DECISIONS OF THE
FEDERAL MARITIME BOARD, AND
MARITIME ADMINISTRATION
DEPARTMENT OF COMMERCE

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UNITED STATES DEPARTMENT OF COMMERCE
WASHINGTON, D.C.

FEDERAL MARITIME BOARD

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FEDERAL MARITIME BOARD, AND
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DEPARTMENT OF COMMERCE

DEPARTMENT OF COMMERCE

MARITIME ADMINISTRATION

No. S-109

FARRELL LINES INCORPORATED—APPLICATION UNDER SECTION 805(a)

Submitted April 22, 1960. Decided April 22, 1960

Farrell Lines Incorporated granted written permission under section 805(a) of the Merchant Marine Act, 1936, as amended, for its owned vessel, the SS *African Pilgrim*, presently under time charter to State Marine Lines, Inc., to be subchartered to Luckenbach Steamship Company, Inc., for one intercoastal voyage carrying general cargo from the San Francisco Bay area to North Atlantic ports, commencing on or about April 26, 1960, since granting the permission found (1) not to result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal trade, and (2) not to be prejudicial to the objects and policy of the Act.

Ronald A. Capone for applicant.
Robert B. Hood, Jr., as Public Counsel.

REPORT OF THE MARITIME ADMINISTRATOR

BY THE MARITIME ADMINISTRATOR:

Farrell Lines Incorporated filed an application for written permission under section 805(a) of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1223) (the Act), for its owned vessel, the SS *African Pilgrim*, presently under time charter to States Marine Lines, Inc., to be subchartered to Luckenbach Steamship Company, Inc. (Luckenbach), for one intercoastal voyage carrying general cargo in Luckenbach's intercoastal service, commencing San Francisco Bay area on or about April 26, 1960, for discharge at North Atlantic ports. The vessel is to be redelivered by subcharterer at an east coast port. Notice of hearing was published in the Federal Register of April 14, 1960 (25 F.R. 3227). No one appeared in opposition to the granting of the application.

Luckenbach is a common carrier of general commodities in the intercoastal trade. It needs a vessel for an April sailing but has been unable to obtain any other than the *African Pilgrim.*

It is found that the granting of the requested permission will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal trade, or be prejudicial to the objects and policy of the Act.

This report shall serve as written permission for the voyage.

FEDERAL MARITIME BOARD

No. S–67

T. J. McCarthy Steamship Company—Application Under Section 805(a)

Submitted January 18, 1960. Decided April 25, 1960

Continuation of bulk service until December 31, 1961, between United States ports on the Great Lakes by T. J. McCarthy Steamship Company, limited to a coal and ore movement, in the event it is awarded an operating subsidy contract, found not to constitute unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service, or to be prejudicial to the objects and policy of the Merchant Marine Act. 1936, as amended, and written permission for the continuation of such service, in the event subsidy is awarded, granted.

Paul D. Page, Jr., and *Arthur Tarantino* for applicant.

John H. Eisenhart, Jr., for Great Lakes Ship Owners Association, and *Donald A. Brinkworth* for Eastern Territory Railroads, interveners.

Edward Schmeltzer as Public Counsel.

Supplemental Report of the Board

Clarence G. Morse, *Chairman*, Thos. E. Stakem, Jr., *Vice Chairman*

By the Board:

In our original report herein (5 F.M.B. 666 (1959)), we found and concluded that (1) the continuation by T. J. McCarthy Steamship Company (McCarthy) of its automobile-carrying service from Detroit to Cleveland and to Buffalo, in the event it was awarded an operating-differential subsidy contract, (a) would not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service, and (b) would not be prejudicial to the objects and policy of the Merchant Marine Act, 1936,

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as amended, 46 U.S.C. 1223 (the Act), and (2) the continuation of its bulk-trade service, in the event subsidy was awarded, would be prejudicial to the objects and policy of the Act. Thus, section 805(a) permission was granted only for the continuation of the automobile service.

On January 4, 1960, applicant filed with the Board a petition for reconsideration and modification of its report, praying for section 805(a) permission to cover its bulk-trade service for a period not to extend beyond December 31, 1961. Interveners filed replies in opposition to the petition. Public Counsel did not file a reply.

The principal reason advanced by McCarthy for the permission appears to be that applicant is "firmly obligated" to carry ore for Wilson Transit Company and that McCarthy "is forced by the Board to breach its contract with Wilson or abandon its subsidy application." This argument is a pristine example of an "operation boot strap." The requirements of statutes are not subservient to the provisions of private contracts. The Government is not a party to the McCarthy-Wilson contract. Applicant's chief argument is totally without merit and we comment upon it merely because it was put forth with such stress.[1]

We are disposed, however, to modify our earlier decision on entirely different grounds. McCarthy's four bulk vessels have a combined deadweight capacity of slightly less than 30,000 tons, or about 3 percent of the total deadweight capacity of all the independent bulkers on the Great Lakes. The remaining independents operate 97 bulk carriers with a total available deadweight of 985,000 tons. In 1957, when McCarthy moved about one million tons in this service, about one-half was Wilson ore and the other half consisted chiefly of coal, stone, sand, salt, and grain. It is to be noted that Wilson does not oppose the application, and it is reasonable to assume that, absent McCarthy's participation, Wilson itself would undertake to move the ore. It also follows that if Wilson handled the ore (which moves south from Duluth-Superior), it would carry a substantial portion, if not all, of McCarthy's northbound coal movement. It does not necessarily follow, however, that Wilson would capture the remaining bulk cargoes—particularly grain, the domestic movement of which, on the Great Lakes, is declining. While we reason that the termination of McCarthy's ore and coal business would result in little, if any, benefit to the primarily domestic interveners, we are of the view that modifying our earlier report so as to permit McCarthy—in the event it becomes subsidized—to continue to engage solely in the ore and coal trades, only through December 31, 1961, thereby freeing to the pri-

[1] Further, applicant's "belief" that it can reach an agreement with Wilson relating to to this contract is entirely immaterial.

marily domestic operators the remaining bulk cargoes heretofore carried by McCarthy, would not be prejudicial to the objects and policy of the Act.

We found originally that none of the interveners operates an exclusively domestic service on the Great Lakes within the meaning of section 805(a) of the Act, hence that portion of the section is inapplicable.

We therefore grant section 805(a) permission for the continuation of this bulk service limited to ore and coal in the event of the award to McCarthy of an operating-differential subsidy contract, for a period not to extend beyond December 31, 1961. Upon that date the written permission, if it ever becomes operative, shall terminate.

This report shall serve as written permission to continue the service under consideration.

FEDERAL MARITIME BOARD

No. S–78

AMERICAN PRESIDENT LINES, LTD.—APPLICATION UNDER SECTION 805(a)

*Submitted November 4, 1959. Decided April 28, 1960**

American President Lines, Ltd., granted written permission under section 805(a), Merchant Marine Act, 1936, to operate its proposed "superliner" SS *President Washington* (and in the interim the SS *President Hoover*) in the California/Hawaii passenger trade, subject to certain limitations.

"Grandfather" rights of American President Lines, Ltd., under the proviso of section 805(a), in re the operations of its transpacific passenger vessels in the California/Hawaii passenger trade, determined.

Warner W. Gardner, *Vern Countryman*, and *Peter N. Teige* for applicant.

Alvin J. Rockwell, *Kenneth F. Phillips*, and *Willis R. Deming* for Matson Navigation Company, intervener.

Robert E. Mitchell, *Edward Aptaker*, and *Robert C. Bamford* as Public Counsel.

REPORT OF THE BOARD

Clarence G. Morse, *Chairman*, and Thos. E. Stakem, *Vice Chairman*

BY THE BOARD:

This is a proceeding under section 805(a), Merchant Marine Act, 1936, as amended (the Act), to ascertain whether American President Lines, Ltd. (APL), a subsidized operator, should be granted permission to carry passengers and cargo between California ports and Hawaii in its transpacific Trade Route No. 29, Line A–1 service, on the SS *President Hoover*, and, subsequently, on its proposed "superliner" SS *President Washington.*

APL seeks permission for the *Hoover* to make eight calls annually on one leg of the transpacific voyage and carry about 20 passengers a voyage, and for the *Washington* (scheduled to replace

*See also 6 F.M.B. 95.

the *Hoover* in late 1962) to make 11 voyages a year carrying about 4,000 passengers and 1,350 L/T of cargo annually.

As a subsidized operator APL requires permission under section 805(a) of the Act before it may engage in the domestic trade between California and Hawaii.

Section 805(a) provides in part:

> The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act: *Provided,* That if such contractor or other person above-described or a predecessor in interest was in bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

Hawaiian Textron, Inc., and Matson Navigation Company, operating as nonsubsidized domestic water carriers between California and Hawaii, intervened in opposition to the application. Textron, whose predecessor entered the trade in 1957, withdrew its passenger ship SS *Leilani* from the trade shortly after the hearing and did not file a brief.

Hearings were held before an examiner. In his recommended decision the examiner concluded:

1. APL or a predecessor in interest was in bona fide operation as a common carrier by water in the domestic coastwise trade in 1935 in its transpacific passenger and freight service between California and Hawaii and has so operated since that time except as to interruptions of service over which APL or its predecessor had no control.

2. Subject to a limit of 4,300 and 3,320 L/T of cargo a year, the service proposed with the addition of the *Hoover*, to be replaced by the *Washington*, is in substantial parity with that maintained by APL or its predecessor in 1935.

3. A. Granting APL permission for the *Hoover* to carry 160 passengers and 491 L/T of cargo annually between California and Hawaii will not result in unfair competition to any person operating exclusively in the coastwise or intercoastal service, and will not be prejudicial to the objects and policy of the Act.

3. B. Granting APL permission for the *Washington* to carry 4,000 passengers and 1,353 L/T of cargo annually between California and

Hawaii will result in such unfairness and prejudice, except (a) to the extent cargo (1,353 L/T) is involved, and (b) to the extent that carriage of passengers by the *Cleveland*, *Wilson*, and *Washington* will not exceed 4,332 passengers annually.

3. C. Since the public interest and convenience will be served by the operation as limited above, permission should be granted to such extent.

Exceptions to the recommended decision and replies thereto were filed, and oral argument was heard. Exceptions and proposed findings not discussed in this report nor reflected in our findings have been considered and found not justified by the facts or related to material issues in this proceeding.

APL has served Hawaii regularly in transpacific voyages since 1879, except for (1) a five-year period from 1885–1890 and (2) the period 1942–1946. In 1925 Dollar Steamship Lines, Ltd.,[1] commenced a fortnightly service from San Francisco to Honolulu, Yokohama, Kobe, Shanghai, Hong Kong, and Manila, returning by way of the same ports, and in 1927 Los Angeles was added as a port of call. In 1935 the service was provided by seven vessels—the *Coolidge* and the *Hoover* and five ships of the so-called 535 class. The *Hoover* and the *Coolidge* sailed from California over the route described above to Manila and returned to California. The 535's operated in what was called the New York/Manila service, calling at San Francisco and Hawaii in both directions.

The 1931–1935 service provided by APL is shown in column (1) of the following table:

TABLE I

APL'S voyages and carryings between California and Hawaii, including future estimates

	(1) 1931-35 (average)	(2) 7 ships, 1935	(3) *Cleveland, Wilson,* 1951-57 (average)	(4) *Cleveland, Wilson, Hoover,*[1] 1959-62	(5) *Cleveland, Wilson, Washington,*[1] 1963
Voyages (1 way)	52	52	32	40	54
Passengers	2,671	2,852	1,959	2,119	5,959
Cargo L/T	------------	3,204	1,965	2,456	3,318

[1] Columns (4) and (5) estimates are proposed carryings of the *Hoover* and *Washington*, respectively, added to 1951-57 averages in column (3).

Since 1948 APL has served its transpacific trade on Trade Route No. 29 with the *Cleveland* and *Wilson*. In 1957 the *Hoover* was

[1] Dollar was incorporated August 2, 1929. In November 1938 the name was changed to American President Lines, Ltd.

added, and as far as this record is concerned, the *Washington* is scheduled to replace the *Hoover* in late 1962.

APL has concentrated on booking Far East passengers, serving the California/Hawaii trade only as space is available because the transpacific trade is its primary trade and is more profitable. It expects to follow this course in the future. Since it has to book transpacific passengers several months in advance, any space unoccupied approximately three weeks prior to the sailing will not be sold transpacific. Unoccupied first class space is then offered for California/Hawaii bookings. This space, it is argued, is the only space competitive with that of domestic lines.[2]

APL claims (1) that it has "grandfather" rights in the California/Hawaii trade and (2) that, in any event, the service it proposes to Hawaii would not amount to unfair competition to any person operating exclusively in the coastwise or intercoastal trade, nor be prejudicial to the objects and policy of the Act.

We will first consider APL's claim of "grandfather" rights.

It is clear that in 1935 APL was providing service between California and Hawaii. Matson argues that APL really had two services in 1935—one, termed by APL its transpacific service, was provided by the *Coolidge* and the *Hoover*, which operated between California and the Far East, the other provided by five ships serving San Francisco and Hawaii in both directions only in connection with the service from New York to the Far East. Matson contends that APL's "grandfather" rights, if any, must be confined to the service provided by the *Coolidge* and the *Hoover* in 1935, a service which conformed to APL's present-day transpacific service.

We disagree with Matson. APL in 1935 actually maintained fortnightly service between California and the Orient via Hawaii. The fact that such service consisted partly of operations over a segment of an entire route or service is inconsequential. Service between California and Hawaii was provided by the vessels in the so-called New York/Manila service just as much as the service provided by the *Hoover* and the *Coolidge* in the transpacific service. In determining the "grandfather" rights both services should be included.

Matson contends that APL was not in bona-fide common carrier operation between California and Hawaii from 1935 to 1938, because under the Dollar-Matson Agreement[3] APL carried passengers and cargo as agent of Matson and paid to Matson half the gross domestic revenue. During that period, APL did not advertise for or solicit

[2] Tourist class is available and is booked earlier.

[3] See *Dollar-Matson Agreements*, 1 U.S.M.C. 750 (1938), 2 U.S.M.C. 387 (1940).

cargo and passengers; it turned inquiries and requests for transportation over to Matson; calls were made at Honolulu, with passengers and cargo to Hawaii obtaining the space unsold to the Far East; and APL did not have a California/Hawaii cargo tariff on file until 1938.[4] However, APL maintained its own offices, held itself out to the public, issued its own tickets and bills of lading, paid its own claims, filed its own passenger tariff, and carried passengers and cargo—all in the same manner as before and after the Agreement. These acts show that APL held itself out as a common carrier between California and Hawaii to the extent its space was not needed for transpacific trade, and that it did carry passengers and cargo between California and Hawaii.

Matson also contends that APL failed to resume regular post-war service to Hawaii, and that this amounted to a voluntary interruption of service within APL's control and, therefore, resulted in the abandonment of its "grandfather" rights. APL called at Hawaii with only one of its first six post-war passenger sailings which started in May 1946; its first call at Honolulu was in December 1946; there was a lapse of 45 days between this call and its second call in February 1947; and APL devoted the other five voyages to the urgent post-war needs of carrying displaced persons, repatriates, and other passengers to the Far East. We conclude that such an interruption in its service to Hawaii did not amount to an abandonment of any "grandfather" rights which APL might have had.

We find that APL, or its predecessor in interest, was in bona-fide operation as a common carrier by water in the domestic coastwise trade in 1935 in its transpacific passenger and freight service between California and Hawaii, and has so operated since that time except as to service over which APL, or its predecessor, had no control.

We now look to see whether APL's proposed service is in substantial parity with that maintained by it in 1935. Referring to table I, we find that APL proposes a passenger service for 1959–1962 with the *Cleveland*, *Wilson*, and *Hoover* and the carriage of some 2,119 passengers on 40 one-way voyages, which is substantially less than that provided in 1935 when it carried 2,852 passengers with seven vessels on 26 round voyages (52 one-way voyages). In 1963, however, when the *Washington* replaces the *Hoover*, the proposed service contemplates the carriage of 5,959 passengers on 27 round voyages—more than double the number of passengers.

APL claims a right to grow with the trade. Matson, on the other hand, argues that the addition of the *Hoover* and the *Washington*

[4] Such a tariff was also unfiled during the period before the Dollar-Matson agreement and was apparently due to an oversight which was remedied as soon as it was discovered.

would exceed substantial parity with APL's 1935 operations, and contends APL's "grandfather" rights should be limited to the 1935 operations of the *Coolidge* and *Hoover* and to the carriage of 1,782 passengers.

Section 805(a) was inserted in the Act "to protect those companies already interested in the coastwise or intercoastal service." (S. Rept. No. 1721, 74th Cong., 2d Sess.) In disposing of the question of section 805(a) "grandfather" rights, we are guided by two considerations: (1) substantial parity must exist as between proposed and past operations, for the protection of domestic operators already interested in the trade, and (2) the "grandfather" clause cannot be so strictly read as to permit absolutely no flexibility in equipment. *American President Lines, Ltd.—Subsidy, Route 17*, 4 F.M.B.–M.A. 488, 502 (1954). See also *Pacific Far East Line, Inc.—Sec. 805(a) Calls at Hawaii*, 5 F.M.B.–M.A., 287, 297 (1957). This principle is followed by us in contractual dealings with APL and other subsidized operators and, as recognized by APL under Article I–2(e)(7) and II–15 of its subsidy contract, we can reexamine and impose limitations upon the operations of a subsidized operator in the domestic trade.

As indicated in table I, in 1935 with a seven ship operation, APL made 26 round voyages (52 one-way voyages) and carried 2,852 passengers and 3,204 tons of cargo between California and Hawaii. It argues that the limitation on its "grandfather" rights is the space left available upon completion of its transpacific bookings. This, it says, was the service offered in 1935. Although the burden of proving "grandfather" rights rests on the party claiming such rights, applicant was unable to show the amount of salable space available to passengers between California and Hawaii on voyages in 1935. "Substantial parity must exist as between proposed and past operations." *American President Lines, Ltd.*, *supra.*

We find that subject to a limit of 2,852 passengers and 3,204 L/T of cargo a year and not in excess of 26 round voyages, the proposed service of APL is in substantial parity with that maintained by it or its predecessor in 1935.

Table I shows that during the period 1959–62 APL proposes to make some 40 one-way voyages between California and Hawaii, carrying 2,119 passengers and about 2,456 tons of cargo. During that period service would be provided with the *Wilson*, the *Cleveland*, and the *Hoover*. The *Wilson* and *Cleveland* would make about 16 round voyages a year calling at Hawaii in both directions, while the *Hoover*, owing to its slower speed, would call at Hawaii on one leg only of its round voyage. In 1963, when the *Washington* takes the place of the *Hoover*, APL proposes 54 one-way voyages each year. All three vessels, the *Cleveland*, *Wilson*, and *Washington*, would call at Hawaii in both directions for a total of 27 round voyages, and it is estimated they would carry 5,959 passengers and 3,318 tons of cargo. The "grandfather" rights found herein appear to take care of APL's proposed service during the period 1959–1962. The proposed service in the period after 1962, when the *Washington* takes the place of the *Hoover*, is in excess of APL's "grandfather" rights.

In estimating the level of future travel, APL's witnesses John F. Child and P. B. Clover relied chiefly on studies made by Hawaiian Visitors Bureau (HVB) and/or by Stanford (University) Research Institute (SRI). These and other estimates, projected to 1962 and 1965, are as follows:

TABLE II

Estimated travel between California and Hawaii during 1962 and 1965

(1)	(2) Visitors to Hawaii, 2 days and over	(3) Westbound visitors, 2 days and over	(4) California/Hawaii travelers, sea and air	(5) California/Hawaii travelers, by sea
1962				
HVB:				
1. 1955 estimate	225,000	186,750	442,000	
2. 1958 estimate	325,000	270,000	638,000	[1] 160,000
3. Clover estimate			576,000	[1] 144,000
SRI:				
4. 1955 estimate		[2] 179,000	423,000	
5.				[3] 137,475
6.				[4] 84,600
1965				
HVB:				
7. 1955 estimate	280,000	232,400	548,000	[1] 137,000
8. (Child estimate)	415,000		780,000	[1] 195,000
9. Clover estimate			(700–800,000)	[1] (175–200,000)
SRI:				
10. 1955 estimate		215,000	508,000	[1] 127,000
11.				[3] 140,000
12.				[4] 101,600

[1] Assuming sea travelers equal 25 percent of sea and air travelers shown in column (4).
[2] Interpolated.
[3] Assuming sea travelers equal 32½ percent of sea and air travelers shown in column (4). (Residents and intended residents excluded by SRI in 1965.)
[4] Assuming sea travelers equal 20 percent of sea and air travelers shown in column (4).

We agree with the examiner that there will be approximately 125,000 potential ocean passengers in 1962 and 150,000 in 1965. These figures compare with vessel capacities as follows:

TABLE III

Estimated travel California/Hawaii compared with vessel capacities

Capacity of vessels	(a) Including *Leilani*	(b) Excluding *Leilani*	(c)
1. Present [1]	123, 139	89, 339	
2. a. Plus *Hoover*	123, 299	89, 499	
3. b. Plus *Washington*	127, 139	93, 339	
4. Present—Textron and Matson	123, 520	89, 720	
5. a. Plus 2,852 (APL's g.f. rights)	124, 968	91, 168	
6. b. Plus APL, incl. *Washington*	126, 627	92, 827	
Potential passengers:			
1962			125, 000
1965			150, 000

[1] *Lurline*, *Matsonia*, Matson freighters, Oceanic, *Leilani*, *Cleveland*, *Wilson*, APL-R/W, States/PTL.

We take official notice, under Rule 13(g), that the *Leilani* was withdrawn from service subsequent to the hearing. It will be noted that with the elimination of the *Leilani* the remaining vessel capacity is far less than the projected surface passenger movement between California and Hawaii for both 1962 and 1965. If Matson's own estimate of 93,593 surface passengers between California and Hawaii in 1963 be accepted, the demand for space will exceed the space offered. Vessel capacity, exclusive of the *Leilani*, plus the proposed carryings of the *Washington*, would amount to only 93,339.

On the basis of the foregoing, we find that granting permission to APL for its proposed service in 1963 and thereafter, i.e., the carriage of no more than 6,000 passengers and 3,320 L/T of cargo, would not, on this record, result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service.

Since this record demonstrates that without the proposed carryings of the *Washington* in 1963 and thereafter there would be insufficient capacity to carry the potential surface passengers, we find that the proposed service would not be prejudicial to the objects and policy of the Act.

This report shall serve as written permission for the service involved.

FEDERAL MARITIME BOARD

No. 807

ATLANTIC AND GULF-PUERTO RICO GENERAL INCREASE IN RATES AND CHARGES

Submitted December 3, 1959. Decided April 28, 1960

Rates between North Atlantic and Gulf ports of the United States and Puerto Rico, as increased 15 percent or 6 cents per cubic foot or 12 cents per 100 pounds, whichever produces the greater increase in revenue, and as further increased 12 percent, found just and reasonable.

Odell Kominers, *Mark P. Schlefer*, and *Sterling F. Stoudenmire, Jr.*, for respondents.

Eduardo Garcia, *Walton Hamilton*, *William D. Rogers*, *Abe Fortas*, *Seymour Berdon*, and *William L. McGovern* for Commonwealth of Puerto Rico, *John Regan* for Administrator of General Services, *Mitchell J. Cooper*, *Frank M. Cushman*, *Vernon C. Stoneman*, and *John B. Street* for Asociacion de Industriales de Puerto Rico (Manufacturers Association of Puerto Rico) and Commonwealth Manufacturers Association, *John B. Street*, *Frank M. Cushman*, and *Vernon C. Stoneman* for Paula Shoe Company, *John B. Street* and *Vernon C. Stoneman* for Caribe Shoe Corporation, *Mitchell J. Cooper* and *Frank M. Cushman* for Coastal Footwear Corp., *L. Merrill Simpson* for Bata Shoe Company, Inc., *William M. Requa* for Association of Sugar Producers of Puerto Rico, *J. W. Harnach* for Cooperative Grange League Federation, Inc., *Harold L. Copp* for Atlantic Industries, Inc., *T. A. Smith* for Louisiana State Rice Milling Company, Inc., *Wm. M. Reid* for The Rice Millers' Association, *Alan F. Wohlstetter* for Trailer Marine Transportation, Inc., and *Alfred K. Kestenbaum* for Cigar Manufacturers Association of America, Inc., interveners.

Robert E. Mitchell and *Edward Aptaker* as Public Counsel.

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, and THOS. E. STAKEN, JR., *Vice Chairman*

BY THE BOARD:

On December 4, 1956, United States Atlantic & Gulf-Puerto Rico Conference (the Conference), then comprised of Bull-Insular Line, Inc., Lykes Bros. Steamship Co., Inc., Waterman Steamship Corporation, and Alcoa Steamship Company, Inc. (Bull, Lykes, Waterman, and Alcoa), filed with the Board Tariffs FMB F–No. 14, Homeward Freight Tariff No. 7, and FMB F–No. 13, Outward Freight Tariff No. 7, naming increases in commodity rates over the applicable rates then in effect, to become effective January 5, 1957, between United States Atlantic and Gulf of Mexico ports and ports in Puerto Rico. On December 20, 1956, J. W. de Bruycker, agent for the Conference, filed special permission application to modify on short notice the increases in rates to reflect an adjustment not in excess of 15 percent or 6 cents per cubic foot or 12 cents per 100 pounds, whichever produces the greater increase in revenue, over the applicable rates then in effect. This increase will be referred to as the 15-percent increase.

On January 4, 1957, pursuant to section 18 of the Shipping Act, 1916, as amended, 46 U.S.C. 817 (the 1916 Act), and the Intercoastal Shipping Act, 1933, as amended, 46 U.S.C. 843 *et seq.* (the 1933 Act), we ordered an investigation into the reasonableness and lawfulness of the rates, charges, regulations, and practices stated in the tariff schedules filed December 4, 1956, and ordered the operation of these schedules suspended until midnight January 8, 1957, unless otherwise ordered. On January 8, 1957, we amended our order of January 4, 1975, and granted special permission to publish the rate increases, as modified, to be effective not earlier than January 9, 1957, on one day's notice. We also ordered an investigation of the 15-percent increase, and directed (a) that the carriers keep an account of all freight moneys received by reason of the rate increases for the period commencing January 9, 1957, and terminating May 5, 1957; and (b) that the carriers, upon final determination by the Board, pay to shippers, out of the carriers' general funds, the sums if any to which the respective persons who pay the freight might be entitled. The 15-percent increase became effective on January 10, 1957.

The orders of January 4 and January 8, 1957, made the Conference, agent de Bruycker, Bull, Lykes, Waterman, and Alcoa respondents. Notice of investigation and hearing was published in the Federal Register of January 17, 1957 (22 F.R. 355), and hearing was held in New York, N.Y., April 16 through May 3, 1957. After hearing on the 15-percent increase, but before briefs were due, respondents published on July 18, 1957, a 12-percent additional general rate increase (the 12-percent increase), to become effective September 14, 1957. On August 14, 1957, Pan-Atlantic Steamship Corporation (Pan-Atlantic), an affiliate of Waterman, filed revisions to its Homeward Tariff No. 1, FMB. F–No. 1, to become effective September 18, 1957, naming local commodity rates from Puerto Rico to United States Atlantic ports based on the same pattern as the conference rates.

By supplemental order of September 5, 1957, we (a) expanded the proceeding to include an investigation into the lawfulness of the rates as further increased by 12 percent; (b) suspended the operation of the conference and Pan-Atlantic schedules naming the 12-percent increase, until January 14, 1958; (c) made Pan-Atlantic a respondent; and (d) ordered a further hearing. Notice of the expanded investigation and further hearing was published in the Federal Register of September 12, 1957 (22 F.R. 7291), and further hearing was held in New York from October 21 through 28, 1957, and concluded in Washington, D.C., November 1, 1957. The 12-percent increase became effective on January 15, 1958.

During the course of the hearings the examiner denied requests by interveners that respondents be required to produce or make available underlying books, records, and accounts for the purpose of cross-examination in order to test the accuracy of certain of respondents' exhibits in the form of financial and statistical summaries based upon allocations and computations derived from underlying documents. In an initial decision served February 3, 1958, the examiner considered those exhibits as reliable, probative, and substantial, based on the sworn testimony of the witnesses through whom they were introduced as to their correctness and accuracy.

After oral argument upon exceptions to the initial decision, in an order entered June 13, 1958, we overruled the examiner as to these issues, and stated (5 F.M.B. 426, 429, 430):

> We do not agree with the examiner that the summary evidence presented by respondents, without reasonable access to supporting and underlying books, records, and accounts by which the accuracy and sufficiency of the evidence may be tested, is "reliable, probative, and substantial evidence" as required by section 7(c) of the Administrative Procedure Act. The record is insufficient for the Board to make proper findings as to the lawfulness of the rates under section 18 of the 1916 Act and under the 1933 Act.
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> We conclude that this proceeding should be remanded to the examiner for further hearing, and, in order that the full record herein shall contain probative

and substantial evidence sufficient for the Board to make valid determinations as to the lawfulness of the rates under investigation, respondents should produce at such further hearing, or make available to interveners and Public Counsel, such original and underlying books, records, accounts, and worksheets, including corporate profit and loss statements and balance sheets, as are required to determine the probative value of the evidence, the accuracy of computations and allocations between regulated and nonregulated activities, and the scope and accuracy of intercorporate transactions. Further, there should be full disclosure of data with respect to any sales or transfers of corporate assets which would be relevant and material in determining accurately the fair value of properties and assets devoted to this Puerto Rican service.

The proceeding was remanded to the examiner for the purpose of receiving further evidence. Further hearings were held during the period October 6 to 28, 1958. Interveners in opposition to the rate increases, or as their interests may appear, were the Commonwealth of Puerto Rico (the Commonwealth), the Administrator of General Services, Asociacion de Industriales de Puerto Rico (Manufacturers Association of Puerto Rico), Commonwealth Manufacturers Association, Paula Shoe Company, Caribe Shoe Corporation, Coastal Footwear Corp., Bata Shoe Company, Inc., Association of Sugar Producers of Puerto Rico, Cooperative Grange League Federation, Inc., Atlantic Industries, Inc., Louisiana State Rice Milling Company, Inc., The Rice Millers' Association, Trailer Marine Transportation, Inc., and Cigar Manufacturers Association of America, Inc.

In his initial decision on further hearing the examiner found and concluded that the 15-percent and 12-percent increases under investigation were just and reasonable and that the proceeding should be discontinued. Exceptions to the initial decision and replies thereto were filed, and oral argument was heard. Exceptions and proposed findings not discussed in this report nor reflected in our findings have been considered and found not justified by the facts or not related to material issues in this proceeding.

Carrier Respondents

1. *Alcoa.* Alcoa offers weekly service from New York and Baltimore, Md., and weekly service from Mobile, Ala., and New Orleans, La., to Puerto Rico. Each sailing serves all ports in Puerto Rico. The vessels in the North Atlantic service, after discharge at Puerto Rico ports, proceed into other trades, generally contract services. In the Gulf service, the vessels return from Puerto Rico to the Gulf ports, a service inaugurated in March 1958.

2. During 1956, 1957, and the first six months of 1958, average vessel utilization on a cubic basis by Alcoa in the North Atlantic service ranged from 39.5 percent in the second quarter of 1956 to

84.3 percent in the fourth quarter of 1957, and in the Gulf service from 44.4 percent in the second quarter of 1956 to 66.6 percent in the second quarter of 1957. The average southbound voyage in 1957 from the North Atlantic consumed 14.5 days, and from the Gulf, 12.7 days.

3. *Bull.* Bull provides three sailings per week from North Atlantic ports to Puerto Rico. One sailing proceeds from Baltimore and Philadelphia, Pa., to Puerto Rico and return. Another sailing proceeds from New York to Puerto Rico and return (the Thursday sailing), and the third from New York to Puerto Rico, thence to the Dominican Republic and return (the Friday sailing). Basically the services are provided with six C–2 type vessels, operated on a strict two-week turnaround. In addition, Liberty-type vessels also are employed to lift stators, generators, ammunition, and other specialized cargo destined to Puerto Rico which cannot be handled on the regular C–2 vessels. Liberty ships also have been utilized in some instances to carry full cargoes of bagged raw sugar under the tariff, but this movement declined rapidly in 1957 due to conversion of the raw sugar movement to bulk movement under contract, and has since come to a virtual halt. Caribbean Dispatch, Inc., an affiliate of Bull, is a major contract carrier of bulk sugar.

4. In a transaction closed December 18, 1956, characterized in the brief for the Conference as "an irrefragibly [sic] arm's-length transaction between completely unrelated interests," Olympia Corporation, incorporated in Delaware, acquired substantially all of the stock of A. H. Bull Steamship Co., a New Jersey corporation (A. H. Bull New Jersey). Prior to the transaction, the purchaser and the sellers had no stockholders, directors, or other interests in common, or any similar relationship. Olympia had been organized by its parent, American Coal Shipping, Inc. (ACS), which paid $100,000 for all of Olympia's outstanding stock, as the instrument designed to facilitate the consummation of the transaction. ACS and its own stockholders also loaned to Olympia about $5 million, at interest of 5 percent. Between December 18, 1956, and January 21, 1957, Olympia's name was changed to A. H. Bull Steamship Co. (A. H. Bull Delaware). The transaction contemplated purchase by Olympia of all of the outstanding stock of A. H. Bull New Jersey for a total consideration of $40 million (which was not finally accomplished until February 28, 1957), the liquidation of A. H. Bull New Jersey, and the transfer of all of its assets to A. H. Bull Delaware.

5. On December 18, 1956, A. H. Bull New Jersey had over $18 million in cash, obtained from surplus, liquidation of quick assets representing in part depreciation funds, release of vessel replacement

funds, and receipt of the repayments of advances and dividends from subsidiary companies, among others. On the closing date of the stock purchase, this $18 million was declared by A. H. Bull New Jersey as a dividend, paid principally to Olympia, and the remainder of the purchase price of $40 million was met from the proceeds of the loans from ACS and its stockholders of the $5 million mentioned above, and bank loans of some $17 million at interest rates ranging from 4¼ to 5 percent, guaranteed by ACS.

6. The net purchase price paid by Olympia for A. H. Bull New Jersey was therefore about $22 million. The book net worth of A. H. Bull New Jersey at the time of closing was about $12,330,000. Incident to the purchase, the physical assets of A. H. Bull New Jersey and its subsidiaries had been independently appraised. About January 21, 1957, in partial but almost complete liquidation of A. H. Bull New Jersey, its assets were transferred to the books of A. H. Bull Delaware, and in the process the vessel book values were raised from $5,160,421.85 to $12,892,610.21, effective as of the closing date, the latter figure representing about 70 percent of the appraised values of the vessels. The ascribed values of certain other assets were changed also for consolidated statement purposes, but on the corporate books only the vessel values were changed. Thus, on the books of A. H. Bull Delaware the vessel book values are carried presently at amounts, less accrued depreciation since the closing date, representing a pro rata share of the total purchase price paid by A. H. Bull Delaware for the assets of A. H. Bull New Jersey.

7. Corporate entities affiliated with Bull, so far as is here pertinent, include A. H. Bull Delaware, of which Bull is a subsidiary; A. H. Bull & Co., which provides continental United States overhead services for Bull and others in the corporate family in return for management and operating commissions composed principally of a percentage of revenues and a per diem husbanding charge; several separate corporations which own and operate pier facilities in Puerto Rico; Caribbean Dispatch, Inc., mentioned above; and Dafton Realty Co., owner of office facilities in New York utilized by Bull.

8. For 65 days between August 19 and October 22, 1957, Bull's operations were immobilized by a strike arising out of a jurisdictional dispute between seafaring unions. The strike was not unrelated to the fact that ACS, the new owner of the Bull properties, was in part owned by the United Mine Workers. Other strikes which have affected the operations of Bull at various ports, for varying reasons, and for periods of time ranging from 2 to 44 days, totaled 33 days in 1951, 1952, and 1956; 12 days in 1953; 101 days in 1954; 78 days in

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1955; 14 days in February 1957; and 20 days in the first 6 months of 1958.

9. *Lykes.* Lykes operates its weekly service between the Gulf ports of Lake Charles, La., and Houston and Galveston, Tex., and occasionally other western Gulf ports, and Puerto Rico, as a part of its subsidized service on Trade Route No. 19 (Line A service) between Gulf ports of the United States and Cuba, Haiti, the Dominican Republic, Venezuela, Colombia, and Panama. No voyages are operated to or from Puerto Rico exclusively. The number of vessel days operated by Lykes in the Puerto Rican portion of its Line A service is less than that in the service to and from foreign ports. During 1956, 1957, and the first 6 months of 1958, average vessel utilization on a cubic basis achieved in the combination Puerto Rican service ranged from 66.6 percent in the fourth quarter of 1957 to 90.9 percent in the first quarter of 1957.

10. *Waterman.* Waterman is a subsidiary of McLean Industries, Inc. At the outset of this proceeding it operated a weekly service between New Orleans and Mobile and Puerto Rico, utilizing two vessels on a 14-day turnaround, with additional vessels for relief purposes and when extra cargo demanded. Beginning in October 1957, Waterman also inaugurated weekly sailings, utilizing two vessels on a 14-day turnaround in regular break-bulk service, between New York, Baltimore, and Puerto Rico. Waterman intended to provide a permanent North Atlantic-Puerto Rico service, at first with regular break-bulk vessels, and later converting to trailership service.

11. Effective February 4, 1958, Waterman withdrew from the Conference and simultaneously ceased all operations in the Puerto Rican trades, which were taken over without break in service by Waterman Steamship Corporation of Puerto Rico (Waterman P.R.). The latter is a wholly owned subsidiary of Waterman, is not a respondent, and is not a member of the Conference, although its rates are in all respects the same as those of the Conference. When filing its initial tariffs with the Board, and in subsequent pleadings herein, Waterman P.R. has agreed to be bound by the results of this proceeding so far as its rates are concerned. Statistical and financial data reflecting the combined Waterman and Waterman P.R. operations are of record, although no recent data were presented forecasting operating results for the entire year 1958 as was the case with the other Conference respondents.

12. On February 28, 1958, Waterman P.R. inaugurated its North Atlantic-Puerto Rico trailership service, with the sailing of the *Bienville.* This vessel, upon arrival in Puerto Rico, was prevented from discharging because of labor difficulties. After some delay

the *Bienville* proceeded to New Orleans, where her cargo was discharged and that which had not spoiled was transferred to a ship regularly employed in the Waterman P.R. Gulf-Puerto Rico breakbulk service. The voyage consumed 34 days in all. After this experience, Waterman P.R. discontinued its North Atlantic-Puerto Rico service, which has not since been resumed either on a breakbulk or trailership basis.

13. *Pan-Atlantic.* Pan-Atlantic is an affiliate of Waterman, and as such was required to maintain the same rates as the Conference by the terms of the conference agreement to which Waterman was a party. Between April 1957 and early 1958, Pan-Atlantic provided a northbound service from Puerto Rico to Miami and Jacksonville, Fla., in conjunction with its intercoastal and west coast-Puerto Rico services, which was suspended at the end of this period and has not been resumed. The tariff under which such service was operated was canceled effective August 22, 1958. As far as the record discloses, this service was minimal since the cargo carried averaged only 51 tons per voyage, with gross revenue per voyage of $1,506. These data are so insignificant as to warrant their exclusion from consideration herein, although the rates under investigation will remain subject to the findings.

14. Pan-Atlantic instituted a trailership service between New York and Puerto Rico on July 30, 1958, which is presently being operated. On October 27, 1958, we denied a petition by the Conference requesting that this investigation be broadened by naming Waterman P.R. as a respondent, and bringing in issue the current tariffs of Pan-Atlantic and Waterman P.R.

PUERTO RICAN ECONOMY AND THE TRADE

15. Puerto Rico is a small island, 100 miles long and 25 miles wide, separated from the nearest point in the United States by over 1,000 miles of open water. The economy of the island has never been self-sustaining, and it has few natural resources. It is one of the most densely populated areas of the world. Its external trade is almost entirely with the United States. About 40 percent of all goods produced, and about 54 percent of all goods consumed, by its people are destined to, or originate in, the United States. Average income per capita in 1954 was $446, as compared with $1,770 in the United States. The percentage of the labor force of unemployed or only partial employed has consistently exceeded that in the United States. These data indicate that increases in the cost of shipping

such as are here involved affect the economy of Puerto Rico and the living standards of its populace more sharply than would similar increases elsewhere in the nation.

16. The conference rates in the Puerto Rican trade are determined by three-fourths majority vote of the members. Therefore, no one carrier can dominate the making of rates. Waterman P.R., presently operating in the Gulf-Puerto Rico trade, is not a member of the Conference and its rates can be made by individual action, subject only to the competitive impact of the rates maintained by the Conference. As is indicated by the statistics shown in table I, Bull is the dominant carrier in the trade, receiving approximately 50 percent of the revenues even in the year 1957, when its operations were immobilized for more than 65 days.

TABLE I.—*Gross transportation revenues of respondents*

Carrier	1956	1957	First half 1958
Bull	$24, 993, 850	$21, 646, 383	$11, 682, 207
Waterman	6, 534, 389	9, 416, 267	4, 651, 468
Alcoa	6, 244, 864	9, 175, 949	4, 215, 049
Lykes	3, 843, 368	3, 774, 843	1, 940, 279
Totals	41, 616, 471	44, 013, 342	22, 489, 003

17. The most recent traffic and revenue projections of the respondents, where given, were based on an extension of their most recent experience—the first half of 1958—subject to adjustments for known or contracted cost increases. Although there is testimony to the effect that a gradual increase may be expected in the movement of general cargo between Puerto Rico and the mainland, the statistics disclose a decline in volume carried of cargo subject to the tariffs here involved. This decline is attributed in large part to the conversion of the raw sugar movement from bag under the tariffs to bulk under contract, and to the construction of a fertilizer plant in Puerto Rico, which virtually eliminated the movement of prepared fertilizer and substituted therefor the movement of fertilizer raw materials in tramp vessels. Table II shows the cargo data submitted for the years 1955–57 and the first half of 1958, and the projections for the full year 1958, where given. Weight tons are computed on the basis of the weight of the cargo carried, and freight payable tons on the basis on which the freight charges were paid, either weight or measurement. The data for the full year 1957 in tables I and II reflect the impact of the long strike in that year against Bull, and the consequent diversion to Alcoa and other carriers of substantial amounts of traffic normally carried by it. They show the dominant position of Bull in the trade.

