UNITED STATES MARITIME COMMISSION

No. 657

AGREEMENTS AND PRACTICES PERTAINING TO BROKERAGE, AND RELATED MATTERS

Submitted October 27, 1948. Decided November 17, 1949

Provisions prohibiting the payment of brokerage found to be detrimental to the commerce of the United States under section 15 of the Shipping Act, 1916.

Joseph J. Geary, *Allan E. Charles*, *Chalmers G. Graham*, *Leonard G. James*, *F. L. Tetreault*, *Cletus Keating*, *David Dawson*, *William Radner*, *Odell Kominers*, *William D. McGraw*, *Parker McCollester*, *John R. Mahoney*, *Donald E. Leland*, and *Albert E. Stephan* for respondents.

Charles S. Haight and *McDonald Deming* for Joint Committee of Foreign Freight Forwarders Association, New York Foreign Freight Forwarders and Brokers Association, Steamship Freight Brokers Association, National Association of Foreign Freight Forwarders, and the individual members of those associations, *J. Richard Townsend* for Pacific Coast Customs and Freight Brokers Association and 21 Pacific coast ocean freight forwarders, *Robert E. Quirk* for Judson Sheldon Corporation, Universal Trans-Continental Corporation, International Expediters, Inc., and D. C. Andrews & Company, *John R. Cunningham* for Judson Sheldon Corporation and National Carloading Corporation, *Wilbur E. Dow, Jr.*, *Anthony N. Zock*, and *John S. Stillman* for Association of Ship Brokers and Agents, *M. L. Golieb* for International Expediters, Inc., *Robert E. Williams* and *T. R. Stetson* for Pacific Coast Borax Company, *Howard A. Leatart* for American Potash and Chemical Corporation, *Charles Diamond* for Dyson Shipping Co., Inc., and *F. N. Melius, Jr.*, for Universal Trans-Continental Corporation, interveners.

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

REPORT OF COMMISSION

CODDAIRE, *Commissioner:*

In *Agreement No. 7790*, 2 U. S. M. C. 775, we found, among other things, that a provision in the proposed agreement prohibiting payment of brokerage by members of the conference was inconsistent with the Bland Forwarding Act (56 Stat. 171), and that the agreement would not be approved unless the prohibition was eliminated. Respondents therein disputed our finding and continued to function under their then existing Agreement No. 57 and the rules adopted thereunder, which contained a similar prohibition. Other conferences operating with similar prohibitions likewise challenged our finding. On the other hand, freight forwarders and others called upon us to issue rules requiring the payment of brokerage.

We instituted the present proceeding upon our own motion pursuant to sections 15, 16, 17, 18, 21, 22, and 23 of the Shipping Act, 1916, hereinafter called the Act, and section 4 of the Administrative Procedure Act, for the purpose of inquiring into and of taking appropriate action concerning the payment or non-payment of brokerage by carriers, and conference agreements, regulations, arrangements, and practices relative thereto. The scope of the order of investigation is as follows:

ORDERED that the Commission institute public hearings with respect to the payment and non-payment of brokerage by carriers subject to its jurisdiction, and that at such hearings, evidence be received as to whether conference agreements and regulations adopted thereunder, prohibiting the payment of brokerage, are contrary to law or unjustly discriminatory or unfair as between carriers, shippers, importers, exporters, or ports, or detrimental to the commerce of the United States; and it is further

ORDERED that respondents show cause before the Commission why conference agreements (including regulations, understandings and other arrangements) to which respondents or any of them are parties, which prohibit the payment of brokerage, should not be disapproved.

Public hearings were held at San Francisco, California, and New York, New York.

The examiners found that provisions prohibiting the payment of brokerage were detrimental to the commerce of the United States under section 15 and an unreasonable practice under section 18 of the Act. Exceptions were filed to the examiners' report and the matter was argued orally. Our conclusions do not differ materially from those recommended by the examiners. Commissioner McKeough's concurrence in part is attached hereto.

Respondents are steamship conferences and their common carrier members, the conferences being shown in Appendix A, attached hereto and made a part hereof. They prohibit the payment of brokerage

in whole or in part through their conference agreements, rules, and regulations, or tariff provisions. Numerous organizations of forwarders, individual members thereof, and shippers intervened.

The order as originally issued included as respondents certain steamship conferences engaged exclusively in the domestic trade. Upon motion made at the oral argument upon exceptions, and pursuant to agreement and stipulation by and between the parties, the proceeding was limited solely to conferences of common carriers by water in foreign commerce, thereby eliminating without prejudice, those respondents engaged exclusively in the domestic trade.

The Act does not define brokerage and is silent as to any requirement regarding payment of brokerage. In *Agreement No. 7790, supra*, however, we said that "brokerage is compensation for securing cargo for the ship." It is compensation paid by common carriers by water to brokers, including forwarders, and is generally measured in amounts equal to fixed percentages of gross revenues collected by the carriers from shippers who have employed the brokers or forwarders. The Act also fails to describe persons carrying on the business of forwarding. As used in this report, the term "forwarder" means any person employed by shippers or consignees to dispatch shipments by ocean steamships and to take care of formalities incident thereto.

The practice of paying brokerage in world trade dates back more than 100 years, but there is no general uniformity among carriers in observing the practice. Most conferences serving the Pacific coast have limited or prohibited their members from paying brokerage, while most conferences serving the Atlantic and Gulf coasts allow their members to pay brokerage up to a maximum of 1¼ percent of the freight revenue. Some carriers, including certain of the respondents, have membership in both types of conferences. Some nonconference carriers pay brokerage of 2½ percent or more.

The members of Pacific Westbound Conference, operating between the Pacific coast of the United States and the Far East, are prohibited by Rule 16 of the conference from paying brokerage on "local cargo". The term "local cargo" is defined on the title page of Pacific Westbound Conference Local Freight Tariff No. 1-U as follows:

> The local tariff applies on traffic originating in the States of Montana, Wyoming, Utah, Arizona, and States west thereof, and some points in Canada west of the Saskatchewan, Manitoba boundary line, and all other traffic originating east thereof on which overland rates may not be applicable.

The same rule provides that brokerage shall not be paid in excess of 1¼ percent on traffic originating in overland territory (points east of the above described geographical territory) and moving on through export bills of lading. Brokerage is permitted on overland traffic

because of the competition from carriers operating from the Atlantic and Gulf ports to common destinations; most of the latter carriers belong to the Far East Conference, which authorizes brokerage of 1¼ percent.

Prior to the formation of the Pacific Westbound Conference, the trans-Pacific trade was organized into two separate conferences, and there was no prohibition against the payment of brokerage. Some of the carriers paid brokerage at varying rates and others paid none. Because of the abuses which resulted, an official of the United States Shipping Board, the Commission's predecessor, advised the conference to adopt a prohibition against the payment of brokerage on local cargo. Such a prohibition was incorporated in Agreement No. 57, which was approved June 26, 1923.

Pacific/Straits Conference and Pacific/Netherlands East Indies Conference embrace geographical territories contiguous to that of Pacific Westbound Conference and observe the same brokerage practices with respect to local and overland cargoes, although prior to December 31 and April 9, 1936, respectively, there were no prohibitions against paying brokerage except on petroleum and petroleum products.

All other Pacific coast respondents appear to have prohibited the payment of brokerage since their formation, except Pacific Coast-Australasian Traffic Bureau, which, between July 9, 1935, and February 17, 1947, allowed brokerage of 1¼ percent on overland cargo.

All Atlantic and Gulf coast respondents serving Caribbean Sea, Mexican, and Central American areas prohibit the payment of brokerage on all cargo whereas carriers operating from the same Atlantic and Gulf ports to all other destinations generally allow the payment of brokerage.

Pacific Coast European Conference and its members are not respondents but appeared and offered evidence. The agreement of that conference contains no prohibition against brokerage, which the members pay on all traffic, with certain exceptions of no relevance herein. Brokerage is limited to 1¼ percent and applies on cargo originating locally as well as in the interior, and has been paid since before the opening of the Panama Canal. Payment is permitted only to forwarders who are on record with the conference and who have filed authorizations from their clientele.

Forwarding activities have developed American commerce. The maintenance by forwarders of offices in foreign countries has resulted in direct contact between United States shippers and foreign purchasers, thus securing new business and increasing the volume of trade. The studies which many forwarders make of statistical data, trends

of trade, market conditions, and the dissemination thereof to foreign purchasers and to United States shippers also tend to develop trade. Consolidation of small shipments, with the saving of overhead costs of shippers, enables them to reach foreign markets which would otherwise be precluded because of high minimum charges by carriers. Consolidation can also save consular fees and thus improve the exporters' competitive position with foreign exporters to the common market. Moreover, forwarders make a valuable contribution to our foreign trade through their function of relieving the large number of small or occasional exporters from many details and formalities connected with export shipments. Simplification of export trading promotes and develops foreign trade.

The lack of complaints by shippers, public officials, or others interested in water transportation, against the prohibition of the payment of brokerage is not significant on the question of the effect of the practice upon the commerce of the United States. The forwarding industry is an integral part of the commerce of the United States, is employed by a great number of export shippers, and is therefore an indispensable link between those shippers and carriers. Forwarders often receive payments from both the shipper and the carrier where payment by the latter is not forbidden by agreement among carriers. The forwarder receives the shipment, performs whatever is necessary to prepare it for transportation, secures space, prepares documents, and does such other things as are required, all on behalf of the shipper. The forwarder develops business and directs particular shipments to the carrier, all to the advantage of the carrier. Forwarders generally patronize those lines which pay brokerage so long as the interest of the shipper is not jeopardized.

The contention that forwarders perform services only for shippers and that there is no consideration for the payment of brokerage by the carriers, is not convincing. The very fact that carriers fear that the removal of the ban against the payment of brokerage will result in all carriers being compelled to pay it because of the competition which will ensue is persuasive of the fact that forwarders do have the power to and do direct, in many cases, cargo to the carrier which pays them. Testimony that the volume of cargo movement has increased in spite of no brokerage payments is not conclusive that the payment of brokerage might not have produced a greater volume. The forwarder can, and does at times, increase the movement of cargo when otherwise it might be slack, and the receipt of brokerage is an incentive to create new business as well as to seek to divert cargo from one carrier to another. Furthermore, carriers derive benefit from the

activities of forwarders in directing traffic to them even when the carriers maintain their own soliciting staffs.

While it might be possible for carriers to provide necessary services for shippers, and in some instances they do so, it is not any part of the carrier's transportation function. The services performed by forwarders relieve carriers who otherwise might have to perform them in order to retain their customers, but this fact does not mean that those services are performed at the request of and for the carriers. A forwarder who simplifies export procedure by combination of several documents into one relieves carriers of their duty of providing those documents, but here again the service is primarily for the shippers, and the carrier's benefit is incidental.

Brokerage is the major portion of most forwarders' income, and even on the Pacific coast it amounts to 70 or 80 percent of the total revenue although it is paid only by the Pacific Coast European Conference. On the Atlantic coast brokerage ranges from 15 to 90 percent of the forwarders' total earnings. There are approximately 64 forwarders on the Pacific coast, where the volume of business is small compared with that handled by Atlantic coast forwarders. At New York alone it is estimated that there are over 400 forwarders, employing upward of 10,000 persons. One forwarder at New York handles from 7,500 to 11,000 sets of bills of lading per month. About 70 percent of the total volume of the Atlantic coast business originates west of the Allegheny Mountains, while on the Pacific coast most of the tonnage originates at seaboard. The numerical majority of exporters employing forwarders are shippers of package freight in comparatively small quantities.

The contention that a ban on the payment of brokerage results in discriminations in violation of sections 15 and 17 of the Act is not supported by the evidence. The payment of brokerage by the carrier is not a payment to a shipper nor does the shipper in any way benefit from the payment. The Act contains no mention of forwarders or brokers as a group to be protected from undue or unjust discriminations. *American Union Transport, Inc.* v. *Italian Line*, 2 U. S. M. C. 553. Forwarders, when earning and collecting brokerage are doing so in return for services to the carrier, a position analogous to employees of the carrier. Furthermore, the mere fact that a carrier may pay brokerage to a forwarder in connection with the transportation of a commodity from the Atlantic coast to the Far East and not pay either another or the same forwarder brokerage in connection with the transportation of a like commodity from the Pacific coast to the same destination is not unlawful discrimination under the Act.

A reappraisal of our decision in *Agreement No. 7790*, *supra*, that provisions forbidding the payment of brokerage are inconsistent with the Bland Forwarding Act, is warranted in view of the more complete record developed in the present proceeding. The pertinent provisions of that Act are as follows (56 Stat. 171):

(a) The Commission is hereby authorized and directed, through such administrative measures, agreements with other Federal departments and agencies, contacts with individuals or private business concerns, or other arrangements, as it may deem to be necessary or appropriate in the public interest, to coordinate the functions and facilities of public and private agencies engaged in the forwarding and similar servicing of water-borne export and import foreign commerce of the United States, for the efficient prosecution of the war, the maintenance and development of present and postwar foreign trade, and the preservation of forwarding facilities and services for the postwar restoration of foreign commerce. As used herein the term "water-borne export and import foreign commerce of the United States" shall be deemed to include export shipments from the Government of the United States to the governments of nations whose defense is deemed by the President to be vital to the defense of the United States under the authority of the Act of March 11, 1941 (Public Law 11, Seventy-seventh Congress).

The Bland Act is a recognition by Congress of the value of the forwarding industry and of its desire to preserve it as an instrument of commerce. The statute does not frown upon or even mention existing agreements and practices for the payment of brokerage; nor does it lay down any rule to be observed by carriers acting individually or pursuant to agreements among them. Things done by carriers, therefore, can hardly be construed as within the purview of that Act. Accordingly, we modify the grounds of disapproval of the agreement in *Agreement No. 7790*, *supra*.

Motions were made to dismiss this proceeding for lack of jurisdiction over the subject matter, based upon two contentions: First, that if brokerage is not compensation for services rendered by forwarders under circumstances creating an obligation to pay, the Commission may not require payment nor condemn an agreement prohibiting brokerage since it cannot require payment of gratuities by carriers; and second, if what the forwarders do constitutes services to the carrier on a remunerative basis, the Commission has not been granted any authority over the compensation paid by carriers to their agents or employees. As we have already found hereinbefore that forwarders do perform services for carriers, it cannot be said that brokerage is gratuitous. The second contention is irrelevant in that we are not undertaking to pass upon the reasonableness of any payment nor are we undertaking to establish any definite level of payment. The agreements under investigation are all subject to our review to determine

whether the provisions thereof result in detriment to the commerce of the United States, in any discriminations enumerated in section 15, or in any violations of the Act. The motions for dismissal are denied.

We find that concerted prohibition against the payment of brokerage results in detriment to the commerce of the United States in that it has had and will have a serious effect upon the forwarding industry. We are not impressed with the argument that removal of the ban against the payment of brokerage necessarily will result in increases in rates. Respondents should remove all such prohibitions whether contained in their basic conference agreements, the rules and regulations of their tariffs, or both.

Nothing herein is to be construed as a directive that individual carriers must pay brokerage nor as any limitation as to the amount of brokerage that may be paid by such individual carriers, provided the payments do not result in violations of applicable statutes. A carrier should be free within limits to pay brokerage or not as its individual managerial discretion dictates. Nor is anything herein to be construed as a prohibition against carriers, acting under a conference agreement, from establishing all reasonable rules or regulations which will prevent the payment of brokerage under circumstances which would violate the Act, or as a prohibition against such carriers from placing limitations upon the amounts which they may pay. On the other hand, as we have found that a prohibition against any payment of brokerage results in detriment to the commerce of the United States, we believe that any limitation below 1¼ percent of the freight involved, which is the amount generally paid by carriers in the various trades over a period of years, would circumvent our finding and result in the detriment condemned. *State of California, et al.* v. *United States*, 320 U. S. 577.

Other contentions of respondents and arguments advanced by interveners have been considered but have not been specifically mentioned as they do not affect our conclusions.

No order will be entered at the present time, thus giving respondents an opportunity to take necessary steps to accomplish the removal of the prohibitions condemned.

Appendix A

RESPONDENTS

Atlantic and Gulf/Hawaii Conference.
United States Atlantic and Gulf-Puerto Rico Conference.
The Pacific Coast-Puerto Rican Conference.
Southeastern Alaska Freight Conference.
Pacific Coast Australasian Tariff Bureau.
Pacific Westbound Conference.
Atlantic and Gulf/West Coast or Central America and Mexico Conference.

Atlantic and Gulf/Panama Canal Zone, Colon and Panama City Conference.
Gulf and South Atlantic Havana Steamship Conference.
Havana Steamship Conference.
Pacific Coast/Caribbean Sea Ports Conference.
U. S. Atlantic and Gulf Ports-Jamaica (D. W. I.) Steamship Conference.
Pacific/West Coast of South America Conference.
United States Atlantic and Gulf/Haiti Conference.
Pacific/Straits Conference.
Pacific/Netherlands East Indies Conference.
United States Atlantic and Gulf-Santo Domingo Conference.
Capca Freight Conference.
Pacific Lumber Carriers Association.
Pacific Coast River Plate Brazil Conference.
Pacific Coast/Panama Canal Freight Conference.
Pacific Coast/Mexico Freight Conference.
Santiago de Cuba Conference.

McKeough, *Commissioner*, concurring in part:

I join in the finding of the majority that conference provisions prohibiting the payment of brokerage are detrimental to the commerce of the United States under Section 15 of the Shipping Act, 1916; in my opinion, however, the majority did not go far enough when it limited its condemnation to brokerage prohibition by conferences and concluded that an individual carrier "should be free within limits to pay brokerage or not as its individual managerial discretion dictates", without giving any indication of what the "limits" should be.

Detriment to our commerce, basic to the majority's condemnation of conference rules prohibiting brokerage payments, is seen in the fact that forwarders are a valuable asset to our foreign trade, both as trade simplifiers and as trade promoters, and the further fact that brokerage normally is a major portion of their livelihood. It is quite clear from the report of the majority that it concluded that the welfare of forwarders is essential to our foreign trade and that the failure to receive brokerage payments is detrimental to the welfare of forwarders and, therefore, detrimental to our foreign trade. Yet the majority shrank from drawing the only logical conclusion from its own, in my view, correct interpretation of the evidence: i. e., that if *non-payment of brokerage* is detrimental, *non-payment of brokerage* should be condemned. Instead, the majority outlawed brokerage *prohibition by conferences* only, while expressly authorizing non-payment of brokerage, with its detrimental effect on our foreign trade, by individual carrier action.

Pacific Coast forwarders testified that income from brokerage amounts to 70 or 80 percent of their total revenue and that if the Pacific Coast European Conference, which permits brokerage payments, were to prohibit brokerage like other West Coast conferences,

they could not remain in business. The condition which according to this testimony has so far kept West Coast forwarders in the business with the resulting benefit to our commerce, of course, is not the absence of a brokerage-payment prohibition on the part of a major West Coast conference, but the payment of brokerage by its members, which the Commission's majority says these members are perfectly free to stop paying. While there are over 400 forwarders in New York alone, even with brokerage payments by one important West Coast conference there are apparently only 64 forwarders, or maybe a few more, on the entire Pacific Coast where non-payment of brokerage is prevalent. Fewer forwarders mean less competition and less service to actual and potential exporters. Thus many a manufacturer may decide, to the detriment of our foreign trade, that export shipments are too cumbersome and complicated.

Our condemnation of conference prohibition of brokerage payments may lead to the actual payment of brokerage and if so, well and good. There is, of course, no assurance whatever of such a result nor can the hope for, or even expectation of, such a result justify the failure on our part as a regulatory agency to deal with the real issue: non-payment of brokerage.

It is possible that this unexplained failure of the majority to "carry through" may be due to the feeling that here is another case of what is unlawful if done in concert is lawful for the individual. If this legal differentiation was a factor, it has not been spelled out and can only be surmised. I shall explain further on why I do not concur in the validity of such differentiation in our case.

It is possible, of course, that the majority applied the narrowest possible interpretation to the order of the investigation which required respondents to show cause why *conference agreements* prohibiting the payment of brokerage should not be disapproved. However, the opening language of the same order of investigation read as follows:

> ORDERED that the Commission institute public hearings with respect to the payment and non-payment of brokerage by carriers subject to its jurisdiction * * *.

Thus, while we ordered an investigation into the substance, the majority has been satisfied in its findings to deal with the shadow.

The majority's report lacking an explanation of the contrast between its realistic economic reasoning and its something less than realistic regulatory finding, I can think of one other possible reason for the over-cautious approach, namely, the motion made by respondents that the proceeding be dismissed for lack of jurisdiction based upon the contention that the Commission may not require payment of

gratuities by carriers and the further contention that, if what the forwarders do constitutes services to the carrier, the Commission has no authority over the compensation paid by carriers to their agents or employees. These contentions the majority properly dismisses on the grounds, first, that brokerage is not gratuitous since forwarders perform services for carriers, and, second, that we are not undertaking to pass upon the reasonableness of any payment nor are we establishing any definite level of payment. If these counter arguments are valid, as I believe they are, they would answer as effectively any attack upon condemnation by us of non-payment of brokerage by individual carriers as by conference agreement.

Agreements such as that of the Pacific Westbound Conference, which do not prohibit brokerage payments outright, but ban it on some cargoes, while permitting it on others, are not only detrimental to the commerce of the United States under Section 15 of the Shipping Act, 1916, but are also unjustly discriminatory or unfair under the same section. The majority finds no such discrimination either under Section 15 or Section 17 because, so it says, brokerage is not a payment to a *shipper* and further because the Act "contains no mention of forwarders or brokers as a group to be protected from undue or unjust discrimination". This strange doctrine of vindication, if not invitation, of discrimination against forwarders or brokers is possible only through the unexplained and unjustified inclusion of the words "as a group" and oversight of Section 16 First of the Act which makes it unlawful for any common carrier by water "directly or indirectly * * * to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever".[1] These prohibitions are at least synonymous with, but possibly exceed in breadth the "unjust discrimination" forbidden in Section 15. As the protection of Section 16 extends to *any particular person in any respect whatsoever*, there can be no question that it also extends to forwarders, individually or "as a group". It would be wholly inconceivable, of course, that anybody protected by the Act against prejudicial treatment by individual carriers, should not equally be protected against such treatment by conference agreement; Section 15 fulfills this vital requirement by providing for disapproval of conference agreements found "to be in violation of this Act." Thus, the repugnant implication of anybody being "free

[1] The pertinent part of Section 16 reads as follows:

"That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

"First. To make or give any undue or unreasonable preference or advantage to any particular person, locality or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

game" and unprotected against prejudicial treatment by conferences fortunately is a mistaken one.

The majority, however, not only refused to extend the protection of Section 15 to forwarders although the evidence shows that the same carrier pays brokerage to forwarders on the Atlantic Coast and denies brokerage to forwarders on the Pacific Coast for shipments of the same commodities, but, in addition, it has failed to examine into the possibility of discrimination even against two of the groups listed by name in Section 15, i. e., *exporters* and *ports.*

The conference rule adopted by some of the respondent West Coast conferences permits and prohibits brokerage payment depending solely on point of origin of shipment within the U. S. A.

The unfairness of this rule to some exporters and some ports is very real. The majority found correctly that forwarders affect the routing of export shipments. Only an imprudent forwarder would route export shipments, the routing of which he controls, for shipment via West Coast ports where he will receive no brokerage, if he can route them via Atlantic or Gulf Coast ports where he will be paid brokerage. While what this conference rule designates as "local cargo" probably can only rarely be diverted by a forwarder for shipment through other than West Coast ports, due to excessive inland transportation cost to such other ports, forwarders not only affect the routing of export shipments upon the source of which they have no influence, but, as the majority correctly finds, through their foreign contacts get new business *which they are able to place with exporters of their choosing.* The differential brokerage rule puts a premium on forwarders directing such business to exporters or manufacturers either in "overland" territory or in Atlantic or Gulf Coast territory, in either of which cases they will obtain brokerage, rather than in "local" West Coast territory, where brokerage will be sacrificed through shipment via West Coast ports. This differentiation being the main feature of an arbitrary conference rule which we found is based only on the presence or lack of competition and not on any differential in cost or other factual basis, the rule appears "per se" unjustly discriminatory and unfair not only as between ports, i. e., to the prejudice of West Coast ports, but, in addition, unjustly discriminatory and unfair as between exporters, i. e., to the prejudice of exporters and manufacturers in "local" West Coast territory.

As the majority condemns conference prohibition of brokerage payments which includes, of course, partial prohibitions, I am addressing myself in the above primarily to the insufficiency of its reasoning. However, the majority, as I pointed out, decided to leave payment or non-payment of brokerage to the individual carrier, without in

any way outlawing brokerage payment practices, on the part of individual carriers, similar to those of the Pacific Westbound Conference. Obviously, my objections against the differential brokerage rule of *conferences* equally apply to differential brokerage practices of *individual carriers* which the majority seems to sanction, but which, for reasons herein stated, should be declared in violation of Section 16 First as undue and unreasonable prejudice or disadvantage to particular persons, localities, and descriptions of traffic.

That brokerage is not paid exporters but forwarders does not make such discriminatory treatment any less unlawful as Section 16 First forbids subjecting persons or localities to any undue disadvantage either "directly or indirectly". "Undue" disadvantage or prejudice is disadvantage or prejudice which is *not due*, i. e., not earned, deserved, or justified by factual differences. We found that the differential brokerage payment rule is based solely on competition. Where there is no direct competition, no brokerage is paid. There could be no clearer case of "undue" prejudice. We found it actually in effect by conference rule. If applied by an individual carrier, its unduly prejudicial character would be equally self-evident. Therefore, it should be outlawed by us in both forms. The majority, however, not only made short shrift of interveners' complaint of discrimination, by the mistaken device of denying forwarders and brokers the protection of Sections 15 and 17, but did not even touch upon the analogous question of undue prejudice or disadvantage under Section 16, although the present proceeding was instituted pursuant to Sections 15, 16, 17, 18, 21, 22, and 23 of the Shipping Act.

The majority's examination into Section 17 was likewise incomplete. It found no discrimination under that section, but failed to review non-payment of brokerage in the light of the requirement of Section 17 that every common carrier by water in foreign commerce "shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property". Whether regulations or practices dealing with payment—or non-payment—or brokerage are regulations or practices relating to or connected with the receiving or handling of property by carriers, is a question not easily answered; without any discussion of this aspect of brokerage, however, I feel that the majority report is incomplete.

While not dissenting from the sole formal finding of the majority, I regret that our brokerage investigation has led to a decision so incomplete and in part inconsistent with the conclusions contained in the body of the majority's report.

UNITED STATES MARITIME COMMISSION

No. 674

KEN ROYCE, INC. AND HYMAN-MICHAELS COMPANY

v.

PACIFIC TRANSPORT LINES, INC.

Submitted June 29, 1949. Decided November 29, 1949

Charging of tariff unit weight rates instead of tariff charter per diem rates on surplus road building equipment from Okinawa and Guam to Los Angeles and San Francisco, California, not in violation of Sections 16, 17, or 18 of the Shipping Act, 1916. Complaint dismissed.

Eli Freed, *William F. Cleary* and *Emmett Gebauer* for complainants.
James L. Adams for respondent.

REPORT OF THE COMMISSION

CARSON, *Commissioner:*

Exceptions were filed by complainants to the examiner's recommended report and the matter was argued orally. Our conclusions agree with those of the examiner.

By complaint filed April 16, 1948, it is alleged that the rates assessed by respondent on surplus road building equipment from Okinawa and Guam to Los Angeles and San Francisco, California, between September 24 and October 24, 1947, were in violation of sections 14, 16, 17, and 18 of the Shipping Act, 1916, and of section 9 of the Carriage of Goods by Sea Act, 1936. Reparation is requested in the amount of $96,469.08. Complainants did not argue the applicability of the Carriage of Goods by Sea Act in their brief, and filed no exception to the examiner's finding therein; hence we shall not discuss the Act further.

At the times herein involved, Tariff No. 18 of Trans-Pacific Freight Conference of Japan, of which respondent is a member, covering the transportation of property from Okinawa to Pacific coast ports of the United States, contained a rate on "Surplus Road Building Equip-

ment" of $650.00 per unit weight from 10,000 to 12,000 pounds, plus $25.00 for each additional 2,000 pounds or fraction thereof, loading and discharging costs to be for shipper's account, with the proviso that 15 units must be loaded per weather working day or demurrage as provided to be charged. The tariff also contained the following item:

If shippers desire to charter vessels for the transportation of this surplus equipment from Okinawa to the Pacific coast ports of the United States and Canada the per diem rates will be as follows:

C-3 and AP-3 type Victorys	$2, 250. 00 per day
C-2 and AP-2 type Victorys	2, 220. 00 per day
Libertys	1, 950. 00 per day

Respondent and three other carriers participated in Freight Tariff No. 2 of Pacific Mail Steamship Co., covering traffic between Guam and Pacific coast ports of the United States. This tariff contained unit weight rates identical with those in Tariff No. 18, but there were no comparable per diem rates.

A freight broker first solicited complainant Royce for charter of the S. S. *John Barton Payne*, owned by Waterman Steamship Corp., at a rate of $105,000. Royce was not interested and suggested complainant Hyman-Michaels. The latter, however, was concerned only with unit rates or costs for the transportation of from 52 to 92 tractors from Okinawa to U. S. Pacific coast ports. Waterman not being interested, respondent was then approached for unit rates. Respondent offered to put the S. S. *New Zealand Victory* into Okinawa from Yokohama between September 16 and 18 to lift the cargo, and quoted the conference unit rates. Hyman-Michaels accepted the offer and later called the broker with respect to the loading of 60 tractors on the *New Zealand Victory* at Guam, and on September 19 arrangements were made at the rates contained in Tariff No. 2. On the same day respondent was notified by the vessel's captain that the shipper at Okinawa was considering loading additional road-building equipment and other tractors, and three days later word was received from him that the additional equipment had been booked for Royce at the unit rates. Later that day, Royce, through the broker, asked respondent if it could get the per diem rates, it being stated for the first time that Royce was interested in the Hyman-Michaels shipments, and that all shipments could be lumped together and take the whole vessel. The request was denied.

Respondent issued seven onboard bills of lading, two dated at Okinawa on September 23, four at Okinawa on September 24, and one at Guam on September 29. The Guam bill and one of the Okinawa bills show the shipper as General Commodities Corporation by

W. T. Davis, and the consignee as Hyman-Michaels Company. The other five show the shipper as W. T. Davis and the consignee as Wells Fargo Bank and Union Trust Company, notify Ken Royce, Inc. W. T. Davis was the person with whom the complainants were negotiating for the purchase of the units from the owner. The five bills were made out in the manner described as Royce had not completed its negotiations for the purchase of the units until after they were booked for carriage. Respondent issued one other onboard bill to F. T. Montague, dated at Okinawa on September 23, covering a shipment of two trunks and one suitcase of personal effects from Okinawa to San Francisco. Hyman-Michaels paid $104,599.58 as full freight on October 10, and Royce paid $61,610.50 as full freight on October 16, both under protest—Royce at the time of payment and Hyman-Michaels a few days later.

Complainants claim that respondent never informed them of the per diem rates, else they would have availed themselves of such rates and not attempted to take the Guam cargo on the particular vessel. The basis of the complaint is stated by complainants' attorney as follows:

> The quotation of the unit weight rates without mention of the optional per diem rates * * * was an *incomplete*, and is therefore *inaccurate* quotation. It was, to put it bluntly, a *misrepresentation of the applicable rates of this tariff*. By this we do not mean any bad faith on the part of Mr. McManus.

We can find no evidence of misrepresentation or of an improper withholding of necessary information by respondent. At first, respondent only had information that one shipper desired transportation for a comparatively small number of units from Okinawa, and later for an additional number of units from Guam. Thereafter a second shipper entered the picture and secured space. It was not until all this had happened that respondent learned that both shippers claimed a joint interest in all shipments and that a request was made for the per diem rates. Respondent apparently made no misrepresentation and had no information which called for a quotation of the per diem rates. In fact, the amount to be shipped was not such as to indicate a chartering arrangement.

We can only conclude that complainants originally would not have accepted the per diem rates if they had known of them, since they were then bartering for the purchase of the units and had no information as to the number they could secure. The situation was in a state of rapid change, as shown by the fact that the negotiations shifted from Saipan to Okinawa, and later included Guam. It was not until complainants found they could secure additional units that they became interested in the charter plan. If they had had knowledge at

the start, or even a well-founded hope, that they would secure so many units, they could have determined by simple arithmetic, within hours of their refusal of the S. S. *John Barton Payne*, that that charter would have been cheaper than the cost of the total units at the unit rates.

Under the circumstances, respondent was justified in refusing the request for the per diem rates. By that time the rights of the parties had become so fixed that the change requested should not have been made. The first Okinawa shipment was loading and the Guam shipment had been agreed to. To accede to the request, the parties would have had to cancel the Guam shipment, since the per diem rates applied only to a direct Okinawa-California run and did not authorize the charterer to use the vessel elsewhere. There is no testimony of any offer from complainants to do so.

The per diem rates cannot be made to apply to the Guam cargo because they were not published and filed as required by the Intercoastal Shipping Act, 1933, as amended, and were less than the rate on file with us. It is well settled that a carrier cannot charge other than its established rate. Even misquotations or misrepresentations as to the correct rate by the carrier's agent, upon which the shipper acts, do not establish a contractual basis between the shipper and the carrier. To permit this would allow the enjoyment by some shippers of rates not open to all. *Pacific Lumber & Shipping Co.* v. *Pacific-Atlantic S. S. Co.*, 1 U. S. M. C. 624; *Sands* v. *Calmar S. S. Corp.*, 165 Misc. Rep. 757, 296 N. Y. S. 590; *Texas & Pacific Ry.* v. *Mugg*, 202 U. S. 242.

Section 16 of the Shipping Act, 1916, which forbids a shipper to accept and a carrier to grant, by any device whatever, transportation at less than the regularly established rates, would be violated by now substituting the per diem rates for the unit rates.

No contention is made that the unit rates contained in the two tariffs are unreasonable or otherwise unlawful, and no violation of section 18 of the Act appears.

Complainants offered no evidence of any damage suffered by reason of being either unduly discriminated against or unfairly prejudiced to the advantage of another shipper. We therefore find no violation of sections 16 or 17 of the 1916 Act.

We are not passing upon the lawfulness of the per diem rates as violative of section 14 of the 1916 Act as being based upon volume and available to large shippers only, in view of the lack of evidence of the existence of other shippers in the trade.

An order dismissing the complaint will be entered.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., this 29th day of November, 1949

No. 674

KEN ROYCE, INC. AND HYMAN-MICHAELS COMPANY

v.

PACIFIC TRANSPORT LINES, INC.

This case being at issue upon complaint and answer on file, and having been duly heard, argued 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 decisions 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. 680

HIMALA INTERNATIONAL

v.

GENERAL STEAM NAVIGATION CO. LTD. OF GREECE (GREEK LINE) ET AL.

Submitted December 19, 1949. Decided December 20, 1949

Rate on lanolin or cocculus not shown to be in violation of North Atlantic Mediterranean Freight Conference Agreement or of section 16 or 17 of Shipping Act, 1916. Complaint dismissed.

Hymen I. Malatzky for complainant.

Roscoe H. Hupper and *Burton H. White* for Greek Line.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions were filed by complainant to the decision recommended by the examiner, and the case was orally argued. Our conclusions agree with those of the examiner.

Complainant, Hymen I. Malatzky, an individual doing business as an exporter under the name of Himala International, alleges that respondents[1] conspired to deprive him of prospective benefits which he and others similarly situated might derive from our decision in Docket Nos. 669, 670, and 671 (3 U. S. M. C. 53) by establishing rates on lanolin and cocculus in violation of sections 16 and 17 of the Shipping Act, 1916, as amended, and sentence 1, clause 1, of Agreement 7980.[2]

[1] The complaint alleges that respondents are members of the North Atlantic Mediterranean Freight Conference, and a copy of the complaint was served on each of such members. The only member that entered an appearance was the Greek Line, the sole respondent named.

[2] Agreement 7980 is the North Atlantic Mediterranean Freight Conference Agreement, which was approved by the Commission on February 17, 1948. Superseding the Adriatic, Black Sea and Levant Conference Agreement and others, it covers the trade "from North Atlantic ports of the United States, in the Hampton Roads/Portland, Me., range, either direct or via transshipment, to all ports (except Spanish Mediterranean ports) served on the Mediterranean Sea from Gibraltar to Port Said including Adriatic and Black Sea Ports and from Casablanca to Port Said inclusive." The sentence thereof alleged to be violated is as follows: "This agreement covers the establishment and maintenance of just and reasonable rates, charges and practices, for or in connection with the transportation of all

He asks withdrawal of our approval of the agreement, lawful rates for the future, reparation, and costs.

In the above-mentioned cases, the tariff contained no rate specifically applicable to cocculus or lanolin. On each of these commodities, there was assessed the "General Cargo, N. O. S." rate of $37.50 per 40 cubic feet. Complainant alleged that the rate assessed was unduly prejudicial and disadvantageous to him and unjustly discriminatory, in violation of sections 16 and 17 of the Shipping Act, 1916. He contended that the rate of $30 per long ton provided in the tariff on "Fruits, Dried" should have been applied on the cocculus and that the animal-grease rate of $34.50 per long ton should have been accorded the lanolin. We found that cocculus was not covered by the tariff description "Fruits, Dried", and, while we upheld complainant's contention that lanolin was within the tariff item applicable to animal grease, we further found that no undue prejudice or disadvantage or unjust discrimination was shown.

While the cases referred to were pending, the North Atlantic Mediterranean Freight Conference established a rate of the level of that provided for general cargo, N. O. S., specifically applicable to cocculus and lanolin. Complainant says that this was done "to catch his shipments by surprise thus subjecting him to serious loss should he, in reliance upon the status quo pending the Commission's decision, make other shipments of cocculus and lanolin". He also states that another purpose thereof was to retaliate against him because he had filed a complaint. It is difficult to see any basis for these assertions since the specific rate provided in the tariff during the pendency of the proceeding was the same as the rate charged prior thereto. As stated, we found that there was no showing that the rate assessed was unlawful.

Complainant claims that a comparison which he makes of stowage factors and prices of lanolin with those of comparable animal products or by-products on which the conference rate is $34.50 per long ton indicates no reason why lanolin should be subjected to the rate of $37.50. Respondent Greek Line points out that nothing is shown as to the volume of movement of the commodities with which lanolin is compared, loss and damage claims on the respective commodities, competitive conditions between the products, or injury to complainant's business. Except for the few shipments concerned in the pre-

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cargo in vessels owned, controlled, chartered or operated by the members in the trade covered by this agreement." Sections 16 and 17 of the Shipping Act, 1916, in their pertinent parts, make it unlawful to subject any particular person to any undue or unreasonable prejudice or disadvantage and prohibit rates which are unjustly discriminatory between shippers.

vious cases cited above, there is, in fact, no indication of any movement of lanolin. This is likewise true as regards cocculus. It was testified by complainant that "The only territories which would have been operating insofar as these products are concerned are Greece and Egypt and Turkey", and, as the Greek Line states, he went to some length to establish that there is no movement of lanolin or cocculus to any of these countries for reasons wholly unrelated to any issue in this proceeding.

The record is not persuasive that lanolin or cocculus is entitled to a rate lower than that applicable on general cargo, N. O. S., and there is no showing of undue prejudice or disadvantage or unjust discrimination.

An incidental question is raised by complainant's contention that the term "lanolin" is a trade name and, therefore, inappropriate as a commodity designation in a tariff. *Jaffe* v. *Evans & Sons*, 70 App. Div. 186, which complainant cites, does not support the contention that lanolin is a trade name. It was there held that the word "lanolin" was generic or descriptive of the article.

We find that no violation of section 16 or 17 of the Shipping Act, 1916, or of sentence 1, clause 1, of Agreement 7980 is shown. An order dismissing the complaint will be entered.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 20th day of December A. D. 1949

No. 680

HIMALA INTERNATIONAL

v.

GENERAL STEAM NAVIGATION CO. LTD. OF GREECE (GREEK LINE) ET AL.

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

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

By the Commission.

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

UNITED STATES MARITIME COMMISSION

No. 689

IN THE MATTER OF CERTAIN CARRIERS ENGAGED IN TRANSPORTATION BETWEEN PACIFIC COAST PORTS OF THE UNITED STATES AND HAWAII

Submitted April 17, 1950. Decided May 11, 1950

Certain respondents found subject to Intercoastal Shipping Act, 1933, in respect to transportation of property between the continental United States and Hawaii and to have violated section 2 of that act by engaging in such transportation without having filed tariffs with the Commission.

Stephen W. Matthieu for Mokupapa, Inc., *William Farnum White* for Robert S. Mills and Henry Sause, Jr., *Robert H. Fouke* and *Robert A. Wertsch* for Ocean Prince, Inc., Independent Iron Works, Inc., Oregon Pine III, Inc., and Industrial Developments, *Jonah Jones, Jr.*, for Ernest Judd, *Charles Hazeltine* and *C. T. Truax* for Mission Terminal Company, and *Charles A. Reali* for General Steamship Corporation, Ltd., respondents.

T. R. Stetson for Pacific Coast Borax Company, *Lincoln Fairley* for International Longshoremen's & Warehousemen's Union, CIO, and *Harold B. Cady* for Honolulu Chamber of Commerce, interveners.

Paul D. Page, Jr., and *John Mason* for the Commission.

REPORT OF THE COMMISSION

CARSON, Commissioner:

This is a proceeding instituted by the Commission sua sponte for the purpose of determining whether an order should be entered requiring respondents[1] to cease and desist from engaging in the carriage of property between the continental United States and Hawaii as com-

[1] Mokupapa, Inc., Bellows & Company, Henry Sause, Jr., Robert S. Mills, Mission Terminal Company, Ernest Judd, Independent Iron Works, Inc., Ocean Prince, Inc., Oregon Pine III, Inc., Industrial Developments, South Seas Shipping Company, General Steamship Corporation, Ltd.

mon carriers by water in interstate commerce, unless and until they and each of them have filed schedules of rates with the Commission as required by law.

Pursuant to order of the Commission, hearing was held during which each respondent and intervener was afforded opportunity to appear by counsel and offer testimony. Subsequent to the conclusion of said hearing and prior to Examiner Horan's recommended decision, briefs were filed by counsel for respondents Robert S. Mills, Henry Sause, Jr., Independent Iron Works, Inc., Industrial Developments, Oregon Pine III, Inc., Ocean Prince, Inc.; and by counsel for the Commission.

The Examiner's recommended decision was, on the 28th day of March 1950, duly served upon respondents and, since no exceptions thereto have been filed herein and the time for filing thereof having expired, this matter is now before the Commission for decision.

The Examiner recommends that pending motions to dismiss with respect to Bellows & Company; Henry Sause, Jr.; Mission Terminal Company; Ernest Judd; Oregon Pine III, Inc.; General Steamship Corporation, Ltd.; Industrial Developments; and Independent Iron Works, Inc., be granted. Counsel for Commission also recommends dismissal of all of the foregoing save Independent Iron Works, Inc., but interposes no objection to dismissal with respect to that respondent. Since it appears that it is not established by the record that the respondents next above named are or were engaged as common carriers in interstate commerce as defined in Section 1 of the Shipping Act of 1916, it follows that said motions to dismiss should be granted.

That which follows hereinafter deals with respondents Mokupapa, Inc., Robert S. Mills, Ocean Prince, Inc., and South Sea Shipping Company.

Respondent Mokupapa, Inc., is an Oregon corporation organized in 1948. About December 1 of that year, it acquired the vessel *Mokupapa*, a converted LSM of approximately 1,000 gross tons. All of its stock, except qualifying shares, is held by the Collins Concrete and Steel Pipe Company, an Oregon corporation engaged in the manufacture of concrete pipe and steel products.

Shortly after acquiring the *Mokupapa*, respondent began to operate it between the continental United States and Hawii. At first, it carried only cargo of Collins Concrete and Steel Pipe Company. Thus, on the sailing of the *Mokupapa* from Portland, Oregon, for Hawaii about December 10, 1948, the vessel's cargo consisted entirely of 325,000 feet of lumber and 40,000 Christmas trees belonging to this company. Likewise, on the return voyage to Portland in January 1949, the only cargo carried by the *Mokupapa* was "surplus" machinery

belonging to this company. After the completion of these two voyages, which are said to have been very unprofitable, the *Mokupapa* was tied up at Portland, where it remained for a period of about five months.

On May 1, 1949, a strike of Hawaiian longshoremen was called. This was followed by a suspension of services of carriers then operating between west-coast ports and Hawaii, and, as a result thereof, shippers began to seek other means of transportation. A shipper having merchandise to be transported from Tacoma, Washington, to Hawaii solicited respondent to provide cargo space. The latter acceded to this request and, after the conclusion of an arrangement with the longshoremen's union, moved the *Mokupapa* to Tacoma for loading. The *Mokupapa* sailed from Tacoma about the middle of June 1949, carrying to Honolulu and Hilo, Hawaii, approximately 850 tons of flour and feed. For such transportation, including stevedoring and the Federal transportation tax, respondent, in accordance with its agreement with the shipper, received the sum of $25,000.

In Hawaii, whence the *Mokupapa* was to go to San Francisco, California, to load for another trip to Honolulu, it took on cargo of 10 shippers. Their shipments, which moved under bills of lading dated in the latter part of June 1949, aggregated approximately 680 tons and consisted of a variety of commodities for 12 different consignees. For the transportation from Honolulu to San Francisco, respondent charged $13.60 per ton, except in the case of one shipment, on which the rate was slightly higher.

The *Mokupapa* made the return trip from San Francisco to Honolulu in July 1949, transporting groceries and produce under an agreement which Mokupapa, Inc., had entered into with respondent Bellows & Company. By the terms of this agreement, the former undertook to load, transport, and unload the cargo, and the latter agreed to pay it $27,000 upon the completion of loading, and an additional $3,000 upon evidence of discharge of all cargo at port of unloading. Bellows & Company arranged for receipt of the freight at pier in the States and for delivery thereof in Hawaii.

The *Mokupapa* came back to the States, carrying no cargo because of engine trouble, and, at Portland, under another agreement with Bellows & Company, after repairs had been made, again took on cargo to be transported to Honolulu. This agreement was practically a renewal of the first, except that, upon refusal of Mokupapa, Inc., to call this time at San Francisco, Portland was designated as the port of loading. The vessel sailed under the second agreement in August 1949.

Returning from Honolulu to Portland in September 1949, the *Mokupapa* carried 225 tons of wire rope and 500 tons of automobile parts. The cargo, part of which belonged to Mokupapa, Inc., consisted principally of shipments of 3 or 4 other companies. For the transportation, respondent charged $15 per ton.

None of the cargo transported by Mokupapa, Inc., was solicited. No transportation rates were published by it, nor did it advertise in order to obtain cargo. Due to conditions resulting from the strike previously mentioned, freight was easily obtainable at the time without solicitation or advertising. Respondent accepted shipments to the extent that space permitted and, according to the testimony of its president, was ready and willing to carry for anybody.

