proposed modification (Agreement No. 5200–2) to Article 11 of Pacific Coast European Conference Agreement (Agreement No. 5200) increasing the admission fee of members from $250 to $5,000 should be approved; (2) whether Agreement No. 5200 should be cancelled or modified because of the restrictions contained in Article 10 thereof, which limited admission to the conference to those persons, firms, or corporations regularly engaged as common carriers by water in the trade covered by the agreement; and (3) whether the agreement should be cancelled or modified for any other cause which might appear upon the hearing of this proceeding. At the hearing respondents'[1] contract rate system and the rule in Agreement No. 5200 requiring that decisions thereunder be determined by unanimous vote were assailed. After due notice, a further hearing was had on those issues. Since the hearings, respondents filed, and the Commission approved, Agreement No. 5200–4, which modified Article 10 by eliminating the restriction mentioned above so that common carriers regularly engaged *or giving substantial and reliable evidence of intention of operating regularly* in the trade may qualify for membership in the conference. That issue will not be considered further.

[1] Blue Star Line, Limited; The Donaldson Line Limited; The East Asiatic Company, Ltd. (A/S Det Østasiatiske Kompagni); Fred Olson & Co. (Fred Olson Line); Fruit Express Line A/S; Furness, Withy & Co., Ltd. (Furness Line); Isthmian Steamship Company; Knut Knutson O. A. S. (Knutson Line); J. Lauritzen (Lauritzen Line); Martin Mosvold (Mosvold Line); N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij (Holland-América Line); Rederiaktiebolaget Nordstjernan (Johnson Line); Royal Mail Lines, Ltd.; Westfal-Larsen & Company, A/S (Interocean Line); and Compagnie Generale Transatlantique (French Line).

The Antitrust Division of the United States Department of Justice, the United States Department of Agriculture, the United States Department of Commerce, and the California Fruit Growers Exchange intervened.

The conference has been in existence for twenty years. Its current organic Agreement No. 5200 was approved by the Commission on May 26, 1937. The purpose of the conference, as stated in the agreement is "to promote commerce from the Pacific Coast of the United States to Great Britain, Northern Ireland, Irish Free State, Continental, Baltic and Scandinavian ports and to Base ports in the Mediterranean Sea and to transshipment ports in the Mediterranean Sea, Adriatic Sea, Black Sea, West, South, and East Africa, British India and Iraq * * *."

The principal commodities carried by respondents are apples and pears from Washington and Oregon, dried fruit and canned goods from the San Francisco Bay area, and citrus fruit from Southern California. Refrigerated vessels are used to transport apples, pears, and citrus fruit. Some respondents are engaged in other world trades and carry commodities which compete in Europe with commodities transported by them from the Pacific Coast.

INCREASE IN ADMISSION FEE

The proposed $5,000 membership fee is defended on the grounds that a new member should contribute a share of the expenses to which respondents have been put since 1926 in developing and maintaining the conference, and that membership in the conference is worth that much to any responsible common carrier desiring to participate in the trade. The conference has always maintained an office with salaried employees. It has developed a rate structure; prepared, maintained, and filed tariff schedules; collected and classified commodity statistics for use of the members; established and negotiated shipping contracts with shippers on behalf of the members, and acted as a medium of contact between respondents and the public. It also transacts business with the Commission. The principal items of expense are salaries, office rent, other office expenses, and attorney fees. Conference funds are secured through individual member assessments. Five members were assessed an average of $9,037 for the 5-year period between 1935 and 1939. At the time of hearing the conference had a bank account to about $6,000. Before the war the average bank balance was about $10,000. The replacement value of office equipment is less than $1,000.

Apart from the consideration of past expenses, respondents assert that it would cost a carrier more than $5,000 to establish a rate structure and publish and maintain a tariff, which is only one of the conference's functions enjoyed by a carrier upon admission. The value of good will is another factor urged. It was testified that with the return of normal trade following the war the conference plans to expand its functions and organization, and that a reserve fund should be available to meet future exigencies. During the war the conference maintained its organization and office but drastically curtailed its activities. There is no suggestion that the proposed admission fee is designed to cover the actual administrative costs of admission since such costs are trivial, amounting to no more than is necessary to publish a supplement to the tariff and notify contract shippers of the new member. In fact the substantial bank balance of the conference and its right to assess members for necessary expenses renders a high admission fee unnecessary.

We are not impressed with the argument that the discrimination resulting from the payment of $250 by existing members as distinguished from the $5,000 required of prospective members is not undue and unjust. To remove undue and unjust characteristics, discriminations must be justified by transportation or competitive conditions, or by some other satisfactory reason. Respondents have failed to show that the increase is necessary to continue the existence of the conference or to reimburse themselves for abnormal operating expenses.

It may be that the sum of $5,000 would not prevent any large, well-established carrier from entering the trade, but we cannot say that it would not be a deterrent to a small carrier. We take official cognizance of the fact that many carriers now successfully established sprang from beginnings which might have been very seriously hampered by the $5,000 requirement. Such a financial burden would be a detriment to the commerce of the United States which can not be countenanced.

Agreement 5200–2 is disapproved.

CONTRACT RATE SYSTEM

For many years the conference tariff schedules have contained two rates, one called "tariff" and the other called "contract," the latter being lower than the former by approximately 15 percent. The contract rate is available to shippers who sign "exclusive patronage" contracts. By the terms of these contracts the shipper agrees to use the vessels of the conference members for all of its shipments from Pacific coast

ports of North America to ports in Europe served by the carriers, in return for which the carriers agree not to raise existing rates within 90 days.[2] The carriers also undertake to furnish service sufficient to meet the shipper's requirements, and if at any time they are not able to do so the shipper is then free to use other carriers. The contract is available to all shippers of commodities covered by contract rates regardless of volume offered, the nature of the commodity, or port of origin. As of the commencement of the hearing canned goods and dried fruit were not covered by contract but the shippers of those commodities had a gentlemen's agreement with the conference accomplishing practically the same result; viz, the shippers undertook to ship only over the carriers maintaining rates and the rates to be charged were agreed upon by the parties. Since the hearing, canned goods and dried fruits have been placed on a contract basis and the shippers thereof have accepted the exclusive patronage contract.

Contract rates are not accorded coal in bulk, lumber, grain, bagged barley, N. O. S., human ashes, corpses, old clothing, old shoes (relief goods), household goods, and personal effects, and no contention is made that the shippers of these commodities enjoy any undue advantage.

Government counsel challenged the legality of the contract rate system on the grounds that it is monopolistic; it results in different rates for identical services; the contract is not a section 15 agreement because it is not between the parties to the agreement, and therefore is not subject to the exemptions from the anti-trust acts; the system is a device to penalize a shipper for not giving his whole business to the carrier and thereby violates section 14 [3] of the Shipping Act, 1916; if it is not contrary to section 14 because it is not applied to all commodities, nevertheless it is unjustly discriminatory and unfair as between shippers, creates unreasonable prejudices and disadvantages against some shippers and unreasonable advantages to others, in violation of sections 16 and 17 of the act; and is detrimental to the commerce of the United States in violation of section 15. In other words, these are attacks upon the legality of the system *per se* and are not based upon any evidence which is peculiar to the contract or conference under discussion.

The lawfulness of the contract rate system has been considered by our predecessors and by the courts several times, but *Menacho* v. *Ward*

[2] This provision was incorporated in the contract subsequent to the commencement of the hearing.

[3] "Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason."

(1886), 27 Fed. 529, is the only case, as far as we know, which has held the system to be illegal *per se*. That decision, however, cannot be considered as a controlling precedent in view of the subsequent enactment of the Shipping Act, 1916, and the specific provisions of section 15 thereof, the latter of which removes from the application of the antitrust statutes all agreements approved by us as well as all activities of the parties thereunder.

Every decision, whether by a court or by us or our predecessors, since the passage of the Shipping Act, involving the legality of the contract rate system, has rested upon the facts presented in the specific case. Wherever the system has been condemned the decision has turned on some circumstance which resulted in a discrimination, or in detriment to the commerce of the United States, or in some violation of the Shipping Act, 1916. No administrative finding sustaining the lawfulness of the system has been reversed by the courts.

Although practically all of the points of attack against the lawfulness of the contract rate system were made in *U. S. Navigation Co.* v. *Cunard S. S. Co., Ltd.*, 284 U. S. 474, the court did not pass upon the merits of the complaint but decided that the matter should have been presented initially to the Shipping Board before resort was had to the courts. It is significant that no further action was taken by complainant in that case.

We cannot ignore the fact in *Swayne & Hoyt* v. *U. S.*, 300 U. S. 297, the Supreme Court did not hold that the contract rate system was in violation of section 14 of the Shipping Act, 1916, or that the establishment of two different rates for identical services (contract and non-contract) was in itself unduly and unjustly preferential. In giving full consideration to the decision of our predecessor the court decided that the interpretation which had been placed upon the facts by our predecessor was substantially supported, and that the court was not empowered to make a contrary finding

Contrary to the arguments made to us, Congress was informed before it passed the Shipping Act, 1916, of the existence of the contract rate system as well as of the deferred rebate system. Congress took occasion to prohibit the latter specifically. It is reasonable to suppose that had it intended to prohibit the former it would have said so with equal force.

We can find no authority that the contract rate system is unlawful *per se*. On the contrary, we are constrained to follow precedents and to examine the evidence introduced in this case to determine whether it justifies a disapproval of Agreement No. 5200 or any of its terms upon the grounds that any detriment to the commerce of the United

States, any discrimination or any violation of the Shipping Act, 1916, has resulted or will result.

The testimony of shippers regarding this objection to the contract rate system are both general and specific. Those objections which are general, that there is no penalty against the carriers for their failure to provide sailings, that the noncontract rates are devised solely as threats to shippers if they use outside tonnage were nothing but expressions of witnesses' preferences for some other method of control and were not supported by any evidence that these objectionable features resulted in any loss or damage to the objectors or to anybody else.

The objection that there were discriminations because the dried and canned fruit industries were not required to sign one of the exclusive use contracts but were allowed to substitute therefor a gentlemen's agreement, has been removed by placing contract rates on dried and canned fruits and requiring those industries to sign contracts.

The objection that the contract was not lawful because it did not require the carrier to give the shipper any expressed period of notice of increases in rates, also has been removed by returning to the prewar provision of requiring 90 days' notice of increases.

As against these objections, the same witnesses were practically unanimous in stating that their industries were interested in, yes; dependent upon transportation which was dependable and stable, and "known rates sufficiently in advance so that future sales would be protected * * * since we sell on a C. I. F. basis we could seriously be disturbed by such fluctuations that might otherwise occur."[4] It was stated that the incident of the chartering of a vessel by a buyer in Europe was very disturbing to the trade because of the resulting tendency towards instability of rates. It appeared that without some form of contract rate instability would unquestionably result. Such testimony from the very shippers who had objected to the contract rate, supporting, as it does, the testimony on behalf of the carriers in the trade and the disruption of the conference, is compelling. This trade is highly competitive, of a seasonal nature that lends itself to inviting outsiders to appear to get the profits and to disappear during the off season. The members of the conference had at no time denied membership to any applicant carrier. The contract rate system is a necessary practice in this trade to secure the continuance of the conference; the frequency, dependability and stability of service; and the uniformity and stability of freight rates.

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[4] Mr. Dwight K. Grady, p. 801.

Objection was made to a so-called penalty clause of any nature, and specifically to the one quoted below:

> In view of the impracticability or difficulty of fixing the actual damages which would be suffered by Carriers in the event of a violation of this agreement by the Shipper, the parties agree that if the Shipper shall make any shipments in violation hereof, this agreement at the option of the Carriers shall immediately become null and void as to all future shipments and thereupon the Shipper shall be liable to the transporting Carriers for payment of additional freight on all commodities theretofore shipped with such Carriers since the execution of this agreement, at the tariff (Non-Contract) rate or rates on such commodities set forth in the current tariffs of the transporting Carriers in force at the time of such shipments.

Any damage suffered by the members of the conference in case of violation by shippers would be difficult to assess in actual dollars and cents, and therefore an agreement of damages would appear to be essential for a mutually satisfactory administration of the contract.

The clause quoted above has three objectionable features however. In the first place, it gives the carriers an option as to whether they will assess damages. This of course opens the door to possible discriminations and removes the uniformity of treatment sought to be accomplished by the conference agreement. Secondly, it has the effect of preventing a violating shipper from securing a contract in the future. Thirdly, the retroactive method of establishing the damages and their possible resulting discrimination.

During the hearing it was proposed to amend the clause as follows:

> In view of the impracticability or difficulty of fixing the actual damage which would be suffered by carriers in the event of a violation of this Agreement by the Shipper, the parties agree that if a Shipper shall make any shipments in violation hereof, this Agreement shall immediately become null and void as to all future shipments except as hereinafter provided, and thereupon the Shipper shall be liable to the Transporting Carriers for payment of additional freight on all commodities theretofore shipped with such Carriers since the execution of this Agreement—but not to exceed a period of twelve months preceding the date of discovery by the Carriers of said violation—at the Tariff (non-contract) rate or rates on such commodities set forth in the current Tariffs of the Transporting Carriers in force at the time of such shipments. Shipper will not be offered a new contract unless and until payment of such additional freight shall have been made.

The first and second objectionable features are thereby eliminated. The retroactive feature, however, is retained. This feature is open to criticism because of the unequal manner in which it would operate. A shipper in large volume and of great frequency finds himself in such a position that the amount which he would have to pay, if he used an occasional carrier, would be such as to compel him to use the conference carriers permanently, whereas the infrequent shipper or

one who ships in very small volume would not be deterred by reason of the penalty. The purposes of the clause—to reimburse the carriers for losses suffered by violation of the contract and to prevent breaches in the future—have not been attained.

Conferences have long been confronted with the problem of damages with respect to possible breaches of the conference agreement by its members, and in many cases have fixed the damages to be paid, where the breach has involved the cutting of rates at the amount of the freight involved or at a certain number of times thereof. This establishes a definite formula by which the penalty can be calculated and has no retroactive feature. Respondents will be expected to amend the liquidated damages clause of their contract somewhat along the lines indicated herein.

UNANIMOUS VOTE RULE

Article 10 of Agreement No. 5200 provides that decisions of the conference are to be arrived at by the unanimous vote of members present at any regular or special meeting, and all members whether present or not shall abide by the decision so taken.

This rule is described by some shippers and by Government counsel as particularly dangerous to the interests of Pacific coast shippers since a single member can "veto" a given proposal and compel all other members to act as it directs on a given rate application. For example, a member engaged in carrying citrus fruit from Brazil, Spain, or Palestine in competition with California citrus fruit could prevent action of the conference if a proposal conflicted with its other world trade interests. Pacific coast borax competes with crude borate concentrates from Argentina, Chile, and Turkey. Another fear is that one member serving only Mediterranean ports could block a proposal affecting Northern Europe. A dry cargo operator could control by one vote a situation in which only refrigerator vessels had an interest. The fact that the vote is secret and that of about twenty members only one or two are American flag lines are other elements urged in opposition to the rule.

Respondents maintain that no such power has even been attempted, that generally all members are informed of the agenda in advance of meetings, and that the rule produces more thorough consideration than a majority rule since every member present must be convinced.

The question here is not whether a unanimous or majority rule might be better or whether it could conceivably be abused but whether the record indicates that the rule has been used by respondents in violation of the act. A mass of statistical data showing movement of citrus

fruit and other commodities in world trade is of record. No instance appears where any Pacific coast trader has suffered a disadvantage in favor of foreign competitors by virtue of any action of respondents. Some elements governing the flow of trade, as explained in exhibits of record, are generally crop conditions, influence of the Spanish civil war, and trouble with decidious fruit insects in Palestine. Actions of Germany and other governments before the war are likewise explained by witnesses as affecting Pacific coast exporters. Illustrative of the latter condition is the testimony of a witness shipping borax to Europe.

There are conferences which have the unanimous, two-thirds, three-fourths, or majority voting rules. No one of these can be disapproved as an organizational procedure, but the lawfulness of any of them must be based upon evidence as to their working in practice as introduced in a public hearing. Tests of lawfulness are found in actions or courses of conduct, not in organizational procedure.

We find that the rule in Agreement No. 5200 requiring that decisions thereunder be determined by unanimous vote has not been shown to be unlawful.

Commissioner McKeough, not having been present at the argument, did not participate in the disposition of this proceeding.

An appropriate order discontinuing this proceeding will be entered.

3 U. S. M. C.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 12th day of January, A. D. 1948

No. 648

PACIFIC COAST EUROPEAN CONFERENCE AGREEMENT (AGREEMENTS NOS. 5200 AND 5200–2)

This case having been instituted by the Commission on its own motion 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 Ageement 5200–2 be, and it is hereby, disapproved; and

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

By the Commission.

[SEAL] (S) A. J. WILLIAMS,
Secretary.

UNITED STATES MARITIME COMMISSION

No. 655

TERMINAL RATE INCREASES—PUGET SOUND PORTS

Submitted August 6, 1947. Decided January 13, 1948

Definitions of the terms "service charge," "handling," and "loading or unloading" contained in Seattle Terminals Tariff No. 2–C found to be unjust and unreasonable regulations, in violation of section 17 of the Shipping Act, 1916. Respondents directed to make necessary changes in the definitions.

Respondents expected to supply, within three months, the financial results of their operations over a test period for each service for which they publish rates or charges.

Ray Dumett and *Donald E. Leland* for respondents and for intervener Northland Transportation Company, and *George LaRoche* for respondent The Commission of Public Docks of the City of Portland, Oregon.

Albert E. Stephan and *John Ambler* for American-Hawaiian Steamship Company, American Mail Line, Ltd., Grace Line, Inc., Matson Navigation Company, Oceanic Steamship Company, Sudden & Christenson, Inc., and Sudden & Christenson Overseas Corporation, interveners, *Chalmers G. Graham* for other interveners, *David Scoll* for Alaska Development Board and Territory of Alaska, *Omar O. Victor* for United States Smelting Refining and Mining Company, *Ralph L. Shepherd* for Seattle Traffic Association, interveners, and *W. Reginald Jones* for Board of Port Commissioners of Oakland, California.

Hugh Fullerton for Canners League of California, *Irving M. Smith* for Board of Harbor Commissioners of City of Long Beach, California, *Ray L. Chesebro* and *Arthur W. Nordstrom* for City of Los Angeles.

DECISION OF THE COMMISSION

BY THE COMMISSION:

We initiated this proceeding to determine the lawfulness and propriety of the definitive provisions of Seattle Terminals Tariff No.

2–C, and of service, handling, carloading and unloading charges named in that tariff.[1] Exceptions were filed to the examiner's proposed report and the matter was argued orally. Our conclusions differ somewhat from those recommended by the examiner.

Respondents herein[2] are the parties to Agreement No. 6785, the organic agreement of the Northwest Marine Terminal Association, whose purposes, as stated in the Association's constitution, attached to the agreement, are: "(a) to promote fair and honorable business practices among those engaged in the marine terminal industry; (b) to more adequately service the interests of the public at Northwest ports; i. e., ports in the states of Washington and Oregon; (c) to establish and maintain just and reasonable, and, so far as practicable, uniform terminal rates, charges, classifications, rules, regulations and practices at said Northwest ports in connection with waterborne traffic; and (d) to cooperate with the marine terminal operators of other districts, either individually or through their associations, to the end that the purposes set forth above may be achieved by such other terminal operators." The agreement has been approved under section 15 of the Shipping Act, 1916.

Seattle Terminals Tariff No. 2–C was filed with the Commission pursuant to Agreement No. 6785. It applies at Seattle and certain other ports in the State of Washington. Other tariffs filed with the Commission pursuant to the agreement are Tacoma Terminals Tariff No. 1, applicable at Tacoma, Washington; Terminal Tariff No. 2–A of The Commission of Public Docks of the City of Portland, Oregon, applicable at Portland, Oregon; Port of Astoria Tariff No. 6, applicable at Astoria, Oregon; Port of Longview Terminal Tariff No. 2, applicable at Longview, Washington; and Port of Vancouver Tariff No. 1, applicable at Vancouver, Washington. With one exception, a respondent that is a party to one of the tariffs does not participate in another of them. Most of the respondents are parties to Seattle Terminals Tariff No. 2–C.

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[1] Special Supplement No. 11 to the tariff indicates that the tariff contains charges for "transferring," and such charges, also, were included in this proceeding. The issuer of the supplement testifies that he has been unable to find in the tariff a specific charge for transferring. The supplement, therefore, should be canceled.

[2] Alaska Steamship Company, Ames Terminal Company, Arlington Dock Company, Port of Astoria, Baker Dock Company, Port of Bellingham, City Dock Company, Columbia Basin Terminals Company, Drummond Lighterage Company, G & S Handling Company, Port of Grays Harbor, Luckenbach Steamship Company, Newsprint Service Company, Port of Olympia, Pope & Talbot, Inc. (McCormick Steamship Company Division), Port of Port Angeles, Port of Longview, Puget Sound Freight Lines, Rail Water Terminal Company, Salmon Terminals, Incorporated, Port of Seattle, Shaffer Terminals, Port of Tacoma, Tait Tidewater Terminals, Port of Vancouver, Port of Willapa Harbor, The Commission of Public Docks of the City of Portland, Oregon, and Western Stevedore Company.

This investigation was initiated because of the prima facie evidence of discrimination growing out of the Association's establishment of new increased terminal rates applicable to handling charges, carloading and unloading charges, and the establishment of a new charge designated "service charge" covering Alaska traffic only. Subsequently, the charges covering other traffic were raised in a similar manner. It then appeared that the tariff definitions covering the various charges were ambiguous and overlapped in instances; that there were discriminations as between the recipients of the different services; that there were double payments for the same service under different names; and that a decrease of uniformity rather than an increase might result.

We are of the opinion that there should be uniform and clear definitions of various terminal services, and a clear and inclusive list of the specific activities contained in each definition in order to enable terminal operators, the shipping public, carriers, and us to determine whether each service is bearing its fair share of the cost load. Such uniformity should be a goal sought by all owners and operators of terminals in all ports of the United States and its Territories and possessions. This does not mean, however, that there necessarily should be a uniformity of charges. Uniformity of definitions will result in a much healthier condition of the industry and much fewer competitive situations resulting in noncompensatory charges for certain services. While it may be difficult to cover all ports in an attempt to secure immediate and universal uniformity, we should take every opportunity to require terminal operators to publish their charges under headings which are clear, concise, and which in no way overlap.

In deciding the various issues in this case it is necessary at all times to keep in mind that the respondents are terminal operators that form an intermediate link between the carriers and the shippers or consignees, and that in consequence the operators are performing some services for the carriers and other services for the shippers. In view of the fact that there are so many different methods of furnishing terminal facilities to carriers and of furnishing or not furnishing the labor to work those facilities, it is necessary to distinguish those services which are attributable to the transportation obligations of the carrier from those which are not.

It is thus necessary to delineate clearly the obligations of the carrier to the shipper or consignee in performing its transportation. The carrier must furnish a convenient and safe place at which to receive cargo from the shipper and to deliver cargo to the consignee. If this can be done at end of ship's tackle, then it can be so stated and the contracts of carriage may be limited to such service. On the other hand,

if such receipt and delivery is impracticable or impossible, the carrier must assume as part of its carrier obligation the cost of moving the cargo to where it can be delivered to the consignee or from where it can be received from the shipper—referred to generally as the place of rest. The carrier cannot divest itself of this obligation by offering a service which it is not prepared to perform. It can, however, separate its rates into two factors, one covering the actual transportation and the other covering the handling between tackle and place where cargo is received or delivered. *J. G. Boswell Co.* v. *American-Hawaiian S. S. Co.*, 2 U. S. M. C. 95; *Los Angeles By-Products Co.* v. *Barber S. S. Lines, Inc.*, 2 U. S. M. C. 106. The carrier's obligations also include the receiving of cargo from shipper and the giving of a receipt therefor, and delivery of cargo to those entitled to it, together with the handling of the necessary papers.

With these legal principles in mind the services contained in respondents' tariffs and the definitions thereof can be considered.

DEFINITIVE PROVISIONS OF SEATTLE TERMINALS TARIFF NO. 2–C

Wharfage.—This term is defined in the tariff as follows:

> Wharfage is the charge that is assessed on all freight passing or conveyed over, onto, or under wharves or between vessels or overside vessels when berthed at wharf or when moored in slip adjacent to wharf. Wharfage is the charge for use of wharf and does not include charges for any other service.

Wharfage, then, is a charge against the cargo for its use of the wharf. There is no evidence that this service includes anything that is included in any of the other services.

It is true that a witness for respondents testified that wharfage "is a rental on a per-ton basis for the cargo on the terminal during the free-time period allowed." This, however, appears to be an inaccurate description of the basis of the charge and one that is not included in the tariff. The wharfage charge is made for the passage of the cargo over the wharf and has no reference whatever to the "free time." It is made whether the cargo avails itself of the free time privilege or remains on the pier long after the free time has expired. Free time does not connote the right to use the pier without any charge whatsoever and has not been so interpreted. It merely means that the cargo once lawfully on the pier may remain on and during the period established at no extra expense, or without the enforcement of any of the rights reserved by the carrier or the terminal operator to remove the cargo to a warehouse at the expense of the cargo, or to charge demurrage beyond the free time period.

The imposition of a wharfage charge against the cargo can be justified only on the principle that the carrier, or the terminal operator on the carrier's behalf, does not actually take possession or deliver up possession of the cargo other than at place of rest on the pier as distinguished from the end of ship's tackle. Between that place and the entrance to or exit from the pier the cargo is using the pier to get into position to utilize the carrier's facilities or has finished the use thereof. The establishment of the charge against the cargo for this use has been widespread throughout the country under various names, viz: "wharfage," "top wharfage," "tollage," "wharf tollage." We cannot ignore that fact. The definition appears to be adequate.

Service charge.—This is a charge which was initiated for the first time in the tariff under investigation. The definition in effect at the time of the hearing was as follows:

> Service Charge is the charge assessed against vessels, their owners, operators, or agents, for the performance of services incidental to receiving and delivering freight, and includes berthage of vessels while loading or discharging cargo. Service Charge does not include any freight handling, loading nor unloading operations, nor any labor other than that which is esssential to performing the service.

Prior to November 30, 1946, the effective date of the above-quoted definition, "berthage of vessels while loading or discharging cargo" was not specifically covered by any charge made by respondents. "Berthage" was then, as it is now, defined in the tariff as "the charge assessed against a vessel for the use of berthing space at wharf or alongside of other vessels berthed at wharf when said vessel is not engaged in loading or discharging cargo and unless otherwise specifically provided, it does not include any other wharf services except mooring privileges." No reason appears why berthage may not properly be charged irrespective of whether a vessel is loading or discharging cargo.

There appears to be no distinction between this so-called berthage and the service which is designated as "dockage" in most other localities. To include "berthage" with the other services "incidental to receiving and delivering of freight" will add still more to the general confusion in the use of terminal definitions. Berthage should be established as a separate item since it is purely a use charge for space occupied by the vessel and has no direct relation to a "service" as such.

The above-quoted definition of "service charge," while stating what the charge does not include, leaves to surmise what services incidental to receiving and delivering freight are covered thereby. Conceding the inadequacy of the defintion, Seattle respondents propose to amend it to read as follows:

Service charge is the charge assessed, on the basis of cargo tons handled, against vessels, their owners, agents, or operators, which load or discharge cargo at the terminals, for use of terminal facilities, for berthage while loading or discharging cargo, for administrative expense in serving the carrier, and for performing one or more of the following services:

1. Arrange berth for vessel.
2. Arrange for cargo space on terminal.
3. Check cargo, AT PLACE OF REST ON DOCK, to or from vessel.
4. Receiving cargo from shippers or connecting lines and giving receipts therefor.
5. Delivering cargo to consignees or connecting lines and taking receipts therefor.
6. Prepare dock manifests, loading lists, or tags covering cargo loaded aboard vessels.
7. Prepare over, short, and damage reports.
8. Ordering cars, barges or lighters.
9. Giving information to shippers and consignees regarding cargo, sailings and arrivals of vessels, etc.

NOTE.—Service charge does not include any freght handling, loading, nor unloading operations, nor any labor other than that which is essential to performing one or more of the above specified services.

What has been said above concerning berthage applies also in respect to the proposed amendment. Furthermore, the phrase "for use of terminal facilities" is broad enough to comprehend the use of terminal facilities for which compensation is included in other charges, such as wharfage, and should be eliminated. For a like reason, "administrative expense in serving the carrier" should be deleted. Each service presumably bears its proper share of the administrative expense in the charge established for the service, and, to exact payment for such expense in the service charge would be a duplication of charges.

The principal item in the proposed amendment is checking, which involves the counting and measuring of packages, recording any identifying marks, and making notations as to the apparent condition of the packages. Checking performed for the ship should be covered by the service charges whether or not it is done at place of rest. The words "AT PLACE OF REST ON DOCK, to or from vessel," therefore should be eliminated.

In view of the inadequacy of the definition of "service charge" now in effect and the improper inclusion therein of "berthage of vessels while loading or discharging cargo," and in view of the defects in the presently proposed definition, the definitions are unjust and unreasonable regulations relating to the receiving and delivering of property, in violation of section 17 of the Shipping Act, 1916.

Handling; handling charge.—Under the heading "Handling Defined," the tariff states:

Handling charges are the charges assessed for handlng freight between place of rest on wharf and ship's slings.

Under the caption "Handling Charge Defined" is the following definition:

Handling charge is the charge assessed for the service of handling freight.

Thus, instead of a definition of "handling" and one of "handling charge," there are two definitions of the latter. Prior to November 30, 1946, the tariff, in addition to defining "handling charge" as "the charge assessed for the service of handling freight," declared:

Handling freight is the service performed in moving or conveying freight between ship's tackle and first place of rest on wharf. It includes ordinary sorting, breaking down, checking and stacking on wharf.

It was testified that ordinary sorting, breaking down, and stacking in connection with the service of handling are so related to such service as properly to be covered by the charge for handling. Nevertheless, when checking was removed as a factor in the handling charges, to be made the mainstay of the service charges, the entire sentence above which states that "It (handling freight) includes ordinary sorting, breaking down, checking and stacking on wharf" was eliminated from the tariff. Since the definitions now in force do not provide that ordinary sorting, breaking down, and stacking on wharf are included in handling, they are unjust and unreasonable regulations relating to the handling of property, in violation of section 17 of the Shipping Act, 1916.

Handling takes place after freight has been received and before it is delivered on behalf of the carrier. It is a service performed for the ship. The definitions in question, however, are ambiguous as to whether the handling charge is applied against the ship or the freight. The definitions, for this reason also, are unjust and unreasonable regulations relating to the handling of property, in violation of section 17.

Carloading and unloading.—The tariff, under "Loading or Unloading Defined," declares:

Loading or Unloading charges are the charges assessed on freight loaded into or on cars or unloaded from cars spotted on wharf and include moving between cars and place or rest on wharf.

Beneath the heading "Loading or Unloading Charges Defined" it is stated:

"Loading" or "Unloading" charges are the charges assessed for the services of loading or unloading freight.

The former of these two definitions superseded, effective November 30, 1946, the following:

"Loading" and "Unloading" are the respective services performed in loading freight from wharf premises on or into railroad cars or trucks, and unloading freight from railroad cars or trucks onto wharf premises. The services include ordinary breaking down, sorting, checking and stacking.

As appears from the definition first quoted, loading or unloading charges do not now apply to the loading or unloading of trucks. Such service is performed by the truckmen except on what are said to be "very, very rare" occasions, and it is pointed out that the tariff contains provisions under which the service and necessary equipment can be furnished for charges based on man-hour rates [3] and equipment rental.

The situation is similar to that set forth above in the discussion of handling and handling charges. Accordingly, in not providing that ordinary sorting, breaking down, and stacking are included in carloading and unloading, the definitions under the captions "Loading or Unloading Defined" and "Loading or Unloading Charges Defined" are unjust and unreasonable regulations relating to the receiving and delivering of property, in violation of section 17 of the Shipping Act, 1916.

The definitions above quoted also are ambiguous in that they do not indicate as to whether the charge is against carrier or cargo. The service is obviously performed for the cargo and should be specific on this point.

LAWFULNESS OF SERVICE, HANDLING, CARLOADING AND UNLOADING CHARGES

The handling, carloading and unloading charges consist of basic rates of so much per 2,000 pounds or 40 cubic feet to which an emergency charge has been added to cover what was originally expected to be temporary costs caused by the war. With certain exceptions, for each service on traffic other than Alaska the basic rate is 75 cents, and on traffic to or from Alaska it is 80 cents. These basic rates were not changed in the tariff under discussion. Prior to the filing of the present tariff, the emergency charge had been established at 10% of the basic rates in effect on December 20, 1945, and was raised to 30% on June 15, 1946.

The present tariff further increased the emergency charge on traffic other than Alaskan on November 18, 1946, and on Alaskan traffic November 30, 1946, to 50% of the basic rates on handling, and car-

[3] Man-hour rates, which are said to be a stop-gap "until we get something that is stable in production and costs," lack the definiteness of per-ton charges. The record indicates no objection to them, perhaps because of an appreciation of the circumstances which brought about their establishment. When those circumstances no longer exist, the man-hour rates should be canceled.

loading and unloading. It also inaugurated for the first time the service charges of 60 cents, inbound, and 40 cents, outbound, per 2,000 pounds or per 1,000 feet board measure.[4] It is the establishment of these new charges and the increase of the emergency charge to which the evidence was chiefly directed.

Respondents' position is that the emergency charge and service charges are justified by increased costs. They show that between November 3, 1945, and January 2, 1947, the straight-time wages of longshoremen and dockmen, who perform the handling, carloading and unloading, advanced 47 cents per hour and 57 cents per hour, respectively, exclusive of vacation allowance. Additional wage increases subsequently became effective. They also call attention to the slackened pace of labor and to the mounting of overhead expenses.

Port of Seattle, which engages in a comprehensive terminal service, submits financial statements pertaining to two of its terminals from January 1, 1946, to and including November 30, 1946, during 149 days of which there was no operation on account of strikes. The statements relate to respondent's entire wharfinger operations at the respective terminals and include such items as maintenance, general terminal expense, general administrative expense, and revenue from wharfage, among others. Some of the figures are exact; others are estimates. The expense in respect to respondent's East Waterway Terminal was $267,491.46, and the revenue, $201,287.73. The loss of $66,206.73, divided by the 99,176 tons of cargo that came to the terminal, results in an average net loss per ton of 66.8 cents. Respondent's Stacy-Lander Terminal shows expense of $231,133.57 and revenue of $180,-696.66, a loss of $50,436.91 on 86,358.18 tons, or an average net loss of 58.4 cents per ton.

Western Stevedore Company, which commenced operations at pier 28, Seattle, in May 1946, shut down from early September 1946 until about December 10 of that year because of labor difficulties. During the four months of May to August, inclusive, the cargo at pier 28 totaled 41,357 tons, and the earnings were as follows: wharfage, $12,-

[4] Except in the Pacific coastwise trade, these charges apply where freight is not loaded or discharged by vessels direct to or from open cars and is not loaded or discharged by vessels direct overside to or from water or barge. The service charges, except in the Pacific coastwise trade, are 20 cents, inbound or outbound, where freight is loaded or discharged by vessels direct to or from open cars, and 10 cents, inbound or outbound, where freight is loaded or discharged by vessels direct overside to or from water or barge. On account of railroad competition experienced by vessels in the Pacific coastwise trade, the service charges in that trade are 20 cents, inbound, and 10 cents outbound, carload; and 40 cents, inbound, and 20 cents, outbound, less than carload, where freight is not loaded or discharged by vessels direct to or from open cars and is not loaded or discharged by vessels direct overside to or from water or barge; 10 cents, inbound or outbound, where freight is loaded or discharged by vessels direct to or from open cars, and 5 cents, inbound or outbound, where freight is loaded or discharged by vessels direct overside to or from water or barge.

552.55; carloading $10,357.12; handling $17,877.88; berthage, $1,782.17; and extra labor, $5,819.56, a total of $48,389.28.[5] The "job cost," which includes the cost of checking, handling, carloading and unloading, insurance, social security—in fact, all expenses chargeable to the operation of the terminal except general and administrative expenses and depreciation—was $65,605.53, and general and administrative expenses and depreciation amounted to $6,207.68. Per ton, therefore, the total expense was $1.736 as against earnings of $1.17, which resulted in a net loss of 56.6 cents. What the result was as regards the respective items of handling, carloading or unloading, or the items covered by the service charges is not shown.

G & S Handling Company, handling exclusively traffic to and from Alaska, nearly all of which is conveyed to and from the piers in trucks, does little carloading or unloading and relies for its revenue almost entirely on the handling, wharfage, and service charges. It entered the terminal business at piers 50 and 51, Seattle, on June 1, 1946. Beginning the following September, it was, for some time, affected by strikes. Cost studies presented for June, July, and August 1946, show that the freight amounted to 50,405 tons and that expenses were as follows: gross wages for dockmen, including insurance and taxes, $57,501.65, $1,765.52 of which was retroactive pay; checking cost, $31,345.42; rent, $15,750, and other operating and dock expenses, $27,865.72. The total expense for the three-month period was $132,462.79, and the average cost per ton was, for dockmen, $1.14, including retroactive pay; for checking, 62 cents; for rent, 31 cents, and for other operating and dock expenses 55.2 cents, a total of $2.622. The revenue for the same period amounted to $81,892.64, or $1.62 per ton, resulting in a loss of $50,570.15, or an average of $1 per ton.

Using the same tonnage figure, namely, 50,405, and taking into consideration wage increases between August 1946 and January 2, 1947, it is estimated that, even with the service charges and the emergency charge of 50 percent in effect, the result would be an average loss of 63 cents per ton.

Respondents are not performing under the new tariff any services not performed under the old tariff, although an apparent new service has been added covered by the service charge. As appears hereinbefore, respondents have eliminated checking from the items formerly covered under "handling" and carloading and unloading but they have placed it in the service charge. It does not appear, however, from which of the former charges the other items enumerated under

[5] There is a slight difference between this total and $48,763.56 appearing on an exhibit of record.

the service charge were taken. Each of the handling and carloading and unloading charges was increased by 20% of the basic rates in spite of the deletion of the checking service from each charge. The wharfage charge was not increased unless the service of ordering cars, barges, or lighters, now item No. 8 in the proposed "Service Charge," was originally covered under wharfage. This item No. 8 is clearly a service performed for the cargo except in those cases when barges or lighters may be ordered to effectuate a transshipment. It was of paramount importance, under all the circumstances, that there be presented to us cost studies showing the expense of performing each service so that any question as to the measure of the charge, with the attendant cost, and as to the existence of duplicate charges for the same service, could be resolved.

Except in the case of G & S Handling Company, no cost studies showing the expense of performing any of the services here involved are presented. It appears that, with perhaps a few exceptions, respondents possess no such information. As cost is the very basis of the contention that the charges in question are justified, the record leaves in doubt the correctness of respondents' position. They will be expected to make such studies and keep such records as will enable them to report within 3 months of the date hereof, with supporting data, the financial results of their operations over a test period for each service for which they publish rates or charges.

Our conclusions as to the need for clarity and accuracy of definitions of services applicable to the Seattle operators applies with equal force to the operators of terminals in the other ports within the scope of the Association. Whether or not there is any justification for differences in the services offered as between the different ports or for differences in the charges for the services does not appear. The operators of the terminals at the other ports will be expected to prepare and submit, within the same time, data of costs similar to that requested of the operators parties to Seattle Terminals Tariff No. 2–C.

We find: (1) that the definition of "service charge" contained in Seattle Terminals Tariff No. 2–C is an unjust and unreasonable regulation relating to the receiving and delivering of property, in violation of section 17 of the Shipping Act, 1916, and should be corrected in line with suggestions heretofore made; (2) that the definitions in Seattle Terminals Tariff No. 2–C under "Handling Defined" and "Handling Charge Defined" are unjust and unreasonable regulations relating to the handling of property in violation of section 17 of the Shipping Act, 1916, and should be corrected in line with suggestions heretofore made; and (3) that the definitions in Seattle Terminals

Tariff No. 2–C under the headings "Loading or Unloading Defined" and "Loading or Unloading Charges Defined" are unjust and unreasonable regulations relating to the receiving and delivering of property, in violation of section 17 of the Shipping Act, 1916, and should be corrected in line with suggestions heretofore made.

No order will be entered at this time.

Commissioner McKeough, not having been present at the argument, did not participate in the disposition of this proceeding.

By the Commission.

[SEAL] (S) A. J. WILLIAMS,
Secretary.

3 U. S. M. C.

UNITED STATES MARITIME COMMISSION

No. 652

RATES BETWEEN PLACES IN ALASKA

Submitted January 7, 1948. Decided April 15, 1948.

Rates, fares, and charges of Lomen Commercial Company are unjust and unreasonable in violation of section 18 of the Shipping Act, 1916.

Lomen Commercial Company does not file with the Commission schedules showing all of its rates, in violation of section 2 of the Intercoastal Shipping Act, 1933, as amended.

