FEDERAL MARITIME BOARD

No. 675

THE PORT COMMISSION OF THE CITY OF BEAUMONT, ET AL.

v.

SEATRAIN LINES, INC.

Submitted November 15, 1950. Decided January 11, 1951

Respondent's port equalization practice is not a regulation or practice connected with the receiving, handling, storing, or delivering of property within the meaning of section 17(2) of the Shipping Act, 1916.

Equalization rates in question are "regular" rates, and do not constitute an unjust or unfair device or means to obtain transportation at less than regular rates in violation of section 16(2) of said Act.

Respondent's motion to dismiss denied.

Record inadequate to make determinations on issues under sections 16(1) and 17(1) of said Act, and is remanded to the examiner for further hearing and report on such issues.

Robert E. Quirk and *F. G. Robinson* for complainants.

Arthur L. Winn, Jr., for respondent.

C. D. Arnold for The Southwest Louisiana Traffic Bureau, *Louis A. Schwartz* for New Orleans Traffic and Transportation Bureau and *C. B. Waterman* and *Rene J. Mittlebronn* for Waterman Steamship Corporation, interveners.

REPORT OF THE BOARD

BY THE BOARD:

Complainants, representing the port interests of Beaumont Galveston, Houston, and Orange, Tex., and Lake Charles, La. hereinafter called the "Gulf ports", complain that respondent's rate equalization and absorption practices established by its Port Equalization Circular-Belle Chasse No. 1, effective March 19, 1948 with respect to the transportation of clean rice and other commodities originating in or near the five Gulf ports and from other interior points to Cuban destinations are unjust and unreasonable unduly prejudicial, and unjustly discriminatory against the Gulf ports, and unduly preferential to the port of Belle Chasse (New

Orleans, La.) on the Mississippi River, in violation of sections 16 and 17 of the Shipping Act, 1916, and constitute an unjust and unfair device in violation of section 16(2) of the Act. Respondent filed an answer denying that the complaint stated any grounds for relief, and likewise admitting most but not all of the allegations of the complaint. Respondent neither cross-examined complainants' witnesses nor offered any evidence of its own, and at the close of the hearing before the examiner moved that the complaint be dismissed. The examiner has recommended that the complaint states a cause of action, and that respondent's equalization and absorption practices should be found to be an unjust device or means in violation of section 16(2) of the Act in that they permit persons to obtain transportation at less than regular rates. We agree that the complaint states a cause of action, but we do not find that the record before us is sufficient to determine the nature and extent of relief to be granted.

The controversy concerns mainly, but not exclusively, the transportation of clean rice, which is one of the principal commodities moving from the complainant ports to Cuba. These ports are located in the heart of the largest rice producing area in the United States, which is a strip about 50 miles wide running from New Iberia, La., to a point about 100 miles west of Houston, Tex. All railroads serving the territory publish rules permitting rough rice to be milled in transit at through rates from points of origin to the port of export. Rice mills for this area are located, generally speaking, in the vicinity of the complainant ports. For instance, there are 7 mills in the port of Houston alone, which is about 350 miles from Belle Chasse. On the eastern end of the territory there are 36 mills located at 17 different points in southeastern Texas and western Louisiana, and, according to the record, the average distance from these mills to Lake Charles, the nearest port, is 48 miles as compared to an average of 201 miles from the same points to Belle Chasse.

Testimony shows that the five complainant Gulf ports all have substantial facilities for the berthing of ocean vessels, the handling of cargoes in foreign commerce, and that very large amounts of money, said to aggregate $85,000,000, have been spent from public and private funds to improve the harbor facilities of these ports and the channels leading to them from the Gulf.

Lykes Bros. Steamship Co., Inc., was the only ocean carrier maintaining regular sailings from the Gulf ports to Cuba at the time of the hearings. At that time a Government licensing system covered the export of rice and cut down such exports so that

Lykes Bros. sailings were limited to about two sailings a month from Galveston and Houston and no sailings from the other Gulf ports. Lykes Bros. service to Cuba runs regularly to Havana, but if shipments of rice aggregating 500 tons are made on any vessel destined for a Cuban outport the vessel will discharge at the outport at the regular Havana rate. Lykes Bros. accepts shipments of less than 500 tons of rice for outports, but such cases are subject to transshipment at Havana, and the full Havana rate is collected for ocean carriage, plus Cuban rail and handling charges to destination. Rice has contributed 70 percent to 75 percent of Lykes Bros. tonnage from the Gulf ports to Cuba. If this tonnage is substantially diverted to other ports, the record shows that Lykes Bros. will be forced to reduce the service.

Since the war, rice is the only commodity which has moved through Beaumont to Cuba, 8,784 tons having been handled during the year 1947. From Galveston the heaviest moving commodities to Cuba are rice and flour. From Houston the total volume of exports to Cuba, other than petroleum, in the year 1947 amounted to 77,638 tons, of which 52,798 tons consisted of clean rice. Most of the rice moving through Houston originates within 100 miles and a substantial volume is milled by the seven rice mills located in the city. In 1947, 78 percent of all exports from Lake Charles to Cuba consisted of rice, and that commodity is the only one moving from the port of Orange to Cuba.

Belle Chasse is on the west bank of the Mississippi River opposite New Orleans and is the only Gulf terminal from which respondent now operates a service to Cuba. Respondent has a terminal at Texas City, Tex., near Galveston and Houston, where its vessels can dock, but for a number of years has used this terminal only for its coastal service between New York harbor and Texas City. Respondent's type of service between Belle Chasse and its terminal at Hacendados, near Havana, Cuba, as well as its coastal service is unusual, and has been described in *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, 2 U. S. M. C. 500, at 502 as follows:

> Seatrain's service differs materially from that offered by the break-bulk lines. It is conceded by all parties to be of a superior nature. When using Seatrain, a shipper can load the car at his plant and further handling is eliminated until it is delivered at the consignee's place of business. Cargo handled by break-bulk lines must be transported to the dock, handled, loaded into a car or truck and finally delivered at the consignee's place of business. Seatrain's terminal consists of a railroad spur and a patented loading crane which fastens to the loaded car, picks it up and deposits it on one of the tracked decks in the vessel. The loaded car is strapped to the deck and

at the point of discharge is raised, run onto a railroad track and moved intact to the final point of destination. This difference in handling effects a saving to the shipper in packing goods and reduces loss and damage claims, and losses of business resulting from service delays.

Ordinarily respondent serves Havana proper, but for the past few years, due to controversies in Cuba, its service has been limited to interior points and outports reached by rail from Hacendados (Havana). Cuban rail and terminal charges at destination are added to respondent's ocean rate to Hacendados.

The domestic railroad freight rates from the rice shipping points to the nearest of the Gulf ports are in all cases less than the freight rates from such shipping points to Belle Chasse, and even when the switching, handling, and wharfage charges are added to the railroad rates, the total in all cases is less than the total to Belle Chasse. Respondent, in an effort to attract business, and especially shipments of rice originating in the rice growing territory, established in November 1947 special proportional ocean freight rates between Belle Chasse and Hacendados to equalize domestic rail and ocean combinations of rates on traffic moving through competing ports, including the complainant ports. The proportional rate practice of November 1947 was modified, effective March 19, 1948, when respondent issued its Port Equalization Circular-Belle Chasse No. 1. Respondent's practices under this circular create the issues in this case.

The circular states that respondent will reduce its rates from Belle Chasse to Havana (Hacendados) to the extent necessary to equalize the through rates and charges from points of origin to Havana (Hacendados) via other United States ports of exportation on the Atlantic and Gulf coasts, under conditions summarized as follows: (a) equalization is based on common carrier rail charges, including terminal charges; (b) and (c) describe the traffic to be affected; (d) equalization is based only on ports from which bona fide service is offered to Havana; (e) no equalization shall reduce the local port to port rate, including surcharge, by more than 25 percent; (f) when rail rates and charges from point of origin to shipside at port of exportation on which the equalization will be based are 12¢ per 100 pounds or less, the amount to be used as rail rates and charges in determining the equalization shall be 12¢, subject to (e) above; provided, that paragraph (f) does not apply to ports of export on the Mississippi River or to ports within 50 miles of New Orleans.

The equalization circular thus provides for the reducing of Seatrain's ocean freight rate so that its reduced ocean rate plus

the rail rate from point of origin to Belle Chasse shall equal the combination of railroad rate and ocean carriers rate via the competing route, subject to the 12¢ and 25 percent limits as stated. To take an example, the railroad rate and terminal charges from a typical mill shipping point in Texas to Belle Chasse are 31.20¢ per 100 pounds. From the same shipping point to a Texas port they are 20.45¢ per 100 pounds. Thus, under the circular, respondent reduces its ocean freight rate by the difference of 10.75¢ per 100 pounds so as to offer the shipper at the point of origin a through rate via Belle Chasse exactly equal to the through rate which he has via the Texas port. The foregoing example applies to shipments arising at mills outside of the complainant ports, but, as pointed out, there are in Houston and other Gulf ports rice mills where shipments originate. The domestic charges to get such shipments from the local mill to shipside are substantially less because a domestic rail haul is not needed. In the case of Houston, for instance, the local switching, handling, and wharfage charges to shipside, assuming a 50-ton load in each rail car, amount to 6.83¢ per 100 pounds. These charges are less than 12¢ per 100 pounds and, therefore, bring into play paragraph (f) of the circular under which the equalization is based on a differential of 12¢ per 100 pounds rather than the actual figure of less than 12¢. Respondent, therefore, takes the rail rate from Houston to Belle Chasse of 31.20¢ per 100 pounds and deducts from this 12¢, which makes an equalization allowance of 19.20¢ per 100 pounds which respondent deducts from its ocean rate. In such case the reduction in the ocean rate does not make a full equalization of the rate through the Texas port, but only partially equalizes it.

The complaint is made that respondent's rate-equalization practice prevents complainant Gulf ports from handling not only the tonnage originating and produced locally in those ports, but also tonnage originating at interior points which are naturally tributary to the Gulf ports.

Respondent's answer admits the material facts of the complaint, but denies that respondent's equalization practice deprives the Gulf ports of the tonnage produced locally or produced at interior tributary points of Texas and Louisiana or elsewhere mentioned in the equalization circular (Answer, Article 6), and denies that the practice causes diversion of this tonnage to Belle Chasse (Answer, Article 8). At the oral argument, however, respondent's counsel stated that for the purpose of the motion to dismiss no issues of fact were involved between the parties

and that all questions for decision were matters of law. Respondent's position is, therefore, somewhat unusual. We shall first consider the motion to dismiss on the basis of the allegations in the complaint.

Complainants charge:

1. The equalization rates give an undue preference and advantage to Belle Chasse over the Gulf ports in violation of section 16(1) of the Shipping Act, 1916, and unjustly discriminate between Belle Chasse and the Gulf ports in violation of section 17(1) thereof.

2. The equalization rates constitute an unjust or unfair device or means to permit persons to obtain transportation at less than regular rates in violation of section 16(2) of the Act.

3. The equalization rates constitute unjust or unreasonable regulations or practices connected with the receiving, handling, storing, or delivering of property in violation of section 17(2) of the Act.

Complainants point to the large investment in their harbor facilities, the differentials in rail rates under Belle Chasse which secure to them the handling of tonnage from their ports and certain tributary territory, and the threat that Lykes Bros., which alone maintains regular sailings to Cuba from their ports, may be forced to curtail service if tonnage diminishes. Complainants also point to the provisions of section 8 of the Merchant Marine Act, 1920, wherein Congress has made it the duty of our predecessors to make investigations with the object of promoting and encouraging the various ports of the United States. Complainants point to certain reports of our predecessors (to be considered more in detail hereinafter) wherein we have expressed disapproval of attempts of carriers by artificial means to control the flow of traffic not naturally tributary to their lines.

Taking up the specific charges of complainants in reverse order, we have no difficulty in holding in respect to charge (3) that respondent's equalization practice is not a regulation or practice connected with the receiving, handling, storing, or delivering of property within the meaning of section 17(2) of the Act. The rates under the circular, to be sure, include charges for services at the receiving and at the delivering end of the voyage as is true generally of freight rates of water carriers. If we were to say that such incidental element in the rates gave us full jurisdiction to enforce reasonable rates for carriers in foreign commerce, we should be disregarding the difference of our authority over such carrier under sections 16 and 17 of the Act from our juris-

diction over certain offshore carriers in interstate commerce where, under section 18 of the Act, as amended, we are authorized to enforce reasonable rates. The cases of *California* v. *United States,* 320 U.S. 577, and *American Union Transport Company* v. *United States,* 327 U.S. 427, do not support complainants' position.

In considering complainants charge (2) we do not find that the equalization rates are not "regular rates" or that they are an "unjust or unfair device or means" within the meaning of section 16(2) of the Act. Complainants argue that respondent's local rate from Belle Chasse to Havana is its only "regular rate" and, consequently, that the equalization rate is not regular. But we believe the term "regular rate" in section 16(2) is synonymous with "rate which would otherwise be applicable" in the first paragraph of section 16, and means any rate duly established and published or determined by a specific method published in the tariff. In our opinion a proportional rate or equalization rate is just as "regular" as a local rate, each being applicable to a separate type of traffic and inapplicable to any other type. Our predecessors as well as the Interstate Commerce Commission and the courts have frequently recognized proportional and equalization rates as regular rates, always different and lower than local rates. In *Texas & Pacific Railway Co.* v. *United States,* 289 U.S. 627, the court, referring to *Texas & Pacific Railway Co.* v. *Interstate Commerce Commission,* 162 U.S. 197, said at page 637:

> Since that decision it has been recognized that export and import shipments, although not made on through bills, might lawfully be transported at rates below those charged for domestic traffic between the same points.

In *Intercoastal Rate Structure,* 2 U. S. M. C. 285, at page 304, our predecessors said:

> Proportional rates have existed with approval in railroad and water transportation for many years.

In this case respondent, having filed its equalization circular, is bound to apply the equalized rate on traffic originating at points mentioned, and may not on such through traffic apply the local rate. The equalized rate is the only "regular rate" that may be charged in such case.

Moreover, the equalization practice of respondent does not come within the meaning of "other unjust or unfair device or means" described in section 16(2) of the Act, which defines criminal offenses. We quote from section 16

> That it shall be unlawful * * *

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

"Unfair device or means", coming at the end of a list of dishonest practices such as false billing, etc., must be construed as limited to practices of the same general class as those specifically mentioned. This is the rule of "ejusdem generis." In construing section 10(3) of the Interstate Commerce Act the Circuit Court of the 8th Circuit, in *Armour Packing Co.* v. *United States,* 153 Fed. 1, explained the words "other device", saying, page 16:

The gist of the shipper's offense under paragraph 3 of section 10, as amended by the Act of 1889, is the fraud of obtaining transportation at a rate less than the established rate by false billing, false classification, false weighing, false representation of the contents of the package or false report of weight or by any other device. Under the familiar maxim, noscitur a sociis, the device of this paragraph is a device of the same character as the false representations with which it is associated, a deceptive or fraudulent device. *Davis* v. *United States,* 104 Fed. 136. Obtaining transportation at a rate less than the regular published rate, without committing any fraud or making any false representation to secure it, is not unlawful under this act of 1889. And an averment of the fraudulent device by which the transportation is secured is indispensable to an indictment founded upon that act, because the fraudulent device is the substance of the offense.

Finally, coming to complainant's charge (1), it is said that the equalization rate practice gives undue preference and advantage to Belle Chasse as against the Gulf ports, and creates unjust discrimination between them. Complainant points out that respondent, when formerly operating from Texas City to Cuba, established equalization rates on traffic originating in Beaumont which absorbed the local rail charges between Beaumont and Texas City and effectively drew traffic away from Beaumont. Respondent was then a member of a conference and operated under a conference agreement which authorized such action. On complaint of the Port of Beaumont, our predecessors found that respondent's equalization practice subjected Beaumont to undue predudice and disadvantage in violation of section 16(1) of the Act, *Port Commission of Beaumont* v. *Seatrain Lines, Inc.,* 2 U. S. M. C. 500, and said at page 504:

However, a port and its transportation services are indissolubly linked together, are interdependent, and a practice harmful to one injures the other. Therefore, the diversion of traffic from the port and the consequent crippling of essential carrier services there, constitute undue prejudice and unjust discrimination against the port. * * * We take judicial notice

of the recent abandonment and curtailment of essential water carrier services, which is accounted for in no small degree by indiscriminate rate-cutting through absorptions and otherwise. "Traffic raiding" through unsound methods of rate-making should be a thing of the past.

In the *Beaumont* case our predecessors quoted with approval from the report in *City of Mobile et al.* v. *Baltimore Insular Line, Inc., et al., supra,* at page 486, as follows:

> To permit continuation of unrestricted solicitation by carriers for business through condonation of a practice whereby unfavorable inland rates are overcome, would wholly ignore the right of a port to traffic to which it may be entitled by reason of its geographical location. Such right appears fundamental under statutes designed to establish and maintain ports. Under section 8 of the Merchant Marine Act, 1920, we are required to recognize territorial regions and zones tributary to ports, and should there exist rates to seaboard which, among other things, do not recognize the natural direction of the flow of traffic, recommendations may be made to the Interstate Commerce Commission for such action as it deems necessary. The contention has been made that section 8 has no relation to rate regulatory provisions of the Shipping Act, 1916. But to wholly ignore specific policies of Congress would be unwarranted.

And from *Contract Routing Restrictions,* 2 U.S.M.C. 200, at 226, quoted the following:

> We do not look with favor upon the attempt of carriers by artificial means to control the flow of traffic not naturally tributary to their lines.

In *Baltimore Insular Line, supra,* respondent was engaged in interstate commerce and was, therefore, subject to section 18 of the Act, and in *Beaumont* v. *Seatrain Lines, Inc., supra,* respondent's action was taken pursuant to a conference agreement which made respondent subject to section 15 of the Act. Yet in both cases our predecessors held that there was undue preference and prejudice to the complaining ports under section 16 of the Act because of the effect of the carrier's equalization practices. In this case no interstate commerce or conference agreement is involved, but insofar as it concerns traffic alleged to be drawn from complainant ports and the area around them, to which they claim to be entitled by reason of their geographical location, we find the same kind of undue prejudice to complainant ports. In this case, Beaumont and the other ports are prejudiced to the advantage of Belle Chasse or New Orleans, as in the earlier case Beaumont was prejudiced to the advantage of Texas City.

But, respondent replies that it does not serve both Belle Chasse and the Gulf ports and, therefore, preference and prejudice under the Act are legally impossible. Respondent argues that it is legally impossible to accuse a carrier of discriminating between two ports

when it does not serve both of them and has no responsibility or connection with the rates to or from one of them, relying on *Texas and Pacific Ry. Co.* v. *United States*, 289 U.S. 627.

The *Texas and Pacific* case, *supra*, arose under section 3(1) of the Interstate Commerce Act, which section 16(1) of the Shipping Act, 1916, closely parallels, with certain important elaborations discussed hereinafter. The Supreme Court said of rail rates, at page 650 of that case:

> A carrier, or group of carriers, must be the common source of the discrimination–must effectively participate in both rates if an order for correction of the disparity is to run against it or them.

But here we have a different condition, the prejudice is not created by the separate acts of independent carriers. Here, if equalization exists, the prejudice is created by the sole act of a single carrier: in this case, the respondent, Seatrain. The prejudice is the drawing away of traffic inherently and geographically belonging to the Gulf ports. Furthermore, Seatrain by a through route established with the domestic rail carriers reaches into and serves the Gulf ports, and because of the through route may be held responsible for the prejudice, on the authority of *St. Louis and S. W. Ry. Co.* v. *United States*, 245 U.S. 136, which also involved section 3(1) of the Interstate Commerce Act. Respondent, however, argues that the case last cited is inapplicable because Seatrain neither has, nor can obtain, power to control the through rate although the through route exists. But this argument is not convincing since by its equalization practice Seatrain does in fact determine the through rate to Cuba.

As stated, section 16(1) of the Shipping Act, 1916, is patterned generally after section 3(1) of the Interstate Commerce Act. While both sections prohibit undue preference and prejudice *in any respect whatsoever*, section 16(1) contains the additional injunction that such unlawful acts shall not be done *"either alone or in conjunction with any other person, directly or indirectly."* Emphasis supplied.)

Counsel for respondent argues, in effect, that the additional words are surplusage, since the Supreme Court held in the *Shreveport case* (*Houston, E. & W. T. Ry. Co.* v. *United States*, 1914) 234 U.S. 342), that section 3(1) of the Interstate Commerce Act reached discriminations of every kind to the full limit of congressional power to regulate the rates on interstate and foreign commerce.

However, it must be remembered that the Shipping Act, 1916, was enacted subsequent to the *Shreveport* case, and it cannot be

assumed that Congress was unaware of such decision, or that it was indulging in mere tautology. Plainly, therefore, section 16 (1) was intended to have a broader sweep than section 3(1). If it be assumed that the alleged drawing away of traffic from the Gulf ports is not directly due to the equalization plan in question (with which assumption we cannot agree), then certainly it cannot be disputed that such diversion is due *indirectly* to respondent's method of proportional rates and absorption practices.

In any event, the fact of the drawing away of traffic is admitted for the purpose of the motion to dismiss. We find that a drawing away of traffic from the Gulf ports results in undue prejudice and is due to the individual act of respondent in establishing its equalization practice. Respondent's fault in this case is analogous to the fault of the respondents in *Chicago I. and L. Ry. Co.* v. *United States,* 270 U.S. 287, where the Court said, page 293:

> Whenever discrimination is in fact practiced, an order to remove it may issue and the order may extend to every carrier who participates in inflicting the injury.

The Supreme Court, in *Texas and Pacific Ry. Co.* v. *United States, supra,* page 652, in explaining the *Chicago I. and L. Ry Co.,* case, *supra,* said p. 652:

> The order of the Commission was held proper, because each defendant railroad was *solely* responsible for the prejudice resulting from its own refusal to maintain interchange arrangements with the electric line and for the preference of maintaining such arrangements with other carriers in Michigan City, *each could without reference to the conduct of the other* correct the unjust discrimination which it individually practiced. (Emphasis supplied.)

The sole responsibility of respondent for the condition under consideration is clear. It can be corrected by the unilateral action of respondent. Furthermore, neither Lykes Bros. nor the land carriers can remove the prejudice by their separate or joint act even if they so desire. Any lowering or raising of their rates ever if made for that or any other purpose would, under respondent's circular, require an immediate change in Seatrain's ocean rate to continue the equalization, and this of course would perpetuate the prejudice and preference.

Paraphrasing the language of the sentence of the Supreme Court last quoted to meet the situation in this case, it may be said that Seatrain can, without reference to the conduct of any other person, correct the unjust discrimination which it individually practices. We conclude, therefore, that the complaint states a cause of action, and the motion to dismiss must be denied.

The question remains whether respondent's equalization circular is in violation of sections 16(1) and 17(1) of the Act as charged in (1) above. To approach this question we examine the entire record, including the denials contained in respondent's answer that the equalization circular does in fact divert traffic from complainant ports and from territory naturally tributary thereto. As has been observed, the equalization circular includes the 12¢ limit already described, which gives certain protection to complainant ports and the territory closely surrounding them, and as to such ports and territory the circular effects partial, rather than total, equalization. Thus respondent's equalization practice differs from the practice in *Beaumont* v. *Seatrain Lines, Inc., supra,* already discussed, where no protection was given to traffic originating at the complainant ports. The record in this case shows to some degree the effect of respondent's present equalization circular and includes an analysis of rice shipments carried from Belle Chasse for the eight-month period from November 1, 1947, to June 30, 1948. This period covered one month of operation prior to equalization and seven months of operation under the equalization circulars of November 26, 1947, and March 19, 1948. During this period, however, there were several months when no rice whatever was carried due to the seasonal nature of the trade. From this breakdown the following appears:

Rice carried from Belle Chasse to Hacendados–	*Carloads*
November 1 to November 26, 1947, without equalization:	
From five complainant ports	15
From other Texas and Louisiana territories, except New Orleans	79
From New Orleans	20
November 26, 1947, to December 31, 1947, with equalization:	
From five complainant ports	29
From other Texas and Louisiana territories, except New Orleans	67
From New Orleans	9
January 1, 1948, to June 30, 1948:	
From five complainant ports	7
From other Texas and Louisiana territories, except New Orleans	30
From New Orleans	10
	266

It thus appears that some rice moved from complainant ports to Hacendados even without equalization during the 26 days before the first circular became effective, and this was increased

during the 35 days thereafter. A similar detailed analysis of shipments of other commodities from Belle Chasse is lacking, nor does there appear to be a statement of comparative figures from complainant ports broken down into relevant periods for comparative analysis.

The examiner, in view of his other findings, was not required to make an analysis and report as to whether respondent's present circular did in fact draw traffic from complainant ports and the territory adjacent to them so as to prejudice unreasonably or discriminate unjustly against those ports, nor did the examiner make any finding as to what were the limits of the adjacent territory which could be considered as naturally and geographically tributary to complainant ports. The record seems to us not adequate to make a determination on these issues which we now deem material to a decision on the validity of respondent's equalization circular.

Summing up, we find: (1) That respondents equalization practice is not a regulation or practice connected with the receiving, handling, storing, or delivering of property within the meaning of section 17(2) of the Shipping Act, 1916; (2) that the equalization rates in question are "regular" rates, and do not constitute an unjust or unfair device or means to obtain transportation at less than regular rates in violation of section 16(2) of said Act (3) that upon the facts admitted by respondent for the purpose of the motion to dismiss, the complaint states a cause of action and the motion should be denied; and (4) that the record herein is not adequate to make a determination on the issues under sections 16(1) and 17(1) of the Shipping Act, 1916, and should be remanded to the examiner for further hearing and report on such issues.

The case is so remanded.

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

3 F. M. B.

FEDERAL MARITIME BOARD

No. 692

LOS ANGELES TRAFFIC MANAGERS' CONFERENCE, INC.

v.

SOUTHERN CALIFORNIA CARLOADING TARIFF BUREAU, ET AL.

Submitted February 7, 1951. Decided March 9, 1951

Collection of both carloading and handling charges on cargo handled in continuous movement not unlawful.

Collection of separate handling charges by respondent common carriers for transportation of freight from southern California terminals to world ports not unlawful whether or not those respondents also transport like freight from United States Atlantic and Gulf ports to common world ports without collection of separate handling charges.

W. E. Maley and *T. W. Brendes* for complainant.

Ira S. Lillick, Joseph J. Geary, John C. McHose and *Allan E. Charles* for Southern California Carloading Tariff Bureau, Master Contracting Stevedores Association of Southern California, Pacific Westbound Conference, Pacific Indonesian Conference (formerly Pacific Netherlands East Indies Conference), Pacific Straits Conference, Kerr Steamship Company, Inc., Funch, Edye & Co., Inc., Norton, Lilly & Co., Transpacific Transportation Company, W. H. Wickersham & Co., and Transmarine Navigation Corporation, respondents.

Chalmers G. Graham and *Leonard G. James* 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., Cosmopolitan Shipping Company, Fred Olsen Line, Ltd., Furness, Withy & Company, Ltd., General Steamship Corporation, Ltd., Grace Line, Inc., Interocean Steamship Corporation, H. S. Lear, Salen-Skaugen Line, Rederi A. B. Jamaica, Rederi A. B. Pulp, and D/S A/S Eikland, Salamis A/S, respondents.

W. G. Holland for California-Arizona Cotton Association, *B. C. Neill* for California Fruit Growers Exchange, *K. L. Vore* and *W. G. O'Barn* for Los Angeles Chamber of Commerce, *L. E. Osborne* for California Manufacturers Association, *L. A. Bey* for William Volker & Company of Los Angeles, Inc., *T. R. Stetson, Edwin A. McDonald, Jr.*, and *Omar L. Crook* for Pacific Coast Borax Company, *H. A. Leatart* and *Martin A. Meyer, Jr.*, for American Potash & Chemical Corp., *Eugene A. Read* for Oakland Chamber of Commerce, *James A. Keller* and *W. S. Mayock* for California Portland Cement Company, Monolith Portland Cement Company, Southwestern Portland Cement Company, Pacific Portland Cement Company, and Santa Cruz Portland Cement Company, *Earle J. Shaw* for Chilean Nitrate Sales Corporation, and *S. A. Moore* and *John Bosche* for Permanente Cement Company, interveners.