On July 25, 1949, respondent Robert S. Mills chartered the barge *Sause Bros. No. 12* and the tug *Klihyam* from their owner, Sause Bros. Ocean Towing Co., Inc., for one trip from San Francisco to Honolulu. By the terms of the charter party, it was agreed that the barge would be turned over to Mills at Pier 29, San Francisco and, that on completion of loading at that port, the owner would tow the barge with the tug *Klihyam* from San Francisco to Honolulu. The owner warranted that the tug was fully manned and would be standing by. Mills agreed to pay the owner the sum of $11,225 within 24 hours of the arrival of the tow at Pier 29 and, in addition, to deliver to the latter, simultaneously with the execution of the agreement, an unconditional assignment of $11,225 on funds to be held in escrow by one of two banks for the account of Mills, which sum Mills represented would be paid to the owner when the bank had received proper advice of arrival of the barge at dock in Honolulu. The 3 percent Federal transportation tax, wharfage, dockage, demurrage, stevedore and other costs incurred in the handling of the cargo also were agreed to be paid by Mills, as was the sum of $350 per day if the barge should not be loaded and unloaded and returned to the owner within the free time specified in the charter party, provided the delay should not be occasioned for the owner's convenience, repairs to the tug or barge or other matters properly the owner's concern. The owner assumed no responsibility for any claim or liability arising from any cause or source. The agreement provided that the owner should under no circumstances be liable for loss, damage or delay to Mills' cargo, or any part thereof, occasioned by act of God, or other specified cause, or any cause whatsoever.

Pier 29, San Francisco, where it was stipulated the barge would be turned over to Mills, is a State-owned terminal operated by respondent Mission Terminal Company. Mills had made arrangements with this respondent whereby the latter would receive shipments at the pier on

his behalf. The shipments of more than a score of shippers were received pursuant to such arrangements. The shipments, which were thereafter loaded on the barge for movement to Honolulu, freight charges prepaid, consisted of a wide variety of commodities and ranged in weight from about two hundred pounds to over 100 tons. Mills' bills of lading covering the shipments provided, in lieu of the printed terms and conditions in the common-carrier form which he used, that they would be "subject to terms of charter contract." They also contained the notation "freight prepaid as per contract."

Shortly prior to the voyage just referred to, Mills had likewise made a sailing in the west coast-Hawaii trade with vessels chartered by him from Pacific Tow Boat and Salvage Company, a name under which respondent Ernest Judd does business. As Pacific Freight Forwarders, by agreement dated July 14, 1949, which was similar to the charter party of July 25, 1949, described above, he chartered from this company the barge *Hemlock* and the tug *Kanak* for one trip from Long Beach, California, to Honolulu. On this voyage, the cargo lifted comprised the shipments of 10 or more shippers, on which Mills charged so much a weight or measurement ton. The shipments included package freight of various descriptions. Bills of lading were issued in the name of Pacific Freight Forwarders and, on the back thereof, in lieu of the printed terms and conditions of the common-carrier form employed, the words "subject to terms of freight forwarding contract signed July 11, 1949, at Honolulu" were inserted.

Respondent Ocean Prince, Inc., is a corporation of the State of California. It was formed by the same persons, has the same directors, has, in some instances, the same officers, and is located at the same address in Oakland, California, as respondent Independent Iron Works, Inc., from which in 1947 it purchased the tug *Ocean Prince*, and respondent Oregon Pine III, Inc., which owns the barges *Oregon Pine III*, and *Oregon Cove*, and *Oregon Trader*. Among the purposes for which it was formed, as shown by its articles of incorporation, were the carrying of freight and passengers, maintaining tariffs of rates and charges, and carrying on shipping and navigation generally. It does not advertise a transportation service, and its name is not listed in the telephone directory. Shippers obtain cargo space by communicating with a Mr. Wessel. In this way, one shipper secured space for the transportation of 610 tons of petroleum products at $18 per ton from Oakland to Honolulu on the barge *Oregon Pine III*, in tow of the tug *Ocean Prince*, while respondent Ocean Prince, Inc., had the barge under charter. On the same voyage, in space procured by 3 other shippers in like manner, respondent Ocean Prince, Inc., carried 600 tons of newsprint at $19 per ton for 2 of them and

a quantity of general merchandise for the other. Still another shipper informed by Wessel of the availability of cargo space, shipped on this voyage, at the rate of $18 per ton, approximately 304 tons of petroleum products.

Subsequent to the voyage of the *Oregon Pine III*, a shipper, having been requested by its distributor in Honolulu to obtain cargo space on a barge, learned that such a vessel represented by Wessel was loading at Oakland. By telephoning Wessel, it secured space for the transportation of approximately 750 tons of canned and bottled beer and other commodities at $20 per ton from Oakland to Honolulu on the *Oregon Cove* and *Oregon Trader* in tandem tow of the *Ocean Prince*. The transportation was performed by respondent Ocean Prince, Inc., to which the two barges were then under charter from Oregon Pine III, Inc. On the same voyage, in space secured through Wessel in like manner, a brokerage concern shipped for various manufacturers from Oakland to Honolulu 10 tons of asphalt, 2 tons of salt, and 200 bags of rice. The record indicates that at least two other shippers obtained space on this voyage.

Documents of record purporting to be copies of contracts of affreightment between the respective shippers and Ocean Prince, Inc., covering some of the shipments referred to above, contain the declarations of the latter that "This contract of affreightment is for the private carriage of goods" and that this respondent "is not engaged in a common carrier operation * * *." They also contain certain provisions to be operative in case carriage of the cargo "is not, or is by law determined not to be, private carriage."

Respondent South Seas Shipping Company is the owner of the motor vessel *Pomare*, which it has employed in the transportation of cargo for hire in the west coast-Hawaiian trade on at least three occasions. In July 1949, it undertook the carriage from San Francisco to Honolulu of various commodities shipped by 5 different shippers to numerous consignees. During the following month, it transported on this vessel, on a voyage from Honolulu and Kahului to San Francisco, scrap brass, phonograph records, pickled vegetables, and other commodities for 7 different shippers and consignees. Likewise, returning to Honolulu from Oakland and San Francisco in September 1949, the *Pomare* carried shipments made by 9 different shippers to well over a score of consignees.

None of the respondents has filed with the Commission a schedule of rates covering transportation between continental United States and Hawaii.

The Intercoastal Shipping Act, 1933, as amended (sections 2 and 5), prohibits any person from engaging in transportation as a common

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carrier by water in interstate commerce unless and until his schedules of rates have been filed with the Commission. Omitting words not material, the statutory definition of the term "common carrier by water in interstate commerce," is as follows:

> a common carrier engaged in the transportation by water of * * * property on the high seas * * * on regular routes from port to port between * * * State * * * of the United States and any * * Territory * * * of the United States * * *. Section 1, Shipping Act, 1916.[2]

Counsel for the Commission concede that respondents other than Mokupapa, Inc., Mills, Ocean Prince, Inc., and South Seas Shipping Company are not shown to have engaged in transportation between the continental United States and Hawaii as common carriers by water in interstate commerce within this definition, but they maintain that these four respondents are shown to have done so and that "an Order should be entered against each and every of the said carriers to cease and desist said transportation without the filing of their rates therefor, as prescribed by the Intercoastal Shipping Act, 1933, as amended." It is the position of Mokupapa, Inc., Mills, and Ocean Prince, Inc., that they have not operated as common carriers or engaged in transportation on regular routes. South Seas Shipping Company entered no appearance. Inasmuch as the grounds on which Mills' position rests include those relied upon by Ocean Prince, Inc., and Mokupapa, Inc., consideration can be accorded the contentions of all three by considering his.

On the common-carrier issue Mills claims that there is no evidence that he held himself out as a common carrier, pointing out that the record does not show that he ever published a sailing schedule, solicited any cargo, or advertised that he would take the cargo of anyone or everyone to Hawaii. Such acts are not essential to a common-carrier status. See *Transportation by Mendez & Co., Inc., between Continental United States and Puerto Rico*, 2 U. S. M. C. 717, 720; *Transportation by Southeastern Terminal & S. S. Co.*, 2 U. S. M. C. 795, 796; *James* v. *Public Service Commission*, 177 A. 343, 346. Nor is a holding out as a common carrier negatived, as Mills contends it is, by the fact that the printed terms and conditions of the common-carrier form of bill of lading which he used were crossed out and the shipments covered by separate contracts. Common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they

[2] By Section 5 of the Intercoastal Shipping Act, 1933, as amended, the provisions of that act, including the filing requirements of section 2 thereof, are made to apply to "every common carrier by water in interstate commerce, as defined in section 1 of the Shipping Act, 1916."

rest. *Railroad Company* v. *Lockwood*, 84 U. S. 357, 376; *Liverpool and Great Western Steamship Company* v. *Phenix Insurance Company*, 129 U. S. 397, 440; *Gornish* v. *Pennsylvania Public Utility Commission*, 4 A. 2d 569, 572; *James* v. *Public Service Commission*, *supra*, page 346.

A further contention of Mills concerns his employment of chartered vessels. Chartered vessels were used in the performance of the transportation involved in *Rates of General Atlantic S. S. Corp.*, 2 U. S. M. C. 681, and *Transportation by Mendez & Co., Inc., between Continental United States and Puerto Rico*, *supra*, and it was held by the Commission that the charterers were common carriers. Mills notes, however, that a charter may be a demise or bareboat charter, by the terms of which the charterer assumes exclusive possession, command, and navigation of the vessel during the voyage, or an affreightment contract under which, as in the case of the vessels chartered to him, such possession, command, and navigation are retained by the general owners. He urges that "Only when a person assumes possession, command and control of a vessel by chartering such under a 'demise' or 'bareboat' charter is it possible for him then to hold himself out as a common carrier." In view of *Pendleton* v. *Benner Line*, 246 U. S. 353, this position is without merit. See also *Agreements 6210, 6210-A, Etc.*, 2 U. S. M. C. 166, holding Consolidated Olympic Line to be a common carrier, and *Strittmatter Common Carrier Application*, 250 I. C. C. 639.

The term "common carrier" has been defined variously, the definitions not being necessarily inharmonious. *Walton* v. *A. B. C. Fireproof Warehouse Co.*, 151 S. W. 2d 494, 497. The usual definition of the term is "one who undertakes for hire to transport goods for such as choose to employ him." *Smitherman & McDonald* v. *Mansfield Hardwood Lumber Co.*, 6 F. (2d) 29, 31. See also *Propeller Niagara* v. *Cordes et al.*, 62 U. S. 7, 22, and *James* v. *Public Service Commission*, *supra*, page 345. One transporting goods from place to place for hire, for such as see fit to employ him, whether usually or occasionally, whether as a principal or an incidental occupation, is a common carrier. *Walton* v. *A. B. C. Fireproof Warehouse Co.*, *supra*.

On the basis of the facts recited above, it is found that Mills, Mokupapa, Inc.,[3] Ocean Prince, Inc., and South Seas Shipping Company come within the above definitions. Accordingly, it is concluded that these four respondents are common carriers.

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[3] Except as to the Collins and Bellows shipments and the shipment from Tacoma on the June, 1949, sailing of the *Mokupapa*. See *Transportation by Mendez & Co., Inc., between Continental United States and Puerto Rico, supra*, page 720.

On the question of regular routes, Mills points to the fact that the sailings made by him were one-way trips. He contends that regular route transportation contemplates both an outward and an inward voyage. That a carrier operating in only one direction may be engaged in transportation on regular routes is clear from the decision of the Commission in *Transportation by Mendez & Company, Inc., between Continental United States and Puerto Rico, supra.* There a carrier was held to be subject to the filing requirement here involved on the facts concerning a voyage from Miami to San Juan.

It is also claimed that Mills did not engage in transportation on regular routes according to the tests found by the Interstate Commerce Commission to be criteria of regular-route operations in *Transportation Activities of Brady Transfer and Storage Co.*, 47 M. C. C. 23, and *Garrett Freightlines, Inc.* v. *Northern Transportation Co.*, 47 M. C. C. 707, or according to *Crescent Express Lines, Inc.*, v. *U. S.*, 320 U. S. 401. Those cases involved transportation by motor vehicle and arose under Part II of the Interstate Commerce Act. Contrary to a contention advanced by Mills, nothing said in *U. S. Nav. Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, or *S. L. Shepard & Co.* v. *Agwilines, Inc*, 39 F. Supp. 528, renders them governing in the instant proceeding. Where water transportation and the same definition as is here in question were involved (*Southern Transportation Company Contract Carrier Application*, 250 I. C. C. 453, 455), the Interstate Commerce Commission adopted the view of this Commission expressed in *Alaskan Rates*, 2 U. S. M. C. 558, 580, that "The primary purpose for the insertion in the statute of the phrase 'on regular routes from port to port' was to exclude from regulation traffic transported by tramp vessels."

Mills further contends that the vessels which he employed "show almost all, if not all, of the characteristics of an 'ocean tramp' as traditionally known." In this connection, he quotes the following from a report made to the Commission under date of August 5, 1949, by its Tramp Shipping Committee: "In traditional terms, a tramp vessel is one that operates on irregular or unscheduled sailings from one port of loading to one port of discharge, lifting one dry cargo commodity usually of low value without mark or count and from one shipper to one consignee. The tramp does not usually hold itself out as a common carrier and is free to travel anywhere on any terms, not infrequently being chartered out on time terms. There are no conferences of tramp operators, affecting the foreign commerce of the United States, since tramps are excluded from the benefits of Section 15 of the Shipping Act, 1916. Characteristically, the tramp is a low standard vessel of slow speed serving trades in which time is not a critical factor." It is asserted by Mills that "Although the barges

and tugs in question lifted cargo belonging to more than one shipper which was subject to mark and count, every other characteristic as set forth in the above definition of an ocean tramp meets the facts in the case at bar." The fact that the vessels carried a variety of commodities for numerous shippers radically differentiates them from those coming within the definition. Also, it should be noted that, notwithstanding Mills' use of vessels of slow speed, nothing in the record suggests that the continental west coast-Hawaiian trade is one in which time is not ordinarily a critical factor. Moreover, the "gypsy-like existence" of the tramp, from which it was said in *Rates of General Atlantic S. S. Corp.*, *supra*, it had earned its name and which is doubtless what is referred to by the committee's statement that it is "free to travel anywhere on any terms," is absent in the case of the vessels in question as employed by Mills. Definite ports of origin and destination were fixed by the charter parties.

Mills also points out that, during consideration of the question of whether to insert the phrase "on regular routes" in the definition of "common carrier by water in interstate commerce," Congress had before it a brief submitted by the Chairman of the House Merchant Marine Committee on the subject of the legal status of tramp vessels, in which it was said: "It may be stated as an almost general proposition that such vessels seldom or never can be considered as common carriers. Tramp vessels are almost universally chartered by a single shipper, even though in some instances that shipper may be a charter broker who has accumulated the shipments of a number of small shippers. It has become well established by a long line of decisions in the Federal courts that when a charter party gives the charterer the full capacity of a ship the owner is not a common carrier but a bailee to transport as a private carrier for hire." Mills underlines the second sentence of the quotation, desiring, no doubt, to call particular attention to the part thereof reading to the effect that the charterer of a vessel may be a charter broker who has accumulated the shipments of a number of small shippers. The statements quoted concern the question of whether, when the full capacity of a ship is chartered, the owner of the vessel is a common carrier. They throw no light on the question here as to the character of the transportation engaged in by Mills.

Finally, Mills claims that the legislative history of the Shipping Act, 1916, shows that Congress did not intend to regulate small operators such as he, but only scheduled liner service of the larger steamship lines operating regularly between two ports. This contention is untenable. See *Agreements 6210, 6210–A, Etc.*, *supra*, *In Re M. S. Vincedor, Inc.*, 2 U. S. M. C. 666, *Transportation by Mendez & Co.*,

Inc., between Continental United States and Puerto Rico, supra, In Re Pan-American S. S. Co., Inc., and Transport S. S. Corp., 2 U. S. M. C., 693, *In Re Baltimore-New York Steamship Company*, 1 U. S. S. B. 222, *In Re Bayside Steamship Company*, 1 U. S. S. B. 224, *In Re North Pacific Steamship Line*, 1 U. S. S. B. 227, and *In Re Coast S. S. Co.*, 1 U. S. S. B. 230.

The phrase "on regular routes" was intended to exclude from the coverage of the term "common carrier by water in interstate commerce" only tramp operations. It appears that Congress had some doubt as to whether the tramp was a private carrier, and, as counsel for the Commission maintain, the phrase was inserted in the definition of such term in order to make sure that such operations were exempt. This conclusion is supported by the above-cited cases decided by the Commission. It also finds support in the remarks made on the floor of the House by the manager of the bill which became the Shipping Act, 1916, when the measure, after it had been passed by that body and amended by the Senate, was placed before the former for concurrence in the amendments, one of which was the insertion in the definition of the phrase in question. After stating that the amendment was "wholly unnecessary", he added: "I take it, however, that it was the intention to remove every possible doubt that cargo vessels that come under the legal definition of bailees for hire, and commonly known as tramps, shall be exempt from the provisions of the Act."

The above described transportation engaged in by the common-carrier respondents was, within the meaning of the statute, transportation on a regular route.

We conclude and find that respondents Mokupapa, Inc., Robert S. Mills, Ocean Prince, Inc., and South Seas Shipping Company, during the times mentioned, engaged in the transportation of property between the continental United States and Hawaii as common carriers by water in interstate commerce as defined in section 1 of the Shipping Act, 1916; that none of said respondents so engaged in such transportation filed with the Commission a schedule of rates as required by law and in failing so to do, each violated section 2 of the Intercoastal Shipping Act, 1933.

This matter is dismissed as to the other respondents.

An appropriate order will be entered herein.

Order

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 11th day of May A. D. 1950

No. 689

In the Matter of Certain Carriers Engaged in Transportation Between Pacific Coast Ports of the United States and Hawaii

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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 stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof;

It is ordered, That respondents Mokupapa, Inc., Robert S. Mills, Ocean Prince, Inc., and South Seas Shipping Company be, and they are hereby, notified and required to cease and desist and hereafter abstain from engaging in the transportation of property between the continental United States and Hawaii in the manner herein found to bring them within the provisions of section 2 of the Intercoastal Shipping Act, 1933, without the filing of schedules therefor in accordance with that section.

By the Commission.

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

UNITED STATES MARITIME COMMISSION

No. 690

IN THE MATTER OF THE PRACTICES OF MEMBERS OF CONFERENCES TO ABSORB CERTAIN INSURANCE PREMIUMS CHARGEABLE TO SHIPPERS BY INSURANCE COMPANIES

Submitted April 17, 1950. Decided May 18, 1950

Provisions of respondents' conference agreements authorizing absorption of excess cargo insurance premiums not shown to be unlawful, or to require or justify disapproval under section 15 of the Shipping Act, 1916.

Pending amendment relative to absorption of excess cargo insurance premiums submitted by respondent Leeward and Windward Islands & Guianas Conference, Agreement No. 7540-3, should be approved.

Provisions of respondents' tariffs, relative to absorption of excess cargo insurance premiums should in all instances be consistent with the provisions of the applicable conference agreements.

Provisions of respondents' tariffs, relative to absorption of excess cargo insurance premiums should in all instances specify whether or not such premiums will be absorbed together with any limitations applicable to the absorption.

No order will be issued pending receipt of information that respondents have complied with the findings herein.

Parker McCollester, *John R. Mahoney*, and *A. J. Pasch* for respondent members of Havana Steamship Conference, United States and Gulf/Haiti Conference, United States Atlantic and Gulf/Santo Domingo Conference, United States Atlantic and Gulf Netherlands West Indies & Venezuela Conference, Gulf and South Atlantic Havana Steamship Conference, and Leeward and Windward Islands and Guinas Conference.

Harold B. Finn, *Elmer C. Maddy*, and *John M. Phillips* for respondent members of U. S. A./South Africa Conference, and South Africa/U. S. A. Conference.

Harold B. Finn, *Elmer C. Maddy*, and *George F. Foley* for respondent members of River Plate and Brazil Conferences, Brazil/United States Canada Freight Conference, Mid-Brazil/United States-Canada Freight Conference, North Brazil/United States-Canada

Freight Conference, River Plate/United States-Canada Freight Conference, East Coast South America Reefer Conference, and River Plate and Brazil/United States Reefer Conference.

Walter Carroll and *H. A. Carlys* for respondent members of Gulf/French Atlantic Hamburg Range Freight Conference, Gulf/United Kingdom Conference, Gulf/South and East African Conference, and Gulf Scandinavian and Baltic Sea Ports Conference.

Thomas H. Adams and *E. J. Middleton* for respondent South Atlantic Steamship Conference; and its members.

A. C. Cocke for respondent Lykes Bros. Steamship Company, Inc.

John L. Ingoldsby, Jr. and *Fred B. Otell* for intervener Las Americas Shipping Line, Inc.

John L. Ingoldsby, Jr. and *E. C. Ash* for interveners Mobile Chamber of Commerce, Alabama State Docks and Terminals, City of Mobile, and County of Mobile, Alabama.

John L. Ingoldsby, Jr. and *Doss H. Berry* for interveners Baton Rouge Port Authority, and Baton Rouge Traffic Bureau Inc.

Hymen I. Malatzky for intervener Himala International.

Hoyt S. Haddock for intervener C. I. O. Maritime Committee.

George F. Galland for U. S. Maritime Commission.

Report of the Commission

Carson, *Commissioner:*

This inquiry and investigation was instituted upon our own motion, by order dated August 11, 1949, into the practices of the respondents in absorbing out of freight rates paid by shippers the additional cargo insurance charged shippers by insurance companies because shipment on a particular vessel was considered to involve an extra risk by reason of the age, ownership, or unusual characteristics of the vessel or the fact that cargo was stowed on deck rather than below deck. The purpose of the inquiry and investigation was to determine whether such absorptions of insurance were unlawful under the provisions of the Shipping Act, 1916, as amended, and whether the practice encouraged the use of substandard and inferior vessels and was thus detrimental to the commerce of the United States and whether it resulted in unjust discriminations between carriers or between shippers or was otherwise unlawful under the provisions of the Shipping Act, 1916, as amended.

Respondents are steamship conferences and their members, listed in Appendix A, and are subject to the provisions of section 15 of the Shipping Act, 1916. The absorption out of the freight rates of the additional insurance premiums outlined above is accomplished either by

provisions in the conference agreements or in the conference freight tariffs. Respondents, by our order, were required to show cause why an order should not be entered disapproving the practice, whether previously specifically authorized, proposed to be authorized, or established and practiced by said members of conferences pursuant to general provisions contained in the agreements.

The United States Atlantic and Gulf Santo Domingo Conference (Agreement No. 6080), after the proceeding was instituted, submitted for our approval, an amendment to its conference agreement eliminating any reference to insurance absorption. Several other conferences [1] amended their tariffs by eliminating the rules authorizing the absorption of insurance premiums.

This matter came to our attention when we were asked to approve Agreement No. 7540–3, which was a proposal to amend the Leeward and Windward Islands and Guianas Conference Agreement No. 7540 by adding the following provision thereto:

> Member lines may, when necessary, equalize actual insurance differentials on cargo caused by flag, over-age or undersize disability, and when large or bulky pieces, ordinarily susceptible to under deck stowage, are stowed on deck for the convenience of the carrier.

We requested argument as to the propriety of the foregoing provision, and after the argument, voted to disapprove the amendment. On reconsideration of this action, we withdrew our disapproval and ordered this proceeding.

The above quoted provision, while varying in some respects from similar provisions in other conferences or in tariffs of other conferences, is as comprehensive as any of its counterparts, and raises every substantial question involved in this inquiry. Appendix B, attached hereto, contains a list of the provisions in respondent conference agreements and tariffs in the order the respondents are listed in Appendix A.

Himala International, a shipper, Las Americas Shipping Line, Inc., a carrier and member of the Gulf and South Atlantic Havana Steamship Conference, on behalf of itself, the Mobile Chamber of Commerce, Alabama State Docks and Terminals, City of Mobile, County of Mobile, Baton Rouge Port Authority and Baton Rouge Traffic Bureau, Inc., all intervened in support of the absorption practice. The C. I. O. Maritime Committee intervened in opposition to the practice. All filed briefs with the exception of the C. I. O. Maritime Committee.

[1] North Atlantic Continental Freight Conference (Agreement No. 4490). North Atlantic French Atlantic Freight Conference (Agreement No. 7770). North Atlantic Baltic Freight Conference (Agreement No. 7670). Pacific Coast River Plate Brazil Conference (Agreement No. 6400).

Hearings were held in New York, New York, and New Orleans, Louisiana. Exceptions were filed to the report filed by the examiner. His findings are adopted herein.

Marine insurance underwriters impose excess cargo insurance premiums based upon the various types of disability under which the vessel may be placed. These excess cargo insurance premiums are applied for the purpose of giving the insurance underwriters adequate revenue to protect the risk involved.

Before World War II, the underwriters employed a rating system based upon the loss record of individual lines. The entire fleet of an operator having a favorable record was rated by the insurers, regardless of nationality, which meant that cargo carried on that operator's ships was insured at a basic rate, whereas cargoes shipped on nonrated vessels paid an extra premium. The rate formulas were based on accurate records, line by line, of major losses, such as fire, stranding, collision, and damage to cargo due to handling. Some ships, such as the Shipping Board's Hog Island vessels, carried a special disability, but in general, rates depended on the experience of the owner or operator.

The present rating system is one general basic classification applicable to all vessels, except Greek vessels over 15 years old, all vessels over 25 years old, and vessels of 1,000 gross tons or under. Cargoes carried in vessels included in these exceptions are charged an extra premium. Up to June 1, 1949, the penalty applied to all Greek ships; but since that date, the disability attaches only to those older than 15 years. The rate of penalty for a Greek ship is 15 cents per $100 of insured value, about $^{15}/_{100}$ of 1 percent. Formerly the penalty was approximately 2 percent. This new method of establishing the penalties facilitates the handling of business, and is a less complicated basis of determining what constitutes an approved vessel for the purpose of securing a minimum premium rate. It is preferred by the insured although the underwriters prefer the prewar system.

All vessels regardless of flag, age, and tonnage must maintain a classification in some society, such as the American Bureau of Shipping or Lloyd's of London Register of Shipping as high as A-1 or 100-A-1. Cargo insurance premium rating does not purport to be a determination that a ship has fallen below its classification. It is a private determination of the underwriters that a premium is justified on the basis of underwriting experience. American marine insurance rates are not subject to public regulation but are cooperatively suggested by a committee of the American Marine Insurance Clearing House, which sets forth the penalty rates for the guidance

of reinsurers, and as a practical matter, these rates are largely followed. While there is no uniformity with respect to penalties as between the American and foreign insurance market, the committee guides the entire American insurance market in seeking to keep it on a competitive level with the foreign market.

Of the vessels in regular trades, 90 to 95 percent are free of penalty insurance due to over-age or undersize. Even before June 1, 1949, when the penalty applied to all Greek vessels, the bulk of cargo insurance was placed at standard rates and it was only on an occasional vessel that the underwriters applied excess or premium rates based on the vessel's age or tonnage.

Underwriters familiar with the absorption practice expressed the view that it did not tend to increase the use of disability ships or decrease the use of American flag ships, or in fact have any effect thereon one way or the other.

When a vessel is chartered the person securing the use of the vessel generally knows whether it is one that carries an insurance penalty on the cargo. A ship against which a penalty is imposed finds it more difficult to secure employment and generally must accept a lower charter rate unless tonnage is scarce. At the present time, it is difficult to find a market for handicapped vessels.

Charter rates under normal conditions are generally higher for vessels of United States registry than for other vessels because of the higher costs of operation of the former. Therefore no greater hiring of United States registered vessels could be expected even if the right to absorb the extra cargo insurance premiums is denied handicapped vessels.

At the present time there are very few cargo insurance disability vessels. Lists of such vessels are furnished by underwriters to brokers together with a formula with which to compute the penalty on a certain vessel. While shippers are reluctant to pay penalties and prefer to ship by vessels having no penalties, they are not necessarily deterred by them if the urgency of the movement demands their use. If a shipper has not previously shipped on a disability vessel, he is told what the penalty is and is furnished with an invoice which shows the penalty separately. It is his duty to protect his own interest in connection with securing an absorption of the amount of the penalty in the freight rate.

At the present time absorption of excess cargo insurance premiums based on flag disability is not a major concern to conference carriers. Under current rules of the underwriters disability attaches to no nationality except Greek and then only on vessels 15 years or over.

The only Greek vessels operating in any of respondents' conference trades were seven ex-United States Libertys employed in the trade governed by the Leeward and Windward Islands and Guianas Conference, as outlined below, which after June 1, 1949, were not subject to penalty.

Alcoa is a United States citizen-owned company having 16 owned vessels under United States registry and between 35 and 40 foreign-flag vessels under charter. Their fleet is maintained primarily for the transportation of commodities, mainly bauxite, used in the production of aluminum, in order to supply their manufacturing facilities. They use their ships, however, to supply service to the shipping public as demands develop both northbound and southbound, but largely southbound. The seven Greek-owned Libertys involved were chartered to supplement their fleet to meet the demands of shippers for cargo space. The names of the Greek-owned vessels,[2] their type, the charter rate paid, and their delivered and redelivered dates are:

Vessel	Type	Rate [1]	Period	Delivered	Redelivered
Mariam	Liberty	$3.00	8/9 months	Oct. 12, 1948	July 25, 1949.
Mario C	do	3.00	4/6 months	Nov. 23, 1948	May 23, 1949.
		3.10	5/6 months	May 23, 1949	Oct. 23, 1949.
Aristogiton	do	3.10	6/7 months	Apr. 18, 1949	Oct. 20, 1949.[2]
Aristocratis	do	3.10	6/7 months	Apr. 13, 1949	Oct. 22, 1949.[2]
Resolute	do	3.00	5/6 months	June 8, 1949	Nov. 2, 1949.[2]
Evanthia	do	3.00	18/20 months	Oct. 27, 1948	Apr. 1950.[2]
Anna L. Condylis	do	3.00	21/25 months	Sept. 11, 1948	June 1950.[2]

[1] Rate is the amount per deadweight ton per month.
[2] Estimated.

When these ships were chartered the market was tight, and Alcoa was in it for any suitable vessels available that could be put on berth to carry cargo. While charter rates and availability of vessels are important factors in determining what vessels to charter, the rates paid for these were standard for foreign-flag tonnage, reflecting no discount for flag disability. Alcoa, in common with other operators, prefers to charter basically rated vessels and to avoid the use of disability-rated ships when it can, but when these were chartered no other tonnage was available except higher-cost American vessels. The charter rate on the latter vessels was between $4 and $4.50 as against $3 and $3.10 paid, or between $10,000 and $15,000 a month more per vessel, as compared with an estimated total annual insurance-absorption cost of $7,000 to $8,000. The demand for space was sufficient to permit operation of the Greek ships during the period of their disability without insurance absorption, but the company's

[2] Three Greek-registered and four registered Honduran.

inability to absorb evoked complaints from shippers and is thought by Alcoa to have resulted in loss of some cargo to its competitors.

The seven Greek ships, despite their cargo insurance disability, were rated A-1 or 100-A-1 by the American Bureau of Shipping or Lloyds Register. One of these vessels was redelivered to her owners June 25, 1949, on expiration of charter and not replaced because not needed, four more were due to go off hire by the end of 1949, and the remaining two by the middle of 1950. At the time of the hearing, October 20, 1949, it was Alcoa's plan for all seven of them to go off hire at the expiration of charters and to reduce their fleet because of the condition of the freight market. These were the only vessels in Alcoa's fleet to which insurance penalties applied, and as to these, being Libertys under 15 years old, the penalties did not apply after June 1, 1949.

Respondents find that nonconference vessels, particularly tramps, are competitive with them and that whenever vessels of the outside carriers are subject to the disability premium that fact is reflected in their lower rates and now shown as an absorption. If the conference members are forbidden to make any absorptions in connection with vessels which they may be forced to employ, they will be seriously handicapped from a competitive point of view and probably forced out of the conference in order to meet the competition. This situation developed very acutely between the two World Wars, and in order to prevent such resignations and consequent possible rate wars the conferences adopted the absorption practice. During that period many of the users of penalty tonnage were United States carriers using United States flag vessels which became overage.

Such vessels as those owned and operated by Las Americas Shipping Line, Inc., intervener, are subject to the cargo insurance penalty although they are rated A-1 in the American Bureau of Shipping. They operate from Baton Rouge, New Orleans, and Mobile to Havana, Cuba, and are the only conference vessels serving these ports at the present time. One vessel is subjected to an insurance penalty because it is under the 1,000-ton limit and one because it is a converted LST. This company has been operating since 1946 during which time it has had a perfect no-loss record. As a result the minimum excess penalty is applied which in the case of the undersized vessel is 5 cents per $100 insured value of the goods, and in the case of the LST is 10 cents per $100 insured value instead of 15 cents which would otherwise be applied. This company has recently joined the Gulf and South Atlantic Havana Steamship Conference (Agreement No. 4188), a respondent herein, but if not permitted to absorb this insurance

penalty, would be unable to compete on an equal basis with other members of the conference whose vessels are not subject to this insurance penalty. The president of this company testified that this would force them out of the conference. This would mean no conference service out of the ports of Mobile and Baton Rouge and no service at all for these ports in this trade if the line was unable to continue its operation on a nonconference basis.

No shipper, port, or carrier or other interest offered any evidence protesting against this absorption practice. On the contrary, ports and carriers appeared in favor of it and the one shipper who intervened pointed out the disability under which he would be placed if the power to follow the practice were removed. Whenever a shipper is compelled to use ships subject to the penalty because of urgency arising out of the terms of the letter of credit or because of some other reason, he is placed under a handicap as against his competitors who can use the nonpenalty ship, if the absorption of the penalty is forbidden.

Prior to the war, the underwriters charged an additional premium on cotton and cotton linters, which are always stowed below deck, if the vessel stopped at more than two ports on the Gulf before going abroad; and a further penalty was applied on the two commodities during the winter season if any cargo of any description was loaded on deck. In other seasons a deck load of about 250 tons was allowed before the latter penalty was applied. Although the lines did everything possible to get the underwriters to waive the penalties, they were unsuccessful and therefore the carriers were compelled to provide for the absorption of those penalties.

Cargo which is ordinarily stowed under deck is at times stowed on deck for the carrier's convenience. This practice has been followed for years in order to utilize as fully as possible the cargo space of the vessel and to permit prompt shipment of cargo which might otherwise be shut out. Shippers prefer to have their goods stowed under deck, but in times of stress or lack of space, they would rather have them carried on deck to secure immediate transportation. However, the carriers admit that, in view of the fact that the carrier is carrying the cargo on deck in order to secure more revenue, the shipper should not be compelled to pay the excess insurance cost as compared with the shipper whose cargo is carried below deck.

It is also developed that in some of the trades, vessels subject to an insurance penalty because of age belong to the Government whose flag they fly. Refusal to put those vessels upon a parity with United States flag vessels or others in the conference might lead not only to

resignations from the conference but to governmental retaliations of various sorts.

The use of the word "may" instead of "shall" in the conference agreement in connection with the absorption of the insurance penalty premiums was not intended to permit the carriers to give different shippers different treatment in similar situations. It was designed to allow the carriers to consider the facts in each case and make the absorption only when it is warranted. Insurance underwriters decide which shippers shall have to pay the penalty premium and the method and amount of the payment depending upon the form of insurance coverage and policy the shipper has purchased. Since these differ, the rights of the shippers to the absorption differ. Some shippers are self insurers; some have a large volume of insurance coverage; others a very small volume, and apparently at times the former receives more favorable treatment as to penalties than the latter. No complaint was received as to any different treatment any carrier had accorded shippers in the same situation.

The record discloses several instances in which tariffs do not conform strictly to conference agreements. For example, Agreement No. 140-1 of the Gulf/French Atlantic Hamburg Range Freight Conference[3] provides for absorption of "penalties for deviation and deckload assessed by underwriters on cotton and cotton linters," whereas the tariff thereunder authorized absorption on cotton and cotton linters of "actual differences of insurance account of class of vessel or deviation * * *." "Class of vessel" is covered by the tariff but not the agreement; and "deckload" is covered by the agreement but not the tariff. Such discrepancies should be eliminated in all instances.

We find

That the practice of respondents of absorbing out of their freight revenues the excess cargo insurance premiums charged by underwriters for the insurance of cargoes transported in vessels which have been placed on the underwriters penalty list because of age, nationality or other reason or because cargoes have been stowed on deck for the vessel's convenience, has not been shown to result in any unfair or unjust discrimination against ports, carriers or shippers, nor to operate to the detriment of the commerce of the United States nor to be in violation of any of the provisions of the Shipping Act, 1916, as amended.

That the use of optional provisions in the agreement of the respondents covering the adoption of absorption practices constitutes an authorization that the conference may adopt such practices when con-

[3] All such variances appear in Appendix B.

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ditions and circumstances so warrant; such provisions do not permit member lines individually to exercise any option with respect to the use of such practice nor do they permit the conferences to place such practices into effect indiscriminately; such provisions are not violative of the Shipping Act, 1916, as amended.

That if a conference adopts the practice of absorbing excess cargo insurance premiums, the procedure for making such absorptions must be specifically set forth in its tariffs, including the character of proof to be required of the shipper before absorption will be made; respondents shall eliminate from their tariffs all language indicative of an option in the absorption of such excess premiums.

That the amendment relative to absorption of excess cargo insurance premiums submitted by respondent Leeward and Windward Islands and Guianas Conference, Agreement No. 7540–3, is approved.

That the respondents shall modify their tariff provisions relative to absorption of excess cargo insurance premiums so that in all instances such tariff provisions will be consistent with the provision of the applicable conference agreements.

That this proceeding will be held open and no order issued pending receipt of the necessary amendments.

McKeough, *Commissioner*, concurring:

There are two issues in this proceeding. First, whether the practice of absorption of penalty cargo insurance is lawful, and, second, *if* it is lawful, whether conference provisions leaving it to the discretion of member lines whether or not to absorb are lawful. With respect to the second question, I join with the majority.

With respect to the first issue, the majority's finding that the practice of insurance absorption is not in violation of any section of the Shipping Act of 1916, including the provision against unjust discrimination as between carriers, appears to be based in large measure on the view that the absorption practice does "not tend to increase the use of disability ships or decrease the use of American flagships, or, in fact, have any effect thereon one way or another." At the same time, however, it is said that a "ship against which a penalty is imposed finds it more difficult to secure employment and generally must accept a lower charter rate unless tonnage is scarce. At the present time it is difficult to find a market for handicapped vessels." I find these two statements difficult to reconcile, particularly in view of the further statement that Alcoa's "inability to absorb evoked complaints from shippers and is thought by Alcoa to have resulted in loss of some cargo to its competitors."

It seems reasonable to conclude from the above that if a cargo insurance penalty may not be absorbed by the carrier and therefore makes it more difficult for a vessel to secure employment, and for the operator of such vessel to secure cargoes, then conversely the ability to absorb must promote the operator's ability to employ a disability ship successfully and *thereby tend to increase the use of disability ships.*

However, a basic issue not dealt with in the majority decision must be examined in this situation.

The carrier who "absorbs" insurance penalties imposed by underwriters on shippers using the carrier's vessel subject to such penalties, i. e., who permits the shipper to deduct the insurance penalty from the freight bill, does not grant a similar freight refund to shippers using other vessels of the same carrier not suffering from such penalty. There is no doubt a feature of discrimination in this aspect alone. Yet we cannot say that it is an *unjustly* discriminatory practice and, therefore, outlawed under Section 15 of the 1916 Act. Insurance absorption in the final analysis is a *freight rate reduction* to compensate for a disability *inherent in a particular vessel*, a reduction granted only if, as, and when such disability is present in the vessel, and measured by the exact extent of that disability. We cannot find *unjustly* discriminatory a freight rate allowance compensating for an inherent disability of a particular vessel, whether that disability is an insurance penalty to which that vessel is subjected, or, to name another example, lesser speed resulting in delayed delivery. Such speed differential has in the past in several instances led to differential tariffs, and while uniformity of transportation charges on a given route is a desirable factor of trade stabilization, differential rates, based on different quality of service rendered, cannot ordinarily be considered *unjustly* discriminatory.

In arriving at these conclusions, I express no opinion as to the propriety of another type of rate reduction which insurance absorption no doubt constitutes, i. e., a practice such as port equalization under which carriers refund to more distant shippers major portions of Government-regulated inland freight charges so as to offset the advantage of geographical proximity of certain ports to their natural tributary area, with the result that a carrier collects *different* net ocean freight from different shippers for *identical* transportation services on the *same* ships although the disability *is not inherent in the vessel.* In the present case, on the other hand, the *identical* net ocean freight charges are levied on all shippers receiving the *identical* transportation service on the *same* ships.

APPENDIX A

RESPONDENTS

Leeward and Windward Islands and Guianas Conference (Agreement No. 7540-3)

Members:

Alcoa Steamship Company, Inc.
Royal Netherlands Steamship Company

Gulf/French Atlantic Hamburg Range Freight Conference (Agreement No. 140-1)

Members:

Armement Deppe, S. A.
Compagnie Generale Transatlantique (French Line)
Lykes Bros. Steamship Co., Inc.
N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij "Holland-Amerika Lijn"
(Ropner Line)—Joint Service of
  Sir R. Ropner & Company Limited
  The Pool Shipping Company Limited
  The Ropner Shipping Company Limited
States Marine Corporation/States Marine Corporation of Delaware (Joint Service)
Waterman Steamship Corporation
Wilhelmsens Dampskibsaktieselskab
A/S Den Norske Afrika—og Australielinie
A/S Tonsberg
A/S Tankfart I
A/S Tankfart IV
A/S Tankfart V
A/S Tankfart VI
A/B Svenska Amerika Linien (Swedish American Line)
} Joint Service

Gulf/United Kingdom Conference (Agreement No. 161)

Members:

Thos. & Jas. Harrison (Harrison Line)
Larrinaga Steamship Co., Ltd. (Larrinaga Line)
Lykes Bros. Steamship Co., Inc.
N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij "Holland-Amerika Lijn"
(Ropner Line)—Joint Service of
  Sir R. Ropner & Company Limited
  The Pool Shipping Company Limited
  The Ropner Shipping Company Limited
States Marine Corporation/States Marine Corporation of Delaware (Joint Service)
Waterman Steamship Corporation

Havana Steamship Conference (Agreement No. 4189)

Members:

Compania Trasatlantica
Empresa Naviera de Cuba, S. A.
Lines de Vapores Garcia, S. A.
New York and Cuba Mail Steamship Co.
North Atlantic & Gulf Steamship Co.
United Fruit Company

United States Atlantic and Gulf/Haiti Conference (Agreement No. 5590)

Members:

Alcoa Steamship Company, Inc.
Compagnie Generale Transatlantique (French Line)
Lykes Bros. Steamship Co., Inc.
Royal Netherlands Steamship Company
Standard Fruit and Steamship Company

United States Atlantic and Gulf Santo Domingo Conference (Agreement No. 6080)

Members:

Bull Insular Line, Inc.
Lykes Bros. Steamship Co., Inc.

U. S. Atlantic & Gulf-Netherlands West Indies & Venezuela Conference (Agreement No. 6190)

Members:

Alcoa Steamship Company, Inc.
(Barber-Carribean Line)—Joint Service of
  Rederiet Vindeggen A/S
  Rederiet Besseggen A/S
  Skipsaksjeselskapet Essi
  Skipsaksjeselskapet Estero
  Dampskibsaksjeselskapet Esito
  Bj. Ruud-Pedersen
Grace Line, Inc.
Lykes Bros. Steamship Co., Inc.
Royal Netherlands Steamship Company

River Plate and Brazil Conferences (Agreement No. 59)

Members:

The Booth Steamship Company, Limited
(Brodin Line)—Joint Service of
  Rederiaktiebolaget Disa
  Rederiaktiebolaget Poseidon
  Angfartygsaktiebolaget Tirfing
Cia. Argentina de Navegacion Dodero, S. A.
Dampskibsselskabet Torm (Torm Line)
Flota Mercante del Estado
Furness (Canada) Ltd.
(Holland Interamerica Line)—Joint Service of
  N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij "Holland-Amerika Lijn"
  Van Nievelt, Goudriaan & Co's Stoomvaart Maatschappij N. V.

River Plate and Brazil Conferences (Agreement No. 59)—Continued

Members—Continued

International Freighting Corporation, Inc.
(Ivaran Lines)—Joint Service of
A/S Ivarans Rederi
A/S Lise
A/S Besco
Lamport & Holt Line, Ltd.
Linea Sud Americana, Inc. (Cardiaz Lines)
Lloyd Brasileiro (Patrimonio Nacional)
Mississippi Shipping Company, Inc. (Delta Line)
Moore-McCormack Lines, Inc. (American Republics Line)
The Northern Pan America Line A/S
(Norton Line)—Joint Service of
Rederiaktiebolaget Svenska Lloyd
Stockholms Rederiaktiebolaget Svea
Rederiaktiebolaget Fredrika
Prince Line, Limited
Shepard Steamship Company
(Southern Cross Line)—Joint Service of
A/S J. Ludwig Mowinckels Rederi
Westfal-Larsen & Co., A/S
Sprague Steamship Company
(Wilh. Wilhelmsen interests)—Joint Service of
Wilhelmsens Dampskibsaktieselskab
A/S Den Norske Afrika—og Australielinie
A/S Tonsberg
A/S Tankfart I
A/S Tankfart IV
A/S Tankfart V
A/S Tankfart VI

Brazil-United States/Canada Freight Conference (Agreement No. 5450)

Members:

The Booth Steamship Company, Ltd.
(Brodin Line)—Joint Service of
Anfartygsaktiebolaget Tirfing
Rederiaktiebolaget Disa
Rederiaktiebolaget Poseidon
Cia. Argentina de Navegacion Dodero, S. A.
Dampskibsselskabet Torm (Torm Line)
Flota Mercante del Estado
Furness (Canada) Ltd.
(Holland Interamerica Line)—Joint Service of
N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij "Holland-Amerika Lijn"
Van Nievelt, Goudriaan & Co's Stoomvaart Maatschappij N. V.

Brazil-United States/Canada Freight Conference (Agreement No. 3450)—Con.