TABLE II.—*Cargo carried in freight payable tons, except where indicated*

Carrier	1955	1956	1957	First half		1958 projected
				1957	1958	
Bull	1,876,964	1,828,275	1,151,993	710,877	558,880	1,117,760
Alcoa	429,470	312,701	418,509	186,422	169,363	340,000
Waterman	239,535	238,895	298,831	148,526	132,202	
Lykes			203,438		107,822	215,644
Lykes	[1] 245,334	[1] 262,389	[1] 186,220	[1] 102,522	[1] 102,918	[1] 205,836

[1] Weight tons.

18. Taking into consideration the factors mentioned in paragraph 17, above, and the entry into the trade of Pan-Atlantic with its new and attractive trailership service, which no doubt will succeed in diverting some traffic from the services maintained by the other respondents, it is found that the projections of the respondents as to the year 1958 are reasonable.

SPECIFIC COMMODITY RATES

19. In the first initial decision the examiner found as follows:

60. The shipper interveners, generally, are those who ship commodities under so-called "promotional rates." These rates have been maintained by the carriers, prior to the proposed increases, at comparatively low levels designed to promote the movement of the commodities so rated. The promotional rates apply primarily to northbound traffic, and most of them have been used since 1946 in cooperation with and at the request of the newly-developing industries in Puerto Rico. This traffic, in gross tons, in 1955, amounted to approximately 20,000 tons northbound and 1000 tons southbound. In 1956 it amounted to approximately 25,000 tons northbound and 2000 tons southbound. The revenue from this traffic in relation to total revenue was perhaps less than ½ of 1 percent.

61. Selected commodities from those transported at promotional rates, stated by the carriers to be typical, were northbound: shoes, paperboard, chinaware, coffee, cigars, rugs, artificial flowers, boxes kd, scrap metal, scrap tobacco and confectionary; and southbound: tin cans, iron and steel articles, glass jars, bottles n.o.s., paper and paper products, and tiles. Two shippers, understood to be representative of shippers of such commodities, testified at the first hearing. One was a shipper of candy and the other of shoes, both shipping from Puerto Rico to the United States mainland. Their main objections were that the first rate increases on the commodities were greater than 15 percent. This is so because of the 6 cents per cubic foot or 12 cents per 100 pounds aspect of the first increase.

62. The shippers gave important consideration to the relatively low shipping rates for their products, it is stated, in their decisions to establish business in Puerto Rico, since transportation charges are vital factors in their business prospects. The record shows that the 15 percent rate increase raised footwear costs 1.13 percent of the value of the product, and candy 1.78 percent. These increases, it is stated, seriously limit the possibilities of expanding mainland business, and discourage people from establishing business in Puerto Rico.

63. The record shows that the promotional rates are too low, and appear to be noncompensatory, even with the 15 percent increase, and there is some question as to whether the further 12 percent increase renders said promotional rates compensatory.

20. No exceptions were taken to the above findings. They are borne out by the record, and no additional evidence was presented at the second hearing relating to these issues. We adopt such findings.

Cost Increases

21. The cumulative rate increases under investigation aggregate about 29 percent. The last prior general rate increase in the Puerto Rican trade was made effective November 12, 1951. Since that date the expenses of respondents have increased substantially. For example, Bull shows that stevedoring wages in the United States have increased 46 percent and in Puerto Rico about 63 percent; fuel oil costs have increased 23 percent; vessel operating costs as a whole, 54 percent; crew wages, 62 percent; vessel repair costs, 50 percent; and insurance, 52 percent. Comparable cost increases are shown for the other three carriers in the trade.

22. There is evidence that the carriers, through increased efficiency of operations, have endeavored to minimize the impact of the stated cost increases. Stevedoring expenses account for a substantial proportion of total operating expenses. Bull shows that from 1951 to the end of 1957 loading costs in New York increased from $4.06 per ton to $4.69 per ton, and discharge costs at the same port from $4.80 per ton to $5.74 per ton, increases of 15.5 percent and 19.6 percent, respectively, far lower than the wage increases shown. This favorable result is attributed to increased efficiency in loading and discharging operations, the leasing of modern improved terminal facilities, and in some degree the use of containers and vans. Loading and discharge costs at San Juan, P.R., however, reflect more closely the wage increases, attributed to the lesser efficiency of port arrangements and labor. Loading costs at that port in the same period increased from $2.02 to $3.07 per ton, and discharge costs from $2.79 to $4.71 per ton, increases of 52 percent and 68.8 percent, respectively.

23. Waterman shows, in addition to the cost increases stated above, that effective in October 1958 longshore wage increases at Puerto Rican ports will, after that date, increase stevedoring expenses by about 92 cents per ton, and that known prospective wage increases will, by the end of 1958, increase crew wage costs by $160,000 annually over the wage levels for 1957.

ALLOCATION METHODS

24. Of the principal respondents, Waterman is the only one which operates an exclusive Puerto Rican service. The remaining respondents, as shown in paragraphs 1–9, above, operate their services to and from Puerto Rico either wholly or partially on a joint basis with other services. This has necessitated allocation of the joint service expenses of the respondents and of the assets devoted to these services so as to ascertain as nearly as possible the proper apportionment of of expenses and assets between the regulated and nonregulated trades in order to determine the adequacy of revenue in the regulated trade. For this purpose, respondents have made their allocations principally on ton-mile prorate formulae.

25. Where possible, such as in the case of port and cargo handling expenses incurred in Puerto Rico, the expenses were directly assigned. Most other expenses, including vessel operating expenses, cargo and port expenses in the United States, vessel depreciation, and overhead were subject to allocation. The need for allocation does not alter the basic factors contributing to vessel operating expenses, the volume and the distance carried. In applying the ton-mile prorate, the respondents used the traight-line distances between ports of loading and discharge, since a vessel sailing toward Puerto Rico is also sailing toward foreign ports of call. Vessel operating expenses and certain other expenses were then allocated to the Puerto Rican service in the proportion that Puerto Rican ton-miles bore to total ton-miles operated in the joint services.

26. Where the ton-mile prorate involved too heavy a burden, as where the allocation was between the Puerto Rican trade and the entire company operation, a revenue prorate was used for convenience, using as factors the proportion that Puerto Rican revenue bore to total revenue. In the case of loading costs, distance is not a relevant factor and allocations were generally made on the basis of the number of tons handled. In the case of Bull's substantially equidistant Puerto Rican and Dominican destinations, its use of a ton-mile prorate in the allocation of loading and stevedoring costs in the United States resulted in an approximately equal allocation of loading expense per ton.

27. Strike expenses incurred by Bull in 1957 were allocated by it on the basis of a revenue prorate, because the development of a ton-mile formula would have made necessary a port-to-port analysis of volume and distances for a minimum of 155 sailings, a burden-

some task. Since the Dominican revenue is substantially higher per ton than Puerto Rican revenue for approximately the same distance, as shown below, this actually allocated a higher proportion of strike expenses to the Dominican traffic and a lower proportion to Puerto Rican traffic than would have resulted from the use of a ton-mile prorate.

28. Vessel assets were assigned to the Puerto Rican services of the respondents on the proportion of the vessel operating days in those services, allocated where necessary on the basis of a ton-mile prorate. Assets in Puerto Rico were directly assigned to the Puerto Rican service, and terminal property in the United States was generally allocated on a revenue prorate.

29. At the request of other parties, respondents in most instances also computed their expenses on the basis of revenue prorate formulae. Interveners contend that for the purposes of this proceeding revenue prorate allocations should be used. For example, the Commonwealth argues that segregation of the joint voyage results on the Friday sailings of Bull gave inordinately excessive profits to the Dominican portion and exceptionally large losses to the Puerto Rican portion in 1957, as to which on a ton-mile prorate Bull shows a combined net revenue on the joint sailings, after depreciation and overhead but before taxes, of $46,345, with allocation of a loss of $244,973 to the Puerto Rican portion and a profit of $291,318 to the Dominican portion.

30. In 1957, total traffic carried by Bull on the joint voyages was 311,699 tons, of which 36,784 tons were Dominican cargo. In the same year total joint voyage freight revenue was $5,367,625, of which Dominican revenue was $924, 140. The Commonwealth characterizes as anomalous the results of the ton-mile prorate which attributes to the Dominican trade net revenue equal to 30 percent of each dollar of revenue. Bull's revenue per ton in the Dominican trade in 1957 was 36 percent higher than in the Puerto Rican trade ($27.04 as aginst $19.94), and costs of discharge in the same year in the Dominican Republic were only 22.5 percent of like costs in Puerto Rico ($1.06 as against $4.71). These data indicate that the profit results derived through use of ton-mile prorate formulae reflect with a reasonable degree of accuracy the inherent differences as between the Dominican and Puerto Rican trades. The Commonwealth also argues that the use of the ton-mile prorate results in somewhat higher unit costs on the joint service voyages than on the Thursday sailings of Bull which serve Puerto Rico only. These results are fully explained by the facts that there were more sailings in 1957 in the joint service with about the same amount of total traffic, and

consequently lower volume per voyage and higher costs per ton, and also that the joint voyages were subject to overtime costs because of late sailings not incurred on the Thursday sailings.

31. Manufacturers Association of Puerto Rico contends that allocation of expenses for the Friday joint servicé sailings of Bull should be made on a so-called "known-cost-per-ton" method. By this method, allowable expenses on the joint service voyages would be confined to the unit costs incurred on the Thursday sailings which serve Puerto Rico exclusively, which costs can be computed without the necessity for allocations. Such a method bears no relation to the realities of the situation and is clearly erroneous.

32. The Commonwealth alternatively suggests that in lieu of allocation in the case of Bull's Friday sailings, the total profit results on the joint voyages should be included, on the grounds that the Dominican operation is a by-product of the Puerto Rican trade which could not stand on its own feet; that only 13 percent of the cargo on the joint voyages is Dominican; that Dominican cargo is less than one-half of one percent of the total Bull Puerto Rico traffic; and that the carrier itself recognizes the incidental nature of the Dominican operations by failing to allocate out of its asset statements any portion of vessel and other property values attributable to the Dominican operation. The issue here is not the profit accruing to Bull as a result of its joint service operations, but the justness and reasonableness of the rates under investigation, which, in the nature of the case, must be decided on the basis of the adequacy of the revenues derived therefrom. There is no suggestion that allocation is not necessary in the case of the other respondents which operate joint services, and no good reason appears why Bull should be accorded special treatment in this respect. The authorities cited clearly support agency action in general rate proceedings in adopting appropriate means of effectuating a separation of the regulated and nonregulated portions of an integrated enterprise. See *Cities Service Gas Co.* v. *Federal Power Com'n*, 155 F. 2d 694, 704-5 (1946), *cert. den.* 329 U.S. 773; and *Colorado Interstate Co.* v. *Comm'n.*, 324 U.S. 581, 586-92 (1945). The record clearly indicates that dissimilar rates and cost factors as between the Puerto Rican and Dominican operations make allocation necessary in order to avoid distortion of the operating results in the Puerto Rican trade and the use of the resulting data in assessing the lawfulness of the rates under the jurisdiction of the Board.

33. In the light of the findings in paragraphs 23–31, above, we agree with the examiner that the use of the ton-mile prorate formulae, where

utilized, and the other allocation methods adoped by the respondents, are reasonable and proper for the purposes of this proceeding.

DEPRECIATION AND BULL'S VESSEL BOOK VALUES

34. In general, the vessel book values maintained by respondents represent the cost of acquisition, plus additions and betterments, depreciated on the basis of a 20-year vessel life down to a residual scrap value amounting to 2.5 percent of acquisition cost. In the discussion immediately to follow, vessel acquisition costs and book values are stated as approximations since precision is not necessary for disposition of the issues here raised and since precise data, after allocations, are shown, *infra*.

35. Alcoa's C-1 vessels, utilized in its Gulf service, were acquired in 1941 and 1942 at costs ranging from $1,000,000 to $1,250,000, and by December 31, 1956, had been depreciated down to net book values ranging from $223,000 to $322, 000. Its C-2 vessels used in the North Atlantic service were acquired in 1946 and 1947 for $1,200,000 to $1,333,000, and by the same date had been depreciated down to $535,000 to $635,000.

36. Waterman's C-2 vessels used in its Gulf service were acquired in 1947 and 1948 for $984,000 to $1,100,000, and by December 31, 1956, had been depreciated down to about $500,000. Lykes' C-1 vessels were acquired between 1943 and 1949 for $943,000 to $1,000,000, and by the same date had been depreciated down to slightly less than 50 percent of original cost.

37. In the case of Bull, most of the C-2 vessels had been acquired in 1947 at costs of $948,000 to $1,006,000 by A. H. Bull New Jersey, and by December 18, 1956, had been depreciated down to about $750,000. Two of the C-2 vessels were acquired in 1954 by A. H. Bull New Jersey in exchange for fully depreciated Liberty vessels and modest amounts of cash, and entered on the books at about $208,000 and $248,000. These two C-2's, by December 18, 1956, had been depreciated down to about $173,000 and $203,000. Annual depreciation charges in 1957, if taken by A. H. Bull Delaware on the basis of the vessel book values maintained on the books of A. H. Bull New Jersey, on the portion of the fleet allocated to the Puerto Rican trade, would have amounted to $396,887.

38. As of December 18, 1956, and as a result of the transaction detailed in paragraphs 4-6, above, the C-2 vessels utilized by Bull in its Puerto Rican services were entered on the books of A. H. Bull Delaware at acquisition costs of about $853,000 to $979,000, representing, as there stated, about 70 percent of their then appraised values. As a

result, depreciation charges claimed by Bull in 1957, and actually taken on the books of A. H. Bull Delaware, amounted to $929,514, or $532,627 more than would have been claimed by A. H. Bull New Jersey in the event the transaction had not taken place. Similarly, the increased depreciation taken in the first six months of 1958 amounted to $364,540, as against $194, 456 had the transaction not occurred.

39. Domestic market value for C-2 vessels, exclusive of extras, in April 1957 is shown in the record as $1,350,000, which by October 1958 had declined to $875,000. The earlier value reflects the high market values which were the result of the Suez Canal crisis which created a sudden shortage in available vessels. The later value reflects the decline in vessel market values resulting from the depression in the shipping industry which occurred between the dates given. For C-1 vessels, exclusive of extras, the domestic market value in April 1957 was $1,100,000, which declined by October 1958 to $575,000.

40. The Commonwealth contends that, with respect to depreciation generally, respondents' vessels have already been depreciated below realistic economic residual values as reflected by the market values shown; that residual values based on nominal scrap value are unrealistic and do not represent an accurate measure of the actual residual value of the vessels, which can be presumed to have a service life of more than 20 years and will, at the expiration of that time, either be sold or traded in at prices much higher than scrap value; that the residual service value of the vessels is at least equal to their book values at the end of 1955; and that as a consequence, depreciation charges taken by respondents should be disallowed in their entirety as an item of expense in determining the results of respondents' operations in the Puerto Rican trade.

41. The depreciation practices of respondents and the estimated residual value are recognized for tax purposes and are in conformity with the Board's General Order 24 (46 CFR sec. 284.2(f)). Contrary to the contention of the Commonwealth, this record affords no basis for conjecture as to the possible residual value of the vessels utilized in the Puerto Rican trade, other than the traditional and long-accepted residual value used by respondents. To adopt the suggestion of the Commonwealth would substitute speculation for certainty, since depreciation charges allowed would fluctuate with varying judgments as to possible future residual values which may be affected by unforeseen circumstances. We reject the contention of the Commonwealth.

42. Public Counsel and interveners also contend that for the purposes of this proceeding the depreciation charges claimed by Bull

on the basis of vessel acquisition costs entered on the books of A. H. Bull Delaware must be disallowed, depreciation allowed only on the book values maintained prior to the ACS transaction by A. H. Bull New Jersey, and vessel book values determined on the basis of projections of the books of A. H. Bull New Jersey. The arguments are based in the main on the rule propounded by the Supreme Court, particularly with regard to public utilities such as power and light and telephone companies, that the proper guide to book value of a utility's property is the cost as of the time when the property to be valued was first acquired by a public utility or dedicated to the public use. See *A. T. & T. Co.* v. *United States*, 299 U.S. 232, 239 (1936), and cases there cited. That case, upon analysis, is also authority (pp. 240–4) for the proposition that acquisition cost of the last owner in a bona fide arm's-length transaction properly may be entered on the books of the acquiring utility and is the proper depreciation base.

43. There is no suggestion here that the ACS purchase was anything other than an arm's-length transaction between unrelated interests, that there was any attempt at collusion so as to arbitrarily inflate the values of the Bull properties, or that the purchase was an improvident one. In fact, based upon vessel market values shown in the record, the Bull assets were acquired at bargain prices, and the vessel acquisition costs entered upon the books of A. H. Bull Delaware represent the true acquisition costs incurred by that corporation. The Board has no jurisdiction over financial transactions involving carriers such as are here involved, and the decision here must be based on the facts as they exist.

44. It is found that the depreciation charges claimed as expenses by respondents, including those claimed by Bull on the basis of vessel acquisition costs incurred by A. H. Bull Delaware, are reasonable and proper for the purposes of this proceeding, and that the vessel book values maintained by A. H. Bull Delaware reflect the true acquisition costs of the vessels utilized by Bull in its Puerto Rican services.

Valuation and Rate Bases

45. *General.* The Conference advocates rate bases calculated as of June 30, 1958, notwithstanding that the first increase here involved became effective in January 1957. Waterman individually contends for rate bases compiled as of December 31, 1957. Public Counsel and Manufacturers Association of Puerto Rico contend that rate bases should be constructed as of December 31, 1957, applicable to the 1957 rate increase, and as of June 30, 1958, applicable to the 1958 rate

increase. The Commonwealth assigns values based on a composite analysis of the totality of the exhibits submitted. In *General Increase in Hawaiian Rates*, 5 F.M.B. 347, 354–5 (1957), we stated that carriers are entitled to a fair return on the reasonable value of the property at the time that it is being used for the public, and that in ascertaining the "reasonable value" we are not bound by any artificial rules or formulae, citing *San Diego Land Company* v. *National City*, 174 U.S. 739 (1899), and *The Minnesota Rate Cases*, 230 U.S. 352 (1913).

46. This proceeding involves two separate rate increases, the second superimposed upon the first. The record includes data concerning the actual operations of respondents for almost a full year under the first of these increases and for almost six months under the combined increases. In the usual rate-increase case, determination of the lawfulness of the increases proposed is necessarily predicated upon projections of revenues and expenses expected in the future, and the property values for the purpose of calculating the expected rate of return are most readily determinable as of the time the rate increases are proposed. Here, however, particularly with regard to the 15-percent increase, the results of operations under the increased rates can be ascertained with some degree of certainty. The most precise method of resolving the issues presented by this proceeding would be to determine average values of respondents' property employed during 1957, applying operating results for the year 1957 to the resulting figures to determine rates of return actually earned during that year, and then to ascertain values as of December 31, 1957, applying projected operating results for the year 1958, based upon actual operations during the first six months of that year, to the ascertained values as of December 31, 1957, the approximate date when the 12-percent increase became effective, so as to compute expected rates of return for the year 1958. Such extreme precision is not required, however, and it is doubtful that the different values arrived at would be substantially at variance with each other. For the purposes of this proceeding, therefore, property values will be determined as of December 31, 1957, and the resulting rate bases applied to the actual operating results, so far as they can be determined on the record for the year 1957, and the projected results for the year 1958. While this may have a tendency to lessen somewhat the values applicable to the year 1957 because of depreciation, it is deemed that the results will not be unreasonable.

47. In table III are set forth the rate bases claimed by the Conference, and in table IV the rate bases claimed individually by Waterman.

TABLE III.—*Rate bases claimed by the Conference*

Bull:		
Vessels		[1] $12,048,584
Working capital		2,000,000
Brooklyn terminal	nonowned	5,000,000
Philadelphia terminal	do	3,064,916
Baltimore terminal	do	6,000,000
Puerto Rico terminals		4,062,194
Other property		747,387
Claims pending		22,584
Total		32,945,665
Alcoa:		
Vessels		5,183,638
Working capital		1,233,955
New York terminal	nonowned	2,015,400
Baltimore terminal	do	1,117,000
Mobile terminal	do	1,901,800
New Orleans terminal	do	825,700
Puerto Rico terminal	do	1,500,000
Terminal equipment	do	356,600
Structures		98,371
Equipment		231,957
Spare parts		67,734
Total		14,532,155
Lykes:		
Vessels		3,784,230
Working capital		445,212
Terminal property		3,589
Other property		92,801
Statutory reserve funds		2,022,488
Total		6,348,320
Waterman:		
Vessels		4,170,856
Working capital		1,208,091
Mobile terminal	nonowned	1,000,000
New Orleans terminal	do	750,000
Puerto Rico terminal		1,242,716
Furniture, fixtures, and other equipment		167,604
Office building, Mobile		289,491
P.R. stevedore equipment		23,863
P.R. wharf equipment		1,239
Total		8,853,860
Grand total		62,680,000

[1] This figure does not include any value assigned for Liberty ships, and because of an error in calculation in the conference brief, should be $12,288,581 on the basis claimed by the Conference.

TABLE IV.—*Rate bases claimed by Waterman*

Method 1:	
Vessels, average of reproduction cost depreciated, and net book value	[1] $4,666,171
Other property	3,474,913
Working capital	1,892,107
Total	10,033,191
Method 2:	
Vessels, market value	3,070,500
Other property	3,474,913
Working capital	1,892,107
Total	8,437,520

[1] This figure, although labeled average of reproduction cost depreciated and net book value, embraces as an element the depreciated value of replacement vessels rather than reproduction cost depreciated of the vessels employed.

48. The items listed in table III designated as other property, structures, equipment, spare parts, terminal property, furniture, fixtures, and other equipment, office building, and stevedore and wharf equipment represent allocations of owned property carried into the claimed rate bases at net book value, and there is generally no dispute concerning the propriety of including such asset values. There is little justification for the inclusion of the item called "claims pending," in Bull's rate base, and it will not be further considered.

49. Lykes alone among the respondents does not claim as a part of its rate base the values of any nonowned terminals, on the ground that its vessels utilize a number of different public terminals, and the ratio of its use of any particular terminals would be minimal and difficult to determine. Accordingly, it claims as expense items in its profit and loss statements the full rentals paid for terminal use. It includes in its claimed rate base statutory reserve funds amounting to $2,022,488, made up of capital reserve funds of $1,734,919 representing accumulated depreciation on the portion of its vessels allocated to the Puerto Rican services, and special reserve fund amounting to $287,569. Both of these reserve funds are required to be maintained in connection with Lykes' subsidized foreign operations, under section 607 of the Merchant Marine Act, 1936, as amended, 46 U.S.C. 1177. We are not impressed with the argument that these statutory reserve funds should be considered as *property* devoted to the Puerto Rican service, and no further consideration will be given to this item.

50. *Vessels.* In table III, the vessels allocated by respondents to the Puerto Rican trade are valued by weighting original and reproduction costs, depreciated, using as factors 70 percent of reproduction cost, depreciated, and 30 percent of acquisition costs, depreciated. These percentages were rejected by us in *General Increases in Alaskan*

Rates and Charges, 5 F.M.B. 486, 498 (1958). Respondents argue that Bull has in the distant past built its own ships and operated in the Puerto Rican trade with newly constructed tonnage, and has developed plans for replacement vessels although there are no present indications that new ship construction will be embarked upon in the near future; that Alcoa has likewise had naval architects prepare designs for replacement vessels; and that Lykes is contractually committed to a ship replacement program in connection with its subsidized operations. For these reasons, the Conference contends that the circumstances here present differ from those in the *Alaskan* case and justify the use of the 70-percent/30-percent weighting. The examiner used an average of original costs and reproduction costs, citing *Rates of Inter-Island Steam Navigation Co., Ltd.*, 2 U.S.M.C. 253 (1940); *Alaskan Rates*, 2 U.S.M.C. 558 (1941) and 2 U.S.M.C. 639 (1942); *General Increase in Hawaiian Rates*, *supra;* and *General Increase in Alaskan Rates and Charges*, *supra*.

51. Table V shows, after allocation, the original and reproduction costs, depreciated as of December 31, 1957, the averages thereof, and the market values of the vessels employed by respondents. The market values are averages of the domestic market values stated in paragraph 39, above, taken so as to eliminate extremes of value occasioned by the special circumstances detailed. As in the case of table III, the vessel values in the case of Bull do not include assigned values for Liberty-type vessels which the record indicates will occupy a diminishing role in its operations.

TABLE V.—*Vessel values*

	Original cost, depreciated	Reproduction cost, depreciated	Average	Domestic market values
Bull	$4, 875, 995	$16, 890, 740	$10, 883, 318	$7, 620, 900
Alcoa	1, 421, 166	7, 487, 081	4, 454, 124	3, 913, 972
Lykes	993, 200	5, 409, 969	3, 201, 585	2, 359, 806
Waterman	1, 152, 132	6, 535, 356	3, 843, 744	3, 167, 275
Totals	8, 442, 493	36, 323, 146	22, 382, 771	17, 061, 953

52. We disagree with both the Conference and the examiner as to the fair and reasonable value of respondents' vessels. What respondents are entitled to is "a fair return on the reasonable value of the property at the time it is being used for the public." *San Diego Land Company* v. *National City*, *supra*. We find that the value of the vessels on the domestic market at or about the time the rate increase is requested, with adjustments to eliminate short term peaks in vessel values, is the proper method for determining the reasonable value of the property being used for the public. We do

not feel that we should assume for rate-making purposes that a carrier has reproduced its vessels. When the carrier has reproduced a vessel and placed it in service he is entitled to a fair return on its value. Until then, the shipping public should not be forced to pay rates based even in part on the conjectural value of some phantom vessel which may never serve it. To the extent the conclusions set forth in prior cases disagree with those expressed herein, they are overruled.

53. We find the fair and reasonable values of respondents' vessels devoted to the Puerto Rican service to be those set forth in table V under the heading "Domestic market values."

54. *Working capital.* The examiner found that a fair and reasonable allowance for working capital as an element of the rate bases would be approximately one-twelfth of the annual operating expenses experienced in 1957 of the respective carriers, exclusive of depreciation, or $1,800,000 for Bull, $860,000 for Alcoa, $360,000 for Lykes, and $615,000 for Waterman.

55. The Conference excepts to the finding in paragraph 54 contending that the carriers are entitled to (1) a buffer fund equivalent to one-twelfth of annual operating expenses, exclusive of depreciation, plus (2) an amount sufficient to cover the lag in revenue collections behind the related disbursements, citing *Alaskan Rates, supra.* Under this method they say Bull is entitled both to the "buffer of one-twelfth of operating expenses or $1,800,000 and the collection lag of $1,000,000", and that the other respondents are entitled to a similar working capital determination.

56. Interveners and Public Counsel also except to the examiner's finding, contending that working capital should be computed on the basis of the requirements laid down in General Order 31, 46 CFR sec. 286.3(a)(1).[1]

57. In *General Increases in Hawaiian Rates*, *supra*, we used General Order 71 as the method for computing working capital as an element of the rate base. In *General Increases in Alaskan Rates and Charges*, *supra*, we disallowed claimed working capital computed by the formula detailed in the *Alaskan Rates* cases, *supra*, and allowed working capital calculated in accordance with General Order 71 (superseded by General Order 31), and we characterized that General Order as basically consisting of the average voyage expenses for each vessel in the carrier's fleet.

58. The examiner concluded that use of the formula was inappropriate in this proceeding, pointing out that under Limitation 3 the

[1] Limitations 3 and 4 of that order, which relate to the computation of working capital, are set forth in the appendix.

inclusion by Bull in its current liabilities of annual installments due on its debt and annual interest payments would leave it with a negative balance for working capital. We find nothing in this record to warrant a reversal of our holding in *General Increases in Hawaiian Rates*, *supra*, and *General Increases in Alaskan Rates and Charges*, *supra*. We will clarify those two decisions in one respect, however. In determining a fair and reasonable allowance for working capital as an element of rate bases in proceedings such as these, we will limit the amount to that determined under Limitation 4 of General Order 31 and give no consideration to Limitation 3.

59. We find that the fair and reasonable allowance for working capital would be the amount computed under Limitation 4 of General Order 31, or $1,087,000 for Bull, $264,100 for Alcoa, $222,100 for Lykes, and $285,800 for Waterman.

60. *Property used but not owned.* As is indicated in table III, Bull, Alcoa, and Waterman claim as elements of their rate bases substantial amounts representing the value of terminals and terminal equipment used by them in their Puerto Rican services which are owned by others. In conjunction with these claims, Bull has adjusted its operating expenses to substitute owners' expenses detailed on the record in the case of the Brooklyn and Philadelphia terminals for terminal rentals, and has credited its revenues with the profits derived from the operation of the Puerto Rican terminals by its subsidiaries; Alcoa has adjusted its operating expenses to eliminate rental costs for terminals; and Waterman has adjusted its operating expenses to eliminate profits from the operation of its Puerto Rican terminal owned by Waterman P. R. However, Waterman claims as operating expenses the rentals paid for terminals at Mobile and New Orleans, and the record affords no basis for determining the amount of such rental payments. The Baltimore terminals used by Bull and Alcoa are leased to them free by the owners as an inducement to increase the amount of traffic moving over the piers, and Bull's rental payments for its Philadelphia pier are substantially less than owner's costs.

61. The examiner found that in the case of Bull and Alcoa the inclusion in their allowable rate bases of the value of property used but not owned, with the concurrent elimination from operating expenses of rentals paid for such property and the substitution of owners' expenses therefor, is reasonable and proper. In the case of Waterman, however, he found that since it was impossible to determine on the record its rental payments for the use of its Mobile and New Orleans terminals or the expenses of the owners thereof, that the value of such property should not be included in its rate

base. In arriving at the value of property used but not owned, he found the proper valuation to be the net book value where ascertainable, or if not, a value on the basis of other evidence of record. The examiner concluded that prior decisions of the Board had allowed for rate base purposes the value of property used, although not owned by the carriers, which he states is in accord with the accepted theory of valuation.

62. In our most recent ruling on this point in *General Increases in Alaskan Rates and Charges*, *supra*, we included the value of a chartered vessel in the carrier's rate base but excluded certain nonowned shoreside property, since it was difficult if not impossible to determine its proper value. We think we were in error in including the value of the nonowned assets. We are not impressed with the arguments of the Conference that such assets should be included in the rate base of some of the respondents. We note that Lykes did not claim as part of its rate base such nonowned property, and it appears that Bull did not include piers owned by the Commonwealth. Further, in the case of Waterman, the examiner refused to include the value of such property in its base. Again, in the case of Alcoa, in arriving at a value to be included in that company's rate base, the examiner, because of insufficient data, reduced the amounts claimed by the same percentage he had reduced Bull's claimed values. These same problems led us to conclude in *General Increases in Alaskan Rates and Charges*, *supra*, that certain nonowned property was not properly includable in the carrier's rate base.

As indicated above, such assets were claimed by some of the carriers and not by others, were excluded by the examiner in the case of Waterman, and Bull apparently did not claim all of such property. Thus we are asked to arrive at rate bases of various carriers containing different elements, depending in some cases on the claims of the carrier and in others on the evidence submitted by it as to the value of the property. This we will not do. Proceedings such as this are difficult enough without adding to the problems. Respondents present no binding precedent that requires us to include such property in a carrier's rate base. We do not feel that either logic or law necessitates the inclusion of nonowned property. The carriers are not devoting their capital to the shipping public insofar as such property is concerned. It is proper, of course, to include in allowable expenses the rental paid and other expenses of the carriers which arise by reason of the use of such facilities, but to include the value of nonowned property in the rate bases in our opinion would grant the carriers a windfall at the expense of the shipping public.

63. *Bull's Puerto Rican terminal.* The examiner included in the rate base of Bull $2,144,572, the net book value as of December 31, 1957, of certain Puerto Rican terminals owned by Bull and devoted to the trade. Public Counsel excepts to this inclusion and the Commonwealth contends that the amount should be reduced by some $475,000, representing the total acquisition cost of certain property adjoining one of the terminals on which is located a building which occupies about one-twelfth of the area and which is leased for purposes not related to the Puerto Rican trade. The remainder of the property admittedly is used for terminal services and the building rentals are credited to the Puerto Rican services of Bull. We agree with the examiner that $2,144,572 should be included in the rate base of Bull as representing the value of Bull's Puerto Rican owned terminals. This property is owned by Bull and devoted to the trade, and rentals from the building as well as any profit realized from the operation of the terminal will be credited to Bull's Puerto Rican service. Under such circumstances there is no justification for excluding the terminals in whole or in part from Bull's rate base.

64. *Recapitulation.* Table VI sets forth the total values of respondents' property devoted to their Puerto Rican services, as found for the purposes of this proceeding, reflecting the findings specifically made above concerning the valuation of vessels, working capital, and terminals and terminal equipment as of December 31, 1957, and reflecting also the net book values of all other property as of December 31, 1957, as found in the record. In the case of Lykes, net book values for such other property were not submitted as of December 31, 1957, and the values included are the averages of net book values shown in the record as of June 30, 1957, and as of June 30, 1958.

TABLE VI.—*Values*

Bull	$11,491,987	Lykes	2,680,115
Alcoa	4,570,966	Waterman	5,350,285

REVENUES AND EXPENSES

65. *General.* As stated in paragraph 46, above, in the present posture of this proceeding it is possible to determine with reasonable accuracy the actual operating results experienced by respondents during 1957 in the performance of their Puerto Rican services, and thus to make findings concerning the lawfulness of the 15-percent increase. Reasonable projections for the future may be made based upon revenue and expense data submitted by respondents covering the first six months of operations in 1958 under the combined 15-

percent and 12-percent increases, by which the lawfulness of the combined increases may be gauged. Numerous issues are raised by the parties concerning the revenues to be assigned to the Puerto Rican trade, and the expenses allowable. Certain of these, relating to allocation methods employed by respondents, depreciation claimed by them, and the adjustment of expenses to eliminate rental costs for nonowned terminals or to substitute owners' costs therefor, have been treated separately above and need not be restated here. In restating the assignable revenues and allowable expenses, the findings there made will govern. Generally, disposition of the issues raised concerning 1957 expenses and revenues will suffice, and later data restated accordingly.

66. Interveners and Public Counsel contend that the revenues of respondents for 1957 should be restated so as to give effect to a full year's operations under the 15-percent increase, which became effective on January 10 of that year. It is also contended that the expenses of Bull for that year should be adjusted so as to eliminate the expenses incurred during the strike mentioned in paragraph 8, above, of which $643,037 of general operating expenses and $146,483 of depreciation are allocable to the Puerto Rican services, on the ground that this strike was unique in character and occurred for reasons not related to the Puerto Rican trade. As to the strike expenses, the examiner concluded that the effect on the revenue position of Bull was no different except in degree from that of any other strike for which no claim was made. We disagree with the examiner. This strike was unrelated to the ordinary labor-management controversies, and the general operating expenses incurred during the strike should be excluded from Bull's expenses for 1957, but no sound reason is shown for the elimination of depreciation expenses incurred during that period. With respect to the restatement of revenues to cover a full year of the 15-percent increase, we agree with the examiner that the operating results for 1957 do not enter into projections for the future, and restatement thereof so as to reflect a full year's operation would serve no useful purpose.

67. *1957 revenues and expenses.* Bull shows operating revenues for 1957 of $21,646,383, which are adjusted to include amounts of $117,954 covering interest revenue from a mortgage on the Brooklyn terminal held by Bull, $86,018 covering net profit of the Puerto Rico terminal companies, and $68,187 covering top wharfage collected in Philadelphia. Public Counsel and interveners contend that the revenues should be further adjusted so as to include $38,335 of the net profits of Caribbean Dispatch, Inc., earned in carrying bagged raw sugar under contract terms which normally would have

been transported by Bull at tariff rates, and $60,069 of profits earned by Bull in conducting independent stevedoring operations in Puerto Rico for other carriers during the strike period. Of these adjustments, the examiner found that only the inclusion of the interest revenue is improper, that it is included only for the reason that the value of the Brooklyn terminal is claimed in Bull's rate base and that it is no more a part of the earnings derived from the Puerto Rican service than the revenue from any other unrelated investment. We agree with the examiner as to the interest revenue but are of the opinion that elimination of the strike expense for 1957, as found above, requires also that the bagged raw sugar and stevedoring profits should be excluded from the assigned revenues.

68. Bull shows total allocated operating expenses of $22,644,027. Adjustments upward include $95,872 covering costs incurred as a result of actions brought in Puerto Rican courts for overtime wages by stevedore foremen, and $69,273 covering the excess of actual Puerto Rican overhead expenses over budget provisions therefor. Adjustments downward include a credit of $145,299 for stevedore overhead charged into the stevedoring account; $72,319 to substitute owners' expenses for terminal rentals; $3,813 to cover a correction in the allocation of 1957 strike expenses; and a stipulated correction of $35,232 in mangement and operating commissions. Manufacturers Association of Puerto Rico contends that the adjustment of expenses to cover the foremen's overtime suits is improper on the ground that the expense is attributable to a violation of law by Bull. The suits arose from a difference of opinion as to Bull's liability for overtime payments, and the costs incurred by Bull are operating costs properly includable.

69. Manufacturers Association of Puerto Rico also contends that Bull's 1957 expenses should be adjusted downward by $6,398 to reflect an allocation of inactive vessel expense and depreciation of other equipment to the Dominican traffic, which allocation was not made by respondents, and this adjustment is considered proper. We agree with the examiner that operating expenses should be reduced by $139,404 to cover the excess of commissions paid to A. H. Bull & Co. over and above the costs of the latter as allocated on a revenue prorate.

70. Aloca shows gross operating revenues in 1957 of $9,175,949. Operating expenses after allocation were $10,615,037, adjusted downward by $423,120 to exclude pier rentals.

71. Lykes shows gross operating revenues in 1957 of $3,774,843. Operating expenses after allocation were $4,540,813.

72. Waterman shows gross operating revenues in 1957 of $9,416,267, covering both its Gulf and North Atlantic operations. Expenses were $8,771,685. Interveners contend that the expenses should be adjusted to eliminate charter hire of $32,400 on a vessel included in the rate base, and to eliminate $13,770 interest on a vessel mortgage. Since the vessel is not included in the rate base the charter hire paid is a proper expense. Interest payments are not operating expenses as such, but are rather costs of capital employed which should be borne out of profits earned, and an adjustment is proper. It is also contended that Waterman's revenues and expenses for 1957 should be restated so as to eliminate the results of its North Atlantic service, which was conducted in that year at a loss, for the reason that such service was only temporarily operated. As stated above, operating results for 1957 do not enter into projections for the future, and the service was instituted by Waterman with the full intention of making it permanent. To eliminate the results of this service would distort the actual revenue position of Waterman in defiance of the facts of record.

73. Giving effect to the findings above, including elimination of strike expenses and adjustments relating thereto, and the adjustment in Bull's revenues as found in paragraph 67, above, and the inclusion of rental expenses and deletion of owners' expenses for nonowned property disallowed in the rate base, table VII shows respondents' operating results in 1957 as adjusted:

TABLE VII.—*1957 operating results*

	Revenues	Expenses	Net profit (or loss)
Bull	$21,800,488	$21,835,989	($35,501)
Alcoa	9,175,949	10,615,037	(1,439,088)
Lykes	3,774,843	4,540,813	(765,970)
Waterman	9,416,267	8,757,915	658,352

74. *1958 revenues and expenses.* As stated in paragraph 17, above, respondents' revenue projections, where given, were based on an extension of their most recent experience, that for the first half of 1958, subjected to adjustments for known or contracted cost increases. Revenues for 1958 were calculated as twice those for the first six months, adjusted to give effect for the full year to the 12-percent increase which became effective January 15. Expenses for the first six months were adjusted upward by about 1 percent. Waterman did not submit future projections, basing its position on the fact that it

ceased operations in the trade and its successor in the operation is not a respondent herein. Waterman contends, therefore, that no consideration may be given to the future operations of Waterman P. R. in the trade in determining the lawfulness of the rates here under investigation. Waterman P. R. is, however, an existing operator in the Gulf/Puerto Rico trade, its rates are identical with those under investigation, and it has agreed to be bound by the findings herein. Accordingly, for the purposes of this report, projected 1958 results for the combined Waterman and Waterman P. R. operation from Gulf ports to Puerto Rico are calculated below on the same basis as used by the other respondents. Revenues for the first six months are doubled, and adjusted upward by $54,000 as suggested by Public Counsel to reflect a full year's operation under the 12-percent increase. Expenses for the first six months, as adjusted, are doubled and adjusted upward by 1 percent to reflect the cost increases expected by the other respondents. This will fail to give effect to the cost increases shown by Waterman individually as stated in paragraph 23, above, but it is expected that similar cost increases will also affect the other respondents, and they are disregarded here in order to treat all carriers similarly.

75. In computing operating expenses for the first six months of 1958, Bull included vessel repair expenses on a reserve basis in its voyage accounts. For the period these reserves totaled $197,428. Actual repair expenses during the period were $57,951 less than this amount, and Public Counsel and interveners contend that the excess should be credited to Bull's expenses and only actual repair costs allowed. Bull's actual repair expenses were $413,311 in 1957 and $562,795 in 1956, and it does not appear that the reserves are excessive. For the purpose of projecting expenses over the full year 1958, the reserves for repair expenses will be allowed.

76. The combined Waterman and Waterman P. R. expenses reported for the first six months of 1958 in their Gulf/Puerto Rico service include costs of $8,617 attributable to transfer of the *Bienville* cargo at New Orleans into a vessel regularly providing break-bulk service to Puerto Rico. Waterman contends that this amount should not be disallowed. It is an expense of a nonrecurring nature and for the purpose of projecting future operating results the contention has merit; the adjustment requested will be made.