C. S. Connolly for Interstate Terminal's and *Charles A. Bland* for City of Long Beach, California.

REPORT OF THE BOARD

BY THE BOARD:

Complainant, an association of industrial shippers, complains that the practice at California ports of collecting a handling charge on rail cargo serviced in "continuous"[1] movement, in addition to a carloading or unloading charge, is an improper and unreasonable practice in violation of sections 15 and 17 of the Shipping Act, 1916. It also complains that the imposition of handling charges on cargo shipped for export from California ports by ocean common carriers serving Atlantic and Gulf ports as well as California ports, whether in "continuous" movement to or from rail cars or otherwise, is unjustly discriminatory and unduly and unreasonably prejudicial to California shippers and ports, and unduly preferential to Atlantic and Gulf shippers and ports, since no similar handling charge is collected at the latter ports. The alleged discrimination is said to violate sections 15, 16, and 17 of the Shipping Act, 1916.

[1] There are three types of car service at Southern California ports described as follows in the Board's Report No. 651, *Carloading at Southern California Ports*, 3 F.M.B. 261, 262:

"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."

Originally the complaint named as respondents master stevedore contractors and ocean common carrier lines and conferences serving the entire Pacific coast, but by amendment certain respondents not serving southern California ports were dropped, and the evidence was confined to outbound traffic moving over Los Angeles and Long Beach ocean terminals. Various parties intervened in support of the complaint, but of these only Pacific Coast Borax Company, American Potash & Chemical Company, and certain cement manufacturers offered any supporting evidence.

The examiner recommended findings by the Board (1) that the collection of separate handling charges on cargo in "continuous" movement, in addition to carloading or unloading charges, is not a duplicating or overlapping charge and is not unlawful, excepting as in conflict with the examiner's second finding; and (2) that the collection of separate handling charges on cargo shipped from southern California ocean terminals to world ports by ocean common carrier respondents transporting like cargo from Atlantic or Gulf terminals to the same world ports without collecting there separate handling charges, is unduly prejudicial to southern California shippers and traffic, and unduly preferential to Atlantic and Gulf shippers and traffic in violation of section 16 of the Shipping Act, 1916.

We agree with the examiner's first recommended finding but disagree with his second recommended finding.

The following descriptions and definitions of the terms "handling" and "handling charges" are taken from Pacific coast conference tariffs and are generally representative:

Rule 10, Eighth Revised Page No. 27, Pacific Westbound Conference Local Tariff No. 1–U:

> (a) The carrier, its agent, or stevedore, shall perform at the expense of the consignor or consignee, the handling service at all Pacific coast ports, at rates hereinafter provided:
>
> 1. On terminal direct from place where unloaded from railroad car or other vehicle to ship's tackle.
>
> 2. From place of rest on terminal, barge or lighter to ship's tackle, including ordinary breaking down and trucking.

Item No. 13, Second Revised Page No. 11, Pacific/West Coast of South America Conference Freight Tariff No. 13:

> (a) *Definition*—The services performed in moving or conveying cargo, including ordinary breaking down, sorting and trucking (1) from place where unloaded from railroad car,

truck or other vehicle on the terminal to ship's tackle, or (2) from place of rest on terminal, barge or lighter to ship's tackle shall be known as "handling" and the charges therefor shall be known as "handling charges."

The tariffs show that the separate handling charge imposed at southern California ports range in the neighborhood of 85¢ per ton on the commodities mentioned in the evidence, but the charge is not uniform nor does it apply to all trades. For example, Pacific Coast European Conference, Pacific Coast River Plate Brazil Conference, and Pacific/West Coast of South America Conference impose handling charges on a commodity rate basis generally higher than the flat charge of 80¢ per ton published by Pacific Westbound Conference. On the other hand, carriers in the Puerto Rican and Hawaiian Islands domestic trade impose no handling charges, their rates being applicable from point of rest on the terminal rather than from ship's tackle.

Complainants and interveners do not object to the payment of charges for carloading or car unloading, but complain that where cargo moves from cars to ship's tackle in "continuous" movement the imposition of a charge for "handling" is a duplication and hence an unreasonable practice under section 17 of the Act. In other words, the complaint raises the question whether the collection of both the carloading or car unloading charge and the handling charge in "continuous" movement constitutes a double charge against the shipper for a single service, or whether there is an overlapping of charges for services in "continuous" movement. The alleged double charge is said to be an unreasonable practice on the ground that each charge should be established on the basis of the cost of service. "Continuous" movement is said to involve only one operation and to cost less than the two operations included in "indirect" movement, and from this it is argued that the handling charge in "continuous" movement should be eliminated.

Many of the same arguments with respect to cost were presented to the Board in No. 651, *Carloading at Southern California Ports, supra,* note 1, and many of the same witnesses testified in both cases. The complaint in this case was filed before the decision in that case, wherein this Board held that there could be no difference in the charges for carloading and car unloading at southern California ports whether performed in connection with "indirect" service or with "continuous" service. We find from the evidence in this case that whether the cargo handling

is performed in connection with "indirect" service or with "continuous" service, it is a separate and distinct service from the loading or the unloading of the cars. It follows that a separate and distinct charge may be made for "handling" cargo in addition to the charge for the car service. The provisions contained in Rule 10, Eighth Revised Page No. 27, Pacific Westbound Conference Local Tariff No. 1–U, already quoted, providing for the imposition of the handling charge for movement across the dock "from place where unloaded from railroad car or other vehicle to ship's tackle" (continuous movement) as well as "from place of rest on terminal, barge or lighter to ship's tackle" (indirect movement), insure the imposition of equal handling charges for cargo whether in "indirect" movement or "continuous" movement just as the requirements of this Board in No. 651, *Carloading at Southern California Ports, supra,* require the imposition of equal charges for car service regardless of the manner of movement employed. We hold that respondents' practice of making a separate charge for handling is therefore not improper or unreasonable or a violation of section 17 of the Act.

The history of the practice of collecting separate handling charges by ocean carriers serving the Pacific coast is found in *Los Angeles By-Products Co., et al.* v. *Barber Steamship Lines, Inc., et al.,* 2 U.S.M.C. 106. Our predecessor, the United States Maritime Commission, in that case considered the practice of the ocean carrier to divide its total charges against shippers so as to specify separately the charge for handling from railroad cars or point of rest to ship's tackle, and the charge for ocean carriage from ship's tackle at loading port to destination. The practice was held then, as we hold now, not to be unreasonable or in violation of the second paragraph of section 17 of the Act. Our predecessor said, page 114:

> Our conclusion is that the separate charges for handling cannot be condemned as an unreasonable practice. The right of rail carriers to make a separate charge for terminal services incident to delivery has been recognized by the Supreme Court. *I.C.C.* v. *Stickney,* 215 U.S. 98, and *I.C.C.* v. *C., B. and Q. R.R. Co.,* 186 U.S. 320. In view of the foregoing conclusion, it follows necessarily that the conference agreements in respect of said charges have not been shown to be unreasonable or unfair.

That decision was affirmed by the United States District Court in *Sun-Maid Raisin Growers Asso.* v. *United States* (N. D. California S. D.), 33 Fed. Supp. 959, and by the Supreme Court, 312 U. S. 667.

Coming next to the charge of discrimination between Califor-

nia ports and shippers, on the one hand, and Atlantic and Gulf ports and shippers, on the other hand, a further analysis must be made. Complainant made a very brief case before the examiner, offering in evidence certain tariffs deemed typical and certain bills of lading issued pursuant thereto, from which the fact appeared that the handling charge was made on certain West coast cargo, and that no handling charge was made on similar cargo moving from Atlantic and Gulf ports to the same foreign destinations. A general charge was made that the ocean carriers serving both California and Atlantic ports were guilty of discrimination and prejudice against the California ports and shippers, but no evidence was given by complainant of specific cases. At the conclusion of complainant's case and before interveners' testimony was heard, respondents moved that the entire proceeding be dismissed for lack of proof. Under our Rules of Procedure the examiner could not rule on this motion, and thereupon intervening shippers offered testimony. However, the examiner recommended denial of the motion in his report and we agree with such recommendation.

Intervener American Potash & Chemical Corporation showed that it produced salt cake, soda ash, potash, and borax at Trona, California, about 200 miles inland from Los Angeles, and that about 25 per cent of its total product was exported through southern California terminals. This intervener showed it faced competition from producers along the Gulf coast such as potash producers at Carlsbad, N. M., exporting from Galveston and Houston, and soda ash producers at Corpus Christi, Tex., and Baton Rouge, La., the former being a port on the Gulf and the latter being about 80 miles by rail from New Orleans. The cement interveners showed that their plants were located at various points in southern California between 60 and 140 miles from Los Angeles. They showed that a substantial part of their product was sold for export and that they were in competition with cement plants located on the Atlantic and Gulf coasts, some actually at seaboard at New Orleans, La., Norfolk, Va., and Mobile, Ala., and others on the Hudson River within 100 miles of New York harbor. The third intervener, Pacific Coast Borax Company, offered evidence to show that a very substantial tonnage of crude borate, borax, and boric acid originated at its mines 135 miles inland from Los Angeles and was shipped by rail or truck to Los Angeles and Long Beach for export to foreign countries. This intervener was unable to show that it faced any competition

from producers shipping from Atlantic or Gulf ports. No evidence was offered of any competitive situation as between shippers of the same commodity in various trades out of California ports so as to require identical handling charges for all such trades.

The charge of discrimination and prejudice can only apply to such of respondent ocean carriers operating from both California and Atlantic or Gulf ports to the same foreign destinations, for only in such cases is the carrier the common source of the alleged discrimination. *Texas and Pacific Ry. Co.* v. *United States,* 289 U. S. 627 at 650.

Intervener American Potash and Chemical Corporation showed a drop in the volume of its products exported from 1939 to 1949, but the evidence was lacking in proof that the drop was due to the handling charge. On the contrary this intervener admitted that prior to 1941 it had the benefit of more favorable ocean rates than East coast competitors, which benefit had since been eliminated. The record also showed that the rail rate on soda ash from intervener's competitor's plant at Baton Rouge to shipside at New Orleans was at the time of the hearing $3.27 per ton, whereas the rail rate from intervener's plant at Trona to the Los Angeles dock on soda ash was $5 per ton, a differential of $1.73 per ton in favor of the Gulf exporter, which might account for intervener's unfavorable position in the export trade. Moreover, as to potash, the same intervener disclosed that recently potash exports were "practically nil, due to the fact that at this time there is a shortage of the potash supply in this country, and we, in our efforts to take care of our domestic customers, have been unable to ship potash to any extent for export."

The cement interveners pointed to tariffs from all three coasts to Valparaiso, Chile, for example, where the ocean freight rate on cement was in each case $17 per ton, and where the West coast exporters paid the handling charge of 85¢ per ton in addition, but no specific cases of actual loss of business due to this charge were reported. They showed that their West coast factories were at varying distances inland from Los Angeles, whereas many of the Atlantic and Gulf cement plants were at seaboard within the port switching areas so that rail charges operated unfavorably to California cement exporters. Also, as already indicated, ocean rates on cement to some foreign centers were lower from Atlantic than Pacific ports, quite regardless of the handling charge (i. e., to Panama City, referred to below).

West coast cement interveners showed that their export business was decreasing in 1949 below comparative figures in prior years, but failed to show whether or not the East coast or Gulf producers had suffered similar losses.

Interveners could not say that the falling off in their California exports was not due in some measure to the foregoing causes, nor to other causes having nothing to do with the handling charge, including the drop in export demand due to lack of dollar credits abroad, devaluation of foreign currency, bartering arrangements between nations, and other international conditions developing as the aftermath of the war.

To support the charge of unjust discrimination and unreasonable prejudice, there must, of course, be evidence of actual loss of business due to the discriminatory rate situation. General statements as to the possibility of damage are not sufficient.

In *Port of Philadelphia Ocean Traffic Bureau* v. *The Export Steamship Corp.*, 1 U.S.S.B.B. 538, our predecessors said, page 541:

> 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 the 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. Furthermore, a pertinent inquiry is whether the alleged prejudice is the proximate cause of the disadvantage. Manifestly, the general representations made by witnesses for complainant do not afford convincing proof of the alleged disadvantages under which they and other interests at Philadelphia operate, or that the rate situation is solely responsible therefor. It may be that their conclusions are based on specific facts bearing upon the question of discrimination and prejudice, but the Department cannot accept such conclusions without an examination of the underlying facts upon which they are based, which facts are not of record in this proceeding.

We do not feel that there is satisfactory proof in this case that there has been loss or damage or prejudice to interveners resulting from the collection of the "handling" charge at southern California ports. The alleged drop in interveners' export business may be general to all exporters or may have resulted from any one or more factors already mentioned which may have permitted Atlantic and Gulf coast competitors to quote a lower delivered price than interveners.

But regardless of the lack of satisfactory proof of discrim-

ination, the complaint must fail for a more fundamental reason. The examiner's finding of discrimination was based on the theory that the carrier made a charge for handling on the West coast and performed the same service without charge on the Atlantic and Gulf coasts. We think that an analysis and comparison of West coast with East and Gulf coast tariffs and their practical application shows that in both cases a charge for the service was made, as appears from the following examples which are typical.

Pacific Coast/Panama Canal Freight Conference, Freight Tariff No. 3, issued May 10, 1948, provides, Item 17 (D) (original page No. 11):

All bills of lading shall be claused as follows:

Any provision herein to the contrary notwithstanding, goods may be received and/or delivered by carrier at ship's tackle and receipt and delivery beyond ship's tackle shall be entirely at the option of the carrier and solely at the expense of the shipper or consignee.

Item 13 (sixth revised page No. 9) provides:

Handling Charges at Pacific Coast Loading Ports

(A) *Definition.*—The services performed in moving or conveying cargo, including ordinary breaking down, sorting and trucking, (1) from place where unloaded from railroad car, truck or other vehicle on the terminal direct to ship's tackle, or (2) from place of rest on terminal, barge or lighter to ship's tackle shall be known as "handling" and the charges therefor shall be known as "handling charges."

Schedule of Handling Charges

Cement.....per ton $0.85

Freight rate to Panama (Second revised page No. 18):

Cement..... $11

On the other hand, Atlantic & Gulf/Panama Canal Zone, Colon & Panama City Conference, Freight Tariff No. P–2, effective June 21, 1948, Item 2 (b) (original page No. 3) provides:

Rates published herein, and as may be amended or superseded by the Conference, apply from shipside, Atlantic and/or Gulf ports of the United States of America, as served by participating carriers, to ports of destination.

Freight rate to Panama (Original page No. 9):

Cement..... $9

From this particular comparison it appears that the ocean rate from Atlantic and Gulf ports to Panama is $9 whereas the ocean rate from California ports to the same destination is $11 plus handling charge. In a number of other cases the ocean rate to a common destination on cement was identical from the Atlantic

and Gulf ports and from the California ports, except for the handling charge.

The Atlantic and Gulf tariffs apparently do not define the term "shipside" but from the record it is clear that the term is not equivalent to "ship's tackle" in California ports. As a practical matter, on the East coast and Gulf the shipper is not billed separately for a handling charge to move cargo from point of rest on dock to ship's tackle, whereas on the West coast this is expressly provided for in the tariff and included as a separate charge against the shipper.

In Far East Conference Tariff No. 19, effective June 15, 1948, page 68, specifying rates from Atlantic and Gulf ports of the United States to the Far East, the following language is contained:

> All rates shown herein apply from and to ship's tackle. Tolls, wharfage, lighterage, and cost of landing, and all other expenses beyond ship's tackle are for account of owner, shipper or consignee of the cargo.
>
> Cargo delivered to vessel's loading berth alongside or on wharf shall be assessed the rate in effect at time of such delivery.

This tariff provision is not altogether clear. Perhaps the second sentence applies only at destination, and perhaps the third sentence is a limitation on the broad statement in the first sentence. On the other hand, a different interpretation might make an opening so as to permit a carrier to make a separate handling charge under this East coast tariff as is expressly provided under the West coast tariffs already referred to. However, this tariff does not provide for any separate handling charge, and all the testimony in the case is to the effect that under all East coast and Gulf tariffs, including this one, no handling charge is imposed. Thus, by the application of this tariff, as well as the other Atlantic coast and Gulf tariffs, above-mentioned, the shipper does not pay a separate handling charge on the East coast, and this is the gravamen of the charge of discrimination made by the West coast shippers in this case.

It is clear that the duty of the ocean common carrier in transporting cargo of the description considered in this case, such as borax, potash, soda ash, and cement in bag or package lots, is to pick it up from some place on the dock where the shipper places it and move it to the ship's tackle, load it on board, and carry it to destination. The carrier is entitled to charge for this entire service. Whether he divides the charge into two items (as on the West coast) or includes total service in a single charge

(as on the Atlantic coast), the remuneration is for the total service which the carrier is bound to give.

In *Sun-Maid Raisin Growers Ass'n. et al.* v. *United States, supra*, the court said, page 961:

> It is well established and is conceded that the duty of moving freight from the place of delivery on the dock to the ship's tackle and thence to a place on the dock at the port of delivery is a part of the duty of the carrier transporting the freight from port to port (*Puget Sound Stevedoring Co.* v. *Tax Commission of the State of Washington*, 302 U.S. 90) and in the absence of a special handling charge the freight rate would cover this duty. That is to say, the freight rate would cover the stevedoring charge.

In *J. G. Boswell Company et al.* v. *American-Hawaiian Steamship Company et al.*, 2 U.S.M.C. 95, the Maritime Commission said at page 101:

> It is well settled that a carrier is entitled to compensation for any transportation service rendered and the fact that all parties were advantaged by the receipt and delivery of general cargo at place of rest instead of at ship's tackle could not operate to prohibit the carriers from charging for the service actually rendered in performing the handling beyond ship's tackle, when, as here, it is not shown that the published tackle-to-tackle rates included any compensation for that service or were in excess of fair and reasonable rates for the tackle-to-tackle service actually rendered by the carriers.

It follows that the total freight rate from California ports to destination is the ocean rate as quoted plus the handling charge as quoted, the latter being a factor in the total combination charge. On the East coast and Gulf the total rate for performing the carrier's total obligation is included in a single charge. In order to determine whether or not discrimination exists there must be a comparison of like charges and like services. In this case it appears that the failure to charge separately for handling on the East coast and Gulf when compared with the making of a separate charge on the West coast is not a comparison of like with like, for on the East coast and Gulf the ocean rate includes handling across the dock whereas on the West coast the ocean rate excludes handling. On the East coast and Gulf the handling charge is an unspecified part of the total; on the West coast it is specified.

It is true that the evidence shows that in some cases the total rate to destination from a California port is greater than the total rate to the same destination from an Atlantic or Gulf port, and the basic complaint of complainant and interveners may remain, i. e., that the total ocean rate from California is greater than the total rate from Atlantic and Gulf coasts. But this

difference does not constitute an unreasonable discrimination, for as said in *Intercoastal Cancellations and Restrictions, supra,* page 401:

> Similarity of transportation conditions is a necessary element of undue preference and prejudice.

In *Eastbound Intercoastal Lumber,* 1 U.S.M.C. 608, our predecessors stated at page 620:

> * * * the Commission has no authority to reduce a rate primarily to protect an industry from foreign or domestic competition. *Atchison, T. & S. F. Ry. Co.* v. *Interstate Commerce Commission,* 190 Fed. 591. This decision is a reflection of the basic rule expressed by the Supreme Court of the United States in *Interstate Commerce Commission* v. *Diffenbaugh,* 222 U. S. 42, 46, that "The law does not attempt to equalize fortune, opportunities or abilities" of competitors.

No showing has been made in this case that the general conditions of transportation from Atlantic and Gulf ports to foreign destinations are so similar to conditions on the West coast as to make any difference in overall rates an unjust discrimination.

We therefore hold that the separate handling charges collected on the West coast by ocean carriers serving also the Atlantic and Gulf coasts are not unjustly discriminatory or unreasonably prejudicial to California shippers and ports in violation of any of the sections of the Shipping Act, 1916.

FINDINGS

1. The collection of both an unloading charge and a handling charge on cargo exported from southern California ports handled in "continuous" movement from rail car is not shown to be an improper and unreasonable practice in violation of sections 15 or 17 of the Shipping Act, 1916, or otherwise unlawful;

2. The collection of a separate handling charge at southern California terminals in connection with the transportation of cargo from southern California terminals to world ports by common carrier respondents transporting like cargoes from United States Atlantic and Gulf ports without separate handling charge to the same world destinations is not a practice unduly prejudicial to southern California shippers, is not unduly preferential to Atlantic or Gulf shippers, and does not constitute unjust discrimination in violation of sections 15 and 17 of the Shipping Act, 1916, it appearing that the common carriers perform identical service for compensation for the shippers on both coasts with respect to the handling of cargo at the respective terminals.

An order dismissing the complaint will be entered.

FEDERAL MARITIME BOARD

No. 675

THE PORT COMMISSION OF THE CITY OF BEAUMONT, ET AL.

v.

SEATRAIN LINES, INC.

Submitted March 19, 1951. Decided April 10, 1951

Respondent having discontinued operation of the service covered by the challenged equalization practice, the complaint is dismissed without prejudice to the filing of another complaint in event of resumption by respondent of operation of such service and the use of the equalization practice involved.

Robert E. Quirk and *F. G. Robinson* for complainants.

Arthur L. Winn, Jr., for respondent.

C. D. Arnold for The Southwest Louisiana Traffic Bureau, *Louis A. Schwartz* for New Orleans Traffic and Transportation Bureau, and *C. B. Waterman* and *Rene J. Mittlebronn* for Waterman Steamship Corporation, interveners.

SUPPLEMENTAL REPORT OF THE BOARD

BY THE BOARD:

Subsequent to the decision in this case, served January 11, 1951, complainants filed their petition advising that Seatrain Lines, Inc., during February or March 1950, discontinued the operation of its vessels between Belle Chasse (New Orleans, La.) and Hacendados (Havana), Cuba, and has not resumed such operation. Complainants allege that if the complaint should be assigned for further hearing by the examiner as directed by the Board's prior decision, the parties would be dealing with a nonexistent operation by Seatrain between Belle Chasse and Hacendados, and with such facts as to the diversion of traffic, etc., that existed prior to February or March 1950. Complainants conclude that if such a hearing should be held under present conditions it apparently would serve no practical purpose, and that unless and until Seatrain resumes operation between Belle Chasse and

Hacendados, under equalization rules and practices similar to those herein assailed, complainants will not be injured. Complainants, therefore, pray that the proceeding be held in abeyance until respondent resumes operations under equalization rules and practices assailed by complainants as unlawful.

Respondent opposes the petition and prays that the case should either be set for hearing or that the complaint should be dismissed.

The complaint charged that respondent's equalization and absorption practices from complainant ports and the territory tributary thereto to Cuban destinations were unjust and unreasonable, unjustly discriminatory, and unduly prejudicial in violation of sections 16 and 17 of the Shipping Act, 1916, and constituted an unjust and unfair device in violation of section 16(2) of the Act. Complainants prayed for the entry of an order directing respondent to cease and desist from the alleged violations. No reparation was demanded.

We agree that since respondent has discontinued the carriage of cargo by its vessels from Belle Chasse to Hacendados, the entry of an order granting the relief prayed for in the complaint would now be an idle gesture. It appears that the case has now become moot. If respondent should at a later date resume operations in a manner believed by complainants to be unlawful, complainants can readily institute a new proceeding. Necessary testimony in support of complainants' case may as conveniently be taken in such new proceeding as in the present case. The practice of holding cases open for an indefinite period in the future to consider possible future violations is not favored by the Board.

Accordingly, an order will be entered dismissing the proceedings without prejudice to the complainants to bring new proceedings before the Board for appropriate relief in the event of resumed operations of service by respondent with any equalization practice charged to be in violation of law.

By the Board.

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

3 F. M. B.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 10th day of April A.D. 1951.

No. 675

THE PORT COMMISSION OF THE CITY OF BEAUMONT, ET AL.

v.

SEATRAIN LINES, INC.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and investigation of the matters and things involved having been had, and the Board, on January 11, 1951, 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, in which the matters were remanded to the examiner for further hearing and report; and

Complainants having filed a petition requesting that the Board withhold further action herein inasmuch as respondent has discontinued operation of the service covered by the challenged equalization practice; and

The Board, on April 10, 1951, having considered said petition and the answer thereto of respondent, and 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 herein be, and it is hereby, dismissed, without prejudice to complainants to file another complaint in event of resumption by respondent of operation of such service and the use of any equalization practice charged to be in violation of law.

By the Board.

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

FEDERAL MARITIME BOARD

SPECIAL DOCKET NO. 237

OXENBERG BROS., INC.

v.

UNITED STATES OF AMERICA, WAR SHIPPING ADMINISTRATION, AND NORTHLAND TRANSPORTATION COMPANY, AGENT

Uncontested case *Decided April 17, 1951*

REPORT OF THE BOARD

BY THE BOARD:

This is a special docket proceeding arising under rule 201.58 of the Rules of Procedure of this Board (General Order No. 41 Revised) as the result of an application by respondents United States of America, War Shipping Administration, and Northland Transportation Company, Agent, as common carriers, for authority to make voluntary payment of reparation resulting from the collection of unreasonable freight charges. The charges were collected August 7, 1946, and complaint was filed July 12, 1948, within the statutory 2-year period. The examiner found:

That under bill of lading issued July 2, 1946, by Northland Transportation Company, as agent for the United States of America, acting by and through the Administrator, War Shipping Administration, Astorian Fisheries Corporation consigned to complainant a shipment of 39 tierces of mild cured salmon and 11½ tierces of salted salmon, weighing 46,450 pounds, which moved on respondents' MS. *Sailors Splice* from Bethel, Alaska, to Seattle, Washington; and

That at the time the shipment moved there was no southbound rate on refrigerated fish published in Freight Tariff No. 18 of Northland Transportation Company (U.S.M.C. No. 5); and

That the rate of $60 per 2,000 pounds applicable on cold storage cargo northbound was assessed in accordance with the tariff provision that northbound rates would apply where there were no applicable southbound rates; and

That freight charges in the amount of $1,393.50 were collected from complainant on August 7, 1946, on the basis of the said rate of $60 per 2,000 pounds, plus a surcharge of 16 percent, or $222.96, in accordance with said tariff, plus advances of $34.83, plus wharfage of $29.73, totalling $1,681.02; and

That effective May 23, 1947, by supplement No. 4 to the said tariff, it was provided that on southbound shipments of refrigerated cargo there would be an additional charge of 40 percent of the rate applicable to the particular commodity, and under such provision the rate on the said shipment would have been $10 per 2,000 pounds, plus 40 percent thereof, or $325.15, plus surcharge of $52.02, plus advances of $34.83, plus wharfage of $29.73, or a total of $441.73; and

That at the time of the shipment here involved the ordinary-stowage southbound rate on fish from Bethel was $10 per 2,000 pounds, plus surcharge of 16 percent; that from Nome, Alaska, north of Bethel, the rate was $10 per 2,000 pounds, plus 40 percent if in cold storage, plus surcharge of 16 percent; and that from the Bristol Bay area and Goodnews Bay, south of Bethel, the rate was 25 cents per cubic foot ($10 per 2,000 pounds), plus 40 percent if in cold storage, plus surcharge of 16 percent; and

That the rate assessed the said shipment was unlawful to the extent it exceeded $10 per 2,000 pounds, plus 40 percent thereof, and the applicable surcharge; that complainant paid the said charge and has been damaged to the extent of the difference between the charges paid, or $1,681.02, and the charges which would have accrued at the rate of $10 per 2,000 pounds, plus the various applicable charges, or $441.73; and that complainant is entitled to reparation in the sum of $1,239.29.

We fully agree with and adopt the examiner's findings. The rate originally charged by the carrier for this southbound shipment was the northbound rate on refrigerated cargo made applicable to southbound shipments in accordance with the published tariff. This rate varied so greatly from other southbound rates for refrigerated transportation of fish from nearby points as to be clearly unreasonable and, therefore, unlawful in violation of section 18 of the Shipping Act, 1916, as amended.

The proceeding was instituted by the request for authority to refund the alleged unreasonable portion of the charges, prepared and filed on behalf of the United States of America and War Shipping Administration by Northland Transportation Company, Agent. The application as filed carried the customary written concurrence of complainant. No individual liability was incurred by Northland Transportation Company, which acted as agent only in connection with the shipment in question. We have held in *Sigfried Olsen, d.b.a. Sigfried Olsen Shipping Company* v. *War Shipping Administration and Grace Line Inc.*, 3 F.M.B. 254, that War Shipping Administration, an agency of the United States Government, while operating merchant vessels as common carriers, is subject to the requirements of the Shipping Act, 1916, as amended. Congress has expressly declared in favor of equal treatment as between Government-owned and privately-owned merchant vessels. See Merchant Marine Act, 1920, as amended, section 19(4).

War Shipping Administration ceased to exist September 1, 1946, by virtue of Public Law 492, Seventy-ninth 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. Under the circumstances, the relief requested can best be granted through administrative action.

The chairman of this Board, as Maritime Administrator, will give administrative direction for the payment of the reparation found due in this decision from appropriate funds and, upon receipt of advice that the necessary action has been taken, an order will be entered discontinuing the proceeding.