Members—Continued

International Freighting Corporation, Inc.
(Ivaran Lines)—Joint Service of
  A/S Besco
  A/S Lise
  Aktieselskapet Ivarans Rederi
Lamport & Holt Line, Ltd.
Linea Sud Americana, Inc. (Gardiaz Lines)
Lloyd Brasileiro (Patrimonio Nacional)
Mississippi Shipping Company, Inc. (Delta Line)
Moore-McCormack Lines, Inc. (American Republics Line)
The Northern Pan-America Line A/S
(Norton Line)—Joint Service of
  Rederiaktiebolaget Svenska Lloyd
  Stockholms Rederiaktiebolag Svea
  Rederiaktiebolaget Fredrika
Prince Line, Limited
Shepard Steamship Company
(Southern Cross Line)—Joint Service of
  A/S J. Ludwig Mowinckels Rederi
  Westfal-Larsen & Co., A/S
Sprague Steamship Company
(Wilh. Wilhelmsen interests)—Joint Service of
  Wilhelmsens Dampskibsaktieselskab
  A/S Den Norske Afrika—og Australielinie
  A/S Tonsberg
  A/S Tankfart I
  A/S Tankfart IV
  A/S Tankfart V
  A/S Tankfart VI

Mid-Brazil/United States-Canada Freight Conference (Agreement No. 7630)

Members:

Aktiebolaget Svenska Brazil La Plata Linjen
The Booth Steamship Company, Ltd.
(Brodin Line)—Joint Service of
  Rederiaktiebolaget Disa
  Rederiaktiebolaget Poseidon
  Angfartygsaktiebolaget Tirfing
Cia. Argentina de Navegacion Dodero S. A.
Dampskibsselskabet Torm (Torm Line)
Flota Mercante del Estado
Furness (Canada) Ltd.
(Holland Interamerica Line)—Joint Service of
  N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij "Holland-Amerika Lijn"
  Van Nievelt, Goudriaan & Co's Stoomvaart Maatschappij N. V.

Mid-Brazil/United States-Canada Freight Conference (Agreement No. 7630)—Continued

Members—Continued
International Freighting Corporation, Inc.
(Ivaran Lines)—Joint Service of
A/S Ivarans Rederi
A/S Lise
A/S Besco
Lamport & Holt Line, Ltd.
Lloyd Brasileiro (Patrimonio Nacional)
Mississippi Shipping Company, Inc.
Moore-McCormack Lines, Inc.
The Northern Pan American Line A/S
(Norton Line)—Joint Service of
Rederiaktiebolaget Svenska Lloyd
Stockholms Rederiaktiebolag Svea
Rederiaktiebolaget Fredrika
Prince Line, Ltd.
Shepard Steamship Company
(Southern Cross Line)—Joint Service of
A/S J. Ludwig Mowinckels Rederi and Westfal-Larsen & Co. A/S
Sprague Steamship Company

North Brazil/United States-Canada Freight Conference (Agreement No. 7640)

Members:
The Booth Steamship Company, Ltd.
Cia. Argentina de Navegacion Dodero, S. A.
Dampskibsselskabet Torm (Torm Line)
International Freighting Corporation, Inc.
Lamport & Holt Line, Ltd.
Lloyd Brasileiro (Patrimonio Nacional)
Mississippi Shipping Company, Inc.
Moore-McCormack Lines, Inc.
The Northern Pan America Line A/S

River Plate/United States-Canada Freight Conference (Agreement No. 6900)

Members:
The Booth Steamship Company, Ltd.
(Brodin Line)—Joint Service of
Rederiaktiebolaget Disa
Rederiaktiebolaget Poseidon
Angfartygsaktiebolaget Tirfing
Cia. Argentina de Navegacion Dodero, S. A.
Dampskibsselskabet Torm (Torm Line)
Flota Mercante del Estado
Furness (Canada) Ltd.
(Holland Interamerica Line)—Joint Service of
N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij "Holland-Amerika Lijn"
Van Nievelt, Goudriaan & Co.'s Stoomvaart-Maatschappij N. V.

River Plate/United States-Canada Freight Conference (Agreement No. 6900)
Continued

Members—Continued
International Freighting Corporation, Inc.
(Ivaran Lines)—Joint Service of
A/S Ivarans Rederi
A/S Lise
A/S Besco
Lamport & Holt Line, Ltd.
Linea Sud Americana, Inc. (Gardiaz Lines)
Mississippi Shipping Company, Inc. (Delta Line)
Moore-McCormack Lines, Inc. (American Republics Line)
The Northern Pan-America Line A/S
(Norton Line)—Joint Service of
Rederiaktiebolaget Svenska Lloyd
Stockholms Redriaktiebolag Svea
Rederiaktiebolaget Fredrika
Prince Line, Ltd.
Shepard Steamship Company
(Southern Cross Line)—Joint Service of
A/S J. Ludwig Mowinckels Rederi
Westfal-Larsen & Co., A/S
Sprague Steamship Company
(Wilh. Wilhelmsen interests)—Joint Service of
Wilhelmsens Dampskibsaktieselskab
A/S Den Norske Afrika—og Australielinie
A/S Tonsberg
A/S Tankfart I
A/S Tankfart IV
A/S Tankfart V
A/S Tankfart VI

East Coast South American Reefer Conference (Agreement No. 6800)

Members:
The Booth Steamship Company, Ltd.
(Brodin Line)—Joint Service of
Rederiaktiebolaget Disa
Rederiaktiebolaget Poseidon
Angfartygsaktiebolaget Tirfing
Cia. Argentina de Navegacion Dodero, S. A.
Dampskibsselskabet Torm (Torm Line)
Flota Mercante del Estado
International Freighting Corporation, Inc.
(Ivaran Lines)—Joint Service of
A/S Ivarans Rederi
A/S Lise
A/S Besco
Lamport & Holt Line, Ltd.
Lloyd Brasileiro (Patrimonio Nacional)
Mississippi Shipping Company, Inc. (Delta Line)
Moore-McCormack Lines, Inc. (American Republics Line)

East Coast South American Reefer Conference (Agreement No. 6800)—Continued

Members—Continued
- The Northern Pan-America Line A/S
- (Norton Line)—Joint Service of
  - Rederiaktiebolaget Svenska Lloyd
  - Stockholms Rederiaktiebolag Svea
  - Rederiaktiebolaget Fredrika
- (Southern Cross Line)—Joint Service of
  - A/S J. Ludwig Mowinckels Rederi
  - Westfal-Larsen & Co., A/S
- Sprague Steamship Company
- (Wilh. Wilhelmsen interests)—Joint Service of
  - Wilhelmsens Dampskibsaktieselskab
  - A/S Den Norske Afrika—og Australielinie
  - A/S Tonsberg
  - A/S Tankfart I
  - A/S Tankfart IV
  - A/S Tankfart V
  - A/S Tankfart VI

River Plate and Brazil/United States Reefer Conference (Agreement No. 7200)

Members:
- (Brodin Line)—Joint Service of
  - Rederiaktiebolaget Disa
  - Rederiaktiebolaget Poseidon
  - Angfartygsaktiebolaget Tirfing
- Cia. Argentina de Navegacion Dodero, S. A.
- Dampskibsselskabet Torm (Torm Line)
- Flota Mercante del Estado
- International Freighting Corporation, Inc.
- Lamport & Holt Line, Ltd.
- Lloyd Brasileiro (Patrimonio Nacional)
- Mississippi Shipping Company, Inc. (Delta Line)
- Moore-McCormack Lines, Inc. (American Republics Lines)
- The Northern Pan-American Line A/S
- (Norton Line)—Joint Service of
  - Rederiaktiebolaget Svenska Lloyd
  - Stockholms Rederiaktiebolag Svea
  - Rederiaktiebolaget Fredrika
- (Southern Cross Line)—Joint Service of
  - A/S J. Ludwig Mowinckels Rederi
  - Westfal-Larsen & Co., A/S
  - Sprague Steamship Company
  - (Wilh. Wilhelmsen interests)—Joint Service of
    - Wilhelmsens Dampskibsaktieselskab
    - A/S Den Norske Afrika—og Australielinie
    - A/S Tonsberg
    - A/S Tankfart I
    - A/S Tankfart IV
    - A/S Tankfart V
    - A/S Tankfart VI

Gulf/South and East African Conference (Agreement No. 7780)

Members:

(Java Pacific Line)—Joint Service of
N. V. Stoomvaart Maatschappij "Nederland"
N. V. Rotterdamsche Lloyd
Lykes Bros. Steamship Co., Inc.
Silver Line, Limited

U. S A./South Africa Conference (Agreement No. 3578)

Members:

British and South America Steam Navigation Co., Ltd.
The Clan Line Steamers, Ltd.
Ellerman & Bucknall Steamship Company, Ltd.
Farrell Lines Incorporated
Prince Line, Limited
The Union-Castle Mail Steamship Company, Ltd.

South Atlantic Steamship Conference (Agreement No. 4620)

Members:

South Atlantic Steamship Line
South Atlantic Steamship Line, Inc.
Strachan Shipping Company
Waterman Steamship Corporation

<table>
<tr><td>Wilhelmsens Dampskibsaktieselskab
A/S Den Norske Afrika—og Australielinie
A/S Tonsberg
A/S Tankfart I
A/S Tankfart IV
A/S Tankfart V
A/S Tankfart VI
Aktiebolaget Svenska Amerika Linien (Swedish American Line)</td><td>Joint Service</td></tr>
</table>

North Atlantic Continental Freight Conference (Agreement No. 4490)

Members:

A/S J. Ludwig Mowinckels Rederi (Cosmopolitan Line)
Black Diamond Steamship Corporation
Compagnie Generale Transatlantique
Compagnie Maritime Belge, S. A. Compagnie Maritime Congolaise, S. C. R. L. (Joint Service)
Cunard White Star Limited
Ellerman's Wilson Line, Ltd. (Wilson Line)
(A. P. Moller—Maersk Line)—Joint Service of
Dampskibsselskabet af 1912 A/S
A/S Dampskibsselskabet Svendborg
N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij "Holland-Amerika Lijn"
South Atlantic Steamship Line, Inc.
United States Lines Company (United States Lines)
Waterman Steamship Corporation

North Atlantic French Atlantic Freight Conference (Agreement No. 7770)

Members:

A/S J. Ludwig Mowinckels Rederi (Cosmopolitan Line)
Compagnie Generale Transatlantique (French Line)
Cunard White Star Limited
(A. P. Moller—Maersk Line)—Joint Service of
  Dampskibsselskabet af 1912 A/S
  A/S Dampskibsselskabet Svendborg
South Atlantic Steamship Line, Inc.
United States Lines Company (United States Lines)
Waterman Steamship Corporation

Gulf Scandinavian and Baltic Sea Ports Conference (Agreement No. 5400)

Members:

Det Forenede Dampskibs-Selskab A/S (Scandinavian American Line)
Lykes Bros. Steamship Co., Inc.

Joint Service:
Wilhelmsens Dampskibsaktieselskab
A/S Den Norske Afrika—og Australielinie
A/S Tonsberg
A/S Tankfart I
A/S Tankfart IV
A/S Tankfart V
A/S Tankfart VI
Aktiebolaget Svenska Amerika Linien (Swedish American Line)

North Atlantic Baltic Freight Conference (Agreement No. 7670)

Members:

Black Diamond Steamship Corporation
Compagnie Maritime Belge S. A. and Compagnie Maritime Congolaise S. C. R. L.
Cunard White Star Limited
Den Norske Ameriklinje A/S Oslo (Norwegian America Line)
Det Forenede Dampskibs-Selskab, Copenhagen (Scandinavian American Line)
The East Asiatic Company, Ltd.
Ellerman's Wilson Line, Limited (Wilson Line)
Gdynia America Shipping Lines, Ltd. (Gdynia America Line)
Merivienti Cy (Finnlines)
Moore-McCormack Lines, Inc. (American Scantic Line)
N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij "Holland-Amerika Lijn" (Holland-America Line)
Suomen Hoyrylaiva Osakeyhtio-Finska Augfartygs Aktiebolaget (Finland Steamship Company)
Swedish American Line (A/B Svenska Amerika Linien)—Transatlantic Steamship Co. Ltd. (Rederiaktiebolaget Transatlantic (Joint Service)
Thorden Lines A/B
United States Lines Company (United States Lines)

North Atlantic Baltic Freight Conference (Agreement No. 7670)—Continued

Members—Continued
- Waterman Steamship Corporation
- (Wilh. Wilhelmsen interests)—Joint Service of
  - Wilhelmsens Dampskibsaktieselskab
  - A/S Den Norske Afrika—og Australielinie
  - A/S Tonsberg
  - A/S Tankfart I
  - A/S Tankfart IV
  - A/S Tankfart V
  - A/S Tankfart VI

South Africa/U. S. A. Conference (Agreement No. 3579)

Members:
- British and South America Steam Navigation Co., Ltd.
- The Clan Line Steamers, Ltd.
- Ellerman & Bucknall Steamship Company, Ltd.
- Farrell Lines Incorporated
- Prince Line, Limited
- The Union Castle Mail Steamship Company, Ltd.

Gulf and South Atlantic Havana Steamship Conference (Agreement No. 4188)

Members:
- Empresa Naviera de Cuba, S. A.
- Lykes Bros. Steamship Co., Inc.
- Standard Fruit & Steamship Company
- United Fruit Company
- West India Fruit & Steamship Co., Inc.

Pacific Coast River Plate Brazil Conference (Agreement No. 6400)

Members:
- Cia Argentina de Navegacion Dodero, S. A.
- (Java Pacific Line)—Joint Service of
  - N. V. Stoomvaart Maatschappij "Nederland"
  - Koninklijke Rotterdamsche Lloyd, N. V.
- Moore-McCormack Lines, Inc. (Pacific Republics Line)
- Pacific Argentine Brazil Line, Inc.
- Silver Line, Limited
- Westfal-Larsen & Company, A/S (Westfal-Larsen Company Lines)

APPENDIX B

PROVISIONS IN CONFERENCE AGREEMENTS, AND TARIFFS THEREUNDER, OF RESPONDENTS WITH RESPECT TO ABSORPTION OF EXCESS CARGO INSURANCE PREMIUMS (IN THE ORDER RESPONDENTS ARE LISTED IN APPENDIX A)

Leeward and Windward Islands and Guianas Conference (Agreement No. 7540-3)

Agreement: "Member lines may, when necessary, equalize actual insurance differentials on cargo caused by flag, over-age or under-size disability, and when large or bulky pieces, ordinarily susceptible to under deck stowage, are stowed on deck for the convenience of the carrier".

Leeward and Windward Islands and Guianas Conference (Agreement No. 7540-3)—Continued

Tariff (Southbound): "Rates named herein do not include marine insurance, or other service, apart from transportation, but upon application the carrier may effect insurance for account of shippers at prevailing rates".

Tariff (Northbound): "Rates and charges named herein do not include insurance of any kind".

Virgin Island Tariff (Southbound): "Rates named herein do not include marine insurance, but upon application the carrier may effect insurance for account of shippers at prevailing rates".

Virgin Island Tariff (Northbound): "No insurance whatever is included in the rates named herein".

Gulf/French Atlantic Hamburg Range Freight Conference (Agreement No. 140-1)

Agreement: "The parties hereto agree that penalties for deviation and deckload assessed by underwriters on Cotton and Cotton Linters may be refunded to shippers in all cases, provided claim from shipper is supported by receipt from insurance company, or other satisfactory evidence".

Tariff: "Rates shown herein do not include Marine Insurance and no premiums for account of shipper may be absorbed by the carrier. The only exception to this rule is on Cotton and Cotton Linters which rates are based on Class A Vessel rating and actual differences of insurance account of class of vessel or deviation may be absorbed upon presentation of receipted insurance bills".

Gulf/United Kingdom Conference (Agreement No. 161)

Agreement: "It is further understood additional insurance premiums assessed by underwriters on cargo account overage and/or under-tonnage vessels may be refunded to payees upon presentation of receipted insurance bills, which have been approved for payment by the General Secretary of the Conference".

"The parties hereto agree that penalties for deviation and deckload assessed by underwriters on Cotton and Cotton Linters may be refunded to shippers in all cases, provided claim from shipper is supported by receipt from insurance company, or other satisfactory evidence".

Tariff: "Rates shown herein do not include Marine Insurance and no premiums for account of shipper may be absorbed by the carrier".

Havana Steamship Conference (Agreement No. 4189)

Agreement: "On cargo stowed on deck for the convenience of a member line, the difference between on-deck and under-deck insurance on the cargo on that particular vessel may be absorbed. All such absorptions shall be reported to the Conference".

Tariff: "Rates published herein do not include Marine or other Insurance".

United States Atlantic and Gulf/Haiti Conference (Agreement No. 5590)

Agreement: "The steamer lines will not equalize marine insurance. However, in the case of large or bulky pieces or packages, lines will be permitted to cover with extra insurance where stowage on deck is entirely for convenience of the steamship company".

Tariff: "No insurance or other service apart from transportation is included in the rates named herein".

United States Atlantic and Gulf-Santo Domingo Conference (Agreement No. 6080)

Agreement: "Member lines shall absorb for the purpose of equalizing actual insurance differentials when insurance differentials obtain resulting from diversion, overage or under-sized vessels, or the operation of chartered vessels, or vessels not regularly engaged in the trade and therefore being subject to a higher insurance premium".

Tariff (Homeward): "No insurance whatever is included in the rates named herein".

Tariff (Outward): "No insurance whatever is included in the rates named herein. Shippers desiring to cover their shipments with insurance may so notify the Carrier or Carrier's agent, in writing prior to the sailing of the steamer. Insurance shall then be effected at rates prevailing under the Carrier's open policy and premium for same will be charged on bill of lading, but whether charged or not will be collectible from the shippers".

United States Atlantic & Gulf-Netherlands West Indies and Venezuela Conference (Agreement No. 6190)

Agreement: "Member lines may when necessary, make absorption for the purpose of equalizing actual insurance differentials, especially when resulting from diversion or overage or under-size vessels, or when large or bulky pieces or packages, for the convenience of the carrier, are stowed on deck".

Tariff (Homeward): "Rates and charges shown herein do not include insurance".

Tariff (Outward):

"(a) Rates published in this tariff do not include Marine Insurance.

(b) Shippers desiring marine insurance must so notify the carrier in writing when bills of lading are presented for signature, but in any case not later than the day before sailing. Insurance will then be effected at prevailing rates under a policy taken out by the carrier and cost of same shall be collectible from the shipper".

River Plate and Brazil Conference (Agreement No. 59)

Agreement: Provides that there shall be no absorption of any charges "except as unanimously voted and provided in the tariffs".

Tariff: "Members are permitted to absorb actual difference in cargo insurance premiums between rates applying on their vessels and the lowest rates applying to competitive cargo vessels of any conference member. Such absorptions to be made only by refund of the actual difference in the cargo insurance premium. All instances of such payment shall be reported in writing to the Conference Chairman with copy of supporting bill".

Brazil-United States/Canada Freight Conference (Agreement No. 5450)

Agreement: Provides that there shall be no absorption of any charges, "except as may be otherwise unanimously agreed".

Tariff: Contains authority to absorb insurance differential, the same as stated after *Tariff* under *River Plate and Brazil Conference* (Agreement No. 59) above.

Mid Brazil/United States—Canada Freight Conference (Agreement No. 7630)

Agreement: Provides that there shall be no absorption, "except as may be otherwise agreed and shown in conference tariff."

Tariff: Contains authority to absorb insurance differential, the same as stated after *Tariff* under *River Plate and Brazil Conference (Agreement No. 59)* above.

North Brazil/United States—Canada Freight Conference (Agreement No. 7640)

Agreement: Provides that there shall be no absorption, "except as may be otherwise agreed and shown in conference tariff."

Tariff: Contains authority to absorb insurance differential, the same as stated after *Tariff* under *River Plate and Brazil Conference (Agreement No. 59)* above.

River Plate/United States—Canada Freight Conference (Agreement No. 6900)

Agreement: Provides that there shall be no absorption, "except as may be otherwise unanimously agreed and shown in conference tariff."

Tariff: Contains authority to absorb insurance differential, the same as stated after *Tariff* under *River Plate and Brazil Conference (Agreement No. 59)* above.

East Coast South America Reefer Conference (Agreement No. 6800)

Agreement: Provides that there shall be no absorption, "except as may be otherwise agreed and shown in conference tariffs."

Tariff: "Lines may equalize insurance premiums with premiums applying on the best rated competitive line."

River Plate and Brazil/United States Reefer Conference (Agreement No. 7200)

Agreement: Provides that there shall be no absorption, "except as may be otherwise agreed and shown in conference tariffs".

Tariff: "Lines may equalize insurance premiums with premiums applying on the best rated competitive line".

Gulf/South and East African Conference (Agreement No. 7780)

Agreement: Provides that there shall be no absorption, except as authorized by the parties to the agreement "and recorded in the tariff or tariffs of the conference."

Tariff: "Absorption of insurance differentials is prohibited, except in the following instances:

1. When, for the convenience of the ship, under deck cargo may be stowed on deck, the ship may absorb the difference between on deck and under deck insurance premiums.

2. If, by reason of vessel being over twenty years old, additional insurance premiums are charged by underwriters the ship may absorb the amount of such additional premiums. All instances or such absorption shall be reported in writing to the Conference Office".

U. S. A./South Africa Conference (Agreement No. 3578)

Agreement: Provides that there shall be no absorption unless "adopted and prescribed by the conference".

Tariff: Contains authority to absorb insurance differentials, the same as stated after *Tariff* under Gulf/South and East African Conference (Agreement No. 7780) above.

South Atlantic Steamship Conference (Agreement No. 4620)

Agreement: Provides that there shall be no absorption, "except as provided in the tariffs".

Tariffs: French Atlantic No. 2, and Continental No. 2, provide "Rates shown herein do not include marine insurance. No premium for account of shipper may be absorbed by the carrier except actual differential premiums between on-deck and under-deck stowage, also penalties assessed by underwriters on cargo for over-age and/or under-tonnage vessels, and additionally, on cotton and cotton linters for extra ports of call, deviation, and deckloads. No insurance claims may be paid unless filed within one year of sailing of vessel transporting the cargo, and supported by receipt from insurance company or other satisfactory evidence. No refunds for on-deck, over-age or under-tonnage penalties may be paid until approved by the conference".

South Atlantic/Baltic Tariff No. 2, also under this Agreement No. 4620, contains same provisions as *French Atlantic* and *Continental,* next above, except the difference between on-deck and under-deck stowage is not included.

North Atlantic Continental Freight Conference (Agreement No. 4490)

Agreement: Contains no provision concerning "absorption".

Tariff: The only insurance absorption is on "Cotton and Cotton Linters which rates are based on Class A Vessel rating and actual differences of insurance account of class of vessel or deviation may be absorbed upon presentation of receipted insurance bills".

Changed August 22, 1949, to provide: "Rates shown herein do not include Marine Insurance and no premiums for account of shipper may be absorbed by the carrier".

North Atlantic French Atlantic Freight Conference (Agreement No. 7770)

Agreement: Contains no provision concerning "absorption".

Tariff: Contains authority to absorb, same as stated after *Tariff* under *North Atlantic Continental Freight Conference (Agreement No. 4490)* above, including change August 22, 1949, discontinuing absorption.

Gulf/Scandinavian and Baltic Sea Ports Conference (Agreement No. 5400)

Agreement: Contains no provision concerning "absorption".

Tariff: The only absorption authorized, "is on Cotton and Cotton Linters which rates are based on Class A vessel rating and actual differences of insurance account of class of vessel or deviation may be absorbed upon presentation of receipted insurance bills"

North Atlantic Baltic Freight Conference (Agreement No. 7670)

Agreement: Contains no provision concerning "absorption".
Tariff: Contains authority to absorb insurance differentials, the same as stated after *Tariff* under *Gulf/Scandinavian and Baltic Sea Ports Conference (Agreement No. 5400) above;* but changed August 31, 1949, discontinuing absorption.

South Africa/U. S. A. Conference (Agreement No. 3579)

Agreement: Contains no provision concerning "absorption".
Tariff:

"1 When, for the convenience of the ship, under deck cargo may be stowed on deck, the ship may absorb the differences between on-deck and under-deck insurance premiums.

2. If, by reason of vessel being over twenty years old, additional insurance premiums are charged by underwriters, the ship may absorb the amount of such additional premiums. All instances of such absorption shall be reported in writing to the Conference office.

3. In respect of shipments of Gold Bullion, if, by reason of vessel not having Bullion Room approved by the Bank's underwriters, the Bank is called upon to pay a higher rate of insurance, the ship may absorb the additional insurance premium charged by the underwriters up to an amount of 2½¢ per $100 Ad Valorem. Bills for payment of all such additional insurance premiums shall be approved by the Conference Secretary before payment".

Gulf and South Atlantic Havana Steamship Conference (Agreement No. 4188)

Agreement: Contains no provision concerning "absorption".
Tariff:

"(a) Rates published herein do not include Marine or other insurance.

(b) On cargo stowed on deck for the convenience of a member line, the difference between on-deck and under-deck insurance on the cargo on that particular vessel may be absorbed. All such absorptions shall be reported to the Conference."

Pacific Coast River Plate Brazil Conference (Agreement No. 6400)

Agreement: Provides that there shall be no absorption of any charges.
Tariff: "Rates do not include Marine Insurance and/or charges (if any) for shipping documents, consul fees, etc."

FEDERAL MARITIME BOARD

No. 693

IN THE MATTER OF AGREEMENT NO. 6870 AND THE PRACTICES OF THE PARTIES THERETO WITH RESPECT TO RATES GRANTED OIL COMPANIES

Submitted June 21, 1950. Decided October 30, 1950

Agreements Nos. 6870 and 6190, in so far as they authorize special rates to oil companies on supplies and equipment for use in Curacao, Aruba, Bonaire, Netherlands West Indies, and Venezuela, have not been shown to be in violation of sections 14, 16, and 17 of the Shipping Act, 1916, or in contravention of section 15 thereof, and should not be disapproved. The proceeding ordered discontinued.

Parker McCollester and *John R. Mahoney* for respondents.
Hymen I. Malatzky for Himala International, intervener.
George F. Galland for the Board.

REPORT OF THE BOARD

This is an investigation on its own motion by the United States Maritime Commission, our predecessor, to determine whether Agreement No. 6870 and paragraph 6 (c) of Agreement No. 6190, in so far as they authorize special rates under special conditions to oil companies on supplies and equipment for their own use in Curacao, Aruba, Bonaire, Netherlands West Indies, and Venezuela, should be disapproved. Hymen I. Malatzky, under the name of Himala International, intervened against the agreements. The examiner found that the agreements had not been shown to be in violation of sections 14, 16, and 17 of the Shipping Act, 1916, or in contravention of section 15 thereof, and should not be disapproved. Exceptions to the examiner's recommended decision were filed by Himala International but oral argument was not requested.

The exceptions are in the nature of general conclusions that the contracts between the carriers and the oil companies, which are described

fully in the examiner's recommended decision, result in a violation of sections 14, 16, and 17 of the Act and run counter to the provisions of section 15 thereof. In essence, these conclusions are nothing more than a disagreement with the examiner's evaluation of the evidence. It is also alleged that the shippers named in the contracts are not the oil companies themselves and are not the ones who use the supplies and equipment subject to the contracts, and that therefore the contracts are misleading and should not be sanctioned. This entirely disregards the fact that the shippers, as affiliates of the oil companies, are charged with the purchase and shipment of all supplies and equipment used by the oil companies. For the purpose of this proceeding we are justified in considering the shippers and the oil companies one and the same.

Upon the whole record we find (1) that the exceptions are without merit, (2) that the facts are as set forth in the examiner's recommended decision, which we adopt and make a part hereof,* and (3) that agreement No. 6870 and paragraph 6 (c) of Agreement No. 6190 should not be disapproved.

An order discontinuing this proceeding will be entered.

*See Appendix.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., this 30th day of October A. D. 1950.

No. 693

IN THE MATTER OF AGREEMENT NO. 6870 AND THE PRACTICES OF THE PARTIES THERETO WITH RESPECT TO RATES GRANTED OIL COMPANIES

This proceeding having been instituted on the motion of the United States Maritime Commission, the Board's predecessor, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Board, on the date hereof, having made and entered of record a report containing the conclusions and decision thereon, adopting the recommended decision of the examiner, which report and decision are hereby referred to and made parts hereof;

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

By the Board.

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

APPENDIX

FEDERAL MARITIME BOARD

No. 693

IN THE MATTER OF AGREEMENT NO. 6870 AND THE PRACTICES OF THE PARTIES THERETO WITH RESPECT TO RATES GRANTED OIL COMPANIES

Agreements Nos. 6870 and 6190, in so far as they authorize special rates to oil companies on supplies and equipment for use in Curacao, Aruba, Bonaire, Netherlands West Indies, and Venezuela, have not been shown to be in violation of sections 14, 16, and 17 of the Shipping Act, 1916, or in contravention of section 15 thereof, and should not be disapproved. The proceeding should be discontinued.

Parker McCollester and *John R. Mahoney* for respondents.
Hyman I. Malatzky for Himala International, intervener.
George F. Galland for the Board.

RECOMMENDED DECISION OF C. W. ROBINSON, EXAMINER

This is an investigation by the Board[1] to determine whether Agreement No. 6870 and paragraph 6 (c) of Agreement No. 6190 should be disapproved. Himala International intervened against the agreements.

Agreement No. 6190, approved August 11, 1938, pursuant to section 15 of the Shipping Act, 1916, hereinafter referred to as the Act, covers the transportation of cargo between U. S. Atlantic and Gulf ports and ports in Curacao, Aruba, Bonaire, Netherlands West Indies, and Venezuela.[2] Paragraph 6 (c) of the agreement provides as follows:

> "Nothing herein contained shall prevent any of the parties hereto from making contracts for carrying cargo of oil companies to points of delivery in the island of Curacao, Aruba and Bonaire, Netherlands West Indies and Venezuela, provided that such cargo is intended for the sole use of the oil

[1] The investigation was initiated by the United States Maritime Commission on its own motion on August 23, 1949, but in accordance with section 104 of Reorganization Plan No. 21 of 1950, submitted by the President to the Congress on March 13, 1950, effective May 24, 1950, the regulatory functions of the Commission were transferred to the Federal Maritime Board.

[2] The parties to this agreement are respondents Alcoa Steamship Company, Inc., Grace Line, Inc., Lykes Bros. Steamship Co., Inc., Royal Netherlands Steamship Co. (Koninklijke Nederlandsche Stoomboot Maatschappij N. V.), Rederiet Vindeggen A/S, Rederiet Besseggen A/S, Skipsaksjeselskapet Essi, Skipsaksjeselskapet Estero, Dampskibsaksjeselskapet Esito, and Bj Ruud-Pedersen.

companies in the equipment and operation of their plants and not for resale purposes."

Under Agreement No. 6870, approved May 4, 1939, respondents Alcoa, Grace, Lykes, and Royal Netherlands, hereinafter referred to as respondents, undertake that the cargo encompassed by paragraph 6 (c) above, shall be carried "at rates and charges and upon terms and conditions and in accordance with rules and regulations unanimously agreed upon; and that same shall be duly filed with the U. S. Maritime Commission * * *."

As of the time of the hearing respondents had two contracts with E. D. Sheffe,[3] both dated June 11, 1948, and one with Asiatic Petroleum Corp.,[4] dated June 16, 1948. Each provides "that the materials to be shipped under this Agreement are not for resale, except to the Shipper's own employees but are for the sole and exclusive use of the shipper in connection with the exploration, exploitation, refining, transportation and maintenance of their producing and refining operations of Petroleum products" in Venezuela and/or the Netherlands West Indies.[5] The contracts also provide that the shippers shall furnish, without cost to respondents, safe and suitable berths or anchorage, and that the vessels shall remain continuously in berth until discharge is completed. Rates for the various articles, set forth in schedules attached to the contracts, are generally lower than the regular tariff rates therefor, and are based on competition and lower cost of operation.

To aid in the development of their oil resources, Venezuela and the Netherlands West Indies waive import duties on oil equipment and supplies. The contract traffic here involved approximates 300,000 tons a year, or roughly 25 percent of respondents' total business to the area, and is discharged at the properties of the oil companies usually some distance from respondents' regular ports of discharge. The industrial materials move in such large volume as to make them subject to tramp competition. Indeed, one major oil company switched to chartered tonnage several years ago. It was testified that much of the material used by the oil companies is now available in Europe as well as in the United States, a situation aided by the recent devaluation of foreign currencies, and that as a small difference in the total delivered cost can result in the loss of business to European suppliers, it is most important to American suppliers and respondents alike that the materials be delivered as cheaply as possible. Local merchants at destination are not prejudiced by the contracts as the materials shipped thereunder are not for resale. Furthermore, materials of the kind under consideration are not bought by the companies in the countries where used because of their high prices, which include heavy import duties. As a protective measure, the oil companies must certify that shipments moving at the contract rate come within the terms of the contract. Occasional commercial shipments are carried at regular tariff rates and are discharged at the public terminals utilized by respondents. There is no indication that the contracts are carried out in other than the strictest manner.

It was testified that the laws of Venezuela require oil companies to provide commissaries for their employees in remote areas, and to sell at prices fixed by

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[3] Sheffe represents a group of Venezuelan and Netherlands West Indies companies, subsidiaries of Standard Oil Co.

[4] Asiatic is a subsidiary of Batavian Petroleum Co., a member of the Royal Dutch Shell group.

[5] The materials consist principally of pipe, cement, and iron and steel articles, and commissary supplies for employees.

the Government. Sometimes the companies are compelled to sell for less than the cost of laying the goods down in Venezuela. The employees profit by the low prices and the arrangement is not unfair to local business as usually there are no available stores in such outlying places.

Although there are no figures of record, it was testified that the cost of delivering materials at the companies' private terminals is less than at regular public terminals used by respondents. The companies furnish free facilities, which can be used uninterruptedly until discharge is completed, advantages not enjoyed at the public terminals; there are no stevedoring charges at the private terminals; the employees of the companies handle the cargo more efficiently and expeditiously than the stevedores at the public terminals; commercial cargo must be cleared through the customs, with all its ramifications and delays; at the public terminals respondents sometimes are called upon to make good for losses over which they have no control, a situation which does not exist at the private terminals; and matters relating to customs duties are handled by the companies themselves where the cargo is discharged at their terminals. Conditions at the public terminals in the Netherlands West Indies are better than in Venezuela but costs are equally high. From the foregoing comparison it seems safe to assume that it is cheaper to deliver oil-company supplies at company terminals than at public terminals.

Respondents are willing to make contracts with other shippers similarly circumstanced even though they may not be oil companies. It is significant that no complaints had been received against the contracts until Himala International intervened herein. Himala, an exporter of chemicals and related products, admittedly has not shipped anything to Venezuela for several years. Its objections to the contracts are that the chemicals used by the oil companies would be competitive with those shipped by Himala, and that in the future it might export foodstuffs to Venezuela which could be bought locally by the oil-company employees if the commissaries were discontinued.

Conclusions

Section 15 of the Act authorizes the Board to disapprove any agreement, "whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act:"[6] It is clear beyond cavil on this record that the present agreements are not unjustly discriminatory or unfair as between carriers, importers, or ports, or between exporters and their foreign competitors. There remains for determination, therefore, whether the agreements are unjustly discriminatory or unfair as between shippers or exporters, or operate to the detriment of the commerce of the United States, or are in violation of the Act.

The record is devoid of any substantal evidence that the contracts result in unjust discrimination or unfairness as between shippers or exporters. As already noted, no other shipper has asked for a similar contract and been refused, and the uncontradicted testimony is that shippers similarly circumstanced, irrespective of whether they are oil companies, would be accorded the same rights and privileges as the oil companies. The position of intervener Himala, the only

[6] It must be kept in mind that the present discussion is limited to the special contracts involved and does not relate to the over-all lawfulness of the agreements.

complainant against the contracts, being based on indeterminate future trading, is much too nebulous to justify disapproval of the agreements. Furthermore, from the evidence it does not appear likely that Himala would get any more business if the contracts were cancelled and the oil companies utilized tramp vessels or bought their supplies from European sources.

To be a detriment to the commerce of the United States there must be at least a plausible possibility that the action complained of will affect commerce adversely. There is no such manifestation in the present proceeding. On the contrary, the contracts enable American exporters to compete in foreign markets, an end most desirable whenever possible. Furthermore, respondents have managed to retain a large bloc of traffic which easily could be carried by tramp vessels or by lines operating between Europe and South America. The loss of such traffic conceivably could upset the conference schedule of regular and dependable service. In the final analysis, the present contracts further the interests of American commerce rather than result in a detriment thereto.

Section 14 (4) of the Act forbids any common carrier by water from making any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered. In a broad sense the present contracts are based on volume, for 25 percent of respondents' entire southbound traffic in the trade certainly is a substantial figure. However that may be, the contracts are not unfair or unjustly discriminatory in view of the circumstances. Rather are they premised on a very practical approach to a difficult problem involving the welfare of a segment of the American shipping public and of the conference lines themselves. The commodities subject to the contracts are such as to remove them from the realm of ordinary commercial competition, and no shipper or consignee has been shown to be hurt by the contracts.

Section 16 (1) of the Act makes it unlawful for any common carrier by water "to make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Since this section and section 14 (4) basically are the same in so far as this proceeding is concerned, further discussion with respect to section 16 (1) is not necessary.

The only other part of the Act having a possible bearing on the subject is section 17, which prohibits any common carrier by water in foreign commerce from demanding, charging, or collecting "any rate, fare, or charge which is unjustly discriminatory between shippers or ports * * *." It has been found that the contracts do not violate any other provision of the Act, and the evidence is not persuasive that the rates themselves are out of line for the service performed, in the light of all the circumstances.

The view of the Board's predecessors on sections 14, 16, and 17 of the Act are clearly set forth in the cases of *Phila. Ocean Traffic Bureau* v. *Export S. S. Corp.*, 1 U. S. S. B. 538, *Atl. Refining Co.* v. *Ellerman & Bucknall S. S. Co. et al.*, 1 U. S. S. B. B. 242 and 531, and *The Paraffine Co.'s Inc.* v. *Amer.-Hawaiian S. S. Co. et al.*, 1 U. S. M. C. 628. In the first case cited, at page 541, the Secretary of Commerce said:

> "It is well settled that the existence of unjust discrimination and undue prejudice and preference is a question of fact which must be clearly demonstrated by substantial proof. As a general rule there must be a definite showing that the difference in rates complained of is undue and unjust in

that it actually operates to the real disadvantage of the complainant. In order to do this it is essential to reveal the specific effect of the rates on the flow of traffic concerned and on the marketing of the commodities involved, and to disclose an existing and effective competitive relation between the prejudiced and preferred shipper, localities, or commodities."

In the *Atl. Refining Co.* case, at page 250, the United States Shipping Board said:

"Sections 16 and 17 of the Shipping Act do not forbid all discriminatory, preferential, or prejudicial treatment, nor does Section 14 declare unlawful all contracts based on the volume of freight offered. To paraphrase the language of the Supreme Court in the case just cited (*United States* v. *Illinois Central R. R.*, 263 U.S. 515): To bring a difference in rates within the prohibition of these sections it must be shown that such a difference is not justified by the cost of the respective services, by their values, or by other transportation conditions."

Upon this record the Board should find that Agreement No. 6870 and paragraph 6 (c) of Agreement No. 6190, in so far as they authorize special rates to oil companies under the circumstances hereinbefore described, are not violative of any of the provisions of the Act or in contravention of section 15 thereof, and should not be disapproved. The proceeding should be discontinued.

UNITED STATES MARITIME COMMISSION

No. 678

INCREASED RATES—SHIP'S ANCHORAGE TO SHORE—NOME, ALASKA

Respondent's rates as a whole for the transportation of commodities from and to points in Alaska not shown to be unlawful.
Suspended schedules not justified.

Malcolm D. Miller for complainant.
S. J. Wettrick for respondent.

RECOMMENDED DECISION OF F. J. HORAN, EXAMINER

On May 5, 1948, respondent, Lomen Commercial Company, filed with the Commission its tariff naming rates for the transportation of commodities between ship's anchorage and shore at Nome, Golovin, Teller, Solomon, and other places in Alaska and from Golovin and Teller anchorages to points beyond Golovin and Teller. Upon protest of the Territory of Alaska, hereinafter called complainant, the rates named in the tariff on cigars, cigarettes, tobacco, snuff, and groceries were suspended by the Commission until October 5, 1948. The other rates contained therein became effective on June 5, 1948. Following the action of the Commission, respondent indefinitely extended the period of suspension, at the same time amending the tariff to show the lower rates that would apply on the commodities mentioned in lieu of the rates suspended. This proceeding concerns the lawfulness of all rates in the tariff.

There has been no formal hearing in this proceeding. Data relating to the question of whether the tariff results in net income in excess of a fair return have been submitted informally, and complainant and respondent have agreed that the matter should be disposed of on the basis of such data. It has been decided to follow this procedure. As in *Rates between Places in Alaska*, 3 U. S. M. C. 33, revenues and expenses in connection with the transportation involved will be spoken of as those of respondent's lighterage department to distinguish them from the revenues and expenses of respondent's sales department.

In the case cited, it was determined that the value for rate-making purposes of the lighterage department's property did not exceed $250,000, and 7 percent of such fair value, or $17,500, was found to be a fair return. No change in such fair return is warranted by the record in the instant proceeding.

As pointed out in *Rates between Places in Alaska*, *supra*, the season of navigation in the area in which respondent operates is limited by weather conditions to approximately the 5-month period from June to October, inclusive. In 1948, the cargo carried by respondent totaled 29,577 tons, and for such transportation it received $222,860.60. Sundry lighterage-department revenue of $10,650.25 increased this sum to $233,510.85.

Respondent computes its lighterage-department expenses for 1948 as follows: operating, $177,782.98; administrative, Seattle office, $20,-000; administrative other than Seattle office, $28,974.43; total, $226,-757.41. On the basis of this computation, the lighterage department's net income before income taxes would be $6,753.44, and after income taxes, $5,300.15, or $12,199.85 less than a fair return.

The sum of $28,974.43 appearing as the lighterage department's administrative expenses for other than the Seattle office is 89.456 percent of the total of other-than-Seattle-office administrative expenses, which amounted to $32,389.59, leaving 10.544 percent thereof, or $3,-415.16, to be borne by the sales department. Such percentages are the proportions that the gross revenue of the lighterage department and the gross revenue of the sales department, respectively, bear to the combined gross revenue of the two departments except that deducted from the sales department's gross revenue are the cost of goods sold and certain agency expenses. In *Rates between Places in Alaska*, *supra*, only the cost of goods sold was allowed as a deduction. However, in the instant proceeding, the lighterage department's net income would not exceed a fair return even if no deduction were made. In such case, 73.949 percent, or $23,951.78, would be allocated to that department. Its net income before income taxes would be $11,776.09, and after income taxes, $9,167.58, or $8,332.42 less than a fair return.

The deficiency of net income does not warrant the conclusion that each and every rate in force under the tariff in question is below a reasonable maximum. To quote from *Interstate Commerce Commission* v. *Union Pacific Railroad Company*, 222 U. S. 541, 549: "Where the rates as a whole are under consideration, there is a possibility of deciding, with more or less certainty, whether the total earnings afford a reasonable return. But whether the carrier earned dividends or not sheds little light on the question as to whether the rate on a particular article is reasonable."

There being no evidence from which it can be determined whether respondent's rates in effect on cigars, cigarettes, tobacco, snuff, and groceries are lower than maximum reasonable rates, it cannot be said that, if increased as proposed in the suspended items, they would be just and reasonable.

The Commission should find that the effective rates in question, as a whole, are not shown to be unlawful. It should find further that the suspended rates have not been justified.

Correspondence of record indicates dissatisfaction on the part of United States Smelting Refining and Mining Company with respondent's rates on bulk oil. A determination as to the lawfulness of such rates may be had by filing a complaint as provided in section 22 of the Shipping Act, 1916, as amended.

An appropriate order should be entered.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 2d day of November 1950

No. 678

INCREASED RATES—SHIP'S ANCHORAGE TO SHORE—NOME, ALASKA

It appearing, that by order dated June 4, 1948, the United States Maritime Commission ordered a hearing into the lawfulness of the rates, charges, regulations and practices in tariff schedules of respondent Lomen Commercial Company enumerated and described in said order and suspended the operation of certain items therein enumerated until October 5, 1948;

It further appearing, That investigation of the matters involved has been made by a hearing examiner, who has issued a report recommending a finding that the schedule of rates as a whole had not been shown to be unlawful but that the increases suspended were not shown to have been justified; and that the parties filed no exceptions to said report;

It further appearing, That intervener, the Territory of Alaska, has agreed that this proceeding may be discontinued without prejudice, and the respondent has agreed that the case may be dismissed on the basis of the findings recommended by the examiner;

It is ordered, That the findings recommended by the examiner be adopted as those of the Board, and that this proceeding be discontinued and dismissed.

By the Board.

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

Secretary.

FEDERAL MARITIME BOARD

No. 681

HYMEN I. MALATZKY, DOING BUSINESS AS HIMALA INTERNATIONAL

v.

AMERICAN EXPORT LINES, INC., ET AL.

Submitted October 18, 1950. Decided December 1, 1950

Exclusive patronage contract dual rate system of North Atlantic Mediterranean Freight Conference is not in violation of the Shipping Act, 1916, or in contravention of section 15 thereof.

A provision of a conference contract with the shipper, giving the carrier an option to declare the contract terminated if the shipper violates the contract by shipping via a nonconference vessel, is unjustly discriminatory and should be eliminated from the contract.

Complaint dismissed.

Hymen I. Malatzky for complainant.

George E. Walsh for Pacific Coast Borax Company.

Roscoe H. Hupper and *Burton H. White* for American Export Lines, Inc.

REPORT OF THE BOARD

BY THE BOARD:

By complaint filed June 18, 1948, complainant alleges that 7 days previously he had shipped 75 drums of DDT on respondent's vessel *Exford*, consigned to Athens, Greece, and on which was paid freight at the rate of $45 per ton, under protest, whereas he should have been charged only $37.50 per ton, which was the rate charged to shippers signing contracts giving their exclusive patronage to the carrier. It is contended that the dual rate system is void. The relief asked includes an order declaring the conference, to which respondent is a party, to be a conspiracy, an order withdrawing the Board's approval of the conference agreement, and an order requiring the discontinuance of the dual rate system. The complaint also seeks reparation in the sum

of $41.89, the difference between the noncontract rate charged and the contract rate which complainant claims should have been charged on the 5 tons or more of cargo carried.

The examiner recommended that the complaint be dismissed. We agree in general with the examiner's recommendations. The matter was argued on exceptions before the Board on the same day with No. 684, *Isbrandtsen* v. *North Atlantic Continental Freight Conference, et al.* (decided December 1, 1950), involving many of the same questions, and in which proceeding the present complainant was an intervener.

On February 17, 1948, our predecessor, the United States Maritime Commission, approved the conference agreement of North Atlantic Mediterranean Freight Conference, of which respondent is a member, the agreement providing for the dual rate system discussed at length in the *Isbrandtsen* case, *supra.* The attack on the dual rate system in the instant case is substantially the same as in the *Isbrandtsen* case, *supra*, and for the reasons set forth in the opinion in that case, we find that the system here under consideration is not in violation of the Shipping Act, 1916.

Complainant here admitted that he had signed a conference contract prior to the shipment in question, as assistant manager of Bernard Ring, a merchant exporter, and later, on September 13, 1948, after the shipment, signed a contract on behalf of himself trading as Himala International. In his testimony he somewhat modified his original position and stated that he did not then attack the dual rate system as unlawful *per se*, but objected to the fact that the ocean rates in effect prior to the effective date of the dual rate system were made the contract rates, and a higher rate established for noncontract shippers. He stated that if the conference had continued its prior rates for noncontract shippers and established lower rates for contract shippers, then he "could not have had any objection." His position apparently amounts to a contention that the measure of the rates is too high. Nothing in the evidence, however, supports this contention.