Failure of Lomen Commercial Company to observe the free-time provision of its tariff violates section 2 of the Intercoastal Shipping Act, 1933, as amended.

Kotzebue Sound Lighterage Company, charging the rates covered by the special contract with Magids Bros., violates section 18 of the Shipping Act, 1916, and section 2 of the Intercoastal Shipping Act, 1933, as amended; it also violates section 2 of the 1933 Act with respect to the rates charged pursuant to its other special contracts.

Appearances shown in prior report.

REPORT OF THE COMMISSION

BY THE COMMISSION:

In the original report herein (3 U. S. M. C. 7) we found that respondents, in so far as they furnish ship-to-shore and shore-to-ship services at vessel anchorages in Alaska, are subject to the Shipping Act, 1916, as amended, and to the Intercoastal Shipping Act, 1933, as amended, where they do not perform or participate in the line haul of the ocean carrier. The matter was remanded to the examiner for a supplemental report on the lawfulness of respondents' rates, fares, charges, regulations, and practices. In his supplemental report the examiner found that the rates, fares, and charges of Lomen Commercial Company are unjust and unreasonable; that Lomen's statement of rates as percentages of rates of Alaska Steamship Company violates section 2 of the Intercoastal Shipping Act, 1933, as amended; that

Lomen's failure to observe the free-time provision of its tariff violated section 2 of the 1933 Act, as amended; and that the rates of Kotzebue Sound Lighterage Company are unjust and unreasonable and also violate section 2 of the 1933 Act, as amended.

Exceptions to the supplemental proposed report were filed by Lomen, but oral argument was not requested. Our conclusions agree with those of the examiner.

Lomen Commercial Company.—The season of navigation in the area in which Lomen operates is limited by weather conditions to approximately the five-month period from June to October, inclusive. Preparations for operation begin in March and continue until the arrival of the first ship from Seattle, about June 10. During this period, resuming work that the weather permitted to be started at the close of the preceding season, Lomen repairs its tugs and otherwise gets things ready for the coming season's business. Tugboat captains, mechanics, and other "key men" not locally available are obtained in the States. Eskimos, principally inhabitants of King Island, about 90 miles from Nome, are employed for barge and longshore work. When the season is over, these men are removed from the payroll. The Eskimos from the island are returned there by Lomen at its expense or by the Indian Service. Lomen pays for the transportation of the "key men" back to the States. Most of Lomen's office personnel in Nome then depart for Seattle, where they are employed by Lomen during the winter months.

Normally seven ship arrivals constitute a good season. Depending on the weather, the discharging from ship to barges of cargo for Nome, which is done by the ship's crew, may be accomplished in 1.5 days, or it may require 3 days. As much as 3,000 tons of cargo has been unloaded into barges in a 24-hour period. Due to storms or other causes, there are often intervals of hours and, at times, a day or two during which the unloading of ships is suspended. Some of the storms that rage over the Bering Sea and along the coast of the Seward Peninsula have been so violent that the inhabitants of Nome have considered moving the town to a new location. The worst of these storms, which occurred in 1913, almost completely destroyed the facilities and equipment of a lighterage company then serving Nome. In October 1946, Lomen's machine shop there was so badly damaged by a storm as to be beyond repair.

Lomen's rates for the movement of cargo between ship and shore, including handling between barge and place of rest, are, with certain exceptions, specified percentages of the rates of Alaska Steamship Company for the transportation from Seattle. At the time of hearing,

they were 50 percent at Nome, Golovin, and Teller and 55 percent at Solomon and Bluff. For the carriage of passengers between ship and shore, Lomen receives $2.50 per person.

In addition to conducting ship-shore operations, Lomen engages in coastwise transportation between various points on the Seaward Peninsula.

Except to the extent hereinafter indicated in reference to passenger, storage, and miscellaneous earnings, the evidence as to Lomen's revenues and expenses in connection with the ship-shore and coastwise services above mentioned is not so presented as to show the amounts thereof applicable to the respective services. Necessarily, therefore, such revenues and expenses will be treated as a whole in this report. They will be spoken of as revenues and expenses of the lighterage department to distinguish them from revenues and expenses of Lomen's sales department, which is separate and apart from the Nome transportation business.

In the following table are shown the gross revenues of the lighterage department for the years from 1940 to 1945, inclusive, and the cargo tonnage from the carriage of which such revenues, with the exceptions indicated in the table, were derived:

TABLE 1

Year	Commercial cargo	Army cargo	Total cargo	Gross revenues
	Tons	*Tons*	*Tons*	
1940	18,991	4,000	22,991	[1] $197,723.29
1941	29,730	8,232	37,962	[2] 312,213.61
1942	41,268	108,919	150,187	[3] 885,565.95
1943	17,408	63,122	80,530	[4] 710,006.81
1944	20,490	42,409	62,899	[5] 536,930.90
1945	15,568	65,430	81,298	[6] 801,952.07

[1] Includes revenue as follows: Passenger, $1,939.50; storage, $1,056.77; miscellaneous, $2,756.73.
[2] Includes revenue as follows: Passenger, $3,397; storage, $1,055.72; miscellaneous, $2,614.16.
[3] Includes revenue as follows: Passenger, $5,385; storage, $572.25; miscellaneous, $4,243.62.
[4] Includes revenue as follows: Passenger, $7,187.50; storage, $45.48; miscellaneous, $8,259.04.
[5] Includes revenue as follows: Passenger, $2,811.40; storage, $57; miscellaneous, $5,320.31.
[6] Includes revenue as follows: Passenger, $3,802.50; storage, $247.75; miscellaneous, $7,827.13.

For 1946, Lomen computes its lighterage department's freight revenue as $266,470.34. This sum appears in an exhibit submitted by Lomen after the close of the hearing, by agreement, and includes only one-fourth of all of the bulk oil products carried for the reason that such cargo "produces approximately one-fourth the revenue per ton and costs less per ton to handle." The reason does not justify use of the figures employed. In the case of bulk oil products, as in the case of other commodities, consideration should be given to the full revenue received. Including the excluded tonnage at the tariff rate on oil and

petroleum products, the lighterage department's freight revenue for 1946 was $345,008.74, made up as follows:

TABLE 2

	Commercial cargo	Army cargo	Surplus property	Total
Ship-shore:	*Tons*	*Tons*	*Tons*	*Tons*
In-bound	[1] 12,399	[2] 12,399	0	24,789
Out-bound	1,257	1,090	3,774	6,121
Coastwise	126	2,167	4,636	6,929
Total	13,773	15,656	8,410	37,839
	Revenue	*Revenue*	*Revenue*	*Revenue*
	$122,528.21	$134,109.36	$88,371.17	$345,008.74

[1] Includes 2,977 tons of bulk oil products excluded by Lomen.
[2] Includes 7,357 tons of bulk oil products excluded by Lomen.
Adding passenger and miscellaneous earnings of $5,352.31 to the above total of $345,008.74 results in lighterage-department gross revenue for 1946 of $350,361.05.

Lomen excepted to the examiner's increase of the revenue shown on the exhibit by the amount indicated as left out, and claimed that the exhibit only excluded the tonnage but did not exclude the revenue represented by excluded tonnage. No opportunity was given to examine the exhibit at the hearing or to cross-examine the person who compiled it. The sum used by the examiner coincides with other evidence on the average revenue per ton received by Lomen and, therefore, will be used for the purpose of this report.

For the six years from 1940 to 1945, inclusive, Lomen's operating costs in the lighterage department, i. e., those exclusive of general and administrative expenses, were as follows: 1940, $113,079.41; 1941, $150,483.24; 1942, $388,088.51; 1943, $334,510.35; 1944, $325,131.87; and 1945, $395,523.96.[1] According to a preliminary statement, which is subject to change for what are said to be minor year-end adjustments, the operating costs in the lighterage department for 1946 amounted to $231,510.85.

The contention that the operating costs vary with the volume of tonnage handled and must be calculated on that basis is not borne out by the figures. It is stated that, if the sum of $231,510.85 represents actual outlays in 1946, Lomen must have selected that year for making large expenditures for nonrecurring items. The record does not show such to be the case. The sum does include an unspecified amount for depreciation on dwellings in Nome which cannot properly be classed as operating properties. As indicated in footnote 1, the amount shown for such depreciation in 1945 is $1,405.09.

[1] A portion of each of these sums represents depreciation on dwellings improperly included as lighterage-department property. The amount of such depreciation is not shown, except $1,405.09 for 1945. The highest total depreciation, including that on dwellings, was $18,216.65 in 1943.

To show the amount of the lighterage department's general and administrative expense for 1946, Lomen distributes between this department and its sales department the total general and administrative expense of $152,223.36. The largest of the items composing this sum consists of salaries of Lomen's officers. These officers, all stockholders in Lomen, which is "largely a family affair," are the president, three vice presidents, one of whom is also treasurer, and a secretary. With the exception of the secretary, who received less, each of them in 1946 received a salary of $12,500 and a bonus of $5,000. Thus, their salaries and bonuses, aggregating $59,000 and $23,000, respectively, amounted in all to the total of $82,000. The distribution made by Lomen of this expense is 15.416 percent, or $12,641.12, to the sales department and 84.584 percent, or $69,358.88, to the lighterage department. The result of this distribution is to take for the single item of officers' salaries approximately 20 percent of the lighterage department's gross revenue. The other general and administrative expenses, amounting to $70,223.36, are distributed between the two departments according to the same percentages. As a consequence, of the total expense of $152,223.36 for the two departments, $128,756.61 is borne by the lighterage department.

The expense attributed to the lighterage department for officers' salaries and bonuses and by far the greater part of the total cost of the other items entering into the sum of $128,756.61 are allocated, by a further distribution, to Lomen's Seattle office. This office was established in 1927. It is in a suite of rooms partly occupied by Lomen Equipment Company, which was formed by some of Lomen's sales-department employees and others in 1945. So far as the lighterage department is concerned, the main function of the Seattle office is the making of purchases, which in 1946 amounted to less than $17,000. The office does not appear to be necessary to the business of the lighterage department, and, no doubt, the Nome office could absorb the work that it does for that department at a small fraction of the present cost thereof. The sum of $20,000 will be allowed for officers' salaries and other expense to the Nome office that elimination of the Seattle office might entail. This does not mean that the Seattle office must be eliminated, but, if it is retained, the lighterage department shall not be charged in excess of the amount specified for its expenses.

The general and administrative expenses charged by Lomen to the Nome office in 1946 amounted to $26,925.43. As in the case of the Seattle office, 84.584 percent of this expense is allocated by Lomen to the lighterage department and 15.416 percent to the sales department. These percentages purport to be the proportions that the lighterage

department's gross revenue and the sales department's gross profit, respectively, bear to the sum of such revenue and profit. Inasmuch as the lighterage department's gross revenue, unlike that of the sales department, does not include an amount for such an item as cost of goods sold, Lomen excluded the cost of goods from the gross revenue of the sales department in arriving at its method of distribution. The Alaska Development Board and the Territory of Alaska contend that the allocation should be based on the gross revenue of each department notwithstanding the sales department's gross revenue includes cost of goods. As stated above, the gross revenue of the lighterage department in 1945 was $350,361.05. The sales department's gross revenue and gross profit were $110,679.24 and $50, 018.69, respectively. Deducting from the above-mentioned sum of $26,925.43 the amount of $3,219.78 included therein for "dwellings expense," which is not properly chargeable to the lighterage department, leaves an expense of $23,705.65. According to the method used by Lomen, without the exclusion of any of the oil-products tonnage, however, 87.507 percent of this expense would be allocated to the lighterage department and 12.493 percent to the sales department. If no deduction should be made from the gross revenue of the sales department, 24.006 percent of the expense would be allocated to that department and 75.994 percent to the lighterage department. Under the first method, the lighterage department's expense amounts to $20,744.10; under the second $18,014.87. The first method does not appear to be unfair. Accordingly, $20,744.10 is found to be the amount of the general administrative expense properly chargeable to the lighterage department in addition to the amount allowed above in the discussion of the Seattle office.

As of December 31, 1946, the cost of acquisition by Lomen, plus additions and betterments, less accrued depreciation, of the lighterage department's fixed assets, including land, buildings, and floating and shore equipment, was $110,007.36.[2] It is contended by Lomen that the replacement cost new of these assets and such cost less depreciation would be $697,173.54 and $396,303.54, respectively. These estimates are the result of collaboration between employees of Lomen with little or no previous experience as regards such matters.

The working capital for Lomen's two departments, sales and lighterage, in 1945 amounted to $298,274.29. For the lighterage department

[2] This sum is composed of the following amounts: $233,772.27, cost of buildings and floating and shore equipment acquired up to December 31, 1945, plus cost of additions and betterments, less $21,422.90, cost of dwellings improperly included as property of the lighterage department, less $129,686.29, depreciation on lighterage-department property, excluding dwellings, plus $13,323.54, cost of land up to December 31, 1945, plus $14,020.80, cost of lighterage-department property, excluding dwelling, acquired in 1946.

alone in 1946, Lomen's estimate of the working capital necessary is $63,514.39. This does not appear to be excessive.

As to a fair return, certain interveners suggest that Lomen should be allowed 7 percent on its capital stock of $250,000. With weight given to the above estimates of reproduction cost along with the amounts shown for acquisition costs, additions and betterments, depreciation, and working capital, the value for rate making purposes of the lighterage department's property does not exceed $250,000. Lomen contends that it should be allowed 10 percent as a fair rate of return. It points out that the prevailing rate of interest on loans in Nome is 8 percent and claims that it is entitled to a return of a higher percentage in view of the risks to which its lighterage business is subject. A similar position has been taken in previous cases by Alaska Steamship Company, whose ships operate to and from Nome anchorage. In *Alaskan Rates*, 2 U. S. M. C. 558, we found that the rate of return on the value of the property of Alaska Steamship Company devoted to Alaskan common-carrier service should not exceed 7.5 percent, which later (2 U. S. M. C. 639) was reduced to 6 percent. A rate of return not to exceed 7 percent was allowed in *Rates of Inter-Island Steam Navigation Co., Ltd.*, 2 U. S. M. C. 253. Like the risks considered in the cited cases, those here are generally covered by insurance, which, as an item of operating costs, enters into the rates charged the public for the services performed. Bearing on the question of risk involved in Lomen's operations is the testimony that it "never lost one piece of equipment for the U. S. Army during the war," although it carried for the Army 108,919 tons of cargo in 1942, 63,122 tons in 1943, 42,409 tons in 1944, and 65,430 tons in 1945; also, that it "never lost a life." Moreover, the lighterage department has no competition to jeopardize Lomen's income.

As of December 31, 1945, Lomen's net worth, represented by capital stock of $250,000 and surplus of $229,497.71, was $479,497.71, as against a net worth of $280,797.73 on December 31, 1939, when its capital stock and surplus were $250,000 and $30,797.73,[3] respectively. The risks on which Lomen places emphasis are those to its buildings and equipment in Nome after the season of navigation has closed, particularly hazards from fall and winter storms, against which it has been unable to obtain insurance. Some of these storms, as previously stated, are violent, but Lomen's loss from them over the years of its existence does not appear to have been great. Certainly, no risks are indicated which

[3] This surplus of $30,797.73 was accumulated over a period of nine years, during which Lomen's average net income after taxes was less than 2 percent of its capital stock. In this period it paid a dividend of $3,000.

would warrant the rate of return which it seeks. A fair rate should not exceed 7 percent. The sum of $17,500 is found to be a fair return.

Thus, on the basis of figures for 1946, with a minor exception, the following results appear in respect to the lighterage department:

Revenue		$350,361.05
Expenses:		
Operating	[1] $230,105.76	
Administrative, Seattle office	20,000.00	
Administrative other than Seattle office	20,744.10	
Total		270,849.86
Net income before income taxes		79,511.19
Income taxes		30,214.25
Net income		49,296.94
Fair return		17,500.00
Excess of net income over fair return		31,796.94

[1] $231,510.85 less $1,405.09, 1945 depreciation on dwellings.

To the extent that Lomen's rates, fares, and charges yield net income in excess of the amount found herein to be a fair return, they are, and for the future will be, unjust and unreasonable, in violation of section 18 of the Shipping Act, 1916.

Lomen's method of charging for ship-shore services according to certain percentages of Alaska Steamship Company's rates from Seattle is objectionable. The latter rates are not a part of Lomen's tariff. Section 2 of the Intercoastal Shipping Act, 1933, as amended, requires the filing of schedules "showing all the rates." To comply with this requirement, the rates must, in accordance with the Commission's tariff regulations, be stated in cents or in dollars and cents per cubic foot, per 100 pounds, or other unit or basis. By using the percentage method, Lomen is not "showing all the rates" for its ship-shore service. It is, therefore, violating section 2.

Lomen at times allows a longer period of free time than is permitted by the rule in its tariff that "Storage will be charged on shipments not removed within five days." Thus, it violates the provision of section 2 of the Intercoastal Shipping Act, 1933, as amended, which forbids the extension to any person of any privilege or facility except in accordance with tariffs on file and in effect at the time.

Kotzebue Sound Lighterage Company.—A contract dated October 4, 1943, exists between "Boris Magids and Elizabeth M. Cross heretofore doing a lighterage business under the name and style of Kotzebue Sound Lighterage Company at Kotzebue, Keewalik, Deering and along the shore of the Arctic Ocean in the Territory of Alaska, the

parties of the first part, and Archie R. Ferguson of Kotzebue, Alaska, the party of the second part." These parties concurrently executed another agreement whereby the party of the first part sold and conveyed to the party of the second part the tug, lighters, barges, and equipment of the Kotzebue Sound Lighterage Company. Ferguson now operates under the name of this company. The parties of the first part agree that they will not directly or indirectly enter into the lighterage business at any of the points mentioned for the period of five years from the date of execution of the contract, and the party of the second part agrees "to lighter all freight from ship to shore of said parties of the first part individually or as co-partners of the firm under the firm name and style of Magids Brothers, and all freight purchased by the parties of the first part individually or as co-partners under the name and style of Magids Brothers which is purchased by them for others. Such freight to be lightered by the party of the second part at the rate of $2.00 (two dollars) per ton, measurement or weight as expressed in bills-of-lading of steamship companies. Such lightering of such freight to continue for a period of five years from the date hereof * * *".

At Kotzebue, Deering, and Keewalik, Kotzebue Sound Lighterage Company lightered for Magids Brothers approximately 1,400 tons of freight in 1945 and 1,350 tons in 1946. This respondent's tariff on file with the Commission did not then, nor does it now, contain a rate of $2.00 per ton, weight or measurement. The lowest weight rate named therein was and is 28 cents per 100 pounds ($5.60 per ton), and the lowest measurement rate, 15 cents per cubic foot ($6.00 per ton, i. e., 40 cubic feet). All other rates of this respondent are higher. By transporting cargo at the $2 rate, respondent violates the provision of section 2 of the Intercoastal Shipping Act, 1933, as amended, which forbids any carrier subject thereto to "charge or demand or collect or receive a greater or less or different compensation for the transportation of passengers or property 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 duly posted and in effect at the time." Moreover, the $2 rate is not sufficient to cover the cost to respondent of labor, fuel, and supplies, not to mention other costs, and, as a consequence, an undue burden is cast upon traffic not embraced within the contract in question. The rate, therefore, is unjust and unreasonably low in violation of section 18 of the Shipping Act, 1916.

Kotzebue Sound Lighterage Company also carries freight under other contracts. The rates charged under such contracts, while higher than those accorded the parties to the contract discussed above, nevertheless, like the latter, depart from the tariff on file with the Com-

mission. Therefore, by charging these rates, respondent violates section 2 of the Intercoastal Shipping Act, 1933, as amended.

We find: (1) that, to the extent that Lomen's rates, fares, and charges yield net income in excess of the amount found herein to be a fair return, they are, and for the future will be, unjust and unreasonable, in violation of section 18 of the Shipping Act, 1916; (2) that Lomen does not file with the Commission schedules showing all of its rates, in violation of section 2 of the Intercoastal Shipping Act, 1933, as amended; (3) that Lomen allows a longer period of free time than that permitted by its tariff on file with the Commission, in violation of section 2 of the Intercoastal Shipping Act, 1933, as amended; (4) that the rates charged by Kotzebue Sound Lighterage Company under the contracts discussed herein violate section 18 of the Shipping Act, 1916, and section 2 of the Intercoastal Shipping Act, 1933, as amended; and (5) that no violation of law by any of the other respondents is shown.

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 15th day of April A. D. 1948

No. 652

RATES BETWEEN PLACES IN ALASKA

This proceeding having been instituted by the Commission on its own motion, 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 containing its conclusions and decision thereon, which report is hereby referred to and made a part hereof;

It is ordered, That respondents Lomen Commercial Company and Kotzebue Sound Lighterage Company be, and they are hereby, notified and required to cease and desist on or before May 15, 1948, and thereafter to abstain from the violations herein found.

By the Commission.

[SEAL] (S) A. J. WILLIAMS,
Secretary.

UNITED STATES MARITIME COMMISSION

No. 661

ALASKAN RATE INVESTIGATION No. 3

Submitted February 25, 1948. Decided June 15, 1948

The rates, fares, charges, regulations, and practices of respondents Alaska Steamship Company, Alaska Transportation Company, and Northland Transportation Company not shown to be unlawful.

The record held open for submission of additional evidence reflecting respondents' operations from October 1, 1947, to June 1, 1948.

Stanley B. Long, *Ira L. Ewers*, and *Albert E. Stephan* for respondents

Ralph J. Rivers, *Malcolm D. Miller*, *Ralph L. Shepherd*, *Herald A. O'Neill*, *H. O. Berger*, *Donald Wallace*, *Germain Bulcke*, *Nathan Jacobson*, *Philip Eden*, *Omar O. Victor*, *Norman C. Stines*, and *Felix S. Cohen* for interveners.

Paul D. Page, *Clarence J. Koontz*, and *Guy M. Carlon* for the Commission.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions were filed to the examiners' proposed report by the Territory of Alaska and Alaska Steamship Company.[1] Our conclusions do not differ from the recommendations of the examiners.

This was an investigation instituted upon our own motion to determine the lawfulness of the rates, fares, charges, regulations, and practices of respondents Alaska Steamship Company, Northland Transportation Company, and Alaska Transportation Company, common carriers by water engaged in transportation between the Puget Sound area of the State of Washington and ports in Alaska.

[1] Alaska Steam's exception was a technical one merely to correct an error in a table in the report.

The Territory of Alaska, Alaska Development Board, United States Department of the Interior, Alaska Salmon Industry, Inc., Seattle Traffic Association, Tacoma Chamber of Commerce, International Longshoremen's and Warehousemen's Union (C. I. O.), National Union of Marine Cooks and Stewards (C. I. O.), United States Smelting, Refining and Mining Company, Fairbanks Chamber of Commerce, and Alaska Miners Association intervened. The United States Department of the Interior was not represented at the hearing.

The investigation was ordered on June 4, 1947, shortly after respondents had started operations for their own account under an interim agreement between them and the Commission dated May 15, 1947. This agreement was entered into pursuant to the powers given us by Congress in Public Law 12 of the 80th Congress to assist in the establishment of essential privately owned and operated water transportation for the Territory of Alaska. Under the agreement we chartered at a nominal hire of $1.00 per vessel per annum such additional vessels as respondents required, and we also relieved the respondents of the financial obligation to insure the hull and machinery risks of the vessels thus chartered as well as those owned by them. Respondents were obligated to file tariffs where they did not already have them on file in accordance with the Intercoastal Shipping Act, 1933, as amended.

For transportation purposes the Territory is divided into Southeastern Alaska, running from Ketchikan to Cape Spencer; Southwestern Alaska, running from Cape Spencer to Kodiak Island and the Alaska Peninsula; the Aleutian Islands; Bristol Bay; Kuskokwim River-Goodnews Bay area; and the Nome area. Alaska Steamship Company was authorized to serve all parts of Alaska generally, provided that, if and when Santa Ana Steamship Company resumed service to the Kuskokwim River-Goodnews Bay area Alaska Steamship Company would cease service there. It filed initial tariffs covering transportation to the various localities. At the time of the hearing it operated 13 vessels chartered from the Government at the nominal price referred to above, and operated 4 of its own vessels, 3 of which were combination passenger-cargo vessels. It owned one other combination passenger-cargo vessel which it chartered to Northland Transportation Company at $1.00 per year.

Northland Transportation Company was authorized to operate in Southeastern Alaska only, except that the combination passenger-cargo vessel chartered to it by Alaska Steamship Company might be used in joint service with the combination vessels of the Alaska Steamship Company wherever the latter were used. It operated five Government-owned vessels in addition to the combination passenger-

cargo vessel. Northland was also authorized to enter into contracts with the Army for the transportation of military cargo to or from any place in Alaska. Initial tariffs covering the trades so authorized were filed.

Alaska Transportation Company operated four Government-owned vessels chartered to it. It served Southeastern Alaska only and had on file tariffs covering this transportation. It also was authorized to carry military cargo to or from any part of Alaska under special contract with the Army.

During World War II the Territory of Alaska was served by respondents acting as agents for the Government, which had requisitioned respondents' vessels. During 1946 the Government suffered losses in the Alaska trade estimated at about $4,000,000. The tariffs filed under the interim agreement were designed to increase revenues approximately 35 percent. This was not done by a straight percentage increase of the rates on all items, but in a manner designed to affect the internal economy of the Territory of Alaska as little as possible. For example, rates on agricultural implements and building material were increased very little, and, at the request of the Territory, groceries were removed from the general merchandise item and given a lower commodity rate. The rates on general merchandise N. O. S. were increased generally by 39 to 50 percent and on canned fish by 43 to 58 percent. Where respondents served the same localities their tariffs were identical.

We find no occasion to change our previous observations as to the general characteristics of this trade. *Alaskan Rates*, 2 U. S. M. C. 558, 559. It is an unusually hazardous one; involves an exceptional number of ports or small places to be served; is extremely seasonal; and were it not for the salmon industry and the transportation of canned salmon, almost everything would move northbound and very little southbound. As the result of World War II there has been an increase in the number of military installations and in military personnel in Alaska. What effect this will have on the future need for transportation is problematical. The civil population is only approximately 90,000, of which approximately 30,000 are Indians and Eskimos. During the canning season the population is increased by approximately 10,000 workers, who are brought into the Territory by the canning industry. The tariffs indicate that there are in Southeastern and Southwestern Alaska some 13 principal ports of call and 93 outports. All outports are not served on every voyage but do receive service when cargo offers.

Rates in other trades.—Attempts to compare the rates in the Alaskan trade with rates to Hawaii and Puerto Rico have no significance by

reason of the lack of similarity in the trades. The latter trades are not as unbalanced; are not as seasonal; are not as dangerous; and do not require lay-up of ships by reason of the closing of navigation during the winter months. Moreover, the population of Hawaii and Puerto Rico is far in excess of that of Alaska and the volume of freight much greater. The number of ports served in Hawaii and Puerto Rico is small compared with the number served in Alaska.

Traffic pattern.—Northbound cargo destined to the canneries, such as material necessary for their upkeep and groceries and provisions for personnel, amounts to approximately 50 percent of the total north-bound movement, while the products from the canneries, such as canned salmon, frozen fish, etc., amount to approximately 85 percent of the total south-bound movement. The cannery traffic is particularly seasonal. The movement of supplies such as fiber boxes, cans, cordage, netting, groceries, provisions, and building materials begins in March and tapers off in July and August. There are 10 fishing districts, the opening and closing of which are determined by the run of the fish and are limited in time by the Department of the Interior, and the times vary in the different districts. The fishing period is comparatively short. Canning starts approximately coincident with the fishing and continues through the period. Immediate transportation is required in practically all of the districts because of the lack of adequate warehousing facilities to prevent freezing.

About 20,000 tons of cargo a year go to Bristol Bay, commencing in the middle of May, as compared with approximately 1,500 tons of town freight.[2] The bulk of the cargo is in shipload lots destined directly for the area, and whether consigned to the canneries or to civilians, is lightered ashore and handled over the cannery docks by cannery personnel. The salmon pack begins to move in the latter part of May or early June, amounts to from 40,000 to 50,000 tons a year, and moves almost entirely in shipload lots from Dutch Harbor to Puget Sound without intermediate stops. Because of ice and weather conditions, tugs and barges belonging to the canneries have to be pulled out of the water at the end of the season.

At Kodiak and in the Peninsula area about 30,000 or 40,000 tons of canned salmon south-bound can be counted upon annually, with a north-bound average movement of from 12,000 to 15,000 tons of supplies. There are approximately 2,500 tons of north-bound town freight to the same area. The ports in these areas are open the year around and the season is considerably longer than that at Bristol Bay. The first of the salmon pack is available about the 10th of June. At Cook

[2] Town freight is freight which is not military or cannery cargo, either north- or south-bound.

Inlet there is an annual south-bound movement of approximately 7,000 or 8,000 tons of canned salmon; at Prince William Sound and Copper River, approximately 20,000 tons. Southeastern Alaska, the largest producing area, originates about 60,000 tons of canned salmon annually.

The movement of both north-bound and south-bound cannery cargo requires immediate availability of tonnage. Speed of handling rather than regularity of service is necessary. The civilian population, on the other hand, requires a regular scheduled service in order that the merchants may be assured of ample supplies and not be required to maintain extensive warehouse facilities. Even with the present service the retailer has to be his own warehouseman.

Passenger traffic.—There is an increased tendency on the part of the canneries to utilize air rather than water facilities in transporting annually their 10,000 personnel from the United States to Alaska inasmuch as wages begin when personnel is signed on in Puget Sound and are paid during the period of transportation. As soon as expanded air facilities can be provided very few of the cannery passengers will move by water.

While this tendency will have an effect upon the advisability of the continued use of passenger vessels, the evidence applicable only to one peak season of operation is not sufficient to arrive at a definite conclusion that passenger demand will not appear elsewhere to take the place of the loss of the cannery passengers. At the present time the income from the passengers carried cannot be ignored. In the case of Alaska Steamship Company, the revenue received from passengers during the period under consideration was 16 percent of its entire revenue. However, each carrier must scrutinize continually and with great care the operation of its passenger vessels to be sure that it does not result in such loss as will affect seriously the level of its freight rates.

Operating costs.—Respondents' costs of operation are high for the following reasons: wages increased approximately 150 percent between 1939 and 1947; the small amount of cargo at the majority of the ports served increases the relative cost per ton for handling; the lack of stevedores and the consequent use of crews increased overtime; the varied character of north-bound cargo does not lend itself to volume movement and thereby increases the costs of handling both prior to loading and in the actual loading and unloading; the lack of proper terminal facilities at many of the larger ports causes delays to ship and crew; subsistence is increased because of the number of meals that must be served not only to the regular crews but also to longshoremen and guards. Alaska Steamship Company's experience with claims for loss and damage to northbound cargo is slightly less than 3 percent of the entire

revenue. These losses are occasioned by improper and insufficient packaging, rough handling, and pilfering. The experiences of the other respondents are similar. Education and the greater use of mechanical handling devices are being resorted to in an attempt to reduce costs from this source.

Operating results.—Tables I and II show respondents' operating results through September 30, 1947, under the interim agreement:[3]

TABLE I

	Ships	Voyages	Percent of cargo carried by all carriers			Percent of each carrier's total			
			Cannery	Military	Civilian	Cannery	Military	Civilian	Total
ASCO	17	52	77	6	36	85	3	12	100
NTCO	6	24	13	70	35	24	56	20	100
ATCO	4	14	10	24	29	34	35	31	100
Total	27	90	100	100	100				

NOTE.—This table does not include the joint rail and water traffic carried by Alaska R. R. in connection with Alaska Steamship Co.

TABLE II

	Revenue	Expense	Percent of expense to revenue	Net profit before Federal taxes, insurance, charter hire	Estimated adjusted net profit for insurance and charter hire[1]	Estimated amount available for recapture after insurance[2]
ASCO	$4,108,835	$2,877,017	70	$822,990	$631,987	$312,098
NTCO	1,332,418	982,071	74	246,309	159,853	71,070
ATCO	600,560	406,706	68	142,853	138,341	77,952
Total	6,041,813	4,265,794	71	1,212,152	930,181	461,120

[1] The year 1941 is used as a basis.
[2] Marine and war risk hull insurance and charter hire are computed, respectively, at commercial rates and under the Ship Sales Act of 1946.

Table III shows the estimated profit available under the interim agreement for recapture by the Commission on operations through June 30, 1948, and estimated additional income needed for a 10 percent return if the vessels were purchased by respondents and operated through the same period:

[3] Article 5 (a) of the interim agreement provides: "If at the end of the calendar year 1947, or at the termination of this Agreement, or at such other time or times as the Commission may require or the Operators may elect, the cumulative net voyage profit * * * shall exceed ten percent (10%) per annum on the Operator's capital necessarily employed in the business of the vessels * * * the Commission shall be reimbursed in the manner provided below with respect to additional charter hire (to the extent of such profits in excess of ten percent (10%) (per annum) for the actual amount of any otherwise unrecoverable costs and expenses incurred by it pursuant to Article 3 hereof not including, however, the total loss or constructive total loss value of vessels owned by the Commission."

TABLE III

	Estimated profit available for recapture on operations through June 30, 1948	Estimated additional income needed for 10 percent return, before Federal taxes, if vessels purchased and operated through June 30, 1948
ASCO	None	$1,216,332
NTCO	do	463,929
ATCO	do	488,594
Total	None	2,168,855

Respondents' earnings do not appear excessive for the period of operation under consideration, and estimates indicate there will be a large deficit at the conclusion of a full year's operation.

Discrimination.—The fact that rates on fishery products southbound and on some fishing supplies northbound are relatively lower than other rates results, according to the Territory, in undue discrimination and preference in favor of such traffic. It is also argued that the fishery traffic does not bear its fair share of the transportation burden. These contentions fail to take into account the transportation factors underlying the lower rates. As already noted, the volume of cannery traffic is greatly in excess of the town freight, being about 85 percent of the total southbound and better than 50 percent northbound. Southbound cannery cargo is shipped in uniform shaped cases and is cheaper to handle, both as to stevedoring and because of the absence of claims for loss, damage, and pilferage. As also noted, much of the handling at the canneries is done by cannery personnel, which relieves the vessel of some expense. An important consideration is that the vessels get full loads and thereby make quicker and more direct voyages without calling at way-ports. On this record we find that no unlawful discrimination has been shown.

Competition.—Although the rates on cannery traffic were increased as much percentagewise as those on town traffic, the per-ton rates are less. Even if the transportation factors alone did not justify the amount of the differential, there is considerable evidence of possible serious competition. Before World War II the canneries operated approximately 15 vessels of their own, but these were taken over by War Shipping Administration at the outbreak of the war. All had not been used for the transportation of canned salmon, some being chartered to the regular carriers in the Alaskan trade for general operation. The cannery vessels operated during the canning season only and handled no town freight. A majority of the cannery vessels

were not returned to their owners after the termination of the war, and those that were returned were not in usable condition.

Respondents are desirous of retaining the salmon business, and while the canneries have no vessels at the present time, their representative testified that they would consider securing suitable vessels to handle their products if respondents' rates are increased to the point where it will be advantageous for the canneries to take such steps. It was further testified that the salmon rates are about as high as the industry can stand without again using its own vessels. Even at the present level the rates on salmon from the Ketchikan area are such that some of the canneries use their fishing equipment to haul their product to Prince Rupert, British Columbia, from whence it goes via Canadian National Railway, in bond, to the eastern part of the United States. The rail rates are the same from Prince Rupert and Seattle. It seems fairly evident that any increase in the salmon rates will tend to promote the movement via Prince Rupert and invite resumption of operation of cannery vessels from other areas.

Allocation of costs to cannery traffic.—We believe that evidence relating to movement during the peak season only is not sufficient to enable us to judge accurately whether the proper percentage of the costs of operation are allocated to the cannery traffic. Not until we know the results of winter operations in conjunction with the peak summer period can we decide the extent to which the cannery traffic should be charged with capital and general administrative costs.

Relation of freight rates to cost of living—The freight rates applicable in this trade are too often cited as the sole cause for the high cost of living in Alaska. The record does not support any such conclusion. A survey of retail prices as compared with freight rates showed that local competitive conditions operate in Alaska as elsewhere, and have even more effect upon prices than do the freight rates. Of course, the rates do have an effect upon the cost of living, but they do not appear to be the principal cause. Other factors must be considered: lack of local wholesalers and the necessity for carrying larger stocks, thereby increasing handling costs and decreasing rapidity of turn-over; higher wages to merchandising personnel; and higher rents. Manpower and merchandizing and living quarters are scarce.

Joint Rates.—This is a subject which we have considered previously and suggested that the joint rates with Alaska Railroad should be cancelled and replaced by proportionals. *Alaskan Rates*, 2 U. S. M. C. 558, 581. As appeared at that time, no regulatory agency has control of the rates of the Railroad and, therefore, the existence of joint rates tends to take those rates out from under any effective regulation. We believe that ample time has been given the carriers by water to

make the changes suggested. The establishment of such proportional rates by water carriers may resolve the present complaints against the joint rates by interveners Fairbanks Chamber of Commerce and United States Smelting, Refining and Mining Company.

Mining machinery at Nome.—Intervener United States Smelting objects to the rates of Alaska Steam on mining machinery to Nome. The increase on freight N. O. S. is 44 percent, and although the rate on mining machinery was increased 26 percent, some articles which formerly were included under the description of mining machinery have been removed from such classification and are now subject to the N. O. S. rate, which means that the increase as to those articles is 72 percent. Intervener argues that the Nome N. O. S. rate should have been increased percentagewise the same as from Seattle to Ketchikan. Exhibits show, however, that the increase in the latter area was 45 percent whereas the increase to Nome was only 44 percent. Intervener also believes that the articles taken out of the machinery item, and thus made subject to the N. O. S. rate, should be restored to the machinery item. In view of our conclusions, this question could well be held in abeyance.

Miscellaneous issues.—Respondents' revenue and expense figures were not challenged except as to the alleged duplication of overhead through the continued existence of Alaska Steamship Co. and Northland Transportation Co., which are practically of the same ownership. We have been unable to find any indication, however, that a consolidation of these companies would result in such savings as would necessitate a reduction in the present rates. The administrative and general expenses of Northland, less various agency fees for the three and a half months under consideration, was $60,399.34. This amounts to $206,493 per year, and while such sum undoubtedly contains items which could not be eliminated by a merger of the two companies, for present purposes it can be treated as though it could all be eliminated. With this amount added to the net joint income of the two companies, the net profit would not be enough to pay marine and war risk insurance costs, to say nothing of charter hire or depreciation of the vessels used. We do not pass upon the question of whether the two companies should be consolidated as that question is not germaine to the present proceeding. Not until it has been shown that an unnecessary duplication of overhead results in sufficient increased expenses to affect the rate base will that matter be considered.

Efforts were made to inject into the proceeding various questions such as whether the interim agreement was broken by one of the lines, what vessels should be allocated by the Commission to respondents, and whether the agreement should be revised. These are matters

which pertain to the respective rights of the carriers as against each other rather than to the lawfulness of the rates, fares, charges, regulations, and practices, which is the question before us.

CONCLUSIONS

We find that respondents' rates, fares, charges, regulations, and practices have not been shown to be unlawful. The record will be held open, however, for the receipt of additional evidence reflecting respondents' operations from October 1, 1947, to June 1, 1948. In the meantime, it is suggested that respondents, the proper personnel of the Maritime Commission, the Department of the Interior, and the Territory of Alaska get together as soon as possible for the purpose of determining what evidence is needed to show the costs of operation, the revenues, the efficiency of operation, and all other matters relating to the general level of the rates as well as the rates on individual commodities. We are convinced that this is the only way to ensure an adequate record upon which satisfactory findings can be made.

No order will be entered at this time.

By the Commission.

[SEAL] (S) R. L. McDONALD,
Asst. Secretary.

WASHINGTON, D. C., *June 15, 1948.*

UNITED STATES MARITIME COMMISSION

Nos. 669 and 670

HIMALA INTERNATIONAL

v.

FERN LINE, FEARNLEY & EGER AND A. F. KLAVENESS & CO. A/S, BARBER STEAMSHIP LINES, INC., AS AGENTS, AND ADRIATIC, BLACK SEA & LEVANT CONFERENCE

No. 671

HIMALA INTERNATIONAL

v.

GREEK LINE, GENERAL STEAM NAVIGATION CO., LTD., OF GREECE, AS AGENT, AND ADRIATIC, BLACK SEA & LEVANT CONFERENCE

Submitted May 7, 1948. Decided June 15, 1948

Lanolin misclassified in tariff of Adriatic, Black Sea & Levant Conference. No violation of the Shipping Act, 1916, found. Proceedings discontinued.

Hymen I. Malatzky for complainant.
Roscoe H. Hupper and *Burton H. White* for respondents.

REPORT OF THE COMMISSION

BY THE COMMISSION:

These cases were heard together and will be disposed of in one report. Exceptions were filed by the parties to the examiner's recommended decision, but oral argument was not requested. Our conclusions agree with those of the examiner.