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

FEDERAL MARITIME BOARD

No. 705

WEST COAST LINE, INC., AND REDERIET OCEAN A/S
v.
GRACE LINE INC., ET AL.

Submitted April 19, 1951. Decided May 14, 1951

Pooling agreements covering freighting operations of respondents Grace Line Inc. and Compania Sud Americana de Vapores in the United States Atlantic-Chile trade, and freighting operations of the latter and respondent Gulf & South American Steamship Co., Inc., in the Gulf-Chile trade not shown to be unjustly discriminatory or unfair as between complainants and respondents, or to subject complainants to undue or unreasonable prejudice or disadvantage, or to operate to the detriment of the commerce of the United States, or to be in violation of the Shipping Act, 1916, as amended. Complaint dismissed.

John W. Cross, Alfred E. Notarianni, and *Robert B. House, Jr.*, for complainants.

William Radner and *Odell Kominers* for Grace Line Inc. and Gulf & South American Steamship Co., Inc.

Cletus Keating and *David Dawson* for Compania Sud Americana de Vapores.

Samuel H. Williams for Chamber of Commerce of Philadelphia, intervener.

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

REPORT OF THE BOARD

BY THE BOARD:

The complaint filed in this case by West Coast Line, Inc., and Rederiet Ocean A/S, trading jointly as West Coast Line, against Grace Line Inc. (hereinafter called "Grace"), Gulf & South American Steamship Co., Inc. (hereinafter called "Gulf & South American"), and Compania Sud Americana de Vapores (hereinafter called "C.S.A.V."), attacks two proposed pooling agreements, No. 7796 covering Atlantic coast/Chile trade, and No. 7797 covering Gulf coast/Chile trade, both of which have been

submitted to the Board for approval under section 15 of the Shipping Act, 1916. It is claimed that the operation of these pooling agreements, in combination with the import control system of the Government of Chile, will permit the establishment of a complete monopoly of the trades by the members of the two pooling agreements, and thus will be destructive of free commerce, detrimental to the commerce of the United States, and will be unjustly discriminatory and unfair to the complainants whose joint service is the only other service in the trades, and will subject them to undue and unreasonable prejudice. Complainants allege that they have requested membership in the two pools, but have been refused. Accordingly, complainants have applied to this Board either to direct the modification of the pooling agreements so as to permit complainants to participate therein, or, in the alternative, to disapprove the agreements for the reasons stated.

The examiner recommended minor modifications of the agreements so that they will comply with section 20 of the Shipping Act, 1916, prohibiting disclosure of trade information. Apart from this, the examiner found that the agreements and their operation were not shown to be unjustly discriminatory and unfair, or detrimental to the commerce of the United States, and recommended that the complaint be dismissed. Exceptions were filed by the complainants and the case was submitted without oral argument. In general, we agree with the examiner's recommendations.

The complaint expressly avers that ordinary pooling agreements between shipping companies are not *per se* a violation of the Shipping Act, 1916, as amended, but charges that they may become unjustly discriminatory and unfair because of their actual method of operation in combination with other factors. Here complainants point to the Chilean import license system as the chief outside factor operating with the pooling agreements which produces the alleged unjust discrimination and unfairness. In order to obtain the necessary background it is necessary, first, to consider the provisions of the two pooling agreements, and then the origin, operation, and effect of the Chilean licensing system.

Agreement No. 7796, as amended, covers the freighting operations of Grace and C.S.A.V. on all southbound cargo, with specified minor exceptions, shipped from ports on the U. S. Atlantic coast destined to Chile (not including cargo destined to Bolivia)

and on all northbound copper (metal only) from Chile to U. S. Atlantic ports. Cargo shipped under local bills of lading only is covered, thereby excluding shipments originating in Canada or Europe and transshipped at United States ports. Likewise mail, passengers' baggage, including passengers' automobiles, are expressly excluded. Grace and C.S.A.V. each undertakes to maintain a minimum of 25 southbound sailings per annum, spaced not more than 25 days apart, and to provide southbound capacity, averaged over each period of 3 months, adequate to accommodate 50 percent of the southbound pool tonnage carried by both parties during such period. They agree that each will maintain a minimum of 15 sailings northbound per annum, spaced not more than 30 days apart, and that each will provide northbound capacity similarly averaged to accommodate the portion of northbound pool cargo offered to its line. After deduction of a handling charge of $9 per revenue ton on southbound pool tonnage and a handling charge of $6.50 on north bound pool tonnage, the remainder of the gross freight earnings accruing on pool tonnage is to be pooled separately northbound and southbound. The southbound pool revenue is to be divided between Grace and C.S.A.V. on the basis of 50 percent to each line. The northbound pool revenue is to be divided so that each line retains for itself the percentage which corresponds to the percentage of northbound pool tonnage actually carried by it during each year, but if either line during any year fails to carry at least 30 percent of the northbound pool tonnage without any deficiency in the number of sailings or agreed capacity, it will receive 30 percent of northbound pool earnings and the other party will receive 70 percent of such earnings. In case of failure by either party to maintain sailings or available capacity either northbound or southbound as required by the agreement, the percentage of pool revenue of such party is reduced in a specified manner. The computations and divisions of pool revenues are to be made beginning November 1, 1950, and the pools are to continue until December 31, 1960, and thereafter from year to year, subject to termination by either party on 3 months' prior written notice before the end of any calendar year. Provision is also made for the termination of the agreement on 60 days' notice if either the United States or Chile should adopt any laws or regulations which treat one party differently from the other with respect to the routing of cargo, and for other reasons not material to this proceeding.

Agreement No. 7797 is substantially similar to No. 7796, ex-

cept that it covers the freighting operations of Gulf & South American and C.S.A.V. only on southbound cargo shipped from points on the Gulf coast of the United States destined to ports of Chile (not including cargo destined to Bolivia); Gulf & South American and C.S.A.V. each undertakes to maintain a minimum of 10 sailings per annum, spaced not more than 45 days apart, and to provide capacity, averaged over a 6-month period, adequate to accommodate the portion of pool cargo constituting the minimum guarantee (35 percent of the pool revenue). A handling charge of $8 per revenue ton is deducted from gross freights, and the balance of pool revenue is apportioned between the parties on the basis of the pool revenue produced by each line, but if either of the parties during the yearly pool period fails to produce at least 35 percent of the pool revenue without deficiency in number of sailings or cargo capacity, such party is to receive 35 percent of the pool revenue and the other party the remaining 65 percent with specified modifications of percentage division in case either party fails to maintain the agreed minimum sailings or capacity.

Both agreements were submitted to the Federal Maritime Board for approval on November 2, 1950, and notice thereof was published in the Federal Register, but as yet they have not been approved. On November 15, 1950, complainants wrote to each of the parties to the two agreements requesting admission to membership, but, as above stated, admission was refused. Complainants, as well as respondents, are members of all conference agreements in the trades in question.

Complainant West Coast Line, Inc., is a New Jersey corporation, organized in 1940 to engage in the steamship operation and agency business. By Agreement No. 7578, filed with the United States Maritime Commission on May 24, 1946, and approved June 20, 1946, West Coast Line, Inc., and J. Lauritzen, a Danish citizen, organized a joint service between U. S. Atlantic and Gulf ports and ports in Chile, Peru, Ecuador, and the West coast of Colombia, under the name of West Coast Line. Wessel, Duval & Company, Inc., an American trading corporation, owns 88 percent of the stock of West Coast Line, Inc., and had, as shipowner, been in this trade since 1825, using the name "West Coast Line" over the years. In 1946 West Coast Line, Inc., acted as a common carrier, but since that time has acted as agent in the United States for J. Lauritzen and more recently for Rederiet Ocean A/S, the successor of J. Lauritzen, the other party to the

joint service agreement No. 7578 above mentioned. West Coast Line, Inc., claims to be a common carrier in said agreement No. 7578, but whether at the present time, in view of its reduced activities, it is still technically a common carrier so as to be eligible for admission to any pooling agreements need not here be decided since the complaint is brought both in the name of West Coast Line, Inc., and of Rederiet Ocean A/S, and the latter, as owner and operator of Danish-flag ships, is clearly a common carrier by water within the definition of that term in the Shipping Act, 1916.

Rederiet Ocean A/S, a Danish corporation, has been since 1946 supplying the ships for the joint service known as West Coast Line, and has been operating a fortnightly service in the trade between U. S. Atlantic coast ports and the West coast of South America, and monthly between U. S. Gulf ports and the West coast of South America. While the first service is the successor to one of ancient origin, the second service began only in 1950.

Grace, an American-flag subsidized carrier, maintains a weekly service with combination passenger and cargo ships from U. S. North Atlantic ports to West coast of South America ports, and this service is supplemented by a fortnightly freighter service. Grace has been operating in this trade for about 100 years.

Gulf & South American, an American-flag carrier, in which Grace interests own a 50 percent share, began operating in the U. S. Gulf/West coast of South America trade in 1946. Prior to that time, between 1918 and 1938 and between 1941 and 1946, Grace had operated on the route. Gulf & South American operates with fortnightly sailings.

C.S.A.V. is a Chilean corporation, now maintaining a fortnightly service between U. S. North Atlantic ports and Chilean and other West coast of South America ports. This service commenced in 1920, but was suspended from 1932 until 1938, since when it has operated continuously. Some of C.S.A.V. vessels proceed from Chile to United States Atlantic ports and thence to Europe and return by the same route. C.S.A.V.'s Gulf service was instituted in 1942, discontinued in 1945, and reestablished in 1947, since which time it has been in continued operation. In 1950, 7 southbound sailings on this route were made.

In the U. S. Atlantic-West coast of South America trade there have been two previous pooling agreements. One, No. 5893, between Grace Line Inc. and West Coast Line, was in effect from

July 1, 1937, to September 19, 1940. It was then disapproved by the Maritime Commission because, on account of war conditions, the Danish-flag carrier could no longer provide its agreed share of the tonnage. (See *Pooling Agreement No. 5893, 2 U.S.M.C. 372.*). The other agreement, No. 7340, between Grace Line Inc. and C.S.A.V., was approved January 23, 1941, but pooling payments thereunder were suspended during World War II and have not been resumed. Unlike Agreement No. 7796, Agreements Nos. 5893 and 7340 covered the freighting operations of the parties from U. S. Atlantic coast ports to Pacific ports of Colombia, Ecuador, Peru, as well as Chile, and like No. 7796 they provided for a division of revenue on a percentage basis. At the time that these two prior pools were in effect, there were three carriers in the trade, so that, in effect, then as now, one of the three carriers was excluded from every pool.

Since World War II the Chilean Government has become increasingly active in the support of Chilean-flag merchant vessels. The country has an extended coast line and has declared that an adequate national merchant marine is required for security, both in peace and war. The commerce and industry of the country have grown, and many large firms which, in former years, were directed by non-Chileans, have now passed into the control of Chilean citizens. The following extract from the Note of the Chilean Ambassador to the State Department, dated January 16, 1951, urging the approval of the pooling agreement, here under consideration, indicates the recent trend:

* * * Because of her extensive coastline, the improvement and development of an adequate merchant marine, making it possible to carry a substantial part of her foreign trade, is of vital importance to Chile.

This importance is clearly evident in time of peace, and of imperative necessity in case of war, since Chile must have assured means of transportation for her exports and imports. Her economy is such that she must be able to convert, by essential purchases, the foreign exchange which will be made available by the operation of an appropriate merchant marine. * * *

In February 1950, pursuant to this national policy, the Chilean Government adopted a new import permit system requiring importers to answer the following question:

9. Ocean freight charges: (Specify if these will be contracted for on Chilean vessels; and if so, whether they will be paid in Chilean or foreign currency).

In May 1950, by Circular No. 37, issued by the Ministry of Foreign Affairs to Chilean consuls abroad, it was announced:

the National Council of Foreign Trade * * * has given instructions

to its local Commissions to the effect that confirmations of import permits shall bear a stamp, in a visible place, stating whether the merchandise in question is to be shipped on Chilean vessels or on Foreign vessels.

Consequently, you may only visa shipping documents submitted to you provided they comply with this requirement, which should be indicated on the respective Confirmation of Import Permit.

At first, two stamps were used on the import permits:

"Shipment National Vessels" and "Shipment Foreign Vessels."

Thereafter, in August 1950, the Chilean licensing system was further implemented by Resolution No. 281, providing as follows:

The H. (Hon.) governing council agreed to authorize the Local Commission to establish in their anticipated applications the requirements to shipping cargo in national vessels, up to the amount of fifty percent of the anticipated freight from ports served by the regular lines of the Chilean Shipping companies. This requirement will be limited to the cargo capacity of the Chilean ships.

The clear purpose of this regulation was to give 50 percent of the southbound traffic to Chilean vessels, leaving the remaining 50 percent to all of the carriers in the respective trades.

Against this background the pooling agreements were signed by Grace, Gulf & South American, and C.S.A.V. on October 20, 1950. Although the agreements have not yet been approved, there was a prompt change in the operation of the Chilean import permit system. A new stamp reading "Shipment National or Associated Vessels" was made available in substitution for "Shipment National Vessels". Under Agreement No. 7796, Grace became associated with C.S.A.V. on the North Atlantic shipments, and under Agreement No. 7797, Gulf & South American became associated with C.S.A.V. on Gulf shipments. Very shortly thereafter, Chile announced a free list (i. e., cargo not subject to import licensing) and the items on this free list have come to include those which in the first 10 months of 1950 made up more than 49 percent of complainants' southbound carrying from U.S. Atlantic ports to Chile. Furthermore, according to complainants' own witness, the operation of the Chilean import licensing system since the signing of the pooling agreements indicates that Chile's objective is to assure that 50 percent of non free-list imports shall move via Chilean lines and associated lines together, and not that 50 percent must move via Chilean lines exclusively. Furthermore, complainants' witness admitted that since the pooling agreements had been signed, he knew of no application by Wessel, Duval & Company for permit to import licensed cargo on ships of complainants' line which had been denied.

Complainants also charge that the effect of the pooling agreement is unreasonably preferential to C.S.A.V., and conversely unfair and unreasonably prejudicial and discriminatory to complainants. They charge that C.S.A.V. vessels do not have the capacity to carry one-half of the southbound tonnage from the United States to Chile, and that a pooling agreement which in effect gives C.S.A.V. more freight revenue than it is capable of earning within its total capacity, should be stricken down. This argument appears to be based on the number of southbound sailings from Atlantic ports in 1950, as follows:

Grace	78
C.S.A.V.	29

However, it is pointed out that the relationship as to southbound sailings does not necessarily imply inability by C.S.A.V. to carry 50 percent of the trade. The Traffic Officer of Grace testified that C.S.A.V. could, with its existing tonnage, easily accommodate 50 percent of the trade from U. S. Atlantic ports to Chile and have space to spare, and that C.S.A.V. capacity was ample to handle 100 percent of the traffic from the Gulf. More specifically, the witness elaborated on the North Atlantic trade, saying:

> By handling fifty percent of the trade from Europe, from England and North continental ports, excluding Scandinavia, and handling fifty percent of the trade from U. S. Atlantic to Chile, and I am only talking cargo to Chile, that the C.S.A.V. with the fleet they now have in service would be only eighty-five percent full after they had accommodated fifty percent of the two movements I have mentioned.

No substantial countervailing testimony was offered in opposition to the foregoing. The conclusion was supported by computations based on the first 9 months of the 1950 southbound cargo carried from North Atlantic ports to Chile and the first 6 months of 1950 cargo carried from Gulf ports to Chile, showing that a fair estimate of the cargo space on C.S.A.V. vessels for the year 1950 supported the general statements made by the witness of Grace. It must be pointed out that no sailings of the carriers here involved from the United States to Chile are direct sailings; all of them usually carry some cargo for Colombia, Ecuador, Peru, or Bolivia. This appears to be a factor favorable to general flexibility to meet the special requirements of each destination. While it was testified that the movement of traffic in the southbound trades in 1950 was below normal, it does not appear that the volume is likely to increase to a point where C.S.A.V.'s capacity would be insufficient to accommodate at least 50 percent of it.

Complainants have also offered some estimates, based on 1950 carryings, of the possible payment which Grace may have to make to C.S.A.V. under Pooling Agreement No. 7796. These also are estimates only and may prove greatly at variance from actual experience. In any event, these estimates point to a detriment to Grace rather than to complainants.

It is to be pointed out that in this case we are considering the pooling agreements under the Shipping Act, 1916. The regulatory problems thus presented are, in our opinion, distinct and must be treated separately from any questions which may arise under any subsidy agreement of Grace under the Merchant Marine Act, 1936. By reason of circumstances over which neither Grace nor the United States of America has control, C.S.A.V. became the beneficiary of Chilean regulations which aimed to reserve to C.S.A.V. 50 percent of the entire southbound Chilean trade, a larger proportion than that company had theretofore enjoyed. Thus Grace, as well as other carriers in the trade, were faced with a very practical fiscal problem. They had to forecast what might be their decrease in revenue if the Chilean regulations remained in full force as against more favorable results to be hoped for if the regulations could be eased as the result of agreement among the parties or some of them.

The evidence shows that the pooling agreements have been followed by a relaxation of Chilean import regulations in a manner which is deemed to be satisfactory to Grace, and at the same time are not shown to have resulted in reducing the participation of complainants in the trades, nor are they shown to have operated in other respects to the detriment or prejudice of complainants.

One thing seems reasonably clear and that is that the pooling agreements between respondents were not entered into for the purpose of eliminating complainants as a factor in the trade. It was readily testified to by a witness of Grace that the Chilean regulations were a very important motivating circumstance that led to the execution of the pooling agreements. The pooling agreements developed as the result of a number of other factors also, but the Chilean regulations were clearly dominant.

Complainants argue that there is a reasonable possibility in the future that the pooling agreements may have an unjustly discriminatory or unfair result, and that Chile may hereafter change her policy and increase her presently indicated requirements in excess of 50 percent of regulated imports on "National

or Associated Vessels." In this connection, a paragraph from the Note of the Chilean Ambassador to the State Department, dated January 16, 1951, already referred to, indicates that the Chilean Government presently intends that the operation of the regulations shall not be detrimental to nonmembers of the pool such as West Coast Line:

> It should be noted that the agreements give identic treatment to national shipping lines and lines actually representing United States shipping interests in the traffic with the United States. At the same time, the Government of Chile deems that the proposed agreements are not detrimental to the interests of other shipping lines, such as the West Coast Line which operates Danish vessels, because importers are authorized to designate such vessels for shipment.

This Board is only able to decide cases on the evidence of existing facts and the reasonable deductions to be drawn therefrom. It is not authorized to base decisions on speculative possibilities. However, the Board points out that a finding at this time that the operations of the pooling agreements in question do not today result in unfair discrimination does not close the door to a reexamination of the same pooling agreements at a future date if changed conditions bring about changed results. Section 15 of the Shipping Act, 1916, expressly provides that the Board may "disapprove, cancel, or modify any agreement * * * *whether or not previously approved by it*, that it finds to be unjustly discriminatory or unfair" etc. (Emphasis supplied.)

Mention should be made of the intervening petition of the Chamber of Commerce of Philadelphia, which has an interest in continued and regular service to Chile. In 1950 complainants made 25 sailings from Philadelphia to Chile whereas Grace made not more than 14. It does not appear that the approval of Agreement No. 7796 will adversely affect complainants' service from Philadelphia. In any event, Grace testified without contradiction that it is willing and able to provide all the service that may be required either from Philadelphia or any other Atlantic port in the event that complainants' service is withdrawn.

Counsel for the Board raise a question in respect to one term of the agreements which provides for the exchange of manifests and other shipping documents between members of the pools. It was pointed out that such an exchange would violate section 20 of the Shipping Act, 1916, and thereupon Grace agreed that it was not necessary for the purpose of the pool to reveal the names of shippers or consignees and indicated that the pooling

agreements would be operated so as to prevent violating either the letter or the spirit of section 20.

CONCLUSIONS

We conclude that an agreement to pool earnings by two or more carriers in a particular trade is not *per se* unlawfully discriminatory or a violation of the Shipping Act, 1916, as amended. Nor does the refusal by the members of a pool to admit an additional applicant necessarily render the continued operation of the pool unjustly discriminatory or a violation of the Shipping Act, 1916. The division of earnings, losses, or traffic by members of a pool contemplates close relations and exchanges of confidential information between them which may well be voluntarily assumed by competitors, but which should hardly be imposed upon them from the outside.

We find from the evidence in this case that Pooling Agreements Nos. 7796 and 7797, when operated in the manner indicated, are not shown, even when considered in connection with the present operation by the Chilean Government of its import regulations, to be unjustly discriminatory or unfair as between complainants and respondents, or to subject complainants to undue or unreasonable prejudice or disadvantage, or to operate to the detriment of the commerce of the United States, or to be in violation of the Shipping Act, 1916, as amended. Accordingly, 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 14th day of May A. D. 1951

No. 705

WEST COAST LINE, INC., AND REDERIET OCEAN A/S

v.

GRACE LINE INC., ET AL.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Board, 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 Board.

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

FEDERAL MARITIME BOARD

No. M–32

AMERICAN PRESIDENT LINES, LTD.—APPLICATION TO BAREBOAT CHARTER GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO REFRIGERATED VESSELS FOR USE IN THE TRANSPACIFIC TRADE, AND PERMISSION TO CALL AT ADAK, ALASKA, UNDER SECTION 805 (a), MERCHANT MARINE ACT, 1936

SUPPLEMENTAL REPORT OF THE BOARD

In the Board's findings, certification, and recommendation herein dated May 24, 1951, this proceeding was held open to permit any party so desiring to file a supplemental application for operation of vessels in a broader trading area.

By application dated May 31, 1951, American President Lines, Ltd., requested permission to operate the refrigerated M. V. *Lightning*, bareboat chartered to applicant in Docket No. M–27, and the M. V. *Shooting Star*, bareboat chartered to applicant in this proceeding, in the transpacific trade on such routes and with such itineraries as may be prescribed or requested by Military Sea Transportation Service, Department of the Navy, including the port of Adak, Alaska.

Further hearing was held by the Board in this proceeding under Public Law 591, Eighty-first Congress, and section 805 (a) of the Merchant Marine Act, 1936, on June 15, 1951, in accordance with notice thereof published in the Federal Register of June 9, 1951. The usual notice of 15 days was not given because of the urgency of the matter. Parties desiring to intervene were permitted to do so at the time of the hearing.

STATEMENT OF FACTS

Applicant's witness testified that the two vessels involved are for use in its transpacific service as nonsubsidized vessels to meet requirements of Military Sea Transportation Service in the Far East. He further testified that enlarging the trading area of these two vessels to include Adak for outbound cargo only will

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not result in unfair competition to other companies operating exclusively in the intercoastal or coastwise service; nor will it be prejudicial to the objects and policies of the Merchant Marine Act, 1936. He also testified that the only American-flag companies operating from the Pacific Northwest and Alaska are Alaska Steamship Company and Coastwise Line; that he has discussed this application with counsel for these lines, and instead of being opposed to it they are in favor of it. Applicant's witness further testified that the present reefer service is inadequate to meet military requirements, and that there are no such privately owned American-flag vessels available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

A representative of Military Sea Transportation Service testified that enlarging the trading area of these two vessels to include Adak, for operation in the transpacific trade in conjunction with other reefer vessels on a synchronized schedule, is necessary in order to meet the requirements of the armed forces. He also testified that cargo carryings to Adak on these vessels will be restricted to outbound cargo from Pacific and northwest Pacific ports, and that it will be military cargo only. He further testified that this operation is very important to the military as there are no privately owned American-flag reefer-type vessels available for charter.

No testimony was adduced at the hearing in opposition to this application, either as to the chartering or as to the broadening of the trading area.

SUPPLEMENTAL FINDINGS, CERTIFICATION, AND RECOMMENDATION UNDER P.L. 591

On the basis of the facts adduced of record, the Board finds and hereby certifies to the Secretary of Commerce:

1. That the transpacific service under consideration, to include Adak, Alaska, is required in the public interest;

2. That such service is not adequately served; and

3. That privately owned American-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

The Board recommends that adequate provision be made to protect the interest of the Government under its operating-differential subsidy contracts with applicant.

PERMISSION UNDER SECTION 805(a), MERCHANT MARINE ACT, 1936

Applicant is a subsidized operator. Its application here includes request for permission to have the ships involved call at Adak, Alaska. In this connection there was no evidence adduced at the hearing to the effect that permission to have the vessels involved call at Adak would 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 the Merchant Marine Act, 1936.

We conclude that the granting of the application (1) will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service; (2) will not be prejudicial to the objectives and policy of the Merchant Marine Act, 1936, as amended; and (3) will be in the public interest and convenience; provided: that such permission shall be subject to revocation, cancellation, or modification by the Board upon thirty days' notice in writing to American President Lines, Ltd.

The application for permission under section 805(a) of the Merchant Marine Act, 1936, as amended, is hereby granted, subject to the conditions indicated.

By the Board.
JUNE 19, 1951.

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

FEDERAL MARITIME BOARD

No. M–33

SOUTH ATLANTIC STEAMSHIP LINE, INC.—APPLICATION TO BAREBOAT CHARTER GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS FOR EMPLOYMENT IN THE SOUTH ATLANTIC/UNITED KINGDOM AND ATLANTIC EUROPE SERVICE (TRADE ROUTE NO. 11)

REPORT OF THE BOARD

This proceeding was instituted under Public Law 591, Eighty-first Congress, upon the application of South Atlantic Steamship Line, Inc., to bareboat charter two Government-owned, war-built, dry-cargo vessels for use in applicant's existing berth service on Trade Route No. 11 between South Atlantic ports of the United States, including Hampton Roads ports, and ports in the United Kingdom and Atlantic Europe, and for calls eastbound only at Philadelphia and/or Baltimore as cargo offers to load bulk grain in liner parcels and/or armed services cargo for United Kingdom and/or Continent/Bordeaux/Hamburg range. Pursuant to the Board's notice of hearing dated June 4, 1951, a hearing was held before an examiner on June 12, 1951. The examiner has recommended that except for the calls at Philadelphia and Baltimore,

> The Board should find and so certify to the Secretary of Commerce that the South Atlantic/United Kingdom and Atlantic Europe services in which South Atlantic Steamship Line, Inc., proposes to bareboat charter two Government-owned, war-built, dry-cargo vessels is in the public interest, that such services would not be adequately served without the use therein of such vessels, and that privately-owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service.

Waterman Steamship Company, the only intervener, did not except to the examiner's recommended decision. Counsel for the Board, while not excepting to the examiner's recommended decision, submitted a memorandum "for the purposes of clarification * * * ." The applicant states that the examiner's recommendation is acceptable.

A recitation of the facts set forth in the examiner's recom-

mended findings is not considered necessary, and we adopt such findings of fact as our own. Our comments deal with the memorandum of counsel for the Board. He first suggests a possible ambiguity in the examiner's description of the services on which the vessels are to be used, and suggests that in lieu of the language above quoted from the examiner's recommendation, the service be more specifically described. We think that the record is reasonably clear as to what is meant, but in order to avoid any possibility of error, the service will be more narrowly described in our recommendation to the Secretary, and our statutory findings and certifications will be limited to the service so described.

Counsel for the Board also questions the correctness of the examiner's rulings excluding evidence relating to possible charter restrictions and conditions such as may be brought to the attention of the Secretary of Commerce for inclusion in the charter, pursuant to section 3 of the statute. It is true that the notice of hearing before the examiner in this case stated that the purpose of the hearing was

> to receive evidence with respect to whether the service for which such vessels are proposed to be chartered is rquired in the public interest and would not be adequately served without the use therein of such vessels, and with respect to the availability of privately owned American-flag vessels for charter on reasonable conditions and at reasonable rates for use in such service.

If the evidence were to be strictly limited by the above specifications, the examiner's ruling would be technically correct. However, history of the Board's consideration of cases arising under Public Law 591, including cases heard directly by the Board, indicates that evidence relating to terms and conditions of charter has been admitted to guide the Board in its recommendations to the Secretary. Despite lack of specific reference to such matters in the notice, we think the excluded evidence should have been admitted. The notice indicated that the hearing was to be held pursuant to section 3 of the statute, and should have been conducted by the examiner in a manner so as to place upon the record material evidence on all matters pertinent to the Board's statutory functions. Without the evidence the Board cannot be properly advised as to appropriate restrictions or conditions, if any, which it may wish to bring to the attention of the Secretary. Future notices under Public Law 591 should clearly indicate that evidence of this sort will be received. In this case the record will be referred back to the examiner with directions to obtain

evidence on the issues heretofore excluded. This may be obtained either by stipulations of the parties or in the usual manner. Thereafter a supplemental recommendation may be submitted to the Board.

By the Board.

JULY 2, 1951.