77. Giving effect to the findings relating to 1957 revenues and expenses, and to those made specifically with regard to 1958, table VIII shows respondents' revenues and expenses for the first six months of 1958, and the projected operating results for the full year 1958.

TABLE VIII.—*1958 operating results*

	First half 1958		1958 projected		
	Revenues	Expenses	Revenues	Expenses	Net profit (or loss)
Bull	$11,706,918	$11,384,232	$23,650,643	$23,070,350	$580,293
Alcoa	4,215,049	4,990,803	8,484,000	10,027,000	(1,543,000)
Lykes	1,940,279	2,150,083	3,919,737	4,318,234	(398,497)
Waterman and Waterman P. R.	4,121,323	3,417,080	8,296,646	6,902,501	1,394,145

DISCUSSION AND CONCLUSION

In our order remanding the proceeding for further hearing we directed that the record should be sufficient for consideration of the issues either through analysis of all carriers or through consideration of Bull as the rate-making carrier. The examiner treated respondents as a whole. We disagree. In *General Increases in Hawaiian Rates*, *supra*, and again in *General Increases in Alaskan Rates and Charges*, *supra*, we followed our prior decisions and adhered to the principle that the dominant carrier in a noncontiguous domestic trade will be taken as the rate-making line. We find nothing in the present record which warrants a different conclusion here. Bull is by far the dominant carrier in the trade and its gross revenues during the first half of 1958 exceeded those of the other three carriers. They were approximately two and one-half times those of the next largest carrier. Consideration of the issues will be made on the basis of Bull as the rate-making carrier.

On the basis of the findings set forth herein, Bull in 1957 suffered a loss of some $35,500 and the 15-percent increase has been shown to be fully justified. On the basis of the 1958 projection, which we have found to be reasonable, Bull, on a rate base of $11.5 millions, during 1958 would earn 5.0 percent before income taxes.

The Commonwealth contends that Bull's allowable return should be 5 percent. The Conference argues that a rate of 10 percent after taxes is reasonable. Public Counsel says 7.5 percent after tax is the proper rate of return. Our predecessors fixed 7 percent after taxes in *Rates of Inter-Island Steam Navigation Co., Ltd.*, *supra*, and 7.5 percent in *Alaskan Rates*, *supra*. Recently, in *General Increases in Alaskan Rates and Charges*, *supra*, we allowed rates of return of 5.22 and 8.90 percent upon two alternative methods of rate base valuation. We find that a rate of return of not in excess of 7.5 percent, after income taxes, of the rate bases determined as set forth in our findings is fair and reasonable.

In view of our finding as to a fair and reasonable rate of return and the finding as to Bull's earnings under the combined 15-percent and 12-percent increases, we find it unnecessary to give further consideration to the contentions of the Commonwealth with respect to the treatment of income taxes.

The Conference excepts to the examiner's failure to include in the rate base a separate amount for going-concern value. As we said in *General Increases in Alaskan Rates and Charges*, *supra*, at page 500, "Neither the Board nor any of its predecessors has ever included a separate 'going concern value' in a rate base."

We see no reason to depart from the fair-return-on-fair-value standard which the Board and its predecessors have used, and we reject the contention of the Conference that the operating ratios experienced by respondents should be considered as a method of determining the reasonableness of the rates here involved.

Ultimate Findings

We find and conclude that the 15-percent and 12-percent increases here under investigation are just and reasonable.

An order discontinuing the proceeding will be entered.

APPENDIX

General Order No. 31 provides in pertinent part as follows (46 CFR sec. 286.3 (a) (1) in part):

LIMITATION (3)

ADJUSTED WORKING CAPITAL

The excess, if any, of the balance of "Adjusted Working Capital" of the operator and its wholly-owned subsidiary companies as of the balance sheet date, after interim adjustments thereof, as provided in paragraph (d) of this section, and allocated to subsidized operations as provided in paragraph (e) of this section, over "Limitation of Adjusted Working Capital" in subsidized operations, as defined in Limitation (4), shall be deemed to be "Capital Held in Reserve" in the business and shall not be taken into account in determining "capital employed."

For the purpose of applying this Limitation, "Adjusted Working Capital" shall include only the following accounts defined in Part 282 of this chapter:

Accounts	
100–199 (369)	Current assets (less reserves and provision for accrued deposits in statutory reserve funds other than voluntary deposits, which shall not be accrued for deposit).
200	Unterminated voyage expense.
375–389	Deferred charges (to operations) and prepaid expenses.
Less:	
400–534	Current liabilities (excluding mortgage notes—vessels, and other liabilities payable from statutory reserve funds).
495	Advance ticket sales and deposits.
500	Unterminated voyage revenue.

The provision for accrued deposits into the statutory reserve funds referred to in Accounts 100–199 hereinabove shall include, but is not limited to, the following:

(i) Accrued depreciation on vessels required to be deposited into the Capital Reserve Fund;

(ii) Proceeds from sale or loss of vessels and other amounts which, upon collection, are required to be deposited into the Capital Reserve Fund;

(iii) All accrued mandatory deposits into the Special Reserve Fund.

LIMITATION (4)

LIMITATION OF ADJUSTED WORKING CAPITAL

Adjusted Working Capital as determined under Limitation (3) shall be allowed as "capital employed" to the extent of the Total Average Voyage Expenses employed in subsidized operations determined as follows:

Average Voyage Expenses shall be determined on the basis of the actual expenses of operating and maintaining the subsidized vessels (excluding lay-up expenses) for a period represented by the average length of time of all round voyages (excluding lay-up periods) calculated separately for each subsidized service (line). For the purposes of this Limitation, the term "line" shall be deemed to mean those described in Part I of the Operating-Differential Subsidy Agreement, or in instances where the routes or services described therein are not designated as "lines", then the trade routes referred to in Part I of the Subsidy Agreement shall for such purposes be deemed to be "lines"; *Provided*, That in any event passenger services shall be deemed to be "lines" separate and distinct from freight services: *And provided further*, That in instances where unsubsidized vessels are operated in subsidized services and are subject to the reserve and recapture provisions of the Agreement, they shall not be considered as a separate category but shall be included with the subsidized vessels for the line involved.

This determination shall be made in the following manner:

First: By dividing the sum of such expenses for the accounting period involved applicable to the subsidized vessels in each such service (line) by the aggregate number of days (excluding "lay-up" days) consumed in all voyages of such vessels in each such service (line) terminating during such period;

Second: By multiplying the quotient thus obtained by the number of days (excluding "lay-up" days) in the average voyage in each such service (line); and

Third: By multiplying the resulting product by the quotient of the total number of days (excluding "lay-up" days) consumed in voyages of subsidized vessels in each such service (line) terminating during the accounting period divided by the number of calendar days within the accounting period.

The expense of operating and maintaining the subsidized vessels shall include overhead (Accounts 900–955 less Accounts 670 and 895) allocated to subsidized operations under § 286.4 and total Operating Expense—Terminated Voyages (Accounts 701–799 in Part 282 of this chapter). For the purpose of this Limitation (4), if, in any instance, the average subsidized voyage in any subsidized service (line), as determined above, is of less than ninety (90) days' duration, the expense of hull and machinery insurance (Account 755) and P & I insurance (Account 757) shall be determined to be that for a period of ninety (90) days: *Provided*, That such allowance for insurance expense shall not, in the aggregate, exceed the total actual insurance expense for the accounting period. Expenses used for this purpose shall be those included in the annual accounting for each calendar year, filed under Part 292 of this chapter, and shall not be adjusted thereafter.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 28th day of April A.D. 1960

No. 807

ATLANTIC & GULF-PUERTO RICO GENERAL INCREASE IN RATES AND CHARGES

This proceeding having been instituted by the Board on its own motion, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the 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, and having found that the proposed rates and charges under investigation are just and reasonable:

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

By the Board.

(Sgd.) JAMES L. PIMPER,
Secretary.

FEDERAL MARITIME BOARD

No. 867

PROPORTIONAL COMMODITY RATES ON CIGARETTES AND TOBACCO

Submitted February 9, 1960. Decided April 28, 1960

Proposed proportional commodity rates on cigarettes, cigars, and tobacco from New York, N.Y. (Port Newark, N.J.), to Ponce and San Juan, P.R., found unduly preferential of the port of New York and unduly prejudicial to the port of Baltimore, in violation of section 16 of the Shipping Act, 1916.

Proposed rates ordered cancelled and proceeding discontinued.

Warren Price, Jr., and *W. C. Farnell, Jr.*, for respondent.

Mark P. Schlefer for United States Atlantic & Gulf-Puerto Rico Conference, *William L. Marbury* and *John M. Jones, Jr.*, for Maryland Port Authority, *Charles McD. Gillan* for Baltimore Association of Commerce, and *Alfred K. Kestenbaum* for Cigar Manufacturers Association of America, Inc., interveners.

Frank Gormley, *Robert E. Mitchell*, and *Edward Aptaker* as Public Counsel.

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, THOS. E. STAKEM, Jr., *Vice Chairman*, SIGFRID B. UNANDER, *Member*

BY THE BOARD:

By its freight tariff No. 5, FMB–F No. 5, and supplements Nos. 1, 2, and 3, filed with the Board to become effective on August 25, 1959, Pan-Atlantic Steamship Corporation (respondent) proposes to establish proportional commodity rates on cigarettes and tobacco NOS, as defined in the tariff, from New York, N.Y. (Port Newark, N.J.), to Ponce and San Juan, Puerto Rico, when originating at Petersburg and Richmond, Va., and Durham, Greensboro, Reidsville, and Winston-Salem, N.C., and on cigars from and to the same ports when originating at Richmond. Upon protest, the Board by order of August 24, 1959, instituted this investigation to determine the reasonableness and lawfulness of the tariff schedules pursuant to the Shipping Act, 1916 (the 1916 Act), 46 U.S.C. 801 *et seq.*, and the Intercoastal Shipping Act, 1933, 46 U.S.C. 843 *et seq.*, and suspended the operation of the schedules to and including December 24, 1959. Respondent voluntarily has extended the effective date of the suspended schedules until May 24, 1960, to permit disposition of this proceeding. United States Atlantic & Gulf-Puerto Rico Conference (the Conference), Maryland Port Authority (the Authority), and Baltimore Association of Commerce (the Association) intervened in opposition to the proposed rates. Cigar Manufacturers Association of America, Inc., intervened as its interests might appear but took no active part in the proceeding.

Hearing was held before an examiner, and in his initial decision he concluded and found that the proposed rates would unduly prefer the port of New York and would be unduly prejudicial to the port of Baltimore, in violation of section 16 First of the 1916 Act. Exceptions to the initial decision and replies thereto were filed, and oral argument was heard. Exceptions and proposed findings not discussed in this report nor reflected in our findings have been considered and found not justified by the facts or not related to material issues in this proceeding.

Respondent serves only New York in the North Atlantic, does not serve Baltimore, Md., and has no intention of extending its service to the latter port. Its weekly service to Puerto Rico is a new and modern concept of through motor-water trailership transportation, inaugurated in July 1958. Cargo is carried in standard-size highway trailer vans which are loaded on and discharged from the vessel by ship's cranes. Each trailer van is provided with a special chassis for its movement as a unit to and away from the vessel. A connecting motor carrier's truck-tractor may be attached to the chassis unit for haul of the trailer van to and from interior points. This method of operation eliminates intermediate handling of the shipment from the time it is loaded in the trailer van at point of origin until it is discharged at destination in Puerto Rico, and is suitable for a wide range of articles moving to Puerto Rico, especially for commodities having relatively high value and susceptibility to loss and damage in handling.

Despite solicitation of the traffic, respondent has carried only 108 cases of cigarettes, of which 25 originated at Richmond and Reidsville, and no cigars or tobacco from any of the six interior origins mentioned above. The cigarettes all moved in October 1958, during a period when one of the conference carriers serving Baltimore was strike-bound. Sales efforts with the shippers involved have been unfruitful because of alleged lower total freight charges through the port of Baltimore than are applicable over respondent's line. Accordingly, the proposed rates have been designed to equalize the through motor-water charges via New York with those applicable via Baltimore.

The proposed rates are published in two parts in the suspended schedules. The first part names basic port-to-port commodity rates of 58 cents per cubic foot[1] on cigarettes and cigars, and 55 cents per cubic foot on tobaccos NOS, both subject to minimum weights of 28,000 pounds. These basic rates are on the same level as respondent's present rates. They are also on the same level as the present rates maintained by the Conference. As in the case of all other commodities, the port-to-port rates on cigarettes, cigars, and tobacco of both respondent and the Conference are the same from all ports in the United States to Puerto Rico. The second part of the suspended schedules names proportional differentials by which to determine the amounts to be deducted from the ocean charges, calculated on the basis of the basic commodity rates and depending on the particular origin of the commodities shipped. These differentials are 10 cents per 100 pounds, minimum 25,000 pounds, on cigarettes and tobacco originating at Petersburg; 24 cents per 100 pounds, minimum 20,000 pounds, on cigarettes and tobacco originating at Durham, Greensboro, Reidsville, and Winston-Salem; and 26 cents per 100 pounds, minimum 30,000 pounds, on cigarettes, 6 cents per 100 pounds, minimum 20,000 pounds, on cigars, and 6 cents per 100 pounds, minimum 25,000 pounds, on tobacco when originating at Richmond.

The applicable tariff charges over respondent's line are computed by first ascertaining the total charges that would result by the application of the basic commodity rates, and then deducting the amounts determined by the use of the proportional differentials. For example, on a shipment of cigarettes of 30,000 pounds, measuring 1,579 cubic feet and originating at Petersburg, the basic rate of 58 cents per cubic foot would produce revenue of $915.82, but when reduced by $30 by application of the differential of 10 cents per 100 pounds, it will result in a net charge of $885.82. Similarly computed, net ocean charges on like shipments originating at Richmond and at the North Carolina points would be $837.82 and $843.82, respectively. The proportional differentials represent the exact amounts in cents per

[1] The tariff also names a rate of 143 cents per 100 pounds, minimum 28,000 pounds, on all of the commodities, which is inapplicable because of the high cubic to weight ratio of the commodities involved.

100 pounds that the presently applicable motor common-carrier rates from the interior origins to New York exceed the rates to Baltimore, and a parity of through charges with Baltimore would be established on shipments over respondent's line through New York. The table below shows the present motor common-carrier rates on cigarettes from interior origins to New York and Baltimore and the highway distances.

Motor common-carrier rates on cigarettes

From	To Baltimore		To New York	
	Rate	Distance	Rate	Distance
	Cents	*Miles*	*Cents*	*Miles*
Petersburg	89	166	99	363
Richmond	66	143	92	340
Durham	107	298	131	495
Reidsville	107	290	131	487
Greensboro	107	329	131	526
Winston-Salem	107	346	131	543

In each instance the highway distance from interior origins to New York exceeds that to Baltimore by 197 miles, and the most direct highway route from interior origins to New York lies through Baltimore. Respondent does not anticipate that the proposed rates will generate any new traffic, but expects that a portion of the traffic now moving through Baltimore will be diverted to move over its line through New York. No transit time advantage would be gained by the shippers on shipments moving through New York as against those moving through Baltimore. It was stipulated by the parties that respondent has the capacity to handle the traffic involved. Respondent shows numerous situations wherein rail inland export rates lower than domestic rates are equalized to different ports regardless of distance, as for example rates on cottonseed meal, cake, and related articles which are the same from Fort Worth, Tex., to New Orleans, La., 533 miles, as to Houston, Tex., 260 miles.

The membership of the Conference includes the principal carriers operating break-bulk services to and from Puerto Rico. Of these, Bull-Insular Line, Inc. (Bull), and Alcoa Steamship Co., Inc. (Alcoa), provide service at Baltimore. Alcoa operates a weekly southbound service which originates at Philadelphia, calls at Baltimore and New York in that order, and then proceeds to Puerto Rico. For many years Bull operated a year-round weekly round-trip service which began at Philadelphia, proceeded to Baltimore, and then direct to Puerto Rico and return to Philadelphia. Bull thus was the only carrier which provided a direct service from Baltimore to Puerto Rico. In 1959, for the first time, in order to improve vessel

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utilization, Bull has had its vessels call at New York after leaving Baltimore during the summer months, eliminating the direct Baltimore-Puerto Rico service, although it is contemplated that winter schedules will resume the direct service because weather conditions will not permit the continuance of a call at New York in the Baltimore service and still maintain a weekly service with two vessels. In 1959, after leaving the last port of call, free space available in the vessels operating in the Baltimore service averaged 42 percent of the vessels' cubic capacity under the direct winter schedules, as against 24.5 percent for the vessels which called at New York under the summer schedules. Free space on Alcoa's vessels was also substantial, indicating that Bull and Alcoa have ample capacity to carry the traffic here involved.

Cigarettes constitute by far the major portion of the traffic originating at the interior points here involved (more than 95 percent), and about 85 percent of all cigarettes shipped originate at Richmond according to the data furnished by Bull. In 1958 and 1959 to date, from these interior origins, Bull carried 8,064,052 pounds of cigarettes, cigars, and tobacco measuring 494,891 cubic feet, and this volume represented about 2 percent of its total cargo out of Baltimore. Only about 25 percent of all cargo loaded by Bull at Baltimore originates in that city, the remainder being drawn from interior points. Alcoa's share of the traffic is considerably smaller, aggregating 402,096 pounds measuring 24,529 cubic feet in 1958 and the first three quarters of 1959. Tobacco products are among the higher-rated commodities, and in the case of Bull annual revenue therefrom is about $160,000. Loss and damage claims for Bull are relatively insignificant, totaling $1,246 in 1957, $1,686 in 1958, and $1,096 in 1959 to date.

Practically all of the tobacco products moving to Puerto Rico through Baltimore are transported in container vans furnished by Bull and Alcoa, and sufficient numbers of such vans are held at that port for such traffic. These container vans are only about one-third the size of the trailer vans utilized by respondent. The container vans are loaded by the carriers at the port, and deliveries in Puerto Rico may be effected in the vans without unloading at the pier.

In order to counter the proposed rates, the Conference filed with the Board, to become effective on January 24, 1960,[2] reduced port-to-port rates from the United States to Puerto Rico of 54 cents per cubic foot on cigarettes, 57 cents on cigars, and 50 cents on tobacco NOS. These reduced rates are predicated on the basis of equalizing, out of all ports, the lowest port-to-port ocean charges which would

[2] The effective dates of these schedules have since been extended concurrently with those of respondent.

result from respondent's proposed proportional rates, and thus would undercut respondent's proposed rates to some extent, but the Conference feels that in order to avoid the possibility of discrimination against any tobacco shippers not located at the Virginia and North Carolina origins here involved, equal port-to-port rates should be available to all. Bull is opposed in principle to the type of port equalization here proposed by respondent, because of its destructive nature to port interests, and would recommend to the Conference that further similar reductions made by respondent be met to the point that the rates cease to be compensatory.

It was stipulated that the rates proposed by respondent would be compensatory, and that rates resulting from further reductions by respondent in its port-to-port basic rates to the level of the reduced port-to-port rates filed by the Conference would likewise be compensatory. The record indicates that it is the intention of respondent to meet any rate reductions by the Conference on these commodities.

The port of New York has many advantages which attract traffic from all over the United States, including the area around and beyond Baltimore. Steamship lines offer many more direct sailings out of New York to all destinations than out of Baltimore. In addition to its preponderance of steamship services, New York has a far greater number of supplementary services, including international freight forwarders, customhouse brokers, international banking facilities, steamship line agencies, consular services, the only foreign trade zone in the North Atlantic, commodity exchanges, marine insurance brokers, foreign purchasing agencies, and foreign chambers of commerce. Among the North Atlantic ports, New York handles the great preponderance of general cargo in foreign trade. In 1957, 17,118,824 tons of general cargo in the export and import trades moved through New York as compared with 4,518,442 tons through Baltimore. As for general cargo, exclusive of bulk shipments, moving to Puerto Rico from New York and Baltimore, New York's share increased from 65.7 percent in 1954 to 70.3 percent of an expanded volume in 1957. Exports of manufactured tobacco through New York in 1957 were 22,673 tons as compared with only 124 tons through Baltimore, indicating that even at unfavorable inland rates export tobacco shippers, including those at interior Virginia and North Carolina points, favor the port of New York.

Section 18 of the 1916 Act requires that carriers in interstate commerce shall establish and enforce just and reasonable rates, fares, and charges, and just and reasonable regulations and practices relating thereto, and makes unlawful any unjust and unreasonable rates, etc. Section 16 provides, so far as pertinent:

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

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

Respondent contends that the proposed rates are just and reasonable in that they are compensatory and no lower than necessary to meet the competition; that proportional rates, and particularly the practice of port equalization, have been sanctioned by the Board and its predecessors; and that the proposed rates do not violate section 16 because that section does not embrace ports within its terms, and because respondent does not serve Baltimore, or participate in rates through that port, and therefore it cannot be accused of discrimination against the port of Baltimore, citing *Texas & Pacific Ry. Co.* v. *U.S.*, 289 U.S. 627 (1933). The Conference contends that the proposed rates are unreasonable because they would result in destructive competition. The Authority and the Association contend that the proposed rates would result in undue and unreasonable preference to the port of New York and would unduly prejudice the port of Baltimore, in that they are designed to attract to the port of New York traffic which naturally is tributary to the port of Baltimore.

In *Texas and Pacific Ry. Co.* v. *U.S.*, *supra*, the Supreme Court held, at a time when section 3(1) of the Interstate Commerce Act was generally comparable to the present language of section 16 First of the 1916 Act, that ports as such were not "localities" with respect to export and import traffic routed through them, being nothing more than gateways or junction points, and therefore were not susceptible to undue preference or prejudice within the meaning of section 3(1). Respondent recognizes that in *City of Mobile* v. *Baltimore Insular Line, Inc.*, 2 U.S.M.C. 474 (1941), the Maritime Commission held that, with respect to a similar contention, ports are localities within the meaning of the 1916 Act, notwithstanding the holding of the Supreme Court in *Texas & Pacific Ry. Co.* v. *U.S.*, *supra*, stating at p. 478:

Defendants fail adequately to consider one point influencing the court's decision. With respect to traffic moving by rail en route to destinations beyond seaboard, ports are neither origins of the traffic nor shipping, producing or consuming areas affected by the rates; they are merely transshipping points. As to water transportation, a port also is a transshipping point, but it is something more. It is an area affected by the port-to-port rates established by the carrier. It is also the place at which, either actually or constructively, the contract of affreightment is executed. Therefore, a port becomes for the water movement a point of origin and under the court's decision, is within the term "locality" even though shipments have received prior rail transportation under an independent contract.

Respondent argues that the quoted language does not apply with respect to its operations, which contemplate the movement in through service of shipments loaded in trailer vans at interior origins, without off-loading at the port. From the standpoint of the service which it performs, however, respondent's status is no different from that of any other ocean carrier, since it exercises no control over, nor participates in, the interior transportation. So far as respondent is concerned, the port of New York is the origin point of the shipments transported by it, whether or not the shipments have received prior motor transportation.

A contention like that of respondent here, that it cannot be accused of discrimination against the port of Baltimore in view of the fact that it does not serve that port, was considered and rejected in *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, 3 F.M.B. 556, 565–6 (1951), on the ground that injury to a port adversely affected by equalizing proportional rates is caused directly by the action of the carrier establishing such rates and is proscribed by the statute.

Insofar as respondent's services are concerned, the proposed rates would establish varying charges for identical services. Such rates are *prima facie* discriminatory (*Contract Rates—Japan/Atlantic-Gulf Freight Conf.*, 4 F.M.B. 706, 735 (1955), and *Contract Routing Restrictions*, 2 U.S.M.C. 220, 225 (1939)) and are thus unreasonable in the absence of justification therefor. In *City of Mobile* v. *Baltimore Insular Line, Inc.*, *supra*, at page 486, it was stated:

We recognize that proportional rates in water transportation may be proper in some instances, but it must not be presumed that every rate which is lower than the corresponding local rate is a lawful proportional rate. Except when delivery costs at ports are relied upon differentials between defendants' local rates and the alleged proportional rates do not reflect any competitive cost or other transportation factor in the transportation service which defendants actually perform. A carrier undertaking to establish proportional rates should be prepared to prove some such relationship.

In some earlier decisions the predecessors of the Board approved proportional rates which represented absorptions of inland rate differentials. *Board of Commissioners L. C. H. & T. D.* v. *N. Y. & P. R. S. S. Co.*, 1 U.S.S.B. 154 (1929); *Proportional Westb'd Intercoastal Rates on Cast-Iron Pipe*, 1 U.S.S.B.B. 376 (1935); *Intercoastal Rate Structure*, 2 U.S.M.C. 285 (1940). Later decisions, however, have recognized the destructive nature of such absorptions to the right of ports to traffic originating in the areas naturally tributary to their port locations, in the absence of adequate ocean service available at the particular ports. See *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, 2 U.S.M.C. 500 (1941), and 2 U.S.M.C. 699 (1943); *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, *supra; City of Portland* v. *Pacific Westbound Conference*, 4 F.M.B. 664 (1955), and 5 F.M.B. 118 (1956). In *City of Mobile* v. *Baltimore Insular Line, Inc.*, *supra*, the Martime Commission required cancellation of all equalizing proportional rates then in effect in the Puerto Rican trade, and stated at pp. 486–7:

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 basic policies of Congress would be unwarranted.

Respondent admits that the traffic here involved normally would move through the port of Baltimore, and that the proposed rates, if successful, would operate to divert such traffic away from its normal flow. It contends, however, that because of the small amount of traffic involved, such diversion would not cause substantial injury to that port, nor have any adverse effect upon the carriers serving Baltimore, and that any prejudice to the port of Baltimore resulting from the proposed rates could not therefore be found undue or unreasonable within the meaning of the 1916 Act. The revenues from such traffic are substantial, however. The record shows a gradual trend of traffic away from Baltimore and toward New York under the present differentials in inland rates, and the principal carrier of tobacco products has found it necessary to eliminate during the summer months its direct Baltimore-Puerto Rico service because of insufficient traffic, which situation will not be enhanced by the further artificial diversion of traffic such as is here proposed. It is true that through the proposed rates respondent is endeavoring to make available, at equalized transportation costs, a new and improved type of through sea-land service, but there is no evidence that the shippers of tobacco products located at Virginia and North Carolina interior points need or desire such service, or that the present service available to them through the port of Baltimore is inadequate or unsatisfactory in any respects.

We find that the proposed rates would unduly prefer the port of New York and would be unduly prejudicial to the port of Baltimore, in violation of section 16 First of the 1916 Act.

An order will be entered requiring cancellation of the proposed rates and discontinuing the proceeding.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 28th day of April A.D. 1960

No. 867

PROPORTIONAL COMMODITY RATES ON CIGARETTES AND TOBACCO

This proceeding having been instituted by the Board on its own motion, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the 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 Pan-Atlantic Steamship Corporation be, and it is hereby, notified and required to cancel, effective on or before May 31, 1960, the schedules under investigation herein, designated as follows:

Pan-Atlantic Steamship Corporation FMB F-No. 5, and Supplements Nos. 1, 2, and 3,

upon not less than one day's notice to the Board and to the general public, by filing and posting in the manner prescribed by the Board, under section 18 of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended; and

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

By the Board.

(Sgd.) JAMES L. PIMPER,
Secretary.

FEDERAL MARITIME BOARD

No. S-105

AMERICAN PRESIDENT LINES, LTD.—APPLICATION UNDER SECTION 805(a)

*Submitted April 21, 1960. Decided April 28, 1960**

American President Lines, Ltd., granted written permission under Section 805(a) of the Merchant Marine Act, 1936, as amended, for the Operation or Charter (upon time or bareboat terms) of Tanker Vessels by Signal Oil and Gas Company, or by any Division or Subsidiary thereof, for the Carriage of Petroleum Products in the Domestic Intercoastal or Coastwise service, since granting of the permission found: (1) not to result in unfair competition to any person, firm, or corporation operating exclusively in the Coastwise or Intercoastal service, and (2) not to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended.

Warner W. Gardner, for applicant American President Lines, Ltd.
Robert B. Hood, Jr., as Public Counsel.

INITIAL DECISION OF EDWARD C. JOHNSON, EXAMINER

In an application dated December 31, 1959, American President Lines. Ltd., (APL) requested written permission under Section 805(a) of the Merchant Marine Act, 1936, as amended,[1] for the operation or charter (upon time or bareboat terms) of tanker vessels by Signal Oil and Gas Company (Signal), or by any division or subsidiary thereof, for the carriage of petroleum products in the domestic intercoastal or coastwise service. The application further requested that the permission be granted as of September 23, 1959, and stated that there would be no objection if the permission were subject to review, modification or revocation upon reasonable notice—with any modification or revocation to be effective upon terms not involving a breach of any charter obligation.

*In the absence of exceptions thereto by the parties, and upon notice by the Board, the initial decision of the examiner became the decision of the Board on the date shown (section 8(a) of the Administrative Procedure Act and Rules 13(d) and 13 (h) of the Board's Rules of Practice and Procedure).

[1] Section 805(a) is set forth in Appendix "A", attached hereto.

Findings of Fact

1. Signal owns 48 percent of the voting stock of APL, which has an operating-differential subsidy contract under the Merchant Marine Act, 1936. On September 23, 1959, Signal acquired by merger, Eastern States Petroleum and Chemical Corporation (Eastern States), which has since operated as a division of Signal.

2. APL, having learned on November 26, 1959, that Eastern States had a tanker under time charter which was operating in the domestic service, on December 31, 1959, applied for the aforesaid written permission under Section 805(a) of the Merchant Marine Act, 1936.

3. Eastern States operates two inter-connected refineries located about a mile apart, connected by a pipe line system, at Houston, Texas. It specializes in the production of aromatic, intermediate and aliphatic solvents. These are obtained, by extraction and by fractionation, from the components of crude petroleum which lie roughly in the boiling-range of gasoline.

4. Eastern States manufactures about 50 different grades of solvents and will also manufacture any other type to the specification of a customer. The solvents have a wide variety of chemical and industrial uses: paints, insecticides, surface coatings, inks, varnishes, enamels, oil extraction, adhesives, degreasing, rendering and floor-wax are a few of their uses. The solvents are produced to and must retain exact specifications, including boiling points, color, odor, specific gravity and flash point. A very minute contamination or a solvent that is off-test will make the solvent useless and unacceptable. As implied by their name, the solvents contaminate very readily. A tanker which has ever carried black oil, for example, regardless of how long ago or what cleaning processes it has undergone, even including sand-blasting, will contaminate the solvents, while the usual small degree of leakage of valves and pipes will mean that two or more solvents may contaminate themselves and therefore become useless.

5. Eastern States sells its solvents through its terminals at Houston, Brownsville, Chicago, Madison, East Liverpool, Savannah, San Pedro, and San Francisco. It charters, as a shipper, space on barges to supply the Gulf and Mississippi terminals and the wing tanks of the SS *Angelo Petri*, a wine tanker, on its westbound voyages, to supply the California terminals. The Savannah terminal is supplied by, and frequently deliveries to customers are made with, the SS *Spirit of Liberty*.

6. The SS *Spirit of Liberty* is a T–2 tanker, under a 10–11 year time charter to Eastern States, commencing in June 1957, from the Key-

stone Shipping Company (Keystone). In 1958 its tanks 1 and 2 were remodeled for the carriage of solvents: additional compartments were made, and special pumping, segregated pipe lines and double block valves were provided. Eastern States uses tanks 1 and 2 for carriage of its solvents, and is careful that its other tanks be confined to clean service; no lube, vegetable or fatty oils have been carried. Eastern States would find it exceedingly difficult or well nigh impossible to obtain a tanker on the market which would meet its solvent needs. Even if liners with tanks were available, and would happen to have an itinerary which met the needs, Eastern States could not load into its deep tanks for fear of contamination from a prior product. Many of the solvents, moreover, have a flash point too low for carriage on dry cargo vessels.

7. The *Spirit of Liberty* has frequently been sub-chartered to others, for clean service, when not needed by Eastern States. Except for these occasions, it has carried only products owned by Eastern States. After delivery of its product, it ordinarily returns to Houston in ballast, since the commodity transported is ordinarily regarded as "a one-way cargo carriage operation."

8. Eastern States was unable at the time of the hearing to predict whether the future needs of its solvents business would call for operation of one or more tankers fixed up to meet its needs under time charter.

9. There is no operating connection between APL and any tankers operated by Eastern States, nor is there any way to divert cargo one from the other. Eastern States' witness, Manager of Product Handling, had never seen an APL vessel or officer (until he met the APL witness in this proceeding), and knew nothing of the APL services.

Discussion

The precise issue presented in this application appears to have been decided recently by the Board on February 9, 1960, in *States Marine Lines, Inc.—Application under Section 805(a)*, S–57 (Sub. 4), when the Initial Decision of Examiner Gray became the decision of the Board. In pertinent part it reads:

With its numerous tank compartments of various sizes and capacities and special piping and pumping arrangements it [SS *Texas*] is equipped to and continuously since February 1957, has been carrying various liquid commodities shipped in bulk between all U.S. Pacific ports and U.S. Gulf and Atlantic ports.

As a subsidized carrier States Marine Lines, Inc., could not divert cargo from this intercoastal operation because its vessels are not equipped for the carriage of liquid commodities in bulk. Furthermore, U.S. Coast Guard regulations prohibit standard dry cargo ships carrying such inflammable commodities in bulk. No exclusively domestic operator in the intercoastal trade has objected to continuation of the *Texan's* operation.

On this record it is found that granting of the requested permission will not result in unfair competition to any person, firm or corporation operating exclusively in the coastwise or intercoastal service, or be prejudicial to the objects and policy of the Act.

Then in *American President Lines, Ltd., Section 805(a) Application*, 4 F.M.B. 436 (1954), S–36, permission was granted for the operation in domestic services of 6 tankers owned by Independent Tankships, a subsidiary of American Independent Oil Company, in which Signal and Ralph K. Davies, an officer and director of APL, were shareholders. The tankers were subsequently sold, on the open market. One of them was the *Spirit of Liberty*, purchased by Keystone Shipping Company. The order in S–36 in relevant part reads:

It appearing, That American President Lines, Ltd., has applied to the Board and the Maritime Administrator for written permission authorizing the following relationships:

* * * * * * *

(3) For Signal Oil and Gas Co. to be a holding company, subsidiary, affiliate, or associate of American President Lines, Ltd.; and

* * * * * * *

It is ordered, That written permission as required by section 805(a) of the Merchant Marine Act, 1936, as amended, be, and it is hereby, granted, authorizing the existence of the relationships above described, retrospectively and prospectively, subject to the condition that none of the vessels owned, operated, or chartered by Independent Tankships, Inc., shall, after the date of this order, carry any lubricating oils, or vegetable oils (including cocoanut), or fatty oils (including tallow), or detergents, in the domestic intercoastal service.

Notice of hearing was published in the Federal Register on January 29, 1960, and a hearing was held before the undersigned on February 16, 1960. No one appeared in opposition to the application. No operating or traffic connection between APL and Eastern States has existed or can develop. The manufacture and distribution of solvents by Eastern States—an important industrial operation—would be seriously, if not fatally handicapped by denial of the necessary permission to operate the specialized and rigidly controlled tanker space necessary for this solvent movement. Since Eastern States cannot predict the volume and nature of its demand sufficiently to specify whether it needs permission for one, two, or more tankers, generalized permission, with power reserved to the Administrator to modify or revoke, should be given.[2]

There appears to be no reason of substance why permission, in effect granted Signal to operate the *Spirit of Liberty* when owned by a subsidiary, should be curtailed to preclude Signal from operating the same vessel when time chartered to a division. The *Spirit of Liberty* is covered by the permission granted in 1954.[3] Public Counsel agree with the accuracy of applicant's proposed findings of fact and conclusions, and concur therein; and do not oppose the granting of permission to applicant for the operation or charter (upon time or bareboat terms) of tanker vessels by Signal Oil and Gas Company, or by any subsidiary or division thereof, for the carriage of petroleum products in the domestic intercoastal or coastwise service, such permission to be subject to review, modification or revocation upon reasonable notice.

CONCLUSION

On this record, it is found that the granting of the requested permission (subject to review, modification and termination by the Board/Administration upon a showing by any person that continuation of the permission would contravene Section 805(a)), will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service, or be prejudicial to the objects and policy of the Act.

This report shall serve as such written permission requested by applicant.

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[2] In *American President Lines, Ltd.—Section 805(a) Application, supra*, the Board and Administrator on April 14, 1954 granted permission "retrospectively and prospectively" for a Section 805(a) relationship which had commenced in March 1948. The same rule which justified a 4-year retroactivity in that proceeding will justify a 6-month retroactivity in this present proceeding.

[3] The effect of the 1954 permission reaches only to the retrospective issue—Eastern States needs flexible permission for its future operations.

Appendix A

Section 805(a):

It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII of this Act, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act: Provided, That, if such contractor or other person above-described or a predecessor in interest was in bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor.

DEPARTMENT OF COMMERCE

MARITIME ADMINISTRATION

No. S-110

Pacific Far East Line, Inc.—Application Under Section 805(a)

Submitted April 29, 1960. Decided April 29, 1960

Pacific Far East Line, Inc., granted written permission under section 805(a) of the Merchant Marine Act, 1936, as amended, for Long Island Tankers, Inc., a subsidiary, to charter the SS *Kaimana* to Matson Navigation Company for one round voyage between the west coast of the United States and British Columbia and the Hawaiian Islands, commencing on or about May 1, 1960, and a second like voyage if the vessel is chartered to Matson for such second voyage not later than the date of arrival of the vessel in the Hawaiian Islands on the first voyage, since granting of such permission found (1) not to result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal trade, and (2) not to be prejudicial to the objects and policy of the Act.

Odell Kominers for applicant.
Robert B. Hood, Jr., as Public Counsel.

Report of the Maritime Administrator

By the Maritime Administrator:

Pacific Far East Line, Inc. (PFEL), filed an application for written permission under section 805(a) of the Merchant Marine Act, 1936, as amended, 46 U.S.C. 1223 (the Act), for Long Island Tankers, Inc., a subsidiary, to charter the SS *Kaimana* to Matson Navigation Company (Matson) for one round voyage between the west coast of the United States and British Columbia and the Hawaiian Islands, delivery of the vessel to be effected on or about May 1, 1960, at San Francisco, with an option by Matson in the charter for a second like voyage to be exercised not later than the arrival of the vessel in the Hawaiian Islands on the first voyage. Notice of hearing was published in the Federal Register of April 23, 1960 (25 F.R. 3559). No one appeared in opposition to the application.

Matson requires a vessel for use in its regular service between the Pacific coast and the Hawaiian Islands during May. It is found that the granting of the requested permission will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal trade, or to be prejudicial to the objects and policy of the Act.

This report shall serve as written permission for the voyage, and for a second like voyage provided the vessel is chartered for such second voyage prior to its arrival in Hawaii on the first voyage.

DEPARTMENT OF COMMERCE

MARITIME ADMINISTRATION

No. S-111

MOORE-MCCORMACK LINES, INC.—APPLICATION UNDER SECTION 805(a)

Submitted May 17, 1960. Decided May 17, 1960

Moore-McCormack Lines, Inc., granted written permission under section 805(a) of the Merchant Marine Act, 1936, as amended, for its vessel, the SS *Robin Trent*, presently under time charter to States Marine Lines, Inc., to engage in one intercoastal voyage carrying a cargo of lumber and/or lumber products from North Pacific ports to Atlantic ports, commencing on or about May 20, 1960, since granting of the permission found (1) not to result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal trade; and (2) not to be prejudicial to the objects and policy of the Act.

Ira L. Ewers for applicant.
Frank Gormley as Public Counsel.

REPORT OF THE ACTING MARITIME ADMINISTRATOR

BY THE ACTING MARITIME ADMINISTRATOR:

Moore-McCormack Lines, Inc., filed an application for written permission under section 805(a) of the Merchant Marine Act, 1936, as amended, 46 U.S.C. 1223 (the Act), for its vessel, the SS *Robin Trent*, presently under time charter to States Marine Lines, Inc., to engage in one intercoastal voyage carrying a cargo of lumber and/or lumber products commencing at North Pacific ports on or about May 20, 1960, for discharge at Atlantic ports. Notice of hearing was published in the Federal Register of May 7, 1960 (25 F.R. 4121). No one appeared in opposition to the application.

States Marine has cargo bookings of approximately six and one-half million feet of lumber and lumber products but has been unable

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to obtain any other suitable vessel for a May sailing, which, according to its witness, is now scheduled to commence on or about May 20, 1960. The sailing of the *Robin Trent* would not increase the normal pattern of scheduling in States Marine's eastbound intercoastal service.

It is found that the granting of the requested permission will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal trade, or be prejudicial to the objects and policy of the Act.

This report shall serve as written permission for the voyage.

DEPARTMENT OF COMMERCE

MARITIME ADMINISTRATION

No. S-112

MOORE-MCCORMACK LINES, INC.—APPLICATION UNDER SECTION 805(a)

Submitted May 25, 1960. Decided May 25, 1960

Moore-McCormack Lines, Inc., granted written permission under section 805(a) of the Merchant Marine Act, 1936, as amended, for its vessel, the SS *Mormacsun*, presently under time charter to States Marine Lines, Inc., to engage in one intercoastal voyage carrying a cargo of lumber and/or lumber products from North Pacific ports to Atlantic ports, commencing on or about June 1, 1960, since granting of the permission found (1) not to result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal trade; and (2) not to be prejudicial to the objects and policy of the Act.

Ira L. Ewers for applicant.
John E. Cograve as Public Counsel.

REPORT OF THE ACTING MARITIME ADMINISTRATOR

BY THE ACTING MARITIME ADMINISTRATOR:

Moore-McCormack Lines, Inc., filed an application for written permission under section 805(a) of the Merchant Marine Act, 1936, as amended, 46 U.S.C. 1223 (the Act), for its vessel, the SS *Mormacsun*, presently under time charter to States Marine Lines, Inc., to engage in one intercoastal voyage carrying a cargo of lumber and/or lumber products commencing at North Pacific ports on or about May 28, 1960, for discharge at Atlantic ports. Notice of hearing was published in the Federal Register of May 14, 1960 (25 F.R. 4331). No one appeared in opposition to the application.