Himala International is the name under which Hymen I. Malatzky, an individual, does business as an exporter.[1] Fearnley & Eger and A. F. Klaveness & Company A/S, trading under the name of Fern Line (for which Barber Steamship Lines, Inc., acts as agent), and General Steam Navigation Company, Ltd., of Greece, trading as the Greek Line, are common carriers by water and members of the Adriatic, Black Sea and Levant Conference, hereinafter referred to as the conference. The complaints allege that the rates assessed on commodities shipped by complainant via these lines were and are unduly prejudicial and disadvantageous to complainant and unjustly discriminatory, in violation of sections 16 and 17 of the Shipping Act, 1916. The complaint in No. 671 contains the further allegation that an interpretation placed by the conference on a tariff rule respecting insurance results in violations of sections 14, 15, 16, and 17 of the Shipping Act, 1916. A cease-and-desist order, lawful rates for the future, reparation, and costs are sought.

The commodities involved are cocculus, in bags, which complainant shipped on vessels of the Fern Line and the Greek Line from New York, N. Y., to Piraeus, Greece, and anhydrous lanolin, which complainant shipped on vessels of the Fern Line from New York, N. Y., to Piraeus, Greece, and to Istanbul, Turkey. Neither cocculus nor lanolin is specifically named in respondents' tariff. The rate assessed was the "General Cargo, N. O. S."[2] rate of $37.50 per 40 cubic feet. Complainant contends that cocculus is dried fruit, for which the tariff specifically provides a rate of $30 per long ton, and that lanolin is animal grease, the rate for which is $34.50 per long ton.

The contention that cocculus is dried fruit is founded on the statement contained in the National Formulary (seventh edition) and in the United States Dispensatory (twenty-third edition) that it "is the dried ripe fruit of Anamirta Cocculus (Linne) Wight et Arnott (Fam. Menispermaceas)." Cocculus is known also as fish berry, Indian berry and Levant berries. Complainant concedes that cocculus is poisonous and serves chiefly to provide an ingredient for medicines.

When in dispute, a tariff of a common carrier ordinarily is construed as any other document. *Gt. No. Ry.* v. *Merchants Elev. Co.*, 259 U. S. 285, 291. In *Nix* v. *Hedden*, 149 U. S. 304, it was held that while, botanically speaking, tomatoes were the fruit of a vine, in the common language of the people they were not fruit but vegetables.

[1] Malatzky conducts a forwarding business under the name of Bergen Shipping Service and engages in another business, which includes the filing of claims against carriers and insurance companies, under the name of Maritime Audit and Adjustment Service.

[2] General cargo not otherwise specified.

Though cocculus is a fruit of the vine in the language of botany, it is not a "fruit" in the ordinary sense, hence it is not covered by the tariff description "Fruits, Dried."

The tariff item "Provisions, Ordinary Stowage," includes the following commodities:

Grease, Animal; Lard and Lard Substitute; Meats; Casing, Animal, wet (NOT dry which take Casings, dry Rate) Oils, Neatsfoot, Oleo; Red Animal; Edible Tallow; Sausages; Skins, Dry Salt Fat Back Edible; Stearic Acid; Stearine; Stock, Neatsfoot, Oleo, Edible Tallow; Vegetable Compound.

The item is not so drawn as to limit the term "Grease, Animal" to the commodities thereafter following. "Grease, Animal" therefore should be treated as a commodity separate and distinct from those which follow, and must be given its due weight as including animal grease not included in the specific commodities. Lanolin is animal grease inasmuch as it is refined wool grease. The tariff item above quoted is the one which should be applied to lanolin.

A reading of the tariff item indicates an apparent misuse of punctuation marks. It would appear that a semicolon should be inserted after the end of the parentheses; also, that the semicolons after the words "Oleo" and "Red Animal" should be changed to commas, otherwise there seems to be an unnecessary repetition of "Edible Tallow." It does not appear whether "Skins" is a separate item; if so, the nature of the "Skins" should be set forth. It is assumed that "Dry" applies to "Salt Fat Back" although it may apply to "Skins."

As we said in *Rubber Development Corporation* v. *Booth S. S., Ltd.*, 2 U. S. M. C. 746, 748, "carriers' tariffs are submitted to the rule of interpretation applicable to written instruments generally. This rule is that the tariff, having been written by the carrier, is vulnerable against carriers if the tariff's meaning is ambiguous." Every effort should be made by carriers, particularly those that are members of conferences and therefore parties to the same tariff, to so draw their tariffs as to remove all uncertainties; otherwise there is a possibility of preferences and discriminations in violation of sections 16 and 17 of the Shipping Act, 1916.

It must also be remembered that the continued use of ambiguous items in tariffs with the possible diverse interpretations thereof by the conference members has a serious effect upon the stated goal of the conference, uniform rates. The tariff description here under consideration should be clarified.

The record does not show any movement of lanolin other than that shipped by complainant. Nor is there any evidence that the N. O. S.

rate assessed against lanolin and cocculus resulted in undue preference or disadvantage or unjust discrimination.

Complainant claims that the order in Docket No. 128 (*Section 19 Investigation, 1935*, 1 U. S. S. B. B. 470) was violated in that the Commission was not notified by the conference of its decisions that the proper rate had been charged. Such decisions did not come within the scope of the order, however, and were not required to be filed. Moreover, complainant would not have been differently affected if they had been filed.

Respondents' insurance rule is as follows:

> Rates shown herein do not include Marine Insurance and no premium for account of shipper may be absorbed by the carrier.

Complainant testified that insurance companies charge shippers a higher rate on cargo shipped on vessels of a certain age. The Greek Line does not inform complainant whether the vessel on which his cargo will be transported is one that will entail the higher premium, and complainant contends that the carrier should compensate him to the extent of the extra cost when the higher rate is charged. The rule forbids this, and no violation of the Act is shown to result from such interpretation by the conference.

On this record, no violation of the Shipping Act, 1916, is shown.

An order discontinuing the proceedings will be entered.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 15th day of June A. D. 1948

Nos. 669 and 670

HIMALA INTERNATIONAL

v.

FERN LINE, FEARNLEY & EGER AND A. F. KLAVENESS & CO. A/S, BARBER STEAMSHIP LINES, INC., AS AGENTS, AND ADRIATIC, BLACK SEA & LEVANT CONFERENCE

No. 671

HIMALA INTERNATIONAL

v.

GREEK LINE, GENERAL STEAM NAVIGATION CO., LTD., OF GREECE, AS AGENT, AND ADRIATIC, BLACK SEA & LEVANT CONFERENCE

These cases being at issue upon complaints 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 these proceedings be, and they are hereby, discontinued.

By the Commission.

[SEAL]

(S) R. L. MCDONALD,
Assistant Secretary.

UNITED STATES MARITIME COMMISSION

No. 640

TERMINAL RATE STRUCTURE—CALIFORNIA PORTS

Submitted March 31, 1948. Decided August 24, 1948

Formula approved for segregating terminal costs among wharfinger services at California ports. Publicly owned and operated terminals entitled to a fair return on investment. Decision on other issues deferred until after submission of rates made pursuant to formula.

Paul D. Page, Jr., *John B. Jago*, and *George F. Galland* for the Commission.

Irving M. Smith for City of Long Beach and Board of Harbor Commissioners of the City of Long Beach, *Thomas S. Louttit* and *J. Richard Townsend* for Stockton Port District, *W. Reginald Jones* for the Board of Port Commissioners of the City of Oakland, *Fred N. Howser*, *Harold B. Haas* and *Robert K. Hunter* for the State of California and Board of State Harbor Commissioners for San Francisco Harbor, *Ray L. Chesebro* and *Arthur W. Nordstrom* for the City of Los Angeles, and the Board of Harbor Commissioners thereof, and *Joseph J. Geary* and *Gilbert C. Wheat* for Parr-Richmond Terminal Corporation, Howard Terminal and Encinal Terminals, respondents.

Harry C. Burnett, *Charles W. Bucy*, *H. P. Dechart* and *John S. Griffin* for the U. S. Department of Agriculture, *Emuel J. Forman* for Los Angeles Traffic Managers Conference, *James S. Moore, Jr.* for Pacific American Steamship Association, *James A. Kellar* and *A. Dale Cobb* for Pacific Coast Cement Institute, *Harold W. Wright*, *K. L. Vore* and *C. E. Jacobson* for Los Angeles Chamber of Commerce, *James F. Doetsch*, *James A. Daly* and *Earle W. Shaw* for Chilean Nitrate Sales Corporation, *Robert C. Neill* for California Fruit Growers Exchange, *Eugene A. Read* for Oakland Chamber of Commerce and *Walter A. Rohde* for San Francisco Chamber of Commerce, interveners.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions were filed by certain respondents and interveners to the report proposed by the examiner, and the case was orally argued.

Upon the issues decided, our conclusions agree with those of the examiner.

This inquiry was instituted at the request of respondents, who are four privately operated [1] and six State and municipally owned and operated [2] marine terminals at the major ports in California, participating in U. S. M. C. Agreement No. 7345, which has been approved by the Commission pursuant to section 15 of the Shipping Act, 1916, as amended. One of the stated purposes of the agreement is "to establish and maintain just and reasonable, and, as far as practicable, uniform terminal rates, practices, etc."

The purpose of this proceeding is to analyze respondents' operations, "so that there may be established (1) a proper basis for the segregation of terminal services, and costs thereof, rendered for the account of the vessel from those rendered for the account of the cargo, (2) a proper basis for allocating costs assignable to the vessel as between dockage, service charge and other services rendered to the vessel, (3) a proper basis for allocating costs assignable to the cargo as between wharfage, wharf demurrage and storage, and other services rendered to the cargo, (4) a proper basis for determining carrying charges on waterways, land, structures, and other terminal property devoted to furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water, and (5) any other services and costs necessary to a determination of the above-mentioned bases."

Leave to intervene was granted to a governmental agency and representatives of shipper and steamship interests.[3]

All respondents provide, and some operate, facilities for receiving, holding and delivering cargoes. Some have a simple landlord and tenant arrangement, while others provide a complete wharfinger service. Also, some engage in railroad operation, leasing of land, production of oil, and other nonwharfinger activities. The facilities range from one or two general cargo piers and sheds to several score of facilities. The ratio of investment as between the smallest terminal and the largest is about 1 to 47. The publicly owned terminals pay no taxes while those in private ownership pay as high as 10 percent.

The Commission employed Mr. Howard G. Freas,[4] a rate consultant,

[1] Howard Terminal, Oakland, Encinal Terminals, Alameda, Parr-Richmond Terminal Corp., Richmond and Outer Harbor Dock and Wharf Co., Los Angeles.

[2] Board of State Harbor Commissioners for San Francisco Harbor, a State agency, and the following municipal agencies: Board of Harbor Commissioners of the city of Los Angeles, Board of Port Commissioners of the city of Oakland, Board of Harbor Commissioners of the city of Long Beach, Harbor Commission of the city of San Diego and Stockton Port District.

[3] U. S. Department of Agriculture; Los Angeles Traffic Managers Conference, Pacific American Steamship Association, Pacific Coast Cement Institute, Los Angeles Chamber of Commerce, Chilean Nitrate Sales Corporation, California Fruit Growers Exchange, Oakland Chamber of Commerce and San Francisco Chamber of Commerce.

[4] Rate Expert of California Public Utilities Commission.

to study respondents' operations, make a tentative cost formula, apply it to a normal prewar period, and to testify at hearings called to consider the formula. His formula was patterned after the Edwards-Differding formula [5] which has been considered by the Commission in Docket 555—*Practices, etc., of San Francisco Bay Area Terminals* (1941) 2 U. S. M. C. 588. However, he changed and simplified that formula to the extent he thought present day facts and experience justified. The formula was applied to actual terminal operations for the fiscal year ending June 30, 1940, for the purpose, (*a*) of checking its accuracy and (*b*), its utilization in the postwar period in connection with uniform terminal rates.

The study covered the primary function of interchanging cargo i. e., receiving, holding, and delivering cargoes, which activities are classified as wharfinger operations. Activities not closely related thereto are classified as nonwharfinger operations. Witness Freas approached the problem by inspecting each terminal and auditing and analyzing its accounts. Each item of wharfinger expense was considered, and further broken down if necessary. Nonwharfinger items were considered only where necessary properly to distribute joint expenses.

All expenditures were apportioned to vessel and cargo in proportion to the use made of the facilities provided and of the services rendered. The vessel was held responsible to the wharfinger for all usages and services from, but not including, the point of rest on outbound traffic and to, but not including, the point of rest on inbound traffic. All other wharfinger costs were assessed against the cargo. The point of rest is the location at which the inbound cargo is deposited and outbound cargo is picked up by the steamship company.

Since the objective is to determine costs, no consideration was given to value of service and other factors which must be considered in determining the level of the rates.

STRUCTURE OF FORMULA

The purpose of the study is to determine cost of performing services from which wharfingers receive their revenue. Expenditures were determined, separated and apportioned among the various tariff services after wholly nonwharfinger expenses were eliminated. Two primary groupings were adopted: (*a*) carrying charges and (*b*) operating charges. Carrying charges embrace all expenses resulting from the maintenance of the bare plant whether it is in operation or not. Operating costs, which result from operation of the facilities, are divided further between dock operating costs and general and administrative expenses.

[5] A formula for the Determination of Port and Marine Terminal Costs for Rate Purposes (1936).

These cost groups, which represent the full cost of carrying on the wharfinger business, are distributed initially to vessel and cargo, and in turn to the various tariff services rendered to each. The following table broadly outlines this distribution.

TABLE I

Costs / Allocated to:	Vessel	Cargo	Nonwharfinger (eliminated)
I. Carrying charges	1. Dockage	1. Tolls (wharfage)	Railroad, oil production, leasing land, etc.
II. Dock operating costs	2. Service and other vessel charges.	2. Wharf demurrage	
III. General and Administrative expenses.	3. Rental of facilities	3. Car loading 4. Car unloading 5. Truck tonnage 6. Accessorial services	

Carrying charges include return on investment, taxes and rentals on land, structures and facilities, insurance on structures, and depreciation and maintenance. Before these charges are apportioned to tariff services, they are first allocated to the various facilities such as waterways, wharf aprons, cargo areas and special facilities such as oil wharves and lumber storage. (See schedule I of appendix.)

Dock operating charges embrace cost of superintendence, clerking, direct dock labor, and such miscellaneous items as watchmen, claims, and cleaning sheds.

General and administrative costs include all remaining items such as salaries and expenses of general officers and clerks, accounting, legal, and traffic and solicitation expense.

Detailed distribution of these three groups to vessel costs and cargo costs, thence to particular tariff services, is made on schedule II of appendix.

Vessel costs are those incurred in providing dockage facilities, in rendering services to vessel embraced in "service charge",[6] in furnishing facilities rented to vessel under preferential or temporary assignments, in assembling cargo for account of the vessel, and in handling lines or furnishing any other labor for the benefit of the vessel.

Cargo costs are those incurred in providing (1) wharfage, the charge for passing cargo over the wharf, or from vessel to vessel at wharf, and holding cargo during free time; (2) wharf demurrage, the charge for storage or holding cargo beyond free time; (3) car loading and car unloading, the charge for transferring cargo between point of rest and

[6] The charge assessed for arranging berth for vessel, arranging terminal space for cargo, checking cargo to or from vessel, receiving outbound cargo from shippers, and giving receipts therefor, delivery of cargo to consignees and taking receipts therefor, preparing manifests, loading lists or tags covering cargo loaded aboard vessel, preparing over, short and damage reports, ordering cars, supplying shippers with vessel information, and lighting terminal. Some definitions also include "use of terminal facilities."

rail cars; (4) trucking facilities; and (5) accessorial services such as weighing, stenciling and recoopering.

Nonwharfinger costs, so interwoven with wharfinger expenditures as to make their initial separation impracticable, are eventually deleted.

A further break-down is made to reflect substantial differences in the cost of performing services such as (*a*) service charge cost on general cargo moving through sheds, and on general and bulk cargo handled direct; (*b*) wharfage costs on bulk cargo handled direct, on general cargo moving through sheds, and on pipe line cargo; and (*c*) wharf demurrage cost on cargo in open storage and in shed storage.[7] (See schedules III, IV, and V respectively of appendix.) However, costs were not determined on specific commodities or at individual facilities.

Finally, a schedule provides for summarizing the data developed to show the total annual costs of rendering each service involved and the cost per ton or other suitable unit, as well as total revenue. (See schedule VI of appendix.) By way of illustration, the costs developed by witness Freas for respondent Howard Terminal are inserted in schedules I to VI of the appendix.

The foregoing review briefly indicates the nature and purpose of the formula. Following is a summary of the bases upon which the apportionments were made.

BASIS FOR THE ALLOCATIONS

As a general principle expenditures were assigned to the activities in whose furtherance they have been incurred. Contributions of both labor and facilities were measured by the proportionate use made thereof. Proportionate use was determined generally on a time, space, or value basis where possible; otherwise judgment was used. (The schedules in the Appendix contain a column indicating by numbers the various bases used, and a key to such numbers explaining the method of apportionment.) The apportionment is as follows:

A. Costs allocated to the vessel:

(1) Waterways (i. e. water areas used for berthing of vessels and for making those areas accessible.)

(2) Fifty percent of open wharves (exclusive of trackage and other special facilities and their supporting substructures) and of the land on which they are located.

(3) Aprons (exclusive of trackage and other special facilities and their supporting substructures).

[7] Wharf demurrage is separated into a handling cost covering movement into and out of demurrage area, which cost is nonvariable, and a holding cost representing floor space cost which varies with the length of time on demurrage.

(4) One hundred percent of the land supporting aprons without tracks, and fifty percent of the land supporting aprons with tracks.

(5) Aisle space within the shed used by the vessel or its agents in receiving cargo at or delivering it to point of rest, together with a proportionate share of the supporting land.

(6) Services covered by the so-called service charge.

(7) Office and other space used by vessels' clerical forces.

B. Costs allocated to the cargo:

(1) All land not covered by (1), (2), (4), and (5) above.

(2) All trackage and its supporting substructure.

(3) Fifty percent of open wharves (exclusive of trackage and its supporting substructure).

(4) Aisle space within sheds not included in (5) above.

(5) All cargo areas within sheds.

(6) All other trackage, roadways, etc.

(7) Any services rendered for the benefit of the cargo.

For the purpose of dividing costs among the various services, aisle space was computed at 30 percent of the total cargo areas utilized by cargo, whether at rest or in motion, and whether on free time or on demurrage. Aisle space within sheds is apportioned by taking out a proportion corresponding with the average space devoted to demurrage purposes and dividing the remainder among dockage, wharfage, carloading and car unloading, and trucking. Loading docks are treated as aisle space chargeable to car and truck loading and unloading.

Forty percent of the cost of aprons with tracks is deemed to be the average of the cost incurred by reason of the tracks. This amount is chargeable to wharfage and the balance to dockage. The return on the land on which the apron rests is charged to dockage if the structure is without tracks, and is divided between wharfage and dockage on a fifty-fifty basis if the structure is equipped with tracks. Costs are computed for space used by carloaders, by truck operators and by the forces doing the ships' clerking.

Before considering the results of the application of the formula, we shall revert to carrying charges which are a preponderant portion of all costs—about 80 percent. The controversial item of return on investment accounts for 68 percent of carrying charges, or more than one-half of all costs. Depreciation and maintenance represent substantially the remainder of carrying charges. The development of these costs will be discussed in the order mentioned.

RETURN

Witness Freas based his determination of an adequate return on "invested capital" upon a consideration of the following: (*a*) fair value

of the property employed for the convenience of the public, (*b*) the financial needs of the respondents, (*c*) the returns secured at the time from other similar enterprises in the general territory involved, and (*d*) the relative risk to which the capital is subjected. *Bluefield W. W. & Imp. Co.*, v. *W. Va.* (1923), 262 U. S. 679.

Fair value, that is, volume of the rate base, as determined by the witness, consists of present market value of land, values assigned to buildings, structures, other facilities and equipment, depreciated, and working capital.

Land areas devoted to nonwharfinger use were excluded, as well as submerged and surface areas not put to any beneficial use. The remaining areas were assigned present market value. *The Minnesota Rate Cases* (1913), 230 U. S. 352, 455. In the absence of sales of comparable adjacent land, current value was determined upon consideration of (*a*) assessments of the properties involved where available, and of adjacent and comparable areas, (*b*) special conditions giving particular parcels a greater value for special purposes, (*c*) opinions of experts in the assessors' offices and of the valuation staff of the State Board of Equalization, (*d*) book values and (*e*) values applied to three of the private terminals in proceedings before the Railroad Commission of the State of California in 1936.[8] *Decision No. 29171; Case No. 4090 Railroad Commission of The State of California* (1936). The cost of improvements made for the benefit of the appurtenant land and merged therewith, such as seawalls and dredging, is reflected in the value assigned to the land. For instance at San Francisco $8,000,000 was expended for a seawall which, while not included in original cost, is reflected pro rata in the present value assigned to the land. Fills and grading representing benefits to structures were included in the value assigned to such structures.

The witness testified that original cost of land would be extremely difficult, if not impossible, to find; that it would be so remote as to bear little, if any, relationship to present value; and that it would vary so at different terminals as to furnish no standard for a comparable rate base. However, he was of the opinion that if all costs incident to acquisition of land and costs of improvements made thereto were combined with original cost, the result would not be materially different from present market values.

Notwithstanding the fact that return on land at San Francisco approximates 40 percent of the carrying charges, witness Freas testified that if all land values were excluded from that respondent's rate base, expenses would still exceed revenue. If land were excluded at Los

[8] Land values at San Francisco were based upon an appraisal made by the State in 1929. Those at the Port of Oakland were based on market value assigned to the immediately adjacent land of Howard Terminal by Edwards and Differding, and adopted by the California Commission.

Angeles, revenues would slightly exceed expenses. These results are predicated upon expenses embracing operating costs, depreciation and a 7 percent rate of return.

Buildings, structures, and other facilities and equipment were evaluated in the light of records of original cost, costs or other values presently carried on the books, assessors' records, and valuations made by public appraisers and terminals' engineers. Original costs were developed in some instances, and reproduction costs were available in a number of instances. Structures at Los Angeles, San Francisco, and Oakland were evaluated on the basis of appraisals made in 1925, 1929, and 1939, respectively, brought up to date. Values at Los Angeles were not substantially different from original cost, which is said to be the basis of value generally used at the remaining seven terminals. Witness Freas was of opinion that if all structures were valued at original cost, the result would not be materially different from the basis used. Depreciation was computed and applied on a straight line method.

Working capital, consisting of cash and material and supplies needed to meet current obligations in an economical and efficient manner, was estimated at one-sixth of the year's expenses, less depreciation and return.

Rate of return was fixed after considering several factors. The industry is highly competitive. Every major terminal on the Pacific coast is competitive with respondents. New competitors may appear without having to secure certificates of convenience and necessity. Respondents' business may be seriously affected by a shift of tonnage between water and land carriers. The business fluctuates with seasonal peaks and valleys and during periods of prosperity and depression. Major economic changes may jeopardize an entire investment such as the loss, some years ago, of the major portion of coastwise and inland water traffic; and traffic stoppages due to labor disturbances in the general shipping industry.

Offsetting these hazards is the probability that postwar traffic will equal or exceed prewar figures, and the fact that respondents are well established and seem to encounter no great difficulty in obtaining needed capital.

The developed costs for the privately operated terminals are generally less than for those publicly owned; therefore the return was determined for the former and extended to the latter. A return of seven percent for the private operators was determined to be adequate and fair to the terminals, as well as to the carriers and the shipping public. It is noteworthy that on the experience of the fiscal year 1939–40, rates reflecting costs, as determined by the witness, exclusive of any return on capital, would be prohibitive for several of the ter-

minals. In fact, the witness did not suggest that rates at the publicly owned terminals should be fixed at a level which would return seven percent. He merely determined costs upon a comparable basis. On the other hand, he emphasized that private terminals could not compete with publicly owned terminals which operate at bare cost.

The question was raised upon briefs as to the right of the publicly operated terminals to include a reasonable allowance for return on investment in their charges. The only possible restrictio cited in this connection is section 3084 of the California Harbor and Navigation Code which limits the authority of the Board of State Harbor Commissioners (San Francisco) to the collection of moneys which shall not "in the main" exceed that necessary for the performance of its duties, powers, etc. The Attorney General of California, on brief, does not interpret this section as a limitation to bare cost of operation in view of section 3080 of the Code which authorizes the Board to collect revenues sufficient to perform its duties, among which are promotion of the harbor, construction of new facilities and purchase of additional land.

DEPRECIATION, MAINTENANCE, RENTALS, AND GIFT PROPERTY

Depreciation included in the carrying charges is the amount actually chargeable to operaring expenses to reflect a loss in service value of the facilities used. The straight-line reserve method, which is generally used by the terminals, was employed. The property depreciated consists mainly of wharves, transit sheds and equipment. Depreciation was calculated on the actual original cost of the property in use where available; when not ascertainable, other costs said to approximate original costs were used. The depreciation structures used by the terminals were adopted with few exceptions, after a study was made of the service lives of the various properties. Both substructures and superstructures were depreciated on a 100-percent basis. However, where other property such as equipment had a salvage value, such value was deducted before figuring depreciation.

Maintenance includes the amount actually spent for that purpose regardless of any reserve. However, since there is no necessary fixed relation between actual wear and tear and the amounts expended during a given year, average expenditures covering a period of not less than five years were used.

Rentals.—In a few cases where the terminals lease considerable of the property they operate, and pay rentals which reflect conditions other than those ordinarily encountered in such transactions, the rented property was evaluated and included in the rate base as though owned by them. Therefore, the rentals paid were disregarded as an operating cost, inasmuch as the rate base and resulting return thereon was increased.

Gift property.—This term as used by the witness means property acquired without money cost, or at a price well below recognized commercial value. By far the greater portion encountered consists of land, of services reflected by the witness in current land values. or of improveme ts so merged with the land as to be inseparable from it. A substantial portion of the areas involved is reclaimed submerged lands. The greater portion of land used at San Francisco was granted, or transferred in some other manner, to the State of California by the Federal Government, which obtained title by the treaty of Gaudaloupe Hidalgo. The municipally owned terminals acquired their land mainly through grants from the State. Other so-called gift property consists of structures erected by the Public Works Administration to create employment during a depression. This property is included, not in original cost, but in reproduction cost.[9]

Thus, regardless of the source of the property, it is reflected in the rate base developed by the witness—land through inclusion of its present market value, and structures through consideration of reproduction cost in the same manner as allowances for intangibles. Inasmuch as there are no great amounts of depreciable gift property involved, it was depreciated in the same manner as other property.

APPLICATION OF FORMULA

The formula applied to the actual experience of the terminals during the fiscal year ending June 30, 1940, develops costs that substantially exceed the revenue as disclosed by the following table. It should be noted here that only 20 percent of these costs are actual operating expenditures; that 80 percent represents carrying charges, 68 percent of which is return on investment at 7 percent. That is, more than one-half of the costs represent return. (See table IV infra.)

TABLE II

Terminal	Annual revenue	Annual cost	Operating ratio
			Percent
Howard	$313,200	$403,166	128.7
Encinal	544,889	599,107	109.9
Parr-Richmond	227,197	276,153	121.5
Outer-Harbor		231,885	
Oakland	498,200	1,138,023	228.4
Stockton	213,976	328,515	153.5
San Francisco	1,346,091	4,897,170	363.8
Los Angeles	1,863,829	2,348,704	126.0
Long Beach	149,457	553,888	370.6
San Diego	40,295	159,126	394.9
Total (except Outer-Harbor)	5,197,134	10,703,852	205.9

[9] The Federal Coordinator of Transportation reports PWA grants in aid of construction of wharf facilities up to 1937 as follows: San Francisco, $788,743; Oakland, $254,084; Stockton, $430,709; Los Angeles $508,907; total $1,982,443. (*Public Aids to Transportation*, vol. III, Appendix A.) The extent of WPA contributions is not disclosed.

Not only the operations as a whole are shown by table II to be unprofitable, but the costs are not equally distributed. The uneven distribution of the burden of carrying on the services as between the tariff services, and the variation of unit costs at the different terminals, appear from the following table:

TABLE III

	Dockage		Service charges per ton	Assignment charges per square feet	Wharfage (tolls) per ton	Wharf demurrage per ton	Car-loading per ton	Car unloading per ton
	per hour occupancy	Cost per 100 feet [1]						
Howard	$3.38	$2,154.67	$0.31	-------	$0.28	$0.37	$0.83	$0.71
Encinal	4.35	2,437.19	.28	-------	.28	.66	.58	.54
Parr-Richmond	4.87	1,942.42	.13	-------	.34	.21	.51	.40
Outer-Harbor	-------	1,442.49	-------	-------	.37	-------	-------	-------
Oakland	5.81	1,733.58	.37	$1.39	.60	.84	.97	1.00
Stockton	3.20	1,056.71	.31	.65	.39	.66	1.50	.82
San Francisco	2.49	2,285.25	-------	.54	.48	.87	-------	-------
Los Angeles	3.63	2,000.92	-------	.63	.09	.06	-------	-------
Long Beach	5.61	2,336.80	-------	1.03	.56	.23	-------	-------
San Diego	6.60	1,174.57	-------	-------	.50	-------	-------	-------
Percent total cost is of total revenue [2]	527.9		77.5	25.0	205.2	180.3	255.0	213.4

[1] Working areas.
[2] Other percentages are: 235.3% other (vessel) charges; 356.7% truck tonnage; and 92.7% accessorial services.

Generally speaking, losses are shown on every service except service charge and assignment charges. Since the service charge covers approximately 75 percent of the dockage expense, and the assignment charges cover some dockage, the excess revenue on the two services should be applied against the deficiency in dockage revenue. Even with this adjustment, the losses on the two services are shown to be substantial.

The preponderant nature of carrying charges, especially those of the nonoperating public terminals, is revealed by the following table:

TABLE IV

	Carrying charges	Dock operting costs	General and administrative expenses
	Percent	*Percent*	*Percent*
All respondents	80.41	11.06	8.53
Private terminals	38.39	39.47	22.04
Publicly operated terminals	48.36	33.44	18.20
Nonoperating public terminals	92.41	2.68	4.91

The composition of the carrying charges is 68 percent return, 18 percent depreciation, 12.5 percent maintenance and 1.5 percent miscellaneous; and they are apportioned roughly one-third to the vessel and two-thirds to the cargo. The return on the rate bases of all respondents, at seven percent, amounts to slightly more than $6,000,000. If the return were reduced to six percent or increased

to eight percent, the variation in either direction would be about 8 percent of the total costs.

Comparison of the results of the Freas formula with those of the Edwards-Differding formula (1936) shows that as to dockage the former develops 11.07 cents per ton for all respondents and the latter 10 cents for Howard and Encinal. In the case of service charges, the former develops direct costs amounting to 48 percent of the cost whereas the latter develops 44 percent. As to wharfage the former develops 28 cents at Howard and Encinal and the latter 21 cents. The Freas formula develops carloading rates substantially higher than the Edwards-Differding formula—the former range from 51.47 cents to $1.51, the latter 45 to 47 cents. These differences are explained by changes in the costs and efficiency of labor, volume of cargo handled, and the fact that witness Freas included an additional charge representing cost of the portion of the structure or facility devoted to carloading use.

The main conclusions reached by witness Freas are: (1) the operations of respondents during the period in question, as a whole, were highly unremunerative; (2) the reason for their continued operation is the multiple nature of the businesses—real estate, oil etc.—and the fact that they have not set aside their normal depreciation, and in some instances have deferred necessary maintenance; and (3) that there is not an even distribution of the burden as between the various services. He makes the following suggestions in the interest of simpler and more accurate cost finding in the future: (*a*) separate accounts should be maintained for each revenue producing activity; (*b*) there should be more uniformity in the method of accounting and charging for depreciation; (*c*) more complete statistical data should be kept pertaining to operations generally, and particularly as to accessorial services; and (*d*) all nonvariable charges, such as wharfage and dockage should be charged against the vessel. The latter suggestion, if followed, would eliminate difficult problems of apportionment and, according to the witness, would simplify the rate problem for the shipper who eventually bears the costs, either separately or in the ocean freight rate.

A shipper witness introduced financial statements of the harbor commissioners of San Francisco and Los Angeles indicating favorable operating results since 1940.[10] However, the value of these data is impaired by the fact that the statements cover a multitude of nonwharfinger operations, and it is impossible to segregate the revenues and expenses covering strictly wharfinger activities.

[10] The net income after all deductions at San Francisco from all operations for the period 1940–46 ranged from $215,357 in 1940 to $2,275,435 in 1943. At Los Angeles net profits after bond interest for the period 1940–45 ranged from $463,124 to $2,625,224, the operating surplus as of June 30, 1945 being $5,682,035.

CONCLUSIONS

The trial examiner recommended that we: (1) approve the formula as a proper method of segregating terminal costs and carrying charges, and of apportioning such costs and charges to the various wharfinger services; (2) find that respondents operating publicly owned terminals are entitled to a fair return on investment; [11] (3) find that depreciation on so-called "gift property", consisting of buildings, structures, etc., should be charged to operating expenses, but the value of such property should not be included in original cost or cost of reproduction; [12] (4) find that the rate making value of respondents' property used and useful in their wharfinger operations should consist of the actual legitimate cost thereof, properly depreciated, plus working capital; [13] (5) find that in the ascertainment of rate making value resort should be made to data in the following order: first, original cost records if available; second, book values; third, valuations by recognized engineers and appraisers; and fourth, cost of reproduction less depreciation and present market value of lands, only where no other data are available; (6) find that uniformity in the rate structure should be achieved by basing the rate level upon the operations of the lowest-cost operators, such level to be increased,[14] if necessary, to a point where all other respondents may earn their legitimate cost of operation, including depreciation and bond interest, plus a reasonable surplus to meet emergencies and other public needs, subject to competition and the ability of the traffic to pay; (7) give consideration to instituting a nation-wide rule making proceeding under section 4 of the Administrative Procedure Act and the Shipping Act, 1916, to afford interested persons an opportunity to express their views as to whether we should promulgate a rule requiring the assignment to the vessel of all cost incurred in providing dockage, wharfage, ship's services, and free time storage.

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[11] Citing *Logansport* v. *P. S. C.* (Ind. 1931), 177 N. E. 249, which approved the statement that "the matter of earning a return or not earning a return is one of policy to be decided by the municipal authorities. In any case there should be some surplus to take care of emergencies over and above the operating expenses."

[12] Relying upon the practice of the Interstate Commerce Commission in deducting public contributions toward construction from original cost and reproduction cost, in railroad valuation cases, to avoid a "double burden" on the public. *Indianapolis Union Railway Co.* (1934) I. C. C. 46 Val. Rep. 711. But see *Alabama Power Co.* v. *Ickes* (1938), 302 U. S. 464, holding that the taxpayer's interest in a PWA grant is *de minimis;* also *Board of Utility Comm.* v. *New York Telephone Co.* (1926), 271 U. S. 23, holding that protection against confiscation does not depend on the source of the money used to purchase the property.

[13] Following *Federal Power Commission* v. *Hope Natural Gas Company* (1944), 320 U. S. 591, wherein the Supreme Court approved a rate base consisting of "actual legitimate cost." In holding that the "end result" is the ultimate test of whether rates are just and reasonable, the Court said: "Rates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed certainly cannot be condemned as invalid even though they might produce only a meager return on the so-called 'fair value' rate base."

[14] Citing *Federal Power Commission* v. *Natural Gas Co.* (1942) 315 U. S. 575, stating that there are zones of reasonableness and the courts will not set aside a maximum reasonable rate.

The respondents, upon exceptions and oral argument, took vigorous exception generally to recommended findings (3) to (6) inclusive. Their main apprehension appears to be that strict adherence to the "actual legitimate cost" theory would exclude from the rate-making values of the public terminals reclaimed submerged lands for which no money consideration was paid at time of acquisition. They point out also that it would not be possible to arrive at comparable rate bases for the various terminals in the event that actual legitimate costs are not ascertainable in all instances.

The shipper interests contend generally that values of reclaimed lands and improvements thereon should be excluded from the rate base. Their position is that the land was donated by Federal and State governments and the improvements were paid for through sale of bonds which were redeemed through earnings set aside for such purpose, and local taxation. These interests also oppose uniformity of rates among respondents on the ground that it would nullify the natural advantages of certain port areas, and deprive patrons of the benefits of low-cost operation and efficient management of certain terminals.

Respondents request that we approve the Freas formula *in toto*, including specific approval of (1) a rate of return of 7 percent upon the present fair value of their properties, consisting of land, improvements, buildings, structures, etc., used and devoted to wharfinger purposes; and (2) the inclusion of so-called donated or gift properties, both land and improvements, at their present fair value, in the money base upon which the rate of return is applied.

Apart from the fact that there is no substantial evidence in this record to support a rate of return of 7 percent, any rate of return approved here would not necessarily be proper for application in a future rate revision. The rate of return, the method to be used to determine the value of land, and the treatment of so-called gift property—both land and structures—are the most controversial questions in this proceeding. This is so, because return on investment, as computed by witness Freas, accounts for more than one-half of all costs. Carrying charges of respondents average 80 percent of all costs, and at one terminal at least, return on land accounts for 40 percent of carrying charges.

It would be premature therefore for us to fix the rate of return or to establish the method of valuation in advance of an examination of rates made upon the basis sought by respondents. These rates would have to be evaluated in the light of their effect upon the financial structures of respondents and their impact upon the traffic affected. It is realized that some basis must be used in computing carrying charges and respondents are not foreclosed from using any basis

which they are prepared to justify as producing reasonable rates called for by their agreement.

Under all the circumstances, we accept recommended findings (1) and (2) and adopt them as our own. Decision on the issues raised by findings (3) to (6) inclusive will be deferred.

Little interest was shown in recommendation (7), and no action will be taken in that direction at this time.

The record will be held open.

APPENDIX

Formulae for the determination of wharfinger costs applied to the 1939–40 operations of Howard Terminal

SCHEDULE I.—*Carrying charges (plant only) separated as between waterways, aprons, cargo areas, et cetera*

Line No.	Item	Total charges [1]	Bases	Waterways	Aprons [2]	Cargo areas [2]		Special facilities		Rail and truck areas and facilities	Other wharfinger	Non-wharfinger
						Sheds	Open	Oil wharves	Lumber storage			
	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)	(l)
1	Return—land	33,779.20	1	5,946.75	1,114.72	12,659.33				13,233.79	581.50	243.11
2	Return—structures and facilities	33,428.38	1	xxx	3,989.58	20,605.39				6,467.02	2,366.39	
3	Taxes—land	4,912.68	1	459.34	100.32	2,441.31				1,794.31	117.40	
4	Taxes—structures and facilities	6,175.00	1	xxx	277.33	5,011.17				530.20	356.30	
5	Rentals—land	720.00	2								720.00	
6	Rentals—structures and facilities		3	xxx								
7	Insurance (structures only)	2,297.56	3	xxx	278.11	1,480.23				366.57	172.65	
8	Depreciation—wharves and substructures	7,065.15	3	xxx	2,384.49	2,004.38				2,676.28		
9	Depreciation—transit sheds	10,591.83	3	xxx	xxx	10,591.83	xxx	xxx	xxx	xxx		
10	Depreciation—other structures	1,890.21	3	xxx	xxx	xxx	xxx	xxx	xxx	xxx	1,890.21	
11	Depreciation—rail and motor facilities	1,082.92	3	xxx	xxx	xxx	xxx	xxx	xxx	1,082.92		
12	Depreciation—maintenance equipment	59.48	4		1.67	42.41				15.40		
13	Depreciation—fire equipment	72.05	5	xxx	8.07	46.42				12.52	5.04	
14	Maintenance—wharves and substructures	310.36	3	xxx	104.75	88.05			xxx	117.56		
15	Maintenance—transit sheds	2,598.12	3	xxx	xxx	2,598.12	xxx	xxx	xxx			
16	Maintenance—other structures		3	xxx	xxx	xxx	xxx	xxx	xxx	xxx		
17	Maintenance—rail and motor facilities	858.46	3	xxx	xxx	xxx	xxx	xxx	xxx	858.46		
18	Maintenance—maintenance equipment	158.92	4		4.45	113.31				41.16		
19	Maintenance—fire equipment		5	xxx								
20	Maintenance—waterways	2,584.88	6	2,584.88	xxx	xxx	xxx	xxx	xxx	xxx		
21	Total carrying charges (1 to 20, inclusive)	108,585.20		8,990.97	8,263.49	57,681.95				27,196.19	6,209.49	243.11

[1] Excepting where an initial separation is impracticable show wharfinger charges only.

[2] Exclusive of items covered by columns (h), (i), and (j).

Key to bases numbers (Column (c))

1. Apportion according to value.
2. Allocate directly; if separate data not available, apportion according to area.
3. Allocate directly; if separate data not available, apportion according to value.
4. Allocate according to use.
5. Allocate according to value of property protected.
6. Allocate directly.