An objection not advanced in the *Isbrandtsen* case, *supra*, is that the contract provision requires tender of American shipments to conference lines regardless of whether the cargo is to be transported on a through vessel or is subject to transshipment. It is claimed that the conference is thereby attempting to control shipments to ports not actually served. We do not see that this objection has validity since both types of carriers must be deemed to serve the ultimate destination, whether directly or through an on-carrier.

The only objection which complainant makes to the form of the contract, and which appears to us to have merit, is that which is directed to the carrier's option to terminate the contract and collect damages in case of the shipper's violation. As indicated in our opinion in the *Isbrandtsen* case, *supra*, we think the contract should be modified to eliminate this feature.

The testimony shows that complainant has been reimbursed by his Greek customers for the full amount of the freight charges with respect to which he complains. This fact alone, however, would not be considered by the Board as a basis for refusing reparation if complainant were otherwise entitled to it, since complainant would be under obligation to hold the amount of any recovery for the benefit of the party justly entitled thereto. We find that complainant is not entitled to reparation. He paid the noncontract published rate, and because he had not signed the conference contract he was not entitled to the contract rate. Moreover, granting the lower contract rate to complainant without obtaining his signature to the contract, would have amounted to an unreasonable discrimination in his favor by the carrier, and would have been unlawful.

FINDINGS

We find as follows:

(1) The option provision contained in the contract of North Atlantic Mediterranean Freight Conference, permitting termination of the contract and the collection of damages by the conference at the option of the carrier, is unreasonable and should be eliminated.

(2) In other respects the approval heretofore given to the conference agreement by our predecessor, the United States Maritime Commission, on February 17, 1948, is continued.

(3) Reparation is denied.

An order will be entered dismissing the complaint.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 1st day of December, A. D. 1950

No. 681

HYMEN I. MALATZKY, DOING BUSINESS AS HIMALA INTERNATIONAL

v.

AMERICAN EXPORT 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 Board, 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 the complaint herein be, and it is hereby, dismissed.

By the Board.

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

FEDERAL MARITIME BOARD

No. 684

ISBRANDTSEN COMPANY, INC.

v.

NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE ET AL.[1]

Submitted October 18, 1950. Decided December 1, 1950

The proposed exclusive patronage contract dual rate system of North Atlantic Continental Freight Conference and of Continental North Atlantic Westbound Freight Conference are not in violation of the Shipping Act, 1916, or in contravention of section 15 thereof.

A provision of a conference contract with the shipper, giving the carrier an option to declare the contract terminated if the shipper violates the contract by shipping via a non-conference vessel, is unjustly discriminatory and should be eliminated from the contract.

Complaint dismissed.

John J. O'Connor and *William L. McGovern* for complainant.

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

Joseph E. McDowell for United States Department of Justice, *Henry A. Cockrum* for United States Department of Agriculture, *Hymen I. Malatzky* for Himala International, and *E. A. McDonald, Jr.*, and *T. R. Stetson* for Pacific Coast Borax Co., interveners.

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

REPORT OF THE BOARD

By the Board:

The complainant, hereinafter called "Isbrandtsen", originally brought suit in the District Court of the United States for the Southern

[1] Continental North Atlantic Westbound Freight Conference, A/S J. Ludwig Mowinckels Rederi, Black Diamond Steamship Corporation, Compagnie Generale Transatlantique, Compagnie Maritime Belge, Cunard White Star, Ltd., Ellerman's Wilson Line, Ltd., Dampskibsselskabet af 1912 A/S, A/S Dampskibsselskabet Svendborg, United States Lines Company, N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, Waterman Steamship Corporation, and South Atlantic Steamship Line, Inc.

District of New York, seeking to restrain the respondents, who constitute, respectively, the eastbound and westbound North Atlantic conferences, from putting into effect the so-called exclusive patronage contract, hereinafter referred to as the "contract", providing for contract and non-contract rates, hereinafter referred to as the "dual rate system", and seeking to set aside so much of certain orders of the United States Maritime Commission, our predecessor, as purported to authorize the dual rate system. The Commission's orders had been issued from time to time after investigation, but without adversary proceedings, approving the agreements of the two conferences and various amendments thereto, all pursuant to section 15 of the Shipping Act, 1916, hereinafter referred to as the "Act".

The original eastbound conference Agreement No. 4490 provided that the dual rate system might be negotiated with shippers. The original westbound conference Agreement No. 7000 failed to make mention of such system, but by amendment set forth in Agreement No. 7920–1, approved by the Commission, the system was authorized.

It appearing to the District Court that the conference carriers were about to put the dual rate system into effect and thereby require shippers to contract to employ conference carriers exclusively in order to secure tariff rates lower by 20 percent than those applicable if they failed so to contract, a temporary injunction was issued by the court on January 7, 1949, in order to preserve the *status quo*, on condition that Isbrandtsen should, within 20 days from the entry of the order, prosecute before the Maritime Commission a complaint challenging the validity of the dual rate system.

Thereafter, the present proceeding was instituted by Isbrandtsen, praying that so much of the conference agreements above mentioned as purported to authorize the system be revoked, and that the two conferences cease and desist from putting the system into effect. The Department of Justice, the Department of Agriculture, and certain individuals intervened, and counsel for the Board participated in the proceeding.

Isbrandtsen and the Department of Justice have made it clear to this Board and to the Maritime Commission, which will hereinafter collectively be referred to as the "Board", that they do not challenge the validity of the conference agreements generally, but only the dual rate system. Specifically, Isbrandtsen claims (1) that the system is illegal, because in violation of section 14 (3) of the Act, hereinafter quoted, and (2) that the Board may not, under section 15 of the Act, legally approve a conference agreement which includes the dual rate system, because that feature is in violation of section

14 (3), and because such approval would be tantamount to delegating to the conference the right to exclude Isbrandtsen from engaging in commerce. The last of the foregoing objections is based on the ground that the Congress has not delegated to the Board and the Board may not redelegate any such power to any conference, and that the threatened exclusion by the conference would deprive Isbrandtsen of its property without due process of law.

When the case came on before the examiner, Isbrandtsen filed copies of the proceedings in the District Court, the conference agreements, the contracts and rates, and thereupon rested, arguing that the dual rate system on its face showed a *prima facie* case of discrimination which was illegal *per se*. The record before us giving the history and actual operation of the system was developed from witnesses produced by respondents. All parties at interest were afforded opportunity to be heard, and after full adversary proceedings, the examiner recommended that the system should be found not to violate section 14 (3) of the Act, and that the contracts as presented should, with minor changes, be approved. With the examiner's recommendations, we generally agree.

Isbrandtsen, an American corporation organized in 1941, succeeded an earlier corporation, organized in 1921, and both have had a history of ocean shipping operation independent from conference ties. Isbrandtsen insists that it should have the right of unobstructed access to American shippers. Its vessels run in competition with conference liners. It claims that the offering of lower rates to shippers who agree to deal exclusively with the conference lines necessarily puts it at a disadvantage, and that the system restrains trade, encourages monopoly, and directly violates section 14 (3) of the Act. Isbrandtsen apparently is not interested in joining any conference. It is important to note that membership in the conferences in question is and has been open to it, and that the Board's predecessors, in passing on conference agreements, have from time to time insisted that any responsible common carrier be accepted to conference membership on reasonable terms. *Pacific Coast European Conference*, 3 U. S. M. C. 11, at p. 14 (1948). So Isbrandtsen's alleged handicap as an independent, competing for cargo in the face of the conference contract system, is a handicap voluntarily assumed and not the result of exclusion.

Before discussing the contracts, some consideration should be given to the conferences. It may be agreed that the conference system tends to monopoly. This system, as above stated, is not here under attack and at this late date could not very well be, for Congress, as is well known, has chosen to approve a policy of regulated monopoly

rather than cutthroat competition. Section 15 of the Act recognized carrier agreements

fixing or regulating transportation rates * * *; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; * * * or * * * providing for an exclusive, preferential, or cooperative working arrangement.

which under ordinary circumstances might be in restraint of trade, and authorized administrative approval thereof when they met statutory standards. The standards set forth in the same section authorize disapproval when the conference agreements are found to be

unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, * * * or to operate to the detriment of the commerce of the United States, or to be in violation of this act.

The reasons which led to the adoption of this Congressional policy are set forth in full in the Alexander Committee Report, H. R. Doc. 805, 63d Cong., 2d Sess., which was issued prior to the Shipping Act,1916, and on which the latter was largely patterned. The Committee recognized that conditions of ocean transportation were such as to permit recurrent rate wars, which disorganized service, impaired its quality, permitted discrimination against small shippers, discouraged "forward trading" by merchants, and ultimately resulted in monopoly through the process of extermination of absorption of the weaker units by the stronger (Report 295–303; 416), and stated, p. 416,

It is the view of the Committee that open competition can not be assured for any length of time by ordering existing agreements terminated,

and further observed, p. 298,

the conference system largely results in placing rates outside the influence of competition.

Coming now to the provisions of the contracts, there is little difference between the eastbound and the westbound form. The eastbound contract provides that the shipper ("Merchant") shall ship by the conference lines "all shipments of the commodities mentioned (or provided) below"; that "failure so to tender any such shipments to the carriers, or shipment of them by vessels other than those of the carriers shall be a violation of this contract"; that the carriers agree to transport the shipments on their vessels; that if the carriers fail to name space within three days after the shipper applies therefor, the shipper shall be free to secure space elsewhere without prejudice to the contract, but the shipper must first give the conference an opportunity to arrange space; that the carriers agree to furnish "space in such vessels as they may respectively load"; that if the shipper shall

make shipment in violation of the contract the carriers "shall have the option at any time to declare this agreement terminated, and the Merchant shall be liable to the carriers for liquidated damages equal to twice the amount of freight that would have been payable under this contract in respect of the shipments constituting the violation"; that "other commodities as may be shipped by the Merchant from time to time, which shall be deemed covered by this agreement", shall be at the lowest rates then in effect for the particular commodity; that rates are subject to reasonable increase from time to time, and that the notice thereof shall be deemed accepted by the shipper unless, within 20 days after his receipt of the notice, he gives the carriers written notice of non-acceptance, in which case the carriers shall have the option at any time within 20 days after receipt of the shipper's notice to cancel the agreement on giving the shipper at least 60 days; written notice; that the carriers shall have the option to reduce their rates, the shippers in such case to receive the benefit thereof; and that the agreement shall continue in effect throughout consecutive subsequent years subject to the right of either the shipper or the carriers to terminate it as of December 31 in any year by giving the other party 90 days written notice of termination.

The testimony showed that by practical operation the contract shipper was guaranteed against a change of rate for at least 80 days.

Our function in this proceeding is to re-examine the dual rate system to determine whether it violates any express statutory provisions, or if not, whether it contains any elements which violate statutory standards so as to require administrative disapproval.

The gist of Isbrandtsen's argument is that the system violates statutory provisions in that it sets up dual rates for the same service and thereby necessarily creates *discrimination* between those shippers who sign and those who refuse. Isbrandtsen claims that it makes no difference that such discrimination may not be *unreasonable* or *unjust*, contrary to the requirements of sections 15, 16, and 17 of the Act. It points out that the language of section 14 (3) of the Act, unlike that of the other sections referred to, outlaws not only *unreasonable* discrimination but *all* discrimination. Relying on dicta of the Supreme Court in *Swayne Hoyt, Ltd.* v. *U. S.* 300 U. S. 297, complainant concludes that *a prima facie* case of discrimination has been made out, which may not be excused on any showing of reasonableness.

Section 14 (3) of the Act reads as follows,

That no common carrier by water shall, directly or indirectly, * * *

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discrimi-

nating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

It is to be noted that the modifying words "unjust" or "unreasonable" do not appear before the word "discriminating" in this section, as they do in the other sections referred to, although the word "unfair" follows immediately after. Nevertheless, we cannot agree that this section has the effect which Isbrandtsen claims. For this there are several reasons: first, such an interpretation would be contrary to the interpretations which our predecessors have uniformly given since the adoption of the Act in 1916; secondly, such an interpretation would make impossible any harmonious administration of the Act as a whole; thirdly, such construction would extend the application of section 14 (3) to carriers' activities generally, whereas we think application is limited to such retaliation as is there described.

Referring first to the prior decisions of our predecessors, it must be pointed out that the attack made against the dual rate system in this case is substantially the same as was made in *Pacific Coast European Conference Agreement*, *supra*, in which the Department of Justice and the Department of Agriculture participated. What the Maritime Commission said in that case is so appropriate here as to require extensive quotation (p. 16):

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.* * * *

In 1933 the dual rate system was under attack in the case of *Rawleigh* v. *Stoomvaart et al*, 1 U. S. S. B. 285, on the ground that it violated section 14 (3) as well as other sections of the Act. The Shipping Board pointed out that the dual rate practice had then been in effect for many years and had received the approbative attention of the Congressional Committee which drafted the 1916 Act. The Board expressly found that the system did not violate section 14 (3). The practice of our predecessors has been to examine the details of each dual rate system which has been presented, and determine whether there was violation of any express prohibition of the Act, or whether any features were unreasonable or unjustly discriminatory. In a number of the reported decisions of our predecessors, dual rate systems have been disapproved on the latter ground. So in *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U. S. S. B. 41 (1922), a dual rate structure put into effect by a single carrier permitting shippers no choice of service, was disapproved. Again, in *Intercoastal Investigations, 1935*, 1 U. S. S. B. B. 400, and in 1936, *Gulf Intercoastal Contract Rates*, 1 U. S. S. B. B. 524, the Secretary of Commerce determined that the application of the dual rate system in the *intercoastal* trade was unreasonable because of the statutory rate protection there given to intercoastal carriers under the Intercoastal Shipping Act, 1933. The latter of these two cases was, of course, the one reviewed by the Supreme Court under the name of *Swayne & Hoyt, Ltd.* v. *United States*, *supra*, wherein the disapproval of the dual rate system was based on the Secretary's finding of unreasonableness, and not on the ground of violation of section 14 (3). The court, in a note appended to its opinion (p. 307), discussed the particular interpretation of section 14 (3) urged by Isbrandtsen in this case, but did not adopt it.

Based on the interpretation above outlined, our predecessors since 1931 approved no fewer than 32 conference agreements which provide either specifically or inferentially for the dual rate system—and of these agreements, 24 are now in effect and the respective conferences are making active use of the dual rate system.

It may be noted in passing that complainant's predecessor corporation, Isbrandtsen-Moller, adopted for itself an exclusive patronage dual rate system from 1937 to 1939 and filed 176 dual rates with the Maritime Commission, thus apparently at that time agreeing with the Commission's interpretation of the law.

Secondly, complainant's interpretation of section 14 (3) of the Act would make any harmonious construction or administration of

the Act most difficult. If an agreement between carriers submitted to the Board for approval under section 15 were found to contain no unjust or unreasonable discrimination, it would pass muster so far as that section and sections 16 and 17 are concerned. The Board cannot believe that a different standard was set up for testing such agreements by section 14 (3), which might require an opposite finding. It is to be noted that section 15 of the Act expressly requires the filing by carriers of all agreements including and "giving or receiving special rates". We consider that the lower of the two rates shown in the dual rate tariffs filed in this case to be a "special rate" of this description. Possibly, and in order to harmonize with other language in the same section and with other sections, the naked word "discrimination" in section 14 (3) should be held to mean "unjust" or "unreasonable" discrimination. *United States* v. *Wells-Fargo Express Co.*, 161 Fed. 606, affirmed 212 U. S. 522; *U. S. Navigation Co.* v. *Cunard S. S. Co., Ltd.*, 284 U. S. 474.

Finally, we feel that the language of section 14 (3) of the Act is not to be considered as a standard for judging all carrier agreements, but establishes a prohibition against an undesirable practice, i. e., "retaliation". To retaliate is defined in Webster's New International Dictionary, 1945 Unabridged Edition, as "to return like for like" or "evil for evil". Retaliation perhaps connotes the idea of vengeance. Such conduct among carriers in their relations with shippers is in our judgment the evil which section 14 (3) was designed to prohibit. We cannot view the adoption of the dual rate system or the charging of a higher rate to a shipper who voluntarily declines to give his exclusive patronage as a "retaliation". The higher rate cannot be said to be charged as a retaliation for "patronizing any other carrier". It is charged because the shipper does not sign the contract, regardless of whether or not he patronizes any other carrier. A non-signing shipper who does not patronize a non-conference carrier is treated as harshly as a non-signing shipper who ships partially or exclusively with such a carrier.

The history of the various subsections of section 14 appears to support the above analysis. Section 14 (1) made unlawful payment of deferred rebates, a practice which prevailed prior to the 1916 Act, and up to that time had not been held unlawful by the courts. *United States* v. *Prince Line*, 220 Fed. 230 (1915), reversed as moot, 242 U. S. 537. Section 14 (2) made unlawful the use of fighting ships, a practice which even before the 1916 Act was frowned on by the courts in the same case. Section 14 (4) made unlawful all contracts and rates which unfairly and unjustly discriminated between large and small

shippers. Finally, and in addition to the foregoing practices which were considered and condemned in the Alexander Committee Report (Report, *supra*, p. 421), section 14 (3) made unlawful "retaliation" as there defined. A real case of retaliation had been before the courts [*Menacho* v. *Ward*, 27 Fed. 529 (1886)] and was a leading precedent prior to 1916, and in it real carrier retaliation had been condemned. There, two steamship lines engaged in the New York-Cuba trade had increased their rates to plaintiffs because plaintiffs had previously made shipments via tramp carriers in the trade. This was retaliation for the shipper's previous action. The case involved no contract between the shippers and the carriers, a circumstance which was deemed important to the decision, as appears from the following extract, p. 533.

The defendants, to maintain the affirmative, assert that their charges are fair because they do not have the whole of the complainants' carrying business. But it can never be material to consider whether the carrier is permitted to enjoy a monopoly of the transportation for a particular individual, or class of individuals, in ascertaining what is reasonable compensation for the services actually rendered to him or them. *Such a consideration might be influential in inducing parties to contract in advance*; but it has no legitimate bearing upon the value of services rendered *without a special contract*, or which are rendered because the law requires them to be rendered for a fair remuneration." (Emphasis supplied.)

We believe that section 14 (3) was a codification of the common law illegality of retaliation as appearing in the *Menacho* decision. We believe that the distinction between what we regard as real retaliation as condemned in the *Menacho* case, on the one hand, and the dual rate system now under consideration, on the other hand, was recognized in the case of *Lough* v. *Outerbridge,* 143 N. Y. 271 (1894), also decided under the common law well before the 1916 Act. The New York case last cited found nothing unlawful in the dual rate system, expressly pointing out that the *Menacho* case applied to an entirely different situation, the court explaining, p. 280:

The authorities cited seem to me to remove all doubt as to the right of a carrier, by special agreement, to give reduced rates to customers who stipulate to give them all their business, and to refuse these rates to others who are not able or willing to so stipulate, providing, always, that the charge exacted from such parties for the service is not excessive or unreasonable.

See also *Mogul S. S. Co.* v. *McGregor* (1892), App. Cas. 25, at p. 36.

Isbrandtsen's further argument against our construction of section 14 (3) is that where two interpretations are possible, that one which renders the Act unconstitutional in operation should be avoided. Isbrandtsen claims that a construction which approves the dual rate system is equivalent to granting to the conference the power to exclude Isbrandtsen and other independents from the trade, that such power

to exclude is equivalent to a power to grant certificates of convenience and necessity such as Congress sometimes gives to regulatory bodies, but has not given to this Board with respect to foreign trade. Isbrandtsen argues that since this Board may not grant or withhold such certificates, it may not (by our construction of the Act) delegate any such power to a conference without violating several sections of the Federal Constitution and the 5th Amendment.

We think this argument is far-fetched. In the first place, there is no evidence that the dual rate system has in the past, or will in the future, effectively cause the exclusion of an independent carrier from any trade route on which he wishes to operate. This is particularly apparent from the fact that there is a standing invitation to all independents to join the conferences and to operate on the same footing with conference members. The construction which the Board adopts for section 14 (3) places no restrictions on Isbrandtsen's rights to enter any trade and gives no conference or conference members any right to do so.

Having thus considered the contentions of the parties as to the proper construction of section 14 (3) of the Act, we must determine whether the dual rate system as presented in this case qualifies for approval under section 15. That system in many cases is a necessary part of the conference system. The evidence in this case shows that eastbound conference members had, in 1948, 518 sailings as against 38 by complainant. Complainant and its predecessor over a period of 17 years, except during World War II, have maintained at least two sailings a month on the route. Under the conference agreement, uniform rates are offered to all shippers who sign the conference contracts, and a uniform but higher rate is offered to all who do not. There is evidence that the conference system guarantees uniform rates, prevents cutthroat competition, and encourages frequent and regular scheduled sailings; also, that shippers are willing to pay rates to sustain stability and frequency of service, which means more to them over a period of time than being able occasionally to avail themselves of somewhat lower rates offered by non-conference carriers. There is also evidence that even though rates of conference members are identical, there is competition among the members in the matter of the service offered. As stated above, the conference system is not under attack, yet it is important to state that there is evidence in the case, if that be needed, to support a finding that the conference agreements, as distinguished from the dual rate system contemplated by them, meet the requirements of section 15 of the Act and deserve the approval which they have heretofore received from our predecessors.

If the conference members are to provide the service which the shippers value, the service must be matched by a regular availability of cargo from those shippers. The conferences realize that to sustain these mutual benefits, something more than voluntary shipper cooperation must be agreed to. The dual rate system is the device which has been developed for that purpose. Shippers have testified in this case that they deem the stability of rates and regularity of service which a conference can offer are worth a price measured in terms of freight rates. By obtaining exclusive contracts from shippers the carriers are better able to estimate the approximate volume of traffic that is to be expected, tonnage their routes, and arrange their sailings accordingly. As previously indicated, the contracts under consideration guarantee to the shipper that his rate will not be changed for approximately 80 days, and the evidence shows that longer commitments are sometimes granted. In any event, small shippers are put on the same plane with large shippers and both are thus encouraged to engage in "forward trading", so necessary for foreign commerce.

There is a complaint by one of the interveners that the contracts under discussion are unenforceable at law because lacking legal consideration. We believe a technical consideration sufficient to support the contract is found in the agreement of the carrier not to change rates for a specified time in exchange for the agreement of the shipper to ship exclusively by the conference carriers. However, the question of technical consideration and legal enforceability does not seem to us all-important in this case for it is clear from the evidence that the contracts once made are in fact observed without resort to court action, and our problem is to determine whether the agreements by the conference carriers to put the dual rate system into effect (regardless of enforceability) is to be approved under section 15. We find in general that the dual rate system disclosed by the evidence in this case is not contrary to the standards set up in the Act.

On the other hand, one feature of the contract which we think objectionable has to do with the option given to the carrier if the shipper makes shipments in violation of the agreement. The contract provides that in such a case

> the Carrier shall have the option to declare this agreement terminated and the Merchant shall be liable to the Carrier for liquidated damages equal to twice the amount of freight that would have been payable under the contract in respect of the shipment constituting the violation.

Our predecessors have pointed out that an option of this sort makes it possible for the carrier to discriminate between shippers, *Pacific Coast European Conference*, *supra*. We think this objection is valid.

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Any approval which we give to the use of the dual rate system in this case is conditioned upon the modification of the contract form by the carriers so as to eliminate the option feature and substitute therefor the specific treatment which will be accorded shippers in all cases of violation.

The contract provides for liquidated damages in case of violation equal to twice the amount of freight that would have been payable under the contract in respect to the shipment constituting the violation. Our predecessors have considered the reasonableness of liquidated-damage provisions for violation of contracts of this sort. We agree that this type of contract is one in which a liquidated-damage provision may be incorporated, because the harm caused by breach is extremely difficult if not impossible of accurate estimation. Of course, the agreed measure of damages must bear a reasonable relation to the breach so as to class it as real damages and not as a penalty. In this case the contract provides for liquidated damages in twice the amount of the freight involved. Perhaps this is on the high side, but since by a violation some member of the conference whose ship has sailed, has lost the freight involved, and the conference as a whole has been weakened by the violation, we think the provision is not unreasonable and may be retained. In *Pacific Coast European Conference*, *supra*, our predecessors approved a liquidated-damage feature for breach of exclusive patronage, limited to an amount equal to the freight involved in the shipment or a certain number of times thereof. Court approval of a somewhat similar liquidated-damage clause was given in the case of *North German Lloyd* v. *Elting*, 96 Fed. 2d 48.

The fact that the conference collects the damages instead of an individual carrier, does not militate against reasonableness, since there will be damage to an individual though unascertained member of the conference as well as to the conference as a whole. The collection of damages by the conference appears to be a practicable measure to make the contracts effective for the benefit of the conference members. The result is in substance a pooling of damages, analogous to the pooling of earnings or profits which the Act, section 15, expressly authorizes.

An objection is made to the clause of the contract which requires that all the shipper's cargo originating out of North Atlantic ports be tendered to the carriers for transportation on their vessels at seven American and several Canadian named ports. It is claimed that this clause may discriminate against a shipper who has cargo located at an intermediate unnamed port, or perhaps discriminate as between

the named and the unnamed ports. The named ports include the seven major American ports between Norfolk, Virginia, and Portland, Maine, and it would seem that the shipper is thus given a broad selection of ports from which to choose. The carrier cannot be required to serve ports beyond his choosing and we cannot, therefore, say that the designation of the named ports creates any unreasonable discrimination as claimed.

We think the special treatment accorded to the Department of Agriculture on Government-owned or -controlled cargo, in granting to it the lower contract rate without requiring the Government to sign a contract, is a reasonable exception in the public interest and is not a discriminatory practice.

Exceptions not discussed in this report nor reflected in our findings have been given consideration and found not justified.

Findings

We find as follows:

1. The findings contained in the report of the examiner are a substantial compliance with the orders of reference of the Commission of December 19, 1949 and January 13, 1950.

2. The provision contained in the eastbound contract permitting termination of the contract and the collection of damages by the conference at the conference's option, is unreasonable and should be eliminated.

3. The use of the dual rate system by the two conferences and their members is not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and does not operate to the detriment of the commerce of the United States, and is not in violation of the Shipping Act, 1916, provided that the form of contract used shall be modified so as to be in keeping with finding (2) above.

An order will be entered dismissing the complaint.

ORDER

At a session of the Federal Maritime Board, held at its office in Washington, D. C., on the 1st day of December A. D. 1950

No. 684

ISBRANDTSEN COMPANY, INC.

v.

NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE 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 Board, 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 the complaint herein be, and it is hereby, dismissed.

By the Board.

[SEAL]

(Sgd.) A. J. WILLIAMS,
Secretary

FEDERAL MARITIME BOARD

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 October 16, 1950. Decided December 8, 1950

On further hearing on damages, complainants failed to prove damages. Reparation denied.

Frank J. McConnell, *James D. Brown*, and *Paul M. Jones* for complainants.

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

REPORT OF THE BOARD

BY THE BOARD:

On July 26, 1949, the Maritime Commission, predecessors to this Board, found (3 U. S. M. C. 131) that respondent, in refusing complainants an equal opportunity with Twedberg, Kleppe and Cia Ltda. of Rio de Janeiro, Brazil, hereinafter referred to as Kleppe, to secure space to ship fresh fruit in the MS *Freja* in November 1944, from New York to Rio de Janeiro, Brazil, violated section 14 (Fourth) and section 16 of the Shipping Act, 1916 (hereinafter called the Act), and that complainants were entitled to reparation. A further hearing was ordered to determine the amount of damage, if any, suffered by complainants as a result of the violation. The examiner's recommendation allowed a substantial award to each complainant.

[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., against which respondents the complaint was heretofore dismissed by the Commission.

The respondent filed exceptions to the examiner's recommendation, and the issues were argued orally before this Board. Our conclusions differ from those recommended by the examiner. We find no sufficient proof of any damages suffered by complainants which are the proximate result of any violations of the Act.

It has long been established by the courts and Government agencies having jurisdiction in such matters that (a) damages must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation.[2]

In the instant case, we are asked to award damages on the basis of a record which we find lacks the necessary proof. Claimants predicate their claim for damages on the alleged loss of profits resulting from respondent's violation of the Act in refusing to afford them an equal opportunity to ship fresh fruit to Brazil on the MS *Freja* in November 1944, along with the shipment being carried for Kleppe, their competitor in Brazil. They base their alleged pecuniary loss on hypothetical shipments of 4,000 and 5,000 boxes of Canadian apples, which, they assert, they could have obtained in time for the sailing of the vessel and would have sold in Brazil at the same profit of $4.00 per box, which, they were advised by their agents in Brazil, their competitor must have earned on his apples. It is not disputed that the Kleppe shipment, consisting of apples, pears, and grapes, was not made on a bill of lading basis, but by a special agreement under section 6 of the Carriage of Goods by Sea Act, whereby the vessel owner was absolved from all liability including negligence. Nor is it disputed that the vessel owner had refused to carry fresh fruit for some three years prior to this voyage because of the vessel's faulty refrigeration machinery and the poor outturn of fruit in previous attempts, for which extensive damage claims had been paid. Although claimants testified that they would have shipped on this same save-harmless basis as their competitor Kleppe did, they acknowledged that they would not have shipped in the *Freja* if their competitor had not done so. Indeed, they insist their motivation was to remain competitive with Kleppe in the Brazilian market. We deem this particularly important in connection with our consideration of the question as to what complainants' shipments might have included if in fact they had been made.

Despite claimants' testimony during the hearing on damages (some five years after the fact) that they would have shipped apples only,

[2] *Pennsylvania R. R. Co.* v. *Int'l. Coal Co.*, 230 U. S. 184, 203, 206.

the proof in the record is substantial that given the opportunity, they would also have shipped pears and grapes, as well as apples. Considering the uncertain length of time of a voyage during the war period and the save-harmless basis of shipment, it is not clear whether any loss of profits on such mixed shipment resulted from the carrier's act of refusing space. The proof amounts to little more than their showing of a possibility which is highly speculative, uncertain, conjectural, and lacks a reasonable basis of certainty. It is incumbent on complainants to meet the burden of proof and we find they have not done so.

The record shows that the Kleppe shipment in the MS *Freja* consisted of 7,463 boxes of fresh apples, 7,560 boxes of fresh pears, and 937 lugs of grapes. To remain truly competitive with Kleppe, it is reasonable to conclude that claimants would have shipped the same three types of fruit. Claimants' testimony that because of the poor record of the vessel they would have shipped apples only, if permitted to do so by the carrier, is not persuasive when one considers the facts that complainants were aware of the record of the *Freja* at the time they were insisting that carrier accept reasonable amounts of apples, pears, and grapes for shipment. Nor can we overlook, in considering the question of what claimants might have shipped, their admission that they knew all of Kleppe's grapes were a total loss. The continuous and consistent demands by complainants after they learned of the November 3, 1944, Kleppe booking are not without value in casting light upon what they would have shipped had space on the MS *Freja* been made available to them. In their cablegram protest of November 9, 1944, to the Swedish owner of the vessel relative to the reefer space on the MS *Freja*, claimants stated, in so far as is here pertinent: "The undersigned American firms who have shipped apples, pears and grapes to Brazil for many years protest * * *. We request you authorize your agents Norton Lilly to accept reasonable quantities of apples, pears and grapes from our firms for shipment on the *Freja* * * *." Cox's letter of November 8, 1944, to Norton Lilly, in requesting space on the MS *Freja*, stated: "distribution as to apples, pears and grapes to be given to you, upon acceptance of our booking." Waterman's letter of November 9, 1944, to Norton Lilly specifically requested "space for 2,000 boxes of apples, 1,000 boxes of pears, and 1,000 boxes of grapes." These were their demands at the time closest to the event and truly reflect their shipping intentions as to types of fruit. Cox's testimony during cross examination impels the conclusion that it would have been a mixed shipment of fruit, if made in November 1944. As to Waterman, not only his sworn complaint alleged apples and pears, but on cross examination he admitted: "I

have no doubt at that time that we would have been glad to have shipped pears and grapes." Questions of intent can best be determined from complainants' acts and declarations explanatory thereof, and not from what they subsequently testified to in relation to their real intent. Their testimony must be weighed and considered with all other evidence in the case in passing upon the question of actual intent.

The record is barren of evidence pertaining to damages on pears and grapes that complainants presumably would have shipped on the *Freja* had reefer space been made available to them. Questions of their availability in time for shipment on said vessel, cost, outturn, and selling price are left unanswered. Here again the burden of proof has not been met. As to the apple portion of claimants' respective hypothetical shipments, we are inclined to the view that the matter was susceptible of satisfactory proof, considering that claimants made it known to respondent's agent at the time of the violation that they would pursue such remedies as they could. For reasons best known to themselves, the complainants did not avail themselves of the right to take depositions of material witnesses not present at the hearings, which our Rules of Procedure authorize.

On the question of availability of apples for shipment on the *Freja*, complainant Waterman offered in evidence over respondent's objections a letter dated October 19, 1949, from the B. C. Tree Fruits, Ltd., of Canada, stating that in 1944 they could have supplied additional carloads "that year." Cox similarly offered in evidence, over respondent's objection, a letter from said company dated August 29, 1949, in which is quoted their telegram of October 9, 1944, offering apples for "immediate acceptance." This can hardly be considered satisfactory proof of availability of apples at the time in question, inasmuch as the record shows the *harvest* year extended beyond the *Freja*'s sailing date; that it took approximately two weeks to get these Canadian apples shipside; and that the producer was engaged at the time in making deliveries of the same type of apples for the shipment on another vessel, the MS *Trondanger*, which apparently was the vessel contemplated in the telegram to Cox, that being the only scheduled vessel for Brazil at the time. The burden of proof being on the complainants, the producer's deposition would have properly reflected the true factual situation, giving respondent at the same time an opportunity to exercise its rights by way of cross-interrogatories.

The same criticism applies to complainants' attempt to prove selling price and prospective purchasers. On this phase of the matter, no evidence of any nature was adduced from prospective buyers. There were admitted in evidence, over respondent's objection, letters to

claimants from their agents in Brazil dated long after the occurrence and as late as 1949. The statements contained therein were not made in the ordinary course of business, are mere self-serving statements, and are of no probative value to establish the demand and market value of the fruit in Rio. While we are not bound by strict rules of evidence, which would of course exclude the letters, we think that facts stated in the letters of an agent to his principal written for use in this proceeding are an inadequate substitute for facts which should properly have been developed by deposition or direct testimony. As was aptly stated by the court in the case of *United States* v. *Barker*, 24 Fed. Cas. 1004, 1005, "The letter of the agent of the United States cannot be given in evidence against a third person. His deposition might have been taken." A letter allegedly written as of the time of the occurrence deserves special comment. This letter addressed to Waterman from his agent Engelke is dated October 7, 1944. Since this date preceded by about a month the *Freja* booking by Kleppe on November 3, 1944, which the letter discussed, it was apparent something did not jibe. Cross-examination of Waterman disclosed that the letter was actually written in 1949 at his request and forwarded under a covering letter dated October 7, 1949, which, among other things, states: "If the letter is not the way you want it written, or the dates should be different ones, I would thank you to let me know, and very gladly I will furnish you a new letter, *worded exactly as you want it.*" [Italics added.] This development speaks for itself. The attempted explanation that the predated letter was merely intended to be a statement is not convincing, particularly in view of Waterman's failure to produce the copy of his request to Engelke, after respondent's request to produce. In any event, there is no satisfactory proof on this aspect of the matter, and we find complainants have not sustained their burden in this regard. Nor does the record contain any evidence as to the actual outturn or condition of the apples on the *Freja* upon arrival in Brazil, which fact is unquestionably important in connection with any claim for reparation, where the vessel, upon which the physical transportation of the apples would have taken place at the *shipper's* risk except for the act of the carrier, was recognized as possessing inadequate refrigerator machinery and being generally unfit for the transportation of fresh fruit. Because of the unfit condition of this particular vessel, we cannot reach any reasonable inferences such as might be the case if the vessel had well-conditioned, normal, refrigerated compartments.

In view of the foregoing, it becomes unnecessary to determine (a) what share of the *Freja* reefer space each claimant was entitled to, (b) whether the two shippers that joined complainants in the protest of

the Kleppe booking or other shippers would also have shipped had the carrier advertised the *Freja* space on Kleppe terms, or (c) what effect competition would have had on the market price of apples, pears, and grapes in Brazil had Waterman and Cox also shipped on the *Freja.*

In consideration of this case we are dealing with private rights and wrongs.[3] To award damages alleged to have been incurred by reason of unjust discrimination, there must be that degree of certainty and satisfactory conviction in the mind and judgment of the Board as would be deemed necessary under the well-established principles of law in such cases as a basis for a judgment in court. Complainants have been accorded ample opportunity to present facts supporting an award of reparation and presumably have presented all of the evidence possessed by them. Their case must stand or fall on the facts now of record. Our conclusion, reached after careful consideration of all the evidence of record with respect to damages alleged to have been sustained, is that the record is completely lacking in details from which a finding might be made whether reparation is due. The evidence is far too vague, general in character, and indefinite to warrant the conclusion that complainants have suffered actual pecuniary loss attributable directly to respondent's discriminatory act. In short, the requisite proof of damage is wanting. This failure to establish the fact of damage attributable to the wrong is fatal to claimants' case for reparation. Upon this phase of the case, we therefore find and conclude that no basis for an award of reparation for damages has been shown. The prayer for reparation accordingly is denied, and an order to such effect will be entered.

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[3] *King Stone Co. v. Chicago I. & L. Ry. Co.*, 171 I. C. C. 47, 52.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 8th day of December A. D. 1950

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.

This case being at issue upon the question of complainants' damages, and having been duly heard and submitted by the parties, and full investigation of the matters and things having been had, and the Board, 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 reparation herein be, and it is hereby, denied; and

It is further ordered, That the complaint be, and it is hereby, dismissed.

By the Board.

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

FEDERAL MARITIME BOARD

No. 630

SIGFRIED OLSEN, D. B. A. SIGFRIED OLSEN SHIPPING COMPANY

v.

WAR SHIPPING ADMINISTRATION AND GRACE LINE INC.

Submitted October 25, 1950. Decided December 8, 1950

War Shipping Administration, in the common-carrier operation of merchant vessels through its agent, was a "common carrier by water" within section 1 of the Shipping Act, 1916.

Tariff demurrage provisions applicable on lumber from California to Balboa, Canal Zone, between January 20, 1942, and January 1, 1943, were unjust and unreasonable regulations and practices in violation of section 17 of the Shipping Act, 1916, but not otherwise in violation of that section or in violation of section 16 of the Act.

Demurrage charges assessed but not collected by the agent of War Shipping Administration will be waived and the security therefor released by direction of the Maritime Administrator, who is also Chairman of the Board.

William Cattron Rigby, *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.

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

REPORT OF THE BOARD ON REHEARING

BY THE BOARD:

Complainant brings this proceeding to obtain waiver of certain demurrage charges made against it by Grace Line Inc., acting as berth

agent of War Shipping Administration (hereinafter referred to as "WSA"), incurred pursuant to a demurrage tariff on lumber and other commodities, and to cancel a bond to secure the same. If collected, the amount would benefit the Federal Maritime Administration, which, as will later appear from this report, has succeeded to the rights of WSA. Complainant alleges that the demurrage provisions were unduly and unreasonably prejudicial, unjustly discriminatory and prejudicial, and unjust and unreasonable, and violated respectively sections 16, 17, and 18 of the Shipping Act, 1916 (hereinafter referred to as the "Act"), and, likewise, were unjustly discriminatory and detrimental to the commerce of the United States in violation of section 15 of the Act.

The demurrage rates established January 20, 1942, and abrogated January 1, 1943, applied to lumber, cement, and explosives carried from California ports to Balboa, Canal Zone, also to asphalt and clay pipe not involved in this case, but not to other commodities carried. The Examiner found the rates unreasonable and recommended granting the relief. We agree with the result.

Some of the vessels involved were owned by the United States; others were chartered to the United States, and all were operated for Government account by their respective general agents appointed by WSA. Grace, as berth agent for all, made arrangements for the carriage of the shipments, and issued the freight contracts and bills of lading, which included the demurrage provisions in question. These provisions were set forth in the tariff filed by Pacific Coast/Panama Canal Freight Conference, of which Grace was a member, but of which the United States was not. WSA authorized Grace to charge the conference rates, including demurrage.

Prior to the attack on Pearl Harbor in December 1941, there had been urgent military need for lumber at the Canal Zone, and our predecessor, the United States Maritime Commission, arranged with intercoastal common carriers to carry large quantities of lumber to that point. The intercoastal trade historically does not include cargo to and from the Canal Zone. Carriers feared that congestion at the Canal Zone would delay their vessels and were willing to undertake the carriage of lumber only on terms which included a demurrage rate of $5 per ship's deadweight ton per month on a demurrage form usually applicable to voyage charters. Subsequent to Pearl Harbor and the creation of WSA by Executive Order dated February 7, 1942, all United States flag ships were either requisitioned or chartered to the Government, and all cargo commitments of the intercoastal, as well as other carriers to the Canal Zone, were transferred to Grace, acting as berth agent for WSA.

Respondent WSA challenges the jurisdiction of the Board to grant relief, on the ground that this proceeding is in reality a suit against the United States to which it has not consented. Phrased differently, respondent's position is substantially equivalent to saying that if WSA should disregard the requirements of the Act in operating Government merchant vessels, there would be no relief available to injured parties. We are not aware that WSA has ever claimed to operate outside the Act, and we think it clear that while operating merchant vessels as common carriers it is not authorized to do so. WSA comes within the literal definition of a "common carrier by water" as set forth in section 1 of the Act. Section 9 of the Act expressly makes merchant vessels owned by the United States subject to the Act when chartered or leased for operation by others. *The Lake Monroe*, 250 U. S. 246; *Eastern Transportation Company* v. *United States*, 272 U. S. 689. The same rule has been held to apply when Government-owned vessels are operated by the Government as merchant vessels and not leased or chartered to others. *The Jeannette Skinner*, 258 Fed. 768. See also *California* v. *United States*, 320 U. S. 577, at p. 585, as to jurisdiction over public bodies. Here WSA was, through Grace, charging rates for demurrage established by the conference. Non-governmental members of the conference were subject to the Act, and WSA, by voluntarily adopting the conference rates and practices through its agent Grace, may be said to have put itself under the same control. In any event, any relief that may be granted in this case will not require the entry of any decree against the Government or any agency thereof, nor the payment of funds now in Government hands, since the demurrage charges here involved were never actually collected or paid to the Government.

The demurrage charges complained of were assessed under the following provisions with respect to lumber, and corresponding provisions with respect to cement and explosives.

> Lumber shall be taken from the end of ship's tackle at discharging port at 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 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 booking of 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. Complainant, in turn, required his consignees to deposit with him such amounts as he might be required to pay for demurrage, testifying that such amounts would be held by him pending the determination of this case.

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 Company, which exclusively controlled the assignment of dock facilities and cargo handling. Demurrage was charged to lumber shipments for delay experienced because vessels were unable to secure berthing space. The S. S. *Joseph Hooker*, for example, arrived in Balboa, outer anchorage, at 10: 34 A. M., August 7, 1942. There being no dock available, the vessel remained at moorings until 12: 50 P. M., the next day. However, demurrage time began to run at 5: 00 P. M., on August 7, while the vessel was in stream and unable to discharge. Furthermore, substantial delays, resulting in demurrage charges against lumber, occurred because of time lost in shifting vessels from one dock to another to discharge heavy-lift cargo, which itself was not subject to demurrage. The rule made no exception for delays resulting from breakdown of ship's machinery, opening and closing of hatches, waiting for dock labor controlled by the railroad company, or for heavy rains preventing ship's working, or other causes over which the shipper had no control.

The record further shows that all docks were operated by Panama Railroad Company, and only its employees were permitted to stevedore vessel's cargo, except under special conditions. Complainant showed that in this case neither the shipper nor the consignee was permitted to employ stevedores nor to make any arrangements for the handling of cargo during the idle hours prescribed by Panama Railroad Company. It appeared that demurrage was being charged against the lumber on the basis of a 24-hour day, whereas under the regulations of the Panama Railroad Company, stevedoring operations were limited to 16 hours a day. Complainant made various efforts to speed up discharge and relieve congestion at Balboa. In 1941 he suggested that Canal authorities decentralize operations and permit unloading of cargo into barges while the vessel was in the stream. Complainant constructed two barges for that purpose, but was not allowed

to use them, and there is no evidence that the Canal cargo handling regulations were in any way relaxed in 1942 at the time of the discharge of the shipments here considered.

Referring, first, to the complaint that the demurrage charges created undue and unreasonable prejudice and unjust discrimination in violation of sections 16 and 17 of the Act, we do not find such violations established. The fact that similar charges were not made against lumber from Atlantic Coast ports 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 on the Atlantic side or elsewhere in the Canal Zone, or that complainant was injured as a result of competition encountered on shipments from the Atlantic Coast. The contention that demurrage was not charged against general cargo and that a discrimination resulted therefrom is not supported by the evidence; there is no showing of any competitive situation as between the classes of cargo.

Referring next to the complaint that the demurrage charges were unjust and unreasonable regulations and practices with respect to the delivery of property in violation of section 17 of the Act, we agree that such a violation has been shown. It appears that these demurrage provisions are regulations relating to delivery, since they apply to the disposition of cargo after movement from port of origin to port of destination has been completed. Complainant's duty was to take the lumber from the end of ship's tackle, yet demurrage was charged against him even before discharging operations had commenced, while the ship was in stream, or while idle because of port regulations, or while unloading cargo of other shippers who might or might not be subject to demurrage charges. They were assessed for delays which the shippers and receivers did not cause, and had neither the power nor the duty to prevent. Whether treated as compensation for delay of the vessel, or as a penalty, it appears to us that the charges as they affected complainant and his shipments were unreasonable. Perhaps the explanation of the unusual condition may be found in the anomalous situation created by the effort to apply the demurrage provisions which were appropriate for a voyage charter to shipments by common carrier of general cargo where the receiver has no duty to find the berth or arrange for the unloading.

A further complaint is made that the demurrage charges constituted an unjust and unreasonable rate or tariff provision in violation of section 18 of the Act. We find it unnecessary to pass on this issue in view of our finding that a violation of section 17 existed. We do not feel that the negative finding in the case of *Dobler & Mudge* v. *Panama R. R. S. S. Line*, 1 U. S. S. B. 130 so requires. We are not

aware that any Court has held the Canal Zone to be a possession of the United States within the meaning of the definition of "common carrier by water in interstate commerce" in section 1 of the Act. A holding by us that the Canal Zone is a possession of the United States would run counter to holdings of the Attorney General and the Courts in a number of closely analogous situations, 27 Op. Atty. Gen. 594; 29 Op. Atty. Gen. 194; *Luckenbach Steamship Co.* v. *United States*, 280 U. S. 173; *David Kaufman & Sons Co.* v. *Smith*, 216 U. S. 610. Furthermore, such a holding would create administrative confusion in view of the long continued practice of the predecessors of this Board in treating commerce between the United States and the Canal Zone as foreign commerce, which has resulted, among other things, in permitting American-flag vessels in that trade to qualify for operating-differential subsidies under the Merchant Marine Act, 1936, sec. 601, 46 U. S. C. A. 1171.