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

3 F. M. B.

FEDERAL MARITIME BOARD

No. M–33

SOUTH ATLANTIC STEAMSHIP LINE, INC.—APPLICATION TO BAREBOAT CHARTER GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS FOR EMPLOYMENT IN THE SOUTH ATLANTIC/UNITED KINGDOM AND ATLANTIC EUROPE SERVICE (TRADE ROUTE NO. 11)

The Board should find and so certify to the Secretary of Commerce that the South Atlantic/United Kingdom and Atlantic Europe services in which South Atlantic Steamship Line, Inc., proposes to bareboat charter two Government-owned, war-built, dry-cargo vessels is in the public interest, that such services would not be adequately served without the use therein of such vessels, and that privately-owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such services.

The Board should further find and so certify to the Secretary of Commerce that applicant has not shown that the services from Baltimore and Philadelphia to the same destination areas are inadequate.

William I. Denning and *Earl C. Walck* for applicant.
Sterling F. Stoudenmire, Jr., for intervener.
Max E. Halpern for the Board.

RECOMMENDED DECISION OF ROBERT FURNESS, EXAMINER

This is a proceeding under Public Law 591, Eighty-first Congress, on an application of South Atlantic Steamship Line, Inc., to bareboat charter two Government-owned war-built, dry-cargo vessels for use in applicant's existing berth service on Trade Route No. 11 between South Atlantic ports of the United States, including Hampton Roads ports, and ports in the United Kingdom and Atlantic Europe, and for calls eastbound only at Philadelphia and/or Baltimore as cargo offers to load bulk grain in liner parcels and/or armed services cargo for United Kingdom and/or Continent/Bordeaux/Hamburg range. The vessels are requested to accomodate cargo in excess of the present berth capacity of applicant's owned fleet of five vessels. It estimates that the cargo offering would require operation of the two vessels sought for about one year.

Hearing on the application was had June 12, 1951. Waterman Steamship Corporation appeared at the hearing and opposed the application.

South Atlantic has been operating from South Atlantic ports since 1886 and is the only carrier furnishing regular berth service from ports south of Hampton Roads, such as Charleston, S. C., Savannah, Ga., and Jacksonville, Fla. Cargo originating in those areas consists largely of paper mill products, naval stores, cotton, hardwood lumber, tobacco, and manufactured products from the interior.

Until May 1951 applicant had been able to accommodate all the cargo offered, but since then has not been able to book all freight due to unavailability of space. In one instance applicant refused 1,200 tons of soy bean cake, and in another it lost 1,500 bales of cotton. Foreign-flag vessels called for and transported both parcel lots. Some freight has been transported by railroad north to Hampton Roads for shipment to Europe because South Atlantic had no space available at the southern ports. Applicant testifies that space demands are steadily increasing and figures are offered fully supporting such testimony.

Applicant is unable to show, however, that the services out of Philadelphia and Baltimore are inadequate. Waterman produced evidence that those services are adequate, and argues that if the application is granted the two vessels may not be permitted to call at those ports under the terms of the statute. Counsel for the Board makes the same contention.

Public Law 591 requires findings as to the availability for charter of privately-owned vessels. The record is clear that no such vessels are available at reasonable rates and on reasonable conditions. Exhibits of record reveal that in May 1951 a quotation of $80,000 per month was given applicant for charter of a Victory-type vessel which might be available in July, and that another quotation of $100,000 per month was obtained from a private owner. Applicant testifies that he suffered substantial loss within the past six months on a Liberty-type vessel at a charter rate of about $50,000 per month.

CONCLUSIONS AND RECOMMENDATIONS

The Board should find and so certify to the Secretary of Commerce that the South Atlantic/United Kingdom and Atlantic Europe services in which South Atlantic Steamship Line, Inc., proposes to bareboat charter two Government-owned, war-built,

dry-cargo vessels is in the public interest, that such services would not be adequately served without the use therein of such vessels, and that privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service.

The Board should further find and so certify to the Secretary of Commerce that applicant has not shown that services from Baltimore and Philadelphia to the same destination areas are inadequate.

FEDERAL MARITIME BOARD

No. M–33

SOUTH ATLANTIC STEAMSHIP LINE, INC.—APPLICATION TO BAREBOAT CHARTER GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS FOR EMPLOYMENT IN THE SOUTH ATLANTIC/UNITED KINGDOM AND ATLANTIC EUROPE SERVICE (TRADE ROUTE NO. 11)

SUPPLEMENTAL REPORT OF THE BOARD

In our report in this case of July 2, 1951, we set forth fully the facts relating to the application of South Atlantic Steamship Line, Inc., to bareboat charter two Government-owned, war-built, dry-cargo vessels for use in the applicant's existing berth service on Trade Route No. 11.[1] In that decision we remanded the case to the examiner with directions to obtain evidence relating to possible charter restrictions and conditions such as may be brought to the attention of the Secretary of Commerce for inclusion in the charter pursuant to section 3 of Public Law 591, Eighty-first Congress.

The examiner has now reported back to the Board that a stipulation has been entered into between counsel for applicant and counsel for the Board, dated July 5, 1951, and the examiner states:

> In view of the nature of the stipulation, I deem it unnecessary to offer any further recommendations or to suggest any restrictions or conditions to be included in the terms of the charter which the Board might recommend to the Secretary of Commerce.

A review of the stipulation satisfies the Board that no restrictions or conditions need be included in the standard form of charter at this time.

FINDINGS AND CERTIFICATION TO THE SECRETARY OF COMMERCE

On the record adduced in this case, the Board accordingly finds and hereby certifies to the Secretary of Commerce that the service

[1] Trade Route 11 is described in *Arnold Bernstein S. S. Corp.—Subsidy, Routes 7, 8, 11*, 3 U.S.M.C. 351, as follows: U. S. South Atlantic ports (Hampton Roads-Key West inclusive)—United Kingdom and Ireland, Continental Europe north of Spanish border (including Scandinavian and Baltic ports except as to cargo to and from Hampton Roads).

operated by the applicant within Trade Route No. 11 between South Atlantic ports of the United States, including Hampton Roads ports, and ports in the United Kingdom and Atlantic Europe, is required in the public interest; that such service would not be adequately served without the charter of two Government-owned, war-built, dry-cargo vessels; and that suitable privately-owned vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service.

By the Board.

JULY 6, 1951.

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

FEDERAL MARITIME BOARD

No. 676

D. L. PIAZZA COMPANY

v.

WEST COAST LINE, INC., ET AL.

Submitted November 22, 1950. Decided July 9, 1951

Freight charges for carriage of refrigerated cargo from Chile to New York in accordance with oral agreement with agents of vessel were not unjustly discriminatory, unreasonably prejudicial or unreasonably disadvantageous and did not constitute an unreasonable practice in violation of sections 14, 16, or 17 of the Shipping Act, 1916.

Imposition of charge as alleged demurrage on vessel at destination was, in the absence of any agreement for demurrage, an unreasonable practice in violation of section 17 of the Act. Reparation awarded.

Edward B. Hayes for complainant.

Stanley W. Schaefer for respondents.

REPORT OF THE BOARD

BY THE BOARD:

The complaint in this case charges that respondents violated sections 14, 16, and 17 of the Shipping Act, 1916, causing damage to complainant for which reparation is claimed under section 22 of that Act. Total damages demanded are $51,132.69, of which $48,632.69 is claimed to be excessive freight resulting from alleged discrimination in violation of sections 14, 16, and 17 of the Act, and $2,500 is claimed to enforce a refund of that amount, said to have been collected by respondents as demurrage for the detention of the SS. *Argentinean Reefer* at destination, which collection is said to constitute an unreasonable regulation or practice relating to the handling, storing, or delivering of property in violation of section 17 of the Act. The complaint is filed against West Coast Line, Inc., Wessel, Duval & Co., Inc., two American corporations, and J. Lauritzen, a Danish partnership, who share the same offices in New York City.

The examiner recommended that the claim for refund of excessive freight be disallowed, and that the claim for refund

of demurrage be allowed against all three respondents. We agree with the examiner's result on the freight, and partly agree with the result on the demurrage.

Complainant is a partnership with an office in Minneapolis, Minn. It is an importer and distributor of fruits and vegetables. In March 1946 it planned to import fresh fruit from South America and sent one Samuel Chertok, who was in the fruit business in Chicago, to New York to obtain space for the importation. About April 1, Chertok applied at respondents' New York office for refrigerated cargo space. He was referred to Mr. Tage Nielsen in that office, who said there was no such space available. Chertok left word with Nielsen to telephone him in Chicago if refrigerated space should later become available "in little spaces, or a vessel." Some days later, Nielsen called Chertok in Chicago and Chertok proceeded to New York where the two began negotiations for the charter of the refrigerated motor vessel *Argentinean Reefer*, then in San Francisco, for a voyage from Valparaiso, Chile, to New York. At first, the only cargo discussed was apples and Nielsen indicated that the freight for the ship would have to be on the basis of 90,000 cases of apples at $2 a case. Chertok objected that the rate was too high and that he was not sure that he could get that much merchandise. Nielsen finally suggested a rate of $1.75 per case of apples, and indicated that a deposit of $10,000 would be required before the ship sailed from San Francisco to the loading port, and a further deposit of $5,750 when she sailed from Valparaiso. Chertok thereupon went to Chicago, and after talking with one of the complainant partners returned to New York for further conversations with Nielsen on April 15. Chertok said that his principals could not provide 90,000 cases, but could possibly make up 84,000 to 85,000 cases. Complainant now says that the agreement as made was to load 84,000 to 85,000 cases, while respondents say that it was to load 90,000 cases.

An oral agreement was made that day between Chertok, acting for complainant, and Nielsen, that the entire refrigerated space of the ship would be chartered on the basis of $1.75 per case of apples from Valparaiso to New York, and that in the event an all-apple cargo could not be furnished, the deficiency in cubic feet might be supplied with other fruit yielding the same revenue per cubic foot.[1] Advance payments of $10,000 and $5,750 above

[1] A case of apples measures 1-8/12 cubic feet; freight $1.75.
A case of pears measures 1-5/12 cubic feet; freight $1.4875.
Cases of grapes measure 9/12 cubic feet or 1-3/12 cubic feet; freight $0.875 or $1.31.

mentioned were agreed to, with the understanding that the balance of freight was to be paid two days before arrival of the vessel at New York. It was agreed that the vessel owners would unload the ship at New York. Nothing was said about demurrage, dead freight, bills of lading, or the transportation of goods of other persons on the ship, and there was disagreement as above indicated as to the quantity to be loaded. Chertok apparently did not know at that time who were the owners of the *Argentinean Reefer,* but understood that Nielsen was authorized to act for them, and as the result of the conversation both parties understood that a definite agreement had been made. No written charter party was ever entered into nor were the terms of the oral charter confirmed in writing by either party to the other. Nevertheless, upon the payment of the deposit of $10,000 on April 18, the vessel started in ballast from San Francisco to Valparaiso where she arrived on April 28. At Valparaiso the vessel owner was represented by A. J. Broom & Co., Ltd., and complainant by a certain Alberto Zavala.

Zavala supplied the following cargo for complainant, which was loaded into refrigerated spaces:

74,996 cases of apples
4,000 cases of pears
6,752 cases of grapes (in small cases)
1,000 cases of grapes (in large cases)
2 barrels of tomato paste

For shippers other than complainant, Zavala tendered for carriage to Cristobal, C. Z., in refrigerated spaces:

1,000 cases of pears
3,000 cases of grapes (in small cases)

For shippers other than complainant, Zavala tendered for carriage to the Canal Zone and New York, in non-refrigerated spaces:

600 cases of onions
3,955 cases of melons
300 cases of garlic
37 cases of lentils

There was some duplication of effort in the chartering arrangements. Mr. A. J. Broom of Valparaiso testified that he was "General Agent for the Lauritzen Line, Copenhagen, to which the vessel belongs." Mr. Broom testified that the shipper of all the cargo was Mr. Alberto Zavala, and stated further "We had to take cargo other than apples as Mr. Zavala could not fill the

vessel with this fruit and had to fill her somehow or other in order to avoid paying false freight, in view of his obligation to give the vessel a full and complete cargo."

Each shipment was covered by a separate bill of lading. These bore the heading,

"WEST COAST LINE
For West Coast of South America
West Coast Line, Inc. Agents
67 Broad Street, New York
BILL OF LADING.",

and were signed,

"For the Master, West Coast Line, Inc., Agents
A. J. Broom and Co., Ltd."

Each bill of lading showed the name of the shipper, the destination, consignee, party to be notified, the marks and number of cases, the weight, and the freight, with a notation, "Freight payable by consignee at least two days before arrival of vessel." The bills of lading did not refer to the charter. All bills were "order" bills of lading and except for Canal Zone shipments were made out to the order of the shipper or a bank. They did not disclose the name of the carrier or the owner of the vessel. There appear to have been five separate shippers of the fruit destined for complainant, and at least three of the five were also shippers of cargo destined for other parties either at Cristobal or New York. Respondents claim they did not know and had no means of knowing what shipments were made for complainant's account.

The *Argentinean Reefer* sailed from Valparaiso on May 3, and a week later arrived at Cristobal where she discharged 1,000 cases of pears and 3,000 cases of grapes from the refrigerated space and the garlic and lentils from the nonrefrigerated space. She then proceeded to New York and docked at Pier 19, Staten Island, Friday, May 17. Discharge of nonrefrigerated cargo not consigned to complainant commenced on May 17 at 1 p.m. Unloading of complainant's fruit from the refrigerated space began on the following Monday morning, May 20. Respondents claim and complainant denies that complainant was not ready to take delivery of its cargo at 1 p.m. May 17. Accordingly, West Coast Line, Inc., as agent for the vessel owner, made a charge against complainant of $6,250 for demurrage, which was paid under protest. Subsequently, $3,750 of this amount was refunded by West Coast Line, Inc., to complainant, with a letter stating that

the demurrage charge had been adjusted to $2,500. The vessel completed discharge of all the cargo on May 22 and departed the following morning.

Complainant paid the balance of the freight on its cargo by check to West Coast Line, Inc., which, with the deposits previously made, came to a total of $144,350.

The foregoing rates were higher than the rates contemporaneously in effect on like traffic from Valparaiso to New York via regular liner vessels of Grace Line or the Chilean Line. On the basis of the liner rates, the freight on complainant's shipments would have been $95,717.31. The difference of $48,632.69 is the alleged overcharge of freight for which complainant seeks reparation, in addition to the $2,500 retained as demurrage and unrefunded.

Respondents take the position that the Board is without jurisdiction to determine this matter, claiming that no one of the respondents was a common carrier within the definition and requirement of sections 1 and 22 of the Shipping Act, 1916, on which jurisdiction is based. Respondents claim that the testimony proves a charter and not common carriage. Where a charter gives to the charterer the full capacity of the ship and the charterer is the only shipper, the carrier is not a common carrier. *The Fri*, 154 Fed. 333; cert. den. 210 U. S. 431. But here there were various shippers whose order bills of lading made no reference to the charter. Their rights were, therefore, determined by their respective bills of lading, *The Titania*, 131 F. 229, and the ship was, therefore, a common carrier.

Respondents also object that the complaint was filed too late, relying on paragraph 22 of the bill of lading and the limitation in section 22 of the Act. Neither defense is valid. As between vessel owner and charterer the agreement of carriage is not modified by the bill of lading. *The G. R. Crowe*, 294 Fed. 506. The statutory violations are claimed to have arisen from the payment of freight and demurrage on May 21, 1946, and May 24, 1946. The complaint was filed on May 5, 1948, well within the 2-year statutory period.

The effect of complainant's proceeding under chapter XI of the Bankruptcy Act should also be considered. On September 4, 1948, four months after filing the original complaint herein, claiming $51,132.69, and six weeks before filing the amended complaint claiming the same amount, complainant filed in the U. S. District Court for the District of Minnesota a petition

under title XI of the Bankruptcy Act for authority to make an "Arrangement" with its creditors, and, thereupon, on the same day, the Court passed an order continuing the complainant as a "debtor in possession" with full authority to continue its business. It thus appears that the members of the complainant partnership were, after September 4, 1948, authorized to continue the prosecution of the complaint which they had on May 5, 1948, filed in this case. It is significant, however, that in Schedule B of the Debtor, filed on September 4, 1948, signed and sworn to by Providence F. Piazza, one of the members of the partnership, and purporting to be a schedule of all the property and claim of complainant, the only reference to any claim against respondents in this case is the listing of an unliquidated claim against West Coast Steamship Company of $9,832.72.

Coming now to consideration of complainant's claim for excess freight of $48,632.69, complainant does not charge that this was based on a higher rate than it had agreed to pay. Complainant charges that the rate which complainant and respondents agreed to was unreasonable and unjustly discriminatory in violation of sections 14, 16, and 17 of the Act, unreasonably prejudicial in violation of section 16 of the Act, and unreasonably disadvantageous in violation of section 16 of the Act. It charges that the agreement was to charter the entire ship and the charter rate was based on complainant's exclusive use of the ship. Since the vessel owner carried fruit belonging to other persons, and since the refrigerated spaces were opened at the Canal Zone to discharge shipments of other persons, complainant claims it did not receive the exclusive service it paid for, and hence is entitled to damages. Complainant measures these damages not by any depreciation in the value of its fruit caused by any fault of the vessel, but by the difference between the agreed rate and the advertised rate of other lines. Respondents answer is that shipments for persons other than complainant were accepted only in order to minimize damages for dead freight. Respondents claim that whether complainant agreed to ship 90,000 cases of apples or only 84,000 to 85,000 cases of apples, its own shipments were substantially less than either figure. Witness MacDonald for respondents computed that the total fruit shipments made for complainant's account in Chile were the equivalent of only 31,699 cases of apples. Furthermore, respondents point out that Zavala, complainant's agent in Chile, tendered all shipments to

the vessel whether actually for the account of complainant or for the account of outsiders, and claim that neither the vessel owner nor its agent in Chile knew or could have known which shipments were for complainant's account until the vessel reached New York and complainant presented the bills of lading.

As above stated, the New York bills of lading were all order bills of lading. The evidence is not entirely clear as to whether the vessel owner's agent in Chile had knowledge that some of the shipments were for persons other than complainant, but, under the circumstances, this point is not material for in any event complainant failed to deliver to the ship the maximum of 84,000 cases of apples or its equalent in other fruit which it had agreed to ship. This was a breach of complainant's duty. Complainant urges that its shipments were within 10 percent of the agreed quantity and that it was legally entitled to this leeway. This was not an agreement to ship *"about"* 84,000 cases, but an agreement by complainant's own testimony to ship between 84,000 and 85,000 cases and in such a situation no leeway is allowed. *The Emilie Maersk,* 1929 A.M.C. 343.

Under the circumstances the shipowner was authorized to fill the space which complainant had agreed to take, and in fact was required to make reasonable effort to do so to minimize the damages which complainant's breach of contract might occasion. *Wallems Rederij* v. *W. H. Muller & Co.,* 1927 2 K.B. 99; Scrutton, Charter Parties, 14th Ed., Art. 46. Indeed, since complainant's agent in Chile, Zavala, actually tendered all the shipments to the vessels—both those which eventually passed into complainant's hand and those of outsiders—the vessel owner, if in fact he was aware that there was any distinction as to ultimate ownership of the various shipments, was entirely reasonable in assuming that the shipments for outsiders were being tendered with complainant's full approval. There is evidence that complainant's agent Zavala cabled complainant about shipments for outsiders before the vessel left Chile and that complainant either made no comment or stated he was not interested. Mr. Zavala, complainant's Chilean representative, testified:

> I made all the work necessary to obtain the necessary fruit for Messrs. Piazza and also I secured orders for myself from my friends in the Commissary Division in Cristobal in order to obtain the necessary cargo to fill the boat.
>
> Q. State whether or not you communicated with D. L. Piazza Company relative to loading cargo on the vessels for others than them.
>
> A. Yes I did.

Q. If your answer to the preceding interrogatory is in the affirmative state what you communicated to them and what, if any, replies they made to you.

A. In the case of the shipment to the Panama Canal I did not have any reply either affirmative or negative from Mr. Piazza and in the case of other shipments to New York he told me he was not interested.

We find that the shipowner's failure to give complainant the exclusive use of the ship under the circumstances described created no unjust discrimination or unreasonable prejudice or disadvantage.

Complainant charges discrimination in that the rates charged by respondents were higher than the advertised rates of the regular lines in the trade. However, there was no refrigerated space available at the time on any of the regular liners, and the *Argentinean Reefer* was sent specially in ballast for complainant's cargo from San Francisco so that the services are not comparable. In any event, respondents had no responsibility for the lower advertised rate of the regular liners, and legal discrimination cannot be charged against respondents on this showing since respondents were not the common source of the alleged discrimination or prejudice. *Texas and Pacific Ry. Co.* v. *U. S.*, 289 U. S. 650; *Sugar from Virgin Islands to United States,* 1 U.S.M.C. 695, 699.

Complainant, still maintaining that respondents were in fact the common source of discrimination, pointed out that the vessel owner charged only the liner rate on nonrefrigerated cargo carried for other persons whereas it charged more than the liner rate on complainant's refrigerated cargo. But the mere fact that the vessel owner's rate for nonrefrigerated cargo matched the liner rate does not mean that a difference between them existing in the refrigerated rate constituted unjust discrimination. The services are not comparable. The *Argentinean Reefer* was primarily a refrigerated vessel with a small amount of nonrefrigerated space. The liner vessels were the reverse, with ample nonrefrigerated space, and moreover, as stated above, no liner refrigerated space was available.

Complainant next charges unjust discrimination in that the vessel owner, in order to discharge some of the cargo accepted from others, opened some of the refrigerated spaces at Cristobal. The complaint does not charge damage or delay to complainant's shipments resulting from this act. Clearly that stop cannot be a basis for a claim for unjust discrimination.

Complainant argues that the foregoing acts also amounted to an unreasonable practice connected with the handling, storing, or delivering of property contrary to the second paragraph of section 17. Complainant urges that the acceptance by respondents of the agreed freight rate without furnishing the exclusive use of the ship was an unreasonable practice. As already stated, the taking of shipments of outsiders was justified. The vessel owner's action in this regard was not unreasonable or unlawful, and in any event was not a practice connected with the handling, storing, or delivering of property within the statutory language as interpreted in *California* v. *United States*, 320 U. S. 577, at 583–84. Accordingly, we find no unlawful action by the vessel owner in collecting freight at the rate agreed upon.

Next, the circumstances leading up to the charge for demurrage require consideration. MacDonald, the ship's agent at New York, testified that on May 13, 1946, four days before the vessel's arrival in New York, he lunched with Chertok and advised that the ship would arrive on the morning of Friday, May 17, would be promptly cleared, and would commence discharging at 1 p.m. MacDonald testified that Chertok objected, saying he could not utilize the fruit over the week-end and did not want it lying on an unrefrigerated pier, and insisted that no fruit be discharged until the following Monday. MacDonald testified that he told Chertok that if the vessel was to be used as a refrigerated warehouse, he would have to pay demurrage. MacDonald continued, that it was rather warm and the vessel owner would not take the risk of discharging fruit and leaving it lay on the wharf.

Chertok testified that he and his buyers with refrigerated trucks went to the pier on Friday, but were told by MacDonald that the vessel would not discharge the fruit from the vessel either Friday or Saturday. Chertok admits that nonrefrigerated cargo was discharged from the vessel Friday afternoon.

There is thus a direct conflict as to whether the ship declined to discharge on Friday or complainant declined to accept cargo on that day. Contemporary documents tend to support the vessel owner's position.

By letter dated May 17 (Friday), MacDonald wrote Chertok:

> This will confirm telephone conversation of today with your representative Mr. George Otto at which time we pointed out to him that as previously advised this vessel arrived at the port of New York the morning of May 17th

and docked at Pier 19, Staten Island where discharge was commenced at 1 p.m. today.

Inasmuch as we have not as yet received any indication from you or your broker as to when and how you expect to take delivery of the Fruit consigned to your Company, we have placed you on notice and hereby confirm same that it is our intention to hold you responsible for demurrage at the rate of $2,500 per calendar day beginning from 1 p.m. May 17th until such time as you make satisfactory arrangements to take delivery of the Fruit.

On Monday, May 20, discharge started at 8 a.m. without difficulty as complainant and his buyers were on hand with refrigerated vehicles.

On the next day, May 21, the vessel's agent sent complainant a bill for 2½ days' demurrage (May 17, 1 p.m., to May 20, 8 a.m.) at $2,500 per day, or a total of $6,250. Mr. George Otto, complainant's New York agent, replied to the vessel's agent on May 21 (Exhibit R–41) saying:

We are very much surprised that you should bill us for this charge. We understand that the vessel discharged other cargo upon arrival and that, therefore, the ship itself was not held up by us. As a matter of fact, had you unloaded around the clock, as you state you would have been obliged to, it would have involved overtime expense, also considerable expense for unloading on Saturday and Sunday. We understand, it is not customary for ships therefore to unload in this manner.

Under the circumstances, we feel that your charge for demurrage is not only exorbitant, but an improper charge. Rather than delay the discharge of this vessel, we are enclosing herewith our check dated May 21st, 1946, payable to your order in amount of $6,250.00, which sum we are paying to you under protest, reserving all of our rights against the vessel and/or its agents and/or its owners.

It is to be noted that the last letter quoted does not refer either to any refusal of the vessel owner to discharge on Friday or Saturday or to the fact that complainant was then ready to receive the cargo. Furthermore, complainant's sworn amended complaint, paragraph III. F., filed October 20, 1948, recites:

* * * contrary to the terms and conditions of said charter party and agreement the respondent Wessel Duval & Co., Inc. upon its behalf and upon the behalf of said other respondents wrongfully insisted upon the immediate discharge of complainant's cargo and wrongfully insisted upon the payment of demurrage which said demurrage complainant was wrongfully compelled to pay in the net amount of $2,500.

It is to be noted that there is no statement in the foregoing to the effect that vessel owner refused to discharge the fruit promptly on arrival of the ship.

Upon the record in this case, we find that the vessel owner gave due notice to complainant that the vessel would be ready

to discharge complainant's cargo beginning Friday, May 17, at 1 p.m., that complainant was not able or willing to take delivery until Monday, May 20, at 8 a.m., and that the vessel owner's failure to discharge the refrigerated cargo onto an unrefrigerated dock in the interval was justified.

As already stated, the oral agreement made no reference to demurrage, and, therefore, demurrage as such (based on an expressed agreement) was not collectible.[2] However, in the absence of an express agreement, the charterer was under an implied obligation to receive cargo at such time as was reasonable in view of the existing facts and circumstances. The burden of proof was on the vessel owner to justify the imposition of the charge which it made for the vessel's detention by showing the charterer failed in its duty to accept the cargo seasonably, and to show the extent of the vessel owner's resulting damages. *Empire Trans. Co.* v. *Philadelphia & R. Coal & Iron Co.*, 77 Fed. 919, at page 925.

The vessel owner, after making the initial charge for 2½ days detention at $2,500 per day, modified its position, reducing the charge to $2,500 for 1 day's detention, thus waiving detention damages after 1 p.m. on May 18. There was testimony that stevedore charges on Saturdays and Sundays as well as after 5 p.m. on week days, was 50 percent above regular rates, and that the overtime charges on either Saturday or Sunday to discharge the refrigerated fruit would cost the vessel owner approximately $1,160 per day. The delay in unloading until Monday, therefore, saved the vessel owner this extra expense. There is uncertainty as to how much refrigerated cargo might have been discharged on the half day of Friday if complainant had been ready to accept as was his duty, or whether this would have permitted the vessel to leave the discharging berth earlier than the morning of May 22 when she actually left. Furthermore, there is an absence of testimony as to the reasonable daily value of the vessel. The figure of $2,500 a day, stated to be the owner's usual rate for the vessel, is, of course, not proof of the vessel's fair daily value at the time. Thus, while it appears that complainant's default prevented the discharge of refrigerated cargo beginning Friday at 1 p.m., the record does not show with reasonable certainty what damages the vessel owner sustained

[2] The clause in the bills of lading providing for demurrage must be disregarded, since as between shipowner and charterer the bill of lading does not modify the contract contained in the charter. *The G. R. Crowe, supra.*

therefrom. We therefore conclude, as did the examiner, that the charge of $2,500 collected as demurrage was unreasonable and must be returned. However, the circumstances are not such as in our judgment require the payment of interest on this refund.

A final question remains as to which, if any, of the respondents is liable to make the refund of the $2,500 charge unreasonably collected. This sum was part of $6,250 paid under protest to West Coast Line, Inc., as agent of the vessel owner. This company handled the ship at New York, collected freight and other moneys, and transmitted them, subject to the agent's commission and fee, to the vessel owner.