SCHEDULE II.—*Expenses separated as between dockage, wharfage (tolls), service-charges, wharf demurrage, et cetera*

Line No.	Item	Total expenses	Bases	Vessel		Cargo						Non-wharfinger
				Dockage	Service and other charges	Wharfage (tolls)	Wharf demurrage	Car loading	Car unloading	Truck tonnage	Accessorial services	
	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)	(l)
	I. CARRYING CHARGES (from schedule I)											
1	Waterways (column (d))	8,990.97	1	8,990.97	xxx	xxx	xxx	xxx	xxx	xxx	xxx	
2	Aprons (column (e))	8,263.49	1	8,263.49	xxx	xxx	xxx	xxx	xxx	xxx	xxx	
3	Cargo Areas—Sheds (column (f))	57,681.95	2	3,598.72	xxx	37,223.55	9,555.97	1,799.37	1,799.37	3,598.72	106.25	xxx
4	Cargo areas—open (column (g))		2		xxx							xxx
5	Special facilities—oil wharves (column (h))		3		xxx		xxx	xxx	xxx	xxx	xxx	xxx
6	Special facilities—lumber storage (column (i))		2		xxx							xxx
7	Rail and truck areas and facilities (columns (j))	27,196.19	4	xxx	xxx	27,196.19	xxx	xxx	xxx	xxx	xxx	71.73
8	Other wharfinger (column (k))	6,209.49	2	409.49	1,997.56	1,743.72	1,148.26	146.21	373.92	70.64	247.96	243.11
9	Nonwharfinger (column (l))	243.11	5	xxx	xxx	xxx	xxx	xxx	xxx	xxx	xxx	
10	Total carrying charges (lines 1–9, incl.)	108,585.20		21,262.67	1,997.56	66,163.46	10,704.23	1,945.58	2,173.29	3,669.36	354.21	314.84
	II. DOCK OPERATING CHARGES											
11	Superintendence	5,181.58	6		3,505.34		455.98	194.83	593.81		431.62	
	Clerking											
12	Checking cargo (account vessel)	60,554.31	7	xxx	60,554.31	xxx	xxx	xxx	xxx	xxx	xxx	xxx
13	Checking cargo (account demurrage)	4,316.01	8	xxx	xxx	xxx	4,316.01	xxx	xxx	xxx	xxx	xxx
14	Checking cargo (account railroad)	4,258.18	9	xxx	xxx	xxx	xxx	xxx	xxx	xxx	4,258.18	xxx
15	Clerical—other than checking	25,037.48	7	xxx	25,037.48	xxx	xxx	xxx	xxx	xxx	xxx	xxx
	Dock labor											
16	Assembling cargo (account vessel)	9,191.99	7	xxx	9,191.99	xxx	xxx	xxx	xxx	xxx	xxx	xxx
17	Carloading	5,648.23	5	xxx	xxx	xxx	xxx	5,648.23	xxx	xxx	xxx	xxx
18	Car unloading	17,236.15	5	xxx	xxx	xxx	xxx	xxx	17,236.15	xxx	xxx	xxx
19	Handling and high piling account demurrage	8,925.83	8	xxx	xxx	xxx	8,925.83	xxx	xxx	xxx	xxx	xxx
20	Handling lines	6,918.92	7	xxx	6,918.92	xxx	xxx	xxx	xxx	xxx	xxx	xxx
21	Weighing and stenciling		9	xxx	xxx	xxx	xxx	xxx	xxx	xxx		xxx
22	Recoopering	4,921.27	9	xxx		xxx	xxx	xxx	xxx		4,921.27	xxx
23	Miscellaneous labor	3,337.70	9	xxx	xxx	xxx	xxx	xxx	xxx	xxx	3,337.70	

SCHEDULE II.—*Expenses separated as between dockage, wharfage (tolls), service-charges, wharf demurrage, et cetera*—Continued

Line No.	Item	Total expenses	Bases	Vessel		Cargo						Non-wharfinger
				Dockage	Service and other charges	Wharfage (tolls)	Wharf demurrage	Car loading	Car unloading	Truck tonnage	Accessorial services	
	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)	(l)
	Miscellaneous expenses											
24	Cleaning sheds and docks	4,677.70	5	229.68	1,940.78	1,238.19	448.12	142.20	363.46	68.76	240.90	5.61
25	Watchmen	9,063.94	10	558.34	3,156.96	3,010.59	886.00	258.77	618.16	166.78	393.84	14.50
26	Gas, water and electricity	3,454.72	5	169.63	1,433.36	914.46	330.96	105.02	268.43	50.78	177.92	4.16
27	Claims	2,173.79	5	----------	1,521.65	----------	652.14	----------	----------	----------	----------	----------
28	Car demurrage	300.30	11	xxx	xxx	----------	xxx	75.44	224.86	xxx	xxx	xxx
29	Insurance, cargo	----------	5	xxx	----------	xxx	----------	----------	----------	----------	----------	----------
30	Other	6,690.60	------	4.01	1,669.88	2,270.21	211.06	934.69	1,393.47	1.34	205.94	----------
	Dock equipment											
31	Carloading (sup., maint., depr., and ret.)	3,794.43	5	xxx	xxx	xxx	xxx	953.16	2,841.27	xxx	xxx	----------
32	Weighing (sup., maint., depr., and ret.)	----------	5	xxx	xxx	xxx	xxx	xxx	xxx	xxx	----------	----------
33	High piling (sup., maint., depr., and ret.)	2,745.15	5	xxx	----------	xxx	2,745.15	xxx	xxx	xxx	xxx	----------
34	Tractors and trailers (sup., maint., depr., and ret.)	1,080.52	5	xxx	242.25	xxx	235.23	148.90	454.14	----------	----------	----------
35	Miscellaneous (sup., maint., depr., and ret.)	1,999.88	------	----------	573.57	----------	317.78	201.19	613.56	----------	293.78	----------
36	Total dock operation (lines 11–35, incl.)	191,508.68	------	961.66	115,746.49	7,433.45	19,524.26	8,662.43	24,607.31	287.66	14,261.15	24.27
37	III. GENERAL AND ADMINISTRATIVE	103,535.64	12	7,941.18	40,741.27	25,355.88	10,457.10	3,416.68	8,966.19	1,408.08	5,125.02	124.24
38	Grand total—expenses (lines 10, 36, 37)	403,629.52	------	30,165.51	158,485.32	98,952.79	40,685.59	14,024.69	35,746.79	5,365.10	19,740.38	463.35

Key to bases numbers (column (c))

1. Separate nonwharfinger on basis of use; balance to dockage.
2. Apportion on basis of use.
3. Charge pipe line if owned by terminal to tolls, divide remainder equally between tolls and dockage.
4. Separate nonwharfinger on basis of use, allocate balance to tolls.
5. Direct.
6. If wharfinger operates own terminal on basis of lines 10 and 12 to 25, inclusive. If not, 50% to dockage and 50% to toll and wharf demurrage.
7. To column (e).
8. To column (g).
9. To column (k).
10. On basis of lines 2 to 9, inclusive if terminal not operated by wharfinger; otherwise, 50% divided in this manner; balance on basis of lines 12 to 23, inclusive.
11. To car loading and unloading unless occasioned by lack of space, in which case charge to wharfage.
12. On basis of lines 10 to 25 and 31 to 35, inclusive.

SCHEDULE III.—*Separation of "service and other charges" between A. Service charges on: (1) General cargo other than direct, (2) general cargo handled direct, and (3) bulk cargo handled direct. B. Wharf rental or other vessel charges*

Line No.	Item	Expenses from Schedule II column (e)	Other than service charges	Service charges	Bases	General cargo not direct	General cargo direct	Bulk cargo direct
	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)
1	I. CARRYING CHARGES (from schedule II, line 10)	$1,997.56	$316.41	$1,681.15	1	$1,507.49	$54.13	$119.53
	II. DOCK OPERATION							
2	Superintendence (line 11)	3,505.34	565.76	2,939.58	1	2,635.92	94.65	209.01
3	Checking—account vessel (line 12)	60,554.31	xxx	60,554.31	2	54,299.05	1,949.85	4,305.41
4	Clerical other than checking (line 15)	25,037.48	xxx	25,037.48	2	22,451.11	806.21	1,780.16
	Dock labor							
5	Assembling cargo—account vessel (line 16)	9,191.99	9,191.99	xxx		xxx	xxx	xxx
6	Handling lines (line 20)	6,918.92	6,918.92	xxx		xxx	xxx	xxx
	Miscellaneous expenses							
7	Cleaning sheds and docks (line 24)	1,940.78	307.42	1,633.36	3	1,464.63	52.59	116.14
8	Watchman (line 25)	3,156.96	500.06	2,656.90	4	2,656.90		
9	Gas, water and electricity (line 26)	1,433.36	227.04	1,206.32	3	1,081.71	38.84	85.77
10	Claims (line 27)	1,521.65		1,521.65	3	1,364.46	49.00	108.19
11	Cargo insurance (line 29)				3			
12	Other (line 30)	1,669.88	269.52	1,400.36	3	1,255.70	45.09	99.57
	Dock equipment							
13	High piling equipment (line 33)			xxx				
14	Tractors and trailers (line 34)	242.25	242.25	xxx		xxx	xxx	xxx
15	Miscellaneous (line 35)	573.57	573.57	xxx		xxx	xxx	xxx
16	Total dock operation (line 36)	115,746.49	18,796.53	96,949.96		87,209.48	3,036.23	6,704.25
17	General and administrative (line 37)	40,741.27	6,612.31	34,128.96	5	30,699.00	1,068.24	2,361.72
18	Grand total expense (lines 10, 36, 37)	158,485.32	25,725.25	132,760.07		119,415.97	4,158.60	9,185.50
	Statistical items							
19	Tons loaded and discharged	xxx	xxx	425,685		306,412	21,980	97,293
20	Average cost per ton	xxx	xxx	$0.3119		$0.3897	$0.1892	$0.0944

Key to bases numbers (column (e))

1. Divide amount in column (b) between columns (c) and (f), (g), and (h) on basis of the totals of lines 3, 4, 5, and 6.
2. Apportion among columns (f), (g), and (h) according to tonnage giving general cargo a weight of 1, general cargo direct a weight of ½ and bulk cargo direct a weight of ¼.
3. Direct or estimate on best basis available.
4. To column (f).
5. Divide amount in column (b) among columns (c) and (f), (g), and (h) on basis of the totals of lines 1 and 16.

SCHEDULE IV.—*Separation of costs assignable to shipper in the form of wharfage (tolls) as between (1) general cargo, (2) bulk tonnage handled direct to or from rail car, and (3) tonnage loaded and/or discharged by pipe line*

Line No.	Item	Expenses from schedule II column (f)	Bases	General cargo	Bulk cargo direct	Pipe line cargo
	(a)	(b)	(c)	(d)	(e)	(f)
	I. CARRYING CHARGES (from schedule II)					
1	Cargo areas—sheds (line 3)	$37,223.55	1	$37,223.55	xxx	xxx
2	Cargo areas—open (line 4)		1		xxx	xxx
3	Special facilities—oil (line 5)		2	xxx	xxx	
4	Special facilities—lumber (line 6)		3		xxx	xxx
5	Rail and truck areas and facilities (line 7)	27,196.19	4	21,963.64	$5,232.55	xxx
6	Other (line 8)	1,743.72	5	1,154.16	102.00	$487.56
7	Total carrying charges	66,163.46		60,341.35	5,334.55	487.56
	II. DOCK OPERATION					
8	Superintendence (line 11)		6			
9	Cleaning sheds and docks (line 24)	1,238.19	6	1,129.23	99.80	9.16
10	Watchmen (line 25)	3,010.59	6	2,745.66	242.65	22.28
11	Gas, water, and electricity (line 26)	914.46	6	833.98	73.71	6.77
12	Claims (line 27)		7			
13	Car demurrage (line 28)		7			xxx
14	Miscellaneous dock equipment (line 35)		7			
15	Miscellaneous expense (line 30)	2,270.21	7	2,270.21		
16	Total dock operation (line 36)	7,433.45		6,979.08	416.16	38.21
17	III. GENERAL AND ADMINISTRATIVE (line 37)	25,355.88	6	23,124.57	2,043.68	187.63
18	Grand total—expense (lines 10, 36, 37)	98,952.79		90,445.00	7,794.39	713.40
	Statistical items					
19	Number of tons loaded and discharged	350,222		265,911	63,326	20,985
20	Average cost per ton	.2825		.3401	.1231	.0340

Key to bases numbers (column (c))

1. To column (d).
2. To column (f).
3. Divide between columns (d) and (e) in relation of quantity not handled to or from car direct to that so handled.
4. Divide between (d) and (e) on basis of tonnage handled.
5. On basis of use.
6. On basis of line 7.
7. Direct.

SCHEDULE V.—*Break-down of wharf demurrage cost into (1) handling costs per ton (i. e., receiving and delivery expense), (2) holding costs (i. e., the floor space costs and overhead which vary with the period of storage)*

Line No.	Item (a)	Expenses from schedule II column (g) (b)	Bases (c)	Handling costs (d)	Holding costs (e)
	I. CARRYING CHARGES (from schedule II)				
1	Cargo areas—sheds (line 3)	9,555.97	1	xxx	9,555.97
2	Cargo areas—open (line 4)		1	xxx	
3	Other facilities (lines 6 and 8)	1,148.26	1	xxx	1,148.26
4	Total carrying charges (line 10)	10,704.23	1	xxx	10,704.23
	II. DOCK OPERATIONS				
5	Superintendence (line 11)	455.98	2	455.98	xxx
6	Checking (to/from demurrage) (line 13)	4,316.01	2	4,316.01	xxx
7	Handling and high piling (line 19)	8,925.83	2	8,925.83	xxx
8	Cleaning sheds (line 24)	448.12	2	448.12	xxx
9	Watchmen (line 25)	886.00	3	443.00	443.00
10	Gas, water and electricity (line 26)	330.96	3	165.48	165.48
11	Claims (line 27)	652.14	3	326.07	326.07
12	Insurance—cargo (line 29)		3		
12a	Miscellaneous dock expense (line 30)	211.06	3	105.53	105.53
13	High piling equipment (line 33)	2,745.15	2	2,745.15	xxx
14	Tractors and trailers (line 34)	235.23	2	235.23	xxx
14a	Miscellaneous dock equipment (line 35)	317.78	2	317.78	
15	Total dock operations (line 36)	19,524.26		18,484.18	1,040.08
16	III. GENERAL AND ADMINISTRATIVE (line 37)	10,457.10	3	5,228.55	5,228.55
17	Grand total expense (lines 10, 36, 37)	40,685.59		23,712.73	16,972.86
18	Total tons received on wharf demurrage	108,511		xxx	xxx
19	Total tons months of wharf demurrage	81,864		xxx	xxx
20	Total number of square feet involved	47,460		xxx	xxx
21	Handling cost per ton	xxx		.2185	xxx
22	Holding cost per square foot	xxx		xxx	.3576
23	Adjusted holding cost per square foot	xxx		xxx	.5960

Key to bases numbers (column (c) schedule V)

1. To column (e).
2. To column (d).
3. Divide between columns (d) and (e) on 50–50 basis.

SCHEDULE VI.—*Summary of total and unit costs for services performed and comparison with the corresponding revenues*

Tariff services	Costs from	Annual cost		Annual revenue, total
		Total	Per ton [1]	
CHARGES TO VESSEL				
I. Dockage	Schedule II—column (d) L. 38	30,165.51	xxx	8,398.10
(a) Cost per hour-occupancy		xxx	3.3898	xxx
(b) Cost per 100 feet wkg. areas		xxx	2,154.67	xxx
II. Service charges:				
(a) All cargo	Schedule III—column (d) L. 18	132,760.07	.3119	157,199.75
(b) General through shed	Schedule III—column (f) L. 18	119,415.97	.3897	xxx
(c) General—direct	Schedule III—column (g) L. 18	4,158.60	.1892	xxx
(d) Bulk direct	Schedule III—column (h) L. 18	9,185.50	.0944	xxx
III. Assignment charges	Schedule III—column (c)[2] L. 18		xxx	
(a) Cost per square foot		xxx		xxx
IV. Other	Schedule III—column (c) L. 18	25,725.25	xxx	9,953.63
Total vessel		188,650.83	xxx	175,551.48
CHARGES TO CARGO				
V. Wharfage (tolls).				
(a) All cargo	Schedule IV—column (b) L. 18	98,952.79	.2825	61,261.62
(b) General cargo	Schedule IV—column (d) L. 18	90,445.00	.3401	xxx
(c) Bulk cargo	Schedule IV—column (e) L. 18	7,794.39	.1231	xxx
(d) Pipe line	Schedule IV—column (f) L. 18	713.40	.0340	xxx
VI. Wharf demurrage:				
(a) Total costs	Schedule V—column (b) L. 17	40,685.59	.3749	34,541.39
(b) Handling cost per ton	Schedule V—column (d) L. 21	xxx	.2185	xxx
(c) Holding cost per square foot	Schedule V—column (e) L. 22	xxx	.3576	xxx
(d) Adjusted cost per square foot	Schedule V—column (e) L. 23	xxx	.5960	xxx
VII. Car loading	Schedule II—column (h) L. 38	14,024.69	.8389	8,930.05
VIII. Car unloading	Schedule II—column (i) L. 38	35,746.79	.7172	24,772.21
IX. Truck tonnage	Schedule II—column (j) L. 38	5,365.10		
X. Accessorial services	Schedule II—column (k) L. 38	19,740.38	xxx	8,143.07
Total cargo		214,515.34	xxx	137,648.34
Grand total		403,166.17	xxx	313,199.82

[1] Except as otherwise indicated.
[2] For terminals not operated by wharfinger.

UNITED STATES MARITIME COMMISSION

No. 668

P. A. DANA, INC.

v.

MOORE-MCCORMACK LINES, INC., ET AL.

Decided

Submitted July 6, 1948. *August 24, 1948*

Charges collected on shipments of quartz crystal from Rio de Janeiro, Brazil, to the port of New York found applicable. No violation of Shipping Act, 1916, shown. Complaint dismissed.

Henry Alpern for complainant.
Harold B. Finn for respondents.

REPORT OF THE COMMISSION

BY THE COMMISSION:

No exceptions were filed to the recommended decision of the examiner. Our conclusions agree with those of the examiner.

Complainant, a corporation, by complaint seasonably filed alleged that it has been subjected by respondents[1] to the payment of charges for the transportation of quartz crystal from Rio de Janeiro to New York which were unduly and unreasonably prejudicial and disadvantageous, unjustly discriminatory, unjust and unreasonable, and an unwarranted tax on the movement of merchandise. Lawful rates for the future and reparation[2] were sought. At the hearing, the allegations of undue and unreasonable prejudice and disadvantage, unjust discrimination, and unjustness and unreasonableness were abandoned. Respondents, asserting that there is no prohibition in the Shipping Act, 1916, against an unwarranted tax on the movement of merchandise in foreign commerce, contend that the complaint should be dismissed for want of jurisdiction.

[1] Moore-McCormack Lines, Inc.; J. Ludwig Mowinckels Rederi and Westfal-Larsen & Co., jointly operating as Southern Cross Line; Lloyd Brasileiro; International Freighting Corp., Inc.; Shepard Steamship Co.

[2] Computed by complainant to be $10,804.55 on shipments made up to date of hearing.

Respondents are members of the Brazil-United States/Canada Freight Conference and parties to the agreement of that conference approved by the Commission under section 15 of the Shipping Act, 1916. One of the provisions of the conference agreement is that rates and charges shall be collected by the members strictly in accordance with their tariff, which has been filed with the Commission. There is raised in this case a question as to whether the charges collected by respondents accorded with their tariff, and both sides presented evidence on the question. We may determine the applicable charges under our authority in respect to the agreement. See *Remis* v. *Moore-McCormack Lines, Inc.*, 2 U. S. M. C. 687, and *Rubber Development Corp.* v. *Booth S. S. Co., Ltd.*, 2 U. S. M. C. 746.

At the time of the transportation here involved respondents' Tariff No. 9 was in force, and the following item covered transportation of quartz crystal from Rio de Janeiro, Brazil, to the port of New York:

Commodity	Basis	Rate in U. S. A. dollars
Crystal rock	W/M [1]	$30.00 plus 2% ad valorem on full value to be declared on B/L

[1] Weight or measurement, i. e., per 1,000 kilos or 40 cubic feet, whichever brings the greater revenue to the vessel.

Contemporaneously, the tariff provided for the application of a surcharge expressed in a percentage of the rates and charges contained in the tariff, including the above item; the amount of the surcharge was changed from time to time. Respondents applied and collected from the complainant the rate as shown by the above item, together with the applicable surcharge thereon. Complainant paid the charges under protest.

At the time of the transportation here involved there was contained in respondents' tariff rule 7 (b) as follows:

7. Ad valorem cargo * * *:

(b) The liability of the Carriers as to the value of shipments at the rates herein provided shall be determined in accordance with the clauses of the Carrier's regular bill of lading form. Unless otherwise specifically provided in individual rate items, if the Shipper desires to be covered for a valuation in excess of that allowed by the Carrier's regular bill of lading form, the Shipper must so stipulate in Carrier's bill of lading covering such shipments and such additional liability only will be assumed by the Carrier at the request of the Shipper and upon payment of an additional charge of two percent (2%) of the total declared valuation in addition to the stipulated rate on the commodities shipped as specified herein.

The valuation allowed by respondents' regular bill-of-lading form and referred to in 7 (b) was $500 per package or customary freight unit.

Complainant contends that, since it did not seek to have respondents assume a liability on the basis of a higher valuation than $500 per

package, the collection of the ad valorem mentioned in the rate item was inconsistent with rule 7 (b).

Respondents contend that the rate item sets up a charge consisting of two parts—the $30 per ton plus the 2% ad valorem—and must be read as an individual rate item contemplated in 7 (b) by the words "unless otherwise specifically provided in individual rate items." This rate item is definite as including both constituent parts, contains no alternative and does not give the shipper any option. However, rule 7 (b) is not intended to give the respondents the right to charge a second 2% to give higher protection to packages of crystal rock worth more than $500. It is believed that the rule should be clarified in this respect.

We find no violation of the Shipping Act, 1916.

An order dismissing the complaint will be issued.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 24th day of August A. D. 1948.

No. 668

P. A. DANA, INC.

v.

MOORE-MCCORMACK LINES, 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 this complaint be, and it is hereby, dismissed.

By the Commission.

[SEAL] (S) A. J. WILLIAMS,
Secretary.

UNITED STATES MARITIME COMMISSION

No. 660

MATSON NAVIGATION COMPANY—RATE STRUCTURE

Submitted July 12, 1948. Decided August 24, 1948

The rates, charges, regulations, and practices of Matson Navigation Company and other respondents in connection with transportation between United States mainland ports and Hawaii, not shown to be unlawful.

Herman Phleger for Matson Navigation Company, *David Dawson* for United States Lines Co., *G. F. Murphy* for Lykes Bros. Steamship Co., Inc., *Frank J. Haley* for Waterman Steamship Corp., and *James J. McCabe* for Isthmian Steamship Co., respondents.

John G. Breslin for California & Hawaiian Sugar Refining Corp., *William F. Krause* for Fibreboard Products, Inc., *R. R. Gudgel* and *C. H. Webling* for Honolulu Consumers Council, and *Germain Bulcke* for International Longshoremen's and Warehousemen's Union, interveners.

Paul D. Page, Jr., *Clarence J. Koontz*, and *Guy M. Carlon* for Commission.

DECISION OF THE COMMISSION

BY THE COMMISSION:

No exceptions were filed to the examiner's recommended decision. Our conclusions agree with those of the examiner.

We instituted this investigation on June 4, 1947, to determine whether the rates, charges, regulations, and practices of Matson Navigation Company and other respondents [1] in the Hawaiian trade are unduly prejudicial or unreasonable in violation of sections 16 and 18, respectively, of the Shipping Act, 1916.

California & Hawaiian Sugar Refining Corp., Fibreboard Products, Inc., International Longshoremen's and Warehousemen's Union, and Honolulu Consumers Council intervened. The Consumers Council was the only intervener which offered testimony.

[1] The Oceanic Steamship Co., Isthmian Steamship Co., and American President Lines, Ltd., were also made respondents on June 4, 1947. By order of September 16, 1947, Lykes Bros. Steamship Co., Inc., United States Lines Co., and Waterman Steamship Corp. were named as additional respondents.

Matson is the principal water carrier in the Hawaiian trade. It operates a Pacific-Hawaii combination passenger-and-cargo service, a Pacific-Hawaii freighter service, and an Atlantic-Gulf-Hawaii freighter service. The latter is a joint service with Isthmian. The other respondents operate principally to the Far East, serving Hawaii only incidentally. Uniform rates are observed by all respondents under a conference agreement approved by the Commission pursuant to section 15 of the Shipping Act, 1916. Matson is the rate making line, and this inquiry deals primarily with its rate structure.

Hawaii's economy is tied in closely with that of continental United States. It exchanges principally sugar and pineapples for foodstuffs, manufactured goods, fuel, and lumber. Shipments from Hawaii in 1947 exceeded $200,000,000 in value. In 1939 Hawaii's population had increased 59 percent and its agricultural production 100 percent over 1920. By 1946 the change over 1920 represented an increase in population of about 100 percent, whereas agricultural production had increased only 55 percent. This could account for its present unfavorable trade balance which, until the recent war, was favorable.

Matson began pioneering the trade in 1882, and since World War I has developed the tourist trade, built hotels, established a lumber service from the Northwest, an Atlantic service through the Canal, refrigerator service, and bulk sugar and molasses transportation.

Its fleet of 33 ships, aggregating 275,000 tons, was requisitioned by the Government during World War II and operated by Matson as agent. Private operation was resumed in June 1946. At the time of hearing in January 1948 Matson had completely replaced its freight fleet by the purchase of 15 C–3 type ships, nine of which already were in service and six were undergoing reconversion. Reconversion of the passenger liner *Lurline* was practically complete at an expenditure of around $13,000,000 of Matson's own funds.

In all, Matson's commitments for floating and other equipment are around $52,000,000 of which $43,000,000 have been expended.[2] This program has reduced its marketable securities from $12,000,000 in February 1947 to around $500,000 in November 1947; and has increased its current working liabilities $3,000,000 during the same period. Also it has necessitated bank loans of $6,000,000 and arrangements for another loan in the same amount. Moreover, Matson is guarantor of bank loans of Oceanic, its subsidiary, amounting to $4,000,000.

The entire new fleet is to be in operation by July 1, 1948, on the following schedule: freighters are to sail weekly from Los Angeles

[2] This includes $18,682,338 estimated cost of restoring the *Lurline* (including $5,000,000 paid by the Commission); and an average of around $1,500,000 each for the Hilo bulk sugar plant, Royal Hawaiian Hotel, and Matson office building.

and San Francisco; fortnightly from Northwest ports; fortnightly from Atlantic and Gulf ports (3 vessels) in conjunction with Isthmian; and every 20 days in the lumber service. The *Lurline*, replacing the *Matsonia*, was scheduled to start in April 1948 on a 12-day turn-around between Honolulu and Los Angeles and San Francisco alternately.

Originally, Matson filed increased rates to become effective March 1, 1947, which were designed to raise revenues approximately 22 percent. These rates, with certain exceptions, were suspended in Docket 656, without prejudice to the establishment of rates designed to produce an over-all increase of 20 percent. The latter rates, together with those excepted, were filed to become effective either on March 1 or March 10, 1947, and are the subject of this inquiry.

Matson justifies the rate increases on the rapid and continuous rise in operating costs. Its comparisons with increased rates in other trades are not persuasive, as no evidence of the transportation factors existing in those other trades to show that they are comparable with the Hawaiian trade was introduced. Vessel and cargo expenses on actual tonnage carried in the Pacific-Hawaiian service have increased (1947 over 1941) by the following percentages: insurance, 123.85 percent; repairs, 19.96 percent; sea expense, 89.93 percent; cargo handling, 102.27 percent; port charges, 30.82 percent—grand total, 93.36 percent on a weighted basis. Expenses in 1947 divided approximately 61 percent to cargo and 39 percent to vessel.

Since 1940 Matson has increased, including the present increases, rates between Hawaii and Pacific coast ports on general merchandise 70 percent; canned pineapple, 76 percent; lumber, 66 percent; bagged raw sugar, 77 percent; feed, flour, etc., 62 percent; fertilizer, 59 percent; and common building cement, 86 percent. Little or no increases had been made at the time of the hearing in rates on refrigerator cargo, and rates on molasses, fuel oil, and asphalt liquid, in bulk,[3] the latter three of which are influenced by tanker competition.

In opposition to the rate increases, the Consumers Council alleges in substance (1) that the increases have an inflationary effect upon the cost of living in the Islands, (2) that rate increases would not be required under more efficient management and operation, and (3) that Matson is in a strong financial position and could well forego the increases.

On certain selected items of food and clothing, the increased transportation cost resulting from the last rate increases ranges from $0.001 on a pound of potatoes to $0.014 on a pair of men's shoes. Nails would be increased $0.001 per pound and refrigerators, $1.91 each. The Consumers Council estimated from exhibits of record that the increased

[3] Official notice is taken of increases made on April 1, 1948, on molasses, fuel oil, and asphalt liquid, in bulk, ranging from 23 to 50 percent.

landed cost of principal commodities imported from the mainland in 1947 was $2,639,000. Its witness testified that the cost of living in the Islands is approximately 25 percent higher than on the mainland. The present freight rates average 3.81 percent of retail prices on 17 food items in Honolulu as of September 15, 1947, which prices on the average are lower than in New York, but higher than in San Francisco and Seattle. For instance, the 17 items cost approximately $0.05 per unit more on the average in Honolulu than in San Francisco. The freight rates on these items from Pacific coast ports to Honolulu average about $0.024 per unit.

The Consumers Council points out that the prices of food and other commodities in Honolulu average 20 percent higher than in mainland cities. It admits, however, that in addition to freight rates, high labor costs and wholesale and retail mark-ups are factors which create this cost differential. The transportation factor cannot be too controlling if, as shown by the record, freight rates average less than 4 percent of retail prices. Moreover, the record shows that transportation costs account for only one-half of the difference between unit costs of food in Honolulu and in San Francisco. These statistics may or may not be representative, but in any event, it would not be just to deny reasonable rate increases to a common carrier for the simple reason that merchants use such increases as an excuse to inflate their prices.

The intimations of inefficient management are based on the slow turn-around of vessels and Matson's acquisition and reconversion of vessels during a period of peak prices. The record shows that vessel operation was slowed down on account of port congestion, which in turn was due to a backlog of shipments resulting from strike and other conditions. The new and faster fleet should provide much quicker turn-arounds than were possible during 1947. At any rate, there is no evidence of inefficient operation—it is all to the contrary. The wisdom of the management in acquiring its fleet when it did, and adapting it to the trade through reconversion, is a question which must be resolved in the light of future operating results.

Even though Matson's financial position was such as to enable it to stand substantial losses, the law does not compel it to operate under such conditions. Matson's financial standing is of no evidentiary value in determining the lawful level of the rates.

The following table shows earnings (or losses) from vessel operations for the calendar year 1947,[4] based on actual operations; also, assuming that the present rates had been in effect the full year, and that expenses had been incurred for the full year on the basis prevailing on December 31, 1947.

[4] December operations are estimated.

	Freight service combined (1)	Passenger service *Matsonia* (2)	Total (3)
(A) 1947 vessel operations:			
Net profit (or loss)	[1] ($61,562)	$156,672	$95,110
Depreciated investment plus working capital	$20,312,900	$1,526,998	$21,839,898
Return (percent)	None	10.27	0.44
(B) 1947 vessel operations with the increased rates and the expenses prevailing Dec. 31, 1947, applied to full year of 1947:			
Net profit	[2] $129,239	$93,738	$222,977
Depreciated investment plus working capital	$20,416,900	$1,561,998	$21,978,898
Return (percent)	0.63	6.00	1.01

[1] Pacific service lost $130,505, and Atlantic-Gulf service earned $68,853.

[2] Pacific service would have earned $82,614, and Atlantic-Gulf service would have earned $46,625.

Earnings before taxes reflected in the above table are higher than shown by Matson by $257,893 on freight service and $39,144 on passenger service due to the exclusion of inactive vessel expenses and depreciation on vessels not employed in the Hawaiian service during 1947; also charter hire revenue on passenger vessels not applicable to the period used.[5]

Matson discontinued payment of quarterly dividends on June 15, 1947, which had been paid regularly since 1906. Since 1937 dividends have ranged from a high of $1.50 per share to 60 cents in 1947. Its stock declined progressively during 1947 for a loss of around 8½ points. Matson capital stock, without par value, has a book value of $20.18 per share.

Matson estimates that earnings under present freight rates during the calendar year 1948, with its new fleet in operation the entire year, would yield less than 3 percent on capital employed in its freighter service. Estimated earnings after taxes, but before return on capital, are $702,865 on the west coast freighter service and $119,926 on the east coast freighter service. Capital employed in these services would be $32,186,436 and $5,420,637, respectively. While the *Matsonia* earned 10.27 percent in 1947 on its depreciated investment of around $1,500,000, it is anticipated that a year's operation of the *Lurline* will yield earnings of $340,314 after taxes, on capital employed of $17,110,855, or a return of approximately 2 percent.[6] Of the 1948 revenue dollar it is estimated that 2.66 percent will be available for return on investment, 45 percent for cargo handling and 35 percent for vessel expense, the largest items of which are wages and fuel. In estimating expenses no account is taken of increased expenses which might result from the arbitration just completed on

[5] The items excluded were charter hire on the *Lurline* and the *Matsonia*, depreciation on *Lurline*, *Hawaiian Refiner*, and *Hawaiian Wholesaler*, and inactive vessel expense during reconversion of freight vessels.

[6] Matson's passenger carryings in 1947 were only one-half of its carryings in 1940, the reduction being attributed to subsidized competition of Pan American Airways and United Air Lines.

wages of firemen, cooks and stewards, engineers, and radio operators. Moreover, negotiations will be conducted during 1948 on possible wage increases for the longshore, clerking, and seafaring personnel.

Isthmian's operations in the Hawaiian-Atlantic-Gulf service in 1947 under the present rates resulted in an estimated net loss of $13,687. American President Lines incurred a net direct vessel operating loss of $10,876. Oceanic lost $44,457. The other respondents made only incidental calls at Hawaiian ports.

CONCLUSIONS

Upon the record Matson's 1947 common carrier freighter operations in the Hawaiian service were conducted at a loss. Little better than an even break would have resulted had the increased rates of March 1947 been in effect, and the expenses prevailing on December 31st been incurred during the entire year of 1947. Moreover, if Matson's estimates of prospective traffic and expenses prove reliable, 1948 operations will yield only a modest rate of return on investment.

While the evidence here reveals operating losses, it provides no reliable basis upon which to predicate a reasonable and stable rate structure for the future. This is true because 1947 operations were conducted partly with old ships and under unusual traffic and shipping conditions. A more appropriate test period would include operation under the new, faster, and presumably more economical fleet.

This record supports certain conclusions which merit consideration in the fixing of, or judging, the rate structure in the Hawaiian trade, which is under review here for the first time:

First, the transition from the old to the new operation is a stage of new development necessitating extra costs, capital, and otherwise, chargeable to development. Development costs do not necessarily increase immediately and *pro-tanto*, the value of the service to the shipper. They are a business risk, assumed for the future, and should be spread out over the future.

Second, Matson has enjoyed a long and successful operation in the trade, thereby accumulating large reserves which have been converted into a modern fleet. The purpose of this, undoubtedly, was to place the company in a position of greater earning power. Other things being equal, Matson should progressively achieve such position. It is questionable, therefore, whether during this period of transition and development the highest permissible return on investment is warranted.

Third, this is a revenue case and no consideration is given to individual rates or to the question as to whether all commodities bear

their equitable share of the burden with due consideration given to the ability to pay.

We find that the rates, charges, regulations, and practices in issue have not been shown to be unlawful.

The proceeding will be discontinued.

3 U. S. M. C.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 24th day of August A. D. 1948

No. 660

MATSON NAVIGATION COMPANY—RATE STRUCTURE

This case having been instituted by the Commission on its own motion, 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 this proceeding be, and it is hereby, discontinued.

By the Commission.

[SEAL] (S) A. J. WILLIAMS,
Secretary.

3 U. S. M. C.

UNITED STATES MARITIME COMMISSION

No. 659

FREE TIME AND DEMURRAGE CHARGES AT NEW YORK

Submitted July 7, 1948. Decided October 19, 1948

Regulations and practices concerning free time and demurrage on import property at the port of New York found unjust and unreasonable in certain respects and not unjust or unreasonable in others.

Gustave Springer for Commerce and Industry Association of New York, Inc., American Spice Trade Association, Association of American Woodpulp Importers, American Watch Assemblers' Association Inc., Burlap and Jute Association, Cotton Importers Association, Inc., Hard Fibers Association, Lace and Embroidery Association, Linen Trade Association, Inc., National Council of American Importers, Inc., National Association of Importers of Hides and Skins, Oriental Rug Importers Association, Rubber Trade Association of New York, Shippers Conference of Greater New York, Tapioca Institute of America, and Tea Association of the United States.

C. A. Pascarella for Association of Food Distributors, Inc.

De Witt C. Reed for Association of American Importers of Green Olives.

George E. Shapro for the Hills Brothers Company.

William M. Fenn and *David S. Smith* for Green Coffee Association of New York City, Inc., and Cocoa Merchants Association of America, Inc.

Thomas J. Semler for United States Rubber Company.

Charles E. Egan for Spanish Olive Packers.

William M. Knox for Buckley Dunton Pulp Co., Inc.

Daniel J. Pitot for Price & Pierce, Ltd.

W. E. Aebischer for Great Atlantic & Pacific Tea Company.

Herbert M. Simon for American Bleached Shellac Manufacturers Association.

C. W. Mawer, Jr. for Mawer-Gulden-Annis, Inc.

Shirley Rief for New York Association of Dealers in Paper Mills' Supplies, Inc.

H. E. Simpson for Brookhattan Trucking Co., Inc.

Joseph M. Adelizzi for Motor Carrier Association of New York.

Wilbur La Roe, Jr., *Frederick E. Brown*, *Arthur L. Winn, Jr.*, and *Samuel H. Moerman* for Port of New York Authority.

A. C. Welsh for Brooklyn Chamber of Commerce.

Charles H. Toll, Jr. for Port of Boston Authority.

Samuel H. Williams for Chamber of Commerce of Philadelphia.

Charles McD. Gillan for Baltimore Association of Commerce.

Roscoe H. Hupper and *Burton H. White* for Trans-Atlantic Associated Freight Conferences.

Parker McCollester and *John R. Mahoney* for carriers named in footnote 7.

Herman Goldman, *Elkan Turk*, *Leo E. Wolf*, and *Elkan Turk, Jr.* for carriers named in footnote 8.

William Radner and *Odell Kominers* for carriers named in footnote 9.

Harold B. Finn for carriers named in footnote 10.

David H. Sackett for Calcutta-U. S. A. Conference.

Paul D. Page, Jr. and *George F. Galland* for the Commission.

Report of the Commission

By the Commission:

Exceptions were filed to the recommended decision of the examiner and oral argument was heard. Our conclusions agree in part with, and differ in part from, those of the examiner.

This is a rule-making proceeding instituted by the Commission on its own motion pursuant to sections 17 and 22 of the Shipping Act, 1916, and section 4 (a) of the Administrative Procedure Act. The notice of hearing[1] stated in part that "The Commission desires to receive evidence of conditions in the port relevant to [free time and demurrage at New York] for use in determining what action, if any, is required to assure the establishment, observance, and enforcement of just and reasonable regulations and practices," and directed that public hearings be held at which interested persons might express their views.

Section 22 of the Shipping Act, 1916, authorizes the Commission to investigate "any violation of this Act." Section 17 of the Shipping

[1] Published in the Federal Register on June 7, 1947, 12 F. R. 3754.

Act, 1916, requires, in its pertinent part,[2] that every common carrier by water in foreign commerce and every other person subject to this Act "shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property," and that: "Whenever the board [i. e., the Commission] finds that any such regulation or practice is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable regulation or practice." [3] Section 4 (a) of the Administrative Procedure Act provides for notice of rule-making proceedings.

The question for consideration is whether, as to property transported to the port of New York by "common carriers by water in foreign commerce," as defined in section 1 of the Shipping Act, 1916,[4] the carriers' regulations and practices are unjust or unreasonable with respect to (a) adequacy of the free time,[5] (b) the time of commencement of free time and the giving of notice of readiness of goods for removal from pier, (c) the inclusion in free time of periods during which consignees, due to circumstances beyond their control, are unable to remove cargo from pier, or (d) the charging of the full amount of demurrage [6] where consignees, due to circumstances beyond their control, are unable to remove cargo from the pier.