States Marine has cargo bookings of approximately six and one-half million feet of lumber and lumber products but has been unable to obtain any other suitable vessel for an early June sailing which, according to its witness, is now scheduled to commence on or about June 1, 1960. The sailing of the *Mormacsun* would not increase the normal pattern of scheduling in States Marine's eastbound intercoastal service.

It is found that the granting of the requested permission will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal trade, or be prejudicial to the objects and policy of the Act.

This report shall serve as written permission for the voyage.

FEDERAL MARITIME BOARD

No. S–57 (Sub. No. 3)

States Marine Lines, Inc.—Waiver Under Section 804 of the Merchant Marine Act, 1936

Submitted April 26, 1960. Decided May 31, 1960

Special circumstances and good cause shown under section 804 of the Merchant Marine Act, 1936, as amended, to permit (1) ownership and/or operation by Global Bulk Transport Corporation of 21 specified vessels in specified bulk trades; (2) ownership and operation by Navegacion del Pacifico of certain Mexican-flag vessels to provide lighter services at Guaymas and La Paz, Mexico; (3) chartering by Isthmian Lines, Inc., of foreign-flag vessels for use as lighters in the Persian Gulf; and (4) Global Bulk Transport Corporation to act as husbanding agent in the United States for Reardon Smith & Sons, Ltd.

Waivers will be granted under section 804 for a period of two years, subject to cancellation upon 90 days' notice to the operator.

Elkan Turk, *George F. Galland*, and *Robert N. Kharasch* for applicant.

Warner W. Gardner for American President Lines, Ltd., *Odell Kominers* for Lykes Bros. Steamship Co., Inc., and Pacific Far East Line, Inc., *Frank B. Stone* and *Claude R. Breese* for American Export Lines, Inc., and *Ronald A. Capone* for United States Lines Company, interveners.

Robert Blackwell as Public Counsel.

Report of the Board

Thos. E. Stakem, Jr., *Vice Chairman*, and Sigfrid B. Unander, *Member*

By the Board:

States Marine Lines, Inc., a Delaware corporation (States Marine or applicant), filed an application for a waiver under section 804 of the Merchant Marine Act, 1936, as amended [1] (the Act), or alterna-

[1] 46 U.S.C. 1222.

tively for a finding that certain specified foreign-flag vessel activities of its associates or affiliates do not compete with any American-flag service determined to be essential as provided by section 211 of the Act. Permission is sought, if required, for the continuance, by affiliates or associates, of such foreign-flag activities in the event the Board should award it an operating-differential subsidy under title VI of the Act.

Although not required, the Board ordered a hearing, at which American President Lines, Ltd. (APL), Pacific Far East Line, Inc. (PFEL), Lykes Bros. Steamship Co. Inc. (Lykes), United States Lines Company (U.S. Lines), and American Export Lines, Inc. (Export), intervened.[2]

Hearings were held and the examiner's recommended decision was served on January 28, 1960. Exceptions to the recommended decision and replies thereto were filed, and oral argument was heard. Exceptions and proposed findings not discussed in this report nor reflected in our findings have been considered and found not justified by the facts, or not related to material issues in this proceeding.

Section 804 of the Act provides as follows:

> It shall be unlawful for any contractor receiving an operating-differential subsidy under title VI or for any charterer of vessels under title VII of this Act, or any holding company, subsidiary, affiliate, or associate of such contractor or such charterer, or any officer, director, agent, or executive thereof, directly or indirectly, to own, charter, act as agent or broker for, or operate any foreign-flag vessel which competes with any American-flag service determined by the Commission to be essential as provided in section 211 of this Act: *Provided, however*, That under special circumstances and for good cause shown the Commission may, in its discretion, waive the provisions of this section as to any contractor, for a specific period of time, by affirmative vote of four of its members, except as otherwise provided in section 201(a).

The foreign-flag vessels which applicant's associates[3] propose to own, charter, act as agent or broker for, or operate are as follows:

A. Global Bulk vessels

1. Six Norwegian-flag combination ore carriers and tankers[4] to operate (a) in world-wide trade carrying petroleum and its products in bulk, (b) in world-wide trade, not in the foreign commerce of the United States, carrying various types of ore in bulk, and (c) from Canada, Liberia, Brazil, Chile, Peru, and Venezuela to United States

[2] The Joint Committee for American-flag Tankers also requested leave to intervene, but did not appear nor further participate in the proceeding.

[3] The "associate" status of Global Bulk Transport Corporation, Navegacion del Pacifico (Mexico), and Isthmian Lines, Inc., was conceded by States Marine and is not controverted.

[4] MV *Bomi Hills*, 23,870 DWT; MV *Enduro*, 23,870 DWT; SS *Chateaugay*, 23,860 DWT; SS *Moisie Bay*, 23,950 DWT; SS *Free State*, 29,050 DWT; SS *Cuyahoga*, 29.050 DWT.

Atlantic and Gulf ports carrying iron ore in bulk, and from Brazil to United States Atlantic and Gulf ports carrying manganese ore in bulk.

2. Five Liberian-flag ore carriers [5] to operate (a) in world-wide trade, not in the foreign commerce of the United States, carrying various types of ore in bulk, and (b) from Canada, Liberia, Brazil, Chile, Peru, and Venezuela to United States Atlantic and Gulf ports carrying iron ore in bulk, and from Brazil to United States Atlantic and Gulf ports carrying manganese ore in bulk.

3. Two Norwegian-flag ore carriers (appr. 18,000 DWT) [6] to operate (a) in world-wide trade, not in the foreign commerce of the United States, carrying various types of ore in bulk, and (b) from Canada, Liberia, Brazil, Chile, Peru, and Venezuela to United States Atlantic and Gulf ports carrying iron ore in bulk, and from Brazil to United States Atlantic and Gulf ports carrying manganese ore in bulk.

4. Three Norwegian-flag ore carriers [7] to operate (a) in world-wide trade, not in the foreign commerce of the United States, carrying various types of ore in bulk, and (b) from Canada, Liberia, Brazil, Chile, Peru, and Venezuela to United States Atlantic and Gulf ports carrying iron ore in bulk, and from Brazil to United States Atlantic and Gulf ports carrying manganese ore in bulk, and (c) from Jamaica, B.W.I., to United States Gulf ports carrying bauxite in bulk, occasionally carrying supplies and equipment to and from Baton Rouge and Gramercy, Louisiana, and mining installations in Jamaica.

5. Two Norwegian-flag ore carriers (appr. 35,000 DWT) [8] to operate (a) in world-wide trade, not in the foreign commerce of the United States, carrying various types of ore in bulk, and (b) from Canada, Liberia, Brazil, Chile, Peru, and Venezuela to United States Atlantic and Gulf ports carrying iron ore in bulk, and from Brazil to United States Atlantic and Gulf ports carrying manganese ore in bulk.

6. One Norwegian-flag combination ore carrier and tanker [9] to operate (a) in world-wide trade carrying petroleum and its products in bulk, (b) in world-wide trade, not in the foreign commerce of the United States, carrying various types of ore in bulk, and (c) from Canada, Liberia, Brazil, Chile, Peru, and Venezuela to United States Atlantic and Gulf ports carrying iron ore in bulk, and from Brazil to United States Atlantic and Gulf ports carrying manganese ore in bulk.

7. One Norwegian-flag converted "Liberty" ship [10] to operate in

[5] SS *Rio Caroni* 35,462 DWT; SS *Rio Macareo* 35,412 DWT; SS *Rio Orinoco,* 35,412 DWT; SS *Rio Manamo,* 35,412 DWT; SS *Rio Barima,* 35,412 DWT.

[6] MV *Cerro Bolivar,* 18,650 DWT; MV *Cerro Altamira,* 18,750 DWT.

[7] SS *Baumare,* 34,970 DWT; SS *Baune,* 34,970 DWT; SS *Bauta,* 34,970 DWT.

[8] SS *Sigvik,* 35,393 DWT; SS *Sigborg,* 35,400 DWT.

[9] SS *Sjoa,* 31,798 DWT.

[10] SS *Sokna,* 10,800 DWT.

service from Cuba to United States Gulf ports carrying cobalt and nickel slurry in bulk; from United States Gulf ports to Cuba carrying molten sulphur in bulk and liquefied petroleum gas in pressurized tanks; and from United States Gulf ports to Moa Bay, Cuba, carrying supplies for the mining and loading installation at Moa Bay.

8. One Norwegian-flag tanker [11] to operate in world-wide trade carrying petroleum and its products in bulk.

Applicant also requests that any waiver granted include permission to the companies operating the 19 vessels described in paragraphs 1 through 6 to charter substitute or supplementary vessels, either American-flag or foreign-flag, to operate in the trades named, carrying the named bulk ore cargoes.

B. Navegacion del Pacifico (Mexico) vessels

1. One riverboat.
2. Six wooden lighters.
3. Two Sea-Mule type tugs.

These vessels are used to provide lighter service to vessels at Guaymas and La Paz, Mexico.

C. Isthmian Lines, Inc., vessels

1. A foreign-flag vessel to be time chartered for use as a lighter ship in the Persian Gulf.

The record shows that American-flag services had carried until recently some, and was still carrying other types of cargo now carried by the foreign-flag vessels which are described in the application. Iron ore moves in parcel loads. In the heaviest movement from Chile it is used by liners as bottom cargo. In 1958 American-flag liners carried 10 percent of the movement. Bauxite was carried by one of the interveners in 1956. Small loads moved on liners in 1957, in the described trades. Manganese ore moves in from Chile. In 1958 American-flag liners carried 1 percent of the movement. Some competition for Brazilian manganese ore comes from India ore. Manganese ore is carried regularly from South and East Africa to Gulf and Atlantic coast ports in liners.

Quantities of ore from competing areas were shown. The importation of iron ore has increased about six-fold from 1947 to 1959. Bauxite ore imports are now about 8,000,000 tons a year. Manganese ore now is imported at the rate of 2,000,000 tons a year. Reference was made to bidding for iron ore cargoes. The daily cost of operating various types of competing tankers was described. The records show that United States-flag liner vessels operating on essential trade routes

[11] SS *Sigdal*, 33,320 DWT.

participate to some extent in carrying ores inbound to fill out their vessels.

Petroleum products of the type carried by Global Bulk vessels appear to be in far less competition with essential American-flag service, although there was evidence that to the extent that lubrication oil and asphalt are carried there may be some liner competition. No other bulk cargo, such as grain, will be carried by these vessels.

There are two oil-ore bulk special purpose vessels, eight dry-bulk ore carriers, and one intercoastal coal carrier under United States registry amounting to 4 percent of the world fleet of dry-bulk carriers. The eight ore carriers are owned by one steel company subsidiary. There thus appear to be very few American-flag vessels, exclusive of tankers carrying petroleum products, engaged in carrying these cargoes in bulk lots.

Discussion

The principal issues are:

1. the existence of competition between foreign-flag vessels and essential American-flag service; and
2. the presence of special circumstances and a showing of good cause for a waiver of the 804 prohibition.

We find that there is competition within the meaning of section 804. The section opposes "foreign-flag vessels" and "American-flag service". The testimony disclosed few American-flag vessels of the type (bulk cargo) applicant seeks to operate. A lack of American-flag vessels of this type does not preclude a finding of competition with American-flag service under section 804. The term "service" embraces much more than vessels; it includes the scope, regularity, and probable permanency of the operation, the route covered, the traffic handled, the support given by the shipping public, and other factors which concern the bona fide character of the operation.

The record disclosed that there is available transportation service by American-flag vessels to carry from time to time the same products to and from the same areas as proposed by applicants. The service does not have to be identical if the same products are carried to and from the same areas. Indeed, section 804 requires only that the American-flag service be determined to be essential under section 211 of the Act. Ore is carried in American-flag service liners as bottom cargo. Petroleum is carried in the deep tanks of the C-3 or Mariner-type of ship with a capacity of about 2,800 tons. In bulk-oil shipments known as "parcel trade", special types of oils (vegetable oil, lubricating oils, etc.) are carried in liner deep tanks.

Bulk cargo in specialized vessels may compete with liner services. Carryings by liners of such bulk cargoes were shown to be infrequent, however.

Under section 804 we are concerned with the existence, not the degree, of competition. The fact that there is no harm at this time to the particular interveners, or that some of them do not object, or that other carriers failed to intervene, is immaterial. The lack of vessel-to-vessel competition is equally immaterial. Our responsibility is to discover the existence or nonexistence of foreign-flag vessel competition with essential American-flag service. We find that these vessels would be competing with service found to be essential under section 211. Having so found, a waiver is required under section 804 if the activities are to be continued and States Marine enters into a subsidy contract. Applicant seeks to create an inference of lack of competition from the fact that there were no other interveners. This shows only lack of interest in the outcome of this hearing. Our responsibility exists regardless of any lack of interest, and conclusions premised on the default of others will not be reached.

A decision about the propriety of removing the prohibition by waiver requires a study of the purposes sought to be accomplished by the prohibition.

The legislative history of section 804 shows that Congress was concerned lest subsidy money to be paid to support foreign vessel activities detrimental to American-flag service.[12] The forerunner of the present Act was first proposed by the President in a message to the Congress dated March 4, 1935, transmitting "Views and Two Reports on Subject of Adequate Merchant Marine." [13] One of these, the "General Report of the Postmaster General", dated January 11, 1935, stated: "Too many of the contractors [operators under ocean mail contracts] have diverted these grants or subsidies, or by whatever name this aid may be called, to other than sound shipping operations * * *. Some of the contractors, up to this very time, have their principal interest in foreign-flag ships and have diverted millions of dollars of mail pay into foreign-flag operations." [14]

A remedial provision was proposed as follows: [15]

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[12] S. Rept. 898, 74th Cong., 1st sess., pages 16, 43.

[13] Hearings before the Committee on Merchant Marine and Fisheries, House of Representatives, 74th Cong., 1st sess., on H.R. 7521, "To Develop an American Merchant Marine," page 1093; H. Doc. 118, 74th Cong., 1st sess.

[14] Id. pages 1095, 1103.

[15] 79 Cong. Rec. 10125.

No contractor under a contract in force under this title, or any subsidiary, holding, or affiliate company connected with, or directly or indirectly controlling or controlled by, such contractor, or any officer or director of such contractor or company shall own, operate, charter, or act as agent for foreign vessels or foreign interests, unless permission is first obtained form the Authority in accordance with rules and regulations prescribed by the Authority.

Congressman Moran, speaking against the bill, said: "Under this section [534(b), later 804] the authority has discretionary power to permit an operator to use foreign-flag ships. The expenditure of American taxpayers' money to aid in operating foreign ships certainly will not build an American merchant marine."[16] In other words, payments for the program would be ineffective. He moved to strike the words "unless permission is first obtained from the Authority in accordance with rules and regulations prescribed by the Authority."[17] Congressman Bland responded by saying that "* * * there are conditions that we cannot meet in legislation * * *. They have to be left to the maritime authority, and this vests them with discretionary authority." The Congressman also gave examples of the conditions which could not be met:

We are not in favor of the use of foreign ships, but there are conditions that arise sometimes in connection with the operation of certain lines where there are not sufficient vessels at this time of the proper draft to serve the purpose and until the purpose can be accomplished to have those ships [that is, ships with the proper draft, feeder line types] permission is given to the maritime authority to grant permission under these very limited circumstances.[18]

The motion was defeated.

Against this background of legislative interpretation of section 804, we have concluded that the primary purpose of the section was to prevent contractors receiving operating-differential subsidies from paying their associates and affiliates for services involving the use of foreign-flag vessels which compete with American-flag services. The purpose was to stop the use of foreign-flag vessels which compete with American-flag service unless it could be shown that subsidy payments would not be affected by their operation or that there was no competition. As shown by the defeat of the amendment, the purpose was not to prohibit the use of foreign-flag vessels. In the light of such congressional action, we will not prohibit the use of foreign-flag vessels either, by refusing to grant waivers where the applicant can show special circumstances and good cause.

Authority to waive the prohibition was given (a) under special circumstances and (b) for good cause shown. The Act also required

[16] Id. page 10094.
[17] Id. page 10181.
[18] Id. page 10182.

an affirmative vote of four of the five members of the agency,[19] when for ordinary matters only three votes were sufficient, and that the waiver be for a specified period of time, thereby assuring a periodic reexamination of circumstances. These requirements point to restrictive policy in granting waivers. There appears to be no legislative history as to the meaning of the phrase "under special circumstances and for good cause". The restrictions therefore call for the exercise of the Board's "discretion", consistent with the declaration of policy of the Act.

Enough has been said, however, to indicate (1) that a special circumstance exists where (a) the proposed foreign-flag vessel use will not adversely affect subsidy payments or the subsidized service, and (b) the applicant would suffer a hardship if the prohibition is enforced, and (2) that good cause is shown (a) if the proposed vessel use will have an insignificiant effect on American-flag service, (b) if ownership or operation of the vessels under United States registry by citizens is not practicable, and (c) there is an insufficiency of American-flag vessels of the right type to serve the purpose. Other special circumstances and good causes may exist. The present application presents these particular factors:

(1) There is a relative absence of competition between the 21 vessels and essential American-flag service. Berth liner services do not compete effectively with the large specialized bulk ore and petroleum vessels named herein;

(2) The named vessels are engaged in carrying raw materials that are vital to American industry;

(3) Global Bulk is operating the vessels under long-term contracts, made prior to October 1, 1959, the date of the application, with importers who require long-term, stable transportation;

(4) As a result of using the ore vessels, substantial savings are achieved, which are important to American industry;

(5) Successful operation of American-flag bulk-carrier vessels on these routes would require an operating-differential subsidy, which is not now being provided;

(6) If Global Bulk does not continue to control the operation of the vessels, they will have to forego valuable business arrangements;

(7) There is an insufficiency of American-flag vessels for these purposes;

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[19] Act sec. 804. By Reorganization Plan No. 21 of 1950 (64 Stat. 1273), except as otherwise provided in the Plan, the functions of the United States Maritime Commission and of its Chairman were transferred to the Secretary of Commerce. The function of approving waivers under section 804 was not excepted and was subdelegated to the Administrator of the Maritime Administration.

(8) The record shows that the foreign-flag operations would have an insignificant effect on American-flag service; and

(9) Global Bulk was organized as a business entity separate from applicant, to meet requirements for a separation of foreign-flag activities from its requested subsidized operations. The Act prohibits any diversion of subsidy payments to meet costs or expenses of Global Bulk's operation.

The next major classification of vessels for which a waiver is sought involves a fleet (unspecified as to number or vessel name) of foreign-flag vessels. Global Bulk, or its predecessor organizations, has been agent since 1931 for Sir William Reardon Smith & Sons, Ltd., of Cardiff, Wales, which operates a fleet of British-flag tramp vessels in world-wide full-cargo trading. The agency services performed are the husbanding and handling of vessels during loading and discharging of cargoes that are fixed by the owners in London. Such services do not involve any cargo solicitation and are confined to the mechanics of servicing ships in port.

As special circumstances, applicants presented:

(1) The agency began in 1931, has continued without interruption, and is confined to husbanding activities;

(2) Smith provides general agency services to States Marine and to Global Bulk ships in Europe. The existing agency helps retain these services and maintain European contacts. As such it is a valued connection. Smith supervises the port agents and handles accounts with them in Europe. In the United Kingdom it acts as berth agent in soliciting and booking cargo.

The remaining classifications of vessels for which a waiver is sought apply to the vessels operated by Navegacion and those operated by Isthmian. Applicant showed as to these:

1. Navegacion

(a) Lighterage services are necessary for the use of the port by applicant's vessels;

(b) The lighterage services are purely local.

2. Isthmian

(a) Charter of a British-flag vessel as a lighter ship in the Persian Gulf reduced delays in port and brought about an average saving of over 14 days in turnaround time. The ship has been returned but may be needed again if port congestion recurs.

(b) The lighterage services are essentially local.

No evidence was presented, no charge was made, and we have no right to assume that unsubsidized associates will be milking the subsidized applicant through high charges for services under contracts not negotiated in arms-length dealing. These are the basic evils section 804 sought to prohibit.

It has been suggested by interveners that they may inquire into the foreign-flag vessel operation of any other associates not named in the application. We deal only with the application which has been presented to the Board, that is, only to those matters specifically requested in the application and noticed for hearing. If there are other situations covered by section 804 and no waiver is granted, then the provisions of that section will be applicable.

It has been argued that the Smith agency should not be allowed to continue, on the basis of *American Export Lines, Inc.—Section 804 Waiver* 4 M.A. 379 (1954).

That decision applied the prohibition in section 804 by refusing to grant a waiver because Export and the foreign operator-agent were competitors in substantially parallel services (American Export was a passenger soliciting agent for Italian Line). The facts in that case are quite different from the situation we have before us, where the owner of the vessels does its own solicitation and makes its own bookings and calls on the agency for clerical, mechanical, or housekeeping services when the vessel is in a United States port. Our action here is consistent with the past practice of granting waivers for husbanding agencies.[20]

During the hearing it developed that applicant's associate, Navegacion, used a personnel launch in operations at the Mexican ports as an incident of lighterage activities. The launch was not named in the application. Applicant has asked for a waiver with respect to the launch. Since section 804 does not require a hearing, we will act on such request outside the scope of this proceeding and grant the waiver following the prior practice in other similar cases.

CONCLUSIONS

We have concluded that the vessels named in this application compete with essential American-flag service because many of the commodities carried and the areas served have involved American-flag service. American-flag service of the liner type is in competition on essential trade routes with foreign-flag vessels providing bulk service. Consequently, the prohibitions of section 804 are in effect as to applicant and the vessels controlled by its associate, Global Bulk. The prohibitions have also been found to apply to the husbanding

[20] One of the intervenors had continuing waivers since 1940 to act as husbanding agent for foreign-flag nonliner operators, and a blanket waiver to act as agent for any foreign-flag tramp vessel. See exhibits 3, 4, and 5.

activities of Global Bulk, to the services performed by the foreign-flag vessels owned by Navegacion, and to the services to be performed by the foreign-flag vessel chartered by Isthmian.

The record disclosed (1) that the proposed foreign-flag vessel use would not adversely affect subsidy payments or the subsidized service; (2) that applicant would suffer a hardship through a disruption of long standing business arrangements if the prohibition is enforced; (3) that the proposed foreign-flag vessel use would have an insignificant effect on American-flag service determined to be essential; (4) that ownership and operation of the vessels under United States registry is not practicable because of the absence at this time of operating-differential subsidies; and (5) that there is an insufficiency of American-flag vessels of the right type to serve the purpose of economical bulk carriage of raw materials vital to American industry. For these reasons we have concluded that under special circumstances and for good cause shown a waiver of the prohibition of section 804 should be granted as to the foreign-flag vessels operated by Global Bulk.

The record further disclosed that the husbanding agency involved limited noncompetitive activities, had existed for a long time, and was a valuable business connection. The two lighterage service operations of Navegacion and Isthmian were both necessary to the efficient use of port facilities and were local in nature, having a minimum competitive effect. Here, too, we have concluded that under special circumstances and for good cause shown a waiver of the prohibitions of section 804 should be granted as to the foreign-flag vessels husbanded by Global Bulk and owned, operated, or chartered by Navegacion and Isthmian.

Waivers will be granted covering the above vessels and the specified services or activities in the particular trades, for a period of two years, subject to cancellation upon ninety days' notice to the operator thereof. These waivers will include permission to the companies operating the vessels to charter American-flag vessels or foreign-flag vessels as substitute vessels. Permission to use supplementary vessels must be applied for on an individual basis.

FEDERAL MARITIME BOARD

No. S–113

GRACE LINE INC.—CONTRACT MODIFICATION, ROUTE 33

Submitted June 9, 1960. Decided July 14, 1960

Application by Grace Line Inc. for modification of Contract FMB–49 under section 606(4) of the Merchant Marine Act. 1936, denied, but relief requested is granted, under specified conditions.

Maritime Administrator requested to review essentiality of Trade Route No. 33.

Odell Kominers for Grace Line Inc.
Carl S. Rowe for Committee of American Steamship Lines.
Louis Zimmet and *John E. Cograve* as Public Counsel.

REPORT OF THE BOARD

THOS. E. STAKEM, Jr., *Vice Chairman*, and SIGFRID B. UNANDER, *Member*

BY THE BOARD:

Grace Line Inc. (Grace), a Delaware corporation, filed an application pursuant to section 606(4) of the Merchant Marine Act, 1936, as amended (the Act), and to Article II–32 of Operating-Differential Subsidy Agreement (Contract No. FMB–49), dated January 17, 1956, as amended (the contract), between the United States and Grace, requesting a modification of the contract and a recision of its provisions obligating Grace each year during the period of the agreement to maintain and operate vessels on the berth service designated "Line D—Trade Route No. 33—Great Lakes/Caribbean" (the route).

The application claims that Grace cannot maintain and operate its vessels on the route with a reasonable profit on its investment. Grace claims a loss of $1,657,000 in this service in 1959 and forecasts a loss of not less than $120,000 per voyage in 1960, plus pro rata of ballast and lay-up costs of about $250,000 for two vessels for such season.

Public Counsel responded with the contention that (1) "under normal circumstances the service could be conducted at a profit" and (2) the petition for relief would force the Board into "an unnatural construction of Sec. 606(4)" in that the claim is not proved unless (a) no reasonable profit is shown in the investment on all services, routes, and lines covered by the contract (not just Trade Route No. 33), (b) a longer period of profit experience has elapsed, particularly since a profit is foreseeable if Maritime Administration staff estimates are used, and (c) all other rights in section 606 have been used. The issues were presented by briefs. The Committee of American Steamship Lines responded with a memorandum opposing contention (2) (a). Grace responded to all of the above contentions by brief and affidavits. Oral argument was heard, at the conclusion of which we declared the proceeding had been submitted for final decision pursuant to Rule 14(b) of the Board's Rules of Practice and Procedure, with the exception of the answers to questions which Member Unander had asked. The answers and Grace's memorandum in connection therewith have been reviewed. The resultant issues resolve themselves into a controversy over (1) the future profit prospects on the route, and (2) the interpretation of section 606(4). Public Counsel submitted a further "Supplemental Data Submission" in a memorandum of June 15, 1960, which, in essence, estimates that a carriage of 8,000 revenue tons outbound on one 50-day round voyage at the rate of $38.00 per ton will produce a net profit per voyage of $75,838. Grace responded further with a reply dated June 17, 1960, denying the validity of these estimates. The full record of the case is contained in the hearings, briefs, and supporting affidavits and memoranda.

We have decided that in passing on Grace's application and claim we must take into consideration the profit projection and experience under the entire operating-differential subsidy contract. Applicant does not prove its claim that it cannot maintain and operate its vessels on a service, route, or line with a reasonable profit on its investment unless it establishes that it cannot operate under the contract with a reasonable profit upon its entire investment devoted to the performance of the contract. Since there has been no claim nor is there any evidence of lack of profit on investment devoted to the performance of the contract and to the services, routes, or lines which are the subject of the contract, section 606(4) does not operate to establish a right in applicant to the requested modification of its contract. In this view of the case it is unnecessary to pass on the other contentions as to the profitability of the particular route, nor as to the period over which profitability must be determined. Grace's entire case is premised on the contention that the "investment" referred to in section 606(4)

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relates only to a specified "service, route, or line." This contention is rejected.

For the reasons hereinafter stated, however, the contract will be modified to exclude the route from the contract pursuant to the provisions of Article II–33 permitting modification by mutual agreement, if Grace agrees to the amendment on the conditions set forth herein.

Discussion

Section 606(4) of the Act provides as follows:

> Every contract for an operating-differential subsidy * * * shall provide * * * (4) that if at any time the contractor receiving an operating-differential subsidy claims that he cannot maintain and operate his vessels on such service, route, or line, with a reasonable profit upon his investment, and applies to the Commission for a modification or rescission of his contract to maintain such service, route, or line, and the Commission determines that such claim is proved, the Commission shall modify or rescind such contract and permit the contractor to withdraw such vessels from such service, route, or line, upon a date fixed by the Commission, and upon the date of such withdrawal the further payment of the operating-differential subsidy shall cease and the contractor be discharged from any further obligation under such contract * * *.

The words "such service, route, or line", when first used in subdivision (4), refer back to subdivision (3), which provides that if the Commission shall determine that a change in the service, route, or line receiving an operating-differential subsidy under this title is necessary in the accomplishment of the purposes of the Act, it may make such change upon readjusting the amount of subsidy.

Section 211 of the Act clearly indicates that the Act contemplates contracts covering American-flag service on routes and lines which may not be profitable. Such American-flag service could not be obtained if section 606(4) were interpreted as granting relief when a reasonable profit cannot be made on one particular trade route. Statutes such as the Act must be construed in a way that gives meaning to the over-all policy sought to be achieved. Each section must be read as a reflection of congressional intention to fit that section into the over-all objective of the statute in order to make an harmonious whole. Congress did not intend to guarantee a subsidized operator a profit on each trade route, nor on the whole contract for that matter. Grace's construction of section 606(4) would put that section at odds with the policy of Congress and out of harmony with other provisions of the Act.

Section 211(a) and (b) of the Act provides as follows:

> The Commission is authorized and directed to investigate, determine, and keep current records of—

(a) The ocean services, routes, and lines from ports in the United States, or in a Territory, district, or possession thereof, to foreign markets, which are, or may be, determined by the Commission to be essential for the promotion, development, expansion, and maintenance of the foreign commerce of the United States, and in reaching its determination *the Commission shall consider and give due weight to the cost of maintaining each of such steamship lines, the probability that any such line cannot be maintained except at a heavy loss disproportionate to the benefit accruing to foreign trade,* the number of sailings and types of vessels that should be employed in such lines, *and any other facts and conditions that a prudent business man would consider when dealing with his own business, with the added consideration, however, of the intangible benefit the maintenance of any such line may afford to the foreign commerce of the United States and to the national defense;*

(b) The type, size, speed, and other requirements of the vessels, including express-liner or super-liner vessels, which should be employed in such services or on such routes or lines, and the frequency and regularity of the sailings of such vessels, *with a view to furnishing adequate, regular, certain, and permanent service* * * *. [Italics supplied]

The plain meaning of the above-quoted language is that a service or route may be determined to be essential even though operation thereon will result in substantial losses, if such losses are not disproportionate to the benefits accruing to the foreign commerce of the United States from such operation. Also, in determining what is an essential service, route, or line, consideration is to be given to the intangible benefit the maintenance of any such line may afford to the foreign commerce of the United States and to the national defense.

If an operator has the right under the Act to discontinue a service, route, or line upon a showing that he could not make a reasonable profit upon his investment in such service, route, or line, even though he could make a reasonable profit on his investment under the entire contract, the Act would provide no way of carrying out the foregoing purposes. It must be presumed that the provisions of the Act were intended to provide some way to accomplish the objectives thereof.

The words "upon his investment" in section 606(4) should be construed to mean upon the investment under the entire operating-differential subsidy contract. Section 606(4) provides for relief if the contractor establishes that "he cannot maintain and operate his vessels on such service, route, or line, with a reasonable profit upon his investment." It does not say upon his investment in what. To carry out the purposes of the Act, these words must be construed to mean the investment under the entire operating-differential subsidy contract rather than the investment in the service, route, or line. Even if the words "upon his investment" refer back to "service, route, or line", the requirement is that the contractor establish that he cannot make a reasonable profit on his entire investment under the contract. We construe the words "service, route, or line" as "services, routes, or lines" in sections 601(2) and 603(a), and these words should be construed the same way in section 606(4).

Section 601(a) of the Act authorizes the Board "to consider the application of any citizen of the United States for financial aid in the operation of any vessel or vessels, which are to be used in an essential service in the foreign commerce of the United States." Section 603(a) provides that if the Board "approves the application, it may enter into a contract with the applicant for the payment of an operating-differential subsidy * * * for the operation of such vessel or vessels in such service, route, or line * * *." Under these sections the Board, in carrying out the purposes of the Act, has interpreted the words "service, route, or line" as "services, routes, or lines", and has therefore included in some contracts more than one service, route, or line.

The foregoing interpretation and this way of contracting permit the averaging, for recapture purposes, of profits and losses from all of the services, routes, and lines included in the contract. To include all of the operator's services, routes, and lines in one contract carries out the purposes of the Act in that it permits the more profitable operations to help carry the less profitable operations and thus assists in obtaining service on the less profitable services, routes, and lines. The words "service, route, or line" should receive the same construction in section 606(4) as they receive in section 601(a) and 603(a), and for the same reason.

Operating-differential subsidy contracts, properly construed, provide for relief only if the operator cannot make a reasonable profit on his investment under the entire contract. Article II–32, Part II, of the contract is derived from section 606(4) of the Act. Part II is the same for each subsidized operator. Article II–32 is as follows:

II–32. *Modification or Rescission at Request of Operator.* The operator may at any time make claim to the United States that it cannot maintain and operate the subsidized vessel(s) and service(s), route(s), or line(s), with a reasonable profit on its investment, and apply to the United States for a modification or rescission of this agreement, and if the United States determines that such claim of the Operator is proved, the United States shall modify or rescind this agreement and permit the Operator to withdraw the vessel(s) from the service(s), route(s), or line(s) upon a date to be fixed by the United States, and upon the date of such withdrawal further payments hereunder by the United States shall cease and the Operator shall be discharged from any further obligation under this agreement. Such discharge shall be without prejudice to any accrued rights of the United States and the Operator hereunder.

The evident purpose of "(s)" in "service(s), route(s) or line(s)" is to indicate that the words are in the singular if the contractor has only one service, route, or line, and in the plural if he has more than one. Under the foregoing article, if the contractor had more than one service, route, or line, he would have to establish that he could not make a profit on his investment in all of them in order to be entitled to relief. The provisions of Part I of the contract, relating to financial accounting and replacement vessels, also indicate that the foregoing is the correct construction of Article II–32.

On the uncontroverted proofs before us, Grace in 1959, on all its subsidized services conducted under Contract No. FMB–49 (including the Trade Route No. 33 service), realized a substantial profit. In other respects its financial position appears strong. Grace's proofs established to our satisfaction, however, that it has suffered, and will for the foreseeable future suffer, a loss on its investment on this particular service, route, or line. In such circumstances, and in the absence of any objection having been received from any of the American shippers or exporters who will be affected by the discontinuance of such service, route, or line, we do not feel impelled to require the continuation of the losses even though Grace does not have a right under section 606(4) to a contract modification to so provide. Consequently, we have reconsidered Grace's letter of March 4, 1960, requesting modification of its operating-differential subsidy contract No. FMB–49 to discontinue the service required to be performed by it on the route, and will grant such request subject to agreement by Grace to the following conditions:

1. The withdrawal of the SSs *Santa Alicia*, *Santa Cristina*, *Santa Regina*, and *Santa Mercedes* from the operating-differential subsidy agreement (Contract No. FMB–49) will be authorized effective as of the last voyage of each such vessel, determined in accordance with paragraph No. 2;

2. For the purpose of determining eligibility for subsidy, the final voyage of each of the aforesaid vessels, in accordance with Article II–37(c), shall be deemed to terminate at midnight on the day of the completion of final discharge of cargo at an authorized United States port of discharge on the route, but in no event later than December 31, 1959;

3. No expenses incurred with respect to the aforesaid four vessels (including, but not limited to, depreciation and overhead allocation) for any periods subsequent to the date of termination of the last voyage of each vessel (determined in accordance with paragraph No. 2) shall be charged against subsidized operations for the purpose of determining earnings subject to recapture and deposits in the Special Reserve Fund;

4. The amount of depreciation applicable to the above vessels and to the SS *Santa Mariana* and the SS *Santa Victoria* shall continue to be deposited in the Capital Reserve Fund for periods after December 31, 1959, while such vessels are or were owned by Grace, regardless of whether the same was earned and whether the vessels were idle or under charter or otherwise engaged in nonsubsidized operations; and

5. In the event of sale or other disposition of the *Santa Alicia*, *Santa Cristina*, and/or *Santa Regina* within a period of three years from July 14, 1960, as to each such vessel, the proceeds therefrom shall be deposited in the Operator's Capital Reserve Fund.

We have requested that a review be made by the Maritime Administrator as to the essentiality of Trade Route No. 33 as one essential to United States commerce and defense.

FEDERAL MARITIME BOARD

No. S–60 (Sub. No. 2)

Isbrandtsen Company, Inc.—Waiver Under Section 804 of the Merchant Marine Act, 1936

No. S–64 (Sub. No. 1)

Isbrandtsen Company, Inc.—Waiver Under Section 804 of the Merchant Marine Act, 1936

Submitted July 1, 1960. Decided July 18, 1960

Special circumstances and good cause shown to justify waiver of the provisions of section 804 of the Merchant Marine Act, 1936, permitting Jakob Isbrandtsen, a director of Isbrandtsen Company, Inc., to retain ownership in shares of stock of Canadian Foreign Steamship Company Limited, a British company operating foreign-flag vessels.

Waivers will be granted under section 804 of the Act for a period of two years, subject to cancellation upon ninety days' notice to the operator.

Richard W. Kurrus for applicant.

Robert J. Blackwell as Public Counsel.

Report of the Board

Thos. E. Stakem, Jr., *Vice Chairman*, and Sigfrid B. Unander, *Member*

By the Board:

We adopt the examiner's recommended decision, to which no exceptions have been filed. The recommended decision is as follows:

"Under date of April 14, 1960, Isbrandtsen Company, Inc., applied for a waiver to the extent required by section 804 of the Merchant Marine Act, 1936, as amended (the Act), to permit the retention by Jakob Isbrandtsen, President and Director of applicant, of an interest held personally in Canadian Foreign Steamship Company Limited, in the event the Board should award Isbrandtsen Company, Inc., operating-differential subsidies under section 601 of the Act.[1] A public hearing was held but there were no intervenors.

"Section 804 of the Act provides:

"It shall be unlawful for any contractor receiving an operating-differential subsidy under title VI or for any charterer of vessels under title VII of this Act, or any holding company, subsidiary, affiliate, or associate of such contractor or such charterer, or any officer, director, agent, or executive thereof, directly or indirectly, to own, charter, act as agent or broker for, or operate any foreign-flag vessel which competes with any American-flag service determined by the Commission to be essential as provided in section 211 of this Act: Provided, however, That under special circumstances and for good cause shown the Commission may, in its discretion, waive the provisions of this section as to any contractor, for a specific period of time, by affirmative vote of four of its members, except as otherwise provided in section 201(a).

"Jakob Isbrandtsen owns approximately 42 percent of the outstanding common stock and is a director of Canadian Foreign Steamship Company Limited (Canforship), a firm organized under the laws of Great Britain and domiciled in Nassau. With three Dutch-flag, specially designed bulk carriers listed as "combination ore-oil carriers" of approximately 26,500 deadweight tons each bareboat chartered in 1956 for 15 years, it is engaged in the transportation of iron ore, generally in lots of a minimum of 15,000 tons, from the Republic of Chile to United States Gulf and Atlantic ports and Canadian, Japanese and European ports. Its customers are the purchasers of the ore with whom it has entered into ordinary contracts of freight, for periods up to seven years; some contracts are based on daily requirements of the receivers. To eliminate southbound voyages in ballast, Canforship endeavors to carry oil; it is occasionally engaged by such shippers as Standard Oil Company. All such transportation of oil has been from Venezuela or other Caribbean ports to Peru and Chile. Because of their lack of cubic capacity [2] the three chartered vessels are not usable for any commodities other than ore or oil. As business necessities arise Canforship charters other specially designed foreign-flag bulk carriers. When carrying ore from Chile to Canada efforts are made to bring cargoes of ore from Seven Islands, Labrador, to Baltimore. There are no American-flag berth operators in that trade.

"Applicant asserts that the Canforship vessels are not competitive with any American-flag vessels operating on an essential foreign trade route simply because there are no American-flag vessels of this nature in service. The competitive rates at which the ore must move are said to be too low to allow for the operation of an American-flag bulk

"[1] See *Isbrandtsen Company, Inc.—Subsidy, E/B Round-the-World*, 5 F.M.B. 448, and *Isbrandtsen Company, Inc.—Subsidy, T/R 32*, 5 F.M.B. 525.

"[2] 10,000 tons of coal or grain being the maximum that could be carried.

carrier. The ore is available however, to American berth services but except on occasions when it is used as bottom cargo it is not susceptible of carriage in liner service. One such liner service is that of Grace Line Inc., the only operator of American-flag vessels between United States Atlantic ports and ports in Chile, Pacific Coast of Colombia, Ecuador, and Peru.[3] A factor of importance to the person selling the ore is the differential of 25 to 50 cents per ton between the existing bulk rate per ton in large bulk carriers of the type here considered and the rate prevailing on a parcel lot of 2,000 or 3,000 tons carried by Grace Line. Canforship has provided Grace Line with certain ores to the limit of the latter's requirements for discharge at United States Atlantic and Gulf ports[4] and Mr. Isbrandtsen has been told by representatives of Grace Line that they do not object to the continuance of the Canforship operations.

"Isbrandtsen Company, Inc., has no direct legal interest in Canforship and would obtain no direct financial benefit if the requested waiver be granted. Certain indirect benefits might accrue to the extent that knowledge of the costs of operating foreign-flag vessels could aid in establishing efficiencies in operation of American-flag vessels. Mr. Isbrandtsen further testified that the grant or denial of this application would not affect the ability of any American-flag vessels to carry ore or oil as described in the application; that it would not be possible for him to dispose of his interest in Canforship except at a rather substantial financial sacrifice, and that even if this were done the situation with respect to American-flag vessels would not be altered in any respect. Foreign-flag bulk carriers would continue to carry the ore at world-market rates. In support of special circumstances and for good cause for granting the waiver the applicant states that Mr. Isbrandtsen will hold no office, nor will he act as director of Canadian Foreign Steamship Company Limited.

"DISCUSSION

"Applicant's position is that a waiver for the operation described is not necessary under section 804 of the Act because:

"(1) The specially designed bulk carriers operated by Canforship are not competitive with any American-flag service that

"[3] *Review of Grace Line Subsidy, Route 2,* 4 F.M.B. 40, 42.