We are not at this time claiming general jurisdiction to inquire into or pass on regulations and practices in foreign ports relating to or connected with the receiving, handling, storing, or delivering of property. In this case we have before us a demurrage regulation imposed upon the shipper as a condition to shipment at an American port. Furthermore, it was part of a tariff made effective under a conference agreement, which conference agreement our predecessors passed upon and approved pursuant to section 15 of the Act. There are, therefore, peculiar characteristics of the demurrage regulations now under consideration which are the basis of jurisdiction in this case.

The testimony shows that complainant has collected from his consignees and holds the full amount of the demurrage which he seeks to have remitted. This fact, however, is not deemed to be a ground for refusing relief where, as here, complainant is otherwise entitled to it, since complainant will be under obligation to reimburse others when his liability is terminated.

WSA ceased to exist September 1, 1946, by virtue of Public Law 492, 79th Congress (60 Stat. 501), which transferred all its functions, powers, and duties to the United States Maritime Commission. By Reorganization Plan No. 21 of 1950, these functions were again transferred to the Secretary of Commerce and by him delegated to the Maritime Administrator, so that Grace Line Inc., formerly the agent of WSA in this matter, is now subject to the direction of the Administrator with respect to this agency matter. Under the circumstances, the relief requested can best be granted through administrative action.

FINDINGS

We find as follows:

1. The demurrage regulations established by Pacific Coast/Panama Canal Freight Conference, effective January 20, 1942, and now abrogated, constituted an unjust and unreasonable regulation relating to the delivery of property in violation of section 17 of the Shipping Act, 1916.

2. The demurrage charges made against complainant by Grace Line Inc., as agent for WSA, pursuant to such regulations, not having been paid, should now be waived and remitted and the security therefor released.

The Chairman of this Board, as Maritime Administrator, will give appropriate administrative direction to Grace Line Inc., to carry out the foregoing findings, and, upon receipt of advice that Grace Line Inc., has taken the necessary action, an order will be entered discontinuing the proceeding.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its Office in Washington, D. C., on the 11th day of January, A. D. 1951.

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 United States Maritime Commission, the Board's predecessor, having entered an order on November 15, 1949, dismissing the complaint, and the Board having entered an order on April 6, 1950, reopening the proceeding for reargument and reconsideration, and the matter having been duly reargued, and the Board, on December 8, 1950, having made and entered of record a report on rehearing stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof, and the demurrage charges against complainant having been waived and the bonds deposited as security therefor having been released in accordance with said report:

It is ordered, That the order entered herein on November 15, 1949, be, and it is hereby, vacated and set aside; and

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

By the Board.

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

FEDERAL MARITIME BOARD

No. 651

CARLOADING AT SOUTHERN CALIFORNIA PORTS

(Agreement No. 7576)

Submitted October 11, 1950. Decided October 31, 1950

Respondents' lower rates in favor of "continuous" service as against "indirect" service will violate section 16 (First) of the Shipping Act, 1916, and should promptly be discontinued. No culpability found.
Respondents' rate structure non-compensatory.
Respondents' cost studies are sufficient to determine compensatory rates.

Additional appearances:

Leonard G. James for Pacific Coast European Conference, et al., Interveners,

Martin A. Myer, Jr., for American Potash & Chemical Corporation, Interveners, and

Omar L. Crook for Pacific Coast Borax Company.

Report of the Board on Further Hearing

The proceedings in this case originated in an investigation ordered by the United States Maritime Commission to determine whether a rate-fixing agreement establishing increased rates for "car service", filed by the respondents who are members of the Master Contracting Stevedores' Association of Southern California, should be approved under section 15 of the Shipping Act, 1916. There have been three prior hearings reported, 2 U. S. M. C. 784, 2 U. S. M. C. 788, and 3 U. S. M. C. 137. A similar proceeding involving the Port of San Francisco, Docket No. 639, *Status of Carloaders and Unloaders* is reported, 2 U. S. M. C. 761 and 3 U. S. M. C. 116. We agree in substance with the examiner's findings.

By the Commission's first report in this case, 2 U. S. M. C. 784, it found that all the respondents were either common carriers

by water or other persons subject to the Shipping Act, 1916. It found the prior rates not compensatory, and a burden upon other services performed by respondents, and, therefore, detrimental to commerce within the meaning of section 15. It approved the agreement and new rates provisionally, pending analysis of actual costs by the Commission. Before the analysis was completed, the respondents were required to grant heavy wage increases and, therefore, requested authority to put into effect emergency surcharges of 34% of the rates approved by the first order, and this surcharge was found justified and approved in the Commission's second report, 2 U. S. M. C. 788, decided November 7, 1946.

Thereafter cost hearings were held by the Commission, some of them jointly with the Public Utilities Commission of the State of California (Application No. 28248), but again before these were completed, respondents applied for permission for a further flat increase of 16½ percent based upon further increased labor costs. No hearing was held on that application, but the Commission by letter dated January 27, 1949, and consistently with its action taken with respect to the San Francisco carloaders on December 20, 1948, Docket No. 639, 3 U. S. M. C. 116, notified the respondents that permission for the increase was granted, but "that permission does not apply to the continuous movement of commodities between rail cars and ship's tackle". Respondents thereupon increased all rates 16½ percent effective February 7, 1949, except those applicable to commodities handled in "continuous movement".

As has been pointed out in the prior reports, the term "car service" means the loading or unloading of railroad cars on steamship piers. There are three ways of accomplishing the car service for unloading: "indirect" car service, which involves the use of a place of rest on the pier at which the commodity is deposited pending further movement, which may be indefinitely deferred; "direct" service, which is the unloading of open top cars immediately under ship's tackle; and "continuous" car service, which involves the substantially continuous movement of the commodity directly from the car to the ship's tackle. "Direct" service is not involved in this case.

Between the second and third reports of the Commission, evidence was offered covering costs (without overhead or profit) on tonnage handled in "indirect car service" and showed that the rate structure for this type of service prior to the 16½ percent increase did not even pay for the costs involved. No evidence was then effered as to the cost of loading or unloading in "continuous" movement, the Commission stating "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."[1] The bare statements by respondents that the cost of "continuous" movement was greater than the "indirect" was not considered a sufficient basis for a finding that the rate structure for "continuous" movement was also noncompensatory.

The Commission in its third report, dated October 18, 1949, 3 U. S. M. C. 137, accordingly found the rates for "indirect" car service as they existed prior to February 7, 1949 to be noncompensatory and detrimental to commerce, but since relief as to these had been given by the 16½ percent increase, no order was entered at that time, and the record was held open to permit the production of full and complete evidence of costs and overhead on all types of work.

The regulatory functions of the Commission were by section 104 of Reorganization Plan No. 21 of 1950, transferred to this Board and the case is now before use to consider the whole record, including especially the testimony taken since the Commission's third report.

The main controversy in the case now lies between the respondent carloaders on the one hand, and certain shippers who have intervened on the other. The carloaders desire to eliminate any differential in rate between "continuous" and "indirect" car service. They point out that there never was a different rate until the Commission's order of January 25, 1949, and urge that the testimony now before the Board shows that the costs of "continuous" car service are greater than for "indirect". The intervening shippers urge that the respondents' testimony is not an adequate cost study, and also urge that the differential of 16½ percent in favor of "continuous" be perpetuated. They agree, as well they must, that the result accomplished in transferring cargo from freight car to ship's tackle, whether by the "indirect" or "continuous" method is the same, but claim that different rates are justified because of different manners of operation and different costs. This they say makes the differential reasonable and not unjustly discriminatory so as to be objectionable under section 15 of the Act.

It is perhaps necessary to scrutinize the details of "continuous" movement to understand its operation in practice. The examiner described it as follows:

> The labor gang in the continuous movement consists of a minimum of six men used in connection with the ship stevedoring gang as provided by the rules and regulations of the Longshore Agreement, copy of which is an exhibit of record. Usually a gang of eight are employed to service two cars simultaneously. Respondents' witnesses illustrate various methods used in unloading cars in continuous movement. A small, low-built, four-wheel, single-deck truck is utilized

[1] 3 U. S. M. C. 140.

to unload all cargo except where unusual size or shape is involved. If commodities in burlap bags, such as flour and sugar, are being unloaded, the first step is to push the four-wheeler into the car and place a sling on its deck. Four men, two in each end of the car, then proceed to load the four-wheeler. Upon completion of the load, the ends of the sling are gathered together and the four-wheeler with the cargo in the sling is pushed out of the car by man power to a point on the wharf just outside the car door where it remains until two other four-wheelers are similarly loaded and coupled together in a train of three loaded four-wheelers. A jitney hauls the train across the wharf to shipside where the ship's tackle is hooked to the slings and the cargo hoisted aboard. While the cargo is being hoisted from the four-wheelers one by one, another train is being prepared. After the train is unloaded at shipeside the jitney hauls the empty four-wheelers back to the car and picks up the next loaded train. This process is repeated continously until the railroad car is unloaded. * * *

The examiner also pointed out that as the record stands, it is now clear that the men performing car service in "continuous" as well as "indirect" service, operate between the car and wharf, and that in both types of service there is a subsequent movement to the ship's tackle.

It thus appears that whether cargo is moved by the "indirect" or "continuous" method, the result is the same. The cargo is removed from the rail car. In fact, part of a single shipment may be handled one way and part another, in which event the two parts would now qualify for different rates. The evidence shows that it is the terminal operator and not the carloader or shipper who decides which method shall be used. The determination involves many factors which are not necessary to explore. It is sufficient to observe that circumstances such as wharf congestion, vessel schedules, nature of cargo, volume of cargo arriving by motor truck to be stowed with similar freight arriving by rail, overseas destinations, and time of arrival of cargo at the wharf are all considered. Conditions on the piers change daily, and it is usually impossible for a terminal operator to arrange long in advance for any particular kind of car service.

The fact that two types of service of identical benefit to shippers for which two different rates are charged can be operated side by side opens the door not only to confusion but to the possibility of carriers "arranging" for preferred shippers the servicing of their cargo in the manner calling for the lower rate. Instances of errors and confusion appear in the record, although no instances of any such "arranging." However, the latter possibility in a highly competitive field cannot be overlooked.

If the shippers had the choice between "indirect" and "continuous" car service there might be more basis for saying that a different rate could be charged, if "continuous" service were the less costly of the two, but the contrary is indicated in the record. Be that as it may

since the shipper must accept whatever type of service is given to him, we find it impossible to justify continuance of a difference in rate even if based on a different cost. We cannot imagine that a railroad using both steam and Diesel engines could justify a different passenger tariff between the same points based on different operating costs if the convenience of the railroad rather than the taste of the passenger should control the selection.

We find from the evidence that the charging of lower rates for "continuous" service than for "indirect" service will (a) give an undue and unreasonable preference and advantage to traffic handled by continuous service, and to shippers and consignees of such traffic; and (b) subject traffic handled by "indirect" service, and the shippers and consignees thereof, to undue and unreasonable prejudice and disadvantage—all in violation of section 16 of the Act; and that continuance of such practice should promptly cease. No culpability attaches, however, to the charging of such lower rates in the past, since the dual rate scale resulted from observance of the Maritime Commission's order.

Referring now to the evidence as to the cost of the various services, respondents, with a few special and unimportant exceptions, supplied figures covering costs of "indirect" operations from January 1, 1947, to March 31, 1948, and from December 6, 1948, to December 6, 1949. Strikes interrupted work during part of the intervening period. As to such costs the technique already approved in prior reports of the Commission was used and appears to us entirely sound. Respondents' accountants also reported the costs of "continuous" movement based on spot checks covering 5,408 tons of the main commodities in the trade except for cement, which were handled over a two-week period of 1950. Since no cement was handled in "continuous movement during that period, a special spot check of 760 tons of cement in "continuous" movement in September 1949 was reported.

The manner of obtaining evidence as to the cost of "continuous" service by spot checking appears to us fair and appropriate in view of the difficulties peculiar to the special problems affecting that operation, and the evidence presented supports the examiner's finding that the cost of "continuous" movement exceeded the cost of "indirect." Similarly we find that the evidence supports the examiner's finding that the ratio of overhead expense to cost at Southern California ports was 17.8%, and that the entire rate structure is still, even after allowing the most recent 16½ percent increase, on a noncompensatory level.

Having made the above findings, it is perhaps unnecessary for the Board to go further. Agreement No. 7576 of respondents, originally filed with the Commission, provides that fair and reasonable

rates will be established and maintained. The studies made in this case are sufficient for the respondent to determine and establish a rate structure which will comply both with section 15 of the Act so as to be compensatory and therefore not, as hitherto, detrimental to the commerce of the United States, and at the same time meet the requirements of the agreement so as to be fair and reasonable. It therefore now becomes the duty of the respondents to file a new tariff eliminating all differentials between "indirect" and "continuous" car service, and meeting the above requirements. When filed, the tariff will be subject to the same treatment as is accorded to other tariffs filed with the Board by carriers and others pursuant to section 15 of the Act.

Although the Board has the power to fix minimum charges so as to reflect actual costs of car service rendered and so as to prevent undue burdens on other services performed by the same contractors, it has determined not to do so in this case. On the contrary it has in this case required the respondents themselves to establish rates that will meet the statutory requirements. See *California* v. *United States*, 320 U. S. 577.

While the Board must approve *agreements* between common carriers and between "other persons subject to the Act" under section 15, there is no reason why rates established under such agreements may not become effective when filed without the prior approval of the Board. *Green Coffee Association of New Orleans* v. *Seas Shipping Co.*, 2 U. S. M. C. 352. One further point of importance should be noted before concluding this report. The evidence in this case shows that certain shippers using California and other west coast ports receive separate billings for carloading or unloading service at ocean terminals. These and other miscellaneous terminal charges also billed separately are the so-called "nuisance" charges about which there is considerable complaint on the part of shippers and west coast business and civic associations. In contrast, at certain east coast and gulf ports where the over-all service to shippers or receivers in the final analysis is identical to that provided on the west coast (and very often to or from the same overseas ports), no separate billing is made for car service. An all-inclusive rate is used to the end that the car service charges are included either in the line haul of the land carrier to or from the ocean terminal or the water haul of the ocean carrier. This lack of uniformity as to the practices of the various coasts creates confusion and dissatisfaction and seems to be of sufficient importance to require comment. The Board ventures to suggest that the whole problem may be reviewed by the interested parties and some satisfactory solution voluntarily adopted which will elimi-

nate practices which on further investigation might appear to be unfair as between ports in different sections of the United States.

FINDINGS

We find:

1. That the charging of lower rates for "continuous" service than for "indirect" service will give undue and unreasonable preferences and will create undue and unreasonable prejudices and disadvantages—all in violation of section 16 of the Act, and should be promptly discontinued.

2. No culpability attaches, however, to the charging of such lower rates in the past, since the dual rate scale resulted from observance of the Commission's order.

3. That respondents' rate structure as a whole is still noncompensatory.

4. That respondents' studies are sufficient to determine compensatory rates.

5. That, in accordance with Agreement No. 7576, respondents shall file a new tariff of compensatory rates based upon their cost studies and all other material facts.

These proceedings will be held open pending compliance with the above findings and the accompanying order.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 31st day of October A. D., 1950

No. 651

CARLOADING AT SOUTHERN CALIFORNIA PORTS

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

It is ordered, That on or before November 20, 1950, respondents shall file with the Board tariff provisions eliminating differentials between rates for "continuous" service and rates for "indirect" service; and

It is further ordered, That on or before January 1, 1951, respondents shall file with the Board a new tariff of compensatory rates in accordance with cost studies made in these proceedings, and all other material facts; and

It is further ordered, That these proceedings be held open pending respondents' compliance with this order.

By the Board.

[SEAL]

(Sgd.) A. J. WILLIAMS,
Secretary.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 11th day of January, A. D. 1951

No. 651

CARLOADING AT SOUTHERN CALIFORNIA PORTS

(Agreement No. 7576)

This proceeding having been held open by the United States Maritime Commission, the Board's predecessor, in accordance with its report entered herein on October 18, 1949, "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", and full investigation of the matters and things involved having been had, and the Board, on October 31, 1950, having made and entered of record on further hearing a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof, and respondents having complied with the order attached to the report of October 31, 1950:

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

By the Board.

[SEAL]

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. 639

STATUS OF CARLOADERS AND UNLOADERS

Submitted April 26, 1950. Decided December 1, 1950

Rate structure found noncompensatory as a whole.

Direct labor and overhead cost studies approved and found sufficient to determine compensatory rates.

Proceeding held open pending receipt of new tariff of charges in compliance with Board's findings.

Additional appearances:

William L. Anderson for United States Department of Agriculture, intervener.

Chalmers Graham for Capca Freight Conference, Pacific Coast Australasian Tariff Bureau, Pacific Coast/Caribbean Sea Ports Conference, Pacific Coast European Conference, Pacific Coast/Panama Canal Freight Conference, Pacific Coast River Plate Brazil Conference, Pacific/West Coast of South America Conference, Balfour Guthrie & Co., Limited, Agents, Cosmopolitan Shipping Company, Inc., Agents, Furness, Withy & Co., Ltd., Agents, General Steamship Corporation, Ltd., Agent, Interocean Steamship Corporation, Agents, H. S. Lear, Agent, Moore-McCormack Lines, Inc., Agents, and Fred Olsen Line Agency, Ltd., Agents, interveners.

J. J. Usher for the Port of Seattle, intervener.

Charles A. Bland for Board of Harbor Commissioners of Long Beach, California.

REPORT OF THE BOARD ON FURTHER HEARING

This investigation was initiated by the Maritime Commission to determine whether a rate-fixing agreement arrived at by respondents was one which came within the purview of Section 15 of the Shipping Act, 1916, and therefore should be considered for approval and whether a tariff of respondents establishing rates for loading and unloading

railroad cars, hereinafter called "car-service", was subject to our jurisdiction and complied with the provisions of the Shipping Act, 1916, and with the terms of the agreement.

The first decision in the case, handed down May 31, 1946, by the Maritime Commission, found that the San Francisco Bay Carloading Conference was an agreement between stevedoring companies, terminal operators, and other contractors all performing car service for water-borne traffic at San Fancisco Bay piers, and was subject to Section 15 of the Shipping Act, 1916, as the parties to the agreement were "other persons" subject to the Act. An interim adjustment of rates 33⅓ percent over those established in 1941 was also found to be justified. 2 U. S. M. C. 761.

There have been two other interim decisions of the Maritime Commission. In the first, 2 U. S. M. C. 791, November 7, 1946, an additional emergency surcharge of 34 percent was found justified, except on cement and petroleum products, and the case was held open for further evidence of costs. In the second, 3 U. S. M. C. 116, January 28, 1949, a proposed tariff was prepared and evidence to support rate increases was introduced at the hearing. It was found that the rate structure in existence at the time of the hearing was noncompensatory as a whole and that rates which produce revenue less than the cost of service as revealed by cost studies are detrimental to the commerce of the United States within the meaning of Section 15 of the Shipping Act, 1916. With respect to the proposed tariff of rates, however, which was based upon the labor costs, increased by 42.86 percent thereof to cover overhead, the finding was made that this overhead percentage was not based upon actual study of car service costs of the members of the conference but rather upon a set formula which had been set up and used for an entirely different service and under different circumstances. The record was held open to enable respondents to present full and complete evidence concerning labor costs and the costs of overhead based upon their own experience from January 1, 1947 to the latest available date prior to hearing thereafter to be set. In the meantime rates per 2 U. S. M. C. 791, November 7, 1946, remained in effect.

That hearing was held September 15, 1949, and resulted in the introduction of voluminous and detailed cost data and testimony by respondents and shippers. The examiner has made a recommended decision, to which exceptions have been filed, but no oral argument has been requested. We agree with the examiner's findings.

The straight time wages of car service men, lift truck drivers, car service foremen, walking and assistant walking bosses have all been materially increased since November 1947. To off-set, in part measure,

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this increased cost, the productive efficiency of the car loading and unloading operations has increased 15 and 10 percent, respectively, measured by tons handled per man-hour. These results were based upon a study of the experience of respondents during the calendar years 1947, 1948, and first six months of 1949 in "indirect" car service. As has been pointed out in prior reports, the term "car service" means the loading and unloading of railroad cars on steamship piers. There are three ways of accomplishing the car service which for car unloading can be described as follows: "indirect" car service, which involves the use of a place of rest on the pier at which the commodity is deposited pending further movement, which may be indefinitely deferred; "direct" car service, which is the unloading of open top cars immediately under ship's tackle; and "continuous" car service, which involves the substantially continuous movement of the commodity directly from the car to the ship's tackle. The men performing "indirect" as well as "continuous" car service for unloading, work between the car and wharf, and in both types of service there is a subsequent movement to the ship's tackle. In respect to the "direct" car service, there was no complaint developed from any shipper as to the charge, nor was there any challenge from any shipper or receiver at the lack of cost data. The car service of commodities in the San Francisco port area in "continuous" movement is at the present time practically nonexistent. In any event, whether the cargo is moved by the "indirect" or "continuous" method, the result is the same. The cargo is removed from the rail car.

The method described and approved by the Maritime Commission in its report of January 28, 1948, *supra*, for finding costs was followed, adjusting the factors to the 1949 experience, viz, multiplying the man-hours necessary for the car service of each commodity studied by the calculated cost per man-hour. The cost per man-hour included the wage cost, plus the cost for vacation allowance, social security taxes, insurance (compensation, public liability, and property damage), and payroll service fees to the Pacific Maritime Association. The labor costs as thus arrived at were reduced 15 and 10 percent for loading and unloading, respectively, to represent the increased labor productivity.

Respondents introduced an overhead cost study based upon their actual experiences. The same qualified public accountant who made the study in Docket 651, Carloading at Southern California Ports, decided October 31, 1950, made this study. In this case he made an analysis of 15 companies' overhead costs for the years 1947 and 1948. Overhead figures were not available for the first six months of 1949.

These companies were selected because they performed 90 percent of the car service work during the period. They were divided into three groups: first, those whose principal work is car service; second, those whose principal work is stevedoring; and third, those who are common carriers or common carrier affiliates, i. e., W. R. Grace and Company, Matson Terminals, and Pope and Talbot. The two latter were members of the conference during the period of study although they withdrew later.

The formula adopted for allocating the overhead applicable to car service was the same in principle for all three groups. Overhead expenses clearly caused by car service were charged to those services. All other overhead, not clearly chargeable to other services, was charged to car service in the same ratio which the car service costs (or man hours) bore to the total. While this procedure presented a much more difficult problem of segregation of the different services and allocation of the costs in the case of the common carrier group than it did for either of the other two, the results arrived at show no improper application of accounting principle. The overhead of 34 percent, constituting a weighted average of the three groups, is justified by the analysis.

We find:

That the general level of the tariff charges in Car Servicing Tariff No. 1 (MC–No. 1) is noncompensatory;

That respondents' cost studies are sufficient to enable respondents to determine compensatory rates;

That, in accordance with Agreement No. 7544, respondents shall file on or before December 22, 1950, a new tariff of compensatory rates adjusted as between commodities as based upon their past and present cost studies and all other material facts. The effective date of the tariff should be at least thirty days after filing.

These proceedings will be held open pending compliance with the above findings.

No order will be issued at this time.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 25th day of January, A. D. 1951.

No. 639

STATUS OF CARLOADERS AND UNLOADERS

This proceeding having been held open by the United States Maritime Commission, the Board's predecessor, in accordance with its report entered herein on January 28, 1949, "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", and full investigation of the matters and things involved having been had, and the Board, on December 1, 1950, having made and entered of record on further hearing a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof, and respondents having complied with the findings in the report of December 1, 1950;

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

By the Board.

[SEAL]

(Sgd.) R. L. McDonald,
Assistant Secretary.

UNITED STATES MARITIME COMMISSION

No. S-2

Baltimore Mail Steamship Company—Application to Transfer Certain Vessels Owned by It to Intercoastal Trade

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Submitted June 3, 1938. Decided June 7, 1938

Application of Baltimore Mail Steamship Company for permission to enter intercoastal trade approved.

Cletus Keating for applicant.

Roscoe H. Hupper, William P. Palmer, J. R. Bell, Hon. William G. McAdoo, Arthur L. Winn, Jr., W. L. Thornton, Jr., H. J. Wagner, and *G. H. Pouder* for interveners.

Report of the Commission

By the Commission:

By application, as supplemented, filed May 17, 1938, Baltimore Mail Steamship Company, hereinafter referred to as the "applicant," requests permission under section 805 (a) of the Merchant Marine Act, 1936, to transfer to domestic intercoastal service five combination passenger and cargo vessels owned by it; namely, *City of Baltimore, City of Norfolk, City of Hamburg, City of Havre,* and *City of Newport News.* A public hearing was held pursuant to notice and briefs were filed.

The above-named vessels were formerly operated by that company in foreign commerce between Baltimore, Md., and Newport News and Norfolk, Va., on the one hand, and continental European ports, on the other. Applicant states that, after a contemplated reorganization now in progress, all of its stock will be owned by the International Mercantile Marine Company and/or The Atlantic Transport Company of West Virginia, the Baltimore Trust Company, and the Canton Company.

In 1915 The Atlantic Transport Company of West Virginia inaugurated a service between the Atlantic and Pacific coasts by way of the Panama Canal. The Atlantic Transport Company of West Virginia is a subsidiary of the International Mercantile Marine Company and

owns outright the American Line Steamship Corporation, which has had a service under the name of "Panama Pacific Line" for sometime with the vessels *California, Pennsylvania,* and *Virginia,* since the latter were constructed.

The Baltimore Mail Steamship Company, a Maryland corporation, at the present time is owned 46.59% common stock and 25% preferred stock by The Atlantic Transport Company of West Virginia. According to the record, the Baltimore Mail Steamship Company will be reorganized after which all of the stock of the Baltimore Mail Steamship Company will be owned by the International Mercantile Marine Company and/or Atlantic Transport Company of West Virginia and two affiliated companies. It is stated in briefs filed on behalf of applicant that "upon completion of reorganization, The Atlantic Transport Company of West Virginia will own a substantial majority of all of the outstanding stock of the Baltimore Mail Steamship Company."

The International Mercantile Marine Company controls The Atlantic Transport Company of West Virginia and also the United States Lines Company, a common carrier by water in foreign commerce and the holder of an operating-differential subsidy contract under title VI of the Merchant Marine Act, 1936. Section 805 (a) thereof provides, in part, that—

> It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII of this Act, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act * * *

Carriers actively operating in intercoastal service intervened in opposition to the application. Their contentions, briefly summarized, are—that the trade is now overtonnaged; that there is no present need for the vessels of the Baltimore Mail Line; that the transfer of those vessels to the intercoastal trade may disrupt the existing rate basis, especially if service is to cover ports that were not previously served by the Panama Pacific Line; that new construction by existing carriers will be discouraged by the proposed transfer; and that approval of the application in

substance will amount to the extension of government aid to the applicant upon terms not available to them. For these reasons they conclude the proposed operation will result in unfair competition to them and prejudice to the object and policy of the Act which we administer. They also contend that the applicant has failed to show the proposed service to be in the public interest.

The vessels involved herein were originally sold in 1921 by the United States Shipping Board and in 1931 were reconstructed by the applicant through the aid of a construction loan made available pursuant to section 11 of the Merchant Marine Act, 1928, aggregating $6,520,706.26, of which $5,933,106.23 is still due. As a part of the application, applicant requests that provision be made for the payment of that indebtedness by equal annual instalments during the balance of the present term of existing mortgage. Each vessel has accommodations for 82 passengers, a speed of 16.5 knots, with a cargo capacity of about 500,000 cubic feet, of which 26,610 cubic feet is now equipped with circulating air refrigeration. It is contemplated that refrigerated space on each vessel will be increased to approximately 80,000 cubic feet.

The service is proposed to operate in lieu of the service hertofore operated between New York, N. Y., and ports in the State of California by the American Line Steamship Corporation and/or The Atlantic Transport Company of West Virginia with the steamships *California, Pennsylvania,* and *Virginia.* Those vessels, and also the combination passenger and cargo vessels of the Grace Line, Inc., which operated continuously in intercoastal service for many years, were recently withdrawn from this route. Except for the westbound service of Dollar Steamship Lines Inc., Ltd., with infrequent sailings from New York during recent months as a part of its Round-the-World service, there is no adequate passenger service between Atlantic and Pacific coast ports of the United States at the present time. Some cargo vessels are equipped with limited passenger space, but they are not classed as passenger vessels. Interveners supporting the application urge the necessity of such a service by more modern vessels than are now in operation, and of a type and kind suitable for use as naval and military auxiliaries in time of war or national emergency. This need is further evidenced by the substantial number of passengers shown to have been transported during 1937 by the Panama Pacific and the Grace Lines. While applicant's vessels can accommodate but a portion of the passenger traffic previously transported via the Panama Canal, to the extent of their capacity they will serve an existing need.

It is also shown that there is little, if any, adequate space on cargo vessels now in operation for certain classes of refrigerated cargo. Vessels of the Panama Pacific Line were equipped with a total of ap-

proximately 300,000 cubic feet of circulating air refrigeration. A representative of the California Fruit Growers Exchange testified that during the period 1933 to 1937, inclusive, shipments of citrus fruits eastbound exceeded 450,000 boxes per season, and that the association filled to capacity all the refrigerated space on the vessels of that line available to it.

Vessels of Grace Line, Inc., now withdrawn from service, were also equipped with substantial quantities of circulating air refrigeration. The witnesses for the Association testified that it is ready, willing, and able to supply cargo to fill all the refrigerated space on the five vessels. In addition to citrus fruits, shipments moving eastbound which require refrigeration include frozen fish, frozen poultry, eggs, fresh vegetables, and fresh fruits. Westbound commodities requiring refrigeration include confectionery, cranberries, cheese, frozen fish, and oysters. It is clear that a need exists for refrigerated service in intercoastal trade, which is evidenced in part by the large number of letters and telegrams from shippers and others that were submitted by the applicant. It was shown that substantial quantities of citrus fruits move all-rail to competitive points in eastern territory, but all-rail rates are substantially higher than the rates via the all-water route to eastern points.

From the foregoing it is clear that to the extent of the refrigerated and passenger service which applicant's proposed operation will afford, its service will not be competitive with that of existing operators.

Interveners American-Hawaiian Steamship Company and Luckenbach Steamship company, Inc., oppose the granting of the application on the ground that the trade is now overtonnaged and that cargo transported by applicant will decrease the carryings of vessels now in operation. They direct attention to present sailings with only part cargoes and state that all lines now operate at a loss. These interveners operate vessels whose speed is 11.5 knots or more with sailing frequencies in excess of their present competitors. With such advantages they are able to attract high grade cargo. Testimony in the record indicates that while there has been some recession in the quantity of higher grade cargo due to present economic conditions, the decline has not been so marked as that with respect to low grade cargo, which has fallen off materially.

However, in considering the problems presented by this application temporary declines in traffic due to existing business conditions should not control. Consideration must be given to the long-term prospects of the trade and to the age of the existing tonnage operated therein. The last factor is of particular significance in view of the fact that no substantial volume of new construction for this trade seems likely at the present time. Therefore, the transfer of the applicant's vessels,

which were completely rebuilt in 1931, may be the only means of insuring adequate long-term service for high grade cargo. Moreover, in this connection it must also be recognized that, while some of the cargo for the proposed operation may be diverted from the objecting water carriers, a substantial amount probably will represent cargo carried by fast intercoastal vessels viz: *Virginia, California,* and *Pennsylvania,* controlled by The Atlantic Transport Corp., of West Virginia, or refrigerated cargo and passenger business for which the objectors' vessels cannot provide. The objectors recognize that they have no right to a monopoly in the trade. Under the ruling herein, the right to compete is not denied to them.

There is no merit in the contention that the proposed operation would result in unfair competition because of the proposed readjustment of the indebtedness covering the applicant's vessels. Such readjustment of the indebtedness as may be hereafter agreed upon would tend to insure orderly liquidation of such indebtedness and would not constitute a grant or disguised subsidy. Similar adjustments have been made in the past with operators engaged in the intercoastal trade, as well as the foreign trade. If found by the Commission to be fair and reasonable, these adjustments in themselves do not introduce any element of unfair competition. In this connection, it also should be noted that the interest rate on the mortgages covering the applicant's vessels would automatically be increased to 5¼ percent, in accordance with the terms of the mortgages.

American-Hawaiian Steamship Company directs attention to impending dangers to the rate structure now observed by it and other carriers. In any event the rate structure is now constantly subject to jeopardy by our lack of authority to prevent intercoastal operation by other persons, and this alone does not justify a denial of the application.

We find that on this record there will be no unfair competition within the purview of the 1936 Act to existing carriers or prejudice to the objects and policy of the Merchant Marine Act, 1936, from the operation of applicant's vessels in the intercoastal trade, and the application will be approved.

In view of this conclusion it is unnecessary to determine whether there has been a continuation of operations. 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 7th day of June A. D. 1938.

No. S–2

BALTIMORE MAIL STEAMSHIP COMPANY—APPLICATION TO TRANSFER CERTAIN VESSELS OWNED BY IT TO INTERCOASTAL TRADE

A hearing having been held in this proceeding, pursuant to the provisions of section 805(a) of the Merchant Marine Act, 1936, and the Commission, on the date hereof, having made and entered of record a report stating its conclusions and decision therein, which report is hereby referred to and made a part hereof;

It is ordered, That the application of the Baltimore Mail Steamship Company be, and it is hereby, approved.

By the Commission.

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

UNITED STATES MARITIME COMMISSION

No. S-1

AMERICAN SOUTH AFRICAN LINE, INC., SEAS SHIPPING COMPANY, INC.—APPLICATIONS FOR OPERATING-DIFFERENTIAL SUBSIDY IN THE OPERATION OF VESSELS TO SOUTH AND EAST AFRICA

Submitted June 17, 1938. Decided August 5, 1938

Cletus Keating, Roger Siddal, and *Luke D. Stapleton* for American South African Line, Inc.

Roscoe H. Hupper and *Frank V. Barnes* for Seas Shipping Company, Inc.

Arthur L. Winn, Jr., and *L. W. Byrne* for Port of New York Authority, *Samuel H. Williams* for Philadelphia Chamber of Commerce, *Charles B. Roeder* for Philadelphia Bourse, and *John J. Egan* for Philadelphia Maritime Exchange, interveners.

REPORT OF THE COMMISSION

BY THE COMMISSION:

The case arises upon applications filed by American South African Line, Inc., and Seas Shipping Company, Inc. (Robin Line), for operating-differential subsidies under Title VI of the Merchant Marine Act, 1936, both applicants seeking subsidies for operations to be performed on one and the same route. Pursuant to the provisions of section 605(c) of the Merchant Marine Act, 1936 (which, with amendments, is hereinafter for convenience sometimes referred to as "the Act"), we held hearings on the applications at Washington, D. C., April 14 and 15, 1938, and at New York, N. Y., April 19, 1938. A proposed report was issued, exceptions were filed thereto, and oral argument was held.

In 1919, the United States Shipping Board began experimenting with American-flag services in the trade from North Atlantic ports to South Africa. In 1922, the American South African Line was established as regular service by the U. S. Shipping Board under Government ownership with private operators. In 1924, the Shipping Board negotiated

a conference agreement with the foreign lines in the trade for maintenance of rates, and an agreement covering spacing and rotation of sailings. The existing conference agreement is based on this agreement made in 1924.[1] Presently, of 48 conference sailings, 12 are apportioned to American South African. In 1925, in keeping with its policy of divesting itself of Government operation, the U. S. Shipping Board advertised the American South African Line for sale. As a result of this advertisement, the American South African Line, Inc. acquired the line from the Government, paying $18.10 per ton for the ships involved, and the purchaser commenced the operation of the line in 1926, which operation, it is stated, has resulted in a profit after depreciation and all other charges of $1,006,244.58 for the period from 1926 to March 31, 1938, or an average profit of $82,142.41 a year.

In 1928, the Merchant Marine Act of 1928 was passed. Under its provisions and in due time, the American South African Line, Inc., was awarded a ten-year mail contract, dated October 1, 1928, and ending October 1, 1938, under which contract this line received mail pay, which was admitted to be in part an operation subsidy, amounting to a trifle less than $300,000 a year. As one of the requirements of the Government under this contract, the American South African Line, Inc., built and put into service a new combination passenger and freight vessel, the *City of New York,* stated to cost $1,917,673.88. This construction cost was in part financed by a loan from the United States Shipping Board, the predecessor of the present U. S. Maritime Commission. On this loan there is a balance owing of $810,000 which is current as to principal and interest maturities. It was stated, without contradiction, in the record that the American South African Line, Inc., was prepared, and offered, to build another vessel under the same plan, but that the Government authorities preferred, under the then existing circumstances, to defer the building of the second vessel.

In 1932, the American South African Line experienced the effects of the world-wide depression in shipping, as in industry generally, but continued to operate, and, on April 18, 1935, initiated a non-subsidized monthly service from New Orleans and other Gulf ports to South Africa

[1] U.S.A./South Africa Conference.

J. B. O'Reilly, Secretary, 26 Beaver Street, New York, New York.

Covers freight traffic from U.S. Atlantic ports—Portland/Key West Range—to West, Southwest, South and East African ports from Lobito to Mombasa, both inclusive, and to the islands of St. Helena, Ascension, Madagascar, Reunion, and Mauritius.

Am, American South African Line, Inc.
Br, The Clan Line Steamers, Ltd.
Ge, Deutsche Dampfschiffahrts Gesselschaft "Hansa" (Hansen Line)
Br, Ellerman & Bucknall Steamship Co., Ltd.
Br, Houston Line (London Ltd.)
Br, The Union Castle Mail Steamship Company, Ltd.
1 American, 5 British, 1 German.

with the sailing of the S. S. *Atlantic,* and on April 1, 1935, extended its subsidized service to East Africa with the sailing of the *Chincha.*

On June 22, 1935, the Seas Shipping Company, Inc. (Robin Line), the present second applicant for an operating-differential government subsidy on this route, initiated a new service from New York and other Atlantic coast ports to South and East Africa with the sailing of the *Robin Adair.* It is stated that the effect of this new service was to "blanket" the service of the American South African Line.

The twelve annual sailings of the Robin Line have been maintained without any governmental aid. As in the case of American South African, the Robin Line has maintained its sailings with four vessels. The latter were purchased from a private shipbuilder in 1920 and 1921 without governmental aid of loans. Approximately the same tonnage is carried by each operator.

Prior to its entry in the trade, Robin Line applied for admission as a member of the conference, with privilege of participation in rate making along with other members, and of maintaining twelve sailings per annum, the same number as was maintained by the American South African Line. This application was denied. Subsequently, the lawfulness of that denial was the subject of a formal proceeding before the United States Shipping Bureau of the Department of Commerce. In a decision entered August 1, 1936, the action of the conference was upheld. *Seas Shipping Company* v. *American South African Line, Inc., et al.,* 1 U. S. S. B. B. 568. Circumstances relating to the rate war which existed during the period June to September 1935, caused in part by Robin Line's entry in the trade, are set forth in the above-mentioned report.

On July 1, 1937, the rate war was ended and rates were restored to the basis existing prior to the rate war. The evidence adduced and before the Commission now is to the effect that the Robin Line did not restore its rates to the conference level. By way of explanation, the Robin Line says, in its brief, that while it made contracts for rates during the rate war and was not in position to raise its rates immediately to the conference level, it now offers to meet the conference rates *if it receives an operating-differential subsidy.*

On February 22, 1937, the American South African Line applied for an operating-differential subsidy pursuant to the Commission's General Order No. 5, and as provided by section 402 (a) of the Merchant Marine Act, 1936.[2] A second application, pursuant to General Order No. 13, was filed on October 25, 1937.[3]

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[2] This application neither contained a request for nor made any mention of an exclusive operating subsidy.

[3] Although this application contained no request for an exclusive operating subsidy, on page

On June 17, 1937, a settlement agreement was reached between the Commission and the American South African Line of the ocean mail contract held by that Line, which was thereupon terminated, and a temporary operating-differential subsidy was granted.[4] This temporary subsidy contract recites that it is in substitution for the former mail contract, which, had it not been terminated by law and the settlement agreement, would have expired by its own terms on October 1, 1938. The temporary subsidy contract has been extended and is still in effect. It contemplates a long-term subsidy to be granted upon the company satisfying the Commission as to an adequate ship replacement plan. Neither the former mail contract nor the present temporary subsidy contract provides that the subsidy granted should be an exclusive subsidy to the American South African Line. The company also requests an operating-differential subsidy for its Gulf to Africa line but claims that if operating subsidies are awarded to both applicants, American South African will, because of insufficient homeward cargo, abandon its Gulf service.

The American South African Line proposes that it will enter into a 12-year subsidy contract on standard form with the following special provisions:

(1) It will agree to contract for two combination passenger and cargo vessels having a 16½ knot or superior speed at estimated cost of $3,600,000 each, within one year and will agree to build a third vessel as soon as finances permit.

(2) $500,000 additional cash will be obtained within 30 days for stock. Balance of construction cost (about $400,000) will be received from sales of surplus vessels to be obtained by merger with the Argonaut Line, which it now controls.

(3) No subsidy will be paid until full compliance with both (1) and (2) above, and in the event of default, subsidy contract may be cancelled retroactively from inception and *all* subsidy money forfeited (except on S. S. *City of New York*) unless default is caused by failure to secure reasonable bids.

(4) Subsidy contract must contain exclusive franchise clause.

(5) It will agree to continue experimentation with Gulf service for about two and a half years under operating subsidy contract, with provision for from seven to twelve sailings per annum.

18, under sec. 27(a), a replacement program to consist of three vessels was offered, "provided a satisfactory construction and operating differential subsidy contract is arranged and no other American-flag line is given a subsidy in the South and East African trade."

[4] The record of negotiations relating to the settlement of the ocean mail contract and the award of the temporary operating-differential subsidy agreement is silent on the subject of any exclusive subsidy in the trade.

On November 30, 1937, the Robin Line also filed an application for an operating-differential subsidy on its service from North Atlantic ports to South and East Africa. This application did not ask for an exclusive subsidy. Its schedule provides for 12 monthly sailings per year. This line claims the right to such a subsidy under the provisions of the Merchant Marine Act, 1936, in order that it may be placed on a parity with its foreign competitors to meet the known disadvantage of operating under the American flag.

The Robin Line proposes that it will enter into a 12-year contract on standard form with the following special provisions:

> (1) Robin will enter into firm contracts satisfactory to the Commission for the construction of three cargo vessels within one year from the date of the contract. The vessels will have a minimum of 15½ knots speed or such higher speed as the Commission may find to be necessary to maintain a monthly sailing schedule. Cost of these vessels is estimated at $2,000,000 each.
>
> (2) Within 30 days from the date of the contract $500,000 in cash will be invested in the Robin Line, the investment to be evidenced by the issuance of preferred stock in an equivalent amount. In addition, guarantees satisfactory to the Commission will be furnished to insure the investment of an additional $250,000 in cash within six to nine months if the company will not have created a capital reserve fund of $750,000 by that time.
>
> (3) No subsidy will be paid over to Robin until full compliance with conditions (1) and (2) above. In the event of non-compliance, the subsidy contract may be terminated from its inception and *all* subsidy monies forfeited, unless non-compliance is caused by the failure to secure reasonable bids.
>
> (4) Robin's corporate structure will be simplified to Commission's satisfaction and about $100,000 of inter-company debt will be eliminated by cancellation or conversion.
>
> (5) Robin will agree not to cut rates or blanket sailings of South African, and may agree to pool homeward cargo.

Except for the *City of New York,* which is owned by the American South African Line, all the vessels owned by each of the applicants are at least 17 years old. The mean speed of these vessels is from 10 to 10½ knots, with the exception of the *City of New York,* which has a speed of 13½ knots. While both applicants readily admit the imperativeness of an immediate replacement program, because of the age of the present tonnage now in operation, they are likewise in unanimity that this will not be possible without the aid of substantial construction and operating subsidies.

As has been stated, American South African proposes to build, contingent, however, upon its receiving an *exclusive* subsidy, two vessels immediately and a third in the near future. The proposed new vessels are to be combination cargo and passenger vessels with a capacity for 100 passengers, with more cargo space than its vessels now in operation, with refrigerated space, and with twin screw Diesel motor propulsion capable of maintaining an average of 16½ knots per hour. The line contends that the proposed three new ships will be ample to maintain the twelve annual sailings now furnished by four ships. No program is advanced for the replacement of the vessels of the Argonaut Line now in use in the Gulf service, and it seems unlikely that any such program can be consummated even with the maximum governmental assistance authorized by the Act.

The Robin Line, on the other hand, has not progressed as far with actual plans as has American South African. It now agrees to build three new cargo vessels with a speed of 16½ knots unless a slower speed is approved by the Commission. It is not the intent of the Robin Line to install passenger accommodations.

Based upon current American shipbuilding costs, American South African estimates that the construction of each of its new vessels, which will require an expenditure of some $3,650,000 per vessel, of which $700,000 will represent the cost of the installation of passenger accommodations and $100,000 for refrigeration equipment. The Robin Line estimates the cost of their new vessels at $2,000,000 per unit, assuming a 15½ knot speed.

Endeavoring to reconcile the differences between the two lines, the Commission has heretofore suggested a consolidation or merger of their interests but after many conferences it appears that neither a consolidation nor a merger is possible of consummation at this time.

At the present hearings some 18 shippers testified that they used both lines, as well as most of the foreign lines, and that in the interest of service they desired to see both lines continue in operation. Competition on this route is very keen. There is ample outward cargo to support 24 monthly sailings per year from North Atlantic ports by the two American-flag lines, and if either of the American-flag services (now carrying together about 33⅓ per cent of the outward cargo) is discontinued, undoubtedly a large proportion of the tonnage carried by the line that withdraws will go to the foreign-flag lines. Both services are found to be competent and efficient by the shippers who testified.

The homeward cargo presents a different problem. Most of the foreign lines do not make the return voyage, but continue on around the world or in other directions, so these two American-flag services get most of the inward cargo. However, this is largely bulk cargo, pays

much lower rates than the outward cargo, and requires larger volume to pay the expenses of transportation. It consists principally of raw materials, such as skins, sisals, barks, and roots, coffee, and ore. A very small amount of the inward cargo goes to the Gulf so the ships in the Gulf service of the American South African Line make the return voyage to North Atlantic and Canadian ports, making 24 inward voyages for that line against 12 for the Robin Line. There is a conflict in the evidence offered as to the number of return sailings which the inbound cargo would support. South African thinks the cargo will support only 19 paying sailings per year; Robin thinks there is enough for 24 sailings. Taking into consideration the upward trend of the movement, the evidence appears to support the Robin Line opinion and the Commission is of the opinion that this business is likely to increase. Both lines agree and the evidence adduced clearly indicates that there is not enough homeward cargo for 36 paying voyages.