Numerous carriers contend that the matter of sufficient free time is not one within the purview of the second paragraph of section 17. Thus, on behalf of the Trans-Atlantic Associated Freight Conferences it is asserted that "the question is one of reasonableness and this must involve the reasonableness of the charge, whether it be in terms of amount or in terms of time pursuant to which the amount is determined" and that "Congress has granted to the Commission no authority

[2] As agreed at a prehearing conference, the only part of section 17 involved in this proceeding is the second paragraph of that section.

[3] Counsel for several carriers attacked our jurisdiction on the ground that the notice of hearing failed to charge a violation of the Shipping Act, 1916. Their argument misses the point of the proceeding, which has for its purpose the prescription of reasonable regulations and practices for the future. Our finding that certain regulations and practices presently in effect are unjust and unreasonable (and to that extent violative of the Act) is a conclusion based on the record *after* consideration of the evidence. We cannot concede that we lack jurisdiction because of our failure to assume and charge a violation *before* considering the evidence.

[4] Section 1 of the Shipping Act, 1916, defines the term "common carrier by water in foreign commerce" to mean a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade: *Provided*, That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce."

[5] The free time in question is a period which is covered by the rates for the ocean transportation and which is allowed for the removal of the property from pier after its discharge from vessel.

[6] The demurrage in question is a charge on cargo on pier after free time has expired.

to regulate foreign rates and charges." Also, other carriers [7] reason: "Since the Commission is thus without authority to require a reduction in a rate for water transportation from a foreign country to the United States or to prescribe a maximum reasonable rate for such service, it must follow that it is likewise without jurisdiction to require a carrier to extend its free time and thus, in effect, determine that the transportation rate is unreasonable because a greater free time is not afforded." In the brief of the Inward Far East Lines [8] it is argued as follows:

> If the Commission should attempt to rule that the period of free time must be enlarged, then the Commission would be ruling that during a certain number of days the carriers are prohibited from making a charge for the use of their facilities. In other words, the Commission would be fixing zero dollars as the charge which the carriers must make during such extended period for the use of its facilities and the services rendered in connection therewith. Such an order would constitute rate making, pure and simple.
>
> The Commission has obviously no more power to order a carrier in foreign commerce to charge zero dollars for the use of its property and the rendition of its services than it has to order the carrier to charge $1.00 or $2.00 or any other sum, for the use of its property and for such services.
>
> The Shipping Act of 1916 and the subsequent statutes which have vested authority in the Commission may be searched in vain for any trace or suggestion of authority to fix rates.

Other carriers,[9] stating that the second paragraph of section 17 cannot be held to authorize fixing the charge for the service rendered, contend that "Likewise, there is no authority therein to fix the service to be rendered for the charge." Still others [10] assert that section 17 does not

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[7] Alcoa Steamship Company, Bermuda & West Indies Steamship Company, Ltd., Compania Colombiana De Navegacion Maritima (Coldemar Line), Compania Sud Americana De Vapores (Chilean Line), Compania Trasatlantica (Garcia & Diaz, as Agents), Compagnie Generale Transatlantique (French Line), Grace Line, Inc. (Grace Line), Flota Mercante Grancolombiana, S. A. (Grancolombiana Inc., Agents), J. Lauritzen (West Coast Line, Inc., as Agents), New York & Cuba Mail Steamship Co., North Atlantic & Gulf Steamship Company, Inc., Panama Railroad Company (Panama Line), Royal Netherlands Steamship Co., Standard Fruit & Steamship Co., United Fruit Company, and West Coast Line, Inc.

[8] American President Lines, Ltd.; Bank Line, Ltd. (Bank Line); Dampskibsselskabet Af 1912 Aktieselskab and Aktieselskabet Dampskibsselskabet Svendborg (Moller Steamship Company, Inc.); The De La Rama Steamship Co., Inc., and Swedish East Asiatic Co. Ltd. (De La Rama Lines); Ellerman & Bucknall Steamship Co. Ltd. (American & Manchurian Line); Fearnley & Eger and A. F. Klaveness & Co. A/S (Fern Line); Isthmian Steamship Company; Lancashire Shipping Company, Ltd. (Dodwell-Castle Line); N. V. Stoomvaart-Maatschappij "Nederland"; N. V. Nederlandsche Amerikaansche Stoomvaart Maatschappij "Holland-America Lijn"; N. V. Rotterdamsche Lloyd; The Ocean Steam Ship Company, Ltd., The China Mutual Steam Navigation Co. Ltd., and Nederlandsche Stoomvaart Maatschappij "Oceaan" (Blue Funnel Line); Prince Line, Ltd. (Prince Line); Silver Line, Ltd.; Skibsaktieselskapet Igadi A/S Besco and Aktieselskapet Ivaran Rederi (Ivaran Lines—Far East Service); T. & J. Brocklebank, Ltd.; United States Lines Company (American Pioneer Line); Waterman Steamship Corporation; Wilhelmsens Dampskibsaktieselskab, A/S Don Norska—Og Australielinie, A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S Tankfart V, and A/S Tankfart VI (Barber Steamship Lines, Inc., Agent).

[9] The New York and Porto Rico Steamship Company and Bull Insular Line, Inc.

[10] The Booth Steamship Company, Ltd.; Rederiaktiebolaget Disa, Rederiaktiebolaget Poseidon, and Angfartygsaktiebolaget Tirfing (Brodin Line); Flota Mercante del Estado;

authorize the Commission "to prescribe either minimum free-time allowances or maximum demurrage charges for the port of New York."

As previously noted, section 17 provides that, whenever the Commission finds that certain regulations or practices are unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable regulation or practice. This constitutes an "unlimited grant to the Commission of the power to stop effectively all unjust and unreasonable practices in receiving, handling, storing or delivering property." *California* v. *United States*, 320 U. S. 577, 584. The court in that case affirmed the judgment in *State of California* v. *United States*, 46 F. Supp. 474, 479 (which in turn upheld an order of this Commission in Docket No. 555, *Practices of San Francisco Bay Area Terminals*, 2 U. S. M. C. 588), wherein it was held that "The allowance of free time is a 'regulation or practice' within the contemplation of § 17." True, as some of the carriers point out, that case concerned an order of the Commission which set a *maximum* free time whereas here involved is the question of whether the free time allowed is long enough. The distinction, however, is of no consequence so far as the instant jurisdictional question is concerned. Minimum free time, and demurrage practices as well, come within the broad scope of that language.

We are not here seeking to exercise rate-making power. The question before us is whether certain regulations and practices are just and reasonable—not how much the services of the carriers are worth. We held in Docket No. 555, *Practices of San Francisco Bay Area Terminals*, 2 U. S. M. C. 588, affd., *California* v. *U. S.*, 320 U. S. 577, that carriers are bound to impose compensatory demurrage charges after the expiration of reasonable free time. If the currently effective tariff rates of demurrage are not compensatory, new rates should be published which are compensatory. We make no finding in this case as to whether existing rates are compensatory or not.

International Freighting Corp., Inc.; A/S Liso, A/S Besco, and Aktieselskapet Ivarans Rederi (Ivaran Lines); Lamport & Holt Line, Ltd.; Linea Sud-Americana, Inc., Lloyd Brasileiro (Patrimonia Nacional); Moore-McCormack Lines, Inc.; Northern Pan-America Line A/S; Prince Line, Ltd.; Rederiaktiebolaget Svenska Lloyd, Stockholms Rederiaktiebolag Svea, and Rederiaktiebolaget Frederika (Norton Line—Joint Service); Sprague Steamship Agency, Inc.; Svenska Brazil La Plata Linjen; Wilh. Wilhelmsen, and Cia Argentina de Navegacion Dodero, S. A., all parties to United States Maritime Commission Agreement No. 7525; American Export Lines, Inc.; The Bank Line Limited; Ellerman & Bucknall Steamship Co., Ltd.; Isthmian Steamship Company; Thos. & Jno. Brocklebank, Ltd.; Seindia Steam Navigation Co., Ltd.; States Marine Corporation, and States Marine Corporation of Delaware, all parties to United States Maritime Commission Agreement No. 7555; The Union-Castle Mail Steamship Company, Ltd.; The Clan Line Steamers, Ltd.; British and South American Steam Navigation Company, Ltd.; Prince Line, Ltd; and American South African Line Inc., all parties to United States Maritime Commission Agreement No. 7575, to which, as well as Agreement No. 7555, Ellerman & Bucknall Steamship Company, Ltd., also, is a party.

Motions to dismiss the proceeding for want of jurisdiction are denied.

Prior to 1937, cargo imported from foreign countries was allowed to remain on piers at the port of New York for indefinite periods. On November 16 of that year, the Commission, in Docket No. 221, *Storage of Import Property*, 1 U. S. M. C. 676, entered an order requiring respondents in that proceeding "to cease and desist, on or before January 21, 1938, from allowing more than ten (10) days' free time (exclusive of Sundays and legal holidays) on import property at the port of New York." While set as a maximum, this period, between the effective date of the order and 1941, was the free time that carriers actually allowed. In 1941, as stated in the notice instituting the instant proceeding, the Commission, for the purpose of minimizing congestion of the port in the interest of national defense, requested that the free time be reduced, and, in accordance with such request, a period of five days was generally put into effect. On property imported from South America or the Caribbean area, a period of six days was fixed as the free time. These periods are still in force. When they were established, Sunday and legal holidays were excluded therefrom, but they included Saturday. Since then, Saturday has been eliminated. It is these periods of five and six days, exclusive of Saturday, Sunday, and legal holidays, that are here in question. They commence at 8:00 A. M. of the day following completion of vessel's discharge of cargo, unless that day is a Saturday, Sunday, or legal holiday, and, if it is such, they begin at 8:00 A. M. of the first day after such completion that is not a Saturday, Sunday, or legal holiday. Under provisions of tariffs filed with the Commission, the commencement of free time may be deferred if shipments are not available to consignees upon application therefor. Cargo remaining on piers after the free time has expired is charged demurrage as follows: 2½ cents per 100 pounds or 1 cent per cubic foot (in some cases, 3½ cents per bag of 60 kilos) for the first five calendar days or fraction thereof, minimum 50 cents; 5 cents per 100 pounds or 2 cents per cubic foot (in some cases, 7 cents per bag of 60 kilos) for the second five calendar days or fraction thereof, minimum $1; 10 cents per 100 pounds or 4 cents per cubic foot (in some cases, 14 cents per bag of 60 kilos) for each succeeding five (in some cases, 10) calendar days or fraction thereof, minimum $2 for each period.[11]

[11] Demurrage is computed on the basis on which the cargo is freighted, except that, in some trades, if the cargo is freighted on a basis other than weight or measurement, the charges are computed on a weight or measurement basis, whichever yields the greater revenue.

Importers seek a minimum free time of ten days.[12] The Port of New York Authority proposes that the present free time be enlarged to seven days, exclusive of Saturday, Sunday, and legal holidays, on general cargo, and to the maximum ten-day period on coffee and cocoa beans.[13] The carriers' position is that the free-time periods now in effect are just and reasonable.

Before the unloading of cargo from ship to pier may be begun, permission to make the discharge must be secured from the collector of customs. Such permission is obtained after the ship's captain makes entry of the vessel, which he is required to do within 48 hours after the ship's arrival at quarantine. Likewise under customs laws and regulations, an importer is allowed 48 hours after such arrival to make entry of his goods.[14] Excluded from this period, which may be extended, are the day of arrival of the vessel at quarantine, Saturdays, Sundays, and legal holidays. If entry of the goods is not made within the time allowed therefor, which seldom occurs, customs, at the expense of the importer, sends them to a "general order" warehouse, which is a private warehouse designated by the collector of customs.

When entry of merchandise is made before 2 o'clock in the afternoon, the permit copy of the entry, bearing orders of the collector, is sent to the customs inspector on the pier, usually by means of government messenger,[15] on the same day. This informs the inspector as to whether the importer may remove the goods from the pier. If there are no further customs requirements to be met, except the singling out of packages for the appraiser's stores, and if the collector does not order the goods to be held for another government agency, such as the Food and Drug Administration of the Federal Security Agency or the Bureau of Entomology and Plant Quarantine of the United States Department of Agriculture, the importer, as far as customs is concerned, may remove them, with the exception of the packages designated to be sent to the appraiser's stores, as soon as they are discharged from the ship.

Goods are weighed by customs if ascertainment of their weight is necessary to find their value for the purpose of assessing duty. In such

[12] It is asked that Saturday, as well as Sunday and legal holidays, be excluded, but, if this request should be granted, the minimum would exceed the period ordered in *Storage of Import Property, supra,* to be observed as a maximum and agreed at the prehearing conference to be generally satisfactory as such.

[13] The suggested discrimination in favor of coffee and cocoa beans would violate our decision in Docket No. 482, *Storage Charges Under Agreements 6205 and 6215,* 2 U. S. M. C. 48, affd., *Booth S. S. Co.* v. *U. S.,* 29 F. Supp. 221.

[14] It appears that entry may be made in respect to perishable merchandise in advance of the report of the vessel at quarantine.

[15] The importer may employ his own messenger.

cases, the carriers must place the merchandise on the piers so that it is not above shoulder height. Where the packages are uniform, approximately ten percent of the consignment is weighed. An effort is made to weigh the merchandise before the importers come for it, but in the last few years this could not generally be done because of the congestion on piers. Several days may intervene between the time of unloading of cargo from ship to pier and the time when pier conditions are such that it can be weighed. As stated by a customs witness, "we receive the greatest cooperation from the steamship people, but in many cases it is just a case where they have just no place to put it. They have no space to put these goods after they are weighed. So, we must wait until we get that space before we can even start on it." Where, due to such a condition, the weighing cannot be undertaken before the importer comes for his merchandise, customs resorts to "weighing to delivery," i. e., weighing as trucks arrive and are in a position to load. In cases where importers make the necessary arrangements with bonded warehouses, customs will weigh shipments there, but it is very seldom that space for weighing can be obtained at a warehouse.

At times, the necessity of weighing precludes the removal of cargo from piers within the free time. It does not result from this, however, that the free-time periods are unlawful. The weighing is not done for any reason that concerns the carriers but is an operation connected with a transaction between the importer and customs. It requires space in addition to that needed for the delivery of cargo. The delays which it entails are not attributable to the carriers and to make no allowance in the computation of free time for the time consumed on account of it is not unjust or unreasonable.

Samples to be sent to the appraiser's stores are taken, pursuant to order of the collector, by the inspector on the pier or by a sampler. They are conveyed to the appraiser's stores by government truck. It does not appear that the drawing of a sample causes the rest of the consignment to remain on pier after the expiration of free time. The evidence indicates that the government truck does not come to the piers for samples as promptly as it should and that some difficulty is experienced in finding particular packages that have been designated for the appraiser's stores. These matters, like weighing, are not factors that carriers are required to consider in fixing the duration of free time. Consequently, that samples remain on the piers after the expiration of free time because of them is not an indication that the free time allowed is unjust or unreasonable.

Imports may require sampling by the Food and Drug Administration. Whether cargoes contain commodities of such character is determined by inspection of the ships' manifests and of consular invoices. Several times a day an employee of the Food and Drug Administration examines the consular invoices in the invoice room of the appraiser's stores, to which they are routed from the customhouse as soon as customs entry of the invoiced shipments is made if there is not also to be a sampling made by the appraiser. If the appraiser decides to examine a portion of a shipment, the invoice in such case does not reach the appraiser's stores and so become available to the Food and Drug Administration until the sample for the appraiser's examination arrives there. This makes for delay. On 100 entries taken at random for a period in September 1947, the average time in customs of the invoices, i. e., the average time, including Saturdays and Sundays, between entry of shipments and availability of invoices to the Food and Drug Administration in the invoice room of the appraiser's stores, was 2.1 days. The time varied from a minimum less than a day, where the Food and Drug Administration received the invoice on the same day as the date of entry, to a maximum of ten days, which occurred once. The time consumed by the Food and Drug Administration from the time when it received the invoices from customs ranged from one day to eleven days, and averaged 4.6 days. Because of the type of examination which particular samples may require, the Food and Drug Administration may need up to three weeks to make its tests. Whether due to customs procedure or to the requirements of the Food and Drug Administration, or to both, the fact is that sampling by this agency is not always completed before free time commences or even before it expires. However, as testified by a witness from the Food and Drug Administration, the agency does not require goods to be left on the piers pending sampling by it. They are covered by a bond, may be removed as soon as the customs permit is issued, and inspected later. It is pointed out that, if an importer should ship goods to an inland point and they should thereafter be condemned, they would have to be transported back to New York. However, the carriers can hardly be required to accommodate cargo on their piers free of charge because it may fail to conform to the standard applicable to it. Moreover, while the Food and Drug Administration strongly recommends against the removal of goods beyond the port area, it will undertake to sample anywhere within that area. In fact, it is estimated that approximately one-fourth of the agency's samples are collected from shipments that have been removed from the piers and stored on importers' premises or in warehouses. Im-

porters refer to the scarcity of available warehouse space and to the expense involved in warehousing merchandise awaiting sampling, such as the cost of its tranfer from pier and the charge made for labor at the warehouse, in addition to the storage charge. Such circumstances, however, have no effect on their ability to remove cargo from piers. They may cause them to decide that it is prudent to delay such removal, but it cannot be said that, on account of them, the free time allowed is unjust or unreasonable.

A person making entry of commodities subject to plant-quarantine regulations is required to give notice of the arrival of such plant material to the Secretary of Agriculture, and, before entry thereof is accepted by customs, there must be on file at the customhouse a permit issued by the Secretary of Agriculture to the Secretary of the Treasury allowing the material to come into the United States. No part of the free time need be used by the importer in securing the issuance of the permit. Immediately upon discharge or partial discharge of the plant material, examination thereof is made on the pier by an inspector of the Division of Foreign Plant Quarantines of the Bureau of Entomology and Plant Quarantine of the Department of Agriculture, and, before it has passed such inspection, it may not be removed from the pier. The inspection is made at or, as is usually true, before the time of weighing by customs. It is almost always completed within 24 hours after the shipment has been landed. Delays may be encountered if labor (which is required to be furnished by the importer) such as that employed in the opening of packages, is not provided as needed. If the inspector finds that the goods are entitled to entry, which is generally the case, they are released by customs. Certain commodities, such as raw cotton, are allowed to enter the country on condition that they will be treated, and, as soon as the importer designates the plant where his imports thereof are to undergo the treatment, they are released to that plant, and it is the duty of customs to see to it that they are delivered there and not released to the importer. If the importer is not prompt in designating the plant, removal of the goods from the pier is delayed. There is no indication that the requirements respecting plant quarantine cause goods to remain on piers after the expiration of free time.

Some commodities, before their removal from the piers, undergo certain processes for purposes unconnected with requirements of government agencies. Spanish olives, for example, are inspected and rebrined, and, where necessary, the barrels and casks containing them are repaired, by or on behalf of the importer. In order that the rebrining may be done, the barrels and casks must be placed on bilge with bungs up, and they must not be stacked one above the other. If they

are so stacked, time is consumed in waiting for the carrier to break down the tiers and place the olives in the required position. One of the carriers has "headed up" cargo two or three tiers high, but its witness testifies that that was done three years ago. Since then, there was portion of a shipment that was "headed up" upon its discharge from vessel, but it was placed on bilge immediately after the unloading of the ship's cargo had been completed.

Waiting for customs and the Food and Drug Administration to accomplish their tasks which, in one case they did not do until eleven days after completion of the ship's discharge, appears to be the principal reason for the delay in effecting removal of olives from piers. In view of what has been said above as regards these agencies, such cause is not sufficient ground to require a modification of free-time practices. The opinion is expressed that "the carrier is held responsible for the condition of the goods, and if those goods go to a warehouse and they are in bad condition, by neglecting to fix them or rebrine them, then he is responsible and he pays a claim." Without passing on the correctness of this opinion, since it is not for the Commission to determine, it is noted that the purpose of the rebrining, which is done for the account of the importer, is "to prevent spoilage in transportation by truck or by lighter and railroad to the plants of the importers." It may be stated, moreover, that, if the view expressed is correct, it may warrant the carriers' considering whether the free-time periods should not voluntarily be lengthened, but it would not justify a requirement by the Commission that more free time be allowed.

Coffee and coca beans, besides being sampled by the Food and Drug Administration, are subjected to sampling by the importers. Coffee roasters have plants in various parts of the country, and, as testified by a witness for the coffee trade, a roaster "has got to be extremely careful that the particular lot that he is sending to his plant for his roasting requirements is in line with the formula or the procedure of the plant, and for that reason, they must definitely inspect, grade, and cup the various lots of the coffee." With the utmost speed, two days are required to complete the test. Meanwhile, the balance of the cargo from which the samples are drawn remains on the piers. In the case of cocoa, the procedure is simpler. It involves inspecting and grading, but not roasting, which is the major time-consuming element in the testing of coffee, or cupping, as tasting is called. As regards either commodity, the sampling is not an operation required in connection with delivery by the carriers. Therefore, it can provide no valid ground to contend that the free time allowed is unjust or unreasonable.

The principal reasons for seeking more free time for coffee and cocoa beans are that 80 percent of such traffic imported through the port of New York is removed from piers by the use of lighters; that the lighters are not always available as needed to accommodate the large volume of these commodities discharged from vessels, and that, when they are secured, it is difficult to find space for them at the piers.

Lighters, like railroad cars or trucks, are furnished, not by the water carriers that allow the free time, but by railroad or other companies, which send them to the piers pursuant to orders of the importers. If they are not available when the time for delivery of cargo arrives, such unavailability can have no effect as indicating that the free time allowed is unlawful. Persons importing merchandise may reasonably be assumed to have, or to be able promptly to obtain, the equipment needed to receive it. It is not necessary, in fixing free time, to allow for delays that may be encountered in the procurement of equipment. Consequently, so far as the availability of lighters is concerned, there is no warrant for holding that the free time which the carriers allow is unjust or unreasonable.

Delay experienced in securing space at piers for lighters is discussed below.

Wood pulp, which is sold on a dry basis, normally is tested on piers by the importer in respect to its moisture content before it is shipped to mills in the interior. For some time, the importers have been able to have the testing waived, but the resumption thereof at a future date is expected. No more warrant exists for its consideration than for that of commercial sampling of coffee or cocoa beans in the fixing of free time. Nor is it the principal reason for seeking additional free time for wood pulp. The chief concern expressed in regard to this commodity is that large quantities thereof, such as 1,000 to 1,500 tons, destined to the same consumer mill cannot be moved from the piers within the free time because, to quote from the testimony of an importer's witness, "the railroads are unwilling to put more cars into that particular mill than they are able to unload in a given period," this due to the fact that "the cars back up along the line, and the railroad people are in trouble." This indicates that the difficulty is that the interior mill to which the importer consigns the wood pulp does not have the facilities to receive it as fast as it could be shipped, not that the free time allowed for the removal thereof from piers is unjust or unreasonable.

The foregoing discussion disposes of the questions presented by the record relative to delays which result from Government procedures and trade practices which tend to impede the removal of cargo from

piers. As to these matters, we accept the examiner's recommendations and hold that the carriers, in determining the duration of free time, are not obliged to take account of delays in the removal of cargo which arise from the causes hereinabove discussed.

We next consider whether free time of five or six days, as provided by the tariffs presently in force, is reasonably adequate to enable the carriers to effect delivery before the inception of demurrage. It should be noted that free time is granted by the carriers not as a gratuity, but solely as an incident to their obligation to make delivery. *The Eddy*, 5 Wall. 481, 495; *The Titania*, 131 F. 229, 230. This is an obligation which the carrier is bound to discharge as a part of its transportation service, and consignees must be afforded fair opportunity to accept delivery of cargo without incurring liability for penalties. Free time must be long enough to facilitate this result—but need not be longer. As stated in Docket No. 221, *Storage of Import Property*, 1 U. S. M. C. 676, 682:

> As a proper part of their transportation service respondents should allow only such free time as may be reasonably required for the removal of import property from their premises, based on transportation necessity and not on commercial convenience.

The best index to the adequacy of free time is evidence relative to the frequency and amount of demurrage assessments. If demurrage were assessed with great frequency, or in large amounts, it would suggest that free time is inadequate for delivery. If, on the other hand, demurrage is the exception rather than the rule, and the amounts of demurrage are small, we must infer that cargo is normally deliverable and delivered within free time, and that free time is adequate.

Olive importers claim that "our members have paid out thousands of dollars in demurrage charges for not being able to move their olives from the piers within the free-time period when they have not been responsible for the delays at all." No evidence was offered, however, to support this general assertion. An importer of rubber and spices, while stating that "about 25% of our imports are subject to demurrage," declined to substantiate the assertion by producing his company's records. A traffic manager for a large food importer was unable or unwilling to furnish any information as to demurrage paid by his company or his industry except that his company had once paid $12.41 on 20,000 cases of pineapple and on another occasion $2.91 on 250 bags of coffee. The same witness said "*We never worry about the penalty charge.*" Asked whether he made every effort to take delivery within free time, he answered, "Yes, we make every effort. We pay terrific—well, very high *transportation* charges."

Only one importer ventured to estimate his demurrage cost over a period of time. He said that his company paid $1,800 demurrage in 1946 on food imports involving $400,000 of ocean freight—the ratio of demurrage to freight being less than half of one percent. This percentage, small as it is, may be higher than the average because the company against which the demurrage was assessed imports figs and dates in quantities so large as to retard inspection by the Food and Drug Administration.

Importers contended during oral argument that statistics as to amounts of demurrage collected should have been furnished by the carriers. The carriers, however, are not seeking relief from their own regulations. That relief is sought by the importers, and it was incumbent upon them to prove the facts on which their case depended. We cannot assume, in the absence of proof, that demurrage penalties are sustained with excessive frequency or in unwarranted amounts. The record being without support for a finding that demurrage is unduly burdensome cannot and does not require or authorize a conclusion that existing free time is inadequate, since demurrage, is, in at least a general way, a measure of the inadequacy of free time.

We have not overlooked the hardships to importers which result from traffic conditions at the piers. The piers themselves are heavily congested with cargo, import and export. Many are old, and inadequate to accommodate readily the cargoes of large modern ships, or to afford easy access and adequate maneuvering space for trucks. These conditions slow down the delivery of import cargo, with the result that trucks which call for it are delayed in long queues at the pier entrances. A particular truck may wait for many hours and then may be turned away without a load, in which event it must return at a later hour or on another day. Trucking is inefficient and expensive in these circumstances, which account for the testimony above quoted of the witness who said that although he tried to take delivery within free time, the effort involved "terrific" transportation (i. e., trucking) charges.

The congestion of trucks has its counterpart with respect to lighters, which carry the greater share of the traffic. Lighters may be and often are blocked out by ships alongside the piers, and are long delayed in finding a place at the apron. We may infer that such delays do not improve the economy of lighterage.

The importers claim that congestion and delay would be reduced or eliminated if free time were extended to ten days. This contention is negated by testimony that importers' trucks would still present themselves at the pier at the earliest possible moment and would "park on the doorstep" until loaded. If all importers did the same (and all

profess eagerness to obtain their goods promptly), congestion would not be reduced.

But even if an extended free-time period should have the effect which importers claim for it, it does not follow that we should or may order the extension unless extension is necessary to assure delivery of cargo without unwarranted penalties. As previously indicated, free time is not a gratuity to consignees. It is allowed solely to permit fulfillment of the carrier's obligation to deliver the goods. It need not exceed "a reasonable time allowed for their removal." *The Titania*, 131 F. 229, 230. A "reasonable time" must be determined with due regard for the rights of all parties, including carriers as well as importers, and especially for the public interest, which requires that congestion of ports be minimized in the interest of efficient water transportation.

The record amply demonstrates that the port of New York is congested, some witnesses having described the congestion as worse than in 1941 when we informally requested that free time be reduced below ten days. Witnesses for the steamship lines testified convincingly that free time cannot be increased without aggravating the congestion [16] and the record contains no reliable evidence to the contrary.

We do not minimize the inconvenience to importers of meeting five-day or six-day deadlines on expiration of free time. The significant fact, however, is that they are meeting them with considerable success, and that import traffic is now moving across the piers more rapidly than it did under the ten-day rule. There was testimony that "a greater percentage of each vessel's cargo is delivered within six days under present conditions than was delivered within six days when the free time was ten days." It thus appears that the shorter free time allowance is promoting the efficiency of the port and that we could not require a general enlargement of free time without risking disorganization of pier operations. Conceding that the removal of property

[16] A witness appearing for a group of lines which allow six days of free time testified: "It not only seems evident to us, but it is positively evident, based on continual study, that we are making, that were we to extend free time beyond the present six-day period, it would certainly have the effect of increasing the congested condition which exists in New York at the present time, and would, within a short time, make it impossible—and I would like to stress the word 'impossible'—for many of our lines, if not all of them, to not only deliver their cargo in good order, but even find it for delivery on the pier.

"Now, to explain a little bit what I mean by that, I should say that a number of our lines operate their services with considerable frequency. Some of them have vessels coming in here at the rate of three and four per week. We are very certain that unless the cargo from one ship is completely delivered by the time the next ship arrives, the next ship is going to cause congestion by reason of the combination of cargo remaining on the pier from the vessel plus the discharge of the second vessel, and as successive vessels arrive, that condition is going to become materially worsened, and within a very short time not over 30 days, the conditions on those piers will be impossible."

within five or six days imposes substantial burdens on importers, we are nevertheless compelled to find that the law and the evidence do not justify the transfer of those burdens to the carriers in the form of extended free time.

We do find that under the conditions currently prevailing in the port of New York, five days is the shortest time that affords to consignees a reasonable opportunity to take delivery of imports. A tariff providing for less than five days of free time would, under existing circumstances, be unjust and unreasonable. No tariff specifically provides for less than five days of free time at New York, but several tariffs are so phrased that they fail to assure consignees of any free time whatever. An example is tariff No. 4 under Agreement No. 7115, which provides in relevant part:

> 1. A maximum free time period not to exceed six days exclusive of Saturdays, Sundays, and legal holidays shall be observed. Any cargo not removed from the piers within this free-time period, shall be placed in public storage at the risk and expense of the cargo.
>
> 2. The carriers do not waive but they reserve all provisions of their bills of lading including those whereby removal may be required within a shorter period than six days.
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> * * * * * * *
>
> 4. Free time expires at 5:00 P. M. on the sixth day after its commencement, including the day it starts but not including Saturdays, Sundays, and legal holidays.

These provisions do not guarantee six days of free time as a minimum; they merely authorize six days as a maximum. By reservation of the provisions of bills of lading "including those whereby removal may be required within a shorter period than six days," they deprive consignees of the right to insist upon any allowance of free time except at a carrier's election. This follows from the fact that bills of lading almost universally provide for transportation only to the end of ship's tackle. A provision for ship's tackle delivery is obviously one "whereby removal may be required within a shorter period than six days."

In the port of New York, delivery can seldom, if ever, be made at the end of the ship's tackle. In these circumstances, a provision in the bill of lading purporting to require the receipt of cargo at ship's tackle, is inconsistent with the common-law requirement of "due and reasonable notice to the consignee, so as to afford him a fair opportunity to remove the goods." (*The Eddy*, 5 Wall, 481, 495.) Moreover, regardless of the actual ability or inability of carriers to deliver at ship's tackle, it is the established custom of the port to make delivery to the dock; and such custom supersedes all contrary provisions of bills of lading (*The Titania*, 131 Fed. 229, 232).

We hold that a tariff which fails to assure to consignees a minimum of five days of free time, and which authorizes "public storage at the risk and expense of the cargo" prior to the expiration of five days' free time (exclusive of Saturdays, Sundays, and legal holidays) is an unjust and unreasonable regulation under the conditions which now prevail at the port of New York.

The examiner recommended that "the tariffs should be revised so as to show the full free time allowed, including that prior to 8:00 A. M. of the day following complete discharge of the vessel." This recommendation refers to the carrier's practice of allowing some cargo to be removed by consignees while the vessel is discharging and before tariff free time officially begins. While this practice involves a possibility of discrimination between consignees, there is no evidence of actual discrimination, and we consider the general practice to be proper because it speeds delivery: one group of carriers delivers about 28 percent of in-bound cargoes during the period of discharge. While approving the practice, as such, we do not feel justified in requiring here that free time be defined in the tariffs to include any part of the period of discharge, since such definition might imply a right in consignees to enter the pier and demand their cargoes as soon as landed. To confer that right would be impracticable because the carriers, in order to operate efficiently, must retain the power to exclude the public, except as admittance may conveniently be granted, until a vessel's entire cargo has been landed, sorted, and laid out in accessible position.

We cannot agree with the examiner's recommendation that free time be extended to take account of the waiting time of trucks and lighters. The suggested rule would, in our opinion, result in less efficient operation, to the detriment of all concerned. Under the examiner's proposal, a consignee who applied unsuccessfully for his cargo would be told by the carrier when to apply again and the interval between his first and second applications would be added to the free time. This system would enable the carrier or its pier personnel to prefer favored shippers by granting them "appointments" to receive their cargo at their own convenience. It would invite bribery of delivery clerks. It could promote disputes between truck drivers if those returning at appointed times were served ahead of others awaiting their turn in line. It would frequently present problems of identifying the cargo to which the time extension applied: if a 10-ton truck should call for part of a 1,500-ton shipment, would the extension apply to 10 tons or to 1,500? If to 10 tons, to which 10?

We do not share the examiner's view that a notice of availability of cargo should be required in order to start the running of free time.

The requirement would merely postpone the removal of cargo by as long a time as the notice took to reach the consignee, and would serve no discernible need. Consignees are universally apprised of the arrival of vessels and routinely inform themselves by telephone, messenger, or reference to shipping publications, as to the availability of their cargoes and the commencement and expiration of free time. Insistence upon a notice of availability would subject the carriers to extra work and expense that would be largely futile, and which appears quite unjustifiable.

As noted above, the demurrage rates in force at New York are on a geometrically progressive scale, beginning at 2½ cents per hundred pounds for the first five days after expiration of free time, increasing to five cents for the second five-day period and to ten cents for each five-day period thereafter. While there is testimony purporting to show that these rates, even at the top of the scale, are non-compensatory to the carriers, it is undisputed that the demurrage rate structure is penal in purpose, intended to clear the piers.

Special problems develop in consequence of the penal demurrage scale, when port-wide conditions arise which prevent the removal of cargo until free time has expired and demurrage has accrued. General disability to remove cargo may result from various causes, of which the most frequent cause in recent years has been labor strife. During the latter part of 1946, the port of New York was crippled by strikes of seafaring personnel and truck drivers. Large quantities of cargo were immobilized on piers pending settlement of the disputes, and demurrage at penalty rates was assessed against many consignees.

In considering the effect of strikes on the rights of the parties, a distinction must be drawn between strikes which involve employees of carriers and those which involve others. Strikes by employees of carriers present no regulatory problem on the present record, since the carriers recognize that when delivery is prevented by strikes of their own employees, free time must be extended. One witness testified that "any condition or any delay brought about by the inability of our lines to tender for delivery due to the seamen strikes or to the picketing of the pier by servants of the vessel by reason of that strike, we were responsible for, and we were obliged to extend free time for a comparable period." This principle is expressly recognized in some of the tariffs.

The tariff under Agreement No. 6015 provides:

* * * The foregoing provisions in respect to the commencement of free time is based upon the assumption that individual shipments or portions thereof are available for delivery to consignees upon application therefor.

Tariff No. 4 under Agreement No. 7115 provides:

> Should any individual shipment or portion thereof, upon application therefor, be unavailable for delivery to the consignee at any time during the free time period, the expiration of the free time period on the unavailable cargo shall be extended for a period equal to that during which said cargo was not available for delivery.

We believe that such provisions as these afford adequate protection to consignees against the assessment of demurrage where, due to strikes of carrier personnel, or other impediments, cargo cannot be tendered for delivery.

A different situation exists in a case such as a truck drivers' strike, which is no responsibility of the carrier, but which effectively prevents consignees from removing their shipments. During the 1946 trucking strike, many piers were blockaded by the physical or moral force of picket lines established by drivers or their sympathizers, and demurrage was assessed on many shipments which, although available for delivery, consignees could not remove. In such cases, neither carriers nor consignees are at fault. Both are helpless bystanders. Consignees claim that, being free from fault, they should not be obliged to pay demurrage, and carriers, equally faultless, insist that we should not require them to waive it.

It is clear to us that where carriers and consignees are jointly affected by conditions beyond their control, neither should be subjected to an avoidable penalty, and neither should be permitted to profit from the other's disability.

Demurrage charges have a dual composition, consisting of an element of compensation for the storage of property, and an element of penalty to induce its removal. *Chrysler Corp.* v. *N. Y. Central R. Co.*, 234 I. C. C. 755, 759. When property lies at rest on a pier after free time has expired, and consignees, through reasons beyond their control, are unable to remove it, the penal element of demurrage charges assessed against such property has no effect in accelerating clearance of the pier. To the extent that such charges are penal—i. e., in excess of a compensatory level—they are a useless, and consequently unjust burden upon consignees, and a source of unearned revenue to carriers. The levying of such penal charges, therefore, constitutes an unjust and unreasonable practice in connection with the storing and delivering of property, and should be forbidden.[17] The carrier is entitled, however,

[17] An individual consignee is not relieved of his normal liability for demurrage, when his disability to remove his shipments results merely from a strike of his own personnel. (Compare *National Cooperage and Woodenware Co.* v. *Alton and S. R.*, 241 I. C. C. 183). The cases which call for a departure from penal scales of demurrage are those in which community-wide disturbances (of which trucking strikes are a good example) render it impossible for consignees as a class to take possession of their cargoes.

to fair compensation for sheltering and protecting a consignee's property during the period of involuntary bailment after expiration of free time.

The Interstate Commerce Commission has consistently held, in relation to car demurrage, that where a locality is paralyzed by a strike against transport facilities, cars detained at or en route to that locality, in consequence of strike conditions, are not subject to demurrage at rates in excess of compensatory levels. *Balfour, Guthrie & Co., Ltd.* v. *Chicago, M., St. P. & P. R. Co.*, 235 I. C. C. 437; *Chronicle Publishing Co.* v. *Great Northern Ry.*, 243 I. C. C. 279. *Croce* v. *N. Y. Central R. R. Co.* (I. C. C., No. 29688, decided August 5, 1948). Compare *Chrysler Corp.* v. *N. Y. Central Ry. Co.*, 234 I. C. C. 755.

In the *Balfour, Guthrie* case, *supra*, the Commission said (235 I. C. C. at 440):

> It is clear, however, that with respect to the cars held on the docks the collection of charges substantially in excess of the cost of furnishing the cars was futile as a deterrent against excessive detention and could not have accomplished the release of the cars if the charges had been several times the amount collected. Likewise, such charges could not have accomplished the prompt release of the cars held in the outer yards. The cars were held because of the intervention of a force entirely beyond the control of both shipper and carrier. None of these cars could have been moved as originally consigned without the possibility of precipitating violence and danger of bloodshed. The longshoremen's strike was, in effect, a strike against transportation facilities over which the shippers had no control. It differed in that respect from the ordinary industrial strikes. While such a condition should not relieve the shipper from the liability of reimbursing the carrier for the expense it suffered by reason of the detention of its equipment, there is no sound reason why defendants should be permitted to collect charges, designed to force the release of such equipment, that are substantially in excess of the cost of furnishing the cars. Defendants should not be permitted to make sizable profits at the expense of the shipper who, in the circumstances, was powerless to release the cars.

This proceeding is not a rate case, and affords no sound basis upon which we may determine whether the first-period penalty rate of 2½ cents per hundred pounds is or is not a compensatory rate. We make no suggestion that the rate of 2½ cents per hundred pounds for five days, or any other rate, is sufficient to reimburse a carrier for its expenses in storing cargo, or to yield a profit. We hold, however, that demurrage charges *at penal levels* are not justifiable by reference to a carrier's need for revenue. As stated in *Croce* v. *N. Y. Central R. R. Co.* (*supra*, I. C. C. No. 29688, decided August 5, 1948), a case involving demurrage on railroad equipment:

> * * * the consequences of strikes and car shortages should not be visited at random upon individual shippers in the form of demurrage charges far in excess of those generally regarded as reasonable when the shipper is able to

establish that unloading of the cars is impossible. Deficiencies in railroad revenues resulting from causes of this character are matters calling for consideration in general revenue proceedings.

For present purposes we must, and do, assume that the minimum demurrage charge, imposed with respect to the first five-day period after expiration of free time,[18] represents a compensatory charge for that period (See Docket No. 555, *Practices of San Francisco Bay Area Terminals*, 2 U. S. M. C. 588; aff'd *California* v. *U. S.*, 320 U. S. 577). In the absence of proof, or of a basis for valid inference, that the cost of harboring demurrage cargo doubles in the second period and quadruples in the third, we find that the charges for the second and third periods are penal to the extent of the excess of those charges over charges for the first period.

We, therefore, hold that in cases where consignees are prevented from removing their cargoes by port-wide trucking strikes, weather, or other port-wide factors not subject to consignee's control, carriers should be limited, for the duration of the strike or other condition, to the first-period demurrage charges. If those charges are not compensatory, the carriers should amend their tariffs by the publication of such new demurrage rates as meet their needs and the requirements of law.