"[4] The only American-flag operator from Chile to United States Gulf ports is the Gulf and South American Steamship Co., Inc., a corporation owned in equal proportions by W. R. Grace & Co. and Lykes Bros. Steamship Company. See *Gulf and South American Steamship Co., Inc.—Application Under Section 605(c), Merchant Marine Act,* 5 F.M.B. 747, decided December 16, 1959. Grace Line also operates a berth service from Chilean ports to United States Pacific Coast ports (See *Grace Line Inc. Subsidy, Route 25,* 4 F.M.B. 549) but to the knowledge of applicant's president there is no movement of liner parcels of bulk ore on Grace Line vessels or on any other vessels to such destinations.

has been determined to be essential under section 211 of the Act;

"(2) The only berth operator from Chile to the United States is the Grace Line and all of the bulk cargoes that Grace Line desires are made available to it by Canforship;

"(3) The movement of ore from Chile to the United States and Canada is by economic necessity forced to move on foreign-flag ships;

"(4) As there are no American-flag vessels operating in the ore trade from Labrador to Baltimore, there are no such vessels operating within the meaning of the essential foreign trade route concept;

"(5) Similarly, there are no American-flag vessels operating in the trade between Caribbean ports and Peru and Chile.

"If, however, a waiver should be deemed essential, applicant submits that this is a situation involving special circumstances and good cause as the particular cargoes have to move by foreign-flag vessels or not move at all. These bulk cargoes are obviously important to the national economy and security and it is also important to the national security that some control of these large vessels should be in the hands of American citizens. Furthermore, granting the waiver and allowing Mr. Isbrandtsen's interest to continue would necessarily limit the operations of Canforship to what is contemplated by section 804.

"Public Counsel agrees that no waiver is required under section 804 for the reasons, first, the oil movement described is not in the foreign commerce of the United States and therefore can not be considered to be a route determined by the Maritime Administrator to be essential under section 211 of the Act. Secondly, while Grace Line serves the trade between Chile and United States Gulf and Atlantic ports and does carry some quantities of ore, its failure to oppose the application indicates lack of competition. The discrepancy between the rates of the two types of carriers also indicates that the operation of Canforship is not competitive with the American-flag vessels offering berth service and carrying ore in the Chilean-United States trade routes. If competition be found, though, it is the view of Public Counsel that special circumstances and good cause constituting justification for waiver have not been shown.

"Certain findings of the Board in *States Marine Lines, Inc., Waiver Under Section 804, Merchant Marine Act, 1936*, 6 F.M.B. 71, decided May 31, 1960, are equally appropriate here. Thus, 'A lack of American-flag vessels of this type (bulk cargo) does not preclude a finding of competition with American flag-service under section 804.' * * * 'The service does not have to be identical if the same products are carried to and from the same area.' * * * 'Ore is carried in American-flag service liners as bottom cargo.' * * * 'Bulk cargo in specialized vessels may compete with liner services.' * * * 'Under section 804 we are concerned with the existence, not the degree, of competition.' * * * 'The fact * * * that other carriers failed to intervene, is immaterial.' * * * 'Our responsibility is to discover the existence or nonexistence of foreign-flag vessel competition with essential American-flag service. We find that these (bulk cargo) vessels would be competing with service found to be essential under section 211. Having so found a waiver is required under section 804 if the activities are to be continued and (applicant) enters into a subsidy contract. Applicant seeks to create an inference of lack of competition from the fact that there were no other intervenors. This shows only lack of interest in the outcome of this hearing. Our responsibility exists regardless of any lack of interest, and conclusions premised on the default of others will not be reached.' (See sheets 6 and 7 of multilithed report served June 1, 1960.)

"After a discussion of the legislative history of section 804 the Board said (at sheet 9):

"Enough has been said, however, to indicate, (1) that a special circumstance exists where, (a) the proposed foreign-flag vessel use will not adversely affect subsidy payments or the subsidized service, and (b) the Applicant would suffer a hardship if the prohibition is enforced, and (2) that good cause is shown (a) if the proposed vessel use will have an insignificant effect on American-flag service, (b) if ownership or operation of the vessels under the United States registry by citizens is not practicable, and (c) there is an insufficiency of American-flag vessels of the right type to serve the purpose. Other special circumstances and good causes may exist.

"As detailed above the following appear as factors for consideration comparable with those recognized in the recent *States Marine Lines* decision:

"(1) There is a relative absence of competition between the three Dutch-flag vessels under charter to Canforship and essential American-flag service. Berth liner services do not compete effectively with the large specialized bulk ore and oil carrying vessels described herein.

"(2) The three specialized foreign-flag vessels are engaged in carrying raw materials that are vital to American industry.

"(3) Canforship is operating the vessels under long term contracts, made prior to April 14, 1960, the date of the application, with importers who require long term, stable transportation.

"(4) As a result of using the ore vessels, substantial savings are achieved which are important to American industry.

"(5) There is an insufficiency of American-flag berth vessels to carry all of the ore moved by Canforship from Chile to the United States.

"(6) The foreign-flag operations of Canforship described of record have an insignificant effect on American-flag service.

"CONCLUSIONS

"Conformable with the decision in *States Marine Lines Inc.—Waiver*, *supra*, it is concluded that the three vessels of Canadian Foreign Steamship Company Limited, as described herein, compete with essential American-flag service. American-flag service of the liner type is in competition on essential trade routes with foreign-flag vessels providing bulk service. Consequently, the prohibitions of section 804 are in effect as to the applicant and the vessels controlled by Canadian Foreign Steamship Company Limited, in which the president and director of applicant holds a minority, but substantial, interest.

"The record discloses (1) that the continued holding by Jakob Isbrandtsen of his personal interest in Canadian Foreign Steamship Company Limited would not adversely affect subsidy payments or the subsidized service; (2) that applicant's president would suffer a hardship through the sacrifice of personal holdings if the prohibition is enforced; (3) that the continued foreign-flag vessel use by Canadian Foreign Steamship Company Limited, would have an insignificant effect on American-flag service determined to be essential, and (4) there is an insufficiency of American-flag vessels of the right type to serve the purpose of economical bulk carriage of raw materials vital to American industry."

Upon the record in this proceeding (1) we conclude that the three vessels of Canadian Foreign Steamship Company Limited, as described in the examiner's recommended decision, compete with essential American-flag service, and (2) we find that special circumstances and good cause have been shown justifying waiver of the provisions of section 804 of the Act with respect to the continued holding by Jakob Isbrandtsen of his personal stock in Canadian Foreign Steamship Company Limited.

A waiver will be granted covering the ownership by Jakob Isbrandtsen of shares of stock in Canadian Foreign Steamship Company Limited, for a period of two years, subject to cancellation upon ninety days' notice.

FEDERAL MARITIME BOARD

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 29th day of July A.D. 1960

No. S-78

AMERICAN PRESIDENT LINES, LTD.—APPLICATION UNDER SECTION 805(a), MERCHANT MARINE ACT, 1936

On May 18, 1960, American President Lines, Ltd. (APL), filed a petition requesting the Board to "reconsider and revise its report and decision" herein of April 28, 1960 (6 F.M.B. 6), insofar as it limits so-called "grandfather" rights under the proviso of section 805(a) of the Merchant Marine Act, 1936 (the Act),[1] to 2,852 passengers and 3,204 L/T of cargo a year and not in excess of 26 round voyages. It says in effect that this is not "substantial parity" because it does not permit APL to maintain its position or to "grow with the trade." APL cites the fact that the "trade has more than doubled" since 1935. The total of all passengers west and east in 1935 was 38,588, and in 1957 (the last full year for which figures are available) it was 76,129.

Matson Navigation Company (Matson) replied that Rule 16 of the Board's Rules of Practice and Procedure, which gives the right to file such a petition, authorizes reopened proceedings only if the Board finds such action is required by "changed conditions in fact or law or by the public interest", and that the petition contains no information which would permit such a finding. In view of the importance of such rights under the proviso of section 805(a) of the Act, as it affects the California-Hawaii trade, and the significance of the question as to whether the "growth with the trade" is applicable under that section to the extent urged by APL, we decided to hear oral argument in the

[1] See appendix.

matter. On June 15, 1960, we gave notice of and ordered oral argument, which was heard on June 21, 1960.

The purpose of this report is to respond exclusively to the petition for a reconsideration of our original report relative to the scope of APL's so-called "grandfather" rights under the proviso in section 805(a) of the Act. These proceedings and this report are limited to this issue.

Under the proviso the "rights" (as distinguished from "permission") to participate in the intercoastal trade arises by virtue of the operator's activities in 1935, and since it constitutes an exception to the necessity of meeting the conditions prescribed by section 805(a), must not be enlarged by a liberal construction of the statute. Activities in excess of such right may be authorized but only in accordance with the requirements of the other parts of section 805, under which we must consider problems of unfair competition and the objects and policies of the Act.

Facts

The status of APL in 1935 during the season ordinarily covered by its operation was as follows:

1. A line known as Dollar Steamship Line Inc., Ltd., had a "Trans Pacific Service" which used two vessels, the *President Hoover* and the *President Coolidge*, operating Los Angeles/San Francisco to Honolulu, Yokohama, Kobe, Shanghai, Hong Kong, Manila, and returning over the same route to California.

2. Dollar Steamship Line also had a "New York to Manila via Panama Canal and return" service, which used five vessels, the *President(s) Lincoln*, *Cleveland*, *Pierce*, *Taft*, and *Wilson*, operating Los Angeles/San Francisco to Honolulu and the same ports served by the "Trans Pacific Service", and return the same way to New York and Boston.

3. The *Hoover* and the *Coolidge* at regular intervals during the year departed 13 times from California for Manila via Hawaii and returned via Hawaii, making 13 round voyages altogether. The *Lincoln*, *Cleveland*, *Pierce*, *Taft*, and *Wilson* at regular intervals during the year departed 13 times from California for Hawaii (en route from New York to Manila) and returned via Hawaii.

4. Schedules were issued and posted and standard fares established. The combination of the "Trans-Pacific" and the "New York" schedules resulted in 26 regular fortnightly departures from California during 1935. It also resulted in 26 regular fortnightly arrivals from Hawaii, on the alternate weeks during 1935. Combined arrivals and depar-

tures between California and Hawaii and return equalled 52 for all seven vessels.

5. The seven vessels, in 1935, actually carried 1,297 passengers west to Hawaii and 1,555 passengers east to California, or a total of 2,852 passengers out of a total of 38,581 passengers traveling between these points by sea. They carried 7.4 percent of the passengers in 1935, and also carried 3,204 L/T of cargo.

6. California-Hawaii passengers were sold space which was available but not sold to the Far East and to returning passengers. APL was not able to reconstruct voyage plans which would show the amount of space unsold but available or "held out" to passengers between California and Hawaii in 1935, i.e., its total capacity (used and unused) for this service. It was simply everything left over after Far East passengers had been taken care of. This space was sold and cargo bookings were made by Matson under an agreement with APL's predecessor, but APL's predecessor was directly responsible to passengers and shippers in rendering service.

7. In November 1938 the name of Dollar Steamship Lines Inc., Ltd., was changed to American President Lines, Ltd.

We have concluded from the foregoing that APL or a predecessor in interest was in bona fide operation as a common carrier by water in the domestic and intercoastal trade in 1935 over the route for which the present application is made.

As a minimum, APL has the right to make 13 departures or 26 round trips between California and the Far East with stops at Hawaii with the same two-vessel capacity, and 13 departures or 26 round trips from New York for the Far East with stops at California (Los Angeles/San Francisco) and Hawaii with the same five-vessel capacity. The problem is the translation of these departures and this capacity to 1960 conditions, and the determination of how these departures and this capacity may be expressed to describe the scope of APL's "grandfather" rights and accommodate changes in the traffic or changes in vessel size and design over the intervening 25 years.

Since 1935 APL or its predecessor in interest have maintained approximately the same service except for the war-time interruption from 1941 through 1945 or other conditions over which it had no control. After the war it used different vessels to some extent and its departures have diminished. In 1958, 12 departures were made. During this period of activity it carried a low of 1,342 passengers in 1947, which was 5.4 percent of the total passengers carried, and a high of 3,574 passengers in 1950, which was 6.7 percent of the total passengers carried. It has carried as high as 15.6 percent of the passengers carried in 1948 and a low of 1.7 percent in 1958. Its capacity likewise has varied, particularly during the period after the war. All of this activity over 25 years has presumably been consistent with its rights under section 805(a). During the period from 1935 through 1958, the total number of passengers traveling this route by sea has increased from 38,584 to 95,286. APL's share of these travelers dropped to 2 percent in 1957, when it made 17 departures from California and 16 from Hawaii with 3 vessels, the *Wilson*, *Cleveland*, and *Hoover*. Applicant now seeks authority to carry more than 2,852 passengers and 3,204 L/T of cargo a year on no more than 35 round trip voyages, which differs from the requirements of our report of April 28, 1960.

Discussion

The principal argument of APL is that our earlier report denied it the right under the proviso of section 805(a) to "grow with the trade", which has more than doubled. We have held that under the proviso operators are entitled to "substantial parity" of operations during the base year 1935.[2] APL seeks to equate substantial parity with growth and a right to maintain its same position in relation to the increased volume of travel. In the past, however, we have concluded that section 805(a) does not give such a right of growth but only protects the 1935 position.[3] In this view, it may maintain substantially its 1935 rights, whatever they may be.

Comparison is made between section 805(a) of the Act and section 206(a) of the Motor Carrier Act to fortify the growth argument. The two sections are not similar, however. The latter includes a provision which was not included in the later-enacted Merchant Marine Act, 1936, prohibiting the Interstate Commerce Commission from limiting a carrier's right to "*add* to his or its equipment and facilities * * * as the development of the business and the demands of the public require". (Emphasis supplied.) Therefore, the court decisions which deny a purpose in the Motor Carrier Act to "freeze" the service to its exact status as the base year or to the precise pattern of prior activities are not applicable to section 805(a) of our Act. Otherwise the express omission of the quoted words from the later enactment would be meaningless. We cannot restore the meaning of the omitted words by our decisions.

The legislative history of section 805(a), on the contrary, shows that the section's purpose was, first, to protect those operating exclusively in the coastwise or intercoastal service from subsidy-aided competi-

[2] *American President Lines, Ltd.—Subsidy, Route 17*, 4 F.M.B.–M.A. 488, 502 (1954).
[3] Id.

tion,[4] and second, to allow those who receive operating-differential subsidy aid to continue the coastwise or intercoastal service they were giving in 1935.[5] Expansion was authorized only if it was determined pursuant to application therefor that the proposed service would not result in "unfair competition" to the exclusively coastwise and intercoastal operators, but only under other parts of section 805(a). An application for section 805(a) permission covering the service which APL apparently contemplates at this time is not before us.

Since there was no new information developed at the hearing on the petition for reconsideration relevant to "grandfather" rights, there is nothing that warrants our changing our position as to the measure of "grandfather" rights set forth in our original report.

In view of the foregoing:

It is ordered, That the petition for reconsideration be, and it is hereby, denied.

By the Board.

(Sgd.) JAMES L. PIMPER,
Secretary.

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[4] See Hearings on S. 3500, Senate Committee on Commerce, 74th Cong., 2d sess., pp. 87–89, and the testimony of Mr. J. C. Peacock, Director, Shipping Board Bureau.

[5] Id. p. 77. See, also, *Am. Pres. Lines, Ltd.—Unsubsidized Operation, Route 17*, 3 F.M.B.-M.A. 457 (1951).

Appendix

Section 805(a):

It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII of this Act, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act: *Provided*, That if such contractor or other person above-described or a predecessor in interest was in bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor.

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. S–115

MOORE-MCCORMACK LINES, INC.—APPLICATION UNDER SECTION 805(a)

Submitted August 3, 1960. Decided August 3, 1960

Moore-McCormack Lines, Inc., granted written permission under section 805(a) of the Merchant Marine Act, 1936, as amended, for its vessel, the SS *Mormacguide*, presently under time charter to States Marine Lines, Inc., to engage in one voyage in the domestic coastwise and intercoastal trade carrying general cargo from Hawaii and California ports to Gulf ports, commencing at Hawaii on or about August 7, 1960, since granting of the permission found (1) not to result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal trade; and (2) not to be prejudicial to the objects and policy of the Act.

Ira L. Ewers for applicant.
John E. Cograve as Public Counsel.

REPORT OF THE DEPUTY MARITIME ADMINISTRATOR

BY THE DEPUTY MARITIME ADMINISTRATOR:

Moore-McCormack Lines, Inc., filed an application for written permission under section 805(a) of the Merchant Marine Act, 1936, as amended, 46 U.S.C. sec. 1223 (the Act), for its vessel, the SS *Mormacguide*, presently under time charter to States Marine Lines, Inc., to engage in one domestic coastwise and intercoastal voyage carrying general cargo from Hawaii and California ports to Gulf ports, commencing at Hawaii on or about August 7, 1960. Notice of hearing was published in the Federal Register of July 27, 1960 (25 F.R. 7110). No one appeared in opposition to the application.

States Marine intended to use its own vessel, the SS *Lone Star State*, for the voyage but the vessel is unavailable because of damage to a boiler. In view of the amount of cargo available, it is necessary to have a C–3 type vessel, but the only vessel of that type in position to satisfactorily perform the voyage is the *Mormacguide*.

It is found that the granting of the requested permission will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal trade, or be prejudicial to the objects and policy of the Act.

This report shall serve as written permission for the voyage.

6 M.A.

FEDERAL MARITIME BOARD

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 11th day of August A.D. 1960

No. 890

UNAPPROVED SECTION 15 AGREEMENTS—SPANISH-PORTUGUESE TRADE

This matter has been presented on interlocutory appeal from a ruling by the hearing examiner. The situation as presented to us is as follows:

1. In his ruling of June 7, 1960, the examiner denied respondents' appeal to the Board from his ruling of April 27, 1960, granting a motion by public counsel for discovery and production of documents under Rule 17(k) of the Board's Rules of Practice and Procedure, and denied respondents' motions for a referral to the Board for determination of issues pursuant to Rule 10(m). The examiner concluded that respondents had not shown any extraordinary circumstances where prompt decision by the Board is necessary to prevent unusual delay, expense, or detriment to the public interest, as required by Rule 10(m).

2. Respondent Compagnie de Navigation Fraissinet et Cyprien Fabre thereafter filed a motion for hearing and determination by the Board, asking for a waiver under Rule 1(i) of the requirements of Rule 10(m), which prohibit appeals from rulings of presiding officers prior to or during the course of hearing, except in unusual circumstances. Respondents Concordia Line, American Export Lines, Inc., and North Atlantic/Spanish Conference filed similar motions. Respondent Naviera Aznar S.A. also moves for reconsideration of the examiner's ruling.

3. Petitioners, pursuant to Rule 1(i), request waiver of the prohibition against interlocutory appeals in Rule 10(m) on the ground that such action is needed to prevent undue hardship in this particular case. They argue that undue hardship will occur because they will be subjected to unusual delay and expense as the result (a) of

the need to preserve their rights by assuming a posture of defiance, leaving it to the Board to justify the examiner's ruling in an enforcement proceeding or by not cooperating in view of being wholly in the dark about the violations with which they are charged, (b) of lack of knowledge as to the status of Public Counsel as either a representative of the Board or as a "party" to the proceeding, (c) of the absence of any ruling on the necessity for producing documents of foreign nationals located in foreign countries, and (d) of the difficulties of obtaining unspecified documents covering a period of 10 years.

Discussion

In view of the importance of the questions raised by respondents and of the necessity for a prompt decision by the Board, we are waiving Rule 10(m) pursuant to Rule 1(i) in order to review the examiner's rulings of April 27, 1960, and June 7, 1960. We sustain the examiner.

Respondents' principal contentions are:

1. The ruling would endow the Board with power not granted by Congress, *i.e.*, empower the examiner, as presiding officer, to direct respondents, as parties, to produce and permit the inspection and copying of documents in response to a motion by Public Counsel, as a "party showing good cause therefor" under Rule 12(k); such a directive is not expressly authorized by the Shipping Act, 1916, which authorizes these proceedings; and such Act only authorizes the issuance of subpenas by the Board itself under section 27.

2. Rule 12(k) requires that an examiner's directive must be in response to a motion "showing good cause therefor", and good cause has not been shown in Public Counsel's motion.

3. The examiner failed to grant requests for further particulars relative to the Board's order of investigation, *i.e.*, the required documents were not described more specifically and their relevence to the issues were not shown.

4. The examiner's ruling compels the production of documents located in foreign countries and owned by foreign corporations.

We discuss these contentions on their merits in the order presented above.

Authorization. Examiners' directives for the production of documents pursuant to Rule 12(k) are authorized by the Merchant Marine Act, 1936, even though the investigation is initiated pursuant to the Shipping Act, 1916. Section 204(a) of the 1936 Act transferred to the United States Maritime Commission "all the functions, powers, and duties vested in the former United States Shipping Board by the Shipping Act, 1916 * * *", and section 204(b) authorized the Maritime Commission "to adopt all necessary rules and regulations to carry out the powers, duties, and functions vested in it by this Act", which included powers under the 1916 Act. Investigation of violations is, of course, a major function, power, and duty of the agency administering the 1916 Act. Thereafter, section 104 of Reorganization Plan No. 21 of 1950 (64 Stat. 1273) transferred to the Federal Maritime Board (established by section 101 thereof) the regulatory functions of the Maritime Commission under the 1916 Act, and by section 105 the Board was given "(5) So much of the functions with respect to adopting rules and regulations, making reports and recommendations to Congress, subpoenaing witnesses, administering oaths, taking evidence, and requiring the production of books, papers and documents under the provisions of sections 204, 208 and 214 of the Merchant Marine Act, 1936, as amended * * * as relates to the functions of the Board under the provisions of this reorganization Plan." We are of the opinion, moreover, that the power to direct the production of documents in the manner prescribed by Rule 12(k) is impliedly contained in the 1916 Act as a necessary adjunct to the power vested in the Board by that Act to conduct administrative proceedings. In this connection, see section 22 of the 1916 Act, authorizing the Board to investigate any violation of the Act's provisions.

Rule 12(k) was adopted under the Board's rule-making power, as expressly vested in the 1936 Act and as impliedly vested in the 1916 Act. Production and inspection of documents under Rule 12(k) is essential to the effectiveness of the present investigation.

"*Good cause.*" Our order of investigation set the subject of the inquiry in the general terms of whether respondents, in their operations in the trade between the United States and Spain and/or Portugal since 1949, have entered into or carried out agreements in violation of section 15 of the 1916 Act. The order reflects that the Board has reason to believe respondents may have violated section 15. The ground for the directive issued by the examiner is the discovery, production, and inspection of documents necessary and relevant to the preliminary stages of this inquiry, and that was made clear in the examiner's ruling of April 27, 1960, directing respondents, under Rule 12(k), to produce and permit inspection of the documents specified in Public Counsel's motion. Clearly, these proceedings satisyfy the requirements of "good cause" within the meaning of Rule 12(k). Moreover, Public Counsel, under the Board's rules, is expressly made a "party", acting in the public interest, and is entitled as such to invoke Rule 12(k).

Particularity. The Board's order of investigation states the issues, and the examiner's April 27 ruling requires Public Counsel to make available to respondents, at least ten days in advance of the hearing, an outline of the principal facts to be presented. At the hearing respondents may make any appropriate motions necessary to a full and fair hearing. In its present stage, this proceeding is merely investigatory. Public Counsel is, and properly so, engaged in the gathering of information preliminary to the presentation of evidence pointing to the question of whether there have been violations of the 1916 Act. At this preliminary stage neither the Board nor its staff is obliged to draw an indictment. It is enough that before any affirmative proof of alleged wrongdoing is presented, respondents be given a fair and adequate notice of what violations they will be charged with and an opportunity to defend against them. This is the procedure being followed in the instant case.

Foreign documents. We have no doubt as to our power to require the production of relevant documents physically located outside the United States, The 1916 Act imposes on us the responsibility of regulating common carriers by water operating in the foreign commerce of the United States, regardless of the nationality of such carriers. Certain agreements and practices are proscribed by the Act, whether accomplished in the United States or abroad. Obviously, the Board could not discharge its responsibility, and the 1916 Act itself would be largely ineffectual, if the Board's authority extended only to the production of documents found within the United States. It appears unnecessary however, to elaborate on the point at this juncture of the present proceeding. In their reply to respondents' motions, Public Counsel state that they "do not press at this time for the production of documents not currently located within the United States", consequently, in the final analysis such documents may not prove to be essential in this case.

In view of the foregoing:

It is ordered, That the above-mentioned petitions and motions, insofar as they seek a waiver of Rule 10(m) pursuant to Rule 1(i), be, and they are hereby, granted; and

It is further ordered, That said petitions and motions, in all other respects be, and they are hereby, denied.

By the Board.

(Sgd.) JAMES L. PIMPER,
Secretary.

FEDERAL MARITIME BOARD

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 18th day of August A.D. 1960

No. 884

UNAPPROVED SECTION 15 AGREEMENTS—JAPAN-KOREA-OKINAWA TRADE

This matter has been presented on interlocutory appeal from a ruling by the presiding examiner. The situation as presented to us is as follows:

1. In his ruling of June 22, 1960, the examiner denied respondents' appeal to the Board from his ruling of March 21, 1960, granting a motion by Public Counsel for discovery and production of documents under Rule 12(k) of the Board's Rules of Practice and Procedure, and denied respondents' motions for a referral to the Board for determination of issues pursuant to Rule 10(m). The examiner concluded that respondents had not shown any extraordinary circumstances where prompt decision by the Board is necessary to prevent unusual delay, expense, or detriment to the public interest, as required by Rule 10(m).

2. Respondents Barber-Wilhelmsen Line—Joint Service and Maersk Line thereafter filed motions for hearing and determination by the Board, asking that the Board direct the examiner to refer to it for review his ruling of June 22, 1960, together with his prior ruling referred to therein, and all motions, replies, and memoranda of the parties related to either of the rulings; hear oral argument; and make and enter an order reversing the examiner's rulings and denying Public Counsel's motion for discovery and production of documents. Respondent United States Lines made no request for reconsideration, or in the alternative, reference to the Board.

3. Petitioners request action in view of the general importance of the questions presented and the serious constitutional and statutory issues involved in their solution. They also argue that they will be subjected to unusual delay and expense as the result (1) of the need

to preserve their rights by assuming a posture of defiance, leaving it to the Board to justify the examiner's ruling in an enforcement proceeding or by not cooperating in view of being wholly in the dark about the violations with which they are charged, (2) of the absence of any ruling on the necessity for producing documents of foreign nationals located in foreign countries, and (3) of the difficulties of obtaining unspecified documents covering a period of several years.

DISCUSSION

Inasmuch as the basic questions involved in this proceeding and the legal contentions of respondents and of Public Counsel are substantially the same as those disposed of by us in *Unapproved Agreements—Spanish-Portuguese Trade*, 6 F.M.B. 103 (1960), and for the reasons set forth therein, we sustain the ruling of the presiding examiner.

In view of the foregoing:

It is ordered, That the above-mentioned petitions and motions be, and they are hereby, denied.

By the Board.

(Sgd.) JAMES L. PIMPER,
Secretary.

FEDERAL MARITIME BOARD

No. S-73 (Sub. No. 1)

Waterman Steamship Corporation—Application Under Section 805(a)

*Submitted August 3, 1960. Decided August 19, 1960**

Waterman Steamship Corporation granted written permission under Section 805(a) of the Act to engage in domestic coastwise service between United States Pacific Coast ports and ports in Puerto Rico, and for continuation of the pecuniary interest of McLean Industries, Inc. and the officers and directors of McLean Industries, Inc. and Waterman in Waterman Steamship Corporation, and for continuation of the agency arrangements between Waterman and its subsidiaries, Waterman Corporation of California and Waterman Steamship Corporation of Puerto Rico, in connection with such service, will not result in unfair competition to any person, firm, or corporation operating exclusively in the domestic intercoastal or coastwise service, nor be prejudicial to the objects and policy of the Act.

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

George Bunn and *William D. Rogers* for intervener the Commonwealth of Puerto Rico, in support of the application.

John E. Cograve and *Edward Aptaker* as Public Counsel.

Initial Decision of Edward C. Johnson, Examiner

INTRODUCTION

In an application dated May 16, 1960, and served on May 26, 1960, Waterman Steamship Corporation (Waterman), an applicant for operating-differential subsidy under the provisions of the Merchant Marine Act, 1936, as amended, applied for written permission under Section 805(a) of the Act[1] to continue, after it is subsidized, to

*In the absence of exceptions thereto by the parties, and upon notice by the Board, the initial decision of the examiner became the decision of the Board on the date shown (section 8(a) of the Administrative Procedure Act and Rules 13(d) and 13(h) of the Board's Rules of Practice and Procedure).

[1] Section 805(a) is set forth in Appendix "A", attached hereto.

operate a domestic coastwise service between United States Pacific Coast ports and ports in Puerto Rico. Request is also made for permission for McLean Industries, Inc., Applicant's parent, and for the officers and directors of Applicant and McLean Industries, Inc., to continue to own a pecuniary interest, directly or indirectly in Applicant, and for approval of the continuation by Applicant of its agency arrangements with its subsidiaries, Waterman Corporation of California, and Waterman Steamship Corporation of Puerto Rico, performed in connection with such service. The application was duly noticed in the Federal Register on May 28, 1960. A hearing was held in Washington, D.C. on June 15, 1960. No parties intervened in opposition to the granting of the requested permissions. As above indicated, the Commonwealth of Puerto Rico appeared in support of the application. Public Counsel has expressed no differences with the proposed findings and conclusions submitted by Applicant, which, in general, and subject to certain modifications hereinafter noted, are incorporated herein.

FINDINGS OF FACT

The testimony and evidence in this case shows the following:

1. Waterman, a wholly-owned subsidiary of McLean Industries, Inc., commenced a Pacific Coast-Puerto Rican service in 1949 and either it or its affiliate, Sea-Land Service, Inc. (formerly known as Pan-Atlantic Steamship Corporation) has operated continuously in that trade since then. No claim of grandfather rights is involved.

2. Waterman operated this service, until recently, in connection with its vessels returning from the Far East operated in the Gulf-Far East trade. Recently, the service has been provided by owned vessels confined exclusively to the service between United States Pacific Coast ports and Puerto Rico. Service has been provided approximately on a monthly basis and is expected to continue substantially on that basis for the immediate future.

3. Waterman, at present, is the only common carrier providing a regular berth service from Northwest Pacific Coast ports and from Los Angeles to Puerto Rico. In addition, it serves San Francisco and Stockton, California.

4. Isbrandtsen Company, Inc. provides a service from the San Francisco Bay Area only, including Stockton, to Puerto Rico, which service is performed in connection with its vessels operated in its Eastbound Round-the-World service.

5. Isbrandtsen also has pending an application for subsidy on its Eastbound Round-the-World service and the Board has approved,

under Section 805(a) of the Act, continuation of the Pacific Coast-Puerto Rican leg of that service after Isbrandtsen becomes subsidized.

6. Pope & Talbot, Inc. operates a common carrier service from Puerto Rico to United States Pacific Coast ports in connection with its intercoastal service but has not operated for some time from the Pacific Coast to Puerto Rico.

7. Waterman observes the same rates as Isbrandtsen and Pope & Talbot.

8. Neither of the above mentioned lines oppose the application and, in fact, no opposition to the application was registered by any person, firm or corporation. The Commonwealth of Puerto Rico intervened in support of the application.

9. A large movement of general cargo, consisting of rice, beans, canned goods and numerous other general commodities moves from the Pacific Coast to Puerto Rico and, in a much smaller volume, limited general commodities move from Puerto Rico to the Pacific Coast. During the period 1955–1959, Waterman and/or its affiliate, Sea-Land Service, Inc., handled 431,495 tons of cargo in this trade, averaging approximately 86,000 tons of cargo a year. For the years 1955–1958, a total of 736,961 tons of cargo moved from the Pacific Coast to Puerto Rico, averaging approximately 185,000 tons per year. Waterman's participation in the total movement (approximately 86,000 tons per year) has been substantial.

10. Without the service of Waterman, there would be no water common carrier service available from the United States Pacific Coast to Puerto Rico other than Isbrandtsen's service from the San Francisco Bay Area. A large number of shippers on the Pacific Coast are dependent on the service of Waterman to meet their shipping needs to Puerto Rico.

11. Waterman Corporation of California, a wholly-owned subsidiary of Waterman, acts as agent on the Pacific Coast for Waterman, performing solicitation service, husbanding of vessels and related services. An agency commission of 5% revenue, which is standard and customary in the industry, is paid by Waterman for these services.

12. Waterman Steamship Corporation of Puerto Rico, also a wholly-owned subsidiary of Waterman, performs similar agency services for Waterman in connection with this service in Puerto Rico, receiving the same agency fee. It also furnishes terminal facilities and stevedoring services to vessels operated by Waterman in this trade.

13. Waterman is a wholly-owned subsidiary of McLean Industries, Inc. and the officers and directors of both are interlocking to a cer-

tain extent, and hence, Applicant's parent and the officers and directors of both Applicant and its parent have a direct or indirect pecuniary interest in Applicant, request for permission to continue which has been made.

14. No exclusive domestic coastwise operator operates from the Pacific Coast to Puerto Rico and no record objection has been made by any person, firm or corporation to the application.

15. Maritime shipping services are vitally important to the more than 2 million people of the Commonwealth of Puerto Rico. In supporting this application, the Commonwealth shows that about half of what it produces and over half of what it consumes is transported by water. Ocean shipping services are the life line of Puerto Rico in the furnishing of food stuffs and other commodities essential to the everyday life of its people on an island approximately 100 miles long and 35 miles wide, and located more than a thousand miles from the nearest port in the United States and much farther away from the important United States Pacific Coast ports from which it gets essential food stuffs and raw materials. The continuation of ocean shipping services likewise has a vital bearing on its own public programs and policies, and its recent $20 million Port Development Construction Program has taken on real meaning in relation to gearing its limited pier facilities in San Juan and elsewhere to increased cargo movements by water. The many new Island industries are by necessity oriented toward ocean shipping, and since Puerto Rico's present industrial development program cannot depend solely on local resources or markets since it lacks major raw materials, it then becomes primarily dependent upon shipping from all geographic areas to develop the economic future of the Island.

CONCLUSION

On this record, it is found that the granting of the requested permission under Section 805(a) of the Merchant Marine Act, 1936, as amended, for Applicant Waterman Steamship Corporation to engage in domestic coastwise service between United States Pacific Coast ports and ports in Puerto Rico, and for continuation of the pecuniary interest of McLean Industries, Inc., and the officers and directors of McLean Industries, Inc. and Waterman in Waterman Steamship Corporation, and for continuation of the agency arrangements between Waterman and its subsidiaries, Waterman Corporation of California, and Waterman Steamship Corporation of Puerto Rico, in connection with such service, will not result in unfair competition to any person, firm or corporation operating exclusively in the domestic intercoastal or coastwise service, nor be prejudicial to the objects or policy of the Act.

This report shall serve as such written permission for the foregoing services, interests, and arrangements requested by Applicant in the absence of any exceptions thereto or review thereof by the Board.

Appendix A

Section 805(a):

It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII of this Act, if said contractor or charterer or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act: *Provided*, that if such contractor or other person above-described or a predecessor in interest was in bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control the Commission shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly any moneys, property or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations and whosoever shall violate this provision shall be guilty of a misdemeanor.

FEDERAL MARITIME BOARD

No. S-73

WATERMAN STEAMSHIP CORPORATION—APPLICATION UNDER SECTION 805(a)

Submitted April 13, 1960. Decided September 12, 1960

1. Waterman Steamship Corporation, as predecessor in interest of its subsidiary, Waterman Steamship Corporation, Puerto Rico, has "grandfather" rights under section 805(a) of the Merchant Marine Act, 1936 (the Act), to the extent of 26 sailings annually between New Orleans, La., and Mobile, Ala., and ports in Puerto Rico.
2. Grant of permission to Waterman Steamship Corporation to continue service by its subsidiary, Waterman Steamship Corporation, Puerto Rico, between Gulf of Mexico ports (east of and including New Orleans) and Puerto Rico would not result in any competition with an exclusively domestic operation nor be prejudicial to the objects and policy of the Act.
3. Grant of permission to Waterman Steamship Corporation to continue service by its affiliate, Pan-Atlantic Steamship Corporation (Sea-Land Service, Inc.) between Atlantic ports and ports in Puerto Rico would not result in unfair competition to any person, firm, or corporation operating exclusively in the intercoastal service, and would not be prejudicial to the objects and policies of the Act.
4. Waterman Steamship Corporation's affiliate, Pan-Atlantic Steamship Corporation (Sea-Land Service, Inc.), has "grandfather" rights under section 805(a) of the Act in service from New York, N.Y., to New Orleans to the extent of 53 voyages, using not more than 4 vessels, but does not have any such rights in service from New Orleans to New York.
5. Permission to Waterman Steamship Corporation to provide trailership service by its affiliate, Pan-Atlantic Steamship Corporation (Sea-Land Service, Inc.), from New Orleans to New York denied because it would result in unfair competition to an exclusively coastwise service, and be prejudicial to the objects and policy of the Act.
6. Grant of permission to Waterman Steamship Corporation to provide two-vessel weekly trailership service between Port Newark, N.J., and Houston, Texas, would not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise service, nor be prejudicial to the objects and policy of the Act.

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7. Permission granted to Waterman Steamship Corporation to charter the *Clairborne* and the *Monarch of the Seas* to Waterman Steamship Corporation, Puerto Rico, for operation between Gulf of Mexico ports and Puerto Rico.
8. Permission granted to Waterman Steamship Corporation to charter or subcharter the *Bienville, Raphael Semmes, Fairland, Azalea City,* and *Gateway City* to Pan-Atlantic Steamship Corporation (Sea-Land Service, Inc.) for operation between ports on the Atlantic and Gulf coasts and in the Atlantic/Puerto Rico trade.
9. Permission granted to Waterman Steamship Corporation to act as general agent for Waterman Steamship Corporation, Puerto Rico, in the United States.
10. Petition of Erie and St. Lawrence Corporation and Containerships, Inc., to intervene and to reopen proceeding, denied.

Sterling F. Stoudenmire, Jr., Donald MacLeay, Harold E. Mesirow, and *Warren Price, Jr.,* for Waterman Steamship Corporation and Pan-Atlantic Steamship Corporation.

William D. Rogers and *Eduardo Garcia* for The Commonwealth of Puerto Rico, *S. S. Eisen* for Seatrain Lines, Inc., *Mark P. Schlefer* and *John C. Wren* for Bull-Insular Line, Inc., and Alcoa Steamship Company, Inc., *Odell Kominers* and *J. Alton Boyer* for Luckenbach Steamship Company, Inc., *M. James Spitzer, Irving Fliegler,* and *O. B. Cline* for TMT Trailer Ferry, Inc., *Carl Helmetag, Jr., R. S. Trigg,* and *W. Q. Keenan* for the Pennsylvania Railroad Company and The New York, New Haven & Hartford Railroad Company, *Arthur L. Winn, Jr., Frances A. Mulhern, Samuel H. Moerman, J. Stanley Payne,* and *Walter J. Myskowski* for Port of New York Authority, *David E. Wells* for Atlantic Coast Line Railroad Company, *Richard H. M. Swann* for City of Miami, Florida, *F. C. Hillyer* for Jacksonville Area Chamber of Commerce and Jacksonville Traffic Bureau, Inc., and *G. B. Perry* for Harris County Houston Ship Channel Navigation District, interveners.

Edward Schmeltzer, Edward Aptaker, and *Robert E. Mitchell* as Public Counsel.

REPORT OF THE BOARD

THOS. E. STAKEM, Jr., *Vice Chairman*, SIGFRID B. UNANDER, *Member*

BY THE BOARD:

Waterman Steamship Corporation (Waterman or applicant) filed on January 30, 1957, an application for operating-differential subsidy covering various services.[1] On April 2, 1957, applicant filed

[1] See 5 F.M.B. 771, for a full discussion of Waterman's subsidy application and the Board's findings thereon in relation to section 605(c) of the Merchant Marine Act, 1936.

an application for permission under section 805(a) [2] of the Merchant Marine Act, 1936, as amended (the Act), for its affiliates and officers to continue the following domestic coastwise services, charters, and relationships:

1. Waterman Steamship Corporation of Puerto Rico (Waterman, P.R.), applicant's wholly owned subsidiary, to operate unsubsidized vessels between Gulf ports east of and including New Orleans, Louisiana, and ports in Puerto Rico;

2. Pan-Atlantic Steamship Corporation (Pan-Atlantic), its affiliated company, to operate unsubsidized vessels between Atlantic ports and ports in Puerto Rico; [3]

3. Pan-Atlantic to operate unsubsidized vessels between Atlantic ports, between Gulf ports, and between Atlantic and Gulf ports;

4. Waterman to continue to charter the *Clairborne* and the *Monarch of the Seas* to Waterman, P.R., for operation in the Gulf/Puerto Rico trade;

5. Waterman to continue to charter the *Bienville*, *Raphael Semmes*, *Fairland*, *Azalea City*, and *Gateway City* to Pan-Atlantic for operation in the trade between ports on the Atlantic and Gulf coasts and in the Atlantic/Puerto Rico trade;

6. The continuation of an agency agreement between Waterman and Waterman, P.R., and of the pecuniary interest of the former in the latter.

The following parties intervened: Bull-Insular Line, Inc. (Bull), Alcoa Steamship Company, Inc. (Alcoa), Seatrain Lines, Inc. (Seatrain), and TMT Trailer Ferry, Inc. (TMT), The Commonwealth of Puerto Rico, the Pennsylvania Railroad Co., The New York, New Haven & Hartford Railroad Company, and various cities and others, as their interests might appear.

Hearings were held before an examiner who, in a recommended decision, concluded, in part, as follows:

> Waterman P.R. and its predecessor in interest found to have been continuously engaged in the U.S. Gulf/Puerto Rico service since 1928, and the continuation of this service to the extent set forth in the findings and conclusions herein found not to result in unfair competition to any person, firm or corporation operating exclusively in the domestic coastwise or intercoastal service, and not to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended. Written permission under Section 805(a) for the continuation of this service and to continue certain charter and agency agreements between Waterman and Waterman P.R., in the event a subsidy contract is awarded, should be granted. Grandfather rights prevail.