All complainant's negotiations in New York leading to the charter were with Tage Nielsen, the representative of Rederiet Ocean A/S, the Danish corporation which owned the vessel, but which was not proceeded against in this case. He was not an officer or agent of any of the respondents in this case although he had an office with them at 67 Broad Street. On the door of that office were the names of the three respondents as well as War Shipping Administration and United States Maritime Commission, but not the vessel owner's name.

West Coast Line, Inc., in April and May 1946, was the American agent of Rederiet Ocean A/S and also the agent of respondent J. Lauritzen, the Danish partnership which acted as general agent for Rederiet Ocean A/S. Bills of lading were signed by West Coast Line, Inc., as agent for the master. Respondent Wessel, Duval & Co., Inc., owned substantially all the stock of West Coast Line, Inc., and its vice president and director was the president and director of West Coast Line, Inc. When Chertok applied at respondents' office in April for the person in charge of refrigerated space, he was referred to Nielsen, but neither then or later was he told of the existence of Rederiet Ocean A/S. In a letter addressed to West Coast Line, Inc., under date of April 23, 1946, Chertok specifically asked the "name of the shipping line," but this information was not furnished to him. On May 24, 1946, J. Lauritzen and West Coast Line, Inc., entered into an agreement to maintain a joint service between U. S. Atlantic and Gulf ports to the ports of Chile and other South American countries under the trade name of "West Coast Line," but this agreement was not in existence at the time that the charter was made or when the bills of lading on the West Coast Line form were issued in Chile for the cargo on the *Argentinean Reefer*.

We think it is clear that J. Lauritzen, the general agent for the Danish vessel owner, must assume responsibility for the charter as fully as if it were in fact the vessel owner. J. Lauritzen was doing business at 67 Broad Street as such general agent and must be held responsible for the manner in which the affairs of the vessel owner were there being conducted by Tage Nielsen. In the absence of any disclosure to complainant by either J. Lauritzen or Tage Nielsen of the identity of the vessel owner or carrier with whom complainant was contracting, the agent itself becomes, on familiar principles, legally bound by the contract which it makes. In fact, the identity of the vessel owner and its general agent was so close that even Mr. Broom, the agent's representative in Chile, testified that Lauritzen was the vessel owner. We hold, therefore, that respondent J. Lauritzen is responsible to make the refund of $2,500, but we are not satisfied that there is sufficient evidence to hold either of the other two respondents. There would seem to be no reason to believe that Chertok thought that he was dealing with all three respondent companies when he made the charter just because their names were on the office door. The Master's use of a bill of lading, signed by West Coast Line, Inc., as agent for the Master, fully disclosed the principal's identity (i. e., the master) as far as the bill of lading was concerned. The acts of West Coast Line, Inc., at ship's destination were the usual acts of an agent and would not in themselves involve the agent in a principal's liability. The relationship of respondent Wessel Duval & Co., Inc., as a stockholder in West Coast Line, Inc., is even more remotely connected with the transaction, even though that company's telegraph blanks were used by Tage Nielsen, and that company's South American representative was kept informed as to the progress of negotiations.

FINDINGS

The freight charges collected from complainant for the carriage of refrigerated cargo from Chile to New York in accordance with oral agreement with agents of SS. *Argentinean Reefer* were not unjustly discriminatory, unreasonably prejudicial or unreasonably disadvantageous and did not constitute an unreasonable practice in violation of sections 14, 16, or 17 of the Shipping Act, 1916.

The imposition of the charge of $2,500 as alleged demurrage on the SS. *Argentinean Reefer* at destination was, in the absence

of any agreement for demurrage, an unreasonable practice in violation of section 17 of the Act.

Complainant is entitled to recover $2,500 without interest from respondent J. Lauritzen, but is not entitled to recover any amounts from the other respondents.

Accordingly, an order will be entered directing the payment of $2,500 to complainant by respondent J. Lauritzen.

By the Board.

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

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 9th day of July A.D. 1951

No. 676

D. L. PIAZZA COMPANY

v.

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

It is ordered, That respondent J. Lauritzen be, and it is hereby, notified and directed to pay unto complainant D. L. Piazza Company, Minneapolis, Minnesota, on or before August 13, 1951, the sum of $2,500 as reparation on account of the unlawful collection of that amount as demurrage.

By the Board.

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

FEDERAL MARITIME BOARD

No. 704

AFGHAN-AMERICAN TRADING COMPANY, INC.
v.
ISBRANDTSEN COMPANY, INC.

Submitted June 29, 1951. Decided July 25, 1951

In the absence of undue prejudice or unjust discrimination, the failure of a carrier in foreign commerce to file with the Board an increase in its tariff rate, as required by the order in Docket No. 128, *Section 19 Investigation, 1935*, 1 U.S.S.B.B. 470, affords no basis for an award of reparation to a shipper. Complaint dismissed.

Samuel W. Earnshaw for complainant.
John J. O'Connor for respondent.

REPORT OF THE BOARD

BY THE BOARD:

Exceptions to the report of the examiner were filed by the respondent. Oral argument was heard. Our conclusions differ from those of the examiner.

Complainant shipped refined sugar in bags from New York, N. Y., to Karachi, Pakistan, on January 13 and 31, 1949, and paid to respondent a rate of $19.50 per 2,240 pounds. At the time of shipment, respondent's India, Ceylon, and Burma Outward Freight Tariff No. 2, on file with the Maritime Commission, our predecessor, showed the applicable rate to be $19 per 2,240 pounds. Complainant demands reparation in the sum of $753.75, with interest, being the excess over the tariff rate on file. The examiner recommended that the Board award reparation, with interest.

The material facts have been stipulated and may be summarized as follows: Complainant is an exporter, and respondent is a common carrier by water in foreign commerce subject to the Shipping Act, 1916, as amended. Freight charges on the two shipments of sugar were prepaid by complainant at the $19.50 rate, amounting to $29,396.25. Respondent's tariff on file with

the Maritime Commission at the time in question contained the following provision:

> Rates and conditions contained herein are subject to change without notice and are contingent upon space being arranged.

The parties have also stipulated that respondent intended to change the tariff to reflect the bill of lading rate of $19.50 per ton for the shipment involved, but through oversight or error such change was not filed until May 9, 1950, effective January 2, 1949, and was received by the Maritime Commission on May 11, 1950; also, that respondent did not transport refined sugar in bags for other shippers at the rate of $19 per ton, or transport any sugar in bags between New York and Karachi, Bombay, Colombo, or Calcutta during 1948 or 1949, except the shipment here involved.

Complainant, upon discovering the discrepancy between the rate assessed and the tariff rate on file, filed a claim with respondent, which was rejected. On August 9, 1950, complainant filed an informal complaint with the Board, and in September 1950 was advised by the Board that the controversy did not appear to be susceptible of voluntary adjustment. Thereafter, on November 9, 1950, a formal complaint was filed with the Board.

Complainant alleges that the rates exacted by respondent are discriminatory and unlawful, in violation of sections 16 and 17 of the Shipping Act, 1916, and in violation of the order in Docket No. 128, *Section 19 Investigation, 1935,* 1 U.S.S.B.B. 470.

Since it is stipulated that no other shipper paid lower rates than were charged complainant in this case, there is no showing of undue prejudice in violation of section 16 of the Act or of unjust discrimination in violation of section 17 of the Act. *Remis v. Moore-McCormack Lines, Inc.,* 2 U.S.M.C. 687, 692.

Complainant urges that regardless of actual undue prejudice or unjust discrimination, the rate charged was unlawful because respondent failed to file its new rate in accordance with the order in Docket No. 128, *supra.* The material part of the order in that proceeding, so far as this case is concerned, is as follows:

> (1) Every common carrier by water in foreign commerce shall file with the United States Shipping Board Bureau of this department schedules showing all the rates and charges for or in connection with the transportation of property, except cargo loaded and carried in bulk without mark or count, from points in continental United States, not including Alaska or the Canal Zone, to foreign points on its own route; * * *

(2) Schedules * * * shall be filed as aforesaid within thirty (30) days from the date such schedule, change, modification or cancellation becomes effective.

The rule was established pursuant to section 19 of the Merchant Marine Act, 1920, which authorizes rules and regulations affecting shipping in the foreign trade not in conflict with law in order to adjust or meet general or special conditions unfavorable to shipping in foreign trade.

It is to be noted that the rule requires the filing of new rates within 30 days *after* they become effective. It contains no provision that the carrier may not lawfully charge rates other than the filed rates — in fact, such a provision in the rule would not be consistent or workable in view of the requirement that the new rate need not be filed until 30 days *after* its effective date. The report of the Secretary of Commerce in promulgating the rule shows that it was designed primarily to correct certain methods and practices of foreign-flag nonconference carriers who were openly or secretly soliciting freight at cut rates and creating conditions unfavorable to shipping in the foreign trade. The Secretary pointed out that sections 16 and 17 of the Shipping Act, 1916, placed an obligation on every common carrier by water in foreign commerce to make its rates public and available on equal terms to all shippers in order to prevent undue prejudice and unjust discrimination between shippers. The rule did not go so far as to declare that the charge by the carrier of a rate not filed within 30 days after its effective date was unlawful where no undue prejudice or unjust discrimination was shown.

In this case the parties agreed on the $19.50 rate. It was not, when charged, contrary to law or regulation, since the carrier's old rate on file at the time provided that the old rate was "subject to change without notice", and since the order in Docket No. 128 permitted the filing of a changed rate within 30 days thereafter. The order is quite different from provisions of law affecting rail carriers and coastwise and intercoastal water carriers, which require the filing of rates *before* they become effective so that they may be referred to and checked by the shipper before he pays or agrees to pay a rate.

The question presented in this case is whether the shipper, who agreed to the $19.50 rate, is entitled to a refund because the carrier through oversight or error failed to post the new rates within the 30-day period. We hold he is not so entitled where no undue prejudice or unjust discrimination is shown and where, as here,

there is no showing that the failure caused the shipper in any way to change its position.

Complainant relies on the decisions of the courts and the Interstate Commerce Commission allowing recoveries for all deviations from the published rate, of which *Louisville & Nashville R.R. Co.* v. *Maxwell,* 237 U.S. 94, is typical. And complainant calls attention to the general similarity between the Interstate Commerce Act and the Shipping Act, 1916, referred to by the Supreme Court in *U. S. Navigation Co.* v. *Cunard S.S. Co.,* 284 U.S. 474. But in the latter case the court, at page 480, recognized that "similarity of construction" could not apply where there was "dissimilarity in the terms" of the statutes.

The Interstate Commerce Act, section 6 (3 and 7) [49 U.S.C. 6 (3 and 7)] requires that changed rates be filed with the Commission 30 days *before* their effective date unless a shorter time is permitted, and that no carrier shall collect a greater or less or different rate than the tariff rate on file. The dissimilarity of this statute from the Shipping Act, 1916, and the order in Docket No. 128 is obvious.

Again, complainant relies on decisions of our predecessors awarding reparation to shippers involving interstate and intercoastal carriers by water, of which *Muir-Smith Co. et al.* v. *Great Lakes Transit Corp.,* 1 U.S.S.B. 138, is typical. In those cases recovery has been allowed where the shipper has paid rates in excess of those filed pursuant to section 18 of the Shipping Act, 1916, or different from those filed pursuant to section 2 of Intercoastal Shipping Act, 1933. The last mentioned statutes require that carriers governed by their terms shall file maximum rates or actual rates, as the case may be, with the Board, and expressly prohibit such carriers from charging a greater rate than that on file. The Intercoastal Shipping Act, 1933, which partially superseded section 18 of the Shipping Act, 1916, is more explicit than section 18, and requires that all changes of rates be filed with the Board 30 days *before* they become effective unless a shorter period is permitted, and prohibits carriers subject thereto from collecting a greater or less or different rate from that which is filed.

From the foregoing it is clear that there is similarity in the statutory requirements on the one hand for rail carriers and water carriers subject to the 1933 Act, but on the other hand, different statutory requirements for carriers in foreign commerce.

Complainant also relies on cases where common carriers in foreign commerce agreed to adhere to regular rates established

by the conference, of which they were members, and then by an unfair means or device charged *less* than the established rate. Recovery of the uncollected balances in such cases is the duty of the carrier. See *Prince Line* v. *American Paper Exports*, 55 F. (2nd) 1053. Recovery there, however, is based on violation of the express provisions of section 16 (second) of the Shipping Act, 1916, which provides:

> That it shall be unlawful for any common carrier by water, * * *
> Second. To allow any person to obtain transportation for property at *less* than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means. (Emphasis supplied.)

Here recovery is sought because the carrier charged *more* than the alleged regular rate.

Upon the facts in this case we are of the opinion that complainant is not entitled to reparation. Nothing herein contained, however, shall be deemed in any way to relax the requirements of the rule announced in Docket No. 128, *supra*, which this Board expects common carriers in foreign commerce to comply with faithfully. We do not condone respondent's disregard of its plain duty under this rule.

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 25th day of July A. D. 1951

No. 704

AFGHAN-AMERICAN TRADING COMPANY, INC.
v.
ISBRANDTSEN COMPANY, 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 Board, on the date hereof, having made and entered of record a report stating its conclusions, decision, and findings thereon, which report is hereby referred to and made a part hereof;

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

By the Board.

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

FEDERAL MARITIME BOARD

No. M–34

PRUDENTIAL STEAMSHIP CORPORATION — APPLICATION TO BAREBOAT CHARTER GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS FOR USE IN THE U. S. ATLANTIC-GULF/MEDITERRANEAN SERVICE

REPORT OF THE BOARD

This is a proceeding under Public Law 591, 81st Congress, to consider the application of Prudential Steamship Corporation to bareboat charter two Victory-type, war-built, dry-cargo vessels for operation in berth service between U. S. Atlantic/Gulf ports and ports in the Mediterranean (including Morocco, Algiers, Italy, Greece, Turkey, Syria, Israel, Egypt, and Trieste).

Lykes Bros. Steamship Co., Inc., and American Export Lines, Inc., intervened.

The application was amended at the time of the hearing before the examiner and ports on the Gulf of Mexico and Atlantic coast ports south of Charleston, South Carolina, were eliminated. Lykes Bros. Steamship Co., Inc., withdrew as an intervener after the application was thus amended.

Counsel for applicant stated that applicant requested the discharge ports mentioned in the original application "should be supplemented by a reference to Lisbon, if that be regarded as a Mediterranean port, also Spain, possibly, and Jugoslavia, to the extent that country is not served by Trieste."

The amendment calling for the elimination of Gulf ports and ports south of Charleston and addition of Mediterranean ports of discharge not specifically enumerated in original application was objected to by intervener American Export Lines, Inc. The examiner has found that the notice reference to "ports in the Mediterranean" was sufficient to cover Mediterranean ports in Spain and Jugoslavia. He did not, however, regard Lisbon as a Mediterranean port. On both points we agree with the examiner. We also agree with the examiner that the elimination of Gulf

ports and Atlantic ports south of Charleston and the enumeration of additional Mediterranean ports before the examiner do not affect the Board's jurisdiction in the proceeding.

Since our conclusions in other respects differ from those of the examiner, a review of the facts is considered appropriate.

Applicant has maintained a berth service to the Mediterranean since March 1946. Since the middle of April 1950, twenty-two sailings have been made from North Atlantic ports at irregular intervals. In some months there have been two, three, or four sailings, and in others, one or none. It owns the SS. *Moline Victory*, bareboat charters on a long term basis the SS. *Newberry Victory*, time charters the SS. *Algonquin Victory*, and partially owns the SS. *Paul Revere*, a converted Liberty tanker. All four of these vessels are now being used in applicant's berth service to the Mediterranean. The time charter of the SS. *Algonquin Victory* expires on August 10, 1951, and applicant proposes to replace this vessel with one chartered from the Government, and to also replace the Liberty-type SS. *Paul Revere* because it contends she is not as well suited for the Mediterranean berth service as is a Victory-type vessel.

It is applicant's position that with four Victory-type ships it will be possible to establish a minimum of two sailings a month and maintain a competitive position in the Mediterranean service.

The testimony by applicant's witness indicates that the space available eastbound is not sufficient for the cargo offerings to applicant and, by reason of the fact that for the past nine months its ships had sailed full or down, or full and down, it was necessary for applicant to refuse cargo offerings and to limit its freight solicitations. Applicant further testified that in many instances applicant's vessels had been completely booked two or three weeks in advance of sailings.

American Export Lines offered no testimony in opposition to applicant's evidence on its cargo operations of the recent past, or otherwise to the applicant's case. It relied mainly upon an argument that the past carryings of the applicant do not afford definite proof as to what volume of business might lie ahead. It is true that Public Law 591, for purposes of determining such factual conditions as the adequacy of a service or the availability of vessels under charter from private operators for use in such service, requires consideration of current conditions. In the absence of definite statistics from both applicant and intervener, the testimony as to applicant's present cargo operations as well

as those of the past nine months, which was uncontradicted, is sufficient to serve as a basis for projecting cargo volume, available space, and generally, the market conditions under which the applicant will operate in the immediate future. In any event, there is adequate provision in the statute and adequate provision will be included in any Government charter to applicant to protect competitors in case of materially changed conditions in the future.

In its exceptions the intervener points out that there is a complete lack of evidence in the record that the use of the two vessels applied for is required in the public interest, and that the burden of proof on that issue is upon the applicant. Public Law 591, Eighty-first Congress, does not provide that the *use of the vessels* shall be in the public interest. It provides that war-built, dry-cargo vessels owned by the United States may be chartered for bareboat use in *any service* which, in the opinion of the Federal Maritime Board, is required in the public interest. There is a lack of direct evidence in the record that the service contemplated is in the public interest, which the applicant should have, and we believe readily could have, supplied. This lack might indicate that the case should be dismissed or remanded to the examiner to take fuller testimony on the point. However, in view of our recent consideration of services from this country to the Mediterranean area we can and do take judicial notice of the fact that the service designated in this application is in the public interest. In our decision in M–26, *Pacific Far East Line, Inc.—Charter of War-Built Vessels,* 3 F.M.B. 535, we stated:

> The record amply confirms that the service contemplated is in the public interest. The record shows that the Mediterranean countries are now more dependent than before World War II upon a number of Pacific coast products, Israel being a particularly important destination. Many of these countries are now receiving aid from the United States. *What this Board has said in prior cases with regard to the importance of the service from Atlantic and Gulf ports to the Mediterranean* area applies with equal force to the service here involved from the Pacific coast. (Emphasis added.)

We find nothing in this record which would modify the conclusions so recently reached in prior cases with respect to the Mediterranean services. See also Docket M–19, *American Export Lines, Inc.—Charter of War-Built Vessel,* 3 F.M.B. 455.

The examiner has stated that "the evidence is persuasive that, upon the expiration of the charter of the *Algonquin Victory,* without additional vessels, the trade would not be adequately served." With this conclusion we agree. The record is also clear

that privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service.

The record in this case will support the three statutory findings and a recommendation for the charter of one Victory-type vessel as a replacement for the *Algonquin Victory* after August 10, 1951. We are not at all satisfied, however, that sufficient justification has been shown for the bareboat charter of an additional Government-owned vessel in substitution for applicant's partially-owned vessel now in operation in the service in which charter is applied for. In Docket No. M–14, *Am.-Haw. S.S. Co.—Charters of War-Built Vessels,* 3 F.M.B. 476, we stated, under somewhat analogous circumstances, that while there may be no dispute over the fact that a specified number of vessels is needed in a particular service at the time in question, "it does not follow that there is sufficient justification for the bareboat charter of Government-owned vessels to an operator in substitution for his own privately-owned vessels now in operation in the service under consideration." We do not mean to imply, however, that Public Law 591 forecloses all possibility of substitution for privately-owned vessels of Government-owned chartered vessels in a particular service, but rather that such substitution would require a showing of unusual circumstances which are not here present.

Counsel for the Board, in a memorandum agreeing with the conclusions of the examiner, suggests that the Board in its findings and certification clarify the service intended to be covered, and we agree that such clarification should be included.

FINDINGS AND CERTIFICATION TO THE SECRETARY OF COMMERCE

On the basis of the facts adduced of record the Board finds and hereby certifies to the Secretary of Commerce:

(1) That the service between U. S. Atlantic ports (including the port of Charleston, S. C., but excluding all ports south thereof) and ports in the Mediterranean (including ports in Morocco, Algiers, Italy, Greece, Turkey, Syria, Israel, Egypt, Jugoslavia, and Spain) for which applicant proposes to charter two Victory-type vessels, is required in the public interest;

(2) That such service will not adequately be served without the use of one additional Victory-type, war-built, dry-cargo vessel after withdrawal from such service of the SS. *Algonquin Victory;* and

(3) That privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service.

By the Board.

JULY 26, 1951.

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

FEDERAL MARITIME BOARD

No. 702

INCREASED RATES—ALASKA STEAMSHIP COMPANY

No. 702 SUB 1

NORTHWEST FISH TRAFFIC COMMITTEE

v.

ALASKA STEAMSHIP COMPANY

No. 702 SUB 2

KETCHIKAN COLD STORAGE CO., ET AL.

v.

ALASKA STEAMSHIP COMPANY

No. 702 SUB 3

TERRITORY OF ALASKA

v.

ALASKA STEAMSHIP COMPANY

Submitted June 11, 1951. Decided August 10, 1951

Increased rates on frozen fish from ports in Alaska to Seattle, Washington, not shown to be unreasonable or otherwise unlawful. Board's order of August 29, 1950, vacated and complaints dismissed.

Fred H. Tolan, Robert L. Jernberg, Irwin W. Silverman, and *George Sunberg* for complainants.

Stanley B. Long, Arthur G. Grunke, Ira L. Ewers, and *A. H. Ziegler* for respondent.

Chas. B. Bowling, J. W. Bourke, Chas. W. Bucy, and *Walter D. Matson* for U. S. Department of Agriculture, intervener.

REPORT OF THE BOARD

BY THE BOARD:

Alaska Steamship Company, 30 days or more before the announced effective date, filed proposed increased rates on frozen

fish (hereinafter referred to as the "new rates") from various ports in Alaska to Seattle, Wash., to become effective September 1 and September 5, 1950. Protests were filed praying for suspension pursuant to Intercoastal Shipping Act, 1933, section 3. The Board, by prior order, denied suspension and directed the carrier to impound the revenue resulting from the increase pending filing of formal complaints by protestants and determination as to the lawfulness of the new rates by the Board.

Complaints were duly filed (1) by Northwest Fish Traffic Committee on its own behalf and on behalf of various member corporations dealing in frozen fish in Chicago, Ill., and Seattle, (2) by Ketchikan Cold Storage Co. and other dealers in frozen fish at Ketchikan, Alaska, and (3) by the Territory of Alaska. The first two complaints charged that the new rates were unduly preferential and prejudicial in violation of sections 16 and 17 of the Shipping Act, 1916, and unreasonable in violation of section 18 of the Act, and prayed that the new rates be set aside. The third complaint charged that the rates were unreasonable and prayed for public hearings in Alaska. The Secretary of Agriculture and the Secretary of the Interior intervened in support of the complaints. Hearings were held in Ketchikan and Seattle.

The examiner found that there was no showing that the new rates were unreasonable or otherwise unlawful, and recommended that the complaints be dismissed. Exceptions were filed by some complainants and the matter was submitted without oral argument. We agree with the conclusions of the examiner.

Halibut and salmon constitute the bulk of frozen fish produced in Alaska. The catching of halibut is governed by a treaty with Canada, pursuant to which an International Fisheries Commission determines the volume that may be caught in given areas and fixes the opening and closing of the season which, during the last two years, was between May 1 and some time in July. The salmon season runs from earlier in the year to October. The total fish frozen in Alaska in 1949 was roughly 40 million pounds, of which 11 million were frozen in Ketchikan.

Fishermen bring their catches to port where the fish are sold to buyers making the highest bids. The buyers then arrange to have the fish processed, frozen, and put in cold storage pending shipment. Some frozen fish moves each month of the year, but the heaviest shipping season is between June and October. About 75 percent of all frozen fish originating in Alaska is shipped in

carload lots by water to Prince Rupert, B. C., thence by refrigerator rail car to destinations east of the Rocky Mountains in the United States. A small amount is shipped overland from Seattle. Chicago, New York, and Boston are the principal points of destination where market competition is encountered with fish from the Atlantic, Gulf, and Pacific coasts, the Great Lakes, and even Japan and other foreign countries. Most frozen fish landed in Seattle is placed in cold storage for local distribution along the Pacific coast and throughout the western states.

Frozen fish generally is packed in boxes of five standard sizes and cubic measurements as follows:

100-pound size equaling 4 cubic feet.
200-pound size equaling 8 cubic feet.
300-pound size equaling 13 cubic feet.
400-pound size equaling 14 cubic feet.
500-pound size equaling 18 cubic feet.

As a rule, respondent accepts the weights stenciled on the boxes and shown in bills of lading by shippers. The larger-sized boxes frequently bulge. The bulge is caused by over-packing the boxes or by the natural shape of large fish.

Respondent is the only common carrier transporting frozen fish from Alaska to Seattle. There are, however, small vessels actively engaged in carrying such fish from Alaska to Prince Rupert and Seattle, operating on a charter basis.

According to exhibits of record, respondent originated nearly three times as much frozen fish in southeastern Alaska as in the rest of the entire Territory between 1945 and 1949 inclusive. Cold storage plants are located at Ketchikan, Wrangell, Petersburg, Juneau, Sitka, and Pelican in that area. The originating points in southwestern Alaska are Cordova, Valdez, Latouche, Point Ashton, Port Nellie Juan, and Seward. On Cook Inlet frozen fish is loaded at Seldovia. In the Kodiak Island range the fish is taken on at Port Williams, and, off the Alaska Peninsula, Sand Point has had a cold storage plant since 1948. Small quantities have originated on Bristol Bay since 1948, although there are no cold storage plants there. Some of the smaller shipping ports do not have wharf facilities, and at times frozen fish is loaded directly from fishing vessels, such vessels having freezing equipment. Ketchikan leads all Alaskan ports in producing and shipping frozen fish, and is the last port of call on respondent's southbound schedules.

The latest general investigation into Alaskan rates was *Alas-*

kan Rate Investigation No. 3, 3 U.S.M.C. 43, where a general description of the peculiarities of the trade in that area was set forth.

For many years prior to the new rates, respondent's tariff on frozen fish was on a cubic basis. The new rates are on a weight basis. Complainant Northwest Fish Traffic Committtee furnished respondent with an average weight of 32 pounds per cubic foot for conversion purposes.

The following table prepared from exhibits of record sets forth in concise form the points of origin, distances to Seattle, and the rates, based on a density of 32 pounds per cubic foot.

From	Distance	Rates in dollars and cents				
		Prior to year 1944	Year 1944	Year 1947	Sept. 1, 1950	
	Miles	*Per cubic foot*	*Per cubic foot*	*Per cubic foot*	*Per cubic foot*	*Per 100 pounds*
Ketchikan	757	.21	.2436	.25	.305	.95
Wrangell	859	----------	.261	.265	.32	1.00
Petersburg	907	.225	.261	.265	.32	1.00
Juneau	1,033	.245	.284	.285	.335	1.05
Sitka	1,218	.2625	.3074	.305	.355	1.10
Pelican	1,261	.2625	.3074	.305	.355	1.10
Cordova	1,599	.325	.377	.35	.42	1.30
Seward	1,856	.325	.377	.35	.42	1.30
Seldovia	2,033	.375	.435	.38	.43	1.35
Point Williams	2,068	----------	.435	.38	.43	1.35
Sand Point	2,416	----------	----------	[1] .40	.448	1.40
Bristol Bay	2,345	----------	----------	.50	.50	1.50

[1] This rate was established in 1948 when the cold storage plant was established.

Mileages are those over the usual routes through the inside channel, except that from Bristol Bay the distance shown is on the outside ocean lane direct to Seattle.

The complaints raise three main objections to the new rates: (1) The change of basis from cubic to weight is unlawful; (2) the rates are unduly prejudicial to Ketchikan and unduly preferential to other shipping ports more distant from Seattle; and (3) any increase in frozen fish rates is unreasonable.

Taking up the first complaint, it appears that some of the complainants in this case participated in a movement to obtain through ship and rail rates from Alaskan ports through Seattle to eastern United States destinations. All rail rates are charged on a weight basis. Apparently the same complainants objected vigorously when respondent computed its new rates on a weight basis in order to bring about uniformity between local ship rates and through ship and rail rates. The record shows there was difficulty in assessing proper freight charges based on cubic

rates because of the bulges of the standard fish boxes when packed. The carrier made some effort to re-measure boxes and recompute charges when there were serious bulges, but this practice was not always uniform. Complainants urge that the carrier should not change to a weight basis but should meticulously measure every bulging box. We cannot see that such a practice is necessary. If, for reasons of uniformity with rail practices or for other reasons of practibility, the carrier believes that charges based on a weight rather than on a cubic content are preferable, they should not be set aside for that reason alone. In a similar case, the carrier has been given the option to charge either by weight or by cubic content. *Alaskan Rate Investigation*, 1 U.S.S.B. 1.