The carriers are, of course, precluded from assessing any demurrage whatever when, because of strikes of their own personnel, or for any other reason, they are unable, or refuse, to tender cargo for delivery.

We find as follows:

1. Free time of five days (exclusive of Saturdays, Sundays, and legal holidays), computed from the start of business on the first day after complete discharge of the vessel, is adequate free time on import property at New York under present conditions.

2. Free time on import property at New York shall not be less than five days, except as the Commission may hereafter direct.

3. Where a carrier is for any reason unable, or refuses, to tender cargo for delivery, free time must be extended for a period equal to the duration of the carrier's disability or refusal.

4. Where a consignee is prevented from removing his cargo by factors beyond his control (such as, but not limited to, trucking strikes or weather conditions) which affect an entire port area or a substan-

[18] Counsel have directed our attention to the fact that when the Interstate Commerce Commission orders partial abatement of demurrage on equipment detained by strike conditions, it permits collection of reasonable compensation over the entire period of detention resulting from the strike, *without allowance of free time.* See *Croce* v. *N. Y. Central R. R. Co., supra.* We do not deem it necessary to borrow that rule for application to the present case, since carriers' rates for transportation are presumably fixed at levels which take account of free time.

tial portion thereof, carriers shall (after expiration of free time) assess demurrage against imports at the rate applicable to the first demurrage period, for such time as the inability to remove the cargo may continue. Every departure from the regular demurrage charges shall be reported to the Commission.

5. The Commission makes no finding approving or disapproving demurrage rates presently effective as to import property at the port of New York.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 19th day of October A. D. 1948

No. 659

FREE TIME AND DEMURRAGE CHARGES AT NEW YORK

By order dated May 29, 1947, and published in the Federal Register on June 7, 1947, the Commission ordered that public hearings be held with respect to free time and demurrage charges on import property at the port of New York.

Hearings were held accordingly and the Commission on the date hereof made and filed a report incorporating its findings, which report is incorporated herein by reference. The findings of the Commission, as therein set forth, are as follows:

1. Free time of five days (exclusive of Saturdays, Sundays, and legal holidays), computed from the start of business on the first day after complete discharge of the vessel, is adequate free time on import property at New York under present conditions.

2. Free time on import property at New York shall not be less than five days, except as the Commission may hereafter direct.

3. Where a carrier is for any reason unable, or refuses, to tender cargo for delivery, free time must be extended for a period equal to the duration of the carrier's disability or refusal.

4. Where a consignee is prevented from removing his cargo by factors beyond his control (such as, but not limited to, trucking strikes or weather conditions) which affect an entire port area or a substantial portion thereof, carriers shall (after expiration of free time) assess demurrage against imports at the rate applicable to the first demurrage period, for such time as the inability to remove the cargo may continue. Every departure from the regular demurrage charges shall be reported to the Commission.

5. The Commission makes no finding approving or disapproving demurrage rates presently effective as to import property at the port of New York.

It is hereby

Ordered, That the foregoing findings be and hereby are adopted as rules of the Commission; and it is further

Ordered, That such rules shall be binding upon all common carriers by water in foreign commerce with respect to regulations and practices affecting free time and demurrage on import property at the port of New York; and it is further

Ordered, that on or before the effective date of this order, all tariffs of such carriers relative to free time and demurrage on import property at the port of New York be conformed to the findings and rules herein set forth; and it is further

Ordered, That this order become effective December 15, 1948.

It is further ordered that this order be published in the Federal Register.

By the Commission.

[SEAL] (Sgd.) A. J. WILLIAMS,
Secretary.

SUPPLEMENTAL ORDER No. 1

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 14th day of April A. D. 1949

No. 659

FREE TIME AND DEMURRAGE CHARGES AT NEW YORK

The Commission having published in the Federal Register of March 4, 1949, a notice of proposed amendment to finding No. 2 of its report and order of October 19, 1948, in this proceeding, as follows:

> Free time on import property at New York shall not be less than five days, except on property of such a special nature as to require earlier removal because of local ordinances or other governmental regulations, or because piers are not equipped to care for such property for such period, or except as the Commission may hereafter direct.

and the thirty-day period provided in said publication for the submission to the Commission of written views and suggestions on said amendment having expired, and none having been received objecting to the amendment or which would require any change in the wording of the amendment; it is

Ordered, That the amendment as above written be, and it is hereby, made to finding No. 2 of the Commission's report and order of October 19, 1948, in this proceeding; and it is further

Ordered, That the said amendment shall be binding upon all common carriers by water in foreign commerce with respect to regulations and practices affecting free time and demurrage on import property at the port of New York; and it is further

Ordered, That the said amendment be published in the Federal Register, to become effective thirty days thereafter; and it is further

Ordered, That any or all of the exceptions authorized by the amendment herein used by any common carried by water in foregn commerce shall be published in the tariffs of such carrier on or before the effective date of said amendment or prior to the date of a later initiation of such use.

By the Commission.

[SEAL] (S) A. J. WILLIAMS,
Secretary.

UNITED STATES MARITIME COMMISSION

No. 658

BILLS OF LADING—INCORPORATION OF FREIGHT CHARGES

Submitted November 8, 1948. Decided May 5, 1949

The Commission does not have jurisdiction to order carriers in the export trade to incorporate their freight and other charges in their bills of lading.

Roscoe H. Hupper, *Burton H. White*, and *John C. McHose* for Trans-Atlantic Associated Freight Conferences; *Herman Goldman*, *Elkan Turk*, *Leo E. Wolf*, and *Elkan Turk, Jr.*, for Far East Conference and American West African Freight Conference; *James S. Hemingway* and *John R. Mahoney* for Associated Latin-American Freight Conferences; *Harold B. Finn* for India, Ceylon and Burma Outward Freight Conference, U. S. A./South Africa Conference, and River Plate and Brazil Conferences; *William Radner* and *Odell Kominers* for United States Atlantic and Gulf-Puerto Rico Conference and United States Atlantic and Gulf-Santo Domingo Conference; *Wilbur La Roe, Jr.*, *Frederick E. Brown*, *Arthur L. Winn, Jr.*, and *Samuel H. Moerman* for Port of New York Authority; *Graham & Morse* and *L. K. Vermille* for Pacific Coast River Plate Conference, C. A. P. C. A. Freight Conference, Pacific Coast and Caribbean Sea Ports Conference, Pacific Coast Mexican Freight Conference, Pacific Coast Panama Canal Conference, Pacific West Coast of South America Conference, and Pacific Coast European Conference; *J. F. Turf* for National Industrial Traffic League; *Manuel J. Avila* for Foreign Trade Association of Southern California; *Robert E. Williams*, *Edwin A. McDonald, Jr.*, and *T. R. Stetson* for Pacific Coast Borax Company; *Hymen I. Malatzky* for Maritime Audit & Adjustment Service and Bergen Shipping Service; *C. A. Buck* for Export Managers Club of Los Angeles; *W. E. Maley* for Los Angeles Traffic Managers Conference; *W. C. Paul* for Union Oil Company of California; *C. E. Jacobson* for Los Angeles Chamber of Commerce; *James A. Keller*

for Pacific Coast Cement Institute; and *H. A. Leatart* for American Potash & Chemical Company.

Paul D. Page, Jr., and *George F. Galland* for the Commission.

REPORT OF THE COMMISSION

BY THE COMMISSION:

On December 5, 1946, there was published in the Federal Register a notice inviting all parties interested therein to file with the Secretary of the Commission, within 30 days of the publication of the notice, written material relevant to the issues presented by the following proposed rule:

> Every common carrier by water engaged in the transportation of property from points in continental United States, Alaska, Hawaii, Puerto Rico, and the Virgin Islands to foreign points, shall incorporate in the original and all copies of bills of lading or other shipping documents the rates and charges for or in connection with such transportation, except for cargo loaded and carried in bulk without mark or count, irrespective of whether such bills of lading or other shipping documents are prepared by the carrier or by any other person for the signature of the carrier.

On May 2, 1947, it was announced that carriers, shippers, forwarders, and others had submitted their views on the proposed rule in written communications, and that after consideration thereof no action thereon would be taken except after public hearings held pursuant to sections 17 and 22 of the Shipping Act, 1916, and section 4 (a) of the Administrative Procedure Act. Notice of such hearing was published in the Federal Register on May 7, 1947, and hearings were duly held at New York, N. Y., Los Angeles, Calif., and Chicago, Ill., at which shippers, carriers, traffic associations, and the Port of New York Authority participated.

The examiner recommended that the Commission should find that it had no jurisdiction to order carriers in the export trade to incorporate their freight and other charges in their bills of lading, and that even if such jurisdiction did exist, the proposed rule was neither necessary nor desirable. The only exceptions to the recommendations conceded that the proposed rule was neither desirable nor necessary at the present time, but urged that we should find that we have jurisdiction in the matter. Oral argument was not requested. Our conclusions, to the extent of our findings, agree with those of the examiner.

The proceeding is premised upon the second paragraph of section 17 of the Shipping Act, 1916, which provides that whenever we find any regulation or practice "relating to or connected with the receiving, handling, storing, or delivering of property" to be unjust or unreasonable, we "may determine, prescribe, and order enforced a just and

reasonable regulation or practice." It must be conceded that the proposed rule does not relate to, nor is it connected with, "handling, storing, or delivering of property." It therefore must be related to or connected with the "receiving" of property to come within the purview of section 17, and therefore within our jurisdiction. There is no indication in the act itself as to what Congress intended by the word "receiving," nor is there anything in the testimony before the congressional committees or in the debates on the floor of the Congress to assist us. Our conclusions must of necessity be founded upon the general intent of Congress.

It is significant that in the Shipping Act, 1916, a distinction is made between domestic and foreign transportation. Our jurisdiction over domestic commerce is much broader in scope and more definitely defined than over foreign commerce. Section 18 of the act, relating to domestic commerce, requires carriers engaged therein to "establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, * * * and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property."

We are given specific authority under such section to determine, prescribe, and order enforced just and reasonable regulations or practices in connection with, not only the receiving, handling, storing, or delivering of property but also the transportation thereof, as well as the rates, fares, charges, and the form and substance of tickets, receipts, and bills of lading applicable thereto. This section is so carefully worded as to show a distinction between the processes of transportation and those applicable to the activities which precede and follow the actual transportation. On the other hand, section 17, second paragraph, is confined to the receiving, handling, storing, or delivering of property, to the exclusion of transportation and rates, fares, and charges in connection therewith.

Among other legislation relating to transportation and the issuance of bills of lading for the protection of the shipping public are the Harter Act (46 U. S. C. sec. 190), the Carriage of Goods by Sea Act, 1936 (46 U. S. C. sec. 1300), and the Federal Bills of Lading Act, 1916 (49 U. S. C. sec. 81). In none of them is it made mandatory for the carrier to place on the bills of lading the freight and other charges connected with transportation. The Harter Act, which is now limited to domestic commerce insofar as transportation is concerned, requires the placing on the bill of lading marks necessary for identification,

number of packages and quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of the merchandise. Under the Carriage of Goods by Sea Act, which pertains to transportation in the foreign trade, a carrier is not required to issue a bill of lading except *on demand of the shipper*, and even in such case there need be shown only the leading marks of the goods, either the number of packages or pieces, or the quantity or weight, and the apparent order and condition of the goods. While that Act did not specifically preclude a regulatory agency from requiring the incorporation of freight charges on the bill of lading if the agency had authority to do so, the grant of such authority must be clear and explicit.

A bill of lading is both a receipt and a contract, and under certain circumstances it is also documentary evidence of title to the goods. *The Delaware*, 81 U. S. 579; *Amerlux Steel Corporation* v. *Johnson Line* (9 CCA), 33 F. (2d) 70; *Aktieselskabet Bruusgaard* v. *Standard Oil Co.* (2 CCA), 283 Fed. 106; *The Esrom* (2 CCA), 272 Fed. 266. In *Bills of Lading*, 52 I. C. C. 671, which was an investigation by the Interstate Commerce Commission "into the practices of carriers with respect to the form and substance, and the issuance, transfer, and surrender of bills of lading * * *," it was stated as follows:

> Contracts between shippers and carrier, however, are almost invariably evidenced by the more or less formal bill of lading, written or printed, which serves three distinct functions: First, a receipt for the goods; second, a contract for their carriage; and, third, documentary evidence of title to the goods. As a receipt for the goods, it recites the place and date of shipment; describes the goods, their quantity, weight, dimensions, identification marks, condition, etc., and sometimes their quality and value. As a contract, the bill names the contracting parties, specifies the rate or charge for transportation, and sets forth the agreement and stipulations with respect to the limitations of the carrier's common-law liability in the case of loss or injury to the goods and other obligations assumed by the parties or to matters agreed upon between them. That part of the bill which constitutes a receipt may be treated as distinct from the part incorporating the contractual terms. (P. 681.)

From the above authorities it is clear that freight charges, when placed on the bill of lading, are not a part of the receipt for the goods but a part of the contract of transportation. This conclusion is strengthened by the decision in *Alaska S. S. Co.* v. *United States*, 259 Fed. 713, which was an appeal from the decision of the Interstate Commerce Commission in *Bills of Lading*, *supra*. In that case, the majority of the court held that the Interstate Commerce Commission had no power to draw carriers' bills of lading, in spite of the fact that the Interstate Commerce Act contained a provision giving the Commission authority similar to that conferred upon us by section 18 of the Shipping Act, 1916. The dissenting opinion forcefully laid

stress on such authority. Had there been no provision giving the Commission authority over bills of lading in foreign commerce, as is true under section 17 of the Shipping Act, 1916, it is reasonable to assume that the decision would have been unanimous. The following observations in the majority opinion in that case are pertinent:

> Congress has unquestionably the power to declare what terms common carriers, subject to the Interstate Commerce Act * * * may or may not insert in their bills of lading, and it has done so from time to time. For the purpose of this case we shall assume that Congress can delegate this legislative power to the Interstate Commerce Commission, but we shall expect to find such delegation in clear and unmistakable language. Examination of the statutes does not convince us that Congress had any intention to confer upon the Commission the right to prescribe the terms of the carriers' bills of lading.
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> Section 15 * * * prescribes the powers of the Commission in the premises, and not one word about contracts or the substance of bills of lading is used. *The reference is only to rates classifications, regulations, or practices, in connection with the receiving, handling, transporting, storing and delivery of property.*
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> * * * * * * *
>
> That the Commission has power under section 12 of the Act * * * to investigate as to the fairness of the carriers' bills of lading we have no doubt, *but we discover nowhere any authority conferred upon it to draw the carriers' bills of lading either in whole or in part.* If they are in any respect unjust or unreasonable or unlawful, the courts are open to the parties injured; if they contain any limitation of liability for loss or damage which Congress has declared to be void, the courts will say so. (Italics supplied.) (Pp. 714, 715.)

In the light of the foregoing we are of the opinion that we are without jurisdiction to promulgate the proposed rule.

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 5th day of May A. D. 1949

No. 658

BILLS OF LADING—INCORPORATION OF FREIGHT CHARGES

This case having been instituted by the Commission on its own motion, 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 this proceeding be, and it is hereby, discontinued.

By the Commission.

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

UNITED STATES MARITIME COMMISSION

No. 639

STATUS OF CARLOADERS AND UNLOADERS

Submitted September 23, 1948. Decided January 28, 1949

Present rate structure and any basis of rates lower than direct labor costs found noncompensatory, burdensome upon other services, and detrimental to commerce.

Proposed increase found not justified and case held open to enable respondents to present evidence of costs over substantial period.

Additional appearances:

William F. Krause for Fibreboard Products, Inc., *T. R. Stetson* and *Robert Williams* for Pacific Coast Borax Company, *S. A. Moore* for Permanente Cement Company, and *Earl J. Shaw* for Chilean Nitrate Sales Corporation, interveners.

John P. Ventre for Howard Terminal, *H. C. Cantelow* for Marine Terminal Association of Central California, *S. Phillips* for San Francisco Steel Company, *E. R. Chapman* for Golden State Company, Ltd., *Adam Hunter* for American Smelting & Refining Co., *A. D. Carleton* and *H. L. Gunnison* for Standard Oil Company of California, *C. R. Nickerson* for San Francisco Bay Carloading Conference, *Lincoln Fairley* for International Longshoremen's and Warehousemen's Union, *C. E. Jacobson* for Los Angeles Chamber of Commerce, *W. H. Adams* for Shell Oil Company, *E. L. Hiatt* for Union Oil Company, and *Richard F. McCarthy* for United States Department of Agriculture.

Paul D. Page, Jr., Solicitor, for the Commission.

REPORT OF THE COMMISSION ON FURTHER HEARING

BY THE COMMISSION:

Exceptions were filed to the examiner's recommended decision, but oral argument was not requested. Our conclusions differ from those recommended by the examiner.

In the original report herein, 2 U. S. M. C. 761, we found, among other things, that car service work performed at San Francisco was subject to our jurisdiction and that an interim adjustment of rates 33⅓ percent over rates established in 1941 was justified. Approval of San Francisco Bay Carloading Conference Agreement (M. C. Agreement No. 7544) and sanction of the rate level to be established thereunder were conditioned upon an undertaking by respondents to refund to shippers any charges found to be unfair or unreasonable as a result of a subsequent cost study to be conducted by the Commission. In the report on further hearing herein, 2 U. S. M. C. 791, decided November 7, 1946, before the cost study was completed, we found justified additional increases approximating 34 percent, except as to rates on cement and petroleum products, as an emergency surcharge to cover additional out-of-pocket costs resulting from wage increases established on June 15, 1946, pursuant to recommendations by a presidential fact-finding board. A hearing on our cost study was held February 17, 1947. However, during the period embraced by the study strike conditions prevailed, causing backlogs of freight and interruption of service on the waterfront. All parties agreed that a study under such conditions was inadequate. Accordingly, respondents employed an analyst of admitted qualifications to continue the study over a normal operating period.

Upon completion of that study, respondents prepared a new tariff reflecting general increases and some reductions in rates, and filed an application before the Public Utilities Commission of the State of California for permission to establish such rates and charges as reasonable maxima. A hearing on that application and on the cost studies and proposed rates was held jointly by this Commission and the State Commission on November 12, 1947.

The greatest element of cost of car service work is wages for labor and supervision. The labor consist of gangs of men secured through the union hiring halls. They are not employees of respondents and, as a rule, none of the gang works more than one day at a time for any respondent. This means that respondents have no control over the selection of men performing the car work. Wage increases have been so rapid that it has been impossible to keep the studies current. Wages and hours are fixed by contract between the Waterfront Employers Association and the union. Although the contract provides a working day of 6 hours, the men actually work 8. The Association is an agency of steamship lines, stevedoring companies, and carloaders which makes up the pay rolls, pays labor, and disburses funds received from the individual operators. For this function, the Association collects an agency fee of 62½ cents per $100 of pay roll from the oper-

ators, including respondents. All laborers who have worked 1,344 hours during the last 12 months of their employment and have previously worked 24 months in the industry are qualified for 80 vacation hours at the basic rate of straight-time pay. Vacation pay is also disbursed by the Association and at the time of hearing respondents were paying into the vacation pay fund 11 cents per man hour to cover the disbursement.

Much of the freight arrives at the piers in mixed carload lots. Supervision per car is not uniform. It may cost more to service a carload of a given commodity one day than on another, depending upon the conditions on the piers, such as the varying distance between the car and place of rest on the dock. Certain commodities such as cement, coal or broken glass in bags, green hides, etc., are designated as penalty cargo in the wage contract and respondents are obliged to pay 10 cents per hour over the basic wage scale to labor for handling such freight. There is no uniformity in the method or the application of the payment of the additional 10 cents per hour to gang bosses. It should be remembered that certain respondents are engaged in other work on the piers, such as stevedoring, strapping, and weighing.

For the purpose of this report, the term "car service" means the loading or unloading of railroad cars on steamship piers. Such freight is, of course, in transit between points in the United States and foreign countries or between the States and Territories of the United States involving transportation by rail and water carriers, the piers being interchange points between the two forms of transportation. The term "indirect" car service means unloading of freight from the car to a place of rest on the pier or loading freight from the place of rest on the pier into a car. The term "direct" car service means the loading or unloading of an open top car under ship's tackle. The term "continuous" car service means the unloading from a car spotted on the low line of the pier to ship's tackle or the loading of a car on the low line from the ship's tackle. In the latter operation, the freight moves across the pier between ship's tackle and the interior of the car without being deposited at a place of rest.

Our study embraced the period between July 15 and September 30, 1946, and the month of December 1946. The time allotted for the study was about 3½ months, which was not sufficient to permit personal inspection of respondents' books and records. Because of this, there was prescribed a form of report reflecting the data to be supplied by respondents as the basis of the study. The reports identified the piers where the service was performed, description of the commodity, type of package, and weight of shipments. They also showed man-hours for straight time, rate of pay, the amount paid, the man-hours

in overtime, the rate of overtime, the amount of overtime paid, type of equipment used, crane hours, and lift truck hours. Only direct out-of-pocket costs, including social security, unemployment, and compensation insurance, were sought. No allowance for overhead and profit was made. In view of the abnormal labor conditions existing on the waterfront during the period of the study and the subsequent wage increases, a detailed analysis of the exhibits and testimony relating to this study is not warranted. It is sufficient to say that there was revealed the fact that in the aggregate the direct out-of-pocket costs exceeded the revenues received under existing tariff rates.

Respondents' study covers the 6-month period between January 1, and June 30, 1947, during which time a total of 273,732 tons of freight were serviced, 142,194 man-hours, exclusive of supervisory time, were utilized, and no strikes occurred. Respondents' analyst prepared a form of report similar to that previously prescribed by us as a means of gathering statistical information used as the foundation for the study. He verified by personal examination of respondents' records the statistical information used. The facts used in determining direct labor cost are sufficiently supported by the evidence. Direct labor cost includes the current wage based on an 8-hour day plus Federal and State insurance and taxes applicable to wage dollars; cost of supervision; vacation pay; and the pay roll carrying cost consisting of agency fees paid to the association. The costs of Federal and State taxes and insurance and vacation pay are arrived at on the basis of averages which the arguments of interveners have failed to prove are unjustified. The total man-hour cost is computed to be $322,407.80, which, when divided by the total man-hours utilized, amounts to $2.27 per man-hour. The cost of servicing any commodity is ascertained by multiplying the cost per man-hour by the number of man-hours used. The direct labor cost of handling every ton of freight serviced during the 6-month period is shown by commodities and compared with the tariff revenue. Without making any allowance for overhead and profit or for wage increases experienced since the study was completed, the number of commodities upon which the cost exceeded the revenue are too numerous to tabulate herein. The record is clear that on the whole respondents' structure produces less than enough revenue to meet their direct labor costs.

Respondents' cost study shows that the cost of loading a car averages 42 percent greater than unloading one and in all cases where they have experienced only unloading of a given commodity the rate is multiplied by 142 percent to arrive at the rate for loading. Conversely, where only loading has been performed, the rate is divided by 142 percent to determine the unloading rate. Respondents propose

to cancel specific rates named in the current tariff, San Francisco Bay Carloading Conference Car Serving Tariff M. C. No. 1, applicable to commodities which have not moved since July 1, 1946. Under the proposed new tariff, rates applicable to indirect car service will apply to continuous car service. Rates for direct car service are based on studies of work done after July 1, 1947, since before that time it was not possible to segregate car work from stevedoring. On that date an agreement with the union changing the gang from 18 to 11 men became effective.

The proposed new tariff is referred to as a "permissive tariff," and names maximum rates with the right to establish lower rates if necessary to meet the competition of operators on the east side of San Francisco Bay. The maximum rates are arrived at by multiplying the direct labor costs by 142.86 percent, which is designed to reflect overhead costs as developed by the so-called Edwards-Differding study recognized as sound by the Commission in *Practices, etc., of San Francisco Bay Area Terminals*, 2 U. S. M. C. 588, 605. It was testified that time did not permit the development of respondents' actual overhead costs and that the Edwards-Differding formula produces a lower overhead cost factor than the formula of Howard G. Freas, which was considered by us in Docket No. 640, *Terminal Rate Structure-California Ports*, decided August 24, 1948.

The overhead costs developed by the Edwards-Differding formula were based upon a study of the experience of privately owned wharfingers prior to 1936; those developed by the Freas formula upon a study of the experience of both privately owned and publicly owned wharfingers during the fiscal year July 1, 1939, to June 30, 1940. None of the respondents herein, most of whom are contracting stevedores and independent carloaders and unloaders, were included in those studies of wharfingers who were engaged in many other terminal services and had substantial investments in terminal property. There is no proof that the overhead burden of the public wharfingers is comparable to that of respondents in 1947, with relatively smaller organizations and investments in property. Furthermore, there is no showing that the volume of tonnage and relative costs of direct labor to overhead are comparable. A variation in the volume of work performed has an automatic effect upon the percentage which the overhead costs bear to direct labor costs. Respondents' overhead should be based on a study of their experience during the period covered by the study of direct labor costs.

In the first hearing in this proceeding in November 1945 the Chairman of respondents' Tariff and Rate Committee testified that the Committee had developed an average overhead cost of 14 cents per ton,

which, when compared with the direct labor cost of loading 36,171 tons of canned goods, amounted to 17.79 percent thereof. If it be related to the direct labor cost of $691,584 covering the loading and unloading of 769,309 tons of all commodities in the year 1944, as shown by Exhibit No. 29, the overhead would amount to $107,703 or 15.57 percent. We cannot reconcile the claim for an overhead of 42.86 percent of the direct labor cost, based as it is on a formula which has factors inapplicable to the present situation, with the former claim of an overhead of 17.79 percent based on respondents' actual costs of loading canned goods at that time or with the 15.57 percent described above. Although it would appear that either the 17.79 percent or the 15.57 percent are more nearly correct, the evidence as to the actual overhead is not sufficient to enable us to make any definite decision. Respondents have failed to justify their proposed "permissive tariff."

We find that the rate structure in existence at the time of the hearing was noncompensatory as a whole, and those rates which produce revenue less than the direct cost of service as revealed by cost studies of record are detrimental to commerce within the meaning of section 15 of the Shipping Act, 1916.

On December 20, 1948, we approved an interim increase of 16.5 percent of the rates in effect on that date in order to enable respondents to meet increases in wages paid to labor subsequent to the present hearing, including the increases granted just prior to said date. Information submitted in support of the increase indicated that the increased rates were sufficient to reimburse respondents for their direct labor cost and provide a margin of approximately 4 percent of such cost for overhead.

The record will be held open to allow respondents to present full and complete evidence concerning direct labor costs of handling the respective commodities, and the costs of overhead based upon their experience from January 1, 1947, to the latest available date prior to the hearing hereafter to be set.

No order will be entered at this time.

By the Commission.

[SEAL] (Sgd.) A. J. WILLIAMS,
Secretary.

WASHINGTON, D. C., *January 28, 1949.*

UNITED STATES MARITIME COMMISSION

No. 673

SEATRAIN LINES, INC.

v.

GULF AND SOUTH ATLANTIC HAVANA STEAMSHIP CONFERENCE, ET AL.

Submitted February 23, 1949. Decided June 9, 1949

Respondents' equalization rules and regulations not shown to be unjustly discriminatory or unfair as between carriers or detrimental to the commerce of the United States in contravention of section 15 of the Shipping Act, 1916, as amended. Complaint dismissed.

Arthur L. Winn, Jr., for complainant.

William Radner and *Odell Kominers* for respondents.

C. B. Waterman and *R. J. Mittelbronn* for Waterman Steamship Corporation, *Robert E. Quirk* for The Port Commission of the City of Beaumont, Galveston Chamber of Commerce, Houston Port and Traffic Bureau, Orange Wharf and Dock Commission, and The Board of Commissioners of the Lake Charles Harbor and Terminal District, *Louis A. Schwartz* for New Orleans Traffic and Transportation Bureau, and *C. D. Arnold* for The Southwest Louisiana Traffic Bureau, interveners.

REPORT OF THE COMMISSION

BY THE COMMISSION.

Exceptions were filed by complainant to the examiner's report, and the matter was argued orally. Our conclusions do not differ from those of the examiner.

Complainant, a common carrier by water engaged in the transportation of property from New Orleans (Belle Chasse), La., to Havana (Hacendados), Cuba, alleges that respondents'[1] equalization rules

[1] Gulf and South Atlantic Havana Steamship Conference (Agreement No. 4188, as amended), Empresa Naviera de Cuba, S. A., Lykes Bros. Steamship Co., Inc., Standard Fruit and Steamship Company, United Fruit Company, and West India Fruit & Steamship Co., Inc.

and regulations provided by their Port Equalization Circular No. 170, effective October 6, 1947,[2] are unjustly discriminatory and unfair as between carriers and detrimental to the commerce of the United States in violation of section 15 of the Shipping Act, 1916, as amended. Cancellation of the circular and lawful rates and practices are sought. The Port Commission of the City of Beaumont, Galveston Chamber of Commerce, Houston Port and Traffic Bureau, Orange Wharf and Dock Commission, and The Board of Commissioners of the Lake Charles Harbor and Terminal District intervened, offered evidence, and filed a brief in support of respondents. The New Orleans Traffic and Transportation Bureau and The Southwest Louisiana Traffic Bureau intervened but took no positive position with respect to the merits of the complaint.

A clear description of the nature of complainant's operation is found in *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, 2 U. S. M. C. 500, 502:

> Seatrain's service differs materially from that offered by the break-bulk lines. It is conceded by all parties to be of a superior nature. When using Seatrain, a shipper can load the car at his plant and further handling is eliminated until it is delivered at the consignee's place of business. Cargo handled by break-bulk lines must be transported to the dock, handled, loaded into the ship, unloaded at destination, again loaded into a car or truck, and finally delivered at the consignee's place of business. Seatrain's terminal consists of a railroad spur and a patented loading crane which fastens to the loaded car, picks it up and deposits it on one of the tracked decks in the vessel. The loaded car is strapped to the deck and at the point of discharge is raised, run onto a railroad track and moved intact to the final point of destination. This difference in handling effects a saving to the shipper in packing goods and reduces loss and damage claims, and losses of business resulting from service delays.

Respondent Gulf and South Atlantic Havana Steamship Conference, hereinafter called the conference, was organized under Agreement No. 4188, approved by the Commission April 24, 1935, "to promote commerce from the United States Gulf and South Atlantic ports south of Virginia to Havana, Cuba, for the common good of shippers and carriers * * *." The other respondents are the present common carrier members of the conference. Their individual services to Havana are: from New Orleans, Standard Fruit and Steamship Company and United Fruit Company; from Houston, Galveston, Beaumont and Orange, Texas, and Lake Charles, La., Lykes Bros. Steamship Co.; from West Palm Beach, Florida, West India Fruit & Steamship Co.; and from Pensacola, Florida, and Savannah, Ga., Empresa Naviera de Cuba, S. A. Complainant was originally a member of the conference but voluntarily resigned effective May 11, 1947. The rec-

[2] Appendix A.

ord indicates that the resignation did not involve the issues in controversy herein. At the time of hearing and for about a year prior thereto, Seatrain was serving only the outports of Cuba via Havana due to certain controversies with the government of Cuba involving labor problems. Seatrain operates to Cuba only from its special pier facilities located at Edgewater, New Jersey, and at Belle Chasse outside of New Orleans. It uses its special pier facilities located at Texas City, Texas, only for its vessels in the coastwise trade.

Complainant does not object to port equalization as such, admits that it participated in the practice for many years as a member of the conference, and now equalizes under its own rule. Its complaint is directed to the specific provisions of the circular which became effective about six months after it resigned from the conference. As of the date of hearing, Seatrain enjoyed the benefit of conference contracts with shippers and, so far as conditions in Havana permitted, followed conference rates, rules, and regulations. Respondents' circular is attacked on two main grounds, the first being the prohibition of equalization on traffic originating in Texas and Louisiana under item 2 (c), and the second being that as to all other points of origin within the purview of the circular respondents may equalize by unlimited reductions in their port-to-port rates.

Rice is the heaviest moving commodity from Texas and Louisiana to Havana. In 1947 it constituted 77 percent of all traffic handled over the facilities of Lake Charles. All rice mills in Texas are within the 12 cents per 100 pounds rail rate to the nearest port and, with the exception of flour, the same is true in Louisiana. Flour is the next most important commodity. With respect to Texas and Louisiana traffic, the position of Seatrain is that if it were a member of the conference it should not be prohibited by the circular from securing cargo, regardless of point of origin, and moving it through New Orleans by means of port equalization. As complainant is not a member it is not bound by the circular, and through its equalization rule has been able to secure some carloads of rice originating at Houston mills and other points in Louisiana and Texas. There is nothing in the circular which would prevent Seatrain as a member of the conference from utilizing its facilities in Texas City in the Cuban trade. The lawfulness of Seatrain's equalization rule is at issue in Docket No. 675, *The Port Commission of the City of Beaumont, et al.* v. *Seatrain Lines, Inc.*, which is now pending. Complainant admits that it is not damaged by the circular but asserts that shippers at Houston, for example, should be able to use Seatrain at New Orleans in case service is immediately available there and not at Houston. It states that that kind of com-

petition would stimulate better service at the Texas and Louisiana ports which are now being served by Lykes alone. Neither Lykes nor any other carrier has an exclusive franchise to serve directly any area covered by the conference.

The history of the conference, the equalization practices of the past, and old controversies between all carriers, indicate a need for a rule on equalization to prevent destructive rate wars. See *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, 2 U. S. M. C. 500, 2 U. S. M. C. 699, and *Lykes Bros. S. S. Co., Inc.* v. *Fla. East Coast Car Ferry Co.*, 2 U. S. M. C. 722.

There is a possibility that should the rice and flour traffic be diverted from Texas and Louisiana ports to New Orleans the existing service at those ports would be discontinued or seriously curtailed. Rice and flour, from a geographical standpoint, are naturally contiguous to those ports. Large local and federal expenditures have been made for the development of their harbors and facilities. The rail rates, a portion of which would be absorbed by Seatrain in event the ports were subject to equalization, have been prescribed by the Interstate Commerce Commission, and equalization would disrupt such rates for all practical purposes. No shipper participated in the hearing, nor were there any complaints as to the adequacy of the service provided at the Louisiana and Texas ports.

The other provisions of the circular do not contain any limitations as to the extent of the amount of the equalization which may be absorbed. On the other hand, there are limitations as to the areas from which equalization may be practiced, which automatically limit, to a certain extent, the amount of absorption. Failure to place a limit on the amount of absorption and making it a matter of business judgment does not necessarily render the rule unlawful. There is no indication that the amount absorbed has been such as to place an undue burden on other traffic not subject to absorptions, or that the respective carrier members have interpreted and applied the rule in a different manner with respect to different shippers. In fact, the rule itself requires all absorptions to be reported to, checked and published by, the conference, which is a deterrent to any single member giving any discriminatory treatment to any shipper or port.

We find that on this record it has not been shown that respondents' equalization rules and regulations are unjustly discriminatory or unfair as between carriers or ports or detrimental to the commerce of the United States in contravention of section 15 of the Shipping Act, 1916, as amended.

An order dismissing the complaint will be entered.

APPENDIX A

PORT EQUALIZATION CIRCULAR NO. 170

(Cancels Circular 100 and Supplements thereto)

Rules governing Port Equalization referred to in Item 30–1 of Gulf and South Atlantic Havana Steamship Conference Freight Tariff No. G–6, supplements thereto or reissues thereof.

Item 1. General Practice

(a) Except as otherwise provided for in these rules, on shipments from interior points in the United States or Canada, the member lines reserve the right to modify the rates published in Conference tariffs from the individual ports in Havana in order to equalize the through gates and/or freight charges from such interior points applicable via any port or gateway when and if such equalization shall have been presented to the Conference office for the purpose of checking the correctness of the figures. All such equalized rates shall be circularized immediately by the Conference office to the member lines.

Item 2. Exceptions to General Practice

(a) Unless otherwise agreed the member lines *shall not* equalize via their ports the through rates via New York and Boston to Havana, except on shipments originating in the States of Illinois, Indiana, Iowa, Michigan, Minnesota, North Carolina, Ohio, South Carolina, Virginia, West Virginia, Wisconsin; also except on shipments originating at points in Kentucky and Missouri in Central Freight Association territory, as listed in Agent B. T. Jones' Freight Tariff No. 3–H, I. C. C. 3784, supplements thereto or reissues thereof; also, except on shipments of Fresh Fruits originating in the States of California, Oregon and Washington.

(b) The Member Lines *shall not* equalize via Gulf and South Atlantic ports the rates applying from any other Gulf and South Atlantic ports on shipments originating locally at such other ports, except as may be specifically provided in the Conference Tariff. Traffic will not be considered as local port traffic which would be subject to a railroad rate of twelve cents ($0.12) per one hundred (100) pounds or more (if moved by railroad) from point of shipment to steamer's ship-side at the port, exclusive of transfer, switching, handling and/or other terminal charges.

(c) Member lines operating service from the Texas ports and Lake Charles will not equalize via Texas ports or Lake Charles through rates from points in Louisiana and Texas via ports East of Lake Charles. Similarly, member lines operating service from ports East of Lake Charles will not equalize via ports East of Lake Charles through rates from points in Louisiana and Texas via ports West of New Orleans.

(d) Member lines operating service from Texas ports and Lake Charles, Louisiana, will not equalize through rates from interior points in Texas or Louisiana via the Texas ports or Lake Charles.

(e) On Bulk liquid in tank cars originating at points in Louisiana and Texas, the Member lines operating service from Ports East of Lake Charles may equalize rates to New Orleans.

Item 3. Construction

(a) All equalization rates checked and confirmed by the Conference shall be listed as port equalization rates from the Gulf and South Atlantic ports covered by the Conference, in a Conference cumulative tariff, and no equalization quota-

tions shall be made by any member line prior to specific check by the Conference office of the measure of the rates, in accordance with rules herein contained. Such rates shall be constructed in accordance with the provisions of the following paragraphs in this Item.

(b) When necessary to equalize another port on shipments from interior points, rates from port of exportation shall be ascertained by deducting from the Conference rate, the actual inland differential existing via a like service between the port to which the lower inland rate applies and the port from which the said port equalization rate is to be established.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 9th day of June A. D. 1949

No. 673

SEATRAIN LINES, INC.

v.

GULF AND SOUTH ATLANTIC HAVANA STEAMSHIP CONFERENCE, ET AL.

This case being at issue upon complaint and answer on file, and having been 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.) A. J. WILLIAMS,
Secretary.

UNITED STATES MARITIME COMMISSION

No. 672

FIBREBOARD PRODUCTS, INC.

v.

W. R. GRACE & COMPANY

Submitted March 1, 1949. Decided June 21, 1949

Rates for loading woodpulp found to be unduly and unreasonably prejudicial and unduly discriminatory in violation of sections 16 and 17 of the Shipping Act, 1916, and unreasonable in contravention of the provisions of Agreement No. 7544. Reparation awarded.

Harold A. Lincoln and *William F. Krause* for complainant.
Joseph J. Geary for respondent.
C. R. Nickerson for San Francisco Bay Carloading Conference.

REPORT OF THE COMMISSION

BY THE COMMISSION

Exceptions were filed to the examiner's recommended decision but oral argument was not requested. Our conclusions agree with those of the examiner.

By complaint filed March 9, 1948, complainant alleges that respondent's rates for loading woodpulp in bales into rail cars at San Francisco, California, were in violation of sections 15, 16, and 17 of the Shipping Act, 1916; also that the rates failed to accord with those approved by us in Docket No. 639, *Status of Carloaders and Unloaders*, 2 U. S. M. C. 761. Reparation is sought in the amount of $352.20, with interest.

Between August 12, 1946, and April 16, 1947, complainant received at San Francisco three shipments of woodpulp transported from Sweden via M/S *Panama*. Respondent was the San Francisco agent for the vessel and also carried on the business of stevedoring and loading and unloading of cars on the pier utilized by the vessel. It was a member of the San Francisco Bay Carloading Conference, functioning under an agreement entered into for the purpose of establish-

ing uniform and reasonable charges by its members and approved by us (U. S. M. C. No. 7544) on June 10, 1946, in Docket No. 639, *supra*, pursuant to section 15 of the Shipping Act, 1916.

The rates involved were published in Conference Car Servicing Tariff No. 1, M. C. No. 1, effective June 11, 1946, but inasmuch as the tariff contained no specific rate for carloading of woodpulp, the rate applicable to the loading of Merchandise, N. O. S., was charged. The rate assessed on the consignment handled August 12, 1946, was $1.06 per ton. Effective December 5, 1946, the rate was increased to $1.46 per ton, which was the rate assessed on the consignments handled December 27, 1946, and April 14, 15, and 16, 1947.