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[2] See appendix.

[3] Pan-Atlantic and Waterman are owned by McLean Industries, Inc. Pan-Atlantic, effective April 1, 1960, changed its name to Sea-Land Service, Inc.

Application of Waterman Steamship Corporation for permission under Section 805(a) of the Merchant Marine Act, 1936, as amended, to continue to operate its New York/Puerto Rico trailership service of Pan-Atlantic, in the event it is subsidized, and to continue certain financial arrangements between and among McLean, Waterman, Pan-Atlantic, Coastal, Beauregard and Sea-Land should be granted, since it is found not to result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service (Alcoa Steamship Co., Inc.), not prejudicial to the objects and policy of the Act. No grandfather rights asserted.

Granting written permission under Section 805(a) of the Act to Waterman Steamship Corporation to continue its Jacksonville/Puerto Rico service, and its Jacksonville/New York service of Pan-Atlantic, in the event subsidy is awarded, is necessary in order to provide adequate service in the trade, and the award of such permission would neither result in unfair competition to any exclusively domestic service (TMT Trailer Ferry, Inc., as to the Jacksonville/Puerto Rico service—no exclusively coastwise service exists between Jacksonville and New York), nor be prejudicial to the objects and policy of the Act, No element of grandfather rights involved.

Granting written permission under Section 805(a) of the Act to Waterman Steamship Corporation to continue to operate its New York/New Orleans Southbound service of Pan-Atlantic, in the event it is subsidized, is merited by grandfather rights. Northbound service voluntarily abandoned 1955 to 1958, hence no grandfather rights. Northbound leg adequately served by Seatrain, an exclusively domestic coastwise operator, and found entitled to protection against unfair competition.

Section 805(a) permission covering weekly service to Miami, Tampa, and Jacksonville by Pan-Atlantic vessels serving the New York/New Orleans trade found not to result in unfair competition to any exclusively coastwise operator, since there are none, and would not be prejudicial to the objects and policy of the Act and should be awarded.

Granting written permission under Section 805(a) of the Act to Waterman Steamship Corporation to continue to operate its New York/Houston service of Pan-Atlantic, in the event it is subsidized, would not result in any unfair competition to an exclusively domestic service (Seatrain), nor would it be prejudicial to the objects and policy of the Act. The trade is not now adequately served, and the requested permission should be granted. No grandfather rights obtain as to Applicant.

Exceptions to the recommended decision and replies thereto were filed, and oral argument was heard. Exceptions and proposed findings not discussed in this report nor reflected in our findings have been considered and found not justified by the facts or not related to material issues in this proceeding.

Waterman's related companies operate the following domestic services:

1. *Waterman, P.R.:* Weekly, two-vessel, break-bulk service between Mobile, Alabama, and New Orleans on the Gulf and San Juan, Ponce, and Mayaguez in Puerto Rico;

2. *Pan-Atlantic:* (a) Two-vessel, weekly, trailership service from Port Newark, New Jersey, to San Juan, Ponce, and Mayaguez, to Jacksonville, Florida, for discharge and loading of Puerto Rico cargo and loading of Port Newark cargo, to Port Newark;

(b) Two-vessel, weekly, trailership service from Port Newark to Miami, Florida, to New Orleans, to Tampa, Florida, to Port Newark;

(c) Two-vessel, weekly, trailership service between Port Newark and Houston, Texas.

Under section 805(a) of the Act, permission shall be granted to continue the foregoing operations if it is shown that applicant has "grandfather" rights; if no "grandfather" rights exist, permission shall not be granted if it is found that it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise service, or be prejudicial to the objects and policy of the Act.

I. Gulf/Puerto Rico Service

A. "Grandfather" rights

Waterman commenced its common-carrier operation between Gulf of Mexico ports and ports in Puerto Rico in 1928, and has operated that service continuously, except during the period of World War II, when the vessels were requisitioned, and other short periods due to labor disturbances or other interruptions beyond its control, until the operation was transferred to Waterman of Puerto Rico, a wholly owned subsidiary. On February 25, 1958, Waterman conveyed all right, title, and interest in its Gulf/Puerto Rico service to Waterman, P. R., which has continued to provide weekly service between New Orleans-Mobile and Puerto Rico.[4]

Applicant claims "grandfather" rights for Waterman, P.R.'s, two-vessel, weekly service between Gulf ports (east of and including New Orleans) and Puerto Rico. In 1935, the base year for establishing "grandfather" rights, Waterman operated a fortnightly service providing 26 sailings between New Orleans-Mobile-Tampa and Puerto Rico. Between 1936 and the end of 1957, except during World War II, the Gulf/Puerto Rico service provided between 45 and 56 annual sailings, with calls at New Orleans and Mobile.

The examiner concluded that the Gulf/Puerto Rico service was covered by "grandfather" rights to the extent of at least 26 annual voyages between New Orleans-Mobile and Puerto Rico; further, that

[4] Waterman, the former operator of the service, is the "predecessor in interest" of Waterman, P.R., the present operator, within the meaning of the "grandfather" rights provision. *American President Lines, Ltd.—Subsidy, Route 17*, 4 F.M.B. — M.A. 488, 501 (footnote 21) (1954).

annual sailings in excess of 26, and calls at Gulf ports other than New Orleans and Mobile, were not covered by "grandfather" rights because they are not in "substantial parity" with the service offered during the base year 1935. Applicant excepts to these conclusions, contending that its purchase of New York and Puerto Rico Steamship Company's (N.Y. & P.R.) Gulf/Puerto Rican service by an agreement dated September 1, 1939, vests it with "grandfather" rights for the difference between the 26 sailings made by Waterman in 1935 and the present weekly service of Waterman, P.R., for which section 805(a) permission is sought.

N.Y. & P.R. made approximately 46 sailings from the Gulf to Puerto Rico in 1935, but it cannot validly be claimed that Waterman or Waterman, P.R., is the successor in interest to that service. Waterman purchased from N.Y. & P.R. only the good will in the latter's Gulf/Puerto Rico service, for a ten-year period. Prior to the agreement, Waterman and N.Y. & P.R. each operated weekly services from the Gulf to Puerto Rico. Thereafter, N.Y. & P.R. withdrew from the trade and Waterman continued to operate a weekly service. No ships were transferred under the agreement; Waterman never operated the ships formerly used by N.Y. & P.R.; and Waterman's so-called acquisition of N.Y. & P.R. did not result in any increase over Waterman's level of operations during 1939. This constitutes an abandonment of the service of N.Y. & P.R. and does not support a claim to "grandfather" rights.

Bull and Alcoa except to the examiner's finding that 26 annual Gulf/Puerto Rico voyages of Waterman, P.R., are covered by "grandfather" rights. They contend that 26 sailings of the C–2 vessels currently serving the trade are not in "substantial parity" with the 26 sailings of the Laker-type vessels operated in 1935, pointing out that the deadweight bale cubic has increased and that reefer service has been added. We disagree. In considering the extent of "grandfather" rights under section 805(a), (1) substantial parity must exist between proposed and past operations, and (2) the "grandfather" clause cannot be so strictly construed as to permit absolutely no flexibility in equipment. *American President Lines, Ltd.*, *supra*. While Bull and Alcoa contend there is no evidence of an inward service in 1935, there is testimony, unchallenged and unrefuted, that such a service existed.

We find that Waterman has "grandfather" rights in its Gulf/Puerto Rico service to the extent of 26 sailings annually between New Orleans-Mobile and Puerto Rico. Permission may be granted for the additional 26 voyages only if it is found that it will not result in unfair competition to an exclusively coastwise service, or be prejudicial to the objects and policy of the Act.

B. Exclusively domestic operators

Alcoa and Bull oppose award of section-805(a) permission with respect to Waterman, P.R.'s, Gulf/Puerto Rico servicee on the grounds that the examiner erroneously found that neither of them would continue in this servicee in the future, the services of both were begun because of a decline in other srvices, and their services must be determined as of the date of applicant's request, or before, rather than on services initiated after this proceeding began. We conclude that neither Alcoa nor Bull had any exclusively domestic service in this trade until after the application was filed, hence no question of unfair competition is present.

Alcoa began a Gulf/Puerto Rico service on February 26, 1951, with vessels which served in the outbound direction only until March 1958 and called at foreign ports on practically every voyage to pick up inbound bauxite. Since April 1958, some 12 months after Waterman filed its application, Alcoa has provided common-carrier service in both directions between Puerto Rico and the Gulf and, except for one voyage,[5] has not called at foreign ports. Bull instituted a Gulf/Puerto Rico service on February 11, 1959, some three months after the start of the hearing on Waterman's application. Based on the sailings made during the few weeks of its existence, it appears that the service operates between New Orleans-Mobile and Puerto Rico.

We agree with the examiner that neither Bull nor Alcoa qualifies as an exclusively domestic operator in the Gulf/Puerto Rico service within the meaning of section 805(a).

Bull did not provide any service in this trade until February 1959, some two years after Waterman filed its application. Alcoa has provided service outbound and inbound since April 1959 only, over a year subsequent to the filing of the application for section-805(a) permission. The chief reliance in proving an exclusively domestic status must be placed on sailings antecedent to the date of application for section-805(a) permission, otherwise an intervener could enter the service purely for the purpose of affecting determinations under that section. Indeed, Bull and Alcoa seem to contend that the exclusively domestic test under section 805(a) may be entirely prospective. Voyages prior to the filing of an application must be considered as the basis for determination of exclusively domestic status; otherwise an intervener could gain such status merely by announcing that in the

[5] The *Alcoa Roamer* called at Trinidad June 21, 1958, on a return voyage from Puerto Rico to Mobile.

future he would confine his operations to domestic ports, thus presenting a new service by a subsidized operator, or eliminating a long-existing service by a new subsidy applicant, without assuring any service in the trade to the shipping public.

We agree with the examiner that even if Bull and Alcoa qualified as exclusively domestic operators in their Gulf-Puerto Rico services, the "fundamentally entitled" doctrine was not applicable. As we said in *T. J. McCarthy Steamship Co.—Sec. 805(a) Application, 5 F.M.B. 666, 671 (1959)*:

> The fundamentally entitled doctrine has been employed (a) to deny permission to a subsidized operator to inaugurate a new domestic service where established domestic operators entitled to protection have the need for, and capacity to carry, cargoes which the applicant would attract (*Am. Pres. Lines, Ltd.—Unsubsidized Operation, Route 17, American President Lines, Ltd.—Subsidy Route 17*, and *Pacific Far East Line, Inc.—Sec. 805(a) Calls at Hawaii, supra*), and (b) to deny permission to a subsidy applicant to continue domestic services as part of subsidized offshore services using subsidized vessels where such domestic services have been served by domestic operators who need the cargo and have the ability to carry it (*Isbrandtsen Co., Inc.—Subsidy, E/B Round the World, supra*). We will not extend the fundamentally entitled doctrine to deny the continuation of an exclusively domestic service by a subsidy applicant where, as here, the applicant has a long and continued association with the protected trade, and where he proposes to operate such service separate from his subsidized service. If we did, such an operator could not participate in the development of our merchant marine by inaugurating a separate and distinct subsidized service without suffering the penalty of being ousted from his unconnected traditional domestic service.

C. Prejudice to the objects and policy of the Act

Bull and Alcoa contend that the examiner erred in finding that the award of permission for Waterman, P.R., to continue to operate its present Gulf/Puerto Rico service would not be prejudicial to the objects and policy of the Act. Their contention is without merit. The refusal of such permission would only result in the substitution of Bull and Alcoa in the trade for an operator of long standing service which, on this record, has proven efficient and satisfactory to shippers. The continuation of such service could not, in our opinion, be said to be prejudicial to the objects and policy of the Act. Quite the contrary, to deny such permission to applicant might well be prejudicial to the objects and policy of the Act by depriving the domestic water-borne commerce between the Gulf and Puerto Rico of an operator which has provided shippers with efficient service over a long period of years.

We find that the grant of permission to applicant to continue its Gulf/Puerto Rico service would not result in unfair competition to any exclusively domestic operation nor be prejudicial to the objects and policy of the Act.

II. North Atlantic/Puerto Rico Service

A. *"Grandfather" rights*

Pan-Atlantic provides a service between the Atlantic coast and Puerto Rico with two trailerships, the *Fairland* and the *Azalea City*, serving the ports of New York and Jacksonville. This service was inaugurated in October 1957 as a weekly break-bulk service. In February 1958, Waterman, P.R., took over the service when it sailed the first trailership to Puerto Rico. Waterman does not claim "grandfather" rights in this service.

B. *Exclusively coastwise operations*

The examiner found that Bull was not an exclusive domestic operator in the North Atlantic/Puerto Rico trade but that Alcoa is such an operator. We agree. We have already passed on this issue as respects Bull's service, and nothing in this record warrants a change in our decision on this point in *Isbrandtsen Co., Inc.—Subsidy, E/B Round the World*, 5 F.M.B. 448 and 5 F.M.B. 483 (1958).

Alcoa operates a weekly service from North Atlantic ports to Puerto Rico, and since 1956 the vessels in this service have sailed foreign on only one occasion. A single foreign call as long ago as 1956 does not deprive this service of its exclusive coastwise status. While Alcoa frequently called at Puerto Rico with vessels in its North Atlantic/Venezuelan service, these calls do not deprive the separate North Atlantic/Puerto Rico service of its exclusively domestic service. *Pacific Far East Line, Inc.—Sec. 805(a) Calls at Hawaii*, 5 F.M.B.—M.A. 287, 292, 297 (1957).

C. *Unfair competition*

In view of Alcoa's status as an exclusively domestic operator, we must determine whether the grant of the permission requested by applicant would result in unfair competition to it.

The examiner found that the grant would not result in unfair competition; that there was excess over-all capacity of break-bulk vessels in the trade, but that there was no such excess capacity among container-carrying vessels in the New York/Puerto Rico trade; and that the container service provided by applicant was preferred by shippers and was needed in Puerto Rico. Accordingly, the situation we have as respects competition is to determine the extent to which a new technique of transportation competes unfairly with a different existing technique. Tonnage and vessel capacity on a route are not the only factors in determining whether more capacity creates unfair competition. We must also compare the types of service. When containership capacities are compared, we find, without applicant's tonnage, that there is a shortage to meet the demands of shippers and for the needs of interested areas. The competition offered a container-vessel service which the evidence shows is needed is not unfair to an existing break-bulk service. This is the case even though the latter service has excess capacity and may suffer from the effects of the new competition. The suffering is not a source of unfairness. Applicant proposes to meet the need and the existing carriers do not. Over two years ago applicant put its first trailership into operation, and since July 30, 1958, has operated the service on a weekly basis with vessels which were converted at considerable expense.

Containership operation is of particular benefit in the Puerto Rican trade. In addition to its greater efficiency and lower cost, it requires less terminal space, and the evidence shows that there is an acute shortage of terminal facilities in Puerto Rico. The Port Authority of the Commonwealth of Puerto Rico bases its port redevelopment plans on a projection that at least 40 to 45 percent of the cargoes moving in and out of Puerto Rico will move in containers when sufficient containers are available. Containers do not need shed space; all that is required is a yard which can be made more readily and cheaply available. Additionally, container-ship operation reduces damage and pilferage. While Bull and Alcoa supply some containers without the capacity provided by applicant, there would be insufficient capacity to carry the containerized cargo which the Commonwealth's plans contemplate in working out a solution to Puerto Rico's terminal facilities problem. It is not clear to what extent Bull and Alcoa will provide more container capacity.[6]

In view of the foregoing, we find that the grant of permission to applicant to continue its weekly containership operation in the North Atlantic/Puerto Rico service would not result in unfair competition to exclusively domestic operators. The service provided by applicant is needed in order that the trade be adequately served.

D. Objects and policy of the Act

We agree with the examiner that grant of permission to applicant for the continuation of the North Atlantic/Puerto Rico service would not be prejudicial to the objects and policy of the Act. Shippers have

[6] Bull's witness McCarty testified that "Bull feels for the present that with the vans and containers now in use, maximum containerization under the circumstances has been accomplished in the North Atlantic/Puerto Rico trade."

indicated a need for, acceptance of, and reliance upon the service provided by Pan-Atlantic. The Port Authority of the Commonwealth of Puerto Rico believes the service is essential to enable it to work out a solution of the Commonwealth's terminal problems. Containership operation admittedly is more efficient and tends towards reducing costs of operations. Under such circumstances, if we were to deny to Puerto Rico, dependent to such a large extent on ocean transportation, the service of applicant, it would in our opinion be prejudicial to the objects and policy of the Act.

III. JACKSONVILLE/PUERTO RICO, JACKSONVILLE/NEW YORK SERVICES

A. *"Grandfather" rights*

As indicated above, Pan-Atlantic operates a two-vessel weekly trailership service from Port Newark, New Jersey, to San Juan, Ponce, and Mayaguez, Puerto Rico, thence to Jacksonville, Florida, for discharge and loading of Puerto Rico cargo and loading of Port Newark cargo to Newark. It has no "grandfather" rights in these trades since it only began to call its New York/Puerto Rico vessels at Jacksonville on January 18, 1959. Service was not provided in 1935 between Jacksonville and Puerto Rico, or from Jacksonville to New York.

B. *Exclusively coastwise services*

TMT Trailer Ferry, Inc. (TMT), which has been providing service between Jacksonville and San Juan since early in 1956, contends that it has adequate equipment and service to handle all the traffic moving between Jacksonville and Puerto Rico, with the exception of reefer cargo; its management has considered the acquisition of further equipment, when and if warranted. It owns three vessels, only two of which are utilized because of lack of sufficient available tonnage. It usually operates two barges, which are towed by tugs used principally in the movement of loaded truck trailers in what is called a roll-on-roll-off type of operation. These sailings vary and are not at regular intervals. The tug-and-barge operation cruises at an average speed of 10 knots and requires 6-½ days transit time from Jacksonville to San Juan, a distance of about 1,100 nautical miles. It provides no pick-up or delivery service in the United States but does provide such service in San Juan. Two-thirds of the freight received by TMT at Jacksonville is rehandled by transfer from trailers of other carriers into those of TMT. It has no reefer equipment and handles no reefer cargo. TMT is an exclusively coastwise operator entitled to protection from unfair competition.

C. Unfair competition

There is shipper testimony that TMT's service involves less handling, that its rates are substantially below those of conference vessels, and that TMT shipments are not subject to the many terminal difficulties prevailing in San Juan. Other shippers testified that they could not use TMT's service because cargo was exposed to the salt air and therefore rusting; that shipments were so badly damaged because of salt air corrosion that they could not be sold when received; that other paper cargo products were exposed to excessive damage; that TMT's service was erratic and not dependable; and that its failure to provide reefer service was serious.[7] There was other shipper testimony in support of the continuance of the Pan-Atlantic trailership service between Atlantic ports and Puerto Rico, pointing up the superiority of the service over that of TMT.[8] While TMT contends that it can handle all the cargo in that trade with presently utilized vessels, and that it has a third vessel which it can put into service when and if conditions justify it, the record shows that in 1958, 18 of TMT's 33 sailings went out full; that all of the sailings with less than 90 percent utilization, except one, occurred in the off season between the middle of July and the beginning of September; and that TMT has been operating at capacity southbound notwithstanding Pan-Atlantic's entry into the trade in January 1959. While TMT claims that it has a third vessel for use if additional cargo offers, this third vessel is used as a rule only when one of the two vessels regularly in use is out of service for inspection, and it will be committed to the trade on a permanent basis only when and if there is sufficient northbound cargo to make it attractive to TMT, leaving the servicing of the heavy southbound trade subject to cargo offerings in the lighter northbound traffic. The service of Pan-Atlantic is needed in order to provide regular and adequate service in the Jacksonville/Puerto Rico trade. We find that the granting of permission to continue a two-vessel weekly trailership service from Port Newark, N.J., to San Juan, Ponce, and Mayaguez, P. R., thence to Jacksonville, Florida, for discharge and loading of Port Newark cargo to Newark would not result in any unfair competition to TMT.

D. Objects and policy of the Act

TMT provides no reefer space from Jacksonville to Puerto Rico

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[7] Jacksonville Traffic Bureau representative testified as to the urgent needs for reefer service.

[8] Such as reduced damage and pilferage experience, more expeditious loading and unloading, availability of trailers permitting shipper control of loading and unloading, availability of reefer equipment, reduction in handling of cargo, faster outturn of perishable cargo, and availability of trailer service at areas other than port areas.

although there is a widespread demand for it; such a service is supplied principally by Pan-Atlantic. In addition, TMT has been operating at full capacity southbound notwithstanding Pan-Atlantic's entry into the trade in January 1959, thus indicating that the latter's service is needed to give shippers adequate service in the trade. We find that the grant of permission to applicant to continue such service would not be prejudicial to the objects and policy of the Act.

IV. New York/Tampa-New Orleans-Miami/New York Service

A. *"Grandfather" rights*

Pan-Atlantic inaugurated its service in 1933 with four vessels providing weekly calls at New York and New Orleans and other ports, not including, however, Miami or Tampa. In 1935, the period for measuring "grandfather" rights, Pan-Atlantic had 53 sailings between New York and New Orleans but did not call at Miami and Tampa, and thus has no claim to "grandfather" rights with respect to these latter two ports. From 1935 to the present time the number of vessels used in this service has ranged from three to seven. From May to December 1957 the service was temporarily suspended while the vessels were taken out of service for conversion to trailerships. The vessels provided annual calls ranging generally from 53 in 1935, an average of 135 annually from 1937 through 1941, and thereafter in excess of 50 annually. In the first half of 1958 there were 28 calls.

Seatrain contends that Pan-Atlantic does not have "grandfather" rights covering the southbound leg of this trade. It argues that the break in service from May through December 1957, when the vessels were out for conversion from break-bulk to trailership, was a voluntary act and not due to circumstances beyond the control of Pan-Atlantic. Seatrain states that Pan-Atlantic could have continued to provide service with other break-bulk vessels, or could have provided service with modified T–2 tankers. It points out that service was provided Houston with the latter type vessels. We find that the break in service between May and December 1957 did not destroy Pan-Atlantic's "grandfather" rights. The conversion was necessary for survival in the New York/New Orleans trade and provided a new service. There was no intention to abandon the service, the vessels were at all times earmarked for this service, and were not used in any other. Conversion was a means to the continuation of the service. We find that Pan-Atlantic has "grandfather" rights in the southbound leg of the New York/New Orleans trades to the extent of 53 voyages, using not more than four vessels.

Pan-Atlantic did not, however, accept cargo for and discontinued its northbound service from New Orleans to New York from April 1955 to January 1958. This break in service does not appear to have been beyond the control of the carrier, or to have been an essential step in the improvement of Pan-Atlantic's future coastwise service; the suspension of service was a voluntary one and constituted an abandonment. Pan-Atlantic's northbound service in its New Orleans to New York trade is not covered by any "grandfather" rights. It therefore is necessary to determine whether an award of section-805(a) permission covering this northbound service would result in unfair competition to an exclusively coastwise service, or be prejudicial to the objects and policy of the Act.

B. Exclusively coastwise services

Seatrain, in the trade since 1932, operates an exclusively coastwise service from New Orleans to New York. This is not contested.

C. Unfair competition

Pan-Atlantic reentered this trade in January 1958 after being out since April 1955. In 1956 Seatrain, then providing the only New Orleans to New York ocean service, carried 104,000 tons of cargo in approximately 2,500 rail cars. Spaces for approximately 850 cars, or an average of 16 cars per sailing, were not utilized. In 1958, Seatrain carried 103,000 tons and Pan-Atlantic carried an estimated 11,000 tons for a total movement in the trade of about 114,000 tons. The total 1958 traffic exceeded that of 1956 by about 9,800 tons. Seatrain's 1956 vessel capacity as such was sufficient to have carried all the cargo which moved in the trade in 1958. Pan-Atlantic has projected a traffic figure of 41,000 tons for 1959. If this figure is added to Seatrain's 1958 traffic of about 103,000 tons, then Seatrain's 1956 capacity of about 138,000 tons could have moved all but about 6,000 tons. If Pan-Atlantic does carry 41,000 tons in 1959, which is about 30,000 tons more than it carried in 1958, at least a good part of the 6,000 tons would no doubt be diverted from Seatrain. Under these circumstances, it appears that Seatrain, as of the present time, can provide sufficient tonnage to serve the New Orleans to New York trade adequately.

The remaining question is whether, in addition to the Seatrain service, the Pan-Atlantic container service is needed to serve the trade. The combined tonnage carried by both in 1958 was lower than that carried by Seatrain alone in 1957 (114,076 tons in 1958 and 121,278 tons in 1957). Pan-Atlantic has not generated as much traffic for water carriers on this route as it has on the other routes where it operates, and it does not appear that this will change in the future. Few shipper witnesses indicated that they were switching over to Pan-Atlantic or that they had any strong preference for its service. Moreover, to the extent the service is needed, Seatrain claims it will extend its Seamobile service and already has agreements with railroads looking to the carrying out of such plans. We find that Pan-Atlantic participation here is not needed to serve the northbound trade adequately.

D. Objects and policies of the Act

Seatrain needs the cargo moving from New Orleans to New York and has capacity and ability to provide adequate service now and in the foreseeable future. Permission under section 805(a) should be denied where the record supports such a finding. A merchant marine sufficient to carry our domestic water-borne commerce and to provide service on this route, essential for maintaining the flow of such domestic water-borne commerce at all times, would be fostered by protecting the service Seatrain has built up and needs for its success against the added competition of Pan-Atlantic.

We find that the grant of permission to Waterman for its subsidiary Pan-Atlantic to engage in the New Orleans to New York domestic trade would be prejudicial to the objects and policy of the Act. The continuation by Pan-Atlantic of its service to Miami, Tampa, and Jacksonville from and to New York would not result in unfair competition nor be prejudicial to the objects and policy of the Act. Such permission is granted.

V. New York/Houston Service

A. "Grandfather" rights

While Pan-Atlantic did not commence service in this trade until 1953, it claims "grandfather" rights on the basis of its service in 1935 from New York to the Gulf. In 1935 Pan-Atlantic did not serve any Gulf port west of New Orleans, nor was any such port served until 1953. We find that Pan-Atlantic's New York/Houston service is not covered by "grandfather" rights.

B. Exclusively domestic service

Seatrain, the only other water carrier in the New York/Houston trade, is operating exclusively in the coastwise trade within the meaning of section 805(a), and permission may not be granted to Pan-Atlantic under that section if we find such permission would result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service.

C. Unfair competition

Seatrain's traffic began to fall off noticeably in 1956 after Pan-Atlantic's converted tankers were put into service as trailerships between Houston and New York, and the decline became more pronounced in the fall of 1957, after Pan-Atlantic introduced its fully converted trailerships. There is testimony from shippers that they had diverted cargoes from Seatrain to Pan-Atlantic. It does not appear, however, that Seatrain has the physical capacity to carry all of the traffic which now moves in the trade. In 1956, when all of Seatrain's vessels were employed, it utilized some 8,350 railcar spaces and had 1,277 free spaces northbound. Southbound, it utilized 8,255 railcar spaces and had 1,366 free spaces. The northbound capacity, therefore, was 9,626 railcars loading an average of 39.3 tons; southbound, it was 9,621 railcars loading an average of 29.3 tons. Seatrain's total capacity during that year appears to be approximately 378,000 tons northbound and 282,000 tons southbound. In 1958, when its vessel utilization was comparatively low, Seatrain's traffic dropped to 242,000 tons northbound.

Pan-Atlantic's traffic for the first six months of 1958—when it was still developing its service—was about 60,000 tons, or approximately 120,000 tons northbound on a full year's basis. Southbound, it carried 64,000 tons for the first six months of 1958. A total of about 361,000 tons of cargo was moved by Pan-Atlantic and Seatrain in 1958. This is about 17,000 tons less than Seatrain's absolute capacity, and under ordinary operating conditions it appears doubtful that Seatrain could have carried all of it. Pan-Atlantic's trailership service was new during the last half of 1958, and its managment states that it will carry approximately 164,000 tons northbound during 1959. Actually, from February 21 to March 14, 1959, the latest period of record, Pan-Atlantic moved cargo at the above rate. If this estimated 1959 traffic is added to Seatrain's carryings in 1958, a total of some 406,000 tons is indicated in 1959, and this presently estimated northbound volume would be approximately 28,000 tons greater than Seatrain's capacity. Southbound, Seatrain carried 150,000 tons in 1958 and Pan-Atlantic carried 128,000 tons, for a total of 279,000 tons. This is about 3,500 tons less than Seatrain's theoretical capacity. Pan-Atlantic expects to move 196,000 tons in 1959, and has in fact carried southbound traffic at this rate for the most recent four-week period of record. If this traffic is added to Seatrain's 1959 volume of 150,000 tons, a southbound total of some 346,000 tons is indicated in 1959; this southbound total appears to exceed Seatrain's capacity by some 64,000 tons.

Although some of Pan-Atlantic's traffic represents traffic lost by Seatrain, new traffic has been generated in the trade and seems reflected in the figures set forth. Pan-Atlantic trailership service appears to be a primary reason for generating much of this new traffic. The shipper testimony shows than Pan-Atlantic has generated and served a substantial demand for trailership service between New York and Houston. Cargo has been attracted away from overland carriers—particularly the railroads—because of lower rates, reduced damage to cargo, and other advantages inherent in Pan-Atlantic's new service. It has provided reliable door-to-door service otherwise unavailable to consignees and consignors who do not have rail sidings. Seatrain has carried railroad cars since 1932. In order to meet more effectively Pan-Atlantic's newer service, and to meet the demands of the trade, Seatrain, in November 1958, after extensive research, instituted its so-called Seamobile service consisting of 27-foot vans, moving from the shipper in the port area to ship's side, then loaded on the regular Seatrain vessels; at destination port they are discharged from the vessel and delivered to shippers in the port area. Service to shippers outside the port area presently is offered at Houston [8] but not at New York, New Orleans, or Savannah, although it is expected to be added later at those places.

Seatrain has 179 27-foot vans in the service. These basically are trailer bodies capable of being demounted from highway chassis. Seatrain also uses in its Seamobile service some 93 special freight bed chassis, which are truck trailers without box or van. Four of Seatrain's vessels are modified by special installations to handle 64 Seamobile units simultaneously with 76 railroad cars, and conversion of its remaining two vessels is now under way, as is also the completion of the necessary terminal facilities at Savannah and New Orleans for the institution of Seamobile service as traffic needs dictate. At the present time, with a total of 179 vans of 27 feet, Seatrain cannct provide nearly as much trailer service as that presently offered by Pan-Atlantic with its 226 35-foot vans moving every week in each direction. Seatrain had no vans under construction at the time of hearing, and when and if it does acquire additional vans they will have to be apportioned among its Houston, Savannah, and New Orleans services. Seatrain has averaged 5.4 loaded vans southbound and 2.8 loaded vans northbound between New York and Houston. There is some testimony that the Seamobile units are unsuited for certain purposes because Seatrain does not handle less-than-carload shipments and the service is limited geographically.

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[8] Seatrain actually docks at Texas City, which is in the Houston port area.

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We find that the grant of permission to Pan-Atlantic to continue its two-vessel weekly service between Port Newark, N.J., and Houston, Texas, will not result in unfair competition to Seatrain as a carrier operating exclusively in the coastwise service.

D. Objects and policy of the Act

It is well known that coastwise shipping has long been in a state of decline. We are charged with the duty under the Act and have the responsibility to encourage the revitalization of such shipping and to foster the development of a strong and adequate coastwise fleet. Applicant has expended large sums of money in converting vessels for use in the coastwise trade. The converted vessels represent a forward step in meeting the needs of shippers, increasing efficiency, and reducing cost. We find that the grant of permission for Pan-Atlantic to continue its two-vessel weekly service between Port Newark and Houston would not be prejudicial to the objects and policy of the Act. Indeed, on the contrary, the denial of such permission, in our opinion, would be prejudicial to the objects and policy of the Act, for an operator not already subsidized would not consider the expenditure of funds to improve its vessels used in the domestic service if it knew that if it later should seek operating subsidy aid it would have to give up its coastwise service, even though adequate capacity in meeting the needs of shippers was not otherwise available.

Financial

One of the exceptions is that the examiner failed to recommend a finding that applicant's financial obligations will result in a diversion of subsidy payments to support the proposed coastwise or intercoastal operations. It is contended that applicant and its corporate parent, McLean, depend on the payment of subsidy in order to discharge their "financial obligations entered into for Pan-Atlantic's benefit." Applicant's obligations are to lend Coastal Ship Corporation money needed to discharge any obligations Coastal may incur, with certain exceptions, and to maintain certain minimum net current assets and consolidated net current assets. Coastal acquired five trailerships with certain borrowed funds and has demise-chartered them to applicant and Pan-Atlantic jointly. Pan-Atlantic operates the ships under subcharter from applicant. Pan-Atlantic pays charter hire to applicant and owes applicant money on notes on which it pays substantial interest. The principal of the notes covers defaulted charter-hire payments. From this it may be seen that no money, subsidy or otherwise, is paid by applicant to the intercoastal operator, Pan-Atlantic. Payments are all to applicant. The only "benefit" that appears is that if Pan-Atlantic fails to pay either charter-hire money or interest, applicant, because of its improved financial position as the result of receiving subsidy, will be able to withstand adverse effects of any failure to make such payments when due. Pan-Atlantic already has failed to pay charter hire and allegedly will lose money on its entire operation. Applicant also has failed, in the past, to maintain prescribed current asset levels. This is said to be equivalent to a "threat of assistance from subsidy" from applicant. Such threat is said to be a bar to grant of permission to operate affiliates in the domestic trade.

Under the second paragraph of section 805(a), it is unlawful "to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations * * *." The surmises as to the "support" or "benefit" given by subsidy, particularly in case of default, appear to be quite speculative and far short of diversion. All of the services for which section 805(a) permission is sought are to be operated as separate and distinct services from those which Waterman proposes to operate under subsidy. There is no competitive unfairness where the subsidy will not even indirectly be used in the domestic affiliate's operations, at least not under the remote and speculative circumstances dealt with by interveners. More than threats and speculations are required to show indirect use of subsidy money for domestic operations by an affiliate of an applicant for subsidy. Other arguments, related to the commingling of subsidy and other funds and the use of subsidy money for nonsubsidy purposes if applicant's resources are called on for other obligations, cannot be accepted. The Board will see to it that no diversion of subsidy occurs and that the requirements on applicant under any loan agreements are separate, distinct, and above those required for subsidy purposes.

Railroads as Interveners

Three railroads intervened and two of them participated in the proceeding. They contend that one of the issues is the effect on their business of any permission granted under section 805(a), and whether section 101, containing a statement of the objects and policy of the Act, governs our authority to act if such action affects the railroads. Section 805(a) expressly applies only "to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service"; the objects and policy stated in section 101 apply to the "merchant marine" and its encouragement and maintenance. The Act contains no limitation or directive which authorizes the Board to consider the impact of its decisions on land or air transportation of any kind. Any arguments of this nature must be addressed either to other regulatory agencies or to Congress. We are powerless to consider the facts presented by the railroads.

Other Permissions

Waterman, as a contractor under title VI of the Act, also asks written permission to charter the *Clairborne* and the *Monarch of the Seas* to Waterman, P.R., for operation between Gulf ports and Puerto Rico. The award or payment of subsidy to applicant-contractor is unlawful unless written permission for chartering vessels engaged in the domestic intercoastal service is given by the Board. Service to Puerto Rico is such intercoastal service. The charters run for three years from March 1, 1959, and are renewable. The charter hire is $2,200 per day, which is at least as high as the going market rate at the date of the charter agreement, and higher than later rates. No unfair competition from excessively advantageous costs to the competing line appears to exist, and no prejudice to the objects and policy of the Act have been shown.

Waterman also asks written permission to charter the *Bienville*, *Raphael Semmes*, *Fairland*, *Azalea City*, and *Gateway City* to Pan-Atlantic for operation between ports on the Atlantic and Gulf coasts and in the Atlantic/Puerto Rico trade. Actually, this is a subcharter from Waterman. Waterman is not the owner of the vessels but charters them jointly with Pan-Atlantic from their owner, Coastal Ship Corporation, by demise charter dated September 30, 1957. Such demise charter was made contemporaneously with a loan and subordination agreement in connection with an issue of debt securities by Coastal to finance the purchase of the five vessels upon completion of their conversion into C–2 containerships. The vessels were bought from Waterman pursuant to an agreement of September 30, 1957. Pan-Atlantic assigned to Waterman its right in the demise charter and thereafter entered into a subcharter agreement for the operation of the vessels "in any trade throughout the world." No part of subsidy funds could lawfully be used to meet the obligations of the related companies. Applicant's charter was made for the purpose of meeting certain financial requirements related to Coastal's debt financing, not for the purpose of providing any subsidy-aided competition. The charter rates appear reasonable and involve, over a ten-year period, a complete return of the entire purchase price paid by Coastal. These transactions do not involve any factors which would amount to unfair competition to existing intercoastal operators. Continuance of the charter by Waterman is therefore permitted.

Applicant acts as general agent for Waterman, P.R., in the United States, and asks for permission to continue the relationship and its pecuniary interest in the latter, which otherwise would be unlawful under section 805(a). After entering into a contract for subsidy, applicant will be paid 8 percent on outbound and inbound traffic in comparison with 6 percent of the freight revenues accruing on traffic from the United States to Puerto Rico and 3 percent on traffic moving to the United States from Puerto Rico. One of the interveners, under a similar intercompany agency arrangement, receives 7 percent and 3 percent for such traffic, and another, under a limited agency, pays generally in the United States only 2½ percent. Under its arrangement applicant is not giving the affiliate operating vessels in intercoastal service any unfair competitive advantage on such service. Permission to retain the agency may be given.

When and if Waterman commences subsidized operations in the absence of any later action by the Board, this report shall serve as written permission under section 805(a) for:

1. Waterman, Puerto Rico, to operate a weekly two-vessel service between New Orleans-Mobile and Puerto Rico;
2. Pan-Atlantic to operate a two-vessel weekly trailership or containership service between Port Newark and Puerto Rico, with calls at Jacksonville for discharge and loading of Puerto Rico cargo and loading of Port Newark cargo to Port Newark;
3. Pan-Atlantic to operate not more than four vessels and 53 voyages in southbound service between New York and New Orleans, including calls at Miami, Tampa, and Jacksonville;
4. Pan-Atlantic to operate a two-vessel weekly trailership service between Port Newark and Houston;
5. Waterman to charter the *Clairborne* and the *Monarch Of The Seas* to Waterman, Puerto Rico;
6. Waterman to charter the *Bienville, Raphael Semmes, Fairland, Azalea City,* and *Gateway City* to Pan-Atlantic;
7. Waterman to act as agent for Waterman, Puerto Rico.

After the matter had been submitted on April 13, 1960, Erie and St. Lawrence Corporation filed a petition on July 22, 1960, to intervene and to reopen the proceeding. Rule 5(n) of the Rules of Practice and Procedure provides that "if filed after hearing has been closed it [a petition for intervention] will not be granted ordinarily." Accordingly, the petition is denied. On our own motion, however, we will set down for further hearing the question of continuing the permissions granted herein insofar as they involve service between Jacksonville and New York (Port Newark).

Appendix

Section 805(a):

It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII of this Act, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act: *Provided*, That if such contractor or other person above-described or a predecessor in interest was in bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor.

Order

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 1st day of December A.D. 1960

Docket No. S–73

Waterman Steamship Corporation—Application Under Section 805(a)

Whereas, the Board, on September 13, 1960, served its report herein; and

Whereas, the Board, in accordance with said report, desires on its own motion to set down for further hearing the question of continuing the permissions granted therein insofar as they involve service between Jacksonville, Florida, and New York (Port Newark), New York; and

Whereas, the Board, pursuant to section 25 of the Shipping Act, 1916, as amended (46 U.S.C. sec. 824), has authority, upon its own motion, to reopen the proceeding:

It is therefore ordered, That the proceeding be, and it is hereby, set down for further hearing; and

It is further ordered, That, in accordance with Rule 6(d) of the Board's Rules of Practice and Procedure (46 CFR § 201.94), a prehearing conference shall be held before an examiner on January 10, 1961, beginning at 10:00 a.m., in Room 4519 of the new General Accounting Office Building, 5th and G Streets N.W., Washington, D.C. Any interested party may file a petition to intervene.

By the Board.

(Sgd.) Thomas Lisi,
Secretary.

FEDERAL MARITIME BOARD

No. 819

ABSORPTION OR EQUALIZATION OF INLAND FREIGHT CHARGES IN CONNECTION WITH TRANSPORTATION BY WATER OF EXPLOSIVES

Submitted April 19, 1960. Decided September 16, 1960

Respondent E. I. du Pont de Nemours and Company found to have knowingly obtained transportation by water for shipments of explosives at less than the rates or charges otherwise applicable, by means of an unjust or unfair device, in violation of section 16 of the Shipping Act, 1916.

Respondents Pacific Far East Line, Inc., and Grace Line Inc. found to have allowed E. I. du Pont de Nemours and Company to obtain transportation for explosives at less than the regular rates by means of an unjust or unfair device or means, to have given undue or unreasonable preference or advantage to the shipper or subjected other shippers of explosives to undue or unreasonable prejudice or disadvantage, or to have unjustly discriminated between shippers of explosives, in violation of sections 16 and 17 of the Shipping Act, 1916.

Edwin B. Connolly, *William H. Atack*, and *Robert Furness* for E. I. du Pont de Nemours and Company.

William Ross Wallace, *William R. Ray*, and *Russell Lutz* for Grace Line Inc.

John Hays for Pacific Far East Line, Inc.

Leonard G. James for R. F. Burley, appearing under subpoena.

Robert J. Blackwell, *Robert E. Mitchell*, and *Edward Aptaker* as Public Counsel.