It is next charged that the new rates are unduly prejudicial to Ketchikan in violation of sections 16 and 17 of the Shipping Act, 1916. Section 17, of course, applies to rates in foreign commerce only and is not applicable to this case. Section 16, however, is applicable and prohibits any undue prejudice to any person, locality, or description of traffic. Ketchikan complainants contend that the new rates discriminate against that port in favor of every other Alaska port originating frozen fish, in that it narrows the spread of difference in rates from the other ports as against Ketchikan to the disadvantage of Ketchikan. It will be observed from the table above that as distance increases the rate increases, and that Ketchikan, being nearest to Seattle, takes the lowest rate. The alleged discrimination is claimed to result because the percentages of rate differentials at the northern ports over Ketchikan have decreased, thus changing port percentage relationships in favor of the northern ports. They compare the differentials of the new rates with those which existed prior to 1944, and with those resulting from the rate adjustments in 1944 and 1947. For example, prior to 1944 the Petersburg rate differential was 7.1 percent over Ketchikan; in 1947 it was reduced to 6 percent; and on September 1, 1950, it became 5 percent. At Seldovia the drop was more drastic, from 78.6 percent prior to 1944 it became 52 percent in 1947 and 42 percent on September 1, 1950. Similar comparisons are made with differentials at Juneau, Sitka, Pelican, Cordova, Seward, Kodiak, and Sand Point, which show the same trend in varying degrees. All comparisons and percentages are based on the tariff rates reflected in the table herein and do not include war surcharges. By contrast it may be noted that the absolute money differential

between ports is almost the same by the new rates as by the 1947 rates.

Ketchikan complainants also charge undue prejudice on the ground that Ketchikan shipments to Seattle pay a greater ton-mile rate than those from ports more distant. They assert that from Ketchikan the ton-mile rate is 3.46 cents whereas from Sand Point it is 2.14 cents, although the basis for the computation is not explained. Respondent concedes that long hauls yield less gross revenue than short hauls per mile, showing a ton-mile rate of 1.61 cents from Ketchikan and 7.4 mills from Sand Point, computed upon a measurement ton of 40 cubic feet at the rates per cubic foot and the distances shown in the foregoing table.

Respondent testified that it has never used a percentage relationship of port differentials in rate making and that further increases to the distant ports over Ketchikan would dry up northern traffic. That ton-mile revenue should decrease as distance increases is a cardinal principle of rate making. Water carriers are required to pay certain terminal costs such as stevedoring and port charges at each end of any carriage. These charges may vary with port conditions but bear no relation to the number of miles that the cargo is carried. The matter of distance is not controlling as a factor in rates for water transportation. *Eastbound Intercoastal Lumber*, 1 U.S.M.C. 608, 622. Furthermore, it is well established that the question of reasonableness is not a matter of mathematical computation but one of fact. The lessening of the Ketchikan percentage differential in rates under the more distant ports in 1947 apparently caused no loss of business after that date. Ketchikan's freezings of 1948 and 1949 increased substantially over the 1947 figure. Proof is lacking that the new change in percentage differential will have a different effect. The record reveals various considerations, other than price, governing the port at which fishermen choose to deliver their fish: weather and storms; distance from fishing areas to port; shortening of the halibut season which makes unprofitable long trips from the fishing areas; and the imposition by the Territory of non-resident fishing taxes which result in diversion of some fish from Alaskan ports. Furthermore, respondent's testimony develops that prices bid for fish will fluctuate as much as two or three cents in a single day at the same port.

We find, therefore, that the evidence does not support complainants' charge of undue prejudice or unreasonableness based

on respondent's failure to maintain the percentage differentials between ports which existed in prior tariffs or on the ground that the ton-mile rate to Seattle for the haul from Ketchikan is higher than the ton-mile rate from more distant ports.

Finally, complainants charge that the increased rates are unreasonable and impose an undue burden on the frozen-fish industry. Complainants urge that the frozen-fish business has proved unprofitable since 1947, and one of the complainants contends that it has recently been losing money. Further, it is urged that the business is unprofitable because of the tremendous influx of foreign frozen fish into the United States in competition with the Alaskan product. While these facts are doubtless true, they are not proof of unreasonableness of respondent's new rates. In *Eastbound Intercoastal Lumber, supra*, our predecessors said at page 623,

> We cannot require of carriers the establishment of rates which assure to a shipper the profitable conduct of his business. The carrier may not impose an unreasonable transportation charge merely because the business of the shipper is so profitable that he can pay it; nor, conversely, can the shipper demand that an unreasonably low charge shall be accorded him simply because the profits of his business have shrunk to a point where they are no longer sufficient.

The law does not contemplate the equalization of natural advantages and disadvantages through adjustment of freight rates. *Intercoastal Cancellations and Restrictions*, 2 U.S.M.C. 397, 399.

Complainants also charge that the new rates are unreasonable because they single out frozen fish for the present rate increase, thus putting an undue burden on this traffic to its disadvantage in comparison with other commodities carried. The table quoted above shows that respondent's new rate on frozen fish from Ketchikan to Seattle makes an increase over the 1944 rate of approximately 25 percent. There was a minor rate increase from 24.36 cents per cubic foot to 25 cents per cubic foot in 1947, at a time when respondent's other rates were generally increased about 36 percent to meet the carrier's increased operating costs. Respondent states that in realization of the situation of frozen fish packers at that time, the overall 35 percent increase was not then added to the frozen fish rate.

Respondent shows that while frozen fish rates from Ketchikan to Seattle will, as a result of the new rates, show an increase of about 25 percent over 1944, the rate on freight N.O.S. has gone up in the same period 45 percent, and the rate on canned fish

has gone up 70 percent. For the same period, respondent's operating costs, including stevedoring, but exclusive of overhead or return on invested capital, have gone up 82.5 percent.

Respondent shows that the new rates produced a total increase of revenue from all Alaskan ports to Seattle on frozen fish amounting to $2,005.72 in September 1950, and $5,942.63 in October 1950, and are expected to produce in a single calendar year an increase of $33,895.65 from the entire territory of Alaska, including $5,514.53 increased revenue from Ketchikan. For the year 1949 respondent reported total operating revenues of $14,687,441. It thus appears that while respondent's revenue from frozen fish is a relatively small part of its entire business, it is a part which in recent years has not faced the increase in rates imposed upon respondent's other traffic.

Complainants point out that respondent's gross revenue from frozen fish has increased 152 percent since the prior increase in rates without any increase in the number of ships to handle the traffic. This argument is not convincing in the absence of a showing that increase in gross revenue has also brought an increase in net revenue and in the absence of proof that the carrier's present service is inadequate.

The Board has carefully considered the record in this case, including the testimony of the intervener, the Secretary of Agriculture, and the prepared statement of the intervener, the Secretary of the Interior. The Board finds there is no showing that the new rates are unduly preferential or prejudicial, or unreasonable, or otherwise unlawful. Accordingly, an order will be entered vacating the Board's order of August 29, 1950, in Docket 702 and dismissing the complaints in Dockets 702 Sub 1, 702 Sub 2, and 702 Sub 3.

Chairman Cochrane, being absent, took no part in the decision.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 10th day of August A. D. 1951

No. 702

INCREASED RATES—ALASKA STEAMSHIP COMPANY

No. 702 SUB 1

NORTHWEST FISH TRAFFIC COMMITTEE

v.

ALASKA STEAMSHIP COMPANY

No. 702 SUB 2

KETCHIKAN COLD STORAGE CO., ET AL.

v.

ALASKA STEAMSHIP COMPANY

No. 702 SUB 3

TERRITORY OF ALASKA

v.

ALASKA STEAMSHIP COMPANY

These cases being at issue upon complaints 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 Board's order of August 29, 1950, in Docket No. 702, be, and it is hereby, vacated; and

It is further ordered, That the complaints in Docket Nos. 702 Sub 1, 702 Sub 2, and 702 Sub 3 be, and they hereby are, dismissed.

By the Board.

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

FEDERAL MARITIME BOARD

No. M–35

LYKES BROS. STEAMSHIP CO., INC.—APPLICATION TO BAREBOAT CHARTER GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS FOR USE IN THE U. S. GULF/FAR EAST SERVICE (TRADE ROUTE NO. 22—LINE "D")

REPORT OF THE BOARD

This is a proceeding under Public Law 591, Eighty-first Congress, on an application of Lykes Bros. Steamship Co., Inc., to bareboat charter two Victory-type Government-owned, war-built, dry-cargo vessels for use in its subsidized U. S. Gulf/Far East service on Line "D" of Trade Route No. 22 for a minimum of one voyage, and such additional voyages as may be justified by traffic conditions.

The case was heard by an examiner on August 20, 1951, and the examiner has recommended that the required statutory findings and certification be made by the Board. There was no opposition to the application and no exceptions were filed to the recommended decision of the examiner except by Board counsel, who recommends that the charter applied for be limited to one round trip voyage with each vessel. The facts are set forth fully in the examiner's recommended decision and we adopt his statement of facts as our own. We also adopt his recommendation that the Board make the required findings and so certify them to the Secretary of Commerce. Our comments deal with the proposed limitation to one round voyage for each vessel, which has been recommended by counsel of the Board.

In its application the company states that it desires two vessels for a minimum of one voyage each, and such additional voyages as may be justified by traffic conditions. Testimony offered in this case, which is not disputed, shows clearly that applicant's vessels have sailed substantially full from July 1 to August 15, 1951, and that the company has found it necessary to decline a very substantial amount of cargo offered for prompt or reasonably prompt shipment. Applicant has maintained a schedule of

48 sailings per annum on this line for the past two years. The testimony also shows that the vessels moving outbound on this route are all booked full through September, and that the situation is becoming more acute every day and will even become worse during the next 60 to 90 days when the cotton crop becomes available for export. In addition, it is expected that due to increased production in the Philippines of sugar and copra, which will begin to move in volume in November, and a heavy and growing import of logs and lumber from the Philippines, the situation will be equally acute on inbound cargo. The evidence clearly shows that the Board can at this time make the three statutory findings. There appear to be no circumstances in this case which make it appropriate at this time to recommend the placing of restrictions on the charter of these vessels as to time or number of voyages. It is to be noted that the standard form of bareboat charter contains a 15-day termination clause, which the Maritime Administrator is at liberty to exercise at any time changed conditions warrant such termination.

FINDINGS AND CERTIFICATION TO THE SECRETARY OF COMMERCE

Upon the record in this case, the Board finds and hereby certifies to the Secretary of Commerce: (1) That the service considered is required in the public interest; (2) that such service will not be adequately served without two additional vessels; and (3) that privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service.

The Board recommends that adequate provision be made to protect the interest of the Government under its operating-differential subsidy contracts with applicant.

Board member Gatov, being absent, took no part in this decision.

By the Board.

AUGUST 31, 1951.

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

FEDERAL MARITIME BOARD

No. M–35

LYKES BROS. STEAMSHIP CO., INC.—APPLICATION TO BAREBOAT CHARTER GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS FOR USE IN THE U. S. GULF/FAR EAST SERVICE (TRADE ROUTE NO. 22—LINE "D")

The Board should find and so certify to the Secretary of Commerce that the U. S. Gulf/Far East service in which Lykes Bros. Steamship Co., Inc., proposes to bareboat charter two Victory-type, Government-owned, war-built, dry-cargo vessels is in the public interest, that such service would not be adequately served without the use therein of such vessels, and that privately-owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service.

William Radner for applicant.

M. E. Halpern, Joseph A. Klausner, and *Alan F. Wohlstetter* for the Board.

RECOMMENDED DECISION OF A. L. JORDAN, EXAMINER

This is a proceeding under Public Law 591, Eighty-first Congress, on an application of Lykes Bros. Steamship Co., Inc., to bareboat charter two Victory-type, Government-owned, war-built, dry-cargo vessels for use in its subsidized U. S. Gulf/Far East service on Line "D" of Trade Route No. 22 for a minimum of one voyage, and such additional voyages as may be justified by traffic conditions. The vessels are sought to accommodate cargo in excess of the present berth capacity of applicant's owned vessels in this service.

Hearing on the application was held August 20, 1951, pursuant to notice in the Federal Register of August 10, 1951. The usual notice of 15 days was not given because of the urgency of the matter. There was no opposition to the application, and the only testimony of record is that of applicant's vice president in charge of traffic.

Trade Route No. 22 is one of the essential foreign trade routes of the American merchant marine. It has been served by Lykes since 1937 under subsidy contract. Three other American-flag

operators are serving certain segments of this route. States Marine and Waterman primarily to Japan and Korea; Isthmian to some extent with only two out-bound sailings in the first seven months of 1951. Inbound participation by these lines is negligible which practically leaves Lykes as the sole American-flag operator inbound.

Over a million and a half tons of cargo outbound and 700,000 tons inbound move over the route annually. Outbound cargo is principally cotton, fertilizers, chemicals, foodstuffs, petroleum, naval stores, and manufactured goods. Inbound cargo is primarily sugar, copra, canned pineapple, logs and lumber from the Philippines, and rubber, tin, and bauxite from the N.E.I.-Straits area.

Lykes' subsidy contract provides for a maximum of 24 sailings per annum on this route. In addition, by authority of the Maritime Administration, it is permitted to make two additional sailings per month over Line "D" with owned vessels without subsidy. Notwithstanding this, all of its vessels for the past several months on this route have sailed approximately 100 percent full, and substantial cargo offerings had to be declined. Applicant's witness testified that from July 1 to August 15, 1951, Lykes has had to decline more than 77,000 tons of cargo offered for prompt or reasonably prompt shipment, and is already booked full through September on this route. Recent offerings declined for lack of space, for instance, were 10,000 tons of rice, Export-Import Bank financed, to N.E.I.-Straits, and 38,000 drums of gasoline and 5,000 tons of fertilizer for Formosa. The backlog at present, it is stated, is more than enough to fill two Victorys, and cargo is being declined by Lykes for lack of space at the rate of 12,000 tons weekly. This condition, the witness states, is getting worse every day, and will become more acute during the next 60 to 90 days, when the cotton crop becomes available for export. He estimates that in excess of 1,500,000 bales will be exported to the Far East, and states that many of the cotton shippers have requested Lykes to increase its number of sailings to handle this movement.

The situation, the witness states, during the coming months will be equally acute inbound, due to increased production in the Philippines of sugar and copra, the sugar crop to begin to move in volume in November; and unless additional tonnage is provided, essential imports of sugar and copra will not be able to

move to the United States. Also from the Philippines it is expected there will be a continued heavy and growing import of logs and lumber.

The witness testified there is urgent need for additional capacity on this route, both outbound and inbound, and that the need will continue indefinitely.

It is essential, the witness states, that the route be serviced with fast liner-type vessels. Liberty vessels, he says, could be used if no other alternative existed, but their use would result in delay in the delivery of critically needed cargoes such as aviation gasoline and delay of import of such strategic commodities as rubber and tin; and, moreover, the use of Liberty vessels, when Victory vessels are available from the Government fleet, could needlessly impair the standing and reputation of the established American liner operations.

Applicant states that it has recently surveyed the charter market and is advised by New York brokers there are no fast liner-type vessels available for charter; that such Libertys as are available are held at a time-charter rate of $65,000 per month; and that Victory vessels, when available, have been offered at time-charter rates of between $80,000 and $85,000 per month. These rates, the witness testified, cannot be justified for regular, round-trip service in liner-type operation such as provided by Lykes, and operation at the current market rates with such chartered tonnage would produce an out-of-pocket loss in Lykes' service. The witness testified, for instance, that a Victory will carry 6,650 tons of gasoline in 55 gallon drums. At the tariff rate of $34.50 per ton the revenue would amount to $229,425, enabling the company to barely break even.

Lykes purchased three Victory vessels in the early part of this year, and owns other vessels employed in other services. The witness testified that none of these could be withdrawn and put into the service under consideration without impairing such other services.

Counsel for the Board takes the position that applicant for the present has met the three statutory requirements of Public Law 591, Eighty-first Congress, but has not shown that suitable vessels may not be available after one voyage, the length of which is about 4 months. He also suggests that consideration should be given to a charter rate higher than 15 percent.

The record does not justify the limitation suggested by counsel for the Board.

CONCLUSIONS AND RECOMMENDATIONS

The Board should find and so certify to the Secretary of Commerce that the U. S. Gulf/Far East service in which Lykes Bros. Steamship Co., Inc., proposes to bareboat charter two Victory-type, Government-owned, war-built, dry-cargo vessels is in the public interest, that such service would not be adequately served without the use therein of such vessels, and that privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service.

FEDERAL MARITIME BOARD

No. M–20

AMERICAN PRESIDENT LINES, LTD.—APPLICATION TO BAREBOAT CHARTER GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS FOR EMPLOYMENT IN ITS ATLANTIC/STRAITS SERVICE (C–2, TRADE ROUTE NO. 17)

REPORT OF THE BOARD

This proceeding was originally instituted under Public Law 591, Eighty-first Congress, upon application of American President Lines, Ltd., for the bareboat charter of two Government-owned, war-built, dry-cargo AP–2 vessels (Victory type) for use in the company's Atlantic/Straits service (Service C–2 of Trade Route No. 17). The Board, on March 1, 1951, made the required findings and certification to the Secretary of Commerce as to the charter of one vessel in that service (3 F.M.B. 504). The company has now applied for one additional AP–3 or AP–2 Victory-type vessel for use in the same service, and the examiner has made the following recommendation:

> The Board should withhold its findings and certification to the Secretary of Commerce and hold this record open for the purpose of affording applicant an opportunity to submit additional facts in support of the application. It is recommended that further hearing herein be had on or about October 1, 1951.

Exceptions to the examiner's decision were filed by American President Lines, and a memorandum of American-Hawaiian Steamship Company and Luckenbach Steamship Company supports the recommended decision.

Oral argument was held on August 21, 1951.

In its letters dated June 11 and June 18, 1951, applicant stated that because of delays incident to the procurement of the *Anchorage Victory* (which was chartered pursuant to the Board's finding of March 1, 1951, in this case) the company was unable to provide a sailing in February 1951; that delays incurred by that vessel in the Indonesia-Malaya area and the other causes beyond its control indicated that a further break in the service appeared to be inevitable in June or July; and that a maximum of only 11 voyages could be completed in the calendar year 1951

with the 4 vessels then in service. It was further stated that demands for shipping space from both East and West coast outbound for each of the four sailings prior to June 11 had far exceeded each vessel's capacity, and that applicant's vessels had been booked to capacity on inbound voyages. It was pointed out that the *Anchorage Victory* on her latest in-bound voyage found it necessary to decline an offer of 1,000 tons of rubber due to shortage of space.

The company now operates four vessels in this unsubsidized service, one of which is under bareboat charter from the Government pursuant to our prior findings in this case decided March 1, 1951. From the record before us we should have no difficulty in making the findings (1) that the service is required in the public interest, and (2) that privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates. The substantial question here involved is whether there is sufficient evidence upon which the Board can make a finding that the service for which the applicant intends the vessel is not adequately served.

We understand that applicant claims the need of a further ship to make a sailing from New York in November 1951, a date which is sufficiently close at hand so that a decision may be made on the presently available evidence. We feel that applications like the present must stand or fall on the evidence presented when the cases are heard. Applicants are always at liberty to make new applications if new conditions arise.

Applicant contends that a prima facie case of inadequacy of service is made out because applicant's vessels have been shutting out cargo in both directions, and because, due to port delays in the Far East, voyages are taking longer than 120 days to complete, thus making a sailing from the Atlantic coast approximately each 4 weeks a practical impossibility with the 4 ships now available. Applicant points out that by the decision in S–17, dated January 24, 1951, we held that United States-flag services between U. S. Atlantic and California ports and Malaya-Indonesia were inadequate and that there was a need for applicant's C–2 service with a sailing approximately each 4 weeks. Applicant points out that there was a gap of over 50 days between its June 9, 1951, and its July 30, 1951, sailings and that applicant, without an extra ship, might be unable to make a sailing in November. We take official notice, however, that irrespective of applicant's statements of inability to maintain a 120-day schedule, on August

27, 1951, it made application to the Maritime Administration for permission to call its C--2 service vessels out-bound from U. S. Atlantic and Pacific at Guam. Even though it were possible to cover the added Guam port time by a corresponding reduction of port time at some subsequent port (an operation not always attainable), the deviation itself necessary to include Guam tends to diminish the possibility of meeting the basic 120-day schedule of the service.

The inadequacy of service contemplated by the statute is inadequacy of all American-flag operations in the service, not merely the inadequacy of the service of a particular applicant or line. A clear showing by an applicant that its American-flag vessels are unable to provide adequate service is some evidence that all American-flag vessels are unable to do so, and in the absence of evidence to the contrary from competitive or other sources may well be sufficient to support the statutory finding. But it must always be kept in mind that the adequacy or inadequacy of applicant's own operations are important so far as the statutory requirements are concerned only as they are evidence of the total inadequacy of all American-flag operations in the service contemplated. See *Report No. 1783 of Senate Committee on Interstate and Foreign Commerce, Eighty-first Congress, Second Session.*

Luckenbach Steamship Company, appearing in opposition to the application, showed that the present intercoastal carriers could readily carry the estimated 3,000 tons of intercoastal cargo which American President Lines carries on the average eastbound on each sailing of its C–2 service. A witness of Pacific Far East Line, also appearing in opposition to the application, showed that company to be operating between California and Malayan ports with a minimum of 14 sailings eastbound in 1951 and much free space, and that it was in 1951 in a position to carry a substantial amount of additional cargo from the Indonesia-Malaya area to California. Of course, it may be pointed out that the intercoastal service offered by Luckenbach Steamship Company and American-Hawaiian Steamship Company, and the California-Indonesia service offered by Pacific Far East Line covers parts or segments only of the entire Atlantic coast-Indonesia service offered by applicant. Applicant urges that the mere fact that competitors are able to supply segments of the total C–2 service should not be given weight against applicant's claim of inability to provide adequacy over the entire service. We do not need to express our opinion on this point to decide this case. In any event,

competitors along segments of a service may very well be protected in other ways.

The question in this case is whether there is an inadequacy of the service as a whole. In the decision in S–17 it was emphasized more than once that the C–2 service was primarily a Malaya-Indonesia service. The carriage of intermediate cargo between the Philippines and Hong Kong and United States ports was not to interfere with the primary purpose of maintaining a service to and from Malaya-Indonesia. Looking then at applicant's testimony in the light of the primary purpose of its C–2 service, this shows that its vessels on sailing from Atlantic ports carry approximately 40 percent of capacity for the Indonesia-Malaya area and approximately 40 percent for other transpacific ports, leaving apparently some space to be filled at California ports. Applicant urges that its evidence supports the claim that its vessels are fully loaded, and may even have to refuse cargo for some one or more transpacific destinations. When analyzed, however, this testimony does not show that applicant's vessels are concentrating on Indonesia-Malaya cargo, or that there is more of such cargo than the vessels can carry if they exclude shipments to ports which we have declared to be secondary in this service. Similarly, the record shows that while applicant's vessels may be fully loaded on their home-bound voyages when cargo from all ports is considered, there is no showing that they are fully loaded with cargo originating in the Indonesia-Malaya area. In fact, the reverse appears from the evidence. A witness of American President Lines testified that normally a ship should be around 60 to 70 percent loaded leaving Singapore. The witness further testified that even if it were possible to fill the C–2 service vessels at Singapore home-bound, they would not so book them, stating:

> We are trying to give service, and serve all segments of the route. We have shippers that depend on us in the Philippines and Hong Kong, just the same as they do in Indonesia and Malaya.

Thus, when all the evidence is analyzed, it does not support a finding that there has been in the recent past an inadequacy of service on the C–2 service as a whole as outlined in Docket S–17.

Accordingly, on the basis of the record, the Board is unable to make the third finding of inadequacy of service.

By the Board.

SEPTEMBER 13, 1951

(Sgd.) A. J. WILLIAMS,
Secretary

FEDERAL MARITIME BOARD

No. M–16

PACIFIC-ATLANTIC STEAMSHIP CO.—APPLICATION TO BAREBOAT CHARTER GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS FOR EMPLOYMENT IN THE INTERCOASTAL TRADE

No. M–17

POPE & TALBOT, INC.—APPLICATION TO BAREBOAT CHARTER GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS FOR EMPLOYMENT IN THE INTERCOASTAL TRADE

No. M–28

LUCKENBACH STEAMSHIP COMPANY, INC.—APPLICATION TO BAREBOAT CHARTER GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS FOR EMPLOYMENT IN THE INTERCOASTAL TRADE

REPORT OF THE BOARD

This proceeding, instituted under Public Law 591, Eighty-first Congress, is based upon applications of Pacific-Atlantic Steamship Co., Pope & Talbot, Inc., and Luckenbach Steamship Company, Inc., to bareboat charter Government-owned, war-built, dry-cargo vessels for use in the intercoastal trade. The case was heard before an examiner, who has recommended that the Board make the statutory findings: (1) That the service for which Pacific-Atlantic proposes to bareboat charter the *Linfield Victory, Jeremiah S. Black, and Elmer A. Sperry,* and Pope & Talbot proposes to bareboat charter the *Pere Marquette, Albert S. Burleson,* and *M. M. Guhin,* for one additional round voyage each, is required in the public interest; (2) That such service would not be adequately served without the use therein of such vessels; and (3) that privately owned American-flag vessels are not available for charter on reasonable conditions and at reasonable rates for use in such services.

Waterman Steamship Corporation, one of the interveners, has filed exceptions to the examiner's recommended decision as respects the application of Pacific-Atlantic Steamship Company but did not except to that portion of the examiner's recommended decision relating to Pope & Talbot, Inc. The other interveners, West Coast Lumbermen's Association, American-Hawaiian Steamship Company, and American President Lines, Ltd., did not except to the examiner's decision, and Luckenbach, at the hearing before the examiner, withdrew its application. The application of Pope & Talbot was not opposed.

These cases were considered by the Board in January 1951 (3 F.M.B. 489), and again in March 1951. The Board's last report was on April 17, 1951 (3 F.M.B. 525), wherein it was recommended that the applications, as amended, of Pacific-Atlantic Steamship Company and Pope & Talbot, Inc., be limited to one and one-half voyages for each of three vessels operated by those two applicants, such voyages to terminate on the Atlantic coast, with a requirement that the charterers should assume all expenses incident thereto and that the charter hire payable thereunder shall continue to be not less than the 15 percent of the statutory sales price of the vessels chartered as provided in section 5(b) of the Ship Sales Act of 1946, as amended.

The necessary statutory findings were made in both proceedings and the Board authorized the record to be held open for such further hearing or consideration as may be deemed necessary by any party or by the Board in the light of conditions existing at or about the time the voyages are to be terminated.

We adopt the examiner's entire findings of fact and recommendations with respect to the application of Pope & Talbot, Inc. We also adopt his findings of fact and recommendations with respect to the application of Pacific-Atlantic Steamship Company that the service is required in the public interest and that privately owned American-flag vessels are not available for charter on reasonable conditions and at reasonable rates for use in such service. Our other conclusions with respect to the Pacific-Atlantic application basically agree with his recommendation as to the finding of inadequacy of service, as will be noted below.

The vessels applied for by Pacific-Atlantic are the war-built Victory-type *Linfield Victory* and two Liberty-type war-built vessels *Jeremiah S. Black* and *Elmer A. Sperry.*

According to testimony of applicant's witness, Pacific-Atlantic's vessels have been operating in the intercoastal trade eastbound

with capacity loads and, in most instances, westbound; approximately 60 percent of which eastbound is for the transportation of lumber and the remainder for the carriage of general cargo.

Testimony further indicates that in so far as lumber eastbound is concerned other carriers likewise are being offered more lumber than they can carry and the applicant is experiencing no difficulty filling the space allocated for this commodity. As to the general cargo eastbound, it was testified by the witness of the applicant that the canned goods movement is at its peak, which will continue until about the middle of next March. He expressed the view that the canned goods movement will be greater than the vessels in the trade can handle without delay.

It is proposed by applicant that the two Liberty vessels applied for will carry lumber and general cargo eastbound for Baltimore, Philadelphia, New York, and Albany, and on the Victory vessel lumber for these four ports and general cargo for Baltimore and Albany only, the latter arrangement being the result of an agreement between counsel for Pacific-Atlantic and Luckenbach.

As a result of this agreement to limit the carriage of cargo eastbound, Luckenbach Steamship Company withdrew its application and American-Hawaiian Steamship Company does not oppose the application of Pacific-Atlantic Steamship Company.