Complainant contends that it should have been charged 71 cents per ton for the first consignment and 95 cents per ton for the others, based upon our decision in Docket No. 639, *supra*. When the conference agreement was submitted for approval it was accompanied by a proposed tariff of charges designed to increase by approximately 47 percent the charges in current Tariff No. 4 (C. R. C. 4), on file with the California Railroad Commission and participated in by most of the parties to the agreement. Respondent was not a party to the tariff although, for competitive reasons, it had followed the practice of making the same charges. Tariff No. 4 contained a rate of 53 cents per ton for the carloading of woodpulp.

During the course of the hearing in Docket No. 639, *supra*, it appeared questionable whether the increase of 47 percent was justified on the evidence. Accordingly, the conference proposed an alternative tariff (M. C.–1) reflecting an interim increase of 33⅓ percent rather than 47 percent. It was stated that the alternative tariff would be the one which had been drawn up by War Shipping Administration and filed with the Interstate Commerce Commission (WSA 1–A, I. C. C. No. 1), effective December 1, 1945, and that the latter tariff was an exact copy of the commodity items contained in Tariff No. 4, with charges increased by 33⅓ percent. On the strength of the representations the interveners for the most part withdrew their objections to the alternative tariff. The proponents, including respondent, agreed to refund any charges found by us to be unfair or unreasonable after a formal determination as to the proper level of the rates.

Had the War Shipping Administration tariff been an exact copy of Tariff No. 4 it is unlikely that a complaint would have been made because, as stated previously, the latter contained an item for loading woodpulp. The War Shipping Administration tariff contained no such item, however, and therefore Tariff M. C.–1 contained none. As a consequence, the Merchandise, N. O. S. rate was applicable. The 53-cent rate on woodpulp in Tariff No. 4, increased by 33⅓ per-

cent, would have become 71 cents per ton, and increasing it again by 34 percent pursuant to our permission of November 7, 1946 (2 U. S. M. C. 791), would have resulted in a charge of 95 cents per ton.

After complainant made the payments under consideration it applied to the conference for a correction or reinstatement of the rate for loading woodpulp. Effective August 28, 1947, Tariff M. C.–1 was revised to include an item for carloading of woodpulp at 95 cents per ton, with the explanation that it represented reinstatement of the item.

Respondent contends that it is bound by Tariff M. C.–1 as that is the only tariff to which it was a party, and also that a charge lower than that applicable to Merchandise, N. O. S., would be unremunerative and non-compensatory. Respondent is estopped to deny that the 33⅓ percent increase was non-compensatory. The representations made in connection with the tariff, coupled with the fact that, as a result of the request by complainant, the rate was reinstated and the actions taken in accordance with those representations, precludes any consideration that the costs of loading woodpulp were other than represented.

We cannot ignore the circumstances and the representations by which the parties to Agreement No. 7544 secured our permission to establish an interim increase of 33⅓ percent, and later an additional increase of 34 percent. That respondent was not a named party to Tariff No. 4 does not change the fact that the representations were made on its behalf as well as on behalf of the other members of the conference. When it came to respondent's attention that the representations were inaccurate as to woodpulp, respondent was under a duty to call the mistake to the attention of the conference and to request a proper amendment. Failure to do this resulted in an increase of 100 percent on woodpulp but only 33⅓ percent on all other commodities. For the purposes of the present discussion, it must be assumed that the increase of 33⅓ percent was reasonable at the time made.

We find that the respective rates assessed for loading woodpulp were unjustly discriminatory, and subjected woodpulp to undue and unreasonable prejudice, in violation of sections 17 and 16, respectively, of the Shipping Act, 1916; that such rates were unreasonable and therefore contrary to the express provisions of Agreement No. 7544; and that complainant is entitled to reparation in the amount of $352.20, with interest, which represents the difference between the respective charges paid and those which would have accrued at the rates represented to us to be reasonable.

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 21st day of June, A. D., 1949.

No. 672

FIBREBOARD PRODUCTS, INC.

v.

W. R. GRACE & 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 containing its conclusions, decision, and findings thereon, which report is hereby referred to and made a part hereof;

It is ordered, That respondent, W. R. Grace & Company, be, and it is hereby, authorized and directed to pay to complainant, Fibreboard Products, Inc., of San Francisco, California, on or before 30 days after the date hereof, the sum of $352.20, with interest as reparation on account of unlawful charges collected for the loading of the shipments involved herein.

By the Commission.

[SEAL] (Sgd.) A. J. WILLIAMS,
Secretary.

UNITED STATES MARITIME COMMISSION

No. 638

EDMUND WATERMAN & GUSTAVE WATERMAN DOING BUSINESS AS E. WATERMAN & CO. AND LEO W. COX DOING BUSINESS AS L. W. COX & CO.

v.

STOCKHOLMS REDERIAKTIEBOLAG SVEA ET AL.[1]

Submitted July 17, 1946. Decided July 26, 1949

Respondent Stockholms Rederiaktiebolag Svea, in refusing to afford complainants an equal opportunity with their competitor to secure space on its vessel, violated sections 14 FOURTH and 16 of the Shipping Act, 1916. Upon this record complainants are entitled to reparation.

Frank J. McConnell and *James D. Brown* for complainants.

Cletus Keating, *L. de Grove Potter*, and *David P. Dawson* for respondents.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions were filed by respondent Svea to the examiner's proposed report, and the matter was argued orally. Our conclusions agree with those recommended by the examiner.

Complainants, who are importers and exporters of fruit at New York, N. Y., filed their complaint on July 11, 1945, alleging that in November 1944 respondents, operating the MV FREJA from New York to the East coast of South America, booked the entire refrigerated space of that vessel with complainants' competitor in Brazil notwithstanding that complainants had made prior application for space and been refused, resulting in unjust discrimination. Reparation is sought.

Respondent Norton Lilly was the booking agent for the vessel and respondent Thor Eckert was the general agent of respondent Svea,

[1] Skeffington S. Norton, Joseph F. Lilly, and John B. O'Reilly, co-partners doing business under the firm name and style of Norton, Lilly & Company, and Thor Eckert & Co., Inc.

Swedish owner of the vessel, during the period under discussion. On the present record, it appears that Thor Eckert and Company did not commit the act of discrimination complained of. On that ground alone, proceedings may be dismissed against this respondent.

The status of Norton Lilly, the second agent, involves the question of whether his mere description as such is determinative of his status as the person not subject to the provisions of the Shipping Act, 1916, except those provisions where agents are expressly named. (See sections 20 and 21 of the statute.) The Commission has in the past, under particular statements of fact, held persons describing themselves as agents to be carriers or other persons subject to the Act. (See, for example, *In the Matter of Agreements 6210, etc.*, 2 U. S. M. C. 166 (1939); *Agreement No. 7620*, 2 U. S. M. C. 749 (1945); *Remis* v. *Moore-McCormack Lines, Inc., etc.*, 2 U. S. M. C. 687 (1943).

It is obvious, therefore, that the mere designation of a person as agent would not conclusively determine his status as a carrier or other person subject to the Act if on the record it appeared that in his actual course of business he assumed the responsibilities and performed the duties either of the carrier or of the person subject to the Act.

On the record in this case, this question is not either easily capable of resolution nor is it essential that it be resolved. The matter was not considered at any length in the hearings before the examiner and the conclusion dismissing the two agents is not excepted to by any of the parties. Failure of the complainants to take exception would indicate at least that they were satisfied with their remedy against the principal.

Accordingly, the complaint will be dismissed against Norton Lilly as well as against Thor Eckert.

Between 1939 and 1941, and prior to the transactions here involved, fresh fruit was carried three times on the FREJA between New York and South America, and on each occasion the fruit was damaged because of insufficient refrigeration. Damages were paid in settlement subsequent to the institution of court action in each case. No fresh fruit was thereafter accepted until the booking presently to be described. In the opinion of the superintendent of refrigeration for United Fruit Company, who carefully examined the refrigerated space and machinery of the FREJA approximately one year after the present controversy arose, and testified extensively with respect thereto, the vessel is not fit to carry fresh fruit between New York and the East coast of South America. This witness was not cross-examined. Although it can be inferred from the evidence that the fruit of complainants' competitor outturned in good condition in Brazil,

the record as a whole is convincing that the FREJA was not suitable to carry fresh fruit in the trade under consideration.

On September 14, 1944, Inge & Co., Inc., brokers in New York, received a cable from complainants' competitor, Twedberg, Kleppe & Cia., Ltda., Rio de Janeiro, Brazil, requesting them to do their utmost to charter the total refrigerated space of the FREJA. Mr. Schecter, of Inge, asked Mr. McCracken, head of Norton, Lilly's South American department, if he would accept fruit under a guarantee holding the vessel owner harmless for damage to or loss of the fruit. The reply was in the negative. Norton, Lilly finally was authorized by the owner to accept a guarantee, but suggested that the owner arrange the guarantee direct with Twedberg, leaving the actual booking to Norton, Lilly's judgment. On November 2, 1944, Norton, Lilly was advised by the owner that a guarantee had been arranged. Norton, Lilly considered this as an authorization and not as an instruction, and it was testified that the booking was made because the vessel was "far from being booked full" and competitive vessels had been placed on the berth about that time.

The Twedberg booking was made on November 3, 1944. Upon learning from their agents in Brazil that the FREJA was going to carry their competitor's fruit, complainants immediately contacted McCracken and complained that they were being shut out in spite of their earlier applications for space. Complainants were informed that the guarantee arrangements had been made direct between the owner in Sweden and Twedberg in Brazil and that Norton, Lilly could do nothing for them. Complainants cabled the owner, who replied that it had no knowledge of complainants' prior applications, and that before booking the Twedberg cargo it had advised its New York agents that the cargo would be accepted under the guarantee arrangements provided the agents had no special objection.

On September 16, 1944, which was prior to the Twedberg booking, complainant Waterman sent a letter to Norton, Lilly, requesting to be put on their list to receive sailing schedules, and asking them "to make a note on your records to the effect that we will be interested in contracting for any refrigerator space that you may have available" to Brazil, Uruguay, Argentina, Colombia, Venezuela, and Peru. McCracken explained that this letter, together with hundreds of similar applications for space generally, were placed in a folder and no attention paid to them because, as he said, vessels were not available at that time on account of war conditions. The practice was to tear up these applications within a few weeks after their receipt. In the case of the Waterman letter, it is a "fair assumption", according to

McCracken, that the letter was found and preserved when protest was made by complainants to the Twedberg booking. A similar letter was sent by Waterman to Thor Eckert on September 16.

The testimony is contradictory as to whether there were other applications by or on behalf of Waterman prior to the Twedberg booking. Waterman testified that he had several conversations with McCracken between September 16 and November 3, and he further testified that in his conversations with McCracken subsequent to the Twedberg booking McCracken gave him the definite impression that he knew that Waterman wanted space. All of this is denied by McCracken. In Paragraph TENTH of the answer, however, it is stated that "respondent, Norton Lilly & Co., admits that on or prior to September 16, 1944, it advised E. Waterman & Co., that it was not interested in carrying refrigerated fruit on the FREJA, as the FREJA was unfit and unseaworthy for that purpose". Although Waterman's letters of September 16 to Norton, Lilly and to Thor Eckert cannot be considered as firm offers for space, we are convinced and so find that Waterman orally applied to Norton, Lilly for space prior to the Twedberg booking. It is unnecessary, therefore, to decide whether Inge & Co., on behalf of Waterman, also applied to Norton, Lilly for space during the period under consideration.

A different situation exists as to complainant Cox, who admits that his company did not apply direct to Norton, Lilly for space prior to the Twedberg booking, but testified that such an application was made on his behalf by Schechter. Cox has been a regular client of Inge & Co. for 15 years, and Schechter had been in touch with Cox about space as far back as July of 1944. At various times during that year Norton, Lilly had told Schechter that the FREJA would not carry fruit. According to McCracken, the names of no shippers were mentioned at that time. On the other hand, Schechter testified that the name of the exporter is always mentioned to the carrier when space is sought and that Cox's name was specifically mentioned to McCracken in September or October. The examiner found that Schechter had endeavored to secure space for Cox. We accept this finding as we think the examiner was in a better position than we are to appraise the witnesses and to evaluate their testimony.

Approximately three weeks after the Twedberg cargo was booked, Norton, Lilly, on behalf of the vessel, and Inge & Co., on behalf of Twedberg, executed five non-negotiable receipts for the carriage of the latter's fruit. No bills of lading were issued. Section 6 of the Carriage of Goods by Sea Act provides as follows:

> Notwithstanding the provisions of the preceding section, a carrier, master or agent of the carrier, and a shipper shall, in regard to any particular goods be at

liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness (so far as the stipulation regarding seaworthiness is not contrary to public policy), or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea: *Provided*, That in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a nonnegotiable document and shall be marked as such.

The purpose of section 6 is to permit the transportation of goods whose nature is such that a common carrier would be unwilling to handle them under his strict common law or statutory liability. Section 8 of the Carriage of Goods by Sea Act states that the provisions of that Act shall not affect the rights and obligations of carriers under the provisions of the Shipping Act, 1916. Section 9 provides that nothing in the Act shall be construed as permitting a common carrier to discriminate between competing shippers "in any other way prohibited by the Shipping Act, 1916, as amended". Section 14 FOURTH of the Shipping Act, 1916, makes it unlawful for a carrier to unfairly treat or unjustly discriminate against a shipper as to cargo space, and section 16 makes it unlawful for a carrier to unjustly discriminate against a person in any respect whatsoever.

Respondent maintains that a carrier can be both a common carrier and a private carrier, and that it was acting as a private carrier as to the Twedberg fruit. Therefore, it is urged, there can be no finding against respondent of unjust discrimination inasmuch as the Shipping Act, 1916, relates to common carriers only. This position is based upon the contention that the FREJA was unsuitable to carry fresh fruit and that there was no holding out to carry such cargo. The gravamen of the complaint, however, is not that a carrier cannot be a common and a contract carrier with respect to the same voyage of the same vessel, but that an admitted common carrier, who refuses to take refrigerated cargo for anyone, thereafter cannot accept such cargo from one shipper to the exclusion of other shippers who have applied for space.

It is argued that even if respondent be considered a common carrier, there are two reasons why complainants were not unjustly discriminated against. In the first place, complainants never offered, prior to the Twedberg booking, to ship on the same basis as Twedberg. Suffice it to say that complainants had no opportunity to make such offer since they did not know of the negotiations between respondent and Twedberg. Secondly, a decision had to be made on the Twedberg booking by November 3, 1944, in order to obtain fruit from the Pacific coast and the Pacific northwest in time for loading on the

vessel, and that this would have given no time to investigate the possibility of other shippers, of whom respondent had no knowledge. We have already found, however, that respondent did know that complainants wanted space on the FREJA. The fruit they would have shipped would have come from the same areas as the Twedberg fruit, a fact which must have been known by Norton, Lilly in view of its extensive shipping connections over a period of years.

Complainants were entitled to rely upon Norton, Lilly's repeated statements that the FREJA would not carry fruit. When respondent thereafter decided to carry fruit complainants should have been given the opportunity to avail themselves of the same terms that were offered to Twedberg. The special contract between respondent and Twedberg affected the legal relations of those parties only and did not alter respondent's obligations to shippers in general under the Shipping Act, 1916. Upon this record we find that respondent's failure to accord complainants the opportunity to ship on the same terms as Twedberg resulted in violation of section 14 FOURTH and section 16 of the Shipping Act, 1916.

We find (1) that respondent Svea booked the entire refrigerated space of the FREJA with Twedberg; (2) that prior and subsequent to such booking complainants applied for and were refused refrigerated space on the FREJA by respondent Svea; (3) that respondent Svea, at the time complained of, was a common carrier subject to the Shipping Act, 1916, with respect to the refrigerated space on the FREJA; (4) that respondent Svea, in refusing or neglecting to afford complainants equal opportunity with Twedberg to secure space on the FREJA, violated sections 14 FOURTH and 16 of the Shipping Act, 1916; and (5) that on this record complainants were injured by their inability to secure space on the FREJA. As complainants have failed to establish the extent of their injury, however, the matter will be assigned for further hearing with respect to the measure of such injury unless the parties, within 30 days of the date of this report, prepare, certify, and file with the Commission a reparation statement in accordance with section 201.222 and Appendix II (4) of the Commission's Rules of Procedure.

No order will be entered at this time.

By the Commission.

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

WASHINGTON, D. C.

UNITED STATES MARITIME COMMISSION

No. 651

CARLOADING AT SOUTHERN CALIFORNIA PORTS

(Agreement No. 7576)

Submitted February 2, 1949. Decided October 18, 1949

Present rate structure and any basis of rates lower than costs of service found noncompensatory, burdensome upon other services, and detrimental to commerce.

Proposed increased rate structure not justified and case held open to enable respondents to present evidence of costs over substantial period.

Additional appearances:

B. F. Bolling for Pioneer Division, Flintkote Company, *Lester A. Bey* for Los Angeles Traffic Managers Conference and William Volker & Company, *Emuel J. Forman* for Los Angeles Traffic Managers Conference, *F. F. Morgan* for Furniture Manufacturers Association, Inc., of Los Angeles, *F. F. Miller* for Los Angeles Grain Exchange, and *T. R. Stetson, Edwin A. McDonald* and *Robert E. Williams* for Pacific Coast Borax Company, interveners.

Harry L. Helferich for American Fruit Growers, *W. G. O'Barr* and *K. L. Vore* for Los Angeles Chamber of Commerce, *A. F. Schumacher* for Pacific Coast Division of the Owens Illinois Glass Company, *Robert J. Jones* for General Food Corporation, *Jess J. Bradley* for Western Wax Paper Company, *M. C. Ryan* for Harbor Commission, Port of San Diego, *William S. Lawrence* for International Longshoremen and Warehousemen's Union, *P. R. Arturo* for Swift & Company, *Homer E. Rathbun* for Union Oil Company of California, and *Robert Harding* for Weyerhaeuser Steamship Company.

Paul D. Page, Jr., Solicitor, for the Commission.

REPORT OF THE COMMISSION ON FURTHER HEARING

BY THE COMMISSION:

Exceptions were filed to the examiner's recommended decision upon further hearing, but oral argument was not requested. Our conclusions differ somewhat from those recommended by the examiner.

In the original report herein (2 U. S. M. C. 784) June 26, 1946, we found, among other things, that car service work performed at Southern California ports was subject to our jurisdiction, and that an interim adjustment of rates of 33⅓ percent over rates established in 1941 was justified.

Approval of Master Contracting Stevedores Association of Southern California Conference Agreement (M. C. Agreement No. 7576), and sanction of the interim rate level to be established thereunder, was conditioned upon an undertaking by respondents to refund to shippers any charges subsequently found to be unfair or unreasonable after a cost study to be conducted by the Commission. In our report on further hearing (2 U. S. M. C. 791) November 7, 1946, before the cost study was completed, we found justified additional increases approximating 34 percent, except as to the rate on cement, as an emergency surcharge to cover additional out-of-pocket costs resulting from wage increases established on June 15, 1946, pursuant to recommendations by a presidential fact-finding board.

On December 20, 1948, we approved an interim increase of 16.5 percent of the rates in effect on that date, except as to those applicable to commodities handled in continuous movement between rail car and ship's tackle, in order to enable respondents to meet increases in wages paid to labor subsequent to the present hearing, including the increases granted just prior to said date.

Hearings were held on the cost studies on February 24, 1947, on July 28, 1947, and May 24, 1948. The period covered by the first two hearings was so interrupted by strikes, work stoppages, and other unusual conditions that the evidence adduced was not sufficient to justify a finding as to the adequacy of the rate levels proposed. The third hearing was held jointly with the Public Utilities Commission of the State of California, *Application No. 28248*, filed by respondents in the present proceeding pursuant to the provisions of the Public Utilities Act of the State of California, for permission to establish rates and charges as reasonable maxima in respondents' intra-state service.

Car service work consists of labor and supervision and the wages paid therefor. Labor composed of gangs is secured through union hiring halls, and work only short periods for any one respondent. Respondents have no control over the selection of the men. Wage

increases were so rapid during the various periods here involved that it was impossible to keep the studies current, and the Commission's analyst did not have time to audit respondents' books. Wages and hours are fixed by contract between Master Contracting Stevedore Association and the union. Although the contract calls for a working day of six hours, the men actually worked eight, receiving time and a half for the two extra hours. All laborers who have worked 1344 hours during the last twelve months of their employment, and have worked previously 24 months in the industry, are qualified for 80 vacation hours at the basic rate of straight time pay. At the time of the last hearing respondents were paying into the vacation pay fund 11 cents per man hour to cover disbursements.

The term "car service" means the loading or unloading of railroad cars on steamship piers. Such freight is in transit between points in the United States and foreign countries or between the states and territories of the United States involving transportation by rail and water carriers, the piers being transhipment points between the two forms of transportation. There are three ways of accomplishing the entire transhipment: "indirect" car service, which is the use of a place of rest on the pier at which the commodity is piled and generally assorted pending further movement as an intermediate stop in its movement between the vessel and the rail car; "direct" service, which is the loading or unloading of a flatcar immediately under ship's tackle; and "continuous" car service, which is transportation of the commodity directly between the car and the ship's tackle without any stop at the point of rest.

The working conditions and union contracts are very similar to those obtaining in the San Francisco area except that in Southern California the piers are not of the same type; the character and volume of individual commodities handled vary; and continuous service, as described above, is practiced in Southern California on a larger scale than at San Francisco.

For the purpose of the original study embracing the period between June 1, and December 31, 1946, our analyst prescribed a method of procedure and established a form of report to be furnished by the respondents. The individual respondents submitted their reports to a representative of all of them who consolidated the data for our use. Only indirect car servicing was covered. Substantially all tonnage moving in indirect service over the period covered was reported. Respondents' figures were accepted as correct since, as stated above, time did not permit our analyst personally to review their books and records. The cost per ton of each commodity reported, as well as the per man hour labor costs, was computed by the analyst

through application of the current wage scales, payroll carrying charges, and vacation pay accruals. No allowance for overhead and profit was made. The study revealed that as to most of the commodities covered the direct labor costs exceeded tariff revenues.

Again the extended cost study covering the period from June 1, 1946, to July 1, 1947, of direct operating costs for individual commodities, showed that the direct costs exceeded the revenues as follows:

Tons loaded	78,397.72
Direct cost	$135,494.48
Revenue derived	$89,979.08
Tons unloaded	115,947.21
Direct cost	$146,092.49
Revenue derived	$110,207.11

At the hearing on May 24, 1948, a new tariff was proposed which established rates based upon the operating costs plus 42.86 percent thereof to cover overhead. This figure was adopted on the theory that since it had been developed in the so-called Edwards-Differding study and used in *Practices, Etc., of San Francisco Bay Area Terminals*, 2 U. S. M. C. 588, 605, it was applicable in the present instance. At the hearing on May 24, 1948, there was also presented a study of direct operating costs of commodities serviced during the fifteen month period between January 1, 1947, and March 31, 1948, and this showed 70 different commodities were unloaded by respondents, the cost of service on 34 exceeding the tariff rates. The carloading operation involved 78 different commodities, 52 of which cost more to handle than the revenue received. However, it appeared that in the case of some of the other commodities the revenues exceeded the costs, and there was insufficient evidence to evaluate the relative net results of the gains and losses.

No evidence was offered as to cost of loading or unloading commodities in continuous movement, the excuse being that it consisted of a combination of segments made up of the work of the car service men and the stevedores, and that it was impossible to place a dividing line between them. This did not mean that there were two classes of men engaged, but merely that two contracts were involved in connection with the payment of respondents for the work performed. The service of carloading and unloading is performed for the shipper or consignee. The handling of cargo between the point of rest on the dock and into the ship's hold is performed by the stevedores under a contract with the vessel. Respondents performed both services but made no attempt to break down the costs, even though the tariff made the same charge for either the indirect or the continuous movement. In other words, respondents were advertising the continuous move-

ment as a service for the shipper or consignee in the same manner that they were advertising the indirect movement.

Respondents testified that the continuous movement was more expensive than the indirect. However, the evidence as to increased costs was not directed at the carloading service alone but was equally applicable to stevedoring work for the vessel. This situation indicates a confusion in the minds of the carloaders as to their obligations to their customers—the shippers, namely, to keep their accounts so that the shippers can be assured that they are not paying for service rendered to others. The carloaders have an equal obligation to us to keep their records in such a way that we can administer the Shipping Act, 1916.

Interveners raised the question as to whether they should be charged by the carrier for handling when the commodity was not moved between place of rest on the pier and ship's tackle, as is the case in the continuous movement. Since this is a matter between the carriers and shippers and the carriers are not parties to this proceeding, no order can be issued against them under the circumstances.

Inasmuch as they are advertising two services, one to place of rest on dock and the other to ship's tackle, and undertaking to perform them for a charge assessed against the shipper, respondents should not attempt to collect from the vessel or others a part of the cost of the service. It may be that the increased cost for continuous movement will result in a higher rate therefor, but respondents must justify the same. Failure to charge a remunerative rate for the respective services rendered will result in discriminations.

Failure to include the costs of the continuous movement, the revenue of which was variously estimated at from 8 to 12 percent of the total, particularly where the evidence is that the cost of that movement is greater than that of the indirect movement, precludes us from making a decision on the present record as to the reasonableness of the rates even without overhead.

As we pointed out in Docket No. 639, decided January 28, 1949, the Edwards-Differding formula has no application to the situation presently obtaining in this car service work. There is no proof that respondents' overhead burden in 1947 and 1948 is comparable to that of the public wharfingers in 1936. In fact, respondents' relative smaller organizations, smaller investment in property, and different volume of tonnage, would have a radical effect upon the relationship of overhead to the direct operating costs. The only factual evidence offered here on the relationship of overhead to direct labor costs covered the calendar year 1946 and showed an overhead cost of 6.03 percent of the

direct operating costs, which is far removed from the proposed 42.86 percent. Respondents have failed to justify the proposed tariff.

We find that the rate structure in existence at the times of the hearings was noncompensatory, and that those rates which produce revenue less than the direct cost of service, as revealed by cost studies of record, are detrimental to commerce under section 15 of the Shipping Act, 1916. The record will be held open to allow respondents to present full and complete evidence concerning direct labor costs of handling the respective commodities in indirect, continuous, and direct services, and the actual costs of overhead based upon their experience from January 1, 1947, to the latest available date prior to the hearing hereafter to be set.

No order will be entered at this time.

By the Commission.

[SEAL] (Sgd.) A. J. WILLIAMS,
Secretary.

WASHINGTON, *D. C., October 18, 1949.*

3 U. S. M. C.

UNITED STATES MARITIME COMMISSION

No. 630

SIGFRIED OLSEN D. B. A. SIGFRIED OLSEN SHIPPING COMPANY

v.

WAR SHIPPING ADMINISTRATION AND GRACE LINE, INC.

Submitted August 6, 1947. Decided January 28, 1949. Reaffirmed October 13, 1949. Corrected editorially, November 15, 1949

The United States Maritime Commission does not have jurisdiction over claims against the United States under the regulatory provisions of the shipping acts.

In its administrative capacity, the Commission finds that respondents' demurrage rule and charges are not unreasonable or otherwise unlawful.

Fred. W. Llewellyn and *Joseph B. McKeon* for complainant.

William Radner, *Arthur M. Becker*, *Joseph J. Geary*, and *W. R. Wallace, Jr.*, for respondents.

Chalmers G. Graham and *Clarence G. Morse* for North Pacific Coast-Europe Passenger Conference, Pacific Coast/Panama Canal Freight Conference, and Canal, Central America Northbound Conference, and *Parker McCollester* for Atlantic and Gulf/Panama Canal Zone, Colon and Panama City Conference, interveners.

DECISION OF THE COMMISSION

BY THE COMMISSION:

Exceptions were filed by complainant and interveners to the examiner's report, and the matter was argued orally. Our conclusions differ from those of the examiner. Commissioner McKeough dissents.

The complaint alleges that respondents' tariff provisions relating to demurrage and rates applicable to the discharge of lumber, cement, and explosives from Pacific coast ports of the United States to Balboa, Canal Zone, between May 29 and October 11, 1942, were unduly and unreasonably preferential, prejudicial, and disadvantageous in violation of section 16 of the Shipping Act, 1916; unjustly discriminatory and prejudicial in violation of section 17; and unjust and unreason-

able in violation of section 18 of the Act. It is further alleged that the demurrage provisions are in contravention of section 15 of the Act in that they are unjustly discriminatory and unfair, and detrimental to the commerce of the United States. Waiver of unpaid demurrage charges in the amount of $4,287.68 and the cancellation of bonds totalling $4,000, held by respondent Grace Line, Inc. (hereinafter referred to as "Grace"), to secure the payment of the charges, are sought. Another bond of $1,973.99 also is in the possession of Grace, payment of which is dependent upon our decision herein.

North Pacific Coast-Europe Passenger Conference, Pacific Coast/Panama Canal Freight Conference, Canal, Central America Northbound Conference, Atlantic and Gulf/Panama Canal Zone, Colon and Panama City Conference intervened.

Prior to the attack on Pearl Harbor in December 1941 and the creation of respondent War Shipping Administration (hereinafter referred to as "W. S. A.") by Executive Order 9054 in February 1942, there had been such an urgent military need for lumber at the Canal Zone that we arranged with intercoastal carriers (those engaged as common carriers in transportation between the Atlantic and Pacific coasts of the United States via the Panama Canal) to carry large quantities of lumber monthly to the Canal Zone. To persuade these carriers to carry this lumber and to take the risks of delay arising from the congestion known to exist at the Canal Zone, it was agreed that the rates should be the same as those applicable from Pacific coast ports to Atlantic coast ports, plus the Canal Zone landing charges, and should include a demurrage rate equivalent to $5.00, as set forth usually in time charters. The lumber was not confined to full loads, however.

Subsequent to Pearl Harbor and to the creation of W. S. A., the need for construction materials and explosives at the Canal Zone continued urgent. The inadequacy of facilities and the congestion in the Zone, particularly at Balboa, continued to exist and ships were delayed as a consequence. All United States flag ships were either requisitioned or chartered by the Government, and the lumber contracts with the intercoastal carriers were transferred to Grace under the direction of the W. S. A. representative at San Francisco, California. He also had control of the contracts for the transportation of cement and explosives.

The demurrage provisions and rates complained of were published in Pacific Coast/Panama Canal Freight Conference tariff No. 1–A, effective January 20, 1942. The question arises as to whether we have jurisdiction as the proceeding appears to be in reality a suit against the United States. Complainant contends that this is not such a suit

but rather an administrative proceeding to secure the waiver of the uncollected demurrage charges and the surrender of the bonds held to secure the payment thereof, and therefore analagous in principle to a suit to enjoin a Federal officer or agency from taking unlawful action injurious to the party seeking relief. It is argued that all we are requested to do is to pass upon the validity of the conference tariff, to which Grace is a party, and to order Grace to cancel the bonds in its possession.

Some of the vessels involved herein were owned by the United States, others were chartered to the United States; all were operated for the account of the United States by their respective general agents appointed as such under a General Agent form of Service Agreement between them and W. S. A. Grace was designated a berth agent by W. S. A., and in such capacity it made arrangements to pick up cargo, expedited its delivery to the ship, issued freight contracts and bills of lading in the form prescribed by the United States, prepared manifests and other cargo documents, collected all moneys due the United States, deposited, remitted, and disbursed them in accordance with such regulations as the United States prescribed, and accounted to the agent or general agent for all moneys collected or disbursed by the appointed subagents at foreign ports, agents' fees, port charges, and cargo expenses in foreign ports, and agents' cargo clearances.

General agents were required by the terms of the contract with W. S. A., among other things, to maintain the vessels in such trade or service as the United States might direct, subject to its orders as to voyages, cargoes, priorities of cargo, charters, rates of freight, and charges, and as to all other matters connected with the use of the vessels; in the absence of such orders, the general agent was to follow reasonable commercial practices.

The transportation performed in this case was performed by the United States through W. S. A., which exercised the right and power to allot the vessels to the different agents; to require the agents to operate the vessels on particular routes and to particular ports; and to limit commodities which could be carried. It also established the rates at which the transportation could be performed. As already noted, Grace was only a berth agent and did not occupy any different position with respect to its relation to W. S. A. than an employee thereof under special contract. The fact that the demurrage charge in question was incorporated in a tariff filed with us by the Pacific Coast/Panama Canal Freight Conference, of which Grace was a member but of which the United States was not, is not conclusive that the rates were not those prescribed by the United States. The use of the

conference machinery and facilities to prepare and publish the rule was a handy means of making it public.

Supporting its argument that this suit is not one against the United States, complainant cites *Land* v. *Dollar*, 330 U. S. 731, 738, wherein the Supreme Court pointed out that the yardstick to be applied in such a case is whether "the essential nature and effect of the proceeding may be such as to make plain that the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration." See also *Ex Parte New York*, 256 U. S. 490, 500, 502. In our opinion, complainant here seeks a judgment that would not only expend itself on the public treasury, but more important, would seriously interfere with public administration in that it would subject the activities of the United States as a common carrier in war to delays and to the judgment of others than those entrusted by Congress as agents to effectuate definite purposes.

Unless Congress has given its consent for the United States to be subject to the general obligations and duties imposed upon common carriers by the regulatory provisions of the Shipping Act, 1916, we have no jurisdiction to grant the relief here requested. Under the generally accepted interpretation of statutes, a law is not applicable to the United States unless it so provides, either directly or by attendant circumstances which can be read in no other way, and any reference to the applicability of the law to the United States is limited to its terms and is not to be broadened into one of general applicability.

Section 9 of the Act, which is the only one which may be material on this point, provides in part that "every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein." The question now presented is whether the five vessels here involved, which were owned by or chartered to the United States were in turn chartered or leased by the United States, and thus came within the terms of section 9.

The maintenance of the vessels by the general agent and operation by the berth agent was not pursuant to any purchase, charter, or lease; those persons were nothing more than their names imply, agents of the United States, the actual operator. The arrangements made with complainant by Grace, acting as agent under the orders of the United States, were a bill of lading and contract of affreightment.

The latter contained the demurrage clause under attack, similar to the provision in the tariff, and by its terms appeared to be an agreement superior to the bill of lading, which was made a part thereof. Complainant did not have the sole use of the vessel, other shippers having made similar contracts of affreightment. On three of the ships general cargo of between 200 and 300 tons was transported under the ship's regular bill of lading.

In *The Lake Monroe*, 250 U. S. 246, the Supreme Court said that the charter referred to in section 9 of the Act was intended to include a contract for the temporary use of vessels or their services not amounting to a demise, and that the term "charter" was employed in a sense as broad as the definition embodied in the Act of July 18, 1918 (40 Stat. 913), namely, "any agreement, contract, lease, or commitment by which the possession or services of a vessel are secured for a period of time, or for one or more voyages, whether or not a demise of the vessel."

The fundamental distinction between *The Lake Monroe* case and the instant proceeding is that in the former the vessel was space chartered to one shipper for the voyage, which was considered sufficient to bring it within section 9 of the Act, whereas in the present case the vessels were not used by one shipper only but by several; also, bills of lading and not charters were here used. We do not believe that the words "purchased, chartered, or leased", as used in section 9, are broad enough to cover the operations now under discussion. We conclude, therefore, that this Commission does not have jurisdiction under the regulatory provisions of the shipping acts to afford the relief here sought inasmuch as W. S. A. was an instrumentality of the United States acting in its sovereign capacity and Grace was a mere agent of the United States.

Although our quasi-judicial authority does not extend to claims against the United States, nevertheless, as an administrative agency, we are not precluded from passing upon the propriety of the acts of W. S. A., our predecessor. Since it was the desire of Congress that United States-owned vessels receive no preference or favor over privately-owned vessels,[1] we will review the evidence to determine whether any hardship, damage, injury, or discrimination resulted from the establishment of the demurrage charge, and which could have been condemned and corrected had the vessels been owned and operated by private interests.

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[1] Section 9, Shipping Act, 1916; Section 19 (4), Merchant Marine Act, 1920.

Item 35, original page No. 17–A of the tariff under consideration named the demurrage provisions applicable to lumber as follows:

Lumber shall be taken from the end of ship's tackle at discharging port at the rate of not less than five hundred thousand (500,000) feet net board measure (N. B. M.) per twenty-four (24) hour day, failing which shipper shall pay demurrage for any and all delay to ship at the rate of $5.00 U. S. Currency per ship's deadweight ton (summer draft) per month, prorated into days and hours as the port time may reflect, Sundays and holidays not excepted. Time to commence from the time ship arrives in port, provided the ship arrives at 5:00 p. m. or prior thereto (whether in berth or not), and if the ship arrives in port after 5:00 p. m., time to commence at 7:00 a. m. of the day following the date of the arrival of the ship; provided, however, if the ship arrives after 5:00 p. m. and commences discharging before midnight of the same day, time will commence from the time discharging of the lumber from the ship actually begins.

Demurrage is payable on the basis of a twenty-four (24) hour day or prorate thereof down to one hour. Where there is lumber from more than one shipper on one vessel, demurrage, if any, will be prorated between them on a percentage basis that each shipment bears to the total lumber for discharge at Panama Canal destination.

All shipments are also subject to the booking contract for handling lumber from loading ports in use by the individual carriers of this conference.

Effective May 15, 1942, the demurrage rate was changed from $5.00 per ship's deadweight ton to the W. S. A. charter scale with no indication of what the charter scale was.

The demurrage charge was established originally to assure the intercoastal carriers that they would be recompensed for losses due to delays at Balboa, whether occasioned by shippers, consignees, or Government operation of the Canal. It was a sliding scale increase based upon the extent of the delay. Our San Francisco representative, who took part in the preliminary negotiations, reported his belief that the charge had resulted in a somewhat speedier turnaround of vessels. The same reason for the establishment of the change also existed when the contracts for carrying lumber were transferred from the intercoastal carriers to the vessels requisitioned by the United States and operated by and for W. S. A.

The fact that similar charges were not established on lumber from the Atlantic coast to the Canal Zone is not evidence of unlawful discrimination, for there was no testimony that delays similar to those at Balboa occurred at Cristobal or elsewhere in the Canal Zone, or that complainant was injured as the result of competition encountered on shipments from the Atlantic coast. The contention that demurrage was not established against general cargo and that a discrimination resulted therefrom is not supported by the evidence; there was no showing of any competitive situation as between classes of cargo or

that a comparatively infinitesimal amount of general cargo was the occasion of any appreciable amount of delay.

The existence of delays at Balboa and the consequent tieup of ships was admitted. There was no evidence that the measure of the demurrage in any way exceeded the costs occasioned by the delay to the ships. The fact that the charges were also established for the purpose of urging consignees to secure the speedy discharge of ships, and that the shipper or consignee had little if any control over the discharge, does not render the demurrage unreasonable or otherwise unlawful, for it is well settled that whenever an administrative order or rule is legally justified it is not rendered illegal by some other motive in the mind of the officer issuing it. *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139, 145.

No evidence was offered showing any violation of Section 15 of the Shipping Act, 1916.

We conclude that respondents' demurrage rule and charges are not unreasonable or otherwise unlawful. In view of this, it is unnecessary to make any findings as to whether section 18 of the Shipping Act, 1916, is applicable to commerce from the continental United States to the Canal Zone.

An order dismissing the proceeding will be entered, and appropriate instructions will be issued to proceed with the collection of the moneys due.

McKeough, *Commissioner*, dissenting:

This case is before us on exceptions to the proposed report of our trial examiner. I agree in substance with his recommendations for the award of relief to complainant, but base my decision on grounds narrower than, and different from those on which he relied.

Complainant is a shipper. In 1942 he shipped lumber, cement, and explosives from ports on the Pacific Coast of the United States to Balboa, Canal Zone, via five vessels owned by or bareboat chartered to the United States (War Shipping Administration) and operated for the United States by Grace Line, Inc., as agent. Under tariff provisions applicable to the shipments in question, demurrage of $4,287.68 was assessed against complainant for failure to discharge his cargoes at Balboa within the tariff-prescribed time after arrival of the respective vessels at the port. The sum has not been paid. Claiming that the disputed tariff provisions are in conflict with sections 16, 17 and 18 of the Shipping Act, 1916, complainant requests an order against Grace Line and War Shipping Administration cancelling such provisions and the demurrage charges based thereon.

War Shipping Administration filed an answer claiming sovereign immunity to suit, as an instrumentality of the United States. Grace Line filed an answer, claiming that since War Shipping Administration was immune, its immunity extended to Grace Line as its agent.

War Shipping Administration ceased to exist September 1, 1946, by virtue of Public Law 492, 79th Cong. (60 Stat. 501), which transferred all of such Administration's functions, powers and duties to this Commission. In consequence of the merger thus effected, an order entered against War Shipping Administration would be an order entered against ourselves, and would present, in addition to the question whether the United States is "suable" in a proceeding of this type, the further question whether we have the power to order ourselves to do what the law requires. While it cannot be held with assurance, in view of *United States* v. *Interstate Commerce Commission*, 69 S. Ct. 1014, that we lack such power, I propose the road of common sense and justice rather than that of dubious technicalities, by treating the complaint not as a request that the Commission, in its regulatory capacity, find the Commission, in its administrative capacity as successor to War Shipping Administration, "guilty as charged", but rather as a petition seeking rectification of an alleged governmental error. I shall so treat it as it concerns the Government, after first disposing of the claim against Grace Line, Inc.