REPORT OF THE BOARD

THOS. E. STAKEM, JR., *Vice Chairman*, and SIGFRID B. UNANDER, *Member*

BY THE BOARD:

This is an investigation instituted on the Board's own motion pursuant to section 22 of the Shipping Act, 1916 (the Act), 46 U.S.C. 821, to determine whether E. I. du Pont de Nemours and Company (du Pont) knowingly and willfully, directly or indirectly, by means of an unjust or unfair device obtained or attempted to obtain from Pacific Far East Line, Inc. (PFEL), and Grace Line Inc. (Grace) transportation by water for shipments of explosives at less than the rates or charges otherwise applicable, in violation of section 16 of the Act, and whether PFEL and Grace allowed du Pont to obtain such transportation at less than the regular rates or charges then established and enforced on their lines, by means of an unjust or unfair device, in violation of section 16 Second of the Act, and in so doing gave undue or unreasonable preference or advantage to du Pont or subjected other shippers of explosives to undue or unreasonable prejudice or disadvantage, in violation of section 16 First of the Act, or unjustly discriminated between shippers of explosives, in violation of section 17 of the Act.

Hearing was held before an examiner at San Francisco, California. In his recommended decision he found:

1. That du Pont knowingly and willfully obtained transportation by water for certain shipments of explosives at less than the rates or charges otherwise applicable, by means of an unfair or unjust device, in violation of section 16 of the Act.

2. That PFEL and Grace have not been shown to have allowed du Pont to obtain transportation for explosives at less than the regular rates or charges established and enforced on their lines, by means of an unjust or unfair device, or to have given undue or unreasonable preference or advantage to du Pont or subjected other shippers of explosives to undue or unreasonable prejudice or disadvantage, in violation of section 16 of the Act; nor have they been shown to have unjustly discriminated between shippers of explosives, in violation of section 17 of the Act.

Exceptions to the recommended decision and replies thereto were filed, and oral argument was heard. Exceptions and proposed findings not discussed in this report nor reflected in our findings have been considered and found not justified.

PFEL operates as a common carrier subject to the Act from west coast ports to the Far East, including the Philippine Islands, and is a member of Pacific Westbound Conference. Grace operates as a common carrier subject to the Act from west coast ports to west coast ports of Central and South America, and is a member of Capca Freight Conference and Pacific/West Coast of South America Conference. Du Pont manufactures explosives at a plant located on tidewater adjacent to the town of Du Pont, Washington, and the shipments here involved were made from this plant to Philippine and west coast of Central and South American destinations during the period 1953–1957 inclusive via PFEL and Grace.

Du Pont's plant facilities include a deep-water pier, adequate to accommodate ocean-going vessels, and a company-owned narrow gauge rail line connecting the plant and the pier. Prior to and during World War II, shipments of explosives to foreign destinations were loaded directly at the pier. Since the war du Pont has requested similar direct service at its pier from PFEL and Grace, respondents, or in the alternative, Puget Sound direct loadings at Blake Island, the explosives anchorage established by the United States Army Corps of Engineers. Blake Island is located about 25 nautical miles north of Du Pont. Except in one instance—a shipment of explosives loaded at Blake Island by Grace—both Grace and PFEL have refused to load explosives from Puget Sound direct, offering to du Pont in lieu thereof service out of San Francisco, under equalization in the case of PFEL and under transshipment in the case of Grace, as authorized by conference tariffs.

The practices of equalization or transshipment, as such, are not at issue here. So far as the record discloses, equalization on explosives was discontinued by PFEL in the latter part of 1956, and transshipment of explosives was discontinued by Grace early in 1957.

Explosives are particularly difficult for carriers to handle. They are liable to damage other cargo, the vessel itself, and are offensive to passengers. The circumstances under which a ship may be loaded with explosives are rigidly controlled by safety regulations and restrictions of the United States Coast Guard. Vessels may be loaded with explosives only upon issuance of a Coast Guard permit. The Coast Guard frequently invokes restrictions against the loading of explosives unless the location for loading is in compliance with the American Table of Distances or other similar table.

Except at Los Angeles Harbor, California, where a vessel loaded with no more than 300 tons of explosives may use the Outer Harbor dock at San Pedro, no vessel with explosives aboard may dock at a port on the Pacific coast. If a southbound vessel of Grace were to load explosives at Puget Sound for delivery in South America, for example, and called at San Francisco en route, it would be required to proceed first to Anchorage 14 in San Francisco Bay, the designated explosives anchorage, arrange for tugs, lighters, and watchman service, discharge the explosives to lighters, and then proceed to San Francisco Bay terminals. Upon departure from the last terminal the explosives would be reloaded at Anchorage 14. This makes for an extremely costly operation.

Recognizing the difficulties inherent in the handling and carriage of explosives, the conference tariffs effective during the period here involved established special conditions relating thereto. Pacific Westbound Conference tariffs 1–V, 1–W, and 1–X provided in Rule No. 33:

The Ocean Carrier shall have the right to refuse to accept any cargo offered for shipment which is liable to damage other cargo, the vessel, or prove offensive to passengers.

Capca Freight Conference and Pacific/West Coast of South America Conference tariffs have identical provisions. Capca Freight Conference tariff No. 2 provided in Item 11(A):

Explosives, inflammable or other Dangerous and Hazardous Cargo, or cargo of objectionable nature, including Creosoted Lumber, Piling and Timber, will be accepted and transported only at Carrier's option, and subject to special booking arrangement with individual carrier.

All of the tariffs named specific rates on explosives. Grace and PFEL claim the right, under the tariff, to refuse shipments of explosives tendered at a particular port or for a particular vessel. In practice, however, they have cooperated with explosives shippers in making mutually satisfactory arrangements for the movement of shipments offered, and as far as the record shows, no such shipments have failed to move in some manner, though perhaps not at the times nor upon the vessels requested initially by the shippers. The rates applied were those named in the tariffs, and standard forms of bills of lading were executed. No special contracts are entered into with the shippers for movement of explosives. Shipments tendered by explosives shippers other than du Pont—five in the case of PFEL and 28 in the case of Grace—are handled in like manner.

During the period here involved, 56 shipments of explosives moved from the du Pont plant to destinations in the Philippines and the west coasts of Central and South America over the lines of PFEL and Grace. They were carried in regular berth vessels which were advertised for the carriage of general cargo, not excluding explosives. Of these shipments, 38 were carried by PFEL and ranged from 3.1 to 469 tons,[1] averaging 180 tons. The remaining 18 shipments, carried by Grace, ranged from 776 pounds to 427 tons, averaging about 100 tons. All of the shipments moved by rail or truck to San Francisco, and thence were barged to the explosives anchorage where they were loaded aboard the vessels. Du Pont paid ocean freight at the applicable rates named in the conference tariffs, and also paid initially the full delivery costs from its plant at Du Pont to vessel at Anchorage 14 in San Francisco Bay. Periodically after shipments were made, du Pont then billed PFEL and Grace, pursuant to the equalization and transshipment arrangements, for reimbursement of the cost of

[1] When used herein the word "tons" means short tons of 2,000 pounds.

movement of the shipments from its plant to vessel at San Francisco, less $10.96. Reimbursement by the carriers was thereupon made as billed, except on three shipments by PFEL on which the payments are being held in abeyance, and on three shipments by Grace on which reimbursement of the total cost of inland movement was made without deduction of the $10.96 allowance.

It is the allowance of $10.96 which is in issue here. Purportedly, it represents the cost per shipment to du Pont for movement from its plant to Blake Island, the preferred point for loading explosives had direct service from Puget Sound been offered by the carriers. The first of the shipments were destined to the Philippines. When they were offered to PFEL and direct service from Puget Sound was requested by du Pont, PFEL declined to provide such direct service, offering instead to provide service out of San Francisco under equalization as then authorized in the conference tariff. Pacific Westbound Conference tariff then in effect provided, in Rule No. 2, so far as pertinent:

> Subject to Rules 5, 7 & 9 [not pertinent herein], rates are based on direct loading at loading ports or docks but the individual Member Line Carrier may meet the competition of other Member Lines loading direct at Terminal Ports or Docks, either by trans-shipment or by equalization from point of origin.
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> * * * * * * *
>
> Equalization is the absorption by the Carrier of the difference between Shipper's cost of delivery to ship's tackle at Terminal Dock at nearest Conference Terminal Port and the cost of delivery to ship's tackle at Terminal Dock and Port of equalizing line. * * *

The tariff named equal rates to the Philippines from Puget Sound ports and San Francisco, subject to a specific requirement that the rates would apply from Du Pont on minimum quantities of 500 revenue tons. Officials of PFEL explained to officials of du Pont that, under the equalization rule, PFEL could absorb the cost of inland movement from the du Pont plant to vessel at San Francisco, less the cost to du Pont of moving the shipments to Blake Island. Accordingly, du Pont was requested to furnish information concerning such Du Pont-Blake Island cost. This cost was then calculated by du Pont as $10.96 per shipment, regardless of size, representing the cost of fuel oil consumed by the MV *Du Pont*, owned by du Pont, which would be utilized by it in performing the delivery from its plant to Blake Island. Recognizing the lowness of the allowance figure, officials of PFEL inquired as to the possibility that other costs might be involved, such as labor costs, and suggested that the cost per shipment might vary according to the size of the particular shipment, but were assured by officials of du Pont that delivery to vessel at Blake Island would be accomplished with owned equipment, and that labor would be provided by du Pont personnel employed on a monthly wage basis, payable in any event. Thereupon PFEL accepted the assurances and the allowance of $10.96 was used in determining the liability of PFEL to du Pont for reimbursement of inland costs from Du Pont to vessel at San Francisco.

In 1955, when PFEL, in compliance with a revised Pacific Westbound Conference rule requiring that equalization invoices be submitted to the conference for approval before payment, began the preparation of the required reports to the conference, the accuracy of the $10.96 figure was again put up to du Pont, particularly with respect to the ownership of the equipment and the possibility that extra labor expenses might be incurred, and again PFEL received assurance from du Pont that the only extra cost that would be incurred would be the $10.96 per shipment. These facts were reported to the conference, and the equalization payments, less the $10.96 allowance, were approved by the conference.

About the middle of 1953 du Pont offered to Grace the first of the explosives shipments to the west coasts of Central and South America and requested direct service from Puget Sound. Grace likewise refused such direct service but offered to provide service out of San Francisco under transshipment as authorized by the conference tariffs. At the time, Capca Freight Conference and Pacific/West Coast of South America Conference tariffs contained no rates applicable on explosives from Puget Sound to Central and South American ports, the only rates published applying for direct loading from San Francisco and Los Angeles. The tariffs, so far as pertinent, contained a general rule that rates would apply from the Puget Sound ports of Seattle and Tacoma, Washington; that unless otherwise provided, the rates named would apply also from Pacific coast ports other than those mentioned when prior arrangements had been made with the individual carriers, and the vessel called direct to load thereat; and that in the event any carrier found it undesirable for operating reasons to make a direct call at the ports of Seattle and Tacoma, the carrier might effect transshipment between those ports and San Francisco at vessel's expense. The tariff did not provide for similar transshipment at vessel's expense between Du Pont and San Francisco.

It was ascertained that the cost of inland movement from Puget Sound to San Francisco would be about $22 per ton, and accordingly rates were established from Puget Sound to the Central and South American destinations on a level $22 higher than the rates applicable from San Francisco, with the view of permitting transshipment and still preserving to the carriers the full ocean revenue obtainable out of San Francisco. Pacific/West Coast of South America Conference rates were made subject to a note reading "Rates apply from Puget Sound loading, subject to vessel's ability to load." Capca Freight Conference tariff provided:

From Puget Sound loading ports, subject to vessel's ability to load, rates $22.00 over the rates from California ports stated below.

In October 1956, recognizing that conflict might exist between the rate items and the general rules designating loading ports and authorizing transshipment, the rate items were amended to provide that the rates would apply from Puget Sound loading, direct call or transshipment, vessel's option, and were specifically excepted from application of the general rules. It was subsequent to these amendments that the three shipments moved on which Grace made full reimbursement to du Pont for inland costs without taking the $10.96 allowance. An ancillary issue arises as to the propriety of this practice, and the proper application of the tariffs prior to the amendments.

It is clear that the conferences, Grace, and du Pont knew that under the tariffs as first established direct calls at Du Pont for loading explosives would in no event be made, and that Blake Island, the designated explosives anchorage, would be the preferred loading point on Puget Sound. Since the loading of explosives could not as a practical matter be accomplished at the ports of Seattle and Tacoma, it is concluded that the general rules should be interpreted so as to substitute Blake Island for Seattle and Tacoma as the loading port for explosives, as required by official pronouncements of governmental agencies, and that under the tariffs prior to the amendments du Pont, under transshipment, would be required to bear the expense of delivery from Du Pont to Blake Island.

Subsequent to the amendments, however, the rates applied at all Puget Sound ports, including Du Pont, and specifically authorized transshipment to San Francisco from Du Pont. Thus du Pont was no longer required to bear the expense of delivery from Du Pont to Blake Island, and reimbursement by Grace to du Pont of the full cost of inland movement from Du Pont to vessel at San Francisco, without deduction of the $10.96 allowance, was in accordance with the tariff. Early in 1957, when it was determined that inland expenses from Puget Sound to San Francisco would exceed the $22 differential in the ocean freight rates, the transshipment privileges were canceled from the tariffs and direct loadings only were authorized.

Before the first shipments moved to Central and South America officials of Grace and du Pont also had discussions concerning the delivery allowance of $10.96, intended to cover the cost to du Pont of delivery from Du Pont to Blake Island. The same assurances were given Grace as had previously been given to PFEL. Grace officials in San Francisco forwarded the information to their superiors in New York, New York, where additional discussions between traffic officials of Grace and du Pont were had. The du Pont officials in New York assured the Grace officials there that the figure was small because du Pont used its own equipment, but agreed that the figure would be checked with du Pont headquarters at Wilmington, Delaware. Assurance was likewise received from du Pont headquarters that the figure was correct, and the allowance was thereupon approved by Grace.

The *Du Pont* is a wooden motor launch about 65 feet long and 27 years old. It is used by du Pont for the delivery of explosives from its plant to points on Puget Sound, and also to points in southeastern Alaska not accorded regular steamship service. It is manned by a crew of three, whose aggregate monthly salaries are approximately $1,500, and has a maximum capacity of about 50 tons. Although not designed to tow other craft, it has the power to pull a barge laden with up to 250 tons of explosives. If it does tow a barge it is still capable of carrying a full cargo. On occasion it is used by du Pont to transport shipments for other explosives shippers in the Puget Sound area, moving from the du Pont dock to Blake Island or Port Madison, Washington, but only when regular commor-carrier service by carriers operating in the Puget Sound area is unavailable. On such occasions, the charge made by du Pont is the same as that made by the common carriers. Up to August 1955, the common-carrier rate on explosives from Du Pont to Blake Island was 85 cents per 100 pounds, and thereafter was increased to 94 cents per 100 pounds.

Only 10 of the shipments here involved were under 50 tons, ranging from 776 pounds to 47 tons, and were within the capacity of the *Du Pont*. On the shipments between 50 and 300 tons, du Pont would have had to rent a barge and set of tarpaulins, at a daily cost of $18.50 in 1955, in order to effect delivery to Blake Island, such rented equipment being available at Seattle. In order to effect delivery of shipments in excess of 300 tons, du Pont would have had to rent two barges and two sets of tarpaulins, at a daily rental of $37, and would have had to hire a tug to tow the second loaded barge at a minimum charge of $235 plus $35 per hour.

Operating without a tow, the fuel consumption of the *Du Pont* is about 7 gallons per hour, and it can make the trip from Du Pont to Blake Island in about 3 hours. While towing a barge loaded with about 200 tons of explosives, the fuel consumption would increase to about 9 gallons per hour, and the running time from Du Pont to Blake Island would be about 5 hours. Approximately 14 hours total running time is required for the *Du Pont* to tow a barge or barges from Seattle to Du Pont, a loaded barge from Du Pont to Blake Island, and the return of the empty barges to Seattle. The average cost per gallon of fuel oil was 14.11 cents in 1953, 14.86 cents in 1954, 15.51 cents in 1955, and 16.52 cents in 1956.

The plant railroad, operated by du Pont employees, can carry about 30 tons of explosives from the magazine to the dock in one hour. It can be unloaded from the train and loaded into the *Du Pont* by five men, each working a four-hour shift. The two-man train crew would work about nine hours in order to transport 200 tons from the magazines to the dock. Two shifts of five men working eight to eight and one-half hours would be needed to unload the 200 tons from the train, and two shifts of six men working the same time would be required on the barge to receive and store the 200 tons. All of this work would be performed by du Pont employees, whose average wage in 1956 was $2.38 per hour. A shipment of 400 tons would require about twice the number of man-hours required to move and load 200 tons. The *Du Pont* can discharge its cargo into an ocean-going vessel at Blake Island at the rate of about five tons per hour; explosives from a barge can be discharged at the rate of about six tons per hour.

From the above, it is impossible to determine the precise cost to du Pont for the movement of any particular shipment from its pier at Du Pont to Blake Island. It is clear, however, that the figure of $10.96 per shipment, regardless of size, supplied by it to PFEL and Grace, understates the direct costs for such movement. A shipment of 30 tons, after loading at the pier, would occupy the crew of the *Du Pont* for a total of 11 hours at the least, including three hours running time to Blake Island, 6 hours for discharge to the ocean vessel, and three hours on the return trip. Fuel oil costs would be $5.92 at the lowest price shown in 1953, and crew labor costs would be $30 assuming that no overtime would be paid, for a total of $35.92, without regard to labor costs for loading and unloading. On a shipment of 200 tons, and disregarding even crew and other labor costs, a minimum of 47 hours would be required to complete the movement, including 14 hours running time, 8 hours loading time at the pier, and 25 hours unloading time at Blake Island, which would result in fuel costs of $17.78 and equipment rental costs of $37, for a total of $54.78. On a shipment of 400 tons, with costs calculated on the latter basis, allowing only six hours running time for the necessary rented tug to deliver a barge from the pier to Blake Island and return to its base, and assuming that the *Du Pont* and the barges could discharge their cargo simultaneously into the ocean vessel, the movement could not be completed in less than 49 hours, fuel costs again would be $17.78, equipment rental costs for three days would be $111, and tug hire would be $425, for a total of $553.78. Of the 56 shipments, 41 weighed between 50 and 300 tons, the latter figure being the maximum capacity of the *Du Pont* and one rented barge, and 5 weighed in excess of 300 tons.

There is evidence concerning the cost of delivery to vessel at San Francisco of explosives shippers located in the San Francisco area, competitors of du Pont, which are borne in their entirety by such shippers. Such costs range from $5 to $24.30 per ton. The evidence was intended to prove that, should PFEL and Grace be found to have allowed du Pont to obtain transportation at less than the regular rates or charges established and enforced, by means of unjust or unfair means or device, in violation of section 16 Second of the Act, such practice likewise would be in violation of sections 16 First and 17 of the Act as unduly and unreasonably prejudicial and preferential and unjustly discriminatory. The witnesses for the San Francisco area explosives shippers, appearing under subpoena, were unable to state whether the practices of PFEL and Grace subjected their respective companies to any disadvantage.

The Act provides, so far as here pertinent:

SECTION 1. The term "common carrier by water in foreign commerce" means a common carrier * * * engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade: *Provided*, That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce."

SEC. 16. That it shall be unlawful for any shipper * * * or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

That it shall be unlawful for any common carrier by water * * * either alone or in conjunction with any other person, directly or indirectly—

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

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.

SEC. 17. That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports * * *.

Du Pont contends that PFEL and Grace are not common carriers by water in foreign commerce in the transportation of explosives, and that the Board has therefore no jurisdiction over such transportation; that its additional costs which would be incurred in the event shipments of explosives were moved by it from Du Pont to Blake Island, exclusive of labor costs, which are payable in any event, would average out at $10.96, any variations from that figure being *de minimis;* and that consequently no violation of section 16 of the Act has occurred.

As to the first contention, it is asserted that the person to be regulated under the Act is the "common carrier" at common law (*Agreement No. 7620*, 2 U.S.M.C. 749, 752 (1945)); that by the restrictive conditions published in the conference tariffs, including the reservation of the right to refuse shipments of explosives, Grace and PFEL have negated their common-carrier status; and that explosives by their nature are not subject to common carriage, citing numerous authorities, including Hutchinson On Carriers, 3d ed., sec. 62, where it is stated:

To constitute common carriage the carrier must be under such a legal obligation to carry that an action will lie against him for a refusal to perform—if he may carry or not as he deems best he is but a private individual and vested as all other private persons with the right to make his own contract.

The record is clear that Grace and PFEL, through the medium of the conference tariffs, hold themselves out to transport explosives and establish rates applicable to such transportation, subject only to such restrictive conditions as are required by the nature of the cargo; that the restrictive conditions are applied alike to all shippers of explosives; that no special contracts are entered into for such transportation; and that transportation of explosives was performed at the tariff rates and in accordance with the tariff conditions. A common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he rests. *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U.S. 397, 440 (1889).

It is admitted by du Pont that the vessels upon which its shipments were transported were general cargo common-carrier vessels. A carrier may be both a common and a contract carrier, but not, however, on one vessel on the same voyage. *Transp. by Mendez & Co., Inc., Between U.S. and Puerto Rico*, 2 U.S.M.C. 717, 721 (1944); *Gage* v. *Tirrell*, 9 Allen (91 Mass.) 299 (1864). See also *Waterman* v. *Stockholms Rederiaktiebolag Svea*, 3 U.S.M.C. 131 (1949), where an admitted common carrier which had refused to carry refrigerated cargo for anyone was held to be a common carrier of refrigerated cargo when it subsequently transported for one shipper under special contracts; and *Philip R. Consolo* v. *Grace Line Inc.*, 4 F.M.B. 293, 303 (1953).

The conclusion is inescapable that PFEL and Grace were and are common carriers of explosives, in the light of the facts shown here, and as such are subject to the Act. *Grace Line Inc.* v. *Federal Maritime Board*, 280 F. 2d 790 (2d Cir. 1960).

As to the second contention, it has been shown that du Pont's costs for the Blake Island transportation on the *du Pont* are substantial, not "*de minimis*". These substantial costs should have been deducted by du Pont in preparing the billings submitted to the carriers for reimbursement. To the extent that the costs were not deducted, the carriers reimbursed du Pont for its Blake Island transportation costs.

The agreement between the shipper and the carrier, as reflected in the applicable tariff regulation (*supra*), is that the carrier would absorb the difference between du Pont's cost of delivery to the San Francisco loading point and the cost of delivery at Blake Island. The transshipment or equalization-from-point-of-origin provisions in the tariff regulation were interpreted by the carriers, and the interpretation acceded to by du Pont as shipper, to mean that the carriers could absorb the cost of the inland movement less the costs to du Pont of moving the property from Du Point to Blake Island. Du Pont advised the carriers that this amount was $10.96, although it must have known by elementary cost accounting principles that not only fuel but other operating and administrative costs are involved when labor and equipment are diverted from other plant operations. Du Pont always claimed only fuel costs were involved. The tariff regulations apply to all of du Pont's costs for the Du Pont-to-Blake Island movement of property, and not just to any added costs or fuel costs. Du Pont was at least disingenuous in telling the carriers its deductible costs were only $10.96 for the purpose of billing the carriers for reimbursement and, in effect, required them to subsidize part of its operations. The statute proscribes the obtaining of transportation by a shipper at less than the rates or charges otherwise applicable. Violation does not depend upon the amount of money involved, even assuming that the theory of du Pont as to the method of computing its cost is correct. The record shows that, except for a few shipments, du Pont's costs would have been far in excess of the claimed $10.96, and the excess is not "*de minimis*." The facts about these costs were known to du Pont and were understated to the carriers in requesting refunds pursuant to the equalization or transshipment agreements. It is concluded that du Pont knowingly and willfully obtained transportation by water for the explosives shipments here involved at less than the applicable rates or charges, by an unfair or unjust means, in violation of section 16 of the Act.

The foregoing estimates and analysis of the relationship of du Pont's Blake Island transportation costs to other plant costs also point conclusively to the responsibility of the carriers for giving a preference to du Pont. Not only did du Pont know about the understatement of costs, but the carriers did too, although they may not have known the precise amount. The carriers' representatives know enough about business and the allocation of costs to be aware that du Pont's costs for the Blake Island transportation above the $10.96 fuel costs were being paid for twice—once by income from other du Pont revenues and once by the carriers' reimbursement. Wages, repairs, maintenance and replacements, administrative overhead, taxes, insurance, and depreciation are such costs. The agreement was that du Pont would pay these costs. This was to be accomplished by the carriers through a deduction from their reimbursement. Instead, the carriers paid them as a result of the understatement of the deduction and of the consequent overstatement in the billing for reimbursement. This is a fact that no amount of redundant reaffirmation by du Pont officers, that fuel cost is the only cost and that there were no other costs, can conceal. The $10.96 deduction from the reimbursement billing was never misunderstood by the carriers and was clearly represented at all times to be only extra for fuel costs. We do not believe we should let any claimed ignorance of such obvious facts be used to avoid responsibility for allowing any person to obtain transportation for property (explosives) at less than regular rates by the unjust or unfair means of paying the shipper far in excess of the agreed reimbursement, in violation of section 16. To the extent of the excessive reimbursement, the carriers also subjected other shippers to unreasonable prejudice or disadvantage, in violation of section 16 First, and charged a rate that was discriminatory as against other shippers of explosives, in violation of section 17.

The fact that Grace and PFEL told du Pont about the tariff provision, made inquiry about the cost of Blake Island transporation, questioned the allowance, and pursued the matter to du Pont's senior officers at its home office in Wilmington, and did so more than once, proves, if anything, the carriers not only suspected what was going on, but deliberately, or through calculated ignorance, allowed themselves to be side-tracked in the search for a cost figure instead of pointing out to du Pont the true meaning of the reimbursement agreement and the true result of the payments they were making. This they never did. As a result, the carriers actually allowed transportation at less than regular rates and actually allowed du Pont to obtain a discriminatory rate. This cannot be treated as a case of inadvertence. The carriers' failure to object to the obvious double payment of Blake Island transportation costs and to the excessive reimbursement in violation of the tariff regulation involves such a disregard of the facts of business life as to amount to an intent and a knowing scheme to violate sections 16 and 17, and we so hold. This case is clearly distinguishable in this regard from *Practices of Fabre Line and Gulf/Mediterranean Conference*, 4 F.M.B. 611 (1955).

We further believe that the carriers, contrary to their claim of helplessness, had ample means of enforcing the tariff other than by refusing to transport. They could have simply refused to pay on du Pont's billings for reimbursement or abated the reimbursement to du Pont by their estimate of du Pont's Blake Island costs, thus compelling du Pont to produce its known costs.

We conclude (1) that du Pont, by means of false billing, has knowingly obtained or attempted to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable, and (2) that PFEL and Grace allowed du Pont to obtain transportation by water for property at less than the regular rates or charges then established on their lines, by means of an unjust or unfair device or means.

This matter will be referred to the Department of Justice for appropriate action.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 5th day of December A.D. 1960

No. 819

ABSORPTION OR EQUALIZATION OF INLAND FREIGHT CHARGES IN CONNECTION WITH TRANSPORTATION BY WATER OF EXPLOSIVES

Grace Line Inc. having filed a petition for reopening this proceeding for the purpose of reargument and reconsideration, and it appearing that the petition does not present any issues not considered in the report of the Board entered September 16, 1960:

It is ordered, That the said petition be, and it is hereby, denied; and

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

By the Board.

(Sgd.) THOMAS LISI,
Secretary.

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. S–117

Pacific Far East Line, Inc.—Application Under Section 805(a)

Submitted October 13, 1960. Decided October 13, 1960

Pacific Far East Line, Inc., granted permission under section 805(a) of the Merchant Marine Act, 1936, as amended, to use the SS *India Bear* on October 14, 1960, to lift and transport approximately 650 measurement tons of military cargo on one voyage from San Diego, California, to Honolulu, Hawaii, at the request of Military Sea Transport Service, since the granting of such permission would not (1) result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal trade, or (2) be prejudicial to the objects and policy of the Act.

Odell Kominers for applicant.
Willis R. Deming for Matson Navigation Company, intervener.
John R. Cograve as Public Counsel.

Report of the Deputy Maritime Administrator

By the Deputy Maritime Administrator:

Pacific Far East Line, Inc. (PFEL), by letter of October 7, 1960, informed the Maritime Administration that it had been asked by Military Sea Transportation Service (MSTS) to lift approximately 650 measurement tons of military cargo from San Diego, California, to Honolulu, Hawaii, aboard the SS *India Bear*. The letter was treated as an application for written permission under section 805(a) of the Merchant Marine Act, 1936, 46 U.S.C. 1223, and notice was published in the Federal Register of October 12, 1960 (25 F.R. 9773), that a hearing on the application would be held. The only intervener was Matson Navigation Company (Matson).

PFEL proposes to use the *India Bear* on one westbound voyage after completing loading operations in Long Beach, California, October 13, 1960. The vessel can proceed to San Diego on October 14, 1960, without interfering with its presently scheduled departure from San Francisco, California, on October 20, 1960. It will call at Honolulu on its normal schedule. The proposed transportation was negotiated only after the failure of efforts to have the cargo transported by other lines and on Matson's vessels. Alternative offers by Matson for loadings on October 15 and 16 were rejected by MSTS, which attributed military importance to a loading on October 14. Matson is the only other American-flag operator in this service between California and Hawaii which has shown the Maritime Administration that it has any interest in the competitive effect of the proposed transportation. Matson's witness stated that it does not object to PFEL lifting this one westbound cargo on October 14. Public Counsel presented no evidence on the competitive effect of the proposed shipment.

It is found that the granting of the permission applied for will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal trade, or be prejudicial to the objects and policy of the Act.

This report shall serve as written permission for the voyage.

FEDERAL MARITIME BOARD

No. 802

Misclassification and Misbilling of Glass Tumblers and Other Manufactured Glassware Items as Jars

Submitted August 16, 1960. Decided November 21, 1960

Bartlett-Collins Company and Houston Freight Forwarding Company found to have knowingly and willfully misclassified shipments of glass tumblers and other glassware items, obtaining transportation by water therefor at rates less than otherwise would have been applicable, in violation of section 16 of the Shipping Act, 1916, as amended. The matter will be referred to the Department of Justice for appropriate action.

Lykes Bros. Steamship Co., Inc., Royal Netherlands Steamship Company, and Compania Anonima Venezolana de Navegacion (Venezuelan Line) found to have allowed persons to obtain transportation for property at less than the regular rates, by means of false classification, in violation of section 16 Second of the Shipping Act, 1916. The matter will be referred to the Department of Justice for appropriate action.

Karl H. Mueller and *Harold E. Mueller* for Bartlett-Collins Company.

Richard H. Powell and *Warren H. Powell* for Houston Freight Forwarding Company.

M. L. Cook for Lykes Bros. Steamship Co., Inc., and Royal Netherlands Steamship Company.

Norman M. Barron for Royal Netherlands Steamship Company.

David Orlin for United States Atlantic & Gulf-Venezuelan & Netherlands Antilles Conference.

Robert C. Bamford and *John E. Cograve* as Public Counsel.

Report of the Board

Ralph E. Wilson, *Chairman*, Thos. E. Stakem, Jr., *Vice Chairman*, Sigfrid B. Unander, *Member*

By the Board:

The Board, as authorized by section 22 of the Shipping Act, 1916 (the Act), initiated an investigation to determine (1) whether Bartlett Collins Company (Bartlett or shipper), a manufacturer and shipper of glass products, and Houston Freight Forwarding Company (Houston or the forwarder), a freight forwarder, had willfully, directly or indirectly, by means of false classification or by any other unjust or unfair device or means, obtained or attempted to obtain transportation by water for property at less than the rates or charges which otherwise would be applicable during September 1955 and thereafter, and (2) whether Lykes Bros. Steamship Co., Inc. (Lykes), Royal Netherlands Steamship Company (Netherlands), and Compania Anonima Venezolana de Navegacion (Venezuelan Line), common carriers by water (the carriers), allowed any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carriers, by means of false billing, false classification, or by other unjust device or means, in violation of section 16 of the Act. The alleged violations center around certain false classification of glassware shipped from Sapulpa, Oklahoma, to ports in Venezuela, as described in bills of lading covering shipments between September 1955 and June 1956.

The examiner recommended that Bartlett and Houston be found to have violated section 16 but that the carriers be found not to have violated the Act. For the reasons hereinafter noted, we find that all of the respondents violated section 16.

Facts

1. The forwarder classified Bartlett's shipments of glass tumblers or drinking glasses, nappy (a round serving dish), jugs (pitchers), stemware, cookie jars, sherbet glasses, ash trays, beverage sets, tableware, decanter sets, cola tumblers, bowl sets, reamers (juice extractors), flower bowls, and other table glassware and caster cups as "empty glass jars" or "glassware (jugs)" on 44 bills of lading of the carriers, dated between October 7, 1955, and March 19, 1956. The descriptions appeared under the headings "Shipper's Description of Goods" and "Class and Contents of Packages." The forwarder prepared and "rated" (entered the freight rates and computed the freight charge) the bills of lading in complete form except for signature, numbering, and dating, before they were issued by the carriers.

2. Before preparing the bills of lading the president-owner-active manager of the forwarder discussed the classification of the glassware with Bartlett's authorized representatives and was instructed by them to classify the shipments as jars. Both the shipper and the forwarder

knew the shape, size, and appearance of the articles. The shipper correctly classified the glassware on (a) its loading tally based on its catalogue descriptions and numbers, and (b) its inland bills of lading based on the tally; and the forwarder correctly classified the glassware on an "export declaration" which it also prepared. The "jars" classification was used only on the carriers' bills of lading. The classification on this document controls the amounts charged for transportation by the carriers. The shipper's catalogue describes the articles as listed above. They are not referred to therein as jars. There was evidence that the tumblers could be used as jars if suitable caps were used. Caps were not furnished and there is no evidence that they were so used by the consignees named in the bills of lading of record.

3. The commodity descriptions and classifications in Freight Tariff No. 6 of United States Atlantic and Gulf-Venezuela and Netherlands Antilles Conference, in effect September 1955 and carried forward into Tariff No. 7, effective from December 14, 1955, through the date of the last bill of lading, distinguish between "Bottles or Jars, Empty, Glass—with or without caps" (Item 115) and "glassware" and "tumblers" (Item 1000). The former are transported at substantially lesser rates than otherwise would be applicable to correctly classified glassware (e.g., $18.66 as against $92.40 on one shipment).

4. There is no evidence that any of the items shipped were shown to officials of the carriers in order to obtain a decision as to the proper tariff rating. Employees of the forwarder made only verbal inquiries to the carriers' employees as to the rate on "jars" or "tumblers." The carriers did not have and were not informed what the inland bills of lading or the tally sheets showed, but they did have the export declarations. The variances between the bill of lading descriptions and export declaration descriptions of the same property was not noticed because the declaration does not always accompany the bill of lading, and they were not always brought together and compared. The carriers relied on the shipper's description of the property in validating bills of lading and in allowing the shipper to obtain transportation for the property at the established tariff rate (Tariff No. 7, Item 115).

5. Eighteen of the 44 shipments were carried on Lykes vessels, 12 on Royal Netherlands vessels, and 14 on Venezuelan Line vessels, from Houston or Galveston, Texas, to La Guaira, Maracaibo, or Puerto Cabello, Venezuela.

The investigation disclosed that the 44 bills of lading in evidence were merely illustrative of a great number (at least 240) of various documents examined.

Discussion

1. *Charges against the shipper and the forwarder*

Bartlett shipped at least 1977 cartons of glassware consisting of water pitchers, beverage sets, ash trays, vases, bowl sets, salt and pepper shakers, dessert dishes, fruit bowls, cookie jars, sherbet dishes, small one-ounce glasses with handles, sugar bowls, cream pitchers, juice reamers, plates, flower bowls, coasters, and caster cups (see appendix for a breakdown of articles by cartons), which it described on ocean bills of lading as glass jars or jugs when the tariff classifications available also provided a rate for "glassware". The description of these articles as empty jars or jugs instead of glassware was a factual misclassification. Regardless of any dual use of drinking glasses as food containers or for powdered soap or bubble bath granules as shown in exhibits, and as jars, as contended by respondents, there could be no such ambiguity about the contents of the 1977 cartons. Bartlett also shipped over 7700 cartons of drinking glasses, which it contends are correctly classifiable as jars instead of tumblers.

The controlling use of all the glassware (except the caster cups), including the tumblers, however, was table glassware. This is clearly shown both by the pictures and other information in the Bartlett catalogue, and by the fact that retailers of glassware such as department stores, drug stores, and "5 and 10 cent" stores were among Bartlett's customers. Bartlett introduced some evidence of the domestic sale of its products for packaging, but none of the Venezuelan consignees of the shipments examined were identified as packers.

Bartlett relied mainly on argumentative proof that the adaptability of the tumblers for use as jars or as "packers' tumblers" could be used to control the tariff classification. It and the forwarder argue that the matter should be put the other way around and that we should say the articles are jars, such as jelly glasses or jars which are treated as containers, not as tumblers, notwithstanding the fact that they are susceptible to use as tumblers.

We think the starting point should be the manufacturer's catalogue, sales efforts, and common understanding as to what the manufacturer-shipper had for sale. Such common understanding is reached by a study of the essential characteristics of articles.

There is also a constant refrain in the testimony of the forwarder's president that "we are not glass experts." However, this excuse is not applicable to the forwarder's ability to identify table glassware or tumblers for drinking purposes by using as a starting point for their thinking the commonly accepted meaning of these terms. It is only when one reverses the approach by departing from the common understanding and tries to convert table glassware and tumblers into packaging containers that expertise becomes a factor. One has to know whether they are suitable for capping, for use with machinery which puts food into them, or for standing up under the handling involved in packaging, transporting, and merchandising. If the forwarder and his employees had not looked through the wrong end of the telescope to describe the articles in the bill of lading they would not need to be an expert and would have been able to find the correct tariff description with no trouble.

Possible use does not change the essential character of the articles and is not a lawful basis for a difference in freight charges. *Int. Com. Comm.* v. *Balt. & Ohio R.R.*, 225 U.S. 326 (1912); *Crancer* v. *Lowden*, 121 F. 2d 645 (8th Cir. 1941); *Kimball* v. *Chicago R.I. & P. Ry. Co.*, 271 F. 469 (8th Cir. 1921); *Stowe-Fuller Company* v. *Pennsylvania Co. et al.*, 12 I.C.C. 215 (1907); *Ex-River Coal from Mt. Vernon, Ind., to Chicago*, 294 I.C.C. 233 (1955). This is particularly true in the present case where the tumblers were not shown to have been sold for packaging but were sold as table glassware.

The drinking glasses shipped by Bartlett, notwithstanding any adaptability as containers when capped, would be described more correctly by common usage as "tumblers" rather than "jars". They are labeled "Tumblers" in Bartlett's own catalogue. They are so designated in other documents. The identical "Tumbler" designation was an available classification in the tariff. It should have been used.

The controlling use as a drinking glass determines the correctness of the tumbler classification. *Continental Can Company* v. *United States*, 272 F. 2d 312 (2d Cir. 1959), and cases cited. The "jars" classification used to describe tumblers likewise was factually incorrect. We have recently so held in *Hazel-Atlas Glass Co.—Misclassification of Glass Tumblers*, 5 F.M.B. 515 (1958),[1] and *Markt & Hammacher Co.—Misclassification of Glassware*, 5 F.M.B. 509 (1958). We hold that the drinking glasses or tumblers also were falsely classified as jars.

The false classification results in the billing and payment of a lower freight rate than would be applicable to tumblers and glassware. To the extent the billing depends on the classification for its correctness, it too was false. Section 16 is violated by shippers and forwarders if the false classification and the false billing were knowingly and willfully made.

Wilfully means "purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice,

[1] Reversed by *Continental Can, supra*, on the ground that the Board failed to adduce proof that the controlling use was a drinking glass or tumbler.

either intentionally disregards the statute or is plainly indifferent to its requirements." *U.S.* v. *Illinois Cent. R. Co.*, 303 U.S. 239 (1938). In *Rates from Japan to United States*, 2 U.S.M.C. 426, 434 (1940), the Maritime Commission stated: "Their persistent failure to inform or even attempt to inform themselves through the * * * means which normal business resource and acumen should dictate, is proof that they knowingly and willfully keep themselves in ignorance of the false billings concerned." A Federal court has said with reference to the Elkins Act (49 U.S.C. § 41(3)), which penalizes anyone who "shall knowingly * * * receive * * * a rebate": "it was not necessary under the Elkins Act that there should be an intentional violation of the law, but that purposely doing a thing prohibited by the statute amounted to an offense." *United States* v. *Erie R. Co.*, 222 Fed. 444, 449 (D.N.J. 1915).

In addition to what has been noted in the facts and as related to these standards, the examiner found as follows with regard to any willfulness or knowledge the respondents may have had as to what was going on:

(1) Bartlett described the same glassware on a "loading tally", which it prepared, as "tumblers", "vase assortment", "Ste. Gen. Nappy", etc., as noted in the appendix;

(2) Bartlett described the same glassware in inland bills of lading, which it prepared in connection with truck shipments to Houston or Galveston, as "glass tumblers", or "glassware" such as "glass serving sets", or "decanter sets", "ash trays", or "handle mugs", as required. These bills of lading distinguish between the cartons containing tumblers and those containing other glassware. This shows that Bartlett was aware of the distinct characteristics of its product;

(3) Bartlett knew the shape, size, and other characteristics of its products and that they were used predominantly as tableware, as is also shown by its catalogue descriptions and its sales information which it issued to the public;

(4) In spite of its knowledge of the dominant characteristics of its product, Bartlett's representatives instructed Houston to classify the shipments as jars. These actions followed discussions between the owner, president, and active manager of Houston, who testified he talked to "one of the Bartletts"—possibly Edward Bartlett—and "pointed out to the Bartlett Collins Co. the way the tariff read;"

(5) Houston, in 23 of the 44 shipments in evidence, described the cargo as "glass tumblers" in the export declaration which it prepared. It classified the shipments pursuant to a schedule covering "Tumblers, Drinking Glasses and Stemware; Machine Made." The export declarations contained a statement by Bartlett as the shipper, signed by its

"duly authorized officer or employee", authorizing Houston "to act as forwarding agent for export control and customs purposes;"

(6) Houston, in 20 of the 23 foregoing shipments, on the ocean bills of lading which it prepared, described the same cargo as "Empty Glass Jars under 1 gallon capacity", and thus brought the shipment under the tariff classification covering "Bottles or Jars." In the majority of the cases Houston also had in its possession the Bartlett tally sheet or inland bill of lading containing the correct descriptions noted above. If Houston simply had followed the documents in its possession and not consulted with the shipper, it would have described the contents of the cartons correctly. The variances in the ocean bills of lading were made only *after* consultations with the shipper. The foregoing was written on a bill of lading form (Lykes form) which contained the following notation at the bottom of the page: "Attention of shippers, consignors, consignees, forwarders, brokers and other persons is called to the provisions of Sec. 16 of the Shipping Act, 1916, as amended by the Act approved June 16, 1936, in relation to penalty of not more than $5,000 in relation to false billing, false classification, false weighing, false report of weight, or any other unjust or unfair device or means or attempt to obtain transportation by water of property at less than the rates or charges which would otherwise be applicable."