There is disagreement between the two lines as to the carrying of passengers, but the *City of New York,* with a passenger capacity of 56, has had her passenger space usually filled. South African contends that passenger travel is growing and that it will be remunerative to equip new ships which it proposes to build to carry 100 passengers each. The faster speed of the new ships will cut down the voyage time, offering better competition to the route from New York via London. The class of passengers carried is not likely to be affected by the increased air travel.

In its brief and by exceptions to the proposed report, American South African has contended that the Commission is without legal authority to grant subsidies to both applicants for their several operations on the same trade route. The contention is based on a general denial that dual or multiple subsidies are authorized by the Merchant Marine Act, 1936, for a route served by an existing subsidized operator without a finding by the Commission that the existing service of such operator is inadequate within the meaning of that word as used in section 605 (c) of the Act. Plenary power to grant dual and multiple subsidies is expressly conferred upon the Commission by this very section 605(c), subject only to the limitations therein stated. The language of the section is too clear in this regard to require further elaboration. (See extensive analysis of legislative history attached hereto.) Exercise of the power must rest, of course, in the sound discretion of the Commission upon findings of warrantable facts.

American South African contends, however, that the situation "where there is an existing subsidized line and an additional subsidy is sought for another line" is legally different from the situation "where there is no subsidized line and a subsidy is sought for one of two or more lines

in the trade." The argument implies that an operating subsidy contract, as a matter of law, confers upon the holder a privileged status to the exclusion of all other citizens. To this argument we cannot subscribe. The Act neither by definition nor implication invests a subsidy contract with the legal effect of an exclusive franchise although under section 605(c) services created after the passage of the law cannot be subsidized so long as the existing service or services are found to be adequate. Nor does the presently effective temporary contract by its terms confer any such property right upon American South African. A fact that such contract might have been entered into "in substitution" of a terminated mail contract, all claims in connection with which have been settled,[5] would be immaterial. Therefore, the temporary subsidy agreement which American South African now holds, neither by operation of law nor by its terms constitutes an *exclusive right* to a subsidy on the route.

Although not stressed in the briefs, the contention was advanced in oral argument by American South African that a decision in this case is controlled by the first clause in section 605(c), which reads as follows:

> No contract shall be made under this title with respect to a vessel to be operated on a service, route, or line served by citizens of the United States which would be in addition to the existing service, or services, unless the Commission shall determine after proper hearing of all parties that the service already provided by vessels of United States registry in such service, route, or line is inadequate, and that in the accomplishment of the purposes and policy of this Act additional vessels should be operated thereon * * *

This argument is grounded in an assumption that the service for which the Robin Line seeks Federal aid is one "which would be in addition to the *existing* service, or services" already provided by vessels of United States registry. Such assumption is contrary to fact.

It is unnecessary in this case to determine whether the term "existing" speaks as of the effective date of the Act or as of some subsequent date when a subsidy application might be filed or considered. The service for which the Robin Line seeks an operating subsidy has been one continuously existing from a date prior to the passage of the Merchant Marine Act, 1936. The contention that the word "existing" is to be further impliedly restricted to an existing "subsidized" service or services is without merit.

It is the second clause of section 605(c) with which we are principally concerned and as to which the question of adequacy of service has particular application. It reads as follows:

[5] It is interesting to note in this connection that neither American South African nor any other holder of an ocean mail contract terminated by the Merchant Marine Act, 1936, asserted any claim based upon the contention that the termination of the contract by the United States constituted the extinguishment of any right of exclusive franchise.

and no contract shall be made with respect to a vessel operated or to be operated in a service, route, or line served by two or more citizens of the United States with vessels of United States registry, if the Commission shall determine the effect of such a contract would be to give undue advantage or be unduly prejudicial, as between citizens of the United States, in the operation of vessels in competitive services, routes, or lines, unless following public hearing, due notice of which shall be given to each line serving the route, the Commission shall find that it is necessary to enter into such contract in order to provide adequate service by vessels of United States registry. The Commission, in determining for the purposes of this section whether services are competitive, shall take into consideration the type, size, and speed of the vessels employed, whether passenger or cargo, or combination passenger and cargo, vessels, the ports or ranges between which they run, the character of cargo carried, and such other facts as it may deem proper.

American South African contends that its service on the route must be found to be inadequate and unsatisfactory before additional subsidized operations may be permitted in the trade. In support of such contention this applicant lays down the test as being whether it is doing its "fair share" in the trade. It says, "The only question here is: Has the American South African Line, Inc., been an earnest, competent and energetic operator * * * or has the time come when this operator has become laggard, and the Government's support should be shifted to another?"

An analysis of the testimony given by shippers and witnesses for the applicants discloses a steady increase of business with South and East Africa. Both the Robin Line and American South African report capacity outbound sailings. American South African has had sufficient faith in trade developments to establish a new unsubsidized service from the Gulf. The applicants have estimated that they now carry between them approximately 33⅓% of the outward cargo offerings. Whereas American South African, before the entrance of the Robin Line into the trade, had 12 of 48 conference sailings and carried sufficient cargo to realize a reasonable return on its investment,[6] the fact that the Robin Line now also maintains 12 sailings in addition to the conference sailings reveals beyond doubt the growth of the South and East African export trade. To state the matter another way, in the past few years cargo offerings have increased to the extent of 12 additional sailings. This may be accounted for by the rapid increase in population and the advancement of the standard of living conditions in South and East Africa.

A different situation prevails with respect to the inward cargo from

[6] "Our operations have been successful from the start. For the extended period of twelve years and three months we have had an over all profit of $1,006,244.58 or an average profit per annum of $82,142.41." (Testimony of James A. Farrell, Jr., President of the American South African Line, Inc.—Hearings before the Maritime Commission, April 14, 1938, page 145.)

South and East Africa to North Atlantic ports. Not nearly as much cargo, nor cargo paying as high a freight rate as that outward from the United States, is offered for the return voyage. However, the foreign lines do not return directly to the North Atlantic. Their service may be described as "one way" since it is their custom to continue on to Far Eastern and European ports. Hence, virtually all the inward cargo is carried in American vessels. There was disagreement between the two applicants as to the present and prospective amount of homeward cargo. The American South African Line contends that in the light of its experience of 12 years duration, the homeward offerings do not justify in excess of 19 annual sailings. On the other hand, the Robin Line is confident that inward cargo is sufficient to support 24 sailings. American South African did not offer any evidence to show that cargo offerings from New York were now insufficient nor would in the future be insufficient, to support 24 sailings from New York. It confined itself in attempting to show that the offerings of inward cargo will not be sufficient to maintain more than 19 sailings. The Robin Line bases its estimate on the fact that the complete round trip will be a compensatory undertaking. American South African, on the other hand, apparently endeavored to justify a necessity for a profit on each the outward and the homeward voyage. Often srevices do not show commensurate returns for each portion of the round voyage, and it is not improper to consider the round voyage in its entirety as a standard for the needs of the service. From all the evidence, it is believed that the profit on 24 outward voyages will be sufficient for both applicants to realize a profit, even after the homeward leg of the voyage is taken into consideration.

American South African, however, further contends that before a subsidy should be granted to the Robin Line there should be supporting evidence to show that there will be sufficient inward cargo offerings to support 36 sailings. This untenable contention takes into consideration the homeward voyages of their Gulf service. In the matter of these applications, the North Atlantic service and the Gulf service need not be treated as inseparable. Moreover, the Gulf service is admittedly experimental in nature and it seems extremely doubtful whether the service can ever be made to pay. Thus, 24 homeward sailings and not 36 may be the test.

If opportunity for Federal financial aid were denied to the Robin Line, within but a few years when its vessels (which are now 18 and 19 years old) will have reached the end of their economic life, the cargo carried by them would probably be transported either in ships chartered by them (possibly under a foreign flag), or would find its way to foreign-flag vessels. Neither applicant proposes, *nor has either applicant the financial resources,* to build sufficient vessels to maintain 24 outward

sailings, which, without any consideration of future trade development, present cargo offerings now demand. The Robin Line did not necessarily take its present business away from the conference lines. Its carryings may have been and, to a large extent, probably were, developed through its own initiative. It has absorbed the increased amount of exports. This increase in business was accomplished in the face of bitter competition. The Robin Line has now firmly established itself in the trade. Failure to make it possible for it to continue its services would be, in effect, to turn this newly developed American commerce over to foreign lines. The Commission should be loath to take action which would result in this trade, now firmly entrenched with an American company, being taken away from the American merchant marine. Thus, an exclusive subsidy to American South African as requested by that line would result in direct benefit to foreign-flag operators to the detriment of the interests of the American merchant marine.

Pursuant to the provisions of section 211(a) of the Merchant Marine Act, 1936, the Commission has heretofore determined that the route from North Atlantic ports to ports in South and East Africa is an essential trade route of foreign commerce of the United States. Such determination is hereby reaffirmed. *Service of the American South African Line, Inc., on this route is not adequate within the purview of section 605(c) of the Merchant Marine Act, 1936,* and that line alone cannot provide adequate service on the route by vessels of United States registry. Neither of the applicants here is able alone to provide adequate service by such vessels on this trade route.

We find and determine from the records and evidence in this proceeding that each applicant is eligible and should receive an operating-differential subsidy, upon compliance with the terms and conditions of the Act and the requirements of the Commission.

In reaching this determination, we are not unmindful of the difficulties and problems presented by the existence of two subsidized services in the same trade route. For this reason we have concluded that the contracts to be awarded to the applicants should be for an experimental, short-term duration, during which period the applicants, in cooperation with the Commission, should exert every effort to eliminate or solve those difficulties and problems. Specifically, we believe that efforts to effect a merger or consolidation of these companies should be continued; that, failing such a solution, satisfactory arrangements should be worked out covering *sailing dates, rates, and pooling of homebound* cargo, so as to eliminate, as far as possible, competition between the two American companies, and to enable both American companies to cooperate in competing against the foreign lines now carrying the bulk of the commerce in this trade; that, before either operator receives a

long-term subsidy, it should actually complete plans and specifications for replacements, secure bids thereon, and prove its willingness to proceed in accordance therewith; and that, during the experimental dual subsidy period hereinafter provided for, each of the applicants should have the right to apply to reopen this proceeding for the purpose of introducing additional evidence, either in support of or in opposition to, the continuation of an operating subsidy to the other company. The perid of the short term contracts will also provide an opportunity to reach a final determination regarding the continuation of the Gulf-South African route.

In order to carry the foregoing principles into effect, we have determined as follows:

(1) The application of the American South African Line, Inc., should be, and hereby is, denied to the extent that it requests an exclusive subsidy.

(2) Subject to the foregoing, and subject further to compliance with all the applicable provisions of Title VI of the Merchant Marine Act of 1936, as amended, and the requirements of the Commission thereunder, the applications of the Seas Shipping Company, Inc., and the American South African Line, Inc., for operating-differential agreements will be granted on the following terms and conditions:

(*a*) The agreements shall be for a period of six months, with provision for automatic extension for 12 years, at the option of the Commission, upon compliance with all the conditions of said agreements.

(*b*) During said six-month period both companies will be required to exert every reasonable effort to work out or effect a satisfactory consolidation, merger, or other agreement for joint operation over this trade route.

(*c*) The subsidy agreements will require proper spacing of sailings, maintenance of uniform freight rates, and pooling of homeward cargoes by both operators, all on a basis satisfactory to the Commission.

(*d*) The agreement with the Seas Shipping Company, Inc., will require that company to complete, within the period of contract, all necessary plans and specifications for the construction of three cargo vessels of a type and speed satisfactory to the Commission; to advertise for firm bids for the construction of said vessels; to make binding arrangements satisfactory to the Commission for the investment of at least $500,000 in cash in that company, subject to the extension of the agreement for 12 years, the investment to be evidenced by preferred stock or other security satisfactory to the Commission; to make arrangements satisfactory to the Commission for securing satisfactory guarantees to insure the investment of an additional $250,000 in cash, if, as, and when required to complete the construction program; to simplify its corporate structure in a manner satisfactory to the Commission; and to cancel at least $100,000 of inter-company debt.

(*e*) The contract with the American South African Line, Inc., shall cover both the Gulf and Atlantic coast routes, and shall provide that during the period of the contract the company will complete all necessary plans and specifications for two combination passenger and cargo vessels of a type and speed satisfactory to the Commission; to advertise for and obtain firm bids for the construction of said two vessels; to make arrangements satisfactory to the Commission for the investment of at least $500,000 additional cash in the company, such investment to

be made automatically upon the extension of the agreement for 12 years for the North Atlantic route. This agreement shall be accepted by the Commission as compliance with the condition of the second article of the temporary subsidy agreement now in effect.

(*f*) Both agreements shall provide that no subsidy monies shall be paid thereunder, except upon full compliance with the above-mentioned provisions of the contracts, and that, in the event of a default in any of the above provisions, the contracts shall be rescinded and all subsidy monies accruing thereunder (except for an amount equal to sums actually expended in the development of the plans and specifications above referred to) shall be forfeited, except that in the case of the American South African Line, Inc., the subsidy shall be paid on the *City of New York,* unless the default is found by the Commission to be willful.

(*g*) Both agreements shall provide that, at the option of the Commission, the same may be extended for 12 years, upon terms and conditions satisfactory to the Commission with respect to each operator, provided, in each case, that the operator enters into firm contracts for the purchase and construction of the vessels above referred to.

The Commission reserves the right, upon application of either party or upon its own motion, to reopen this proceeding at any time during the said six-month period, to receive evidence covering any pertinent matter regarding the desirability or necessity of subsidizing both services on a permanent basis, and to make such other or final disposition as the Commission may deem just and proper. The degree of compliance by each applicant with the foregoing conditions will be considered in such event. If a final determination adverse to the continuation of dual subsidies beyond the six-months period is reached, both the Commission and the operator whose subsidy is to be terminated shall be under no further obligation to comply with these terms of the temporary agreement which relate to new construction, but such operator shall not be deprived by reason of such determination of any subsidy accruing under the temporary contract. An order of the Commission is accordingly entered herewith.

APPENDIX

LEGISLATIVE HISTORY OF SECTION 605(c)

If there were any doubt as to the legislative intent expressed in the language of section 605(c) it would be removed by an examination of the legislative history of the section.

The Merchant Marine Bill, H. R. 8555, introduced by Congressman Bland, which passed the House in 1935, did not contain the clarifying language of section 605(c), "which would be in addition to the existing service, or services." S. 3500, the Copeland Bill, which was introduced in the Senate February 27, 1936, was identical with the companion bill H. R. 8555 in respect to the corresponding subsection of the latter bill under discussion with the exception that the language, "which would be in addition to the existing service," was added. The Guffy Bill, S. 4110, introduced February 27, 1936, enunciated a single subsidy policy. S. 4110, however, was never reported out of committee. This restriction was deleted when the Guffy-Copeland compromise was drafted. The compromise was in the form of an amendment to H. R. 8555; it was introduced in the Senate May 18, 1936, and ultimately became the Merchant Marine Act, 1936. As a substitute for the single subsidy policy of the Guffy bill, the compromise included section 536(a) of S. 3500, which is identical with section 605(c) of the 1936 Act as presently worded, except for the addition of the words "or services" and the changing of the word "Authority" to "Commission." Section 536(a) of S. 3500 had its origin in H. R. 7521, 74th Congress, a bill which preceded H. R. 8555. Committee Print No. 2 of that bill provided:

"SEC. 506(b). No such contract shall be made with respect to a vessel to be operated on a service, route, or line, served by citizens of the United States, unless the authority shall determine that the service already provided upon such route or line is inadequate and that in the public interest additional vessels should be operated thereon."

At the time the Senate Commerce Committee had S. 2582 under consideration (the companion bill of H. R. 7521), which had been introduced by Senator Copeland, Mr. Ira Campbell, representing the American Steamship Owners Association, appeared before the Senate Committee and submitted a redraft of the bill which substituted section 508 in place of former section 506 (b). Section 508 was of the following tenor:

"SEC. 508. No contract shall be made with respect to a vessel to be operated on a service, route or line, served by citizens of the United States, unless the Authority shall determine, after proper hearing of all parties concerned, that the service already provided upon such route or line is inadequate, and that in the accomplishment of the purpose of this Act additional vessels should be operated thereon."

In explanation of the redrafted section, the following is taken from the Hearings (Hearings on S. 2582, 74th Cong., 1st Sess., page 512):

"The CHAIRMAN. That provides for a certificate of necessity, so to speak, does it not?"

"Mr. CAMPBELL. If the service is inadequate, then the new contract should be made. If additional vessels should be operated to accomplish the purposes of

this whole act, the permission should be given. It does not make much difference whether you state it in this form or in some other form, so long as you adhere to the principle."

On the same day, May 7, 1935, Mr. Frank B. Barns, representing Mr. Arthur R. Lewis, founder of the Robin Line, also appeared before the Senate Committee. In his statement he said that he was of the impression that the future of the Robin Line would be conjectural if the bill, as written, were adopted. He called attention to the fact that Mr. Lewis' company was inaugurating a service from New York to South and East Africa. Mr. Barns, in his interesting colloquy with Senator Copeland, forcefully appealed to the Committee for Commission authority in the matter of the granting of dual subsidies. The following discussion appears in the Hearings (Hearings on S. 2582, 74th Cong., 1st Sess., pages 546, 7, 8):

"The CHAIRMAN. Your question is whether or not you would profit by the bill?"

"Mr. BARNS. The question is whether the Marine Authority would be obliged to consider our application for aid in operating assistance."

"The CHAIRMAN. I do not think there would be any distinction. Any citizen of the United States has a right to apply both for a construction Loan and for a subsidy." * * *

"The CHAIRMAN. I think the complete answer to your question is this: If you are to establish a new line and new service to a port already served by an American line, you would in effect have to have a certificate of convenience and necessity. You know what I mean. If you were establishing a service not now served by American ships, there would not be any question about your right to a differential, and you would not, as a matter of fact, under the bill as written, with the approval of the Authority, establish a tentative line."

"Mr. BARNS. I think it helps one having vessels of the type which I have mentioned, feeling that with this act he can go to the Authority and get not only assistance for any reconditioning that may be necessary, but can get the benefit of the operating help which will put him on a parity with the foreign vessels that are operating to those same ports. That is what I felt especially concerned about—being able to get the operating subsidies so that we may operate to those ports in competition with the foreign ships."

"The CHAIRMAN. Of course, you would have to run the gauntlet of the Authority. They would pass upon the wisdom or the unwisdom of establishing a new service to ports already served by American vessels. But if you succeeded in convincing them, then it would be entirely acceptable."

"Mr. BARNS. That is the only thing that is questionable—whether or not the bill as drawn now places one in a position of having to obtain a certificate of necessity, so to speak. As long as there are foreign companies operating vessels——"

"The CHAIRMAN. Are you speaking for foreign companies?"

"Mr. BARNS. I say, there are foreign companies that are operating between New York and Africa today in competition with American companies that are operating. There will still be, with our going into the field, these foreign companies operating; and as long as there is a foreigner able to do business there, it seems to me assistance should be given to any American citizen who is willing to go in."

that service is adequately covered. That would be for the Authority to determine."

"Mr. BARNS. Well, it would be pretty narrow construction to say that it was adequately covered by an American shipowner as long as there is a foreigner carrying goods there to any extent."

Mr. McAuliffe, President of the Isthmian Steamship Lines, filed a brief with the Senate Committee also urging Commission authority to grant dual subsidies, the brief reading as follows (Hearings on S. 2582, 74th Cong., 1st Sess., page 564):

"I have only one question to place before your committee, and that is whether the financial aid provided by this legislation is to be used to place American vessels upon a competitive basis with foreign vessels or whether it is to be used to enable one favored American operator in each trade route to obtain all the aid and force his American competitors out of business. The former will build up the American Merchant Marine while the latter would promote a monopoly in the hands of a few at the expense of the Government, and would eventually destroy our marchant marine through inefficiency and decay.

"The bill very properly makes the aid available to every citizen of the United States, and, on the face of it, that would seem to answer the question. Yet there seems to be an impression or understanding with many that, in the administration of the act, preference would be given to one operator in each route or service, and that no American competitor would share in the aid until the preferred operator had received all the aid he desired, and refused the contract for any additional vessel or vessels which the Authority might determine should be operated in that route or service. Thus, only in the event that the preferred operator refused aid, could another American operator obtain aid. Of course, the understanding is that the preferred operators would be those who are now enjoying mail contracts. This impression or understanding may be right or wrong; but, to avoid any possibility of the act being so administered, and to relieve the Authority of the importunities which would certainly be addressed to it for such administration, we urge that the wishes of Congress on this question be expressed clearly in the act."

This brief was accompanied by a proposed amendment, the effect of which would be that where two or more applicants requested financial aid in a particular service, no financial aid should be granted to one applicant which would grant an advantage or preference in favor of one over the other, and that if there were two competing lines and they had justified their existence over a number of years, they should be equitably treated in the apportionment of governmental assistance. Mr. McAuliffe also appeared before the Merchant Marine and Fisheries Committee and filed the same amendment.

On March 9, 1936, Mr. Barns again appeared before the Senate Committee and urged that the clarifying words "or services" be inserted in the first sentence of subsection 605 (c) following the words "which would be in addition to the existing service." Hearings on S. 3500, 74th Cong., 2d Sess., pages 183, 4, 5. However, H. R. 8555 with the Senate amendments, when presented to the Senate, did not contain the suggested wording. When the bill (H. R. 8555) was under consideration an amendment offered by Senator O'Mahoney incorporated this language into the bill and it ultimately became part of the 1936 Act. The following is taken from the Congressional Record of July 19, 1936 (80 Cong. Record, page 10076):

"Mr. O'Mahoney: Mr. President, I desire to offer an additional amendment, if I may have the attention of the senior Senator from New York. On page 52, line

6, I move to insert, after the word "service," the words, "or services." That is merely a clarifying amendment, designed to eliminate the possibility that the use of the word "service" in the singular might operate to prevent carrying out the remainder of the section. Will the Senator from New York accept that amendment?"

"Mr. Copeland: I have no objection to the amendment."

"Mr. President pro tempore: The question is on agreeing to the amendment offered by the Senator from Wyoming, (Mr. O'Mahoney) to the amendment in the nature of a substitute."

The amendment to the amendment was agreed to.

Mr. Barns, in his testimony of March 9, 1936, also stated that the Robin Line was encountering difficulty in establishing its services because of the competitive situation with the conference operating in the South and East African trade. This gave rise to another amendment also offered by Senator O'Mahoney, which was adopted, and subsequently became section 810 of the Act.

ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held in its office in Washington, D. C., on the 5th day of August A. D. 1938.

No. S-1

AMERICAN SOUTH AFRICAN LINE, INC., SEAS SHIPPING COMPANY, INC.—APPLICATIONS FOR OPERATING-DIFFERENTIAL SUBSIDY IN THE OPERATION OF VESSELS TO SOUTH AND EAST AFRICA

A hearing having been held and full investigation of the matters and things involved having been had; 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 thereof;

It is ordered, That the application of the American South African Line, Inc., to the extent that it requests that it be granted an exclusive subsidy on the trade route from Atlantic coast ports to South and East Africa be, and the same hereby is, denied.

It is further ordered, That, subject to compliance with all of the applicable provisions of Title VI of the Merchant Marine Act, 1936, as amended, and subject to all of the terms and conditions as contained in the aforesaid report, the applications of the American South African Line, Inc., and the Seas Shipping Co., Inc., for operating-differential subsidy agreements be, and the same are, hereby granted.

By the Commission.

[SEAL]

(Sgd.) RUTH GREENE,
Assistant Secretary.

UNITED STATES MARITIME COMMISSION

No. S-3

(1) APPLICATION OF THE BALTIMORE MAIL STEAMSHIP COMPANY FOR AMENDMENT OF THE ORDER OF JUNE 7, 1938, RELATING TO TRANSFER OF CERTAIN VESSELS OWNED BY IT TO INTERCOASTAL TRADE; (2) APPLICATION OF MATSON NAVIGATION COMPANY FOR WRITTEN PERMISSION TO CHARTER A VESSEL OWNED BY IT FOR OPERATION BY THE BALTIMORE MAIL STEAMSHIP COMPANY IN INTERCOASTAL TRADE; AND (3) APPLICATION OF UNITED STATES LINES COMPANY AND BALTIMORE MAIL STEAMSHIP COMPANY FOR PERMISSION TO CHARTER THE S. S. WASHINGTON FOR OPERATION BY THE BALTIMORE MAIL STEAMSHIP COMPANY FOR A SINGLE VOYAGE IN INTERCOASTAL TRADE

Submitted December 8, 1938. Decided December 9, 1938

Cletus Keating for Baltimore Mail Steamship Company and United States Steamship Company, applicants.

F. A. Bailey for Matson Navigation Company, applicant.

Roscoe H. Hupper, Donald S. Morrison, and *William P. Palmer* for interveners.

REPORT OF THE COMMISSION

BY THE COMMISSION:

The Baltimore Mail Steamship Company applied by letter dated October 19, 1938, for an order amending the order of the Commission of June 7, 1938, by which its application under section 803(a), Merchant Marine Act, 1936, for permission to transfer its fleet of five vessels to domestic intercoastal service was approved. In this application now before us the company requests that the amendment provide that it "may operate on its present intercoastal route its five named vessels and such owned or chartered substitute and/or additional vessels of similar carrying capacity as may be necessary from time to time in order to maintain a service of one sailing each week without interruption."

The original order of June 7, 1938, which followed a public hearing

on the application for transfer of the vessels, as required by section 805(a) of the Merchant Marine Act, 1936, was not sufficiently broad to permit the addition of a sixth vessel to the fleet as desired at this time in order to provide a sailing each week instead of having one in every six weeks without a sailing. The suggested amendment would provide for any substitutions or additions to the fleet that may be necessary to maintain the weekly schedule.

The Matson Navigation Company applied under date of November 22, 1938, for permission to charter its steamship *Maui* to the Baltimore Mail Steamship Company for operation with the five vessels now in use on the Panama Pacific Line, in order to provide the proposed weekly schedule. This vessel appears to be of a type, size, and speed suitable to fill out the service, having a speed of 16 knots, sufficient staterooms to accommodate 250 passengers, deadweight tonnage of 10,340 tons and refrigerated space of approximately 14,000 cubic feet. This application was filed under section 805(a) of the Merchant Marine Act, 1936, on account of the fact that the Oceanic Steamship Company, a wholly-owned subsidiary of the Matson Navigation Company, is receiving an operating-differential subsidy from the Government.

The Baltimore Mail Steamship Company filed an application dated November 22, 1938, for permission to charter from the United States Lines Company the S. S. *Washington* for one round trip commencing February 11, 1939, from New York to the Pacific coast on its intercoastal route. This application was filed under section 805(a) of the Merchant Marine Act, 1936, by reason of the affiliation of the applicant with an operator receiving a subsidy under the same Act.

The United States Lines Company applied under the same date, as owner of the steamship *Washington,* for permission to charter that vessel to the Baltimore Mail Steamship Company for the above-mentioned proposed voyage. This application was also filed pursuant to section 805(a) of the Act by reason of the fact that the applicant is receiving aid from the Government under that Act.

A public hearing on all of these applications was held on December 1, 1938, pursuant to the order of the Commission and after notice to the applicants and all other operators engaged in the trade. The Luckenbach Steamship Company and the American-Hawaiian Steamship Company intervened in protest to the applications. At this hearing testimony by a witness for the Baltimore Mail Steamship Company regarding the application for amendment of the previous order was to the effect that satisfactory service cannot be rendered by the five vessels now operated, with one week in every six without a sailing, and that in order to provide for a regular sailing each week, the operator should have authority to make additions to the fleet and to substitute

vessels when necessary. This authorization would cover the immediate need of the operator for an additional vessel on its route and would permit replacements when drydocking vessels of the regular fleet and in case of the disabling of a vessel.

This witness also testified that cargo offered could not be carried by the five vessels on several occasions since this service started and that considerable business handled by the former Panama Pacific steamers, which upon their withdrawal was driven to the railroads, had not come back because of the irregularity of the service, with no sailing each sixth week.

With reference to the applications for permission for one voyage by the S. S. *Washington* in the intercoastal trade in February of next year, it was brought out in the testimony that, if the plan is approved, this vessel will be chartered to the Baltimore Mail Steamship Company for the proposed voyage. The regular vessel on the route replaced by the *Washington* will take its place on the transatlantic route at the same time for one voyage, without subsidy, under a charter to the United States Lines Company.

The primary purpose of the voyage of the S. S. *Washington* to California and return was stated to be that of advertising for its owner. The vessel will arrive on the West coast about the time of the opening of the San Francisco Fair, is expected to carry some cargo and a large number of visitors to the Fair and will be open for public inspection with the view of advertising the transatlantic service of the United States Lines Company, for which that company has offices on the Pacific coast for the solicitation of business. It is expected that the cargo carried on this voyage will be only half the amount which the regular steamer would carry, on account of the smaller cargo capacity of the *Washington.*

It was also brought out in the testimony that, while engaged on this round voyage, the *Washington* would, of course, be withdrawn from participation in the operating-differential subsidy received by it when operating on the subsidized transatlantic route of the United States Lines Company.

The principal objection by interveners at the hearing on the application for amendment of the previous order of the Commission, other than repetitions of the objections made at the previous hearing, was that the amendment was too broad and that a proper interpretation of section 805(a) would make it necessary to have a public hearing whenever the Baltimore Mail Steamship Company might desire to make additions or substitutions of vessels for operation on its intercoastal route, also that at such hearing the Company would be required to show that the

specific vessel or vessels proposed to be used would offer no unfair competition to other operators, and that the granting of the application would not be contrary to the policies and objects of the 1936 Act.

In granting the original application of the Baltimore Mail Steamship Company, it was concluded by the Commission that there would be "no unfair competition within the purview of the 1936 Act to existing carriers or prejudice to the objects and policy of the Merchant Marine Act, 1936, from the operation of the applicant's vessels in the intercoastal trade." No additional testimony was introduced at the hearing on December 1st on the question of unfairness of the competition to be offered by the operation of six vessels with a weekly schedule, and there was no serious objection made to the employment of the S. S. *Maui* in the regular service of the line or to the use of the S. S. *Washington* for the proposed single voyage.

In view of our previous finding and the lack of any evidence indicating that the changes proposed to be made in the service at this time will result in unfair competition, the principal question for decision appears to be as to whether or not the proposed amendment of the original order is too broad. The original order was so restricted that the operator had no authority to use any but the five vessels transferred to the service, and under that order it would at this time be unable to make any substitution in an emergency in order to maintain the service of the five vessels, which would undoubtedly seriously affect the business of the line if one or more vessels should have to be laid up for any reason. The operator has shown that the addition of one vessel at this time is not only desirable but necessary to meet the requirements of shippers. The proposed amendment is broader than the original order, but it is also restricted to the extent that the Baltimore Mail Steamship Company will not be authorized to have more than one sailing per week or to use any vessel which does not have carrying capacity similar to the five vessels now in the fleet. The competitors will know that no greater or different competition can be offered and they will still have the protection of section 805(a) in its requirement of a hearing on any proposal to use a vessel owned by a subsidized operator or an affiliate of such operator.

We are of the opinion and have concluded that the rights of competitors will not be adversely affected and there will be no violation of either the policy or spirit of the Act in amending the order as requested.

The actual terms of the proposed charters contemplated in the aforesaid applications were not introduced at the hearing. By reason of the pecuniary interest which the United States has in the successful oper-

ation of two of the applicants, the permission herein granted will be subject to our right of approval of all contracts, charters included, which may be entered into to effectuate the permitted results.

An order will be entered granting the applications to the extent and upon the conditions stated in said order.

ORDER

At a session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 9th day of December A. D. 1938.

No. S-3

(1) APPLICATION OF THE BALTIMORE MAIL STEAMSHIP COMPANY FOR AMENDMENT OF THE ORDER OF JUNE 7, 1938, RELATING TO TRANSFER OF CERTAIN VESSELS OWNED BY IT TO INTERCOASTAL TRADE; (2) APPLICATION OF MATSON NAVIGATION COMPANY FOR WRITTEN PERMISSION TO CHARTER A VESSEL OWNED BY IT FOR OPERATION BY THE BALTIMORE MAIL STEAMSHIP COMPANY IN INTERCOASTAL TRADE; AND (3) APPLICATION OF UNITED STATES LINES COMPANY AND THE BALTIMORE MAIL STEAMSHIP COMPANY FOR PERMISSION TO CHARTER THE S. S. WASHINGTON FOR OPERATION BY THE BALTIMORE MAIL STEAMSHIP COMPANY ON A SINGLE VOYAGE IN INTERCOASTAL TRADE

A hearing having been held in this proceeding, pursuant to the provisions of section 805(a) of the Merchant Marine Act, 1936, and the Commission, on the date hereof, having made and entered of record a report stating its conclusions and decision therein, which report is hereby referred to and made a part hereof;

1. *It is ordered,* That the order of June 7, 1938, authorizing the transfer of the five vessels owned by the Baltimore Mail Steamship Company to domestic intercoastal service be, and it is hereby, amended to read as follows:

> The Baltimore Mail Steamship Company may operate on its domestic intercoastal service the five vessels *City of Baltimore, City of Norfolk, City of Hamburg, City of Havre,* and *City of Newport News,* and such owned or chartered substitute and/or additional vessels of carrying capacity similar to that of the above-named vessels as may be necessary from time to time in order to maintain a service of not more than one sailing each week without interruption.

All agreements entered into by the Baltimore Mail Steamship Company with respect to securing such additional or substituted vessels shall be subject to approval of the Commission, and nothing contained in this order shall be construed as a permission to any other person subject to the provisions of section 805(a) of the Merchant Marine Act,

1936, as amended, to charter or otherwise use one or more of its vessels on the Baltimore Mail service without specific permission therefor.

2. *It is further ordered,* That permission be, and it is hereby, given to the Matson Navigation Company to charter its S. S. *Maui* to the Baltimore Mail Steamship Company for operation on its intercoastal route pursuant to the provisions of paragraph (1) hereof.

3. *It is further ordered,* That permission be, and it is hereby, given to the United States Lines Company to charter the S. S. *Washington* to the Baltimore Mail Steamship Company, and to the latter company to use said vessel for one round voyage commencing on or about February 11, 1939, from New York to the Pacific coast and return in the intercoastal service upon the following conditions:

a. The charter party shall be approved by the Commission.

b. Proper adjustment shall be made in the capital employed by the United States Lines Company as defined in its operating subsidy agreement by reason of the withdrawal of the S. S. *Washington* from the subsidized service for the proposed voyage.

c. The profits of the United States Lines Company, if any, from the voyage of the S. S. *Washington* in the intercoastal trade and the voyage of the Baltimore Mail vessel proposed to be operated on the transatlantic route in place of the S. S. *Washington* shall be included in the "net earnings" of the United States Lines Company as defined in its operating-differential subsidy contract.

4. *It is further ordered,* That permission be, and it is hereby, given to the Baltimore Mail Steamship Company to charter one of the vessels now owned by it to the United States Lines Company, and to the latter company to use said vessel for one voyage on its transatlantic route, replacing the S. S. *Washington* for said voyage, subject to the approval of the charter party by the Commission.

By the Commission.

[SEAL] (Sgd.) RUTH GREENE,
Assistant Secretary.

UNITED STATES MARITIME COMMISSION

No. S-4

BLOOMFIELD STEAMSHIP COMPANY AND LYKES BROS. STEAMSHIP CO., INC.—APPLICATIONS FOR FINANCIAL AID IN THE OPERATION OF VESSELS ON TRADE ROUTE No. 15B (UNITED STATES GULF TO SOUTH AND EAST AFRICAN PORTS)

Ben C. Connally for Bloomfield Steamship Company.
William Radner for Lykes Bros. Steamship Co., Inc.
Frank V. Barnes and *Burton H. White* for Seas Shipping Company, Inc., and *Donald D. Geary* for American South African Line, Inc., interveners.

REPORT OF THE COMMISSION

BY THE COMMISSION:

This proceeding involves applications filed by Bloomfield Steamship Company and Lykes Bros. Steamship Co., Inc., for financial aid under Title VI of the Merchant Marine Act, 1936, as amended, in the operation of vessels in a service between "U. S. Gulf ports (Key West—Mexican Border)—South and East Africa (Cape Frio—Cape Guardafui) and Madagascar," designed as Trade Route 15B in "Report of the United States Maritime Commission on Essential Foreign Trade Routes and Services Recommended for United States Flag Operation," dated May 22, 1946.

After due notice to the public and all interested parties, a public hearing was held at Washington, D. C., on July 24, 1946, before Examiners F. M. Darr and C. H. McDaniel. Leave to intervene at the hearing was granted to American South African Line, Inc., and Seas Shipping Company, Inc., holders of operating-differential subsidy agreements with the Commission covering the operation of services on Trade Route 15A (U. S. Atlantic-South and East Africa.). Briefs were filed by the applicants and interveners.

THE APPLICANTS AND THEIR PROPOSALS

Bloomfield Steamship Company, hereinafter referred to as Bloomfield, is a newly-formed corporation, organized and existing under the laws of the State of Texas. The company has not commenced operations and does not own any vessels, but has made application to the Commission for the purchase of three C-2 type vessels under the Merchant Ship Sales Act of 1946, for operation on Trade Route 15B. The company will have a paid-in capital of $1,500,000.00. Each of the officers and directors of the company is a citizen of the United States and the controlling interest in the company is owned by citizens of the United States.

Bloomfield proposes twelve monthly sailings per year on Trade Route 15B with three C-2 type vessels. Bloomfield states that it is willing to purchase and operate an additional vessel on the route if the Commission determines that operation of such a vessel is necessary.

Lykes Bros. Steamship Co., Inc., hereinafter referred to as Lykes, is a corporation organized and existing under the laws of the State of Louisiana. Lykes has been engaged in shipping operations for a number of years and is the holder of an operating-differential subsidy agreement with the Commission covering the operation of five services. As of the date of this application, Lykes owned 33 new vessels and several old vessels, and has made application to the Commission for the purchase of a number of vessels under the Merchant Ship Sales Act of 1946, including three C-2 type vessels for operation on Trade Route 15B. The net worth of Lykes as of December 31, 1945 was approximately $54,000,000.00. Each of the officers and directors of Lykes is a citizen of the United States and the controlling interest in the company is owned by citizens of the United States.

Lykes also proposed 12 monthly sailings per year on Trade Route 15B with three C-2 type vessels. Lykes also states that it is willing to purchase and operate an additional vessel on the service if the Commission determines that the operation of such a vessel is necessary.

The proposals of both applicants are in conformity with the recommendations set forth in "Report of the United States Maritime Commission on Essential Foreign Trade Routes and Services Recommended for United States Flag Operation" for Trade Route 15B, with the exception of the proposal to operate three vessels instead of four as recommended in the Report.

HISTORY OF GULF-SOUTH AND EAST AFRICAN ROUTE AND LYKES' OPERATION THEREON

Prior to 1935 there was no regular American-flag service between Gulf ports of the United States and South and East Africa, practically all of the Gulf cargo being carried by the Bank Line (British) and Silver-Java-Pacific Line under British and Dutch flags. The American South African Line commenced a non-subsidized service in 1935, sailing from the Gulf and returning to the North Atlantic with cargo and thence to the Gulf in ballast, but abandoned the service in 1938 and thereafter concentrated on its service between Atlantic ports and South and East African ports. During the period between 1937 and 1940, the percentage of export tonnage carried by American-flag dry-cargo vessels from the Gulf to South and East African ports averaged approximately 13 per cent.

On October 16, 1940, in an effort to utilize certain of its vessels which had been barred from European ports by the Neutrality Act of 1939, Lykes requested permission from the Commission under its operating-differential subsidy agreement to "operate, from time to time, certain of our non-subsidy vessels between U. S. Gulf Ports and South and East African Ports with authority to load such vessels homeward from South and East Africa to U. S. North Atlantic and Gulf Ports with manganese and chrome ore, or such other bulk cargoes as may be available." American South African Line, Inc., and Seas Shipping Company, Inc., subsidized operators in the service between U. S. Atlantic ports and South and East African ports, agreed that there would be no conflict of interest arising out of the proposed operation, and on December 27, 1940, the Commission approved the operation of vessels withdrawn from Lykes' subsidy agreement in a new service from U. S. Gulf ports to South and East Africa, returning via U. S. North Atlantic ports with manganese and chrome ores, subject to the condition that (a) on ninety days written notice the Commission might rescind its approval of the homeward operation of the vessels via United States North Atlantic ports;[1] (b) no subsidy would be paid with respect to any part of such operation; and (c) the terms and conditions embodied in the action of the Commission on March 14, 1940, approving the withdrawal of twelve vessels from the operating-differential subsidy agreement would be applicable to the subject operation.[2]

[1] Permission to return homeward by U. S. North Atlantic ports was rescinded by the Commission on May 9, 1946.

[2] The action of March 14, 1940, provided, in part, that vessels withdrawn from the subsidy agreement should not be employed in operations which were competitive with any regular existing American-flag service without the express written approval of the Commission, and that if required by the Commission any or all of such withdrawn vessels would be reinstated under the subsidy agreement immediately following termination of the employment in which then engaged.

Lykes stated to the trade in a circular letter dated December 30, 1940, that "feeling there is need for an American-flag service from U. S. Gulf ports to South and East Africa, we take pleasure in announcing that commencing with the sailing of the S. S. *Effingham* on January 18, 1941, from Mobile we have inaugurated a regular monthly service to Capetown, Port Elizabeth, East London, Durban, Lourenco Marques and Beira," and "we earnestly solicit your support which we assure you will be greatly appreciated." The first sailing was made in January 1941, as scheduled.

Lykes obtained approval from the Commission for the operation of individual vessels in the service during 1941, and on October 22 of such year requested that the service be declared essential under section 211 of the Merchant Marine Act, 1936, as amended, stating that "the inauguration of this service filled a much needed requirement from the Gulf district, and has increased steadily in both volume and importance." Lykes added in its letter that it was "carrying outward commodities most useful from a defense standpoint being in close touch with the British authorities, and homeward, we are naturally moving such commodities as directed by the Maritime Commission," and was "utilizing both old and new vessels in this service." Under date of November 5, 1941, the Secretary of the Commission wrote Lykes that "at its meeting of November 4, 1941 the Commission determined the route from United States Gulf ports to ports on the South and East Coasts of Africa (Mossomedes, Angola, to and including ports in Italian Somaliland, except such ports or territories from which American ships may be excluded by the Neutrality Act) is and has been since July 1, 1941, an essential foreign trade route within the meaning of the Merchant Marine Act, 1936, as amended, but subject to modification on the basis of reexamination upon cessation of the emergency."

Prior to the requisition of its vessels by the Government early in 1942, Lykes made 35 sailings with vessels withdrawn from its subsidized services in the service for its own account—30 of which were made during 1941. Lykes operated in the service after the requisition of its vessels as Berth Agent for the War Shipping Administration, and in this capacity made a total of 45 sailings up until the time that requisition was terminated in March of this year. During the period between March 1946 and the date of the hearing, Lykes made four sailings for its own account. Lykes has made two sailings since the hearing.

In 1943, when another operator filed an application with the Commission for financial aid in the operation of vessels in this service, Lykes issued a circular letter dated August 11, 1943, to shippers and forwarding agents in which it stated that "The object of this letter is to ac-

quaint you of the aforementioned developments and to reiterate it is our intention to continue the regular American-flag service which we pioneer between the Gulf and South and East Africa with suitable newly constructed vessels just as soon as hostilities have ceased, and conditions permit," and requested that endorsement of the application be declined. Due to war conditions, no action was taken by the Commission on the application referred to, and on June 17, 1944, Lykes filed an application with the Commission for financial aid in the operation of the service. No action was taken by the Commission on Lykes' application for the same reason.

CONTENTIONS OF APPLICANTS

Lykes contends that (a) it is and has been operating an "existing" and adequate service within the meaning of section 605(c) of the Merchant Marine Act, 1936, as amended, and that the award of an operating-differential subsidy contract to any other applicant is prohibited by the provisions of such section; [3] (b) its qualifications are superior to those of Bloomfield, and that as between competing applicants for a trade route an operating-differential subsidy should be awarded to the one possessing in greatest measure the qualifications required by section 601(a) of the Act; [4] and (c) it is entitled to preference as a Gulf operator under the provisions of section 809 of the Act.[5]

Bloomfield contends that (a) the permission given to Lykes to enter the service in 1941 was temporary in character and an act of expediency in view of the turbulent world situation, and that Lykes could not, therefore, acquire the status of an "existing" operator; (b) the Commission is authorized to enter into a contract with any citizen of the United States who meets the requirements set forth in section 601(a)

[3] Section 605(c) of the Merchant Marine Act, 1936, as amended, provides, in part, as follows: "No contract shall be made under this title with respect to a vessel to be operated on a service, route, or line served by citizens of the United States which would be in addition to the existing service, or services, unless the Commission shall determine after proper hearing of all parties that the service already provided by vessels of United States registry in such service, route, or line is inadequate, and that in the accomplishment of the purposes and policy of this Act additional vessels should be operated thereon; *** "

[4] Section 601(a) of the Merchant Marine Act, 1936, as amended, provides, in part, as follows: "The Commission is authorized and directed to consider the application of any citizen of the United States for financial aid in the operation of a vessel or vessels, which are to be used in an essential service in the foreign commerce of the United States. No such application shall be approved by the Commission unless it determines that *** the applicant possesses the ability, experience, financial resources, and other qualifications necessary to enable him to conduct the proposed operations of the vessel or vessels as to meet competitive conditions and promote foreign commerce ***."

[5] Section 809 of the Merchant Marine Act, 1936, as amended, provides, in part, as follows: "* * * In awarding contracts under this Act, preference shall be given to persons who are citizens of the United States and who have the support, financial and otherwise, of the domestic

of the Act and is under no requirement to favor the larger of two competing applicants; and (c) although Lykes may have had the support of shippers from the Gulf region for the reason that it was the only line engaged in the trade during the emergency period, Lykes does not have the "financial support" of the domestic communites primarily interested to any greater extent than it has.

We do not find that Lykes' right to operate the service was dependent upon permission obtained from the Commission. The privilege of returning by North Atlantic ports was the only phase of the service for which permission was required to be obtained from the Commission, and such privilege is not requested in the present application. Furthermore, the permission to operate vessels on the service which had been withdrawn from Lykes' subsidized services related to the right to operate certain vessels rather than the right to operate the service covered by this application. We must, therefore, determine whether Lykes' operation of the service has been such as to constitute an "existing service" within the meaning of section 605(c) of the Act.

Section 605(c) of the Act does not define an "existing service" and the legislative history of the section is silent as to what was intended by Congress. Examination of the construction of analagous statutes by the courts and administrative agencies would, therefore, appear to be proper.