Waterman Steamship Corporation has excepted to the recommended decision of the examiner, substantially arguing that a privately-owned Victory of the applicant is being operated by its parent corporation, States Steamship Company, in the transpacific trade at substantial profits while on the other hand a Government-owned Victory would be bareboat chartered to applicant at a rate lower than applicant's vessel is being bareboat chartered to its parent company, States Steamship Company. The exceptions point out further that applicant had redelivered to it an owned Victory-type vessel in May 1951, which vessel had been under time charter to Military Sea Transportation Service, which is one of the reasons previously advanced by applicant in various proceedings similar to this as justification for charter of Government-owned vessels in the intercoastal trade. Exceptions further point out that instead of placing "this vessel back in the intercoastal trade in May 1951, the vessel was placed in the transpacific trade." Waterman then stated that applicant has not shown that the vessel redelivered to it in May from M. S. T. S. could not be placed in the intercoastal trade, and what is being asked for is a vessel in substitution for a privately-owned vessel,

which applicant "intended for use in the intercoastal trade" on its availability from M. S. T. S. It is argued that the effect of chartering a Government-owned war-built vessel under the circumstances is tantamount to a substitution of a privately-owned vessel contrary to our comments on such substitutions in the decision in *Docket M–34, Prudential Steamship Corporation—Charter of War-Built Vessels*, 3 F.M.B. 627. We do not feel that the circumstances here are similar to those in Docket M–34.

Whereas applicant has clearly indicated that it is its parent company's intention, when conditions permit, to adjust its two services so that applicant's intercoastal service is tonnaged only with privately-owned vessels, it is not clear that the owned vessel which was under time charter to M.S.T.S. was committed for immediate use in the intercoastal service on its release from time charter. Applicant testified that whereas in this and prior hearings on the same application it argued that one of the factors making it necessary to apply for charter of Government-owned ships in the intercoastal service was the nonavailability of an owned vessel chartered to the military, it was not the only reason. It is also urged in the exceptions that this arrangement will result in substantial losses to the Government because the Government would realize a greater financial return if the *Linfield Victory* were operated under charter in the foreign trade, but this argument becomes unimportant in view of the circumstances stated below.

Subsequent to the filing of exceptions in this case and before a decision by the Board, the Maritime Administrator advised the Board that the *Linfield Victory* will be required by the Maritime Administration for other employment in the Pacific and requested that if the Board determines that statutory findings can be made, that such findings be limited to one round voyage for each of two Liberty vessels, an eastbound voyage for another Liberty vessel, and a westbound voyage for the *Linfield Victory*.

Counsel for applicant has been advised of the requirements of the Maritime Administrator and is satisfied with this arrangement in the event that the Board makes the required findings under Public Law 591.

Counsel for Luckenbach Steamship Company has also been advised of the Maritime Administrator's requirements and has stated that in the event the Board makes the required findings no objection will be interposed to granting Pacific-Atlantic

Steamship Company permission to operate the *Linfield Victory* under bareboat charter on the westbound leg, and will relieve the applicant of any obligation not to carry general cargo for ports other than Baltimore and Albany if such cargo moves in a Liberty vessel.

Counsel for Waterman Steamship Corporation also has been advised of the Maritime Administrator's requirement and has stated in the event the Board makes the required findings that no objection will be interposed to granting Pacific-Atlantic Steamship Company permission to operate the *Linfield Victory* under bareboat charter on the westbound leg, but desires to insist on its objection to the principle of using bareboat chartered vessels, regardless of type, in the intercoastal service in competition with privately-owned vessels.

It is noted, however, that this objection has been raised by Waterman by exceptions as to chartering of Government vessels to Pacific-Atlantic and not to the chartering of vessels to Pope & Talbot. Waterman did not offer evidence to controvert testimony of applicants on inadequacy of service.

Under the circumstances, the Board does not find that the exceptions of Waterman Steamship Corporation in this case prevent statutory findings required to grant the application of Pope & Talbot for one additional voyage for three Liberty ships, and the application of Pacific-Atlantic for one additional voyage for two Liberty ships and westbound voyage for the *Linfield Victory* and one eastbound voyage for one Liberty ship.

FINDINGS AND CERTIFICATION TO THE SECRETARY OF COMMERCE

On the basis of the facts adduced of record the Board finds and hereby certifies to the Secretary of Commerce:

1. That the service considered is required in the public interest;

2. That such service will not be adequately served without the use by Pope & Talbot, Inc., of three Liberty-type, war-built, dry-cargo vessels for one round voyage each, and by Pacific-Atlantic Steamship Company of two Liberty-type, war-built, dry-cargo vessels for one round voyage each and the Victory-type, war-built vessel *Linfield Victory* for a westbound voyage and one Liberty-type, war-built, dry-cargo vessel for one eastbound voyage, and

3. That privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service.

RECOMMENDATION

It is recommended that applicants' obligations as to redelivery of the vessels at an Atlantic coast port, except as to the *Linfield Victory,* as set forth in the Board's decision of April 17, 1951, be continued in effect except that applicant Pacific-Atlantic Steamship Company be permitted to terminate on the Pacific coast the voyage of the *Linfield Victory,* both charterers assuming all expenses incident to the redelivery of the vessels involved in this proceeding as follows:

Pope & Talbot, Inc., three Liberty vessels for delivery Atlantic coast port.

Pacific-Atlantic Steamship Co., three Liberty vessels for delivery Atlantic coast port.

Pacific-Atlantic Steamship Co., one Victory vessel (*Linfield Victory*) for delivery on Pacific coast.

By the Board.

SEPTEMBER 14, 1951.

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

FEDERAL MARITIME BOARD

No. M–16

PACIFIC-ATLANTIC STEAMSHIP CO.—APPLICATION TO BAREBOAT CHARTER, GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS FOR EMPLOYMENT IN THE INTERCOASTAL TRADE

No. M–17

POPE & TALBOT, INC—APPLICATION TO BAREBOAT CHARTER GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS FOR EMPLOYMENT IN THE INTERCOASTAL TRADE

No. M–28

LUCKENBACH STEAMSHIP COMPANY, INC.—APPLICATION TO BAREBOAT CHARTER GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS FOR EMPLOYMENT IN THE INTERCOASTAL TRADE

The Board should find and certify to the Secretary of Commerce that the service for which Pacific-Atlantic Steamship Company and Pope & Talbot, Inc., propose to bareboat charter Government-owned, war-built, dry-cargo vessels is required in the public interest; that such service would not be adequately served without the use therein of such vessels, and that privately owned American-flag vessels are not available for charter on reasonable conditions and at reasonable rates for use in such service.

William I. Denning for Pacific-Atlantic Steamship Company.

Odell Kominers for Pope & Talbot, Inc., Luckenbach Steamship Company, Inc., and American-Hawaiian Steamship Company.

Sterling F. Stoudenmire, Jr., for Waterman Steamship Corporation.

Willis R. Deming for American President Lines, Ltd.

C. A. Luce for West Coast Lumbermen's Association.

M. E. Halpern, Joseph A. Klausner, and *Alan T. Wohlstetter* for the Board.

RECOMMENDED DECISION OF F. J. HORAN, EXAMINER

This is a proceeding under Public Law 591, Eighty-first Congress, concerning applications of Pacific-Atlantic Steamship

Company, Pope & Talbot, Inc., and Luckenbach Steamship Company, Inc., hereinafter called Pacific-Atlantic, Pope & Talbot, and Luckenbach, respectively, to bareboat charter Government-owned, war-built, dry-cargo vessels for use in the intercoastal trade.

West Coast Lumbermen's Association, Waterman Steamship Corporation, American-Hawaiian Steamship Company, and American President Lines, Ltd., intervened.

Luckenbach, at the hearing, withdrew its application.

There is no opposition to the application of Pope & Talbot. Waterman Steamship Corporation, hereinafter called Waterman, opposes the application of Pacific-Atlantic. West Coast Lumbermen's Association requests that both applications be granted.

The charters for which Pacific-Atlantic and Pope & Talbot make application would, in effect, be extensions of those which the Board in its report herein on April 17, 1951, recommended be limited to one and one-half voyages for each vessel applied for, such voyages to terminate on the Atlantic coast. In that report the Board also stated that the record would be held open for such further hearing or consideration as might be deemed necessary by any party or by the Board in the light of conditions existing at or about the time the voyages were to be terminated. It appears that the first of the voyages referred to, that of the *Jeremiah S. Black,* will be terminated about September 15, 1951. By the applications, Pacific-Atlantic seeks to charter the *Linfield Victory* and the two Liberty-type vessels *Jeremiah S. Black* and *Elmer A. Sperry,* and Pope & Talbot seeks to charter the three Liberty vessels *Pere Marquette, Albert S. Burleson,* and *M. M. Guhin,* for one additional round intercoastal voyage each.

Witnesses for applicants and the West Coast Lumbermen's Association, through whom all of the evidence of record was presented, all testified to the effect that there is a shortage of freight space in the intercoastal trade for the movement of lumber.

In addition to the three vessels chartered to Pacific-Atlantic, this applicant is operating in the intercoastal trade one Victory-type vessel owned by it and one such vessel owned by States Steamship Company, of which it is a subsidiary. It serves the Columbia River area, Coos Bay, Newport, San Francisco Bay ports, Long Beach, and San Diego, on the Pacific coast, and Baltimore, Philadelphia, New York, and Albany, on the Atlantic coast, carrying lumber and general cargo eastbound and general cargo, largely steel products, westbound. Since last April, it was testified, this carrier's ships have been transporting capacity

loads eastbound and probably in most instances westbound. About 60 percent of the capacity of Pacific-Atlantic's vessels is utilized, eastbound, for the transportation of lumber, and the remainder for the carriage of general cargo. No difficulty has been experienced by this applicant in filling with lumber the space which it has allocated for that commodity, and it appears that the other intercoastal carriers likewise are being offered more lumber than they can carry. Nor is applicant having any difficulty in filling the space allocated by it for eastbound general cargo. Its vice president testified that the canned-goods season is at its peak and will last until about the middle of next March and that there should be a much greater volume of canned goods than the ships in the trade can handle without delay. At the time of hearing, in the San Francisco Bay area alone, applicant had booked for a vessel in loading berth and one expected to arrive during the following week approximately 4,000 tons of general cargo and had requests for space for 4,300 tons in excess of what it could lift on those two vessels.

Pacific-Atlantic proposes to load the two Liberty vessels for which it has applied with lumber and general cargo for all four of the Atlantic ports mentioned above, and the *Linfield Victory* with lumber for such ports and general cargo for Baltimore and Albany only. It was due to the elimination of New York and Philadelphia as general-cargo ports for the *Linfield Victory* that Luckenbach, which serves those ports, withdrew its application. For the same reason, the application of Pacific-Atlantic is not opposed by American-Hawaiian Steamship Company.

Vessels owned by Pacific-Atlantic which are not employed in the intercoastal trade are being operated in transpacific service, carrying for the most part military and Government cargo.

Pope & Talbot intends to use the vessels for which it has made application exclusively in the carriage of lumber eastbound, with the possible exception of occasional shipments of bulk silicate of soda. Its witness testified that, though the need for ships to carry lumber is not as acute as it was at the time of the last decision herein, it is still urgent. He testified further that, despite efforts of Pope & Talbot to accommodate demands made upon it for space, it has had to turn cargo away.

Westbound, Pope & Talbot operates from Baltimore, primarily, and Philadelphia. There is a considerable volume of low-grade freight, in addition to steel, available at Baltimore for intercoastal movement, and it is such freight that Pope & Talbot en-

deavors to obtain. It was testified that this applicant's ships sail westbound reasonably full.

Besides the three ships chartered to it, Pope & Talbot is operating in the intercoastal trade four vessels of its own. These call at Puerto Rican ports with lumber and general cargo in addition to serving intercoastal ports. Applicant also owns two other vessels. One of these is under charter to the Military Sea Transportation Service, and the other is employed in the service of its subsidiary, Pacific-Argentine-Brazil Line, Inc., between the Pacific coast of the United States and the East coast of South America as a result of a finding of the Board that an actual emergency existed necessitating the operation of the vessel on that route. Thus, Pope & Talbot owns no vessel not employed by it in the intercoastal trade which it is free at this time to operate in that trade in place of any of the vessels which it has under charter.

Time-charter rates prevailing on both the Atlantic and Pacific coasts, which range from $60,000 to $70,000 per month for Liberty vessels, prohibit the charter of privately owned American-flag vessels for use in the intercoastal trade.

The importance of the intercoastal trade has been recognized by the Congress, the Interstate Commerce Commission, the Maritime Commission, and the Board. That the trade would not be adequately served without the use therein of the vessels applied for, so far as the movement of lumber is concerned, is not disputed. Nor is it disputed that the rates being asked for the charter of privately owned American-flag vessels are unreasonable for the intercoastal trade.

Waterman opposes Pacific-Atlantic's application because, if the application should be granted, the vessels applied for therein would be used in carrying general cargo to Baltimore. The Interstate Commerce Commission recently granted Waterman a certificate to operate from California ports to Baltimore and the South Atlantic, and an announcement has been made to the effect that such service will be inaugurated in the early part of September 1951. There is no showing, however, that, with this service but without that of the vessels for which Pacific-Atlantic has made application, Baltimore would be adequately served. According to the announcement referred to, Waterman recognizes the need for additional service to Baltimore.

FINDINGS AND CERTIFICATION

The Board should find and certify to the Secretary of Commerce (1) that the service for which Pacific-Atlantic proposes to bare-

boat charter the *Linfield Victory, Jeremiah S. Black,* and *Elmer A. Sperry,* and Pope & Talbot proposes to bareboat charter the *Pere Marquette, Albert S. Burleson,* and *M. M. Guhin,* for one additional round voyage each, is required in the public interest; (2) that such service would not be adequately served without the use therein of such vessels, and (2) that privately owned American-flag vessels are not available for charter on reasonable conditions and at reasonable rates for use in such service.

FEDERAL MARITIME BOARD

No. M–19

AMERICAN EXPORT LINES, INC.—APPLICATION FOR BAREBOAT CHARTER OF GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSEL FOR USE IN THE SERVICE BETWEEN U. S. NORTH ATLANTIC AND MEDITERRANEAN PORTS

REPORT OF THE BOARD

This proceeding was originally instituted under Public Law 591, Eighty-first Congress, upon application of American Export Lines, Inc., for the bareboat charter of a Government-owned, war-built, dry-cargo vessel (Victory type) for use, without subsidy, in the company's North Atlantic-Mediterranean service (applicant's line B) for a 6 months' period. The Board on January 11, 1951, made the required findings and certification to the Secretary of Commerce as to the charter of one Victory-type vessel in that service. Thereupon the *Elmira Victory* was chartered to the applicant without subsidy, and with the agreement of the applicant to incorporate any profits therefrom in its subsidized earnings. The company has now applied for an extension of the charter of this ship for an additional 6 months. Due notice of hearing on the second application was published in the Federal Register and a hearing was held before the examiner on August 28, 1951. The examiner's report, served September 7, 1951, recommends that the Board should make the necessary statutory findings and certification to the Secretary of Commerce permitting an additional 6 months' charter of the vessel in the service indicated. No interveners opposed the application, and no exceptions have been filed to the examiner's report. We agree with the examiner's conclusions.

The testimony in the case shows that the service between U. S. North Atlantic and Mediterranean ports continues to be in the public interest, not only because of its general importance, but also as the result of world-wide conditions which influence and augment the flow of military and related supplies from this country to various countries in the Mediterranean areas served

by applicant. As recently as July 26, 1951, in Docket No. M–34, *Application of Prudential Steamship Corp.*, 3 F.M.B. 627, we made a finding that this service was in the public interest.

The record supports the examiner's finding that there are no suitable privately owned American-flag vessels available for charter by private operators on reasonable conditions and at reasonable rates for use in the service. Applicant's witness testified that there were at the time of the hearing no vessels of type suitable for applicant's service available in the open market, regardless of rate.

Applicant offered testimony that it planned to continue the use of the *Elmira Victory* on that part of its Line B service running from North Atlantic ports to Venice, Trieste, and Fiume. Applicant's witness testified that the volume of traffic moving from U. S. North Atlantic ports to the Mediterranean area is now very heavy and that it is likely to remain so for some time, although applicant's vessels have not always sailed full. The unused space on sailing was accounted for by the nonarrival at loading port of cargo intended for particular sailings, or by industrial interruptions, such as strikes. In general, however, applicant's witness felt that presently-operating American tonnage in this service is not now able to handle the offered traffic as a whole and probably will not be able to do so in the foreseeable future. Applicant pointed out that its Line B service to the Mediterranean was formerly supplied by four vessels calling at Genoa, Leghorn, Naples, Venice, Trieste, and Fiume on a fortnightly basis with a turnaround of about 56 days. To improve this service, applicant made a division so that three vessels now call at Genoa, Leghorn, and Naples on a fortnightly basis, with a turnaround of about 42 days, and two vessels, including the *Elmira Victory*, call at Venice, Trieste, and Fiume on a monthly basis. Furthermore, applicant's vessels of another line running between U. S. North Atlantic ports and Israel also call at Venice, Trieste, and Fiume, so that with applicant's line B vessels these last-named ports are furnished fortnightly service. Applicant frankly states that the continued use of the *Elmira Victory* in this group of vessels serving the ports of Venice, Trieste, and Fiume is also important to applicant in order that it can develop its long-range plans to round out its general program.

We base our findings in this case, that the service for which the application is made is not now adequately served, on the general requirements of the trade indicated above rather than

on the operator's desire to develop its long-range program.

At the present time applicant has one owned vessel, the *SS. Exmouth*, under charter to Military Sea Transportation Service. Since the withdrawal from its Indian service and charter to Military Sea Transportation Service of this vessel was a factor in applicant's original application, and was considered by the Board in its original findings in this case, it would seem that any release by Military Sea Transportation Service of applicant's owned C–3 type vessel might provide applicant with sufficient owned tonnage to meet its needs on the service here in question without the use of a Government-owned chartered vessel that may be granted pursuant to findings of the Board in this case.

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

On the basis of the facts adduced of record, the Board finds and hereby certifies to the Secretary of Commerce:

1. That the service under consideration is required in the public interest;

2. That such service is not adequately served; and

3. That privately owned American-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

The Board recommends that in any extension of charter that may be made with applicant, provision be included to protect the interests of the Government under its operating-differential subsidy contracts with applicant, and that provision be made for review of the charter in the event that applicant obtains redelivery of its owned vessel now under charter to Military Sea Transportation Service.

Chairman Cochrane, being absent, took no part in this decision.

By the Board.

SEPTEMBER 21, 1951.

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

freight type vessels, to make a minimum of 17 voyages and a maximum of 20; with 5 C–2 freight vessels, to make a minimum of 16 voyages and a maximum of 20; and with 3 C–1A freight vessels, to make a minimum of 10 voyages and a maximum of 12 per annum, the latter vessels serving primarily shallow water ports of North Brazil. The applicant also operates a subsidized service on Trade Route 14 between the Gulf and the West coast of Africa with a feeder service from African ports not directly served. In mid-1950 the services between Gulf and South American ports were heavily overtonnaged. Upon the return of applicant's vessel *Del Alba* from South America to New Orleans in June 1950, that vessel was chartered to Military Sea Transportation Service, which then greatly needed tonnage, the applicant feeling at that time that it could make its required number of sailings without the *Del Alba*.

Because of the need for an additional vessel in the West African service, applicant applied for and received permission from the Maritime Administration, in March of 1951, to transfer one of its South American C–1A vessels, the *Del Campo*, to its African service for use therein for not more than four voyages to be completed not later than March 31, 1952. On about March 25, 1951, or about the same time that the *Del Campo* was transferred to the West African service, the *Del Alba* was returned by the Military Sea Transportation Service and was reintroduced into applicant's South American service.

Applicant's witness has testified that the situation on the West African route has not improved, but, in fact, has become more acute, and indicates that the withdrawal of the *Del Campo* from the West African service for return to the South American service would only further aggravate the situation on the West African route. Applicant intends to apply to the Maritime Administration for permission to use the *Del Campo* in that service for at least two additional voyages beyond March 31, 1952.

Port congestion on Trade Route 20 has, in the meantime, been steadily increasing from the beginning of 1951. Applicant has, consequently, had fewer sailings than scheduled. In July 1951, applicant considered applying to the Government for the chartering of an additional vessel for use on Trade Route 20. The situation was aggravated when applicant's vessel, the *Del Mar*, went on the rocks at Recife on August 27, 1951, and was so badly damaged as to be unable to make her October 11 sailing from the Gulf, and probably to be unusable until December 1951.

Applicant's witness has testified that there is a considerable amount of southbound cargo available for current and near-future sailings for which it has no available space. Northbound coffee offerings to applicant in 1951 are expected to exceed the 1950 figure by more than 500,000 bags. Although applicant's vessels have not always sailed full northbound, its witness stated that coffee is sold in the United States on a position basis and that the vessel that is in position is the one which gets the business, and that in order to obtain such business there must be frequent sailings and proper spacing. Foreign-flag vessels in the trade, according to the witness, are sailing substantially full, and one foreign line recently chartered an additional vessel for early October sailing.

From the above record it is clear that the service on Trade Route 20 will not be adequately served without an additional vessel in the immediate future.

Applicant has been advised by brokers that there are no suitable privately-owned vessels available for use by applicant in this service for the time desired at reasonable rates. C–1A type vessels are most suitable for applicant's needs because of their shallow draft, whereas Victory-type vessels are larger than required. Applicant's witness testified that one Victory-type vessel might possibly be obtained in September at a time charter rate of $90,000 a month, but this vessel was available for one month only and, therefore, not adaptable to applicant's needs. Accordingly, it appears that the examiner's findings that there are no suitable privately owned American-flag vessels available for charter by private operators on reasonable conditions and at reasonable rates is supported by the record.

The examiner has recommended that the statutory findings be made, and that the charter be limited to three round-trip voyages. A round-trip voyage requires approximately 90 days, and, therefore, three such voyages will require approximately 9 months. It appears, however, that within approximately 6 months the *Del Mar* should be back in service, and the *Del Campo,* applicant's C–1A-type vessel, will be due from the West African service. Accordingly, it is not certain that applicant's need for chartered tonnage on Trade Route 20 will continue longer than that period.

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

On the basis of the facts adduced in the record, the Board finds and hereby certifies to the Secretary of Commerce:

1. That the service under consideration is required in the public interest;

2. That such service is not adequately served; and

3. That privately owned American-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

The Board recommends that any charter that may be granted pursuant to the recommendations in this case be for an indefinite period, subject to the usual right of cancellation by either party on 15 days notice, and that the Administrator review the charter prior to March 31, 1952, to determine what effect the then status of the *Del Campo* and the *Del Mar* as to their future use may have on the continued use of the Government-owned chartered vessel on Trade Route 20. The Board also recommends that any such charter include provisions to protect the interest of the Government under the operating-differential subsidy agreement with applicant.

Chairman Cochrane, being absent, took no part in this decision.

By the Board.

SEPTEMBER 21, 1951.

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

FEDERAL MARITIME BOARD

No. M–21

LYKES BROS. STEAMSHIP CO., INC.—APPLICATION TO BAREBOAT CHARTER GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS FOR EMPLOYMENT IN THE U. S. EAST GULF/UNITED KINGDOM, EUROPEAN CONTINENT, BALTIC, AND SCANDINAVIAN SERVICE (TRADE ROUTE NO. 21), AND IN THE U. S. GULF & SOUTH ATLANTIC/MEDITERRANEAN & BLACK SEA SERVICE (TRADE ROUTE NO. 13)

William Radner for applicant.
Allen C. Dawson for the Board.

REPORT OF THE BOARD

This proceeding was instituted pursuant to Public Law 591, Eighty-first Congress, upon the application of Lykes Bros. Steamship Co., Inc., to extend the existing charters of five Victory-type, Government-owned, war-built, dry-cargo vessels, and to bareboat charter three additional vessels of the same type, in the company's subsidized services between U. S. South Atlantic and Gulf ports and Mediterranean ports (Trade Route No. 13), and between U. S. Gulf ports and the United Kingdom, Ireland, Continental Europe, Scandinavian, and Baltic ports (Trade Route No. 21).

Applicant is presently operating five Victory-type ships in the above-mentioned services under bareboat charter pursuant to the findings and certification of the Board in this case, dated March 19, 1951 (3 F.M.B. 510). On August 8, 1951, applicant requested that the charters be extended because of anticipated heavy traffic movements during the forthcoming fall and winter seasons. Applicant, on September 6, 1951, requested that its application be amended so as to include a request for the bareboat charter of three additional Victory-type ships for an indefinite period. Notice of hearing on the original application was published in the Federal Register of September 12, 1951, and on the amended application, in the Federal Register of September 21, 1951. Because of the urgency of the matter the usual 15 days' notice was not given. Hearing on the application, as amended, was held be-

fore an examiner on September 25, 1951. No party appeared in opposition to the application, although counsel for the Board participated in the examination of applicant's only witness.

The examiner has recommended in his decision, which was served on October 2, 1951, that the necessary statutory findings be made by the Board to the Secretary of Commerce. Counsel for the Board, the only party other than applicant appearing at this hearing, has given notice that he will file no exceptions to the examiner's recommended decision.

It appears from the record that the current traffic situation over Trade Routes 13 and 21 is somewhat similar to the traffic situation which existed at the time that the Board made its previous determination in this case on March 19, 1951, except that during the forthcoming fall and winter months it is anticipated that the volume movement of cargo will materially increase as a result of the huge cotton crop in prospect in the United States. The Department of Agriculture has estimated that a cotton crop of approximately 17,200,000 bales will be produced, which represents a substantial increase over the crop of last year. Export quotas on cotton were eliminated on September 25, 1951, and applicant's cotton shippers predict an exceptionally heavy export movement over Trade Routes 13 and 21. At the time of the hearing, all of applicant's scheduled outbound September sailings over the above routes were practically fully booked, except for space held in reserve to fulfill outstanding contracts. From all present indications, there will be a continued heavy movement of foodstuffs, carbon black, and miscellaneous cargo, in addition to the prospective heavy volume of cotton.

During the first 8 months of 1951, applicant has refused a total of 207,000 tons of cargo for export shipment over Trade Route 13, and, during this period, has also refused a total of 267,590 tons for export shipment over Trade Route 21. In addition, for the months of September and October, applicant has already turned down 67,000 tons of Trade Route 13 export cargo and 49,955 tons of Trade Route 21 export cargo. Among the commodities that applicant has been forced to decline are lubricating oil and other petroleum products, grain, phosphorous, iron, carbon black, hardwood lumber, cottonseed meal and cake, machinery, tobacco, cotton, Gilsonite, corn in bags, grain in bulk, sulphur, phosphate, powdered milk, flour, fire clay, and numerous other commodities, including considerable cargo offered by the Army and Military Sea Transportation Service.

The eight vessels covered by this application will provide between four and five voyages per month, and they will handle approximately 37,000 tons of export cargo per month. Since five of the vessels are already in operation, the cargo turned down by applicant reflects the cargo turned down after taking into account the capacity of these five ships. It appears from the record that applicant will be able to utilize the full capacity of the eight vessels.

In addition to the above facts, which support a finding that the trade is not adequately served, we take official notice of the legislation now pending before Congress which, if passed, will provide for substantial additional appropriations for military and economic aid to Europe. See *Report of the Conference Committee on H. R. 5113, Senate Document No. 73, Eighty-second Congress, First Session.* Any such additional Government aid should substantially increase the export traffic on both Trade Routes 13 and 21. We also take official notice of an expanding public interest in Trade Route 13 because of the recent extension of the North Atlantic Pact to include Greece and Turkey, and because of the recent United States loans to Spain which have caused that country to become very active in the export market. Applicant's witness stated that in September 1951 the company had refused 6,000 bales of cotton for export to Spain, which subsequently was shipped via an Italian steamer.

Despite this situation of greatly increased traffic on Trade Routes 13 and 21, other American-flag operators on the whole have decreased their sailings over these routes. On Trade Route 13, during the first 8 months of 1950, other American-flag lines made a total of 70 sailings as compared with only 26 sailings during the same period in 1951. Similarly, on Trade Route 20, the only other American-flag operators made 34 sailings during the first 8 months of 1950 as compared with 23 sailings during the comparable period in 1951.

From the above record it is clear that the services under consideration are required in the public interest and that these services will not be adequately served without the vessels applied for.

Applicant has been informed by its broker that there are no suitable privately-owned vessels available at the present time for short or long term charter at reasonable rates. The only types of vessels suitable for service on these routes are Victory and C-type vessels. Applicant's witness testified that the company had canvassed the market and that no Victory or C-type vessels were available at any price. Accordingly, it appears that the record sup-

ports the finding that there are no suitable privately owned American-flag vessels available for charter by private operators on reasonable conditions and at reasonable rates.