Grace Line, Inc., at all times material to this case, was a berth subagent of the United States under a contract with War Shipping Administration and as such subagent acted for the Administration with respect to the vessels here involved in booking cargo, issuing bills of lading, loading and discharging, and issuing and collecting bills for freight and demurrage. Its status as agent was known to complainant, whose complaint alleges such agency with respect to the ships in question. Irrespective of Grace Line's status as a respondent in a *regulatory* proceeding, however, Grace, as an agent of the Commission, is, of course, subject to the directions of the Commission as its principal, requiring settlement of the pending controversy as the Commission may deem proper. Our direction to Grace Line, Inc. should be in conformity with our disposition, hereinafter urged, of complainant's claim against the Commission as successor to War Shipping Administration.

The transportation service from which this controversy stems was furnished by War Shipping Administration as a common carrier. Before the Administration entered the trade between Pacific Coast ports and the Canal Zone, member lines of the Pacific Coast Panama Canal Freight Conference had served the same trade under a con-

ference tariff (No. 1–A) filed with the Commission. This tariff, as from time to time amended, was continued in force by War Shipping Administration and applied to complainant's shipments. The demurrage charges to which complainant objects were assessed under the following provision with respect to lumber, and corresponding provisions with respect to cement and explosives.[2]

> Lumber shall be taken from the end of ship's tackle at discharging port at the rate of not less than five hundred thousand feet net board measure (N. B. M.) per twenty-four (24) hour day, failing which shipper shall pay demurrage for any and all delay to ship at the rate of $5.00 U. S. Currency per ship's dead weight ton (summer draft) per month, prorated into days and hours as the port time may reflect, Sundays and holidays not excepted. Time to commence from the time ship arrives in port, provided the ship arrives at 5 : 00 P. M. or prior thereto (whether in berth or not), and if the ship arrives in port after 5 : 00 P. M., time to commence at 7 : 00 A. M., of the day following the date of the arrival of the ship; provided, however, if the ship arrives after 5 : 00 P. M. and commences discharging before midnight of the same day, time will commence from the time discharging of the lumber from the ship actually begins.
>
> Demurrage is payable on the basis of a twenty-four hour day or prorate thereof down to one hour. Where there is lumber from more than one shipper on one vessel, demurrage, if any, will be prorated between them on a percentage basis that each shipment bears to the total lumber for discharge at Panama Canal destinations.

Complainant was required, precedent to the booking of his cargo, to sign space-booking agreements obligating him to pay such demurrage as might accrue under applicable tariff provisions. He executed these agreements under protest, and furnished security for payment of demurrage charges. Complainant, in turn, required his consignees to reimburse him for demurrage on their shipments. The fact that other shippers may have paid similar demurrage charges without protest or complaint does not, of course, in any way affect complainant's rights were the Commission to determine, as I believe it should, that complainant be granted relief.

The parties have stipulated that neither complainant nor respondents were responsible for the delays in unloading which resulted in the accrual of demurrage liability. The ships discharged at piers of the Panama Railroad Co. which exclusively controlled the assignment of dock facilities and cargo handling.

The demurrage provisions originated before the period of government operation. The Emergency Shipping Division of this Commission sought in 1941 to induce the intercoastal lines to carry lumber

[2] Similar provisions applied to asphalt and clay pipe, not here involved. All other cargo was demurrage-free. The required rate of discharge varied from commodity to commodity, and the applicable rate of demurrage fluctuated from time to time.

(and later, other items) from the Pacific Coast of the United States to the Canal Zone. Ports in the Zone were then congested and the carriers feared that they would sustain losses due to delays resulting from such congestion. Our Emergency Shipping Division suggested that a minimum discharge rate be stipulated "with demurrage rates equivalent $5 time charter". After intercoastal service was suspended due to the Government's ship-requisitioning program, service from the Pacific Coast to the Canal Zone was provided by War Shipping Administration through the Grace Line under the tariff here involved, amended to include the above-quoted demurrage rule.

Because the rule applied to some but not all commodities moving in the trade (general cargo was exempt), and for other reasons, complainant attacks it on the ground, among others, that it was unjustly discriminatory under sections 16 and 17 of the Shipping Act. While I am strongly inclined to so find, there is no need to pass upon these contentions because I am of opinion that the demurrage rules were invalid under other provisions of the same statute.

Section 17 requires, as to common carriers by water in foreign commerce, that every such carrier "shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property". A somewhat similar, but more extensive requirement appears in section 18 which applies to common carriers by water in interstate commerce, and requires such carriers to establish, observe and enforce "just and reasonable *rates*, *fares*, *charges*, *classifications*, *and tariffs*, and just and reasonable regulations and practices relating thereto * * * and all other matters relating to or connected with the receiving, handling, *transporting*, storing, or delivering of property". The underlined words in section 18 are not found in section 17, but for the purposes of this case the two sections are otherwise identical.

Complainant contends that the demurrage rules are unreasonable under section 18, and that section 18 applies because the respondents were common carriers by water in interstate commerce as defined in section 1 of the Act because the transportation was between a port in the United States and a port in one of its possessions. The contention is sound only if the Canal Zone is a possession of the United States within the meaning of the Shipping Act. This was a sharply contested issue in the case (it attracted several interveners having no other interest in the proceedings) and presents a question of public importance—a question more easily asked than answered in view of the conflicting authorities on the point. My own answer will not be given in this case since the issue is immaterial to the result I reach.

As noted, sections 17 and 18 have in common a requirement that common carriers by water in both foreign and interstate commerce establish, observe and enforce "just and reasonable regulations and practices" relating to various matters, including the "delivering" of property. Therefore, whether the shipments here involved moved in foreign commerce or interstate commerce (they necessarily involved one or the other), they were subject, with respect to regulations and practices affecting delivery, either to section 17 or section 18—we need not decide which—and with like effect under either section. We must decide, then, whether the demurrage provisions of which complaint is made, constitute regulations relating to delivery, and, if so, whether they are unjust or unreasonable. I believe we should hold that they do constitute regulations relating to delivery and that they are unjust and unreasonable.

They constitute regulations relating to delivery because they apply to the disposition of cargo after movement from port of origin to port of destination has been completed and no function of common carriage remains but to make the cargo available to consignees by landing it on a wharf. The act of thus making cargo available is the act of delivery in the parlance of ocean commerce, and is an obligation incident to the function of common carriage. *The Eddy*, 72 U. S. 481. Under the tariff before us, liability for demurrage and the amount of demurrage are directly related to the time required to put cargo ashore, as distinguished from all other factors affecting the duration of the voyage. It follows that the demurrage rules must be treated as delivery regulations, rather than as terms of the tariff rate schedule.

Turning now to the question of reasonableness, and taking due account of the purpose and effect of the rule, I find the rule unjust and unreasonable, and therefore invalid, for the reasons which follow.

The rule originated in a demand by private carriers in intercoastal trade that they be compensated for delays encountered or anticipated at the Canal Zone in connection with the carriage, first of lumber and then of certain additional commodities. By the time complainant's shipments moved, private carriers had ceased to serve the trade and the Government had taken it over, applying the conference tariff above described, to which was added the demurrage rule theretofore employed by the privately owned intercoastal vessels. The evidence indicates that those carriers were primarily interested in demurrage *as revenue*, to compensate them for anticipated slow-down of intercoastal schedules; but that the Government was primarily interested in demurrage *as a penalty*, on the theory that it would accelerate the discharge process at Balboa. War Shipping Administration did not

claim that demurrage was needed to make the rates compensatory.[3] The question whether the charges were proper as elements of compensation may therefore be laid aside—but with no implication that I approve the rendition of common carrier service on a non-compensatory basis. The question of compensation is not here in issue. Since the charges in question were defended as justifiable penalties, I shall necessarily treat them as such and test them by the standards applicable to demurrage in its penal sense. In *Free Time and Demurrage Charges at New York*, 3 U. S. M. C. 89, in discussing this question relative to property left on piers beyond free time, this Commission said (3 U. S. M. C. 89, 107):

> * * * When property lies at rest on a pier after free time has expired, and consignees, through reasons beyond their control, are unable to remove it, the penal element of demurrage charges assessed against such property has no effect in accelerating clearance of the pier. To the extent that such charges are penal—i. e., in excess of a compensatory level—they are a useless, and consequently unjust burden upon consignees, and a source of unearned revenue to carriers. The levying of such penal charges, therefore, constitutes an unjust and unreasonable practice in connection with the storing and delivering of property, and should be forbidden.

If, in this case, complainant and his consignees were powerless to do what the demurrage penalty sought to make them do, such penalty was unjust and unreasonable under this rule.

As noted, the requirement for discharge of selected commodities at specified rates, with demurrage chargeable for excess discharging time, was intended to relieve congestion at Balboa by speeding the turnaround of ships. I fail to see how it could do this (even though a witness testified that he thought it did), since the discharge of a common carrier vessel is the obligation of the carrier, and neither shipper nor consignee has in the ordinary case, or had in this case, any responsibility for unloading any such ship, or any right or opportunity to supervise, control, expedite, or delay the unloading process.[4] A penalty devised to compel the doing of what can not be done, is not sustainable.

Even if I should accept the contention that demurrage did tend to hasten the discharge process, I should not approve the tariff provision before us here, because under its terms, a shipper or consignee who fully met the prescribed rate of discharge might nevertheless be subject to penalty simply because *other* shippers or consignees had failed to do so. For example, complainant's lumber might have been landed

[3] The demurrage provisions were cancelled early in 1943.

[4] Demurrage liability of cargo in common carriage is to be distinguished from liability under a time charter. In the latter case, risks of delay in loading and discharging are commonly assumed by the charterer.

in due season, but a share of demurrage on lumber would have been prorated to complainant notwithstanding, had any lumber aboard been landed too late. The justness or reasonableness of this result is not apparent.

The feature just discussed goes hand in hand with the failure of the rule to apply to all commodities. Only five classes of commodities are covered, all others, including general cargo, being exempt. The record shows that some delays in unloading "penalty" cargo resulted from the prior unloading of demurrage-free cargo. Ships were shifted in several instances to piers equipped to handle heavy lifts of cargo not subject to demurrage while other cargo on which demurrage was accruing was compelled to await its turn at the convenience of the ship or the port authorities. A rule that works in this fashion penalizes the innocent for the benefit of the guilty and its unjustness and unreasonableness should be apparent at a glance. Demurrage-free cargo, it is true, was a small proportion of the total, but it may have been responsible for much of the delay in discharging other cargo. We held in *Practices of San Francisco Bay Area Terminals*, 2 U. S. M. C. 588, aff'd *California* v. *U. S.*, 320 U. S. 577, that demurrage must be equitably apportioned, and I so hold here. It was not so apportioned by this rule.

Another unreasonable feature of the tariff provision before us is the fact that by its terms demurrage was charged under certain conditions from the time the ship arrived in port, i. e., not only before discharge of cargo was completed and the cargo had been made available to the consignee, but even before unloading had begun. In *Free Time and Demurrage Charges at New York*, *supra*, the Commission concluded that "free time is granted by the carriers not as a gratuity, but solely as an incident to their obligation to make delivery. * * * This is an obligation which the carrier is bound to discharge as a part of its transportation service, and consignees must be afforded fair opportunity to accept delivery of cargo without incurring liability for penalties. Free time must be long enough to facilitate this result—but need not be longer." While war conditions in Panama may have justified a reduction in free time, I do not see how demurrage can reasonably be charged until and unless the cargo had at least been made available to the consignee. Surely, even with the utmost diligence a consignee cannot possibly take delivery of cargo before it is discharged. Thus, to compute demurrage, as called for in the tariff provision before us, beginning "from the time ship arrives in port", appears arbitrary and capricious and, therefore, unreasonable.

The respondents argue that even if the charge was improper, complainant should not be relieved from it because if he pays it, he will collect it (and in some cases has already collected it) from his consignees and therefore will either sustain no loss or damage if the charges are not waived, or be unjustly enriched if they are. Whether this argument would have merit if we were awarding reparation as such, need not be decided because no reparation is involved, but I deem it inapplicable in disposing of the complaint as a claim against the Commission. The fact is that complainant was required to accept, and accepted under protest, an obligation for demurrage which I find to have been improper. He now seeks relief from that obligation and I think that relief should be granted. The Commission is in no position to analyze the contract relationships between complainant and his consignees, and need not assume that if the charges are waived, complainant will not, voluntarily or under compulsion, make restitution to consignees who have advanced the charges to him. We can not undertake to supervise his conduct in this respect, particularly in view of the possibility that consignees who have advanced such charges to complainant may themselves have recouped them from their own vendees or others. Under the letter and spirit of the Shipping Act, the charges here involved should be canceled, and Grace Line, Inc. as agent, should be directed to take all measures necessary to secure release of the bond or bonds securing payment of such charges by complainant.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., this 15th day of November, A. D., 1949

No. 630

SIGFRIED OLSEN D. B. A. SIGFRIED OLSEN SHIPPING COMPANY

v.

WAR SHIPPING ADMINISTRATION AND GRACE 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 that we do not have jurisdiction under the regulatory provisions of the Shipping Acts, 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.) R. L. McDonald,
Assistant Secretary.

UNITED STATES MARITIME COMMISSION

No. 621

PORT OF NEW YORK FREIGHT FORWARDER INVESTIGATION

Submitted October 20, 1948. Decided November 17, 1949

Persons carrying on the business of forwarding as forwarders in connection with a common carrier by water, defined.

Certain practices of forwarders in the making of charges, billing for the same, and issuing a receipt for goods which purports to be a bill of lading found to be unreasonable and unfair.

Need found for registration with the Commission of forwarders.

Charles S. Haight and *MacDonald Deming* for Joint Committee of Foreign Freight Forwarders Associations: New York Foreign Freight Forwarders and Brokers Association, Steamship Freight Brokers Association, New York Customs Brokers Association; and National Association of Foreign Freight Forwarders.

Phil Mancini for Acme Fast Freight, *Henry Lauterbach* for American Despatch Agency, *Arthur C. Grannis* for Austin Baldwin & Co., Inc., *Hymen I. Malatzky* for Bergen Shipping Service, *R. A. Craft* for A. V. Berner & Co., Inc., *John Block* for John Block and Company, Inc., *Albert E. Bowen* for Albert E. Bowen, *J. C. Byrnes, Jr.*, for Byrnes and Lowery, *Roy F. Martin* for Caragol-Clarke Co., *Samuel C. Carter* for Carter Shipping Service, *W. F. Mittelsdorf* for L. A. Consmiller, Inc., *Kurt Freund* for Continam Shipping Company, *L. G. Blauvelt* for Copex Company, Inc., *H. D. Weiser* for Draeger Shipping Company, Inc., *Harry G. Drew* for Drew Shipping Company, *Gino Alaimo* for Excell Shipping Co., *C. S. Levitt* for Export Trade & Shipper, *Gordon Rose* for Foreign Freight Contractors Inc., *Paul F. Maguire* for Gallagher and Asher Company and Franklin Forwarding Company, *R. A. Gertzen* for Gertzen, Kerer Co., Inc., *Arthur A. Atha* for Gonrand Shipping Company, *Bart D. O'Brien* for C. S. Grant and Company Inc., *H. L. Greene* for H. L. Greene, *E. R. Starr* for F. Murray Hill and Company, Inc., *Murray Weinstock* for Independent Forwarding and Carloading Company, *M. L. Golieb* for International Expediters, Inc., *Robert E. Quirk*, *John K. Cunningham* and *John A.*

Limerick for Judson-Sheldon Division, National Carloading Corporation, *A. C. Priemer* for Knickerbocker Carriers Inc., *Martin L. Shayne* for Leading Forwarders Inc., *R. G. Ballingeri* for Luigi Serra, Inc., *Murray Weinstock* for Majestic Shipping and Forwarding Co., *Charles R. Zeller* for the Masiller Company, *T. W. Moody* for H. E. Moody and Company, *L. W. Moritz* for L. W. Moritz Company, *Thomas J. McGrath* for T. J. McGrath and Company, *Prop. E. Kubaneck* for New York Forwarding Company, *M. Person* for Person and Weidhorn, *E. C. Peterson* and *Paul M. Klein* for E. C. Peterson, *M. Hertele* for Phoenix Shipping Company, *A. D. Thomas* for Porto Rican Express Company, *Charles Israel* for Reliance Shipping Service, *Frank J. Nardo* for Richard Shipping Corporation, *Al G. Pritchard* for Schmidt Pritchard & Company Inc., *R. G. Ballingeri* for Serra Luigi, *J. R. Willever* for Transhipp Company Inc., *F. M. Melius* for Universal Transcontinental Corporation and Universal Carloading and Distributing Company, *Edwin S. Weber* for Webbal Service, *R. C. Wehling* for R. C. Wehling and Company, *John J. Galgano* for Werckle & Galgano, *Harvey H. Watkins* for Young and Glenn Inc.

Wilbur LaRoe, Jr., *Leander I. Shelley*, *Frederick E. Brown*, *Arthur L. Winn, Jr.*, *Samuel H. Moerman*, *L. W. Byrne*, and *W. L. Thornton, Jr.*, for Port of New York Authority, *H. W. Browne* and *J. W. Nobel* for National Export Traffic League, interveners.

A. C. Welsh for Brooklyn Chamber of Commerce.

W. C. Rossman for Steamship Freight Brokers Association.

David R. Bookstaver and *William W. Kapell* for the Office of Price Administration.

Allan Briggs, *Maurice A. Krisel*, and *Frank J. Gillis* for the Commission.

Report of the Commission

Coddaire, *Commissioner:*

Exceptions were filed to the report proposed by the examiners, and the matter was argued orally. Our conclusions, in the main, agree with those of the examiners. Commissioner McKeough's concurrence in part is attached hereto.

This investigation was instituted by the Commission pursuant to its order of August 21, 1942, which alleges that respondent Foreign Freight Contractors, Inc., in connection with the receiving, handling, storing, or delivering of cargo and freight in foreign commerce, issues contracts under the guise of bills of lading, although not a carrier; purports to establish freight rates; and engages in other acts and practices with respect to contracts it makes with shippers, and the

method of assessing and collecting its charges, in violation of section 17 of the Shipping Act, 1916, as amended. The order states that the public interest requires a general inquiry to determine the extent of the existence of such practices among all other forwarders in the port of New York, subject to the Act, and the lawfulness of such practices under section 17 thereof, with the view toward making such order or taking such other action as may be warranted by the record. The order, as amended, names as respondents some 320 forwarders located at the port of New York, and recites that they carry on the business of forwarding in foreign commerce and that each of them is an "other person subject to this Act" within the meaning of that phrase as used in sections 1 and 17 of the Act.[1]

Prior to hearing a questionnaire regarding their general practices and activities was sent to respondents. The verified answers to the questionnaire were incorporated in the record at the initial hearing in New York. Thereafter, the hearing was adjourned to enable the Commission, through an order issued pursuant to section 21 of the Act, to obtain additional information concerning actual forwarding transactions. Before the time expired within which this information was to be furnished, certain respondents instituted court proceedings to enjoin the order of investigation and the section 21 order. In *American Union Transport* v. *United States*, 55 F. Supp. 682, the court enjoined the section 21 order, holding that the Commission had no jurisdiction over respondents. This ruling was reversed by the Supreme Court of the United States in *United States* v. *American Union Transport*, 327 U. S. 437. Hearings were subsequently resumed in New York and Chicago, Illinois.

A forwarder in foreign commerce in many instances furnishes a necessary link in preparing shipments for export. These services are diverse in character and may vary as to almost every shipment.[2]

[1] Section 1 reads: "The term 'other person subject to this act' means any person not included in the term 'common carrier by water,' carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water."

Section 17 provides in relevant part: "Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices, relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice."

[2] More specifically, forwarders perform on occasion the following services: Examine instructions and documents received from shippers; order cargo to port; prepare export declaration; book cargo space; prepare and process delivery order, and dock receipt; prepare instructions to truckman or lighterman, and arrange for or furnish such facilities; prepare and process ocean bill of lading; prepare consular documents, and arrange for their certification, in the language of the country to which the goods are shipped; arrange for or furnish warehouse storage when necessary; arrange for insurance when so instructed; clear shipment in accordance with United States Government regulations; pre-

Some exporters and shippers maintain their own exporting departments and perform all steps necessary to secure transportation by water and delivery of the goods in the foreign country. These are not forwarders because it is only when such activities are for and on behalf of the shipper or consignee in return for a consideration, money or otherwise, that they constitute forwarding subject to our jurisdiction. Common carriers by water in some instances offer forwarder service, but they have not shown any desire for such business and charge rates which are generally below those of regular forwarders but which have not been shown to be non-compensatory. Their charges are published in tariff form, some as minimum charges and others as specific itemized rates.

Forwarders may, and in a great many instances do, engage in businesses other than forwarding, such as commission merchants, resident buyers for foreign purchasers, manufacturers' agents, and traders. They may or may not have a financial interest in the shipment. This diversity of activity creates uncertainty as to the actual legal status of the forwarder, the legal relationship between the forwarder and shipper, and between the forwarder and the carrier. This uncertainty undoubtedly has given rise to many of the practices against which complaints were made.

The broad scope of the order of investigation, together with the implications of the decision in *United States* v. *American Union Transport*, *supra*, induced at the hearings not only the expression of much shipper dissatisfaction, but a presentation of the problems of the forwarding industry as well. Witnesses included individual shippers, representatives of the National Export Traffic League, the Port of New York Authority, National Industrial Traffic League, and members of the Joint Committee of Foreign Freight Forwarders Associations.[3]

Complaints. Specific complaints were made against the absence of clearness and uniformity in classification of service; lack of specification of charges for services; padding of bills; lack of professional

pare advice notices of shipments, sending copies to bank, shipper or consignee, as required; send completed documents to shipper, bank or consignee as directed; and advance necessary funds in connection with the foregoing.

Also, they provide supervision in the coordination of services rendered to shipment from origin to vessel, render special service on unusual shipments or when difficulties in transit arise, and give expert advice to exporters as regards letters of credit, licenses, inspection, etc.

[3] The Port Authority stated its interest as follows: (1) to suggest regulations which would control unjust or unreasonable practices or unreasonably discriminatory charges, (2) to urge that any regulations be uniform at all ports, and (3) to urge that any regulations be not unduly burdensome to our foreign commerce.

The Joint Committee represents New York Foreign Freight Forwarders and Brokers Association, Steamship Freight Brokers Association, New York Customs Brokers Association, and National Association of Foreign Freight Forwarders.

responsibility; and instances of dishonesty in overcharging on ocean freight. Much of this is attributed by the Port of New York Authority to the "fog" which surrounds the industry, some of whose members "carry their office in their hats", and lack experience and responsibility necessary to the efficient performance of forwarding functions.

The most persistent complaints result from "lump sum" billing for such accessorial services as trucking, insurance, and warehousing. Although shippers conceded that forwarders should charge for these services, they stated that this manner of billing leads to the suspicion of padding. For instance, where there is a single charge for "Marine * * * W. R. Insurance * * * and Services", there is no specification of what constitutes "service", which is typed on the printed invoice, or the cost thereof; nor is it possible to discover the charge for insurance. Another item for "Storage-Demurrage-Lighterage" does not indicate the amount of the charges for the respective subjects. Individual shippers do not know whether they pay for the use of the whole truck or share the charges with other shippers whose goods are carted at the same time.

Instances were given by shippers of what they considered flagrant padding of the forwarder's bill for service; the misrepresentation that insurance had been placed; the collection and use of shipper funds 60 to 90 days before they are remitted; the wide discrepancy in the charges assessed by forwarders at different ports; the differences in the charges of the same forwarder for the same description of service at New York; and the issuance by the forwarder of a receipt which purports to be a bill of lading. The existence of irregularities was admitted by some of the forwarders.

In some cases shipments of various exporters are consolidated by the forwarder and sent forward in his name on one bill of lading to his correspondent or agent abroad. The forwarder's charge is generally 50 percent of the saving to the individual shipper over the minimum charge on his shipment. There was criticism against one forwarder in this connection that although the ocean freight was properly apportioned, the full charge for consular invoice was made on each shipment. The forwarder contends, however, that the rate was agreed upon by the consignee.

If the forwarder is not in the trucking business he may have a contract with a trucking firm to do all his work or may hire a truck for the specific transaction. The forwarder prepares the delivery orders, locates the freight and traces it for delivery when necessary, and advances charges for account of the shipper. Special services are given to perishables and other unusual shipments. Services are billed in various ways; some forwarders add a percentage to the actual

charges, usually 10 percent, or a flat fee of 25 cents or more; others bill actual charges and are compensated by a commission from the trucking company; and still others, who have their own trucking facilities, charge on a contract basis.

In arranging insurance the forwarder must ascertain the age and flag of the vessel, consider the place of stowage of the goods, determine proper coverage and kind of insurance, and in some instances prosecute and settle claims for the account of the shipper. Forwarders having an open policy receive no commission from the insurance company but add approximately 25 cents on each $100 of insurance or 10 percent to the premium for preparing insurance certificate, advancing the premium, and handling claims. Other forwarders bill actual charges and are compensated by brokerage from the insurance company.

Warehousing is necessary when goods arrive at port too soon or too late for a sailing, or where the shipper has failed to send documents on time, or where shipments are to be consolidated. Forwarders who arrange for this service may add a fee to the storage cost or bill actual cost and receive a commission from the warehouse company. Some forwarders are financially interested in warehouses and perform the service on a contract basis.

Some of the practices objected to arose through the willingness of foreign commission merchants, who may control the routing, to have the charges padded so that their commission based upon a percentage of the cost could be increased. Shippers who made these complaints can prevent repetition of the padding by selling C. I. F. or C. & F.

CONCLUSIONS

The opinion of the Supreme Court in *U. S.* v. *American Union Transport*, *supra*, leaves no doubt as to our power to prescribe reasonable regulations designed to remedy any unreasonable practices shown of record herein. In reviewing the regulatory scheme and policy of the Shipping Act, 1916, the court pointed out that forwarders are in a position to enter into agreements with carriers which may be contrary to the policy of section 15 of the Act, and to commit or induce discriminations forbidden by section 16. They are intimately connected with the receiving, handling, storing, and delivering of property, the practices as to which must be just and reasonable under section 17; and they have access to confidential shipping information, the disclosure of whish is forbidden by section 20. See also *California* v. *United States*, 320 U. S. 577.

We are of the opinion that any person carrying on the business of dispatching shipments by ocean going vessels in foreign commerce and domestic commerce with or between our territories and possessions, and of handling the formalities incident thereto, is a forwarder within the provisions of the Shipping Act, 1916.

This definition includes manufacturers, exporters, export traders, manufacturers' agents, resident buyers, and commission merchants if they do not ship in their own name and if they charge a fee for forwarding services. Merely because one offering a forwarding service is engaged in other businesses does not remove him from our jurisdiction. Such definition does not include the foregoing persons, however, if they ship in their own name even though a forwarding fee is charged directly or is concealed in the price of the goods. Admittedly, in the latter instance they might be competitive with regular forwarders, but that is not the test. The statute applies to persons "carrying on the business" of forwarding. Persons who merely perform forwarding on their own behalf can not be regarded as carrying on a forwarding business. Moreover, a shipper who performs his own forwarding, though he passes the cost on to the buyer, needs no protection. The record demonstrates, however, that shippers who do not forward their own shipments but rely through choice or necessity upon professional forwarders, do need a measure of protection. This is true particularly in reference to shippers located far from ports through which their cargoes are shipped.

While it is evident that many of the irregularities complained of have been practiced by a comparative few, it is also evident that temptations arising from keen competition, coupled with the lack of any regulation of the industry, have caused many forwarders to engage in practices which are unjust and unreasonable and detrimental to commerce.

The most common abuses arise from the forwarders' methods of billing—the failure to specify clearly and state separately all service charges, and to segregate them from actual out-of-pocket costs for accessorial services. We are not convinced by the argument that segregation of charges would upset the foreign consignee, and thus prove injurious to our foreign trade. It would seem that the more logical reason why some forwarders do not segregate their charges is that since the business is highly competitive, the present method of billing affords more leeway in bidding. Certain service charges can be made to appear nominal while the profit is concealed in such items as trucking, insurance, and warehousing. This practice is unjust and unreasonable. Itemization of charges and exact disclosure of outlays for

which reimbursement is sought, should be made either prior to the shipment, or thereafter in an appropriately detailed invoice.

During the course of the hearing and in briefs the suggestion was made that forwarders act as independent contractors. The only significance that can be attached to this claim is that once the charges are agreed upon, any ground for complaint as to the reasonableness thereof, either from the shipper or forwarder, is removed. In *U. S.* v. *American Union Transport*, *supra*, the court said (p. 443): "By engaging in these many activities of the forwarding business, independent forwarders—and particularly the appellees [4]—act as *agents of the shipper*." (Emphasis supplied.) But for regulatory purposes, it is immaterial whether the forwarder acts as agent or independent contractor. What he does determines his status and the resultant obligations under regulatory statutes. *United States* v. *California*, 297 U. S. 175. Whether a forwarder is an agent or an independent contractor, he is in either case precluded by the equality provision of section 16 of the Shipping Act from unduly or unreasonably preferring, or discriminating against, any person for whom he performs forwarding service. *Contract Rates—Port of Redwood City*, 2 U. S. M. C. 727. It is realized of course that the services of forwarders are specialized and varied. However, the record indicates a possibility of discriminatory treatment resulting from the great variety of methods upon which charges are based.

The evidence shows instances of a forwarder who, at the same place but under a different name, transacts business as a shipper, simultaneously collecting brokerage under another name as a forwarder of his own shipments. Brokerage paid to a shipper on his own shipments constitutes a rebate in violation of section 16 of the Shipping Act—and this is true notwithstanding that the shipper may also be a forwarder and may purport to receive the brokerage money in his forwarder capacity. Similarly, a forwarder who has any beneficial interest in a shipment and accepts brokerage thereon, is equally guilty of accepting a rebate in violation of section 16.

One effective way of controlling abuses disclosed by the present record would be through legislation providing a system of licensing similar to that applied to custom brokers. In the absence of such legislation, it is essential that we require all forwarders to register with the Commission, since a program of regulation undertaken without means of identifying the members of the industry would be largely ineffective. The Port Authority, representatives of forwarders and shippers, and Commission counsel concede the necessity for registra-

[4] The appellees were those respondents who contested the Commission's jurisdiction.

tion with us of all forwarders. A requirement for registration will be a step in the right direction and will give us an opportunity to decide further as to the need for licensing legislation.

We find:

(1) that there is need for the registration of all forwarders;

(2) that it is an unreasonable practice in violation of section 17 of the Shipping Act, 1916, for a forwarder, in submitting invoices for services or reimbursement of advances in connection with the forwarding of any shipment for export:

(a) to fail to disclose accurately and separately all amounts advanced or contracted for or on behalf of the shipper or consignee; or

(b) to fail to itemize all service charges, unless such forwarder and shipper or consignee shall have agreed in advance as to the charges and method of billing and reference to said agreement is made in the statement presented;

(3) that the issuance of a receipt for cargo by a forwarder, which purports to be a bill of lading, is an unreasonable practice in violation of section 17 of the Shipping Act, 1916.

Proposed registration of all forwarders in the United States, including respondents, and rules and regulations relating to their practices and relations with shippers and consignees, will be published in the Federal Register, and interested persons will be invited to submit written views thereon.

UNITED STATES MARITIME COMMISSION

WASHINGTON

IN THE MATTER OF FORWARDERS ENGAGED IN THE EXPORT TRADE OF THE UNITED STATES

NOTICE OF PROPOSED RULE MAKING

Notice is hereby given that, in accordance with the provisions of section 17 of the Shipping Act, 1916, section 204 of the Merchant Marine Act, 1936, and section 4 of the Administrative Procedure Act, the United States Maritime Commission has under consideration proposed rules and regulations relating to persons engaged in the business of forwarding property by ocean going vessels in the foreign commerce of the United States or in domestic commerce with or between the territories or possessions of the United States.

The purpose of the proposed rules is to effectuate the registration of forwarders and to eliminate certain unjust and unreasonable practices in the forwarding industry.

All persons interested in the proposed rules and regulations hereinbelow set out may file with the Secretary of the Commission, Commerce Building, Washington 25, D. C., within sixty (60) days of the publication of this notice in the Federal Register, written views and suggestions thereon. The proposed rules are as follows:

I. *Definition of a Forwarder:*

1.1 For the purpose of these rules and regulations, a forwarder is any person engaged in the business of dispatching shipments on behalf of other persons, by ocean going vessels in foreign commerce or in domestic commerce with or between the territories or possessions of the United States, and of handling the formalities incident thereto.

II. *Registration with the Commission:*

2.1 All persons who engage in the business of forwarding shall register with the Commission, such registration to be in addition to any registration under the Commission's General Order No. 70.

2.2 All persons who are engaged in the business of forwarding on the effective date of these regulations shall register with the Commission thirty days after such date.

2.3 All persons who are not engaged in the business of forwarding on the effective date of these regulations but who engage therein after such date shall register with the Commission before engaging in said business.

2.4 For good cause shown, the Commission, upon request of the registrant, may extend the time for registration.

2.5 Each registrant shall furnish to the Commission a statement, on a form to be supplied by the Commission, giving full information with respect to (a) the registrant's name and the address of its principal and branch offices, (b) form of organization and place of incorporation if a corporation, (c) names and citizenship of officers and principal stockholders, proprietors, or partners, as the case may be, (d) the extent of the holdings of each stockholder, (e) statement as to whether forwarding business is a subsidiary of any other business and, if so, the name and description thereof, (f) names and addresses of agents, affiliates, and subsidiaries, and (g) statement of businesses other than that of forwarding in which engaged, either directly or through affiliates.

2.6 Each forwarder who has filed the required information will receive from the Commission a registration number which thereafter shall be set forth on his letterheads, invoices, advertising, and all other documents relating to his forwarding business. Use of the registration number in any way other than to indicate the mere fact of registration with the Commission is prohibited.

III. *Regulations:*

3.1 All forwarders shall use invoices or other forms of billing which state separately and specifically, as to each shipment:

(a) the amount of ocean freight assessed by the carrier;

(b) the amount of consular fees paid to consular authorities;

(c) the amount of insurance premiums actually disbursed for insurance bought in the name of the shipper or consignee;

(d) the amount charged for each accessorial service performed in connection with the shipment;

(e) other charges.

3.2 In the case of consolidated shipments, the invoice or other form of billing concerning each shipment shall state the minimum ocean freight and consular fees that would have been payable on each shipment if shipped separately, and the amounts actually charged for these items by the forwarder, on the shipment in question.

3.3 All special contracts between forwarders and shippers or consignees shall be reduced to writing, signed by the parties, and a copy maintained in the files of the forwarder for submission to the Commission upon request.

3.4 To the extent that special contracts are entered into by forwarders with individual shippers or consignees, similar contracts shall be open to all shippers and consignees similarly situated, and they shall be advised as to the terms under which the contracts are available.

3.5 In the case of special contracts where the parties have agreed in advance as to the charges for services in connection with the forwarding of a shipment, the invoice or other form of billing shall refer to the agreement and the charges need not be itemized.

3.6 Forwarder's receipts for cargo shall be clearly identified as such and shall not be in a form purporting to be a bill of lading.

3.7 No forwarder, after the date on which he is required to register, shall demand or accept brokerage from steamship companies unless and until such forwarder has applied for a registration number from the United States Maritime Commission pursuant to these regulations.

IV. *Effective Date and Applicability of Regulations:*

4.1 These proposed regulations shall be published in the Federal Register and shall become effective sixty (60) days after such publication.

McKeough, *Commissioner*, concurring in part:

I concur in the majority's definition of forwarders, except for the blanket exclusion of common carriers.

The majority states that its definition of forwarders includes:

manufacturers, exporters, export traders, manufacturer's agents, resident buyers, and commission merchants if they do not ship in their own name and if they charge a fee for forwarding services.

Earlier in the body of the majority decision, the following finding, although not so labeled, appears:

Common carriers by water in some instances offer forwarder service, but they have not shown any desire for such business and charge rates which are generally below those of regular forwarders but which have not been shown to be non-compensatory. Charges are published in tariff form, some as minimum charges and others as specific itemized rates.

The question of carriers' "desire for such business" can hardly affect their legal status as long as they do "offer forwarder service". Nor can the fact that carriers charge rates for forwarding service "which are generally below those of regular forwarders" justify special treatment of common carriers, when offering forwarding service; to the contrary, the practice of certain steamship companies to perform forwarding services for the public at "cut-rates" may well be one of the reasons why "regular forwarders" find themselves pressed, as we have found, to hide service charges in lump sum billing or in the "padding" of bills for accessorial services.

I can see no grounds for exemption from regulation as forwarders in the fact that common carriers may not offer *all* the services customarily offered by forwarders, or that they offer forwarding services only as an unimportant "sideline". The same, after all, can be said of many of the businesses which the majority has decided to include in its definition.

Neither publication of some common carriers' forwarding charges in their tariffs, nor the definition of "other person subject to this Act" in Section 1 of the Shipping Act, 1916 ("any person not included in the term 'common carrier by water' carrying on the business of forwarding * * * in connection with a common carrier by water") justify exempting common carriers "carrying on the business of forwarding" from such standards as we determine should be established for, and followed by those "carrying on the business of forwarding".

Such exemption is as alien to the broad regulatory policy of the 1916 Act and the intent of its framers, as if we were to exempt common carriers who also furnish wharfage, dock, or other terminal facilities from standards applied by us to independent or affiliated persons furnishing the same facilities. Congress, as is clear from the legislative history of the Act, wanted to make sure that certain of the provisions of the Act apply not only to actual transportation, but to certain accessorial services as well. As these are frequently furnished by persons other than common carriers, Congress provided for a separate category of "other person subject to this Act". Now for us, however, to apply the provisions of the Act to "other persons", yet not to the common carriers themselves *when they perform the same functions*, would not only bring about a most incongruous result, but, in addition, would mean charging the Congress with setting up a "double standard" without any apparent justification or purpose whatsoever. I refuse to so charge the Congress.

Accordingly, finding it necessary to regulate the business of forwarding in connection with a common carrier by water for hire, we should regulate everybody carrying on this business, lest we lay ourselves open to the accusation of playing favorites.

I am unable to concur in the majority's finding

> (3) that the issuance of a receipt for cargo by a forwarder, which purports to be a bill of lading, is an unreasonable practice in violation of section 17 of the Shipping Act, 1916.

This finding is unsupported, in the body of the majority's decision, by any argumentation, explanation, or discussion, and, therefore, appears arbitrary and capricious. The finding is believed to be based upon a single case, not referred to or discussed in the majority's de-

cision. There is no indication that that particular complaint and the damage complained of would have been avoided had the document in question been identified as a cargo receipt rather than a bill of lading. Moreover, due to absence of definitions, indefiniteness in language, and lack of supporting discussion, the finding leaves it open to conjecture whether we condemn, as an unreasonable practice, the issuance of a real bill of lading by a forwarder, or the issuance of a cargo receipt which purports to be, and actually is, a bill of lading, or only the issuance of a receipt for cargo which purports to be, *but actually is not*, a bill of lading.

I concur with another finding made in the body of the majority's decision, but omitted, in my opinion erroneously, from its formal findings. Although Docket 621 is primarily an investigation into the practices of forwarders in their relations with shippers and consignees, and although it may be held, therefore that matters involving the relations between forwarders and common carriers by water are extraneous to the issues, nevertheless, we found, and the majority reports, evidence of a forwarder who collected brokerage from a common carrier on shipments in which the forwarder had a financial interest as shipper. The majority concludes that

> Brokerage paid to a shipper on his own shipments constitutes a rebate in violation of section 16 of the Shipping Act * * *. Similarly, a forwarder who has any beneficial interest in a shipment and accepts brokerage thereon, is equally guilty of accepting a rebate in violation of section 16.

I agree, but having determined that a certain practice constitutes a rebate in violation of Section 16, I believe that we should have included such determination among our formal findings as well as a prohibition of that practice among the proposed rules and regulations; or, if we find that we may not do so because the proceeding was one solely under Section 17 of the Act, the discussion of this matter falling under Section 16 should have been omitted from our report entirely.

I am not at this time concurring in the proposed rules and regulations as we are inviting interested persons to submit to us their views on these proposed rules and regulations, which in no case will become effective except after 60 days from their publication in the Federal Register. Questions relating to the effectiveness of some of the proposed rules and regulations and to the practicability of others can be better resolved when the comments of interested persons will have been received.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 17th day of November, A. D., 1949

No. 621

PORT OF NEW YORK FREIGHT FORWARDER INVESTIGATION

This proceeding having been instituted by the Commission on its own motion, 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 containing its conclusions and decision thereon, which report is hereby referred to and made a part hereof, and provision having been made therein for the registration of all forwarders including respondents and for the consideration of rules and regulations relating to their practices and relations with shippers and consignees;

It is ordered, That this proceeding be dismissed.

By the Commission.

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