Dismissing a complaint seeking to enjoin and set aside an order of the Interstate Commerce Commission granting an applicant a certificate of public convenience and necessity as a common carrier by motor vehicle under the so-called "grandfather clause" provisions of section 206(a) of the Motor Carrier Act of 1935 [6] in *Chicago, etc., Ry. Co. v. United States,*[7] the Court said "The Commission has, in effect, ruled in similar proceedings that proof of actual operations as a common carrier to and from termini and some intermediate points on a regular route, coupled with evidence of a holding out of service and a willingness to serve all points on the route whenever shipments are offered, will justify a finding of bona fide operation to and between all points on the route." [8]

Discussing the question of "bona fide" operation in *Slagle Contract Carrier Application,*[9] the Interstate Commerce Commission said "Were

[6] Section 206(a) of the Motor Carrier Act of 1935, 49 Stat. 543, 551, provides that the Interstate Commerce Commission shall issue a certificate of public convenience and necessity without requiring further proof that public convenience and necessity will be served by an operator if the carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes within the territory for which application is made and has so operated since that time except as to interruptions of service over which the applicant or its predecessor in interest has no control.

[7] D. C. Minn., 50 F. Supp. 249 (1943).

[8] Page 253.

[9] 2 M.C.C. 127 (1937).

the operations openly conducted, without element of pretense, disguise, or concealment, and in such a manner as to indicate a real intent to conduct and maintain a transportation business? Operations so conducted are the 'bona fide' operations contemplated by the Act. Moreover, where applicant has established the fact of actual operations, not only conducted on the 'grandfather' date but continuously maintained thereafter, we think we may fairly assume that they were 'bona fide' unless the contrary is shown." [10]

We believe that the principles enunciated in the foregoing decisions are pertinent in determining whether Lykes' operation of the service in question has been such as to constitute an "existing service" within the meaning of section 605(c) of the Merchant Marine Act, 1936, as amended.

The facts are without dispute that prior to the requisition of the vessels by the Government early in 1942, Lykes made 35 sailings in the service for its own account. It is also undisputed that Lykes has made four sailings for its own account between the termination of Government requisition and the hearing in the proceeding. The record herein shows that Lykes carried approximately 295,000 tons of cargo on the voyages which it made for its own account, and there is no evidence that it ever refused cargo for which it had space. The record also shows that in addition to requesting financial aid for the operation of the service in 1944, Lykes stated to the trade on at least two occasions that the service which it was operating was of a permanent nature and that it intended to place newly constructed vessels in the service as soon as conditions permitted.

We find upon the record that Lykes' operation of the service covered by its application has been such as to constitute an existing service within the meaning of section 605(c) of the Act.

Under the provisions of section 605(c), we are precluded from granting financial aid to Bloomfield under the provisions of Title VI of the Act unless we determine that the service already provided by Lykes as an existing service is inadequate. We are unable to make such a determination. There is no evidence that the service which Lykes has been furnishing is inadequate. On the contrary, Bloomfield admits that the service furnished by Lykes is adequate. Furthermore, Lykes has been making, and proposes to continue to make, sailings in the number and at the frequency recommended by the "Report of the United States Maritime Commission on Essential Foreign Trade Routes and Services Recommended for United States Flag Operation."

In view of our determination that Lykes is conducting an existing and adequate service within the meaning of section 605(c), we deem it un-

necessary to consider the contentions of the applicants with respect to sections 601(a) and 809 of the Act.

NEED FOR FINANCIAL AID

We are authorized and directed by the provisions of section 601(a) of the Act to consider the application of any citizen of the United States for financial aid in the operation of vessels which are to be used in an essential service in the foreign commerce of the United States. We have stated as a matter of policy that we prefer that private United States-flag operation be conducted in the foreign trade without Government aid, but we will enter into contracts for the payment of operating-differential subsidies, in accordance with the provisions of the law, *whenever this is found necessary to maintain adequate United States-flag service on essential foreign trade routes.*[11] The subject applications must necessarily be examined in the light of such policy.

The only foreign-flag operator on Trade Route No. 15B at the present time is the Silver-Java Pacific Line (British-Netherlands), which re-entered the trade in the early part of this year. The record shows that Lykes carried 42,908 tons of cargo with five monthly sailings outbound between February and June 1946, and that the Silver-Java Pacific Line carried 43,193 tons of cargo with eight sailings during the first six months of 1946. The record also shows that during the period between April and June 1946, American-flag participation in export tonnage on this route showed a decided improvement over the tonnage carried for 1938—such vessels carrying 10 per cent more cargo than they carried during the entire year 1938. It appears from the record that all inbound cargo is carried by American-flag vessels, with the foreign-flag operator continuing round-the-world to U. S. Pacific ports for return to the Gulf.

In addition, Lykes states that it is prepared to continue to operate the service without a subsidy in the event that we conclude not to grant financial aid to any applicant at this time. Since the commencement of this proceeding, we have authorized the sale of three C–2 type vessels to Lykes under the Merchant Ship Sales Act of 1946, which vessels are available for operation on this service notwithstanding any provisions of Lykes' existing subsidy agreement. Such vessels will be equal, if not superior, to those employed by Lykes' foreign-flag competitor. Giving weight to the fact that Lykes is not a newcomer to the trade, having been in it for almost six years, we believe that it will be able to continue to provide adequate service without financial aid. The fact that Lykes'

[11] Report of the United States Maritime Commission on Essential Foreign Trade Routes and Services Recommended for United States Flag Operations.

interests are in the Gulf, and that it is established in this service, make it difficult for us to believe that it will abandon the service if operating conditions become difficult.

We have also authorized the sale of three C-2 type vessels to Bloomfield under the Merchant Ship Sales Act of 1946, which are available for unrestricted operation, including Trade Route No. 15B.

Under the circumstances, we conclude that financial aid under Title VI of the Act is not necessary at the present time to promote the foreign commerce of the United States on Trade Route No. 15B, and that both applications therefor should be denied.

CONTENTIONS OF INTERVENERS

The interveners contend jointly or severally that the applications should be denied or, in the alternative, that (1) Atlantic ports should be excluded from the service and (2) competition clauses similar to those contained in the subsidy agreements of the interveners should be inserted in any subsidy agreement covering the service. American South African Line, Inc., also contends that the Commission should obtain and exercise special supervision over sailings, rates, charges, classifications, tariffs, regulations, and practices of any unsubsidized operation in the service by an operator subsidized in other trades.

In view of our decision to deny both applications for financial aid, it is unnecessary to consider the contentions of the interveners except for the one referred to as being made by American South African Line, Inc., alone.

The contention is based on the argument that a subsidized operator on another route serving Trade Route No. 15B on an unsubsidized basis would be in direct competition with the interveners as subsidized operators on Trade Route 15A, and that there would be just as much reason for the Commission's taking a special power of supervision over such operation on Trade Route No. 15B as there would be if such operator were operating on a subsidized basis on Trade Route No. 15A.

We are unable to agree with the contention. We do not believe that an operator serving Trade Route No. 15B competes to any greater extent with an operator serving the same foreign ports from the Atlantic coast than an operator serving the East coast of South America from the Gulf competes with an operator serving the East coast of South America from the Atlantic.

We find and determine on the basis of the foregoing findings and all facts of record:

(1) That Lykes Bros. Steamship Co., Inc., is an existing operator

mission dated May 22, 1946, on "Essential Foreign Trade Routes and Services Recommended for United States Flag Operation", within the meaning of section 605(c) of the 1936 Act; and

(2) That financial aid under Title VI of the Act is not necessary at this time to promote the foreign commerce of the United States on Trade Route No. 15B; and

(3) That the applications of Bloomfield Steamship Company and Lykes Bros. Steamship Co., Inc., for financial aid under Title VI of the Act in the operation of vessels on Trade Route No. 15B be denied.

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 8th day of November A. D. 1946.

No. S-4

BLOOMFIELD STEAMSHIP COMPANY AND LYKES BROS. STEAMSHIP CO., INC.—APPLICATIONS FOR FINANCIAL AID IN THE OPERATION OF VESSELS ON TRADE ROUTE NO. 15 B (UNITED STATES GULF TO SOUTH AND EAST AFRICAN PORTS)

A public hearing having been held, and a full investigation of the matters and things involved having been made, upon consideration of the record, the Commission having made and entered of record a report containing its findings, conclusions, and decision, which is attached hereto and made a part hereof;

It is ordered, That the applications of Bloomfield Steamship Company and Lykes Bros. Steamship Co., Inc., for financial aid under Title VI of the Merchant Marine Act, 1936, as amended, in the operation of vessels on Trade Route 15B be, and hereby are, denied.

By the Commission.

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

UNITED STATES MARITIME COMMISSION

No. S-5

OCEANIC STEAMSHIP COMPANY—APPLICATION FOR FINANCIAL AID IN THE OPERATION OF VESSELS ON FREIGHT SERVICES A AND B, TRADE ROUTE No. 27 (U. S. PACIFIC PORTS—AUSTRALIA, NEW ZEALAND, NEW GUINEA, AND SOUTH SEA ISLANDS)

REPORT OF THE COMMISSION

BY THE COMMISSION:

This proceeding involves an application filed by The Oceanic Steamship Company for financial aid under Title VI of the Merchant Marine Act, 1936, as amended, in the operation of vessels in freighter services between "U. S. Pacific Ports—Australia, New Zealand, New Guinea and South Sea Islands", designated as Freight Services 2(a) and 2(b), Trade Route No. 27, in "Report of the United States Maritime Commission on Essential Foreign Trade Routes and Services Recommended for United States Flag Operation," dated May 22, 1946.

After due notice to the public and all interested parties, a public hearing was held on this and other applications to provide transpacific services at Washington, D. C., on August 12, 13, 14, and 15, 1946, before examiners appointed by the Commission. This report deals only with the application of The Oceanic Steamship Company and the intervention of Isthmian Steamship Company, insofar as applicable to this particular application.

THE APPLICANT AND ITS PROPOSALS

The Oceanic Steamship Company, hereinafter referred to as Oceanic, holds an operating-differential subsidy agreement with the Commission dated December 27, 1937, covering the operation of an express passenger and freight service between U. S. Pacific coast ports in California and ports in Australia, including the privilege of calling at Honolulu, Pago Pago (Samoa), Suva (Fiji), and ports in New Zealand. Applications filed by this company on April 30, June 10, and July 29, 1946, requested among other things (a) extension of the subsidy agreement,

(b) resumption and modification of passenger service, and (c) modification of the subsidy agreement in order to provide for the operation of supplemental freighter services in the same general area served pre-war by the passenger vessels. The application under consideration at the hearing was confined to the establishment of the freight services.

Oceanic purposes to operate two freight services which conform to those set forth for Trade Route No. 27 in the Commission's Report on Essential Foreign Trade Routes, issued May 22, 1948, and may be briefly described as (a) from U. S. Pacific coast ports to Australian ports, with the privilege of calling at British Columbia and Pacific island ports along the route, and (b) from U. S. Pacific coast ports to New Zealand and Australian ports, with the privilege of calling at British Columbia and Pacific island ports lying along the route. While the two services appear to be similar, there is considerable difference. The first is designed for a service direct to Australia; the second, proceeding to New Zealand, then Australia, is primarily intended to carry American exports to New Zealand, then filling out any excess space with cargo for Australia. There is very little return cargo from New Zealand so vessels on that run would complete loading homeward in Australia.

The routes are described in the application as follows:

(*a*) From U. S. Pacific coast ports (with privilege of calling at British Columbia ports) to Australian ports of Sydney and/or Melbourne and/or Brisbane, with privilege of calling at Hawaiian Islands, Samoa, Fiji, and/or other Pacific islands lying along the same general route; and with the further privilege of extensions to other Australian ports as sufficient inducements offer.

(*b*) From U. S. Pacific coast ports (with privilege of calling at British Columbia ports) to Australian ports of Sydney and/or Melbourne and/or Brisbane, with privilege of calling at New Zealand ports, and/or Hawaiian Islands, Samoa, Fiji, or other Pacific islands lying along the same general route; and with the further privilege of extending services to other Australian ports as sufficient inducements offer.

Oceanic proposes eventually to operate 13 round voyages per year on *each* service but requests the privilege of operating one sailing per month over either of the two services or over the two services combined in such manner as will best accommodate cargo offerings. Because of uncertainties following the termination of the war and the reestablishment of trade relations, Oceanic believes that frequencies of sailings, at least in the initial stages, should be permitted on a basis which will provide for their increase or decrease as may be determined by traffic and economic conditions, subject to approval by the Commission. In order to maintain a minimum of a monthly sailing to Australia, with every other ship making the call at New Zealand, Oceanic has applied for the purchase of four C2-S-AJ1 type vessels. As cargo offerings warrant, it is stated that further ships will be added. If it is found

feasible to operate the full 26 sailings over the combined routes, eight vessels will probably be required.

It was developed at the hearing that The Oceanic Steamship Company (a wholly-owned subsidiary of Matson Navigation Company) and its predecessors, the Oceanic and Oriental Navigation Company, have been the only American-flag operator that has operated in this trade during the past 50 years. Oceanic and Oriental Navigation Company, which was equally owned by American-Hawaiian Steamship Company and Matson Navigation Company, operated in this service from 1928 to 1937 under an ocean mail contract, with Matson having charge of the Australian and New Zealand services as Managing Agent. When the mail contracts were terminated, Oceanic and Oriental did not request an operating-differential subsidy and the company was liquidated in 1938 partly because of poor cargo offerings, particularly homeward from Australasia. From 1938 until World War II there was no American-flag service of a strictly freight character, but during the war and until a few months ago, Matson operated a freighter service over the route as Berth Agent of the War Shipping Administration. In June 1946 the applicant began the operation of freight vessels chartered from the Government in this service, and since that time four sailings have been made from California ports to Australasia.

PRESENT AND EXPECTED FOREIGN COMPETITION

The record disclosed foreign competition on Route 27 as follows:

(1) Transatlantic Steamship Co. Ltd., a Swedish-flag service with approximately monthly sailings from British Columbia and Pacific ports to Australasia, using vessels of 14/17 knots speed and 9000 tons lifting capacity.

(2) Union Steamship Co., a British-flag service with sailings approximately every six weeks from British Columbia and Pacific coast ports to South Sea Islands and Australasian ports with five older vessels of approximately 11½ knots speed.

(3) Pacific Island Transport Lines, a Norwegian-flag service with one sailing scheduled at the time of the hearing. It is expected to maintain sailings at approximately three months' intervals serving Pacific coast ports and South Sea Island ports with one cargo vessel of approximately 11 knots speed.

(4) Canadian-Australian Line, a British-flag service not now operating but expected to enter Pacific coast—Australasian service with an express passenger and freight vessel or vessels.

(5) W. R. Carpenter Over-Seas Shipping Ltd., a British-flag service, expected to incorporate service late in 1946 with sailings every two or three months from British Columbia ports to Australasia via Fiji, with three ten-knot freight vessels of substantial capacity.

There is, in addition, indirect competitive foreign-flag service:

(1) American-Australian Steamship Line, a British-flag service maintaining ap-

proximately monthly sailings from Atlantic ports to Australasian ports with vessels of 15/16 knots speed and 8/9000 tons lifting capacity.

(2) Port Line Ltd., a British-flag service maintaining approximately monthly sailings from Atlantic ports to Australasian ports with vessels of 16 knots speed and 8/9000 tons lifting capacity.

(3) Bank Line, a British-flag service maintaining approximately monthly sailings from United States Gulf ports to Australasian ports with large modern vessels of approximately 14 knots speed.

CONFERENCE PARTICIPATION

Oceanic is a member of Pacific Coast-Australasian Tariff Bureau and Australasian-New Zealand and South Sea Islands-Pacific Coast Conference. Tariffs of both conferences are on file with the Commission.

OPPOSITION

Isthmian objected to permitting subsidized vessels to serve the Hawaiian Islands on the ground that this is a domestic transportation served for many years by Isthmian and Matson Navigation Co. without subsidy. Oceanic is a subsidiary of Matson, and section 605(a), Merchant Marine Act, 1936, as amended, provides for reduction of subsidy for that part of the voyage between ports of the United States and any of its possessions, which provision would seem to meet the objection voiced by Isthmian.

NEED FOR FINANCIAL AID

If the proposed freight service is to be reestablished on a long-range permanent basis, government aid will be necessary. Foreign flag competition is extensive and the cost of operating under a foreign flag is considerably less than under the American flag. The records generally support the applicant's testimony as to this.

If, over a ten-year period, the profits to the owner exceed 10% of capital necessarily employed in the business, computed annually, 50% of such profits accrue and are payable to the Commission at the end of the recapture period, provided that such payment shall not exceed the total subsidy payments during the recapture period. The balance of the excess profits are deposited in statutory reserve funds for use in the advancement of the operator's replacement program and for transfer to general funds when and if needed in the operation of the subsidized service.

If, during any temporary period, there are abnormally high profits that help to produce more than a reasonable return to the operator for

any recapture period, the recapture and trust fund provisions protect the Government's interest and at the same time guarantee the use of the operator's resources, after dividends mentioned, in the development and maintenance of the subsidized service on a permanent basis.

AWARD OF SUBSIDY CONTRACT

We have found and determined:

(1) That Freight Services 2(a) and 2(b) within Trade Route 27, as described in the Report of the Commission dated May 22, 1946, on "Essential Foreign Trade Routes and Services Recommended for United States Flag Operation", are essential within the meaning of section 211 of the Merchant Marine Act of 1936, as amended.

(2) That, while Oceanic is the established American-flag operator with respect to Service 1 (passenger and freight service) of Trade Route 27, there now is no established American-flag operator in Service 2 (freight service) of Trade Route 27, under the provisions of section 605(c) of the 1936 Act.

(3) That The Oceanic Steamship Company possesses the ability and experience, financial resources, and other qualifications necessary to conduct the proposed operation so as to meet competitive conditions and promote foreign commerce.

(4) That the granting of the aid applied for by The Oceanic Steamship Company under Title VI of the Act is necessary to place the proposed operation on a parity with foreign competitors and will carry out the purposes and policy of the 1936 Act.

(5) That the application of The Oceanic Steamship Company for financial aid in the operation of vessels on Freight Services (a) and (b), Trade Route 27, be approved, subject to compliance with the applicable provisions of Title VI of the Act and such terms and conditions as may be imposed by the Commission, with a schedule of not less than 10 nor more than 26 sailings per year.

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 30th day of December A. D. 1946.

No. S–5

OCEANIC STEAMSHIP COMPANY—APPLICATION FOR FINANCIAL AID IN THE OPERATION OF VESSELS ON FREIGHT SERVICES A AND B, TRADE ROUTE NO. 27 (U. S. PACIFIC PORTS—AUSTRALIA, NEW ZEALAND, NEW GUINEA, AND SOUTH SEA ISLANDS)

A public hearing having been held, and a full investigation of the matters and things involved having been made, upon consideration of the record, the Commission having made and entered of record a report containing its findings, conclusion, and decision, which is attached hereto and made a part hereof;

It is ordered, (1) That the application of The Oceanic Steamship Company for financial aid under Title VI of the Merchant Marine Act, 1936, as amended, in the operation of vessels in Freight Services (a) and (b), Trade Route 27, be approved, and that, subject to compliance with the applicable provisions of Title VI of the Act and with such terms and conditions as may be imposed by the Commission, a contract be entered into with such Company for the payment of an operating-differential subsidy for the operation of vessels in such route.

By the Commission.

[SEAL]

(Sgd.) A. J. WILLIAMS,
Secretary.

UNITED STATES MARITIME COMMISSION

No. S-6

AMERICAN SOUTH AFRICAN LINE, INC., MISSISSIPPI SHIPPING COMPANY, INC., AND SEAS SHIPPING COMPANY, INC.—APPLICATIONS FOR FINANCIAL AID IN THE OPERATION OF VESSELS ON TRADE ROUTE NO. 14 (UNITED STATES ATLANTIC AND GULF PORTS AND WEST COAST OF AFRICA)

REPORT OF THE COMMISSION

BY THE COMMISSION:

This proceeding involves applications filed by the above-mentioned companies for financial aid under Title VI of the Merchant Marine Act of 1936, as amended, in the operation of vessels in a service between "U. S. Atlantic and Gulf ports (Maine-Texas, inclusive), West Coast of Africa (from Southern Border of French Morocco to Cape Frio) and Madeira, Canary, Cape Verde and other Islands adjacent to the West African Coast," designated as Trade Route No. 14 in "Report of the United States Maritime Commission on Essential Foreign Trade Routes and Services Recommended for United States Flag Operation," dated May 22, 1946. After due notice to the public and all interested parties, a public hearing was held on the applications at Washington, D. C., on September 4, 1946, before examiners appointed by the Commission. Following the hearing, briefs were filed by all applicants.

HISTORY OF THE ROUTE

Service from United States ports to West Africa, approximating Trade Route No. 14, as now constituted, was established by the United States Shipping Board in 1921—A. H. Bull & Company as Managing Agent for the Government, operated the route designated as American West African Line, and service was provided from the Atlantic and Gulf ports until 1928. In 1928, this service and the vessels operating therein were sold to the American West African Line, a wholly-owned subsidiary of the Barber Company, Inc., and Mail Contract FOM 17, operating from Atlantic ports to West Africa, was executed on August

30, 1928, with this company. Mail Contract FOM 47, operating from New Orleans to West Africa was executed on March 3, 1930. These contracts were cancelled in accordance with the Merchant Marine Act of 1936, and settlement with the operator was effected in June 1937. No subsidy has been paid on the route since that time.

During 1938-1940, inclusive, American West African, using seven American-flag vessels, handled the following tonnage:

Year	Atlantic		Gulf		Totals	
	Inbound	Outbound	Inbound	Outbound	Inbound	Outbound
1938	64,883	42,660	.....	30,484	64,883	73,144
1939	72,072	46,335	25,470	26,498	97,542	72,833
1940	129,358	76,222	12,400	15,712	141,758	91,934
Total	266,313	165,217	37,870	72,694	304,183	237,911

During 1941, American West African operated five American-flag vessels and certain foreign-flag vessels, with carryings reported as follows:

Year	Atlantic		Gulf		Total	
	Inbound	Outbound	Inbound	Outbound	Inbound	Outbound
1941	[1] 200,117	[1] 149,335	6,598	......	207,715	149,335
Totals 1938-41	466,430	314,552	44,468	72,694	510,898	387,246

[1] Of this total of 200,117 tons inbound, 174,592 tons were carried by American-flag vessels. Of this total of 149,335 tons outbound, 142,178 tons were carried in American-flag vessels.

Two sailings were made by American West African Line from U. S. Atlantic ports to West Africa and return in 1942.

THE APPLICANTS AND THEIR PROPOSALS

American South African Line, Inc.

The American South African Line, Inc. (hereinafter referred to as "American South African"), is a corporation organized under the laws of the State of New York. Its stock is held principally by residents of New York and adjacent communities. It has operated generally in the route now known as Trade Route 15-A—U. S. Atlantic ports-Key West, inclusive, to South and East Africa (Cape Frio-Cape Guardafui and Madagascar) since 1926. This service was established by the United States Shipping Board in 1922, and was operated from 1922-1925 by the Mallory Transport Lines as Managing Operators. American South African purchased five vessels and the service from the United States Shipping Board in January 1926. A mail contract covering a period of 10 years was awarded on this route to American South African in October 1928. This contract was terminated in June 1937,

and a temporary operating-differential subsidy agreement was executed under provisions of the Merchant Marine Act of 1936, which continued in effect until August 31, 1938. In August 1938, following a public hearing, the Commission determined that it was in order to execute two operating-differential subsidy agreements applicable to this route, services to be provided by both American South African and the Seas Shipping Company, Inc. (another applicant in this case). However, American South African did not apply for an operating-differential subsidy agreement until early in 1940. Such an agreement was executed on April 23, 1940. This service is presently operated with five owned and eight chartered vessels.

American South African requests a subsidy agreement for operating a service between U. S. Atlantic-Gulf and West African ports, which will provide for a minimum of 18 annual sailings without any maximum being established. Actually it proposes to start the service on the basis of 22 annual sailings. It will call at 16 West African ports regularly. It does not propose a scheduled service to the Gulf, stating that its survey does not indicate that such a service is justified. It proposes to call at the Gulf only when a sufficient quantity of paying cargo can be obtained. The service would be provided by five C2 vessels, the purchase of which has been applied for under the Merchant Ship Sales Act of 1946.

In addition to the 16 ports which American South African proposes to call at regularly, it proposes to establish two feeder services; one based on Monrovia and one based on Lagos. The company's survey indicates that there are 23 ports in the Monrovia-Lagos territory which require service, but due to the physical characteristics, it has been found very unsatisfactory and uneconomical to try to serve them with large vessels. The Monrovian-based feeder service will have two parts, a shuttle service between Marshall and Monrovia, using two LCT type vessels, and a service to the north as far as Freetown and to the south as far as Cape Palmos, with FS-type vessels. This feeder service would add seven ports to the ports regularly served by ocean-going vessels. The Lagos-based feeder service will be operated with three FS-type vessels. It will serve regularly four surf ports of importance to the west of Lagos, and 12 shallow draft ports to the east in the Niger Delta, which will add 16 important ports to the list of ports having regularly-scheduled liner service. Service will thus be supplied to a total of 39 ports. It is American South African's present plan to place vessels operating in feeder service under the Liberian flag.

American South African also proposes to separate its liner service into a northern and southern service, with vessels sailing from Atlantic ports alternately in the two services. The northern service will call

regularly at the Azores and Canary Islands, thence to Dakar, continuing along the coast to Douala, returning to Dakar, thence direct to U. S. Atlantic ports. The southern service will proceed from U. S. Atlantic ports to Monrovia, thence along the coast to Lobito, returning via the same route to U. S. Atlantic ports.

American South African states that if the trade route is divided and a direct service is operated between the U. S. Gulf and West Africa, its application should be understood to be for service from Atlantic ports only. The division of the route, if approved, will not reduce the number of sailings proposed by the applicant.

Seas Shipping Company, Inc.

The Seas Shipping Company, Inc. (hereinafter referred to as "Seas"), is a corporation organized under the laws of the State of New York. Its stock is held principally by residents of New York. It has been in business for 26 years, and since June 1935 has operated a service from U. S. Atlantic ports to South and East Africa, approximately the present Trade Route 15-A, U. S. Atlantic ports-Key West, inclusive, to South and East Africa (Cape Frio-Cape Guardafui and Madagascar). In August 1938 an agreement was entered into with the Commission providing for payment of operating-differential subsidy on this route. It is presently operating four owned and 10 chartered vessels in this service.

Seas states definitely that, in its opinion, Trade Route No. 14 should be separated into two services; that is, U. S. Atlantic/West Africa service and U. S. Gulf/West Africa service. It is, however, an applicant for the combined service or for each individual service if separated, as suggested. Seas proposes to institute service on Trade Route No. 14, as presently constituted, with 18 sailings per year, of which six sailings would proceed from New York to Gulf ports to discharge and load cargo and return to New York to complete outward loading.

On the direct service from Atlantic ports a turn-around of 96 days is contemplated. This is based on proposed calls at 11 principal ports and other smaller ports as cargo offers. Application for purchase of five C2 vessels under the provisions of the Merchant Ship Sales Act of 1946, has been filed by Seas to cover this service in the event a subsidy contract is awarded. Seas proposes, if the trade route is separated, to operate 18 sailings per year from U. S. Atlantic ports direct to the West coast of Africa, and six sailings per year from U. S. Gulf ports to ports on the West coast of Africa. If proposals for operating the two services are approved, it will apply for the purchase of three additional C2-type vessels to serve the U. S. Gulf ports-West Africa route, using the five

C2 vessels already applied for in the Atlantic service. Seas stated that it is an Atlantic operator and that while it will operate a combined service as presently constituted, or either of the services, if separated, it is primarily interested in the Atlantic operation.

Mississippi Shipping Company, Inc.

The Mississippi Shipping Company, Inc. (hereinafter referred to as "Mississippi"), is a corporation organized under the laws of the State of Louisiana. Its stock is held principally by residents of the Gulf territory. This company was formed in 1919 for the purpose of operating vessels under an agency agreement for the United States Shipping Board in trade between U. S. Gulf ports and the East coast of South America. In 1929 it purchased 12 ships and the service, which was known at that time as "Gulf Brazil River Plate Line." The service was operated from the date of purchase until 1937 under an ocean mail contract, and has been operated since that time under an operating-differential subsidy agreement. It is presently operating eight owned and three chartered vessels in this service.

Mississippi proposed to inaugurate a schedule of 26 round voyages per year from Gulf ports via Atlantic ports, thence to the West coast of Africa, returning to Atlantic ports, thence to Gulf ports. Contingent application for the purchase of six C1-type vessels for operation in this service has been filed under the Merchant Ship Sales Act of 1946.

Mississippi strongly urges that this route be divided into a U. S. Atlantic/West African service and a U. S. Gulf/West African service. If such a division is made, it is an applicant for the U. S. Gulf/West African service *only*. It proposes to make 12 voyages annually in the service and requests permission, if the route is divided and it is the successful applicant, to call at St. Thomas for fuel and at Para and Pernambuco, Brazil, for the purpose of discharging cargo from U. S. Gulf ports. It proposes to return direct from West Africa to the Gulf. Mississippi states that considerable traffic can be developed between U. S. Gulf ports and northern Brazilian ports. It further points out that this territory is not adequately served at present. It believes that a round voyage will require about 88 days. The applicant proposes to provide this service with three C1A vessels.

Foreign Competition

Prior to World War II, service between U. S. Atlantic and Gulf ports and West Africa was provided by the American West African Line (then operating U. S.-flag vessels) and Elder Dempster Line, Ltd. (a

British-flag operator). Direct service between U. S. Atlantic ports and West Africa is presently provided on a monthly basis by the Elder Dempster Co. (a British-flag company). Semi-monthly service is being operated by the Barber-West African Line. This is a combination of three Norwegian companies, together with the Barber Steamship Company of New York. The agreement under which they are operating provides that Barber will furnish one vessel and the associate companies a minimum of five vessels. Barber has, so far, contributed one vessel of U. S. registry (an old World War I type) and the Norwegian companies have contributed five modern fast vessels. The agreement provides for service between U. S. Atlantic and Gulf ports, ports on the West coast of Africa and adjacent islands.

No United States or foreign-flag liner services are presently operating between the U. S. Gulf and West Africa. However, there is an inbound tramp movement to the Gulf from West Africa. During the second quarter of 1946 this movement amounted to 18,100 tons.

Lloyd Brasileiro is presently operating liner service from U. S. Gulf ports to North Brazilian ports. During July, August, and September 1946, this line made four sailings, carrying a total of 5,000 tons of cargo for North Brazilian ports.

The only direct foreign liner competition from U. S. Gulf ports to West Africa, therefore, is on that portion of the proposed route which will operate to northern Brazilian ports. However, to the extent that traffic could move by a Gulf service, the foreign flag competition from the Atlantic ports is considered as indirect competition with Gulf port services.

SEPARATION OF ATLANTIC AND GULF SERVICES

While applying for the trade route as presently established, each applicant was of the opinion that better results would be obtained if the route were divided into two services. It was the consensus that the trade route should be separated into (a) a service from the U. S. Atlantic ports to the West coast of Africa, and (b) a service from the U. S. Gulf ports to the West coast of Africa.

With foreign competitors operating regular services direct from North Atlantic ports, an American-flag operator combining the two operations would be obliged to call at the North Atlantic to discharge, then proceed to the Gulf to discharge and load, after which it would have to return to North Atlantic ports for final loading, thereby weakening its competitive position with foreign-flag vessels. It is estimated that the inclusion of Gulf ports in a combined service will add a minimum of 17 days to the voyage time. This would materially increase the operating expense of the individual voyage, while at the same time it

would give only an inferior service to the Gulf. Testimony at the hearing indicated that substantial cargo will move between U. S. Gulf ports and West Africa provided satisfactory service is offered. A combination U. S. Atlantic and Gulf service would not provide such a service.

After considering all of the facts adduced at the hearing, we find that the factors favoring separate operations from the Gulf and Atlantic outweigh those factors favorable to a combined operation of the two services.

Ability of Route to Support More Than One American-Flag Operator

Evidence was introduced at the hearing to show that exports from the United States to West Africa for the year 1945 totaled 229,753 tons and imports to the United States for the same period totaled 685,285 tons. The bulk of the import cargo is of the type that would not ordinarily move in liner service. It is obvious that the route will not support all applicants, and if the route is divided as proposed, the U. S. Gulf-West Africa service, with the aid of cargo for Northern Brazilian ports, will support only one applicant. The cargo moving between U. S. Atlantic ports and West African ports should support one of the applicants, but it is not believed it would support two of the applicants.

Need for Financial Aid

The Commission, in accordance with section 211 of the 1936 Act, as amended, has determined that service by U. S.-flag vessels on this route is essential.

American South African states that it might be possible for an American-flag line to establish itself in the U. S.-West African trade at the present time without subsidy and continue so long as present conditions prevail. It stated that it would be willing to operate this service without a subsidy in the beginning, but would not give any assurance of a long-term operation without subsidy.

It further contended that the competition would be keen, the task difficult, and that an American-flag operator should be granted aid provided for in the 1936 Act for the development and maintenance of this essential foreign service on a long-range basis.

Seas states that it is definitely of the opinion that an operating subsidy will be necessary and offers no assurance of operating either or both of the services without a subsidy.

Mississippi states that an operating subsidy will be necessary in any event and particularly if the service is divided.

The purpose of an operating subsidy is to equalize certain operating expense items of the American-flag operator with the corresponding expense items of its foreign competitor or competitors, and the necessity therefor is not determined on a profit basis. Irrespective of disparity in operating costs between American- and foreign-flag vessels, it should be understood, however, that the Commission would not pay a subsidy to an American-flag operator for operating an essential foreign service that could and would be adequately maintained on a long-range basis by an American-flag operator without subsidy.

An American-flag operator in the average foreign service will experience good and bad years and no matter what the outlook might be at a particular time the results over a long period probably will prove to be far less or substantially greater than anticipated. Therefore, in order to avoid the possibility of excess profits accruing to the shipowner by reason of Government aid extended, the recapture clause was inserted in the Act, which provides for the accrual to the Government of 50 percent of the profits, if any, in excess of 10 percent on capital necessarily employed in the business, computed annually, and averaged over each 10-year period, provided the refund to the Government shall not exceed the total subsidy payments during the 10-year recapture period.

All earnings in excess of 10 percent of capital necessarily employed are required to be deposited annually in the reserve funds. The 50 percent of such excess earnings which are subject to recapture, under normal conditions, remains in the special reserve fund until the end of the recapture period, at which time it becomes due and payable to the Government. The other 50 percent in excess of 10 percent of capital necessarily employed becomes available, subject to Commission approval, for ship mortgage payments, the purchase of new vessels, and for transfer to the operator's general fund when and if needed in the operation of its subsidized services.

No American-flag operator is now operating on Trade Route No. 14. If the Government is to extend aid to any American-flag operator in establishing and maintaining a service to West African ports on a long-range basis, now is the opportune time to do so, in view of the advantages accruing to the Government and to the operator in the development of this service through the operation of the recapture and trust fund provisions of the 1936 Act. Therefore, in furtherance of the long-range program enunciated in the Merchant Marine Act of 1936, as amended, we find that operating-differential subsidy contracts should be awarded to American-flag operators in the development and operation of Trade Route No. 14 on a permanent basis.

Award of Subsidy Contracts

We find that all of the applicants possess the ability, experience, financial resources, and other qualifications necessary to conduct the proposed operation. We have also found that each of the services as divided will not support more than one U. S.-flag operator and that financial aid will be required for the long-range operation. We are, therefore, confronted with the problem of selecting one operator for each of the services.

American South African contends that where there are several applicants for a single subsidy, the applicant who proposes a plan of operation developed and designed to meet the special needs of the services which it seeks to enter should prevail over applicants who propose only what the Commission has suggested for the services. The applicant cites in support of its contention the fact that it has made an exhaustive study of the U. S.-West African trade and that the other applicants have given little, if any, attention to the West African end of the route. Although we do not agree that applicant is entitled to preference as such, the scope of the proposed plan for operation of the service should be considered in selecting an operator where there are several applicants.

Seas states that the domestic community primarily interested in the route is New York, and that since it is a New York corporation it enjoys the support of New York and the general North Atlantic area and is entitled to preference under the provisions of section 809 of the Act. It does not appear that Seas has the support of New York and the North Atlantic area to any greater extent than American South African, which is also a New York corporation.

Seas also contends that it is entitled to preference over the other applicants under the provisions of section 601(a)(3) of the Act because of its record of performance as a shipping company under the Merchant Marine Act, 1936, as amended. Although Seas has a creditable record in its operation under the 1936 Act, we do not believe its performance has been superior to that of the other applicants.

Mississippi contends that it is the only one of the three applicants that seriously proposes an adequate service between U. S. Gulf ports and the West coast of Africa. It points to American South African's statement that it has no intention of operating vessels to or from Gulf ports unless offered substantial shipments which justify special calls, and to Seas' statement to the effect that it is a North Atlantic operator and that it made application for both services primarily for the purpose of meeting the Commission's Trade Route Committee's requirements. We have concluded that if the route is divided into separate services

from the Atlantic and Gulf to West Africa, sailings in excess of those proposed by American South Africa and Seas will be required in the proper development of the service.

We have concluded that the type of operation, with feeder service for the West African ports, proposed by American South African is superior to that proposed by other applicants and should produce a greater volume of traffic; that this applicant should receive financial aid in the operation of the U. S. Atlantic-West Africa service.

Mississippi is the only applicant who prefers to confine its operation to a service from U. S. Gulf ports only. It has the support, financial and otherwise, of the domestic communities primarily interested, which gives it preference under the 1936 Act. We have concluded that this applicant should receive financial aid in the operation of the U. S. Gulf-West Africa service.

We find and determine on the basis of the foregoing findings and all facts of record:

1. That, Trade Route No. 14 should be divided into two services:

Service No. 1.—Between U. S. Atlantic ports and ports on the West coast of Africa (from southern border of French Morocco to Cape Frio, including Madeira, Canary, Cape Verde, and other islands adjacent to the West African coast), with a minimum of 18 sailings per annum.

Service No. 2.—Between U. S. Gulf ports and ports on the West coast of Africa (from the southern border of French Morocco to Cape Frio), with the privilege of calling at St. Thomas and at North Brazilian ports (Para-Pernambuco) outbound, with a minimum of 12 sailings per annum.

2. That Trade Route No. 14, as divided into Service No. 1 (from U. S. Atlantic ports to West Africa and Madeira, Canary, Cape Verde Islands) and Service No. 2 (from U. S. Gulf ports to West African ports), is an essential trade route within the meaning of section 211 of the Merchant Marine Act of 1936, as amended.

3. That the American South African Line, Inc., possesses the ability, experience, financial resources, and other qualifications necessary to conduct the proposed operation so as to meet competitive conditions and promote foreign commerce in the operation of Service No. 1, Trade Route No. 14.

4. That the Mississippi Shipping Company, Inc., possesses the ability, experience, financial resources, and other qualifications necessary to conduct the proposed operation so as to meet competitive conditions and promote foreign commerce in the operation of Service No. 2, Trade Route No. 14.

5. That the granting of the aid applied for by the American South African Line, Inc., under Title VI of the Merchant Marine Act of 1936, as amended, is necessary to place the proposed operation of Trade Route No. 14, Service No. 1, on a parity with those of foreign competitors and will carry out the purposes and policy of the Act.

6. That the granting of the aid applied for by the Mississippi Shipping Company, Inc., under Title VI of the Merchant Marine Act of 1936, as amended, is necessary to place the proposed operation of Trade Route No. 14, Service No. 2, on a parity with those of foreign competitors and will carry out the purposes and policy of the Act.

7. That the application of Seas Shipping Company, Inc., for financial aid under Title VI of the Merchant Marine Act of 1936, as amended, for operation of vessels in Trade Route No. 14, shall be denied.

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 9th day of January A. D. 1947.

No. S-6

American South African Line, Inc., Mississippi Shipping Company, Inc., and Seas Shipping Company, Inc.—Applications for Financial Aid in the Operation of Vessels on Trade Route No. 14 (United States Atlantic and Gulf Ports and West Coast of Africa)

A public hearing having been held, and a full investigation of the matters and things involved having been made, upon consideration of the record, the Commission having made and entered of record a report containing its findings, conclusions, and decision, which is attached hereto and made a part hereof;

It is ordered, 1. That Trade Route No. 14, as now constituted, be divided into two services:

Service No. 1.—Between U. S. Atlantic ports and ports on the West coast of Africa (from southern border of French Morocco to Cape Frio, including Madeira, Canary, Cape Verde, and other islands adjacent to the West African coast), the service to be instituted with a minimum of 18 sailings per annum.

Service No. 2.—Between U. S. Gulf ports and ports on the West coast of Africa (from the southern border of French Morocco to Cape Frio), with the privilege of calling at St. Thomas and at North Brazilian ports (Para-Pernambuco) outbound, with a minimum of 12 sailings per annum.

2. That application of American South African Line, Inc., for financial aid under Title VI of the Merchant Marine Act of 1936, as amended, in the operation of vessels on Service No. 1, Trade Route No. 14, be approved, and that, subject to compliance with the applicable provisions of Title VI of the Act and with such terms and conditions as may be imposed by the Commission, a contract be entered into with such company for the payment of an operating-differential subsidy for the operation of vessels in such service.

3. That application of Mississippi Shipping Company, Inc., for financial aid under Title VI of the Merchant Marine Act of 1936, as amended, in the operation of vessels on Service No. 2, Trade Route No. 14, be approved, and that, subject to compliance with the applicable provisions of Title VI of the Act and with such terms and conditions as may be imposed by the Commission, a contract be entered into with said company for the payment of an operating-differential subsidy for the operation of vessels in such service.

4. That application of Seas Shipping Company, Inc., for financial aid under Title VI of the Merchant Marine Act of 1936, as amended, for operation of vessels in Trade Route No. 14, be denied.

By the Commission.

[SEAL]

(Sgd.) A. J. WILLIAMS,
Secretary.

UNITED STATES MARITIME COMMISSION

No. S-7

UNITED STATES LINES COMPANY ET AL.[1]—APPLICATIONS FOR FINANCIAL AID IN THE OPERATION OF VESSELS ON TRADE ROUTES NOS. 12, 17, 22, 28, 29, AND 30

and

GRACE LINE, INC.—APPLICATION FOR PERMISSION TO OPERATE ON FREIGHT SERVICE F OF TRADE ROUTE NO. 29, WITHOUT SUBSIDY

REPORT OF THE COMMISSION

BY THE COMMISSION:

Introductory—This proceeding involves applications filed by all of the applicants here listed, in connection with the operation of vessels in certain services of trade routes described in "Report of the United States Maritime Commission on Essential Foreign Trade Routes and Services Recommended for United States Flag Operation" (hereinafter referred to as the "Report"), approved May 20, 1946, and released May 22, 1946.

The last-named applicant, Grace Line Inc., presently subsidized in other routes, has filed an application to operate a service in Trade Route No. 29 without government aid, permission of the Commission being necessary under the terms of its operating-differential subsidy agreement relating to other routes.

After due notice to the public and all interested parties, a public hearing was held on the applications at Washington, D. C., on August 12, 13, 14 and 15, 1946, before examiners appointed by the Commission. Following the hearing, briefs were filed by all applicants.

The Commission having determined that service by U. S.-flag vessels on the trade routes involved is essential, a detailed discussion of the history of such trade routes is considered unnecessary in this report.

[1] American President Lines, Ltd., American Export Lines, Inc., Lykes Bros. Steamship Co., Inc., American-Hawaiian Steamship Company, American Mail Line, Ltd., Olympic Steamship Company, and States Steamship Company.

The "Report" was issued by the Commission pursuant to section 211 of the 1936 Act, and all of the trade routes involved in these applications have been listed in the "Report" as "Essential Foreign Services." The findings incorporated in the "Report" were based on *long-range* considerations.

The "Report" further stated:

> The Maritime Commission would prefer that private United States flag operation be conducted in the foreign trade without government aid but it will enter into contracts for the payment of operating-differential subsidies, in accordance with the provisions of the law wherever this is found necessary to maintain adequate United States flag service on essential foreign trade routes. It is prepared to grant such a subsidy even though one or more United States flag lines are already in the trade, if it finds that it is necessary to provide adequate service by vessels of United States registry.

Section 605(c) imposes certain limitations on the Commission with respect to the granting of financial aid under Title VI of the Act for (1) the operation of vessels which would be in addition to the service already provided by vessels of United States registry, and (2) the operation of vessels on a service served by two or more citizens of the United States with vessels of United States registry.

The present applications must be examined in the light of the policy expressed in the "Report" and the limitations imposed by section 605(c).

This report is being arranged by trade routes, and the applications relating to a service or services of the trade route involved will be discussed thereunder.

PART I

Trade Route No. 12 (As Described in the "Report")

(U. S. Atlantic ports (Maine-Key West inclusive)—Far East (Philippine Islands, Manchuria, Korea, China, Japan, U. S. S. R. in Asia, French Indo-China, Formosa and Siam.)

1. *Freight Service A:*

   Itinerary: New York with calls at Philadelphia, Baltimore and Hampton Roads as traffic offers via Panama Canal, Honolulu to Yokohama, Osaka, Kobe, Shanghai, Hong Kong, Manila and return via same route to U. S. Atlantic ports.

   Sailing Frequency: 26 fortnightly sailings per year.

   No. and Type of Ships: 7 C3-type freighters.

   NOTE.—To be coordinated with Round-the-World service out of New York to provide weekly sailings.

2. *Freight Service A–1:*

Itinerary: New York, Philadelphia, Baltimore, Hampton Roads, Savannah, Jacksonville, via Panama Canal to Japanese and Chinese ports as traffic offers, Philippine Islands, to load homeward at Manila and Philippine outports for U. S. Atlantic ports via Panama Canal with occasional calls at Japan and China as inward traffic offers; with privilege of calling at Hawaii and U. S. S. R. in Asia for loading and discharging.

Sailing Frequency: 12 monthly sailings per year.

No. and Type of Ships: 4 C2 or other suitable type freighters.

Freight Service B:

Itinerary: New York (calls at other Atlantic ports as traffic offers) via Panama Canal to Manila, Hong Kong, Philippine outports and return direct to U. S. Atlantic with privilege of loading and discharging traffic at French Indo-China and Siam.

Sailing Frequency: Every 4 weeks (13 sailings per year).

No. and Type of Ships: 3 AP–3 or other suitable type freighters.

NOTE.—To be coordinated with Services C–1, C–2 and C–3 on Trade Route 17 to provide weekly sailings from New York to Manila and Hong Kong.

United States Lines Company (Trade Route No. 12)

Present Service and Proposal: The United States Lines Company is a corporation organized under the laws of the State of New York. Its stock is listed on the New York Stock Exchange and widely distributed. It is operating under subsidy contracts between North Atlantic ports, the United Kingdom, certain European Continent ports, and in addition, operates services to the Far East and Australasia, pursuant to the terms of an operating-differential subsidy agreement which was entered into between the United States Lines Company and the Commission for operation of the American Pioneer Line under date of July 30, 1940. The operating-differential subsidy agreement covers two routes, referred to therein as "Service A, Far East Service", and "Service C, Atlantic and Gulf Australian Service." The applicant is concerned with the extension of its Far East Service A only, described in its operating agreement as follows:

> *"Service A—Far East Service (herein called 'Service A'):*
> Between United States Atlantic ports via Panama Canal and ports in Philippine Islands, Hong Kong, China, with the privilege of calling at port or ports in Hawaii, Japan, Manchuria, Russia in Asia, French Indo-China, also North Atlantic Canadian ports."