In our decision of March 19, 1951, pursuant to which applicant was granted the charter of five Victory-type vessels, we declined to recommend that the chartered vessels be restricted to one particular trade route or service. In view of the fact that vessels operating on Trade Routes 13 and 21 carry predominantly export cargo from Gulf ports, we believe that it is in the best interest of the Government and the public to allow applicant to employ the chartered vessels interchangeably over these routes as the public need dictates. Applicant has authority under the terms of its operating-differential subsidy agreement with the Board to use its own subsidized vessels interchangeably on these two trade routes. It would appear unnecessary for the Board, therefore, to recommend that any such restrictions be placed on these vessels which would prevent them from being utilized most advantageously as the exigencies of the Gulf trade may require.

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

On the basis of the facts adduced in the record, the Board finds and hereby certifies to the Secretary of Commerce:

1. That the services under consideration are required in the public interest;
2. That such services are not adequately served; and
3. That privately owned American-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

The Board recommends that the charters which may be granted pursuant to the recommendations in this case be for an indefinite period, subject to the usual right of cancellation by either party on fifteen days' notice, and subject further to annual review of the charter as provided in Public Law 591. The Board also recommends that any such charter include provisions to protect the interests of the Government under the operating-differential subsidy agreement with applicant.

By the Board.

OCTOBER 8, 1951.

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

3 F. M. B.

FEDERAL MARITIME BOARD

No. M–37

LYKES BROS. STEAMSHIP CO., INC. — APPLICATION FOR BAREBOAT CHARTER OF GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSEL FOR EMPLOYMENT IN THE GULF/SOUTH AND EAST AFRICAN SERVICE (TRADE ROUTE NO. 15-B)

William Radner for applicant.
Allen C. Dawson for the Board.

REPORT OF THE BOARD

This proceedings was instituted pursuant to Public Law 591, Eighty-first Congress, upon the application of Lykes Bros. Steamship Co., Inc., for bareboat charter for an indefinite period of one Victory-type, Government-owned, war-built, dry-cargo vessel for employment in its subsidized service between United States Gulf ports and ports in South and East Africa (Trade Route No. 15–B, Line E in applicant's subsidy contract). Notice of hearing on the application was published in the Federal Register of September 15, 1951, and hearing was held on September 25, 1951. Because of the urgency of the matter, the usual 15 days' notice was not given. Counsel for the Board participated in the examination of applicant's only witness. There was no opposition to the application.

The examiner's report was served on October 4, 1951, and counsel for the Board, the only party other than applicant appearing at the hearing, has given notice that he will file no exceptions thereto. The examiner has recommended that the Board make the necessary statutory findings to the Secretary of Commerce.

Trade Route 15–B has been determined by the Maritime Commission to be an essential trade route. Applicant is the only American-flag operator serving this route. It is in addition the only carrier of any nationality operating over the entire route and providing a regular service from South and East Africa to the Gulf of Mexico. Generally speaking, applicant's service covers Gulf ports and all ports in South and East Africa. Under its operating-differential subsidy agreement, applicant is permitted to

make a maximum of 13 sailings per year, or approximately 1 sailing per month.

Cargo offerings for transport over Route 15–B have increased substantially during the past several months, and applicant's vessels were, at the time of hearing, booked full through September, with more cargo being then offered for its October steamer than it could possibly handle. Applicant has turned down only a small amount of inbound cargo, but has found it necessary to decline substantial outbound cargo offerings. Between February and October, applicant turned down cargo offered for transport to South and East Africa totaling 46,977 tons.

It appears from the record that there is a substantial volume of commerce that flows outbound and inbound on this route. The types of commodities that move outbound are petroleum products (consisting principally of lubricating oil), asphalt, tinplate, flour, steel, carbon black, staves and headings, road graders, agricultural implements, automobiles, veneer, sulphur, and numerous other commodities. These commodities are essential for the economic well-being and development of the area serviced by the route in South and East Africa. Inbound, the principal commodities are lead ore, manganese ore, magniferrous ore, vermiculite, asbestos, coffee, sisal, fish meal, and iron ore. These commodities, particularly the ores, are needed in American industry and for our defense effort.

Applicant competes on this route with South African Marine Corp., Ltd.,[1] operating foreign-flag tonnage with occasional American-flag chartered vessels, and British-Dutch ships of the Silver-Java Pacific Lines.[2] The services of these companies have been substantially curtailed during the past several months, and, for the period of January through August 1951, of the six sailings provided by the South African Marine Corporation, all of them partially loaded at North Atlantic and/or South Atlantic ports. The Silver-Java Pacific Lines had seven sailings for the same period, with all of these vessels calling at Pacific coast ports prior to Gulf ports, leaving very little space for Gulf shippers. Only recently, Silver-Java Pacific Lines sold to Cunard S. S. Co., Ltd., two of its liner ships that it had used in the Gulf trade, and it has indicated that the company will shortly further curtail its service from the Gulf, or abandon it altogether. South African Marine

[1] South African Marine Corp., Ltd., is partly owned by States Marine Corporation.

[2] Silver-Java Pacific Line is a combination of Silver Lines and Java Pacific Line, the Silver Lines being a British operator and Java Pacific being a Dutch Line. These lines have operated for many years out of the Gulf as a joint service.

Line has also curtailed its Gulf sailings to a certain extent. Thus, while the amount of space available to the shipping public for cargo carriage over this route is materially below the amount of space that was available last year, the amount of cargo offered for transport over this route has substantially increased.

From the above record, it is clear that the service under consideration is required in the public interest and that this service will not be adequately served without the vessel applied for.

Applicant requires and is presently operating C–2 type vessels on this route but has stated that a Victory-type vessel is suitable. Applicant has been informed by its brokers that there are no Victory or C–2 type vessels available for short or long term charter. Accordingly, it appears that the record supports the finding that there are no suitable privately owned American-flag vessels available for charter by private operators on reasonable conditions and at reasonable rates.

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

On the basis of the facts adduced in the record, the Board finds and hereby certifies to the Secretary of Commerce:

1. That the service under consideration is required in the public interest;

2. That such service is not adequately served; and

3. That privately owned American-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

The Board recommends that the charter which may be granted pursuant to the recommendations in this case be for an indefinite period, subject to the usual right of cancellation by either party on 15 days' notice, and subject further to annual review of the charter as provided in Public Law 591. The Board also recommends that any such charter include provisions to protect the interests of the Government under the operating-differential subsidy agreement with applicant.

By the Board.

OCTOBER 9, 1951.

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

FEDERAL MARITIME BOARD

No. S–32

IN THE MATTER OF THE APPLICABILITY OF SECTION 802 OF THE MERCHANT MARINE ACT, 1936, AS AMENDED, TO CONSTRUCTION-DIFFERENTIAL SUBSIDY AGREEMENTS COVERING THE VESSELS OF AMERICAN PRESIDENT LINES, LTD. — SSs. PRESIDENT VAN BUREN, PRESIDENT JOHNSON, AND PRESIDENT HARRISON (EX. USSs. BOLIVAR, CALLAWAY, AND CLAY)

Decided October 10, 1951

REPORT OF THE BOARD

The matter here under consideration grows out of the granting of construction-differential subsidies to American President Lines, Ltd., in 1948 for the reconditioning of three vessels. These vessels, now known as the *President Van Buren, President Johnson,* and *President Harrison,* were sold by the Maritime Commission to American President Lines, and, pursuant to application of American President Lines, the Commission on September 30, 1948, notified American President Lines that the reconstruction subsidies had been granted. The letter of notification, accepted by American President Lines, contained the terms of the subsidy arrangement, and controlled the interests of the parties pending preparation of more formal contracts.

The point now to be determined arises under section 802 of the Merchant Marine Act, 1936, and the following clause in the Commission's letter of September 30, 1948, outlining the following requirement to be included in the final contracts:

(3) a provision for applicability of Section 802 of the Act should the United States subsequently acquire ownership of the vessels through purchase or requisition, with such revision of the standard provisions as may be necessary for consistency with the pertinent provisions of the Merchant Ship Sales Act of 1946;

Section 802 of the Merchant Marine Act, 1936, provides:

Sec. 802. Every contract executed by the Commission under authority of title V of this Act shall provide that—

In the event the United States shall, through purchase or requisition, acquire ownership of the vessel or vessels on which a construction-differential subsidy was paid, the owner shall be paid therefor the value thereof, but in no event shall such payment exceed the actual depreciated construction cost thereof (together with the actual depreciated cost of capital improvements thereon, but excluding the cost of national-defense features) less the depreciated amount of construction-differential subsidy theretofore paid incident to the construction or reconditioning of such vessel or vessels, or the fair and reasonable scrap value of such vessel as determined by the Commission, whichever is the greater. Such determination shall be final.* * *

The foregoing provision respecting the requisition or the acquisition of ownership by the United States shall run with the title to such vessel or vessels and be binding on all owners thereof.

In March 1949 the General Counsel of the Maritime Commission submitted to American President Lines for execution formal construction-differential subsidy agreements covering the three vessels, which included the following article 6:

Requisition of vessel.—In the event the United States shall hereafter acquire ownership of the Vessel through purchase or requisition, the Owner shall be paid therefor the value thereof.

For the purpose of this Article, the value of the Vessel shall in no event exceed the actual depreciated acquisition cost thereof to the Owner, together with the actual depreciated cost of capital improvements thereof (but excluding the cost of national defense features), less the depreciated amount of construction-differential subsidy theretofore paid incident to the reconstruction and reconditioning of the Vessel, or the fair and reasonable scrap value of the Vessel as determined by the Commission, whichever is greater. It is agreed that such determination shall be final. Acquisition cost to the Owner shall be the actual final price paid by the Owner to the Commission in acquiring the Vessel under the Act of March 8, 1946, the Merchant Ship Sales Act. In computing the depreciated value of the Vessel, depreciation shall be computed on the schedule adopted by the Bureau of Internal Revenue for income tax purposes.

The foregoing provisions respecting the requisition or the acquisition of ownership by the United States, including the valuation of the Vessel in the event of such requisition or acquisition of ownership, shall run with the title to the Vessel and be binding on all owners thereof.

In the same month American President Lines returned the contracts to the Commission unexecuted, objecting to the inclusion of the words "depreciated acquisition cost" on the ground that they were contrary to the statute and not contemplated by the agreement of the parties. The final contracts are still unexecuted, and American President Lines has agreed to abide by the decision of the Board in the matter.

It may be noted that the statute refers to the purchase or requisition by the United States of vessels on which a construction-differential subsidy has been paid, and provides that in such

case the owner shall be paid the *value* thereof, not exceeding, however, the depreciated *construction* cost thereof. This section of the law is applicable in cases of construction-differential subsidies granted for the reconstruction or reconditioning of vessels as well as for original construction, the term "construction-differential subsidy" applying equally to both situations. [See sec. 501(c).]

The staff, in recommending that article 6 be included in the American President Lines final contracts, points out that the vessels were purchased from the Government under the provisions of the Merchant Ship Sales Act of 1946, and that a requisition price up to the depreciated construction cost of the vessels could give compensation in excess of the price at which the owner acquired the vessels; that since the vessels had been "acquired" under the 1946 Act and not "constructed," a departure from the standard contract language dealing with the applicability of section 802 for newly constructed vessels was required. The staff takes the position that article 6 in controversy was incorporated into the final draft of contracts "consistent with the intended meaning" of the clause of the September 30, 1948, commitment letter quoted above.

The matter has been considered by the Board's General Counsel, who points out that since American President Lines has agreed to be bound by the Board's decision, our consideration of the matter should be from a judicial point of view, and with this observation we agree. The General Counsel pointed out that:

> It does not appear that the quoted provision in the Commission's letter to American President Lines, Ltd. would normally be construed to mean that the statutory Section 802 provision would be modified to substitute the words 'acquisition cost' for the words 'construction cost'.

The General Counsel also appropriately suggested that the matter should not be finally determined without first giving American President Lines an opportunity to be heard. This has been done, and American President Lines, under date of August 25, 1951, has submitted its comments in the form of a detailed memorandum prepared by its legal counsel.

In considering the matter of the Commission's original agreement of 1948, reference is made to section 501(c) of the 1936 Act, which gives the statutory basis for the contracts to be entered into between the Commission and American President Lines. That section provides that the Commission consider applications for subsidy aid for the purpose of reconstructing or

reconditioning certain United States-flag vessels and make contracts therefor

subject to all the applicable conditions and limitations of this title and under such further conditions and limitations as may be prescribed in the rules and regulations the Commission has adopted as provided in section 204(b) of this Act.

It may be argued that the Commission might have made a rule under section 204(b) that in granting construction-differential subsidy aid for the reconstruction or reconditioning of war-built vessels acquired by applicants under the Merchant Ship Sales Act of 1946, the limitation of just compensation to "construction cost", as directed by section 802, should be qualified to provide a ceiling limitation not exceeding "acquisition cost," but the Commission made no such rule, and we do not, therefore, have to decide what the legal effect of any such attempted modification of a statutory provision by a rule of the Commission might have been.

The real question is whether the agreement contained in the Commission's letter of September 30, 1948, and accepted by American President Lines, constituted an agreement by American President Lines to accept "depreciated acquisition cost" as a ceiling limit on fair value in case of Government requisition, instead of "depreciated construction cost" as specified in section 802. As quoted above, the original agreement provided for the inclusion in the final contracts of a provision (a) for the applicability of section 802 of the Act in case of purchase or requisition, and (b) such revision of the standard provisions as might be necessary for consistency with the Merchant Ship Sales Act of 1946.

It is argued by American President Lines that the United States Maritime Commission, having agreed to enter into the contracts, certain aspects of which would be governed by specific statutes, was without authority to insist that the formal contracts resulting from the agreement contain clauses not covered in such specific statutes. We agree with this contention.

In our opinion, the use of the words "depreciated acquisition cost" in the proposed final contracts submitted to American President Lines is not in accordance with the language of section 802. The remaining inquiry is whether a ceiling limit of "depreciated acquisition cost" is either authorized by the 1946 Act or necessary for consistency with its pertinent provisions.

We find nothing in the 1946 Act authorizing the change from

"construction cost" to "acquisition cost" or making such change necessary for consistency with its pertinent provisions. We do not see that American President Lines, in accepting the September 30, 1948, letter of the Commission can reasonably be expected to have gathered from that letter that any such change was contemplated by the Commission. The Merchant Ship Sales Act of 1946 includes no provision regarding the price for which vessels purchased under that Act may be reacquired by the Government. The legislative history of that Act shows that early drafts included a provision that vessels purchased pursuant thereto should be subject to acquisition by the Government at the purchase price. However, Congress, after extensive hearings and full consideration, rejected and eliminated this provision and determined that sales should be made "without strings."

Accordingly, we find that the use of the term "depreciated acquisition cost" in the proposed article 6 of the draft of construction-differential subsidy contracts prepared by the Commission and submitted to American President Lines is not in accordance with the original agreement of the parties. We are not advised that the proposed formal construction-differential subsidy contracts contain any matters in controversy other than what has been referred to. With the elimination of reference to "acquisition cost" and in place thereof appropriate reference to "construction cost," the contracts should be in form for prompt execution.

By the Board.

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

FEDERAL MARITIME BOARD

No. M–38

MOORE-MCCORMACK LINES, INC.—APPLICATION FOR BAREBOAT CHARTER OF GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS FOR EMPLOYMENT IN THE UNITED STATES ATLANTIC/EAST COAST OF SOUTH AMERICA SERVICE (TRADE ROUTE NO. 1) AND IN THE UNITED STATES NORTH ATLANTIC/SCANDINAVIAN AND BALTIC SERVICE (TRADE ROUTE NO. 6)

REPORT OF THE BOARD

This proceeding was instituted pursuant to Public Law 591, Eighty-first Congress, upon the application of Moore-McCormack Lines, Inc., for bareboat charter of two Victory-type, Government-owned, war-built, dry-cargo vessels for operation in the company's subsidized services between United States Atlantic ports and ports on the East coast of South America (Trade Route No. 1), and between United States North Atlantic ports and Scandinavian ports and/or ports in the Baltic Sea (Trade Route No. 6).

Notice of hearing was published in the Federal Register of October 17, 1951. Because of the urgency of the matter, the usual 15 days' notice was not given. Hearing on the application was held before an examiner on October 23, 1951. No party appeared in opposition to the application, although counsel for the Board participated in cross-examination of applicant's only witness.

The examiner has recommended in his decision, which was served on October 25, 1951, that the Board make the statutory findings to the Secretary of Commerce in so far as Trade Route No. 1 is concerned. The examiner also made certain recommendations as to Trade Route No. 6. We concur in the examiner's recommendations insofar as Trade Route No. 1 is concerned. No exceptions have been filed to the examiner's recommended decision within the 1-day period agreed to by applicant and counsel for the Board.

Although the original application requested two vessels for operation on either Trade Route No. 1 or Trade Route No. 6,

applicant's only witness, its vice president in charge of traffic, explained at the hearing that the additional capacity is needed and desired at this time only for Trade Route No. 1. All of the testimony and evidence presented at the hearing was consequently directed to Trade Route No. 1. In explanation of the original application, applicant's witness testified that:

> It is conceivable that if we knew that we were going to be allocated additional vessels for Trade Route No. 1 at some particular time we might be able to release a vessel from Trade Route No. 6 to meet a desired position on Trade Route No. 1 and substitute a chartered vessel for the vessel so withdrawn from Trade Route No. 6. That is the reason why our application requests two vessels for operation either on Trade Route No. 1 or Trade Route No. 6 but the additional capacity is needed and desired at this time only for Trade Route No. 1.

Public Law 591 permits charter of Government-owned vessels only for use in services where the applicant has successfully met certain requirements, viz., (1) that the service under consideration is required in the public interest; (2) that such service is not adequately served; and (3) that privately owned American-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service. In view of this and the testimony of applicant's only witness in addition to the fact that no evidence was presented with respect to Trade Route No. 6, we consider that the application embraces two Victory-type vessels for Trade Route No. 1.

It appears that the volume of freight offered for southbound carriage over Trade Route No. 1 has been increasing for some time, and that applicant's vessels operating over the route have sailed outbound from the United States with capacity cargoes, including deck loads. Applicant's witness testified that during the month of September 1951 the company was offered and had to decline 442,000 cubic feet of southbound cargo, consisting primarily of vehicles and resin, and that between the last of September and October 17, 1951, the company has had to decline 618,000 cubic feet of southbound general cargo.

In order to alleviate this situation, applicant has allocated a vessel from its subsidized service between United States Pacific ports and ports on the East coast of South America (Trade Route No. 24) to Trade Route No. 1, which vessel will become available about the second week in December 1951. Applicant has also adjusted its vessel employment on the various elements of Trade Route No. 1 in an effort to employ its vessels where the need is greatest. Applicant does not feel that it is possible with [illegible]

additional vessels from its other services or to make further intra-Trade Route No. 1 adjustments for any appreciable period of time.

The cargo which applicant has refused was all for shipment from United States Atlantic ports to East coast of South America. It was testified that the vessel that will be diverted from Trade Route No. 24 will not be sufficient to lift the extra cargo since there is a growing need for additional ships in the southbound berth from Atlantic ports.

The general traffic situation on Trade Route No. 1 has been further aggravated by the fact that applicant's vessel the *Mormacsea* was grounded at Santos on September 25, 1951, and was out of operation for about two or three weeks. Applicant's witness, however, testified that even after the *Mormacsea* returns to service, both of the additional vessels requested will be necessary in order to serve properly the route, for some time to come.

Applicant at present operates C–1, C–2, and C–3 type vessels over Trade Route No. 1. The present application is for Victory-type vessels, or satisfactory substitutes, which applicant's witness explained to be either C–2 or C–3 type vessels.

There is no doubt that the freight service from United States Atlantic ports to the East coast of South America is in the public interest of the United States. Applicant's vessels serving this route carry primarily mining machinery, agricultural machinery, vehicles, and a variety of general cargo destined to Brazil, Uruguay, and Argentina.

Applicant has made a recent inquiry of the charter brokers and has been informed that "vessels of types desirable for operation in Trade Route No. 1 are practically not available at all."

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

On the basis of the facts adduced in the record, the Board finds and hereby certifies to the Secretary of Commerce:

1. That the service on Trade Route No. 1, under consideration by the Board, is required in the public interest;

2. That such service will not be adequately served without two additional Victory-type, war-built, dry-cargo vessels; and

3. That privately owned American-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

The Board recommends that the charters which may be granted pursuant to the recommendations in this case be for an

indefinite period, subject to the usual right of cancellation by either party on 15 days' notice, and subject further to annual review of the charter as provided in Public Law 591. The Board also recommends that any such charter include provisions to protect the interests of the Government under the operating-differential subsidy agreement with applicant.

The Board deems it unnecessary to make any finding with respect to Trade Route No. 6.

By the Board.

NOVEMBER 1, 1951.

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

FEDERAL MARITIME BOARD

No. M–47

ANNUAL REVIEW OF EXISTING BAREBOAT CHARTERS OF GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS RECOMMENDED FOR USE DURING THE PERIOD BETWEEN JUNE 30, 1950, AND JUNE 30, 1951, UNDER PUBLIC LAW 591, EIGHTY-FIRST CONGRESS

In accordance with section 3(e)(1) of Public Law 591, Eighty-first Congress, an annual review has been made of existing bareboat charters of Government-owned, war-built, dry-cargo vessels authorized under that law and in effect on June 30, 1951.

By order of the Board dated October 10, 1951, the Board has tentatively found that existing conditions justify the continuance of the charters recommended for the use of the Military Sea Transportation Service, until such time as they can be converted to a general agency operation. These charters have been executed pursuant to the findings, certifications, and recommendations of the Board in Docket Nos. M–3, M–6, M–7, M–8, and M–22, dated July 14, 1950, July 27, 1950, August 4, 1950, August 17, 1950, December 20, 1950, and March 6, 1951, respectively.

By order of the Board dated October 10, 1951, the Board also has tentatively found that existing conditions justify the continuance of the following charters upon the conditions previously certified by the Board:

Charterer	Vessel	Docket No.	Date of delivery
Alaska Steamship Company, Inc.	John H. Quick	M–31	June 4,1951
American President Lines, Ltd.	Anchorage Victory	M–20	Mar. 7,1951
	Lightning	M–27	Apr. 16,1951
	Shooting Star	M–32	May 23,1951
Coastwise Line	Tarleton Brown	M–24	Apr. 3,1951
	John W. Burgess	M–24	Apr. 13,1951
	Charles Crocker	M–30	May 28,1951
Isthmian Steamship Company, Inc.	Las Vegas Victory	M–25	June 1,1951
Luckenback-Gulf Steamship Co., Inc.	Pine Bluff Victory	M–14	Mar. 28,1951
	Wayne Victory	M–14	Apr. 23,1951
Pacific Far East Line, Inc.	Louis Sloss	M–26	May 2,1951
	Selma Victory	M–26	June 15,1951
	Sea Serpent	M–27	Mar. 28,1951

Notice of the foregoing orders was served on all interested

parties and was published in the Federal Register of October 31, 1951.

No objections to the tentative findings of the Board were filed within the time allowed.

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

On the basis of evidence considered by the Board, the Board finds and hereby certifies to the Secretary of Commerce that conditions continue to exist which justify the continuance of charters above mentioned upon the conditions originally certified by the Federal Maritime Board.

By the Board.

NOVEMBER 29, 1951.

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

FEDERAL MARITIME BOARD

No. M–39

MISSISSIPPI SHIPPING COMPANY, INC.—APPLICATION FOR BAREBOAT CHARTER OF A GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSEL FOR USE IN THE SERVICE BETWEEN THE GULF AND THE EAST COAST OF SOUTH AMERICA

REPORT OF THE BOARD

This proceeding was instituted pursuant to Public Law 591, Eighty-first Congress, upon the application of Mississippi Shipping Company, Inc., for bareboat charter of a Victory-type, Government-owned, war-built, dry-cargo vessel for use for an indefinite period in its service between the Gulf coast of the United States and the East coast of South America (Trade Route No. 20). Notice of hearing on the application was published in the Federal Register of October 27, 1951, and hearing was held before an examiner on November 6, 1951. Because of the urgency of the matter, the usual 15 days' notice was not given. There was no opposition to the application.

The examiner's recommended decision was served on November 8, 1951, in which it was recommended that the Board make the necessary statutory findings to the Secretary of Commerce. No exceptions were filed to the examiner's decision within the 24-hour period agreed to by counsel for applicant and counsel for the Board, although counsel for the Board has filed a memorandum requesting that any charter granted pursuant to this proceeding provide for review prior to March 31, 1952, similar to that provided for in the decision of the Board in Docket No. M–36 (*Application of Mississippi Shipping Co.*), 3 F.M.B. 664.

Applicant has been granted a charter of a C–1A-type vessel pursuant to our findings in Docket No. M–36, which vessel met an October 15 sailing from the Gulf coast. Hearing on the previous application was held on September 18, 1951, and the report of the Board recommending the charter was dated September 21, 1951. Since much of the factual situation as explained in that

record still exists, it will be unnecessary for us to restate the general situation on Trade Route No. 20, and we shall incorporate by reference our previous report insofar as it is relevant here.

The present application is for a Victory-type vessel. In Docket No. M–36, applicant's witness stated that the *Del Mar*, which went on the rocks at Recife on August 27, 1951, and was badly damaged, was expected to be available for service in time to make a scheduled sailing in early December 1951. The *Del Mar*, however, has incurred additional damage in its removal and has been considerably delayed both in her temporary repairs and in discharging cargo at Santos. The *Del Mar* consequently will not be in sailing position until January 17, 1952, which is two weeks short of two full voyages, whereas the prior expectation was a loss of only one voyage. Even with the return of the *Del Mar*, and with the continued operation of the C–1A-type vessel previously chartered pursuant to our findings in Docket No. M–36, it appears that an additional vessel will be necessary in order to handle the increased cargo offerings on Trade Route No. 20.

In addition to the substantial increase in cargo offerings, the traffic condition on Trade Route No. 20 has been aggravated because of serious port congestion at various South American ports, principally at the Brazilian ports of Santos and Rio de Janeiro. It has thus been necessary for applicant to increase its estimated turnaround time from about 75 days to more than 100 days for those vessels which are serving these congested ports. This congestion is caused by an accelerated cargo movement and by various deficiencies at the port terminals. Applicant's witness also stated that another factor contributing to the congestion is that at Santos and Rio de Janeiro there is no limit on cargo free time at transit terminals, and consignees consequently take full advantage of this free storage opportunity.

It does not appear from the record that this situation is likely to improve in the foreseeable future. Because of this congestion, applicant had three vessels in Santos at the time of the hearing; although it appears that they will also be in position for December loading at Gulf ports, applicant's witness testified that there will be no trouble filling these ships. Applicant's witness testified that because of increased cargo offerings, the additional vessel will be necessary even should the port congestion be substantially alleviated.

As we have stated in Docket No. M–36, applicant received

transfer one of its South American C–1A-type vessels, the *Del Campo*, to its subsidized West African service (Trade Route No. 14) for use therein for not more than four voyages to be completed not later than March 31, 1952. However, cargo offerings in the West African service have increased substantially, and applicant has now filed an application for bareboat charter of a Government-owned vessel for that service.

Nevertheless, unless its present authority is extended, applicant is bound to return the *Del Campo* to its South American service not later than March 31, 1952. There can be no present certainty, therefore, that the need for the vessel herein applied for on Trade Route No. 20 will continue beyond this date.

Applicant has been advised by its brokers that there are no suitable privately-owned vessels available for charter in its South American service at reasonable rates. It was indicated that a Victory-type vessel was available in September at a time-charter rate of $90,000 per month, but even for that vessel the owners appear to be reluctant to charter in expectation of higher rates. Applicant's witness testified that a Victory-type vessel is satisfactory for this service since it has both the speed and the capacity to fit into the schedule of a C–2-type vessel.

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

On the basis of the facts adduced in the record, the Board finds and hereby certifies to the Secretary of Commerce:

1. That the service on Trade Route No. 20 under consideration is required in the public interest;

2. That such service will not be adequately served without one additional Victory-type, war-built, dry-cargo vessel; and

3. That privately owned American-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

The Board recommends that any charter that may be granted pursuant to the recommendations in this case be for an indefinite period, subject to the usual right of cancellation by either party on 15 days' notice, and subject further to annual review of the charter as provided for in Public Law 591. The Board also recommends that the Administrator review the charter prior to March 31, 1952, according to our recommendations in Docket No. M–36, to determine the then status of the *Del Campo* and *Del Mar*, and the then existing traffic situation on Trade Route No. 20, and that any such charter include provisions to protect

the interests of the Government under the operating-differential subsidy agreement with applicant.

Chairman Cochrane, being absent, took no part in this decision.

By the Board.

NOVEMBER 16, 1951.

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