Sailings as described in the agreement are as follows:

> "Service A—Not less than nine (9) nor more than twelve (12) outward sailings per year from United States Atlantic ports."

The above-described service is broad enough to cover Services A-1 and B of Trade Route No. 12, described in the "Report," although the United States Lines Company has operated a service that more nearly parallels Service B.

Applicant requested the following revision of the above service on Trade Route No. 12:

"*Itinerary:*

Outbound—U. S. Atlantic ports via Panama Canal, Los Angeles, San Francisco to Yokohama, Kobe, Shanghai, Hong Kong, Manila.

Inbound—Manila, Hong Kong, Shanghai, Formosa to San Francisco, Los Angeles via Panama Canal to New York and other U. S. Atlantic ports, as cargo warrants.

With privilege of calling at other port or ports in Hawaii, Philippine Islands, Japan, China, Manchuria, Russia in Asia, French Indo-China and North Atlantic Canadian ports as cargo offers.

Sailing Frequency: Every four weeks."

Applicant also requested a service described as follows:

"*Itinerary:*

Outbound—U. S. Atlantic ports via Panama Canal, Los Angeles, San Francisco to Manila, Singapore, Penang.

Inbound—Penang, Singapore via Suez Canal or Cape of Good Hope, or via the Philippines, China, Japan and Panama Canal if cargo warrants, to New York and other U. S. Atlantic ports.

With privilege of calling at North Atlantic Canadian ports and at port or ports in Hawaii, Philippine Islands, French Indo-China, Straits Settlements, Netherlands East Indies and Siam as cargo offers.

Sailing Frequency: Every four weeks."

The last-described service conforms generally to Service C-1 in Trade Route No. 17. Applicant made it clear at the hearing that its primary interest was in obtaining an increase in sailings from 12 to 26 per year in its Far East service and that the request for additional sailings therefor was not contingent upon its being granted the additional ports listed in its application. However, the applicant's request for Service C-1, Trade Route No. 17, will be discussed later in this report.

Opposition: The American President Lines, Ltd., a subsidized operator, is now operating a "Round-the-World" combination passenger and cargo service which calls at all of the ports listed in the United States Lines Company's application. It also operates, under a subsidy contract, a service from California ports to the Far East. It objected to granting permission to United States Lines Company to call at California ports, stating that these calls, which are permissive in character, would give it an option, without obligation to provide regular service. This, it was contended, would invade certain ports served by the American President Lines, Ltd., whose agreement requires it to provide service on established schedules.

The Isthmian Steamship Company, an unsubsidized operator, now operating an eastbound and westbound "Round-the-World" service, objected to any extension of trading range for the United States Lines Company. It also objected to its being granted permission to call at California ports and to the proposed increase in sailings to 26 per year. Isthmian stated that it felt that there would be adequate unsubsidized service available in combination with the subsidized service that is already in effect.

Other Applicants: There were no other applicants for financial aid in the operation of Trade Route No. 12.

Foreign Competition: The records disclose direct foreign competition on Trade Route No. 12, as follows:

> The American and Manchurian Line and Bank Line under British flag are operating monthly service from U. S. Atlantic ports to some of the Far East ports. The Lancashire Shipping Co. (Barber Line), Blue Funnel Line, the Prince Line and the Silver Line, under British flag, are operating monthly Round-the-World services from U. S. Atlantic ports via the Far East.
>
> De La Rama, Philippine flag, is operating a service every three weeks from New York to Manila.
>
> Maersk Line, Danish flag, is operating monthly service from U. S. Atlantic ports to the Far East.
>
> Ivaren Line, Norwegian flag, is operating services from North Atlantic ports to the Far East.
>
> North Negros Sugar, Inc., Philippine flag, is operating services from New York to Manila.

Need for Financial Aid: The Commission, as already pointed out in this report, is subsidizing the United States Lines Company for partial coverage of Services A-1 and B of Trade Route No. 12. Based on a study by the Commission, as embodied in the "Report," a total of 51 American-flag sailings will be required to furnish adequate American-flag participation on this route. These 51 sailings are in addition to the 26 "Round-the-World" sailings of the American President Lines, Ltd., which provide only outbound service from U. S. Atlantic ports to the Far East. The service Isthmian will provide does not schedule calls at ports in Japan, Korea and U. S. S. R. Moreover, a substantial portion of Isthmian's carryings are of necessity devoted to cargoes from the Straits Settlements and the Netherlands East Indies area. It is apparent that adequate service is not being furnished and that additional sailings will have to be made in order to provide the American-flag service determined by the Commission for the route.

Conclusions: We find and determine on the basis of the facts of record:

1. That the service now provided by vessels of United States registry is inadequate and that additional sailings with vessels of

United States registry should be made in furtherance of the purposes of the Merchant Marine Act, 1936.

2. That the United States Lines Company possesses the ability, experience, financial resources and other qualifications necessary to make the additional sailings proposed in its application.

3. That the granting of the aid applied for by the United States Lines Company under Title VI of the Merchant Marine Act, 1936, is necessary to place the proposed increased operations on a parity with those of foreign competitors and will carry out the purposes and policies of the Merchant Marine Act, 1936.

4. That the operating-differential subsidy agreement dated July 30, 1940, of the United States Lines Company, be amended so as to conform Service A of such agreement with Services A-1 and B of Trade Route No. 12, as described in the "Report," and for the making of a maximum of 13 sailings per year on each of such services.

5. That the application of the United States Lines Company for authority to extend its service beyond the scope covered by Trade Route No. 12, as described in the "Report," be denied.

An appropriate order will be entered.

PART II

Trade Route No. 17 (As Described in the "Report")

U. S. Atlantic & Gulf ports (Maine-Texas, inclusive), Straits Settlements and Netherlands East Indies.

1. *Freight Service C–1:*

Itinerary: New York (other Atlantic ports as traffic offers), via Panama Canal, Los Angeles, San Francisco to Manila, Hong Kong, Soerabaja, Batavia, Singapore, Belawan and return to U. S. Atlantic ports via Suez Canal; privilege of calling at French Indo-China and Siam as traffic offers.

Sailing Frequency: Every 4 weeks (13 sailings per year).

No. and Type of Ships: 4 C–3 type freighters.

NOTE.–To be coordinated wtih Service B on Trade Route No. 12 and Services C-2 and C-3 on Trade Route No. 17 to provide weekly sailings from New York to Manila and Hong Kong.

2. *Freight Service C–2:*

Itinerary: New York (other Atlantic ports as traffic offers), via Panama Canal, Los Angeles, San Francisco to Manila, Hong Kong, Singapore, Belawan, Batavia, Soerabaja, Hong Kong and Philippine Islands (as traffic offers) to San Francisco, Los

Angeles and via Panama Canal to New York; privilege of calling at French Indo-China and Siam, as traffic offers.

Sailing Frequency: Every 4 weeks (13 sailings per year).

No. and Type of Ships: 4 C–3 freighters.

NOTE.—To be coordinated with Service B on Trade Route No. 12 and with Services C-1 and C-3 on Trade Route No. 17 to provide weekly sailings out of New York to Manila and Hong Kong.

3. *Freight Service C–3:*

Itinerary: New York via Panama Canal, Los Angeles, San Francisco to Manila, Hong Kong, Singapore, Calcutta (Burma and Ceylon as traffic offers), returning via Belawan, Singapore, Batavia, Soerabaja, Hong Kong, Philippine Islands to San Francisco, Los Angeles and via Panama Canal to New York; privilege of calling at French Indo-China and Siam, as traffic offers.

Sailing Frequency: Every 4 weeks (13 sailings per year).

No. and Type of Ships: 5 C–3 type freighters.

NOTE.—To be coordinated with Service B on Trade Route No. 12 and Services C-1 and C-2 on Trade Route No. 17, to provide weekly sailings out of New York to Manila and Hong Kong.

4. *Freight Service C–4:*

Itinerary: New York (other Atlantic ports as traffic offers) via Suez Canal to Singapore, Batavia, Soerabaja, Singapore, Belawan; returning via Suez to New York.

Sailing Frequency: Every 4 weeks (13 sailings per year).

No. and Type of Ships: 4 C–3 type freighters.

NOTE.—Trade Route No. 17 will also be served by westbound Round-the-World vessels.

United States Lines Company (Trade Route No. 17)

Present Service and Proposal: As stated hereinbefore, applicant is now operating from U. S. Atlantic ports to the Far East, under an operating-differential subsidy agreement dated July 30, 1940.

It has requested a service described as follows:

"*Itinerary:*

Outbound—U. S. Atlantic ports via Panama Canal, Los Angeles, San Francisco to Manila, Singapore, Penang.

Inbound—Penang, Singapore via Suez Canal or Cape of Good Hope, or via the Philippines, China, Japan and Panama Canal if cargo warrants, to New York and other U. S. Atlantic ports.

With privilege of calling at North Atlantic Canadian ports and at port or ports in Hawaii, Philippine Islands, French Indo-China, Straits Settlements, Netherlands East Indies and Siam, as cargo offers.

Sailing Frequency: Every four weeks."

The above described service conforms generally to Service C-1 in Trade Route No. 17..

American President Lines, Ltd. (Trade Route No. 17)

Present Service and Proposal: The American President Lines, Ltd., is a corporation organized under the laws of the State of Delaware. The Commission controls 93% of voting power of the stock. Applicant is presently operating two services under an operating-differential subsidy agreement dated October 6, 1938, described as follows:

> "*Line A—Trans-Pacific Service*—Between a port or ports in California and a port or ports in Japan, China and the Philippine Islands via the Hawaiian Islands. (Sailings 24 to 26 per year)."
>
> "*Line B—Round-the-World Service*—Round-the-World from New York via the Panama Canal, California, Hawaiian Islands, Japan, China, Philippine Islands, Straits Settlements, Ceylon, India, Suez Canal, Egypt, Italy, France in the Mediterranean, New York, with privilege of calling at Boston, Havana, Cuba, ports in the Dutch East Indies and Gibraltar. (Sailings 24 to 26 per year)."

Applicant proposes to supplement its "Line B" Service with the operation of freight service described as follows:

> "New York (other Atlantic ports as traffic offers) via Panama Canal, Los Angeles, San Francisco to Manila, Hong Kong, Singapore, Belawan, Batavia, Soerabaja, Hong Kong and Philippine Islands (as traffic offers) to San Francisco, Los Angeles and via Panama Canal to New York; privilege of calling at French Indo-China and Siam as traffic offers. Thirteen sailings per year are proposed."

The proposed new service conforms to Freight Service C-2, Trade Route No. 17, of the "Report."

American Export Lines, Inc. (Trade Route No. 17)

Present Service and Proposal: The American Export Lines, Inc., is a corporation organized under the laws of the State of New York. Its stock is listed on the New York Stock Exchange. Control is in the hands of United States citizens.

Applicant is now operating the U. S. Atlantic-Mediterranean Services in Trade Route No. 10, and a service from U. S. Atlantic ports to India in Trade Route No. 18, under an operating-differential subsidy agreement dated January 24, 1938. The India service of Trade Route No. 18 is described in the operating-differential subsidy agreement of the applicant as follows:

> "India Service—Line E—From United States Atlantic ports via the Suez Canal to ports in the Red Sea, India and Ceylon in the Karachi-Calcutta range, with privilege of calling at Burma and North Atlantic Canadian ports."

The subsidy contract calls for a minimum of 10 and a maximum of 14 sailings in the above service.

The applicant has requested an extension of its Indian trade territory to include the Straits Settlements and Netherlands East Indies, described in its application as follows:

Eastbound

New York to Karachi, Bombay, Colombo, Madras (optional), Singapore, Batavia, Soerabaja, Sabang (optional), Belawan (optional) and Samarang (optional).

Westbound

Macassar (optional) to Singapore, Penang, Belawan (optional), Sabang (optional), Rangoon (optional), Madras (optional), Colombo, Karachi, Bombay and New York

and, if and as required, other Indian and Mediterranean ports in the Trade Routes of this company."

In addition to the sailings the applicant is now required to make in the India service, it proposes one sailing every four weeks in the extended service, utilizing EXPORTER-type C3-S-A3 vessels carrying 12 passengers. It proposes to substitute vessels having accommodations for 150 passengers each as soon as available. Applicant's proposal would have the effect of combining its present service under Trade Route No. 18, as described above, with Service C-4 of Trade Route No. 17 in the "Report."

Opposition: The American President Lines, Ltd., objected to the granting of permission to the United States Lines Company to call at California ports, Netherlands East Indies, and Straits Settlements, stating that these calls, as proposed, would give it an option, without obligation, to provide regular service, thus invading the berths of the American President Lines, Ltd., whose agreement, with respect to its Round-the-World service, requires it to perform service on established schedules.

Isthmian Steamship Company, an unsubsidized operator, wholly-owned subsidiary of the United States Steel Corporation, is operating an eastbound Round-the-World service described as follows:

"From Atlantic and Gulf ports via the Suez Canal route to the Middle East, Straits Settlements, Netherlands East Indies, returning home from the Straits and Netherlands East Indies via the Philippines, possibly South China coast, to the Pacific coast, California ports, thence to the Gulf on a 28-day schedule."

Isthmian Steamship Company is also operating a westbound Round-the-World service, described as follows:

"A fortnightly service from North Atlantic ports, via California ports, China, Philippines, French Indo-China, Netherlands East Indies, Straits Settlements, returning home by way of Suez to North Atlantic."

Appearance was made by representatives of the Isthmian Steamship Company at the hearing, and objection was entered to the payment of

subsidy of any extension of present services by subsidized operators to the Netherlands East Indies and the Straits Settlements. It contended that adequate service was being rendered these ports by the American President Lines, Ltd., with its Round-the-World service, and by unsubsidized operators.

Waterman Steamship Corporation, an unsubsidized operator, in a brief filed following the hearing, makes a blanket objection to any extension of present service to the Netherlands East Indies or the Straits Settlements.

Need for Financial Aid: The records show that Isthmian is making 39 scheduled sailings in its eastbound and westbound Round-the-World services, which equal the total sailings required by Services C-1, C-2, and C-4 of Trade Route No. 17, as described in the "Report."

Convincing evidence has not been produced showing that Isthmian, with its Round-the-World services, and the American President Lines' Round-the-World service are not now supplying adequate service in services that substantially parallel C-1, C-2, and C-4 of Trade Route No. 17. No application has been received for operation for Service C-3 of this trade route. Under the circumstances, the Commission concludes that no additional operating-differential subsidy contracts should be awarded covering the operation of additional vessels on Trade Route No. 17.

Conclusions: We find and determine on the basis of the facts of record:

1. That the application of the United States Lines Company for financial aid under Title VI of the Merchant Marine Act of 1936, as amended, in the operation of Service C-1 of Trade Route No. 17, should be denied, but without prejudice to the right of the Commission to give further consideration to this matter at some future date should the facts relating to the case seem to warrant such consideration.

2. That the application of American President Lines, Ltd., for financial aid under Title VI of the Merchant Marine Act of 1936, as amended, in the operation of Service C-2 of Trade Route No. 17, should be denied, but without prejudice to the right of the Commission to give further consideration to this matter at some future date should the facts relating to the case seem to warrant such consideration.

3. That the application of American Export Lines, Inc., for financial aid under Title VI of the Merchant Marine Act of 1936, as amended, in the operation of Service C-4 of Trade Route No. 17, should be denied, but without prejudice to the right of the Com-

mission to give further consideration to this matter at some future date should the facts relating to the case seem to warrant such consideration.

An appropriate order will be entered.

PART III

Trade Route No. 22 (As Described in the "Report")

U. S. Gulf ports (Key West-Mexican Border)—Far East (Philippine Islands, China, Japan, U. S. S. R. in Asia, French Indo-China, Formosa, Siam, Manchuria and Korea).

1. *Freight Service D:*
   Itinerary: New Orleans, Galveston, Houston (other Gulf ports as traffic offers) via Panama Canal to Yokohama, Kobe, Osaka (other Japanese ports as traffic offers), Dairen, Shanghai, Hong Kong, Manila, Philippine Island outports returning either direct from Philippine Island outports or from Manila as traffic offers, and via Panama Canal to New York and other Atlantic ports to New Orleans with the privilege of calling at U. S. S. R. in Asia.
   Sailing Frequency: Approximately 2 sailings per month with seasonal adjustments to provide 30 sailings per year.
   No. and Type of Ships: 10 C–3 type freighters.

2. *Freight Service D–X:*
   Itinerary: New Orleans and other U. S. Gulf ports via Panama Canal to ports in Japan (as traffic offers), Manila and Philippine ports (as traffic offers), Hong Kong, French Indo-China and Siam, Straits Settlements and Netherlands East Indies, returning via Suez Canal or via Philippine Islands and Panama Canal to U. S. Gulf ports.
   Sailing Frequency: 1 sailing per month—12 per year.
   No. and Type of Ships: Four C–3 type freighters.

Lykes Bros. Steamship Co., Inc. (Trade Route No. 22)

Present Service and Proposal: Lykes Bros. Steamship Co., Inc., is a Louisiana corporation. The company is owned by U. S. citizens, the majority of whom reside in U. S. Gulf territory.

The applicant is presently operating services under an operating-differential subsidy agreement in Trade Routes Nos. 13, 19, 21 and 22. This report relates to the service on Trade Route No. 22 only. The service covered by applicant's current operating-differential subsidy

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agreement dated December 31, 1937, is described in said agreement as follows:

> "*Line D*—Between a United States Gulf port or ports and Japan and/or China and/or Philippine Islands, with the privilege of calling at ports in the Hawaiian Islands, Manchuria (Manchukuo), Russia in Asia, Formosa, Korea, Indo-China, Siam, also ports in Mexico and the West Indies for the loading and/or discharging of cargo to or from foreign ports, with further privilege of calling at United States Atlantic ports homeward with sugar, copra, and liquid cargo in bulk."

The agreement provides for a minimum of 10 and a maximum of 16 sailings per annum.

The above service conforms generally to Freight Service D, Trade Route No. 22.

The applicant has requested the following two modifications of its existing Line D so as to make it conform more closely to Freight Services D and D-X of Trade Route No. 22, as hereinbefore described:

> "(1) An increase in the permissible sailings from the present maximum of 16 to a maximum of 24.
>
> "(2) A change in the geographic area of the trade route so as to permit calls at ports in the Dutch East Indies-Straits Settlements area on 12 sailings per annum, without the specific permission in each instance of the Director of Operations and Traffic, as now required."

The applicant, in accordance with the above, has proposed to make a maximum of 24 sailings per year in Trade Route No. 22, 12 of which would include calls at Netherlands East Indies and Straits Settlements ports.

Opposition: The Isthmian Steamship Company objected to the extension of Lykes' Gulf-Far East service to include ports of the Netherlands East Indies and Straits Settlements, contending that the 13 sailings made in its eastbound "Round-the-World" service were adequate.

Waterman Steamship Corporation, an unsubsidized operator, also objected to the application of Lykes, stating that it was "ready, willing and able" to serve the ports of the Straits Settlements and Netherlands East Indies in connection with the operation of its Gulf-Far East service.

Foreign Competition: The records disclose direct foreign competition on Trade Route No. 22, as follows:

> Fern Line and Ivaran Line, Norwegian-flag vessels, are operating services from U. S. Gulf ports to the Far East.
>
> North Negros Sugar Co., Philippine-flag vessels, is operating between U. S. Gulf ports and the Philippine Islands.
>
> The Java New York Line, Netherlands-flag vessels, and the Blue Funnel Lines, British-flag vessels, are operating between U. S. Gulf ports and the Far East, Netherlands East Indies and Straits Settlements.

Need for Financial Aid: Isthmian's eastbound Round-the-World service calls at Atlantic and Gulf ports and it contends that this will constitute adequate service for both areas. It is apparent from the record that both the Atlantic and Gulf requirements will not be fully met by such operation. Furthermore, the operation would fail to properly develop service between the Gulf and foreign ports in question.

With respect to Waterman's operations, the Commission's records show that prior to the hearing Waterman made a number of voyages which included calls at Gulf and Far East ports, but no cargoes were loaded or discharged at ports of the Straits Settlements or Netherlands East Indies. Waterman's statement in its brief that it is "ready, willing and able" to serve ports in the Straits Settlements and Netherlands East Indies would not appear to be an important factor in evaluating the adequacy of existing services.

It appears that if adequate service is to be furnished between the Gulf and ports in the Netherlands East Indies and Straits Settlements, the applicant's Gulf-Far East service should be extended to include said ports.

The applicant stated that although a subsidy was not needed at the moment for operation of an extended service to the Netherlands East Indies and Straits Settlements, its application was based on long-range considerations rather than temporary expediency.

Foreign-flag lines are well entrenched in this area, and it is not believed that the service, which would be without industrial connections, could be operated on a long-range basis without Government aid. Also the Commission does not feel that it would further the purposes of the 1936 Act to require that one leg of a subsidized voyage be operated without subsidy.

Conclusions: We find and determine on the basis of the facts of record:

1. That the existing American-flag service from U. S. Gulf ports to ports in the Far East, as described in Trade Route No. 22 of the "Report," is not adequate to meet foreign-flag competition and to promote the foreign commerce of the United States.

2. That Lykes Bros. Steamship Co., Inc., has the ability, experience, financial resources, and other qualifications necessary to conduct the proposed operation so as to meet competitive conditions and promote foreign commerce in the operation of Trade Route No. 22.

3. That the granting of the aid applied for by Lykes Bros. Steamship Co., Inc., under Title VI of the Merchant Marine Act, 1936, as amended, is necessary to place the proposed operation of Trade

Route No. 22, Services D and D-X, on a parity with those of foreign competitors and will carry out the purposes and policy of the Act.

4. That the existing subsidy agreement of Lykes Bros. Steamship Co., Inc., shall be amended to provide for a minimum of 20 and a maximum of 24 sailings per year in the combined services described as D and D-X, Trade Route No. 22, of which a minimum of 5 and a maximum of 8 shall include ports in the Netherlands East Indies and Straits Settlements.

An appropriate order will be entered.

PART IV

Trade Route No. 28 (As Described in the "Report")

U. S. Pacific ports—Straits Settlements, Netherlands East Indies, India, Burma, Persian Gulf and Red Sea.

Itinerary: Trade between U. S. Pacific coast ports and the foreign areas of Trade Route No. 28 is to be carried in vessels provided for by Services C–1, C–2, and C–3 on Trade Route 17, and Service C–2 on Trade Route No. 30.

NOTE.—No separate services are provided for this route. It is served by vessels in Trade Routes Nos. 17 and 30.

PART V

Trade Route No. 29 (As Described in the "Report")

California ports—Far East (Philippine Islands, China, Manchuria, Korea, Japan, U. S. S. R. in Asia, French Indo-China, Formosa and Siam).

1. *Passenger-Freight Service E:*

   Itinerary: Los Angeles/San Francisco via Honolulu to Yokohama, Kobe, Shanghai, Hong Kong, Manila and returning via same route to California.

   Sailing Frequency: 26 fortnightly sailings per year.

   No. and Type of Ships: 4 P2–R–1 type passenger-freight vessels (to be replaced by a suitable number of special type vessels of adequate speed).

NOTE.—To be coordinated out of California ports with Round-the-World service to provide weekly sailings.

2. *Freight Service F:*

   Itinerary: Los Angeles, San Francisco to Yokohama, Kobe, Osaka

(other Japanese ports as traffic offers), Shanghai (other North China ports and ports in Manchuria and Korea as traffic offers), Hong Kong, Manila, Philippine Island outports, and French Indo-China and Thailand (as traffic offers) returning to Los Angeles and San Francisco; privilege to be granted of calling at ports of Russia in Asia.

Sailing Frequency: 26 fortnightly sailings per year.

No. and Type of Ships: 5 C–3 type freighters.

NOTE.—Trade Route No. 29 will also be served by west-bound Round-the-World vessels.

American President Lines, Ltd. (Trade Route No. 29)

Present Service and Proposal: Applicant's service on Trade Route No. 29 is described in its operating-differential subsidy agreement as follows:

> "Line A—Trans-Pacific Service—Between a port or ports in California and and a port or ports in Japan, China and the Philippine Islands via the Hawaiian Islands. (Salings 24 to 26 per year)."

Applicant proposes to supplement the above service with the operation of Freight Service F in accordance with schedule laid down in the "Report."

American-Hawaiian Steamship Company (Trade Route No. 29)

Present Service and Proposal: The American-Hawaiian Steamship Company proposes to organize a company to be incorporated under the laws of Delaware to operate the proposed service. It is understood that the new company will be a wholly-owned subsidiary. The capital stock of the American-Hawaiian Steamship Company is owned by United States citizens.

The applicant has no subsidy contracts with the Commission. It acted as Managing Agent of the Oceanic and Oriental Navigation Co., a company equally owned by Matson Navigation Company and the American-Hawaiian Steamship Company, which company operated with a mail contract between Pacific coast ports and Australia and the Far East from 1928 to 1937. The proposed operation by the applicant is described as follows:

> "California ports (with privilege of calling at ports in Oregon and Washington), Yokohama, Kobe, Osaka (other Japanese ports as traffic offers), Shanghai (other North China ports, ports in Manchuria, Korea and U.S.S.R. in Asia as traffic offers), Hong Kong, Manila and Philippine Island outports, French Indo-China (Thailand, Singapore and East Indies as traffic offers)."

No established schedule of sailings is proposed by applicant at the outset, but it stated that it would operate a regular schedule with not less than 26 sailings per annum when conditions permit.

The service proposed covers Trade Route No. 29, Freight Service F, of the "Report," with the addition of calls at Pacific Northwest ports, which are a part of Trade Route No. 30. It also proposes to call at Singapore and Netherlands East Indies, thus cutting across Trade Route No. 28.

Grace Line Inc. (Trade Route No. 29)

Present Service and Proposal: Grace Line Inc., a Delaware corporation, is a wholly-owned subsidiary of W. R. Grace & Co.

Grace Line Inc. is presently operating subsidized and non-subsidized services in other routes, its subsidized services being a part of Trade Routes Nos. 2 and 25. It proposes to operate the following service, which is substantially the same as Service F of Trade Route No. 29:

> "*An unsubsidized fortnightly* service between San Francisco, Los Angeles and Cebu, Manila, Hong Kong, Shanghai, Dairen, Kobe, Osaka and Yokohama, with calls at other ports in the Cebu-Yokohama range as cargo offers and conditions warrant."

Applicant stated that it proposed to supplement the present service and replace in part services previously operated by the Japanese, and contended that service will not interfere with reasonable expansion by American President Lines, Ltd.

The applicant made a definite statement that it would operate two years without subsidy and not request subsidy thereafter unless changed conditions make it necessary.

Opposition: Pacific Far East Line stated, through its attorney, that it had filed an application for the purchase of five C–2 cargo vessels which it intended to operate in a service between Pacific coast ports and the Philippines, China, Japan and other Far East areas, and that it objected to the granting of financial aid for the operation of Freight Service F for the reason that the service which it proposed to operate would meet the Commission's requirements. The company asserted the position of an existing operator under section 605(c) of the Act in its brief.

Pacific Transport Lines, Inc., stated that it proposed to operate three C–3 type vessels with 13 scheduled sailings per year, in Freight Service F, Trade Route No. 29, without financial aid, and requested that the Commission defer decision on the applications for financial aid for such service due to the unsettled economic conditions existing in the trade.

American President Lines, Ltd., objected to the application of Grace Line Inc., stating that granting of the application would result in the invasion of the territory it had served for a number of years with the aid of an operating-differential subsidy. It further contended that while Grace would be committed to an operation for a period of two

years without subsidy, the President of the company made it clear that it was not waiving its rights to ask for subsidy if changed conditions made it necessary. The American President Lines, Ltd., also objected to the application of the American-Hawaiian Steamship Company on the ground that it covered areas which are being served by it.

Isthmian Steamship Company objected to the application of American President Lines, Ltd., for a new service or any extension of its existing services.

Foreign Competition: Direct competition between California ports and the Far East is provided as follows:

> American and Manchurian Line, Bank Line, Ltd., Blue Funnel Line and the Silver Line, the Java Pacific Line, British-flag vessels; De La Rama Line, Philippine flag; East Asiatic Line and Maersk Line, Danish flag; Klaveness Line, Norwegian flag; Salen Line, Swedish flag; are providing monthly service. The Pacific Orient Express Line, Norwegian flag, is providing fortnightly service from U. S. Pacific ports to the Far East.

Need for Financial Aid: The Commission in its studies of traffic potentials forming the basis for the "Report" determined that, with changed conditions brought about in part by the elimination of Japanese competition, a freight service should be established to complement and support the pre-war combination passenger and cargo service, and Trade Route No. 29 was divided into the two services. However, it was not the intention of the Commission that these services should be operated separately, but rather that one would supplement and support the other. This intention is evidenced by the fact that the Commission by PR 2330, dated June 27, 1945, invited proposals for the purchase of its stock of the American President Lines, Ltd., and specified as one of the conditions to be imposed upon the buyer that he would operate a combination passenger and freight service on Trade Route No. 29, and in addition, a freight service identical in description with Freight Service F of Trade Route No. 29, as set forth in the "Report."

Prior to World War II, the American President Lines, Ltd., operated, under a subsidy contract, four combination passenger and cargo vessels in the territory now described as Trade Route No. 29. These vessels had a large cargo capacity. They were taken over by the Government during the war. Three of said vessels were lost and the fourth vessel is now owned by the War Department. They had sufficient cargo space to handle all tonnage available to vessels of this type at that time. The applicant, having no vessels of its own for the operation of a passenger service on Trade Route No. 29, has been operating military transport vessels chartered from the Government pending the construction of new tonnage satisfactory for the trade. Only a limited amount of cargo can be handled by this type of vessel, and the applicant, in order to

provide needed freight service on this Route, made a total of 26 voyages with chartered and owned freight vessels in a service corresponding to Freight Service F, Trade Route No. 29, during the period April 1st to August 15, 1946. It does not appear that the freight operation is temporary in character. On the contrary, American President Lines, Ltd., purchased in 1945 six C–3 freight vessels for operation in the transpacific service. This company advertised sailings in the service and clearly views it as a permanent operation. Under the circumstances, the Commission finds that the applicant is operating an existing service, corresponding to Service F, within the meaning of section 605(c) of the Act.

The application of the American-Hawaiian Steamship Company covers part of the area embraced by Freight Service F. The Commission is prohibited by section 605(c) of the Act from granting financial aid to American-Hawaiian Steamship Company for the service which it proposes unless it determines that the service provided by American President Lines, Ltd., is inadequate. As the American President Lines, Ltd., is making more sailings on Service F than is recommended in the "Report," it would appear that the service is adequate. Consequently, the application of the American-Hawaiian Steamship Company must be denied.

Although the Commission has determined that the service furnished by the American President Lines, Ltd., in Freight Service F is adequate at the present time, severe foreign-flag competition is encountered on this route both from foreign-flag services originating on the Pacific coast and foreign lines loading at Atlantic ports and stopping off at California ports enroute to the Far East. Therefore, the Commission does not believe that adequate American-flag freight service can be maintained on a permanent long-range basis over this route without subsidy. The freight and passenger services on Trade Route No. 29 are so interrelated that it would not be in furtherance of the purposes and policies of the 1936 Act to have one of the services operated on a subsidized basis and the other on an unsubsidized basis. Under the circumstances, the Commission believes financial aid should be granted to the American President Lines, Ltd., for the operation of Service F.

The application of Grace Line Inc. for permission to operate on an unsubsidized basis in Freight Service F was required by the provisions of its operating-differential subsidy agreement dated November 12, 1940. Such agreement prohibits it from operating any unsubsidized vessels in the foreign commerce of the United States in competition with any other service receiving financial aid, pursuant to the provisions of the Act, without the written approval of the Commission.

The Commission does not believe that it would be consistent with the purposes and policy of the Act to permit a subsidized operator, with respect to other foreign services, to operate vessels with or without subsidy in a service adequately served by another subsidized operator.

As previously stated, the Pacific Far East Line contended that it was an existing operator within the meaning of section 605(c) of the Act in Freight Service F. It does not appear that this company was operating in the area embraced by Freight Service F at the time of the hearing, and the Commission, therefore, finds no basis for the contention of the Pacific Far East Line.

Conclusions: We find and determine on the basis of the facts of record:

1. That the American President Lines, Ltd., is an existing operator in Trade Route No. 29, within the meaning of section 605(c) of the 1936 Act, as amended.

2. That the American President Lines, Ltd., has the ability, experience, financial resources, and other qualifications necessary to conduct the operation of the service applied for.

3. That the granting of aid applied for by the American President Lines, Ltd., under Title VI of the Merchant Marine Act of 1936, as amended, is necessary to place the proposed operation of Trade Route No. 29, Freight Service F, on a parity with those of foreign competitors and will carry out the purposes of the Act.

4. That the application of the American President Lines, Ltd., for financial aid in the operation of vessels providing 26 fortnightly sailings per year on Freight Service F on Trade Route No. 29, be approved.

5. That the existing operating-differential subsidy agreement of the American President Lines, Ltd., be amended to include Freight Service F of Trade Route No. 29, with a maximum of 26 sailings per year.

6. That the application of American-Hawaiian Steamship Company for financial aid under Title VI of the Merchant Marine Act of 1936, as amended, for operation of vessels in Trade Routes Nos. 28, 29 and 30, should be denied, but without prejudice to the right of the Commission to give further consideration to this matter at some future date should the facts relating to the case seem to warrant such consideration.

7. That the application of Grace Line Inc. for permission to operate an unsubsidized fortnightly service on Trade Route No. 29, be denied, but without prejudice to the right of the Commission

to give further consideration to the matter should changed conditions appear to warrant such consideration.

An appropriate order will be entered.

PART VI

Trade Route No. 30 (As Described in the "Report")

Washington and Oregon ports Far East (Philippine Islands, China, Japan, Manchuria, Korea, U.S.S.R. in Asia, French Indo-China, Formosa and Siam).

1. *Freight Service G-1:*
   Itinerary: Seattle, Tacoma (as traffic offers), Portland, Oregon (alternate sailings) to Yokohama, Osaka, Kobe, Shanghai, Hong Kong and Manila, returning over same route to Pacific Northwest.
   Sailing Frequency: 26 fortnightly sailings per year.
   No. and Type of Ships: 4 C-3 type freighters.
2. *Freight Service G-2:*
   Itinerary: Portland, Oregon, Seattle, Washington, other ports in Washington and Oregon as traffic offers, to Manila, other Philippine ports as traffic offers, Hong Kong, ports in French Indo-China and Siam as traffic offers, Netherlands East Indies, Straits Settlements, Calcutta, other Bay of Bengal ports as traffic offers, returning via Straits Settlements and Dutch East Indies to California ports, thence to ports in Oregon and Washington; vessel to have privilege of calling at British Columbia to load and discharge cargo.
   Sailing Frequency: Approximately one sailing per month—12 sailings per year; to be coordinated in so far as practicable eastbound with Service C-3 (Trade Route No. 17) from Calcutta to California.
   No. and Type of Ships: 3 C-2 or other suitable type freighters.
3. *Freight Service H:*
   Itinerary: Oregon and Puget Sound ports (as traffic offers) to Japan and North China, Manchuria and Korea, returning to Pacific Northwest ports with privilege of calling at U.S.S.R. ports in Asia as traffic offers.
   Sailing Frequency: 48 irregular sailings per year.
   No. and Type of Ships: 8 AP-2 or other suitable type freighters.

American Mail Line Ltd. (Trade Route No. 30)

Present Service and Proposal: The applicant is a Nevada corporation, its stock being held by United States citizens. It is operating a

service under an operating-differential subsidy agreement dated April 2, 1941, described as follows:

> "Not less than 26 and not more than 34 outward sailings per annum between a port or ports in Oregon and/or Washington and a port or ports in Japan, China and the Philippine Islands, with the privilege of calling at a port or ports in Pacific Canada, Maritime Province of Siberia not north of the Island of Sakhalin, Korea, Manchukuo, Hong Kong, Indo-China and Thailand (Siam), returning to a port or ports in Oregon and/or Washington; provided that the operator shall have the privilege of returning to a port or ports in California on the homebound voyage with cargo for discharge at California ports limited to sugar, copra, oil cake, fertilizer, ore, logs and lumber; also any other bulk commodities with respect to which other subsidized American flag operators operating on the homeward route from the Philippines, China and/or Japan to California, signify that they have no objection, or which the Commission, after due hearing, may determine cannot be adequately handled by any other established American flag service on such homeward route."

The territory covered in the present agreement is substantially the same as Services G-1 and H of Trade Route No. 30.

The applicant requested an extension of the present route to include:

> "Straits Settlements, Netherlands East Indies (exclusive of New Guinea), Burma, India (Bay of Bengal only) and Ceylon—all with return to Pacific Coast ports."

The extension requested by applicant would cover the trading area described in Services G-1, G-2 and H of Trade Route No. 30. It proposes to make 26 annual sailings in Service G-1 and 12 annual sailings in Service G-2. It proposes 12 regular sailings per year in Service H instead of the 48 irregular sailings recommended in the "Report." It contended that monthly sailings in this service would provide adequate tonnage for some time to come. The applicant stated, however, that it is prepared to make the 48 irregular sailings if the Commission "finds that conditions justify such a program."

Olympic Steamship Company, Inc. (Trade Route No. 30)

The application of the Olympic Steamship Company, Inc., for financial aid in the operation of a service approximating Freight Service G-2 of Trade Route No. 30, has been withdrawn.

States Steamship Company (Trade Route No. 30)

Present Service and Proposal: The States Steamship Company is a Nevada corporation. Controlling stock of the company is owned by Dant and Russell, Inc., Portland, Oregon, a wholesale domestic and export lumber company.

States Steamship Company has no subsidy contracts with the Commission at the present time. It operated under ocean mail contracts F.O.M. 28 and 29 from 1928 to 1937 (from Pacific Northwest to the Orient), when the contracts were cancelled pursuant to the 1936 Act. It continued in the trade, unsubsidized, until 1938, when the vessels were withdrawn and placed in the world-wide trade.

It applied for financial aid in the operation of bulk and general cargo service, with not less than 14 nor more than 24 annual sailings, described as follows:

> "A port or ports in the States of Oregon and Washington to a port or ports in Japan and/or North China, with the privilege of calling at ports in Manchuria, Korea, Maritime Province of Siberia, and the Philippine Islands, and with the privilege of returning via California ports to the area of departure."

The service proposed conforms to Service H, Trade Route No. 30, with the exception that permission to call at Philippine Islands ports and the privilege of returning via California ports is requested.

The service applied for would supplement the proposal of the American Mail Line Ltd. to provide 12 sailings in Service H of Trade Route No. 30.

Opposition: The Isthmian Steamship Company objected to the application of American Mail Line Ltd. to extend its service to include the east coast of India, Burma, Straits Settlements and the Netherlands East Indies, and for permission to discharge cargo at California ports on an unrestricted basis. Isthmian also objected to the application of States Steamship Company for permission to return via California ports with no restrictions as to the character of the cargo to be handled.

American President Lines, Ltd., objected to the granting of financial aid with respect to the return of any vessels in Trade Route No. 30, via California ports. This company stated that the permission given to the American Mail Line Ltd. in 1941, to return via California ports for the purpose of discharging certain bulk cargoes, was based on conditions that no longer exist.

Foreign Competition: Substantial foreign competition exists in this trade. The Klaveness Line and Pacific Orient Express, Norwegian-flag companies, are each operating monthly services from Pacific coast ports to the Far East. The East Asiatic Line, British flag; The Salen Line, Swedish flag; and the Silver Java Pacific Line, British and Dutch flag, are also operating a monthly service from Pacific coast ports.

Need for Financial Aid: The Commission finds that substantial weight should not be given to Isthmian objection in regard to the application of American Mail Line Ltd. for aid in the operation of Service G-2 of Trade Route No. 30 because Isthmian does not offer regular scheduled sailings in this service from the Pacific Northwest.

Under the revised service being recommended for American Mail Line Ltd., this company would only touch California ports with respect to Service G-2. Therefore, in view of the fact that American President Lines, Ltd., was not granted permission to call at ports in the Netherlands East Indies and the Straits Settlements, it appears that operation by the American Mail Line Ltd. on Freight Service G-2, embracing calls at such ports, would not compete with a service provided by the American President Lines, Ltd., and the objection of the latter company to the American Mail Line Ltd. calling at California ports would no longer appear to be relevant.

The application of States Steamship Company for financial aid in connection with the service to be operated by it on Freight Service H embraces the area presently served by the American Mail Line Ltd. under its subsidy agreement. The Commission, therefore, is precluded from granting financial aid to the States Steamship Company for operation in Service H of Trade Route No. 30 unless it determines that the service provided by the established operator, the American Mail Line Ltd., is inadequate.

Although the American Mail Line Ltd. proposes 12 regular sailings per year on this service instead of the 48 irregular sailings recommended in the "Report," the Commission recognizes the uncertain nature of this trade and that a less number of sailings than mentioned in the "Report" may be sufficient. However, the American Mail Line Ltd. has stated that it will increase its proposed sailings to meet the requirements of the trade. Under the circumstances, we are unable to find that the service provided by the American Mail Line Ltd. is inadequate.

The subsidy agreement of the American Mail Line Ltd. covers the subsidizing of its operations on Trade Route No. 30, except for the calls at the additional ports and additional increased sailings set forth in its application.

Strong foreign-flag competition continues on this route, and all the evidence leads to the conclusion that the service cannot be developed and maintained on a long-range basis under American-flag operation without subsidy.

Conclusions: We find and determine on the basis of the facts of record:

1. That the American Mail Line Ltd. is the existing operator in Service H of Trade Route No. 30, within the meaning of section 605(c) of the 1936 Act.

2. That the American Mail Line Ltd. possesses the ability, experience, financial resources, and other qualifications necessary to conduct the proposed operations so as to meet competitive conditions and promote foreign commerce in the operation of Trade Route No. 30.

3. That the granting of the aid applied for by the American Mail Line Ltd. under Title VI of the Merchant Marine Act, 1936, as amended, is necessary to place the proposed operations on a parity with those of foreign competitors, and will carry out the purposes and policy of the Act.

4. That the application of the American Mail Line Ltd. for financial aid in connection with the proposed operation be approved.

5. That the operating-differential subsidy agreement of the American Mail Line Ltd. be amended to provide for (a) redefinition of its service so as to conform to Services G-1, G-2 and H of Trade Route No. 30, and (b) for a minimum of 24 and a maximum of 26 annual sailings in Service G-1, a minimum of 10 and a maximum of 13 sailings in Service G-2, and a minimum of 12 sailings in Service H of Trade Route No. 30.

6. That the application of the States Steamship Company for financial aid under Title VI of the 1936 Act, as amended, in the operation of Service H, Trade Route No. 30, should be denied, but without prejudice to the right of the Commission to give further consideration to this matter at some future date should the facts relating to the case seem to warrant such consideration.

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 9th day of June A. D. 1947.

No. S-7

UNITED STATES LINES COMPANY ET AL.—APPLICATIONS FOR FINANCIAL AID IN THE OPERATION OF VESSELS ON TRADE ROUTES NOS. 12, 17, 22, 28, 29, AND 30

and

GRACE LINE, INC.—APPLICATION FOR PERMISSION TO OPERATE ON FREIGHT SERVICE F OF TRADE ROUTE NO. 29, WITHOUT SUBSIDY.

A public hearing having been held, and a full investigation of the matters and things involved having been made, upon consideration of the record, the Commission having made and entered of record a report containing its findings, conclusions and decisions, which is attached hereto and made a part hereof:

It is ordered, 1. That the application of UNITED STATES LINES COMPANY for permission to make a maximum of 26 sailings per annum in Trade Route No. 12 be approved, and that subject to compliance with the applicable provisions of Title VI of the Act, and with such terms and conditions as may be imposed by the Commission, its operating-differential subsidy agreement dated July 30, 1940, be amended so as to provide for the payment of an operating-differential subsidy with respect to such sailings.

2. That the application of LYKES BROS. STEAMSHIP CO., INC., for (1) extension of its trade route to include ports in the Netherlands East Indies and Straits Settlements, and (2) permission to make a maximum of 24 sailings per annum in Services D and D-X of Trade Route No. 22, of which a minimum of 5 and a maximum of 8 shall include ports in the Netherlands East Indies and Straits Settlements, be approved, and that subject to compliance with the applicable provisions of Title VI of the Act, and with such terms and conditions as may be imposed by the Commission, its operating-differential subsidy agreement dated December 27, 1937, be amended so as to provide for the payment of an operating-differential subsidy with respect to such sailings.

3. That the application of AMERICAN PRESIDENT LINES, LTD., for financial aid under Title VI of the Merchant Marine Act of 1936, as amended, in the operation of 26 sailings on Freight Service F of Trade Route No. 29, be approved, and that subject to compliance with the applicable provisions of Title VI of the Act, and with such terms and conditions as may be imposed by the Commission, its operating-differential subsidy agreement dated October 6, 1938, be amended so as to provide for the payment of an operating-differential subsidy for the operation of vessels in such service.

4. That the application of AMERICAN MAIL LINE LTD. for (1) extension of its trade route to include ports in the Netherlands East Indies, Straits Settlements, Calcutta and Bay of Bengal; and (2) permission to make a maximum of 51 sailings in Trade Route No. 30, be approved, and that subject to compliance with the applicable provisions of Title VI of the Act, and with such terms and conditions as may be imposed by the Commission, its operating-differential subsidy agreement dated April 2, 1941, be amended so as to provide for the payment of an operating-differential subsidy with respect to such sailings.

5. That the application of UNITED STATES LINES COMPANY for financial aid under Title VI of the Merchant Marine Act of 1936, as amended, for the operation of vessels in Trade Route No. 17, be denied.

6. That the application of AMERICAN PRESIDENT LINES, LTD., for financial aid under Title VI of the Merchant Marine Act of 1936, as amended, for the operation of vessels in Service C-2 of Trade Route No. 17, be denied.

7. That the application of AMERICAN EXPORT LINES, INC., for financial aid under Title VI of the Merchant Marine Act of 1936, as amended, for the operation of vessels in Trade Route No. 17, be denied.

8. That the application of AMERICAN-HAWAIIAN STEAMSHIP COMPANY for financial aid under Title VI of the Merchant Marine Act of 1936, as amended, for the operation of vessels in Trade Routes Nos. 28, 29 and 30, be denied.

9. That the application of STATES STEAMSHIP COMPANY for financial aid under Title VI of the Merchant Marine Act of 1936, as amended, for the operation of vessels in Trade Route No. 30, be denied.

10. That the application of GRACE LINE INC. for permission to operate vessels in Freight Service F of Trade Route No. 29, without subsidy, be denied.

By the Commission.

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