The above findings show not only that both Bartlett's and Houston's senior officers knew there was a variance between what was being shipped and what was described in documents containing this warning, and issued over the signatures of their employees, but also that the variances were willfully created. With full information about the articles, they studied the tariff and then made up their minds about what to do. They decided to choose a classification giving the lowest rate. They could ship a jar for 5½ times less than it would cost to ship a tumbler. They had a choice in classifying the articles. They exercised their choice by choosing the improper description consistently and continually. The choice involved willfully ignoring a printed warning, as well as a more descriptive classification of the articles shipped with a full knowledge (a) of the characteristics and normal use of the article and (b) of the proper classification thereof. As a result, they obtained transportation at less than the rate and charge otherwise applicable.

2. Charges against the carriers

Section 16 is violated by common carriers by water if they 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 carriers by means of false billing or false classification.

The status of Lykes, Venezuelan Line, and Royal Netherlands as common carriers by water, and the fact that the tariff used by Bartlett and Houston contains the rates and charges then established and enforced by the carriers and its applicability to the shipments in question, were properly established by testimony and are not denied. The falsity of the classfication and of the use of less than regular rates or charges in billing have been shown above.

To "allow" a person to do something means to approve or to sanction an act, or to suffer something to be done by neglecting to restrain or prevent. (Webster's New Collegiate Dictionary.) In *Practices of Fabre Line and Gulf/Mediterranean Conf.*, 4 F.M.B. 611, 636 (1955), it was stated:

> Although unlike the first paragraph of section 16, the quoted language does not contain the words "knowingly and willfully" or similar words, intent is, nevertheless, an element essential to establishment of violation of section 16-Second, which makes unlawful allowing, *by unjust or unfair device or means*, any person to obtain transportation at less than the regularly established and enforced rates or charges. No resort to lexicography is necessary to determine that a "device" must be a willful, knowing scheme or means to an end.
>
> It is apparent, then, that a carrier does not violate section 16-Second by inadvertence unless the evidence reveals such a wanton disregard of the duty to exercise reasonable diligence to collect applicable rates and charges for transportation as to amount to an intent to collect less than the applicable rates and charges.

In *Rates from United States to Philippine Islands*, 2 U.S.M.C. 535 (1941), the Maritime Commission held that carriers' office procedures, which consisted of comparing bill of lading descriptions with export declaration descriptions, followed up by having someone in the bill of lading department notify the shipper by telephone in case of a discrepancy, was insufficient, and that this procedure against a background of actual knowledge by the carriers of widespread flagrant false billing by shippers, constituted a violation of section 16. In *Rates from Japan to United States*, *supra*, the Maritime Commission held that carriers purposely keeping themselves in ignorance of false billing by shippers, in order to deny actual knowledge, were estopped to deny that which could be learned by the exercise of reasonable diligence. It was concluded that the carriers had violated section 16.

With reference to the foregoing standards, we find the following:

1. In at least 16 shipments by Lykes the ocean bills of lading described cartons as containing "empty glass jars", "glassware, jars", or "glass jars", and the export declaration described them variously as "glass tumblers", "glassware", "tumblers, drinking glasses and stemware", "table glassware", or "beverage sets tumblers";

2. At least 11 shipments by Venezuelan Line were described the same way in the ocean bills of lading, and five export declarations described the property as "table glassware" or "glass tumblers." The remaining six export declarations described the property as "other unfilled glass containers (new) jars and jugs";

3. At least 13 shipments by Royal Netherlands were described the same way in the ocean bills of lading, and five export declarations described the shipments variously as "cookie jars", "glass tumblers", "table glassware", "drinking glasses and stemware", "glassware", or "nappies." The remaining eight export declarations described the property as "other unfilled glass containers Jars (new)", "(new) jars and jugs", or "(new) jars" as variations of the words "Jars (new)".

4. According to its witness, Lykes has a "standard operating procedure" which requires that the descriptions on the bill of lading be compared with the export declaration, and in case of discrepancy the reviewing employee is supposed to report to his supervisor "if the difference in the description has any significance." Under cross examination, however, the witness indicated that it was very unlikely that this "standard operating procedure" was actually followed in "the daily operation of a busy steamship office", where the clerk responsible is "scampering from pillar to post getting all these different things together", while "Consulates are sitting on his neck." This was described as "pretty representative activity." He also said: "* * * now if it's followed all the time, I would hate to say, because you have to depend on clerical help to do it." The witness also stated that in case of doubt about a classification "I must guide myself by the shipper who, after all, knows what he is shipping and tells me." He professed lack of qualification to tell a jar from a tumbler. He declared it is not within "the province of any steamship agent * * * to question the veracity of a shipper, unless he has good solid cause, and in that case I still think he should go to the shipper first * * *";

5. Venezuelan Line's witness stated that "it is our practice to attempt to check each and every bill of lading and dek (sic) [export declaration] against one and the other." In case of discrepancies "we will ask the freight forwarder or shipper * * * to either correct one or the other, whichever is the correct description;"

6. Royal Netherlands, through its "line manager" employed by Strachan Shipping Co. as local agent, testified that "my general instructions and my understanding is that we compare the export declaration description with the bill of lading description when we are in doubt as to whether it is properly described in the bill of lading or whether by referring to the export declaration we might get a better idea of the proper rate to apply to the item that is on the bill of

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lading." Under further questioning about comparison procedure he said the company made "spot checks where sufficient comparison seems in the opinion of the person handling it justified or called for;"

7. The export declaration is a customs document which requires a description of the contents of export shipments. The standard classifications it calls for are contained in a Government publication, in evidence, containing lists of all of the exported commodities of the United States by category and number. Its descriptions do not necessarily conform to those in tariffs, and it is entirely possible to check a declaration against a bill of lading and not find an inconsistency when in fact there is a false classification. Nevertheless, the declaration is a useful guide to variances in descriptions of property which can alert anyone comparing them with bills of lading and lead to the discovery of a misclassification. It seems to be about the only way, short of opening and visually inspecting packages, to find out about discrepancies.

8. In June 1956, at Galveston, the cargo consisting of cartons of glassware on the SS *Fred Morris*, operated by Lykes, was inspected by an inspector employed by the United States Customs. He had a shipper's export declaration with him. The inspection consisted of opening several cartons, taking out several pieces of the glassware contents, looking at them, placing them back in the cartons, and then resealing the cartons. The inspector prepared a written report dated July 18, 1956, showing, from the export declaration, that Bartlett was the exporter and that the contents of various numbers of cartons were "table glassware", "glass serving sets", or "tumblers." The witness called them "ordinary drinking glasses." The purpose of his inspection was to assure conformity between the contents of the cartons and the descriptions in the shipper's export declaration. There is no evidence that any employee of Lykes was present, saw any of these actions or the articles removed, or received a copy of the inspector's report. No inspections were made by employees of the other two lines.

The question is whether these facts show that the carriers did not restrain the shipments after examining the two sets of documents or of having the opportunity to do so, as the result of a wanton disregard of the duty to collect applicable rates. The carriers' office procedures permitted a discovery of questionable variances, but they are not coupled with additional evidence of knowledge about false billing practices generally. The problem is to determine whether the carriers were sufficiently alerted to the significance of the variances in classifications, even without such knowledge, to justify a finding that they purposely kept themselves in ignorance by not inspecting the cargo and checking documents more diligently, and thus allowed the shipper to obtain transportation at less than established rates.

The testimony is meager and confusing about what actually happened with reference to the particular shipments. As to Strachan Shipping Co. and Royal Netherlands, there is no evidence that the spot checks or documents they customarily made were ever made with regard to these shipments. Lykes presented a picture of complete disorganization. But two factors emerge both in the testimony of carriers' witnesses and in the argument of counsel. First, they had available in their offices, and to some extent (the extent is not clear) compared, export declarations and bills of lading to determine whether the bills of lading and the billings were false, but in this case such use failed completely to bring about any discovery which could lead to action to correct the false classifications that have been shown to exist. Lykes' counsel stated that in any event the "differences were certainly not of a nature as to put a nonexpert bill of lading clerk on notice of a misclassification." Second, in case of doubt the carriers, in the words of their counsel, "must rely upon the classification of the goods as furnished by the shipper directly or through his freight forwarder." The Lykes' witness testified, according to counsel's brief, "more than once that * * * he could do nothing other than rely on the shipper's description", and claimed lack of ability to tell jars from tumblers and table glassware "if he had one of the objects in question before him." To the extent of any doubts raised by comparisons, the carriers' employees went to the shipper for information instead of looking at the shipment to satisfy themselves. Third, in case of doubt there was never any effort to inspect cargo, nor any admission of responsibility to do so.

The entire picture, in the words of the carriers' counsel and witnesses, is one of abnegation of any responsibility for making a serious effort to determine the truth. The position they argue puts a premium on ignorance, failure to act, and slovenly office procedures. It encourages the management to hide behind the actions of subordinates as an excuse for mistakes. The carriers' own excuses show a wanton disregard of any kind of duty to exercise reasonable diligence in enforcing procedures which would minimize deceits and falsification of documents. If the carriers' arguments were accepted, section 16 Second would become unenforceable except in the flagrant situations disclosed in the *Japan* and *Philippine* cases, *supra*. The carriers would simply immunize themselves from any obligations under section 16 by inaction, ineffective internal procedures, and inexpert personnel. The carriers' intent to avoid their duty is inferred from their refusal to rely on their own processes of discovery and on their own personnel, and from their placing complete reliance on shippers or forwarders who have an incentive to conceal. This constitutes a willful and knowing means to avoid discovery of the truth, which is an unjust and unfair means.

Where variances in documents were shown, the carriers neglected to restrain or prevent the misclassification simply by taking the shipper's or the forwarder's word as the result of verbal discussions or consultations, and letting it go at that. They allowed the unjust means of falsification of documents to be used and go uncorrected when they did not open packages themselves or ask for the articles to be visually inspected after being alerted by such verbal consultations. We do not think it is always essential that a background of widespread flagrant false billing be shown as an essential ingredient in the offense under section 16. Other evidence is equally material. The fact that there is no specific law or regulation compelling comparison of documents is also not essential or material. We are not making the carriers liable for the violation of such a nonexistent law or regulation, but are interpreting section 16 to determine if, by the action or inaction disclosed, the carriers allowed illegal transportation within our definition of the word "allow". In this case the actions of haphazard document comparisons and of total reliance on the shippers, who are the very persons seeking the transportation for property at less than the carriers' regular rates, constitutes such a wanton disregard of duty as to allow the shipper to obtain the transportation on his terms. *Prince Line* v. *American Paper Exports*, 55 F. 2d 1053 (2d Cir. 1932). As a result of (a) ineffective office procedures, (b) total reliance on shippers for discovery of the truth, and (c) failure to inspect cargo when alerted, we find the carriers have allowed Bartlett to obtain transportation of glassware at less than the applicable rates established and enforced by them.

3. Other issues

Bartlett sought, by petition, to reopen the record for further evidence after the examiner's recommended decision had been made. The further evidence consisted of (a) tariff changes on June 11, 1959 (after reconvening the hearing before the Examiner), changing the rates applicable to tumblers, and (b) of still further changes since the closing of the hearing in March 1960. The subject of the investigation, however, is what respondents did between September 1955 and June 1956. Since the petition does not relate to anything done or existing in this period and relates to happenings long afterwards, it seeks to include evidence necessarily irrelevant to the issues. The petition is denied.

The matter will be referred to the Department of Justice.

Appendix

The following is a listing of the number of cartons of glassware which was shipped, showing, as to each item, the catalogue number and identification title in the catalogue, a description of the article from photographs in the shipper's catalogue, and how it was listed in ocean bills of lading:

1. 14 ctns.—1680—80 oz. Jug (an ice-lip water pitcher with handle)—listed as "glassware, jars" or as "empty glass jars".
2. 10 ctns.—1980—80 oz. Jug, same as 1. above.
3. 530 ctns.—1180—80 oz. Jug—same as 1. above.
4. 1 ctn.—1680—7 pc. beverage Set (an ice-lip water pitcher with 6 tumblers)—listed as "glass jars".
5. 27 ctns.—104 and 107—ash trays—listed as "empty glass jugs" or "glass jars", or "glassware (tumblers)".
6. 77 ctns.—1300—Vase (a 3¾'' high flower vase)—listed as "glass jars empty".
7. 2 ctns.—5678—4 pc. Bowl Set (4 different sized kitchen mixing bowls which fit one inside the other)—listed as "empty glass jars".
8. 137 ctns.—1136—36 oz. Jug (an ice-lip water pitcher with a handle)—listed as "glass jars".
9. 112 ctns.—1700 and 1800—S & P (Salt and Pepper Shakers, regular (3½'') and "King Size" (4⅜''))—listed as "empty glass jars".
10. 42 ctns.—Ste. Gen. Nappy (imitation cut glass decorations on dessert or fruit compote dishes)—listed as "glassware, jars" (4½''), and fruit bowls (8½'').
11. 134 ctns.—1590—cookie jar (a 1 gallon cookie jar with a glass top (9⅝'' high))—listed as "glass jars".
12. 18 ctns.—400 and 500—Sherbet (a dessert dish (2⅜'' high))—listed as "glassware, jars" or "empty glass jars".
13. 65 ctns.—201—1 oz. tumblers (a glass with beer mug shape and a handle (2'' high))—listed as "glassware tumblers".
14. 75 ctns.—2400—vase assortment (flower vases)—listed as "glassware tumblers" or "empty glass jars" or "glass jars".
15. 120 ctns.—1180—1111, 7 pc. sets (an ice-lip pitcher with a handle (80 oz. capacity) together with six 11 oz. tumblers (4⅞'' high) listed as "empty glass jars".
16. 67 ctns.—1980—1911—7 pc. sets (an ice-lip pitcher with a handle (80 oz. capacity) together with 6 tumblers)—listed as "empty glass jars".
17. 11 ctns.—1600—"Sugar" and "Cream" (a sugar bowl, with 2 handles, and a cream pitcher with handle and lip (each 3'' high))—listed as "empty glass jars".
18. 10 ctns.—No. 2 Reamer (a fruit juice squeezer)—listed as "glass jars".
19. 580 ctns.—3200—Flower Bowl—listed as "glass jars".

20. 20 ctns.—Ste. Gen. 11 inch Plate (a flat plate, imitation cut glass)—listed as "glass jars".
21. 40 ctns.—Ste. Gen. Cream or Sugar (handled cream pitcher and sugar bowl with imitation cut glass design)—listed as "glass jars".
22. 1 ctn.—20—coaster (an iced tea or other beverage glass coaster)—listed as "glassware (tumblers)".
23. 8 ctns.—Caster cups (glass cups placed under casters or furniture legs to protect floors)—listed as "glassware (tumblers)".

NOTE.—The shipper's catalogue in evidence is titled: "Crystal Glassware, Pressed Blown Table Glassware, Hotel and Bar Glassware, Kitchen Glassware, Lamp Founts".

6 F.M.B.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 21st day of November A.D. 1960

No. 802

MISCLASSIFICATION AND MISBILLING OF GLASS TUMBLERS AND OTHER MANUFACTURED GLASSWARE ITEMS AS JARS.

This proceeding having been initiated by the Board upon its own motion, and having been duly heard and submitted, and 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 and decision thereon, which report is hereby referred to and made a part hereof:

It is ordered, That:

1. The following respondents be, and each one is hereby, notified and required (a) to hereafter abstain from the practices herein found to be unlawful under section 16 of the Shipping Act, 1916, as amended, and (b) to notify the Board within ten (10) days from the date of service hereof whether each such respondent has complied with this order, and if so, the manner in which compliance has been made, pursuant to Rule 1(c) of the Board's Rules of Practice and Procedure (46 CFR Part 201.3):

Houston Freight Forwarding Company;
Lykes Bros. Steamship Company;
Royal Netherlands Steamship Company;
Compania Anonima Venezolana.

2. The proceeding be, and it is hereby, discontinued.

By the Board.

(Sgd.) THOMAS LISI,
Secretary.

ORDER

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No. 802

MISCLASSIFICATION AND MISBILLING OF GLASS TUMBLERS AND OTHER MANUFACTURED GLASSWARE ITEMS AS JARS.

This proceeding having been initiated by the Board upon its own motion, and having been duly heard and submitted, and investigation of the matters and things involved having been had, and the Board, on November 21, 1960, having made and entered of record a report containing its conclusions and decision thereon, which report is hereby referred to and made a part hereof:

It is ordered, That:

Respondent Bartlett-Collins Company be, and is hereby, notified and required (a) to hereafter abstain from the practices herein found to be unlawful under section 16 of the Shipping Act, 1916, as amended, and (b) to notify the Board within ten (10) days from the date of service hereof whether respondent has complied with this order, and if so, the manner in which compliance has been made, pursuant to Rule 1(c) of the Board's Rules of Practice and Procedure (46 CFR Part 201.3).

By the Board.

(Sgd.) THOMAS LISI,
Secretary.

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

S-118

American Export Lines, Inc.—Application Under Section 805(a)

Submitted December 2, 1960. Decided December 2, 1960

The continuation by Isbrandtsen Company, Inc., of its service from California to Norfolk, Virginia, and Baltimore, Maryland, from California to Puerto Rico, and from Puerto Rico to Norfolk, all in conjunction with its eastbound round-the-world service, found not to constitute unfair competition to any person, firm, or corporation engaged exclusively in the coastwise or intercoastal service, nor to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended, notwithstanding applicant's association with American Export Lines, Inc.

Frank B. Stone and *J. S. Simpson* for applicant.
Richard W. Kurrus for Isbrandtsen Company, Inc.
John Rigby for the Commonwealth of Puerto Rico.
Edward Aptaker and *Donald J. Brunner* as Public Counsel.

Report of the Deputy Maritime Administrator

By the Deputy Maritime Administrator:

American Export Lines, Inc. (American Export), filed an application for written permission under section 805(a) of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1223) (the Act), for the continuation of certain domestic intercoastal or coastwise services by Isbrandtsen Company, Inc. (Isbrandtsen). American Export is a contractor under authority of title VI of the Act (Contract No. FMB-87). Isbrandtsen is conceded to be an associate of the contractor by virtue of having acquired 316,440 shares of its stock, transferred in October 1960. American Export has 1,200,000 shares of stock outstanding and Isbrandtsen is the holder of approximately 26.4 percent of the total. No one intervened in the proceeding.

The Federal Maritime Board already has given Isbrandtsen written permission for the continuation of service from California to Norfolk, Virginia, and Baltimore, Maryland, from California to Puerto Rico, and from Puerto Rico to Norfolk, all in conjunction with its eastbound round-the-world service. The permissions are contained in the following reports and orders of the Board: *Isbrandtsen Co., Inc.—Subsidy, E/B Round the World*, 5 F.M.B. 448 (1958), 5 F.M.B. 483 (1958); and order in same proceeding, dated November 23, 1960. Pertinent portions of these reports and orders are hereby incorporated into the present report.

It is found that granting the required permission to American Export will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service, or be prejudicial to the objects and policy of the Act.

FEDERAL MARITIME BOARD

DOCKET NO. S-73 (SUB. NO. 2)

WATERMAN STEAMSHIP CORPORATION—APPLICATION UNDER SECTION 804

Submitted September 15, 1960. Decided December 7, 1960

Special circumstances and good cause shown under section 804, Merchant Marine Act, 1936, as amended (1) to permit Waterman Steamship Corporation of Puerto Rico to act as agent for Hamburg-Amerika Linie, a West German operator of foreign-flag vessels competing with essential American-flag service, and (2) to permit Waterman Lines (Antwerp) S.A. and Waterman Lijnen (Rotterdam) N.V. to act as agent for Geo. H. Scales, Ltd., and Waterman Lines (Antwerp) S.A. to act as agent for Moor Line, Ltd., in the absence of foreign-flag vessel competition with American-flag service.

Waivers will be granted under section 804 for a period of two years, subject to cancellation upon 90 days' notice to the operator.

Sterling F. Stoudenmire, Jr., for Waterman Steamship Corporation.
John E. Cograve and *Edward Aptaker* as Public Counsel.

REPORT OF THE BOARD

RALPH E. WILSON, *Chairman*, THOMAS E. STAKEM, JR., *Vice Chairman*, SIGFRID B. UNANDER, *Member*

BY THE BOARD:

Waterman Steamship Corporation (Waterman), on June 14, 1960, applied for a waiver from the provisions of section 804 of the Merchant Marine Act, 1936 (the Act), which makes it unlawful for any contractor receiving an operating-differential subsidy under title VI, or any "* * * subsidiary, affiliate, or associate of such contractor * * * or any officer, director, agent, or executive thereof, directly or indirectly," to act as agent for any foreign-flag vessel which competes with any American-flag service determined to be essential as provided in section 211 of the Act. The Board is authorized to waive such provisions "under special circumstances and for good cause shown." Waterman Steamship Corporation of Puerto Rico (Waterman, P.R.) is a wholly owned subsidiary of Waterman. The former acts as a general agent in Puerto Rico for the Hamburg-Amerika Linie (Hamburg), a West German steamship line, in connection with the berth service of that line between Puerto Rico and the Dominican

Republic. The foreign-flag vessels of Hamburg may compete with the service which Lykes Bros. Steamship Co., Inc. (Lykes), is authorized to perform under its operating-differential subsidy contract covering service between Puerto Rico and the Dominican Republic. We find there may be competition on this route.

We may waive the statutory prohibition against Waterman in view of the activities of its subsidiary as to any competing foreign-flag vessel if special circumstances and good cause are shown. We have held that circumstances justifying a waiver are that (1) the proposed foreign-flag vessel use will not adversely affect subsidy payments on the subsidized service, (2) the applicant would suffer hardship if the prohibition is enforced, and (3) the proposed vessel use will have an insignificant competitive effect on American-flag service. *States Marine Lines, Inc.—Sec. 804 Waiver*, 6 F.M.B. 71 (1960). No evidence was produced showing need for increased subsidy as a result of applicant's relation to its subsidiary, and applicant showed that the effect of its foreign-flag agency operation on its regular operation would be very little. This is a special circumstance.

No evidence was presented, no charge was made, and we do not assume that the unsubsidized subsidiary will receive any benefit from subsidy payments to applicant. Such benefit is unlawful. Applicant's witness testified that the furnishing of the agency services are important to the company. They generate additional revenue, which contributes to the over-all operating results of the company. Termination of the agency account undoubtedly would be a hardship to Waterman because a valuable business arrangement would be lost with no provable gain to any other subsidized American carrier. This also is a special circumstance.

Testimony developed that there would be no injury, direct or indirect, to any American-flag operator in Puerto Rico. Any competitive effect on Lykes was apparently not deemed significant enough to justify Lykes in intervening and presenting evidence on the subject. In the absence of such evidence, we accept applicant's testimony as to the insignificance of any competitive effect, and find it to be a good cause for a waiver.

In other respects we concur with the examiner that in the absence of any competition between the foreign-flag vessels of Geo. H. Scales or of Moor Line, Ltd., and American-flag service determined to be essential as provided in section 211 of the Act, no waiver is necessary to permit Waterman Lines (Antwerp) S.A. and Waterman Lijnen (Rotterdam) N.V. to act as agents for such operators.

In the absence of later action by the Board, this report shall serve as written permission for the waivers granted herein.

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. S-119

MOORE-McCORMACK LINES, INC.—APPLICATION UNDER SECTION 805(a)

Submitted December 8, 1960. Decided December 8, 1960

One voyage by the SS *Mormacguide*, commencing on or about December 9, 1960, carrying a cargo of lumber or lumber products from North Pacific ports to Atlantic ports, found not to result in unfair competition to any person, firm, or corporation engaged exclusively in coastwise or intercoastal service, and not to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended.

Ira L. Ewers for Moore-McCormack Lines, Inc.
Donald J. Brunner as Public Counsel.

REPORT OF THE DEPUTY MARITIME ADMINISTRATOR

BY THE DEPUTY MARITIME ADMINISTRATOR:

Moore-McCormack Lines, Inc. (Mormac), has applied for written permission of the Maritime Administrator under section 805(a) of the Merchant Marine Act, 1936, as amended (the Act) (46 U.S.C. 1223), for its owned ship the SS *Mormacguide*, which is under time charter to States Marine Lines, Inc. (States Marine), to engage in one intercoastal voyage commencing at a North Pacific port on or about December 9, 1960, carrying a cargo of lumber and lumber products for discharge at Atlantic ports. Notice of hearing was published in the Federal Register of December 1, 1960, and hearing was held before the Deputy Maritime Administrator. No petitions to intervene were filed and no one appeared in opposition to the application.

States Marine, the charterer of the *Mormacguide*, conducts as a part of its regular steamship operations an eastbound intercoastal lumber service. For the sailing here under consideration it has been unable to get any other suitable ship. No exclusively domestic operators in the trade have objected to the use of the ship for this sailing.

It is found and concluded that the granting of written permission under section 805(a) of the Act for the *Mormacguide*, which is under time charter to States Marine, to engage in one intercoastal voyage commencing at a North Pacific port on or about December 9, 1960, carrying a cargo of lumber to the Atlantic ports of Brooklyn, New York, Newark, New Jersey, New Haven, Connecticut, and Camden, New Jersey, will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service, and will not be prejudicial to the objects and policy of the Act.

This report shall serve as written permission for the voyage.

FEDERAL MARITIME BOARD

No. 879

STORAGE PRACTICES OF THE PORT OF LONGVIEW COMMISSION AT THE PORT OF LONGVIEW, WASHINGTON

Submitted November 10, 1960. Decided December 13, 1960

1. Practices of the Port of Longview Commission of granting certain free time and storage privileges at Longview, Wash., under terms not authorized in its tariff, found unduly prejudicial and preferential, in violation of section 16, and unjust and unreasonable, in violation of section 17, of the Shipping Act, 1916.
2. Respondent required to cease and desist from its unlawful practices.

John F. McCarthy and *Willard Walker* for respondent.
Robert J. Blackwell and *Edward Aptaker* as Public Counsel.

REPORT OF THE BOARD

RALPH E. WILSON, *Chairman*, THOS. E. STAKEM, JR., *Vice Chairman*, SIGFRID B. UNANDER, *Member*

BY THE BOARD:

We adopt the examiner's recommended decision, to which exceptions and replies have been filed. Oral argument was not requested. The recommended decision is as follows:

"This proceeding is an investigation pursuant to section 22 of the Shipping Act, 1916, as amended (46 U.S.C. 821) (the Act), instituted by the Board on its own motion, by order of December 10, 1959, published in the Federal Register of December 23, 1959, 24 F.R. 10464, to determine whether certain storage practices of the respondent, the Port of Longview Commission, at Longview, Wash., constitute the making or giving of any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic, subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage, or constitute unjust or unreasonable practices,[1] in violation of sections 16 and 17 of the Act

[1] "Practices relating to or connected with the receiving, handling, storing, or delivering of property.

(46 U.S.C. 815, 816). Hearing was held at Longview on March 29, 1960.

The Facts

"The respondent operates the only public marine cargo terminal at Longview, and provides wharfage, dock, and warehouse terminal facilities in connection with common carriers by water. The respondent is a party to the Northwest Marine Terminal Association and to section 15 Agreement No. 6785 on file with the Board. The executive secretary of the Association, as required by the said agreement, files each member's terminal tariff with the Board. Respondent is an 'other person', other than a common carrier by water, subject to the Act and to the Board's jurisdiction.

"The Port of Longview (the Port) is on the Columbia River north of Portland, Oreg., about 50 miles downstream from Portland, and about 65 miles from the Pacific Ocean. The Port's terminal is of the quay type lying parallel to the river. The dock is 2,130 feet long, and has four berths for ships. The respondent has in excess of 286,000 square feet of shed storage space and at least 500,000 square feet of open storage area. At least eight warehouses and other miscellaneous facilities are included in respondent's terminal facilities.

"The respondent is a municipal corporation under the laws of the State of Washington. It embraces about two-thirds of Cowlitz County. It may purchase or condemn lands, operate wharves, warehouses, and rail and water transfer terminal facilities. It may raise revenue by levy of an annual tax on taxable property in the port district. Its terminal facilities are supervised by the manager of the Port.

"At least 17 steamship lines serve Longview. The Port was recognized as an inbound terminal port by the various steamship conferences serving the Orient trade one at a time over a period of six years beginning in 1950, and the Port's import business developed and increased with such terminal status. Inbound cargo has increased from 6,371 tons in 1951 to 132,044 tons in 1958. Included in this traffic was dry bulk cargo of 46,951 tons and general cargo of 85,093 tons. Inbound general cargo of 94,000 tons is estimated for 1959. Plywood and chrome ore are two of the main imports. Export traffic in 1958 was 802,851 tons, wheat being the principal commodity. Domestic outbound waterborne cargo, consisting mainly of lumber, decreased between 1951 and 1958, but inbound domestic cargo increased somewhat during these same years. On the whole, the Port has experienced a steady and substantial growth, particularly considering that it has only four berths for ocean-going vessels.

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"The Terminal Tariff No. 2 of the Port, filed with the Board, contains its terminal rules, rates, and charges. It includes provisions relating to free time, wharf demurrage, and storage. On imports there is a free-time period of 10 days following the first 7:00 a.m. after the complete discharge of the vessel. Free time is the number of days that cargo may occupy wharf premises before being subject to a specific demurrage charge, to a storage charge, or to removal by the authorities at the expense of the owner of the goods. Wharf demurrage is the penalty charge assessed on cargo remaining on wharf premises after the expiration of free time unless the cargo is accepted for storage.

"This 10-day free-time provision has been disregarded consistently by the Port. This is known by the members of the Northwest Marine Terminal Association. In the past eighteen years under the present port manager, and prior to that time so far as the record shows, the Port never has charged any demurrage regardless of the length of time that the cargo remained on or off the pier. Nor in that time has anyone been required to remove cargo from the dock under the threat of demurrage. The respondent's manager frankly admitted that the 10-day free-time provision in the tariff is 'absolutely worthless.' In his opinion, the demurrage rules are "meant for the metropolitan area which must move its cargo out of the terminal.' The more liberal free-time or free-storage privileges actually offered by the Port of Longview were not incorporated into the Port's tariff because it did not wish to inflict what it felt would be unfair competition upon the smaller members of the Northwest Marine Terminal Association, inasmuch as the Port felt these smaller members did not have the space or facilities to handle the type of business built up by the Port of Longview. Practically all import cargo using the facilities of the Port of Longview has enjoyed an extended free time privilege ranging from 30 to 90 days.

"The Port has allowed any importer who wishes time to sell and distribute his cargo, at least 30 days free time or free storage. Where the commodities are seasonal in nature, such as Easter baskets, and must be distributed in a short time, the Port has allowed 90 days. On a third general class of imports, including plywood, the Port has allowed importers to keep 20 percent of what they considered would be their annual requirements without charge for storage, provided that they turned that cargo about four times a year.

"The 20-percent requirement is a flexible rule for the industry and not for a particular importer. The rule is subject to the judgment of the Port in a particular instance as to whether the cargo is moving fast enough through the facilities of the Port. As of October 17, 1959, some 91,243 crates of plywood were stored at facilities of the Port. Of these 44,389 crates were in storage from zero to three months, 28,432 crates from three to six months, 15,887 crates from six to twelve months, and 2,535 crates for more than a year. The Port has not had occasion to charge storage on plywood at any time.

"The amount of plywood held in storage was not considered important so long as the owner or shipper moved a sufficient quantity promptly, in the judgment of the Port. Generally, 40 percent of imports moves out within 15 days, and some of the balance is stored in the meantime. One importer shipped a hundred times the amount of plywood which was held in storage. The individual commodity held may be an odd length, grade, or specie.

"Although it has not assessed demurrage against nor charged for storage of plywood, on one occasion the Port requested a customer to remove plywood from a warehouse when he had over 10,000 crates of it, of which almost three-quarters had exceeded the 90-day rotational period of free storage negotiated or allowed by the Port outside of its tariff provisions. As requested, these crates were moved, except for 1,000 crates which were sold. The plywood which was held so long in storage resulted from a situation wherein the importer attempted to perform a manufacturing process normally done abroad, but was unsuccessful in his attempt to compete with the imported product.

"Again, outside of its tariff provisions, 30 days free time or free storage has been granted by the Port on rattan furniture, pottery, earthenware, porcelainware, woodenware, lily bulbs, steel, machinery, tapioca flour, and canned goods. The Port has accorded 90 days free time or free storage on bamboo blinds and poles, toys, Christmas ornaments, tea, and miscellaneous general oriental imports. Where storage charges are assessed after the expiration of the 30 or 90 free days, they are not in conformity with those specified in the tariff.

"The respondent admits that the storage arrangements and charges are the result of private negotiations between it and the owner of the goods. The parties in fact may 'dicker' over the terms of storage.[2] Nevertheless, the Port generally attempts to treat all similar shippers alike, of course, subject to the exigencies of good solicitation in building up the business of the Port.

"While no shipper, terminal operator, port, carrier, or other person has complained to the respondent's manager about the practice of making free storage arrangements outside of those in respondent's Terminal Tariff No. 2, little weight can be accorded such fact. Im-

"[2] See appendix 'A'.

porters are unlikely to complain about arrangements much more liberal than those which are required under the tariff. The Port's liberal free time and storage arrangements are available without regard to the use of any particular common carrier serving Longview, so there was no cogent reason for complaint by the carriers.

"Generally, the Port of Longview advised prospective customers that its Terminal Tariff No. 2 did not apply, and in effect that this tariff could be ignored.[3] In one letter (appendix 'C') it is stated that 'Tariffs, as you know, are of a general nature and I feel that if you have a particular type of movement in mind and can give us details—volume, origin and possible destination—we can quote you much more satisfactorily.'

"DISCUSSION AND CONCLUSIONS

"The Port's failure to observe the free time and storage provisions of its Terminal Tariff No. 2 is based apparently on its reliance upon item 11, entitled, 'Reservation of Agreement Rights', which provides:

"The Port of Longview reserves the right to enter into agreements with common carriers, shippers and/or their agents concerning rates and services providing such agreements are consistent with existing local, state and national law governing the civil and business relations of all parties concerned.

"Tariffs must be read in whole and not in part. Item 1, entitled 'Application of Tariff', clearly takes precedence over item 11 in the circumstances herein. Item 1 provides:

"This tariff is published and filed as required by law and is, therefore, notice to the public, to shippers, consignees and carriers that the rates, rules and charges apply to all traffic without specific notice, quotations to or arrangements with shippers, consignees or carriers.

"Even under item 11 of the tariff, agreements must be consistent with national law, which includes the Shipping Act, 1916.

"In *Practices, Etc., of San Francisco Bay Area Terminals*, 2 U.S.M.C. 588 (1941), also 2 U.S.M.C. 709 (1944), it was found, among other things, that there was a lack of uniformity in and the application of the respondent terminals' free-time rules, regulations, and practices, and that the manner in which they were applied afforded opportunity for unequal treatment of shippers. The free-time rules, regulations, and practices were found unduly prejudicial and preferential in violation of section 16, and unreasonable in violation of section 17 of the Act. Reasonable free-time periods not in excess of 10 days were prescribed, with the single exception of 21 days on petroleum products.

"[3] See appendices 'B' and 'C'.

"The respondent points out that its operations differ from those in *San Francisco Bay Area Terminals case*, *supra*, because there was competition between terminals in that case whereas there is only one terminal in the present proceeding. The respondent contends that a mere preference or discrimination between shippers, carriers, terminal operators, ports, or localities is not of itself unlawful, and that it is only when such preference or discrimination is unjust or unreasonable and results in injury or damage to a particular person or class of persons or advantage to another particular person or class of persons that the same is prohibited by the Act. Respondent cites cases holding that ordinarily there must be a competitive relation between the shippers or between the types of traffic and that there must be a showing of injurious effect upon the traffic to justify findings of undue preference or prejudice. For example, see *Phila. Ocean Traffic Bureau* v. *Export SS. Corp.*, 1 U.S.S.B.B. 538, 541. The citations largely relate to section 16 of the Act and to matters of preference and prejudice, rather than to whether the practices are undue or unreasonable under section 17 of the Act.

"There is no question that respondent offered and shippers availed themselves of free time and free storage arrangements contrary to those provided in respondent's terminal tariff. Not only did these arrangements differ from those in the tariff, but also these arrangements differed from shipper to shipper and from commodity to commodity. The arrangements were negotiated or arranged with individual shippers. This proceeding, at least in part, is similar to *San Francisco Bay Area Terminals*, *supra*. In both instances the free-time rules, regulations, and practices were or are applied in such a manner as to afford opportunity for unequal treatment of shippers. No one was ever charged demurrage for any purpose or any amount at any time in the experience of the manager of the Port of Longview, regardless of the length of time that the cargo remained on or off the pier. As already seen, free time or free storage has been granted for 30 days, 90 days, six months, and a year, and has varied even among shippers of the same commodity. Free time or free storage has been given shippers of some classes of cargo far in excess of that given to shippers of other classes of cargo.

"In *San Francisco Bay Area Terminals*, *supra*, it is stated at pages 595–596 and at pages 603–605 as follows:

"Free time is the period allowed for the assembling of cargo upon, or its removal from the wharves. Upon its expiration, demurrage charges are assessed. * * * Obviously, when demurrage is waived, transit shed space, the most valuable in the terminal is being wasted. This involves a cost which has to be recouped somewhere and it is unreasonable that those shippers who do not use the piers beyond the free time should be forced to bear the burden either directly or indirectly. The practice also affords an opportunity to discriminate between shippers.

* * * * * * *

"The next question is whether granting storage at noncompensatory rates is unduly preferential and prejudicial in violation of section 16 of the Shipping Act, 1916, and an unreasonable practice in violation of section 17 thereof. The storage cases previously mentioned, 1 U.S.M.C. 676, and 2 U.S.M.C. 48, establish two propositions. First, the furnishing of free storage facilities beyond a reasonable period results in substantial inequality of service as between shippers. * * * Second, any preferred treatment by charges or otherwise of certain classes of cargo results in discrimination against other cargo.

* * * * * * *

"Furthermore, it should not be overlooked that the practice of furnishing one service below cost has the tendency to prevent any downward revisions of rates for other services however justified they may be. Clearly, such a practice is unreasonable.

"The failure of respondent to abide by the provisions of its tariff, the manner in which respondent's free time or free storage and storage rules are applied, and the opportunity thereby afforded respondent to provide unequal treatment of shippers and preferred treatment of certain classes of cargo, clearly are practices unduly prejudicial and preferential, in violation of section 16 of the Act, and are unjust and unreasonable practices related to the receiving, handling, storing, and delivering of property, in violation of section 17.

"While no shippers, consignees, or receivers are named as respondents, they should abide by the tariff rates, charges, and provisions relative to handling, free time, and storage of their property in connection with the transfer and transportation by water."

We find that the failure of respondent to abide by the free time and storage provisions in its tariff, the manner in which respondent actually has provided free time and storage outside of its tariff provisions, and the opportunity thereby afforded respondent to provide unequal treatment of shippers and preferred treatment of certain classes of cargo, are practices unduly prejudicial and preferential, in violation of section 16 of the Act, and unjust and unreasonable practices in violation of section 17 thereof.

An appropriate order will be entered requiring respondent to cease and desist from the violations found to exist.

"APPENDIX A

JANUARY 31, 1956.

Mr. W. D. CAVANAUGH,
William D. Cavanaugh Associates,
64 East 34th Street,
New York 16, N.Y.

DEAR BILL: Thanks for your letter on National Potteries Co., and I would appreciate your following it up.

As to storage, I did not anticipate ceramics so on this item you may drop the storage rate to 2¢ per ton per day, after 30 days. Also the rule is not hard and fast, you may dicker and we should be able to get together. The only thing is I don't believe it is wise to open up a "carte blanche" or all we will get is the frustrated stuff while other ports will get the fast moving cargo.

Best regards,

PORT OF LONGVIEW,
HARVEY B. HART,
Manager.

HBH:dr
Encl.

"APPENDIX B

SEPTEMBER 4, 1956.

Mr. ERIC WAGNER,
Del Valle, Kahman & Co.,
260 California Street,
San Francisco 11, Calif.

DEAR SIR: Answering your query of August 30, 1956, the Port of Longview owns very sizeable off dock warehousing facilities and it is our policy in granting relief from conventional storage practices to take into consideration three factors:

1. That certain import commodities require reasonable stocks on hand to allow the importer to do business.

2. That certain products must be assembled due to their seasonal sales characteristics.

3. That some ultimate buyers of Import Commodities cannot accept merchandise in massive deliveries but must have their flow on a scheduled basis.

We, therefore, in selected cases by agreement with the importer allot space in our off dock warehouses without additional charge in order to take care of these demands and, of course, to stimulate the flow of cargo through the Port. The Port of Longview Terminal Tariff does not apply to these facilities.

We will be glad to handle your import plywood as outlined by telephone this morning waiving storage and accepting approximately 20% of your annual requirements at any one time. We will, of course, expect you to use us on fast-moving cargo as well as that which requires detention at the Port. Plywood will be lotted according to bill of lading and vessel and we would appreciate receiving through you or your forwarder packing lists which will allow us to segregate the material by size, glue type, and quality. Delivery will be made on your orders and we request that we be allowed the privileges of picking cases from full range numbers rather than individual case numbers. On loading out our packing list will be sent to you naming individual case numbers shipped. On OCP cargo all charges are absorbed jointly by the ocean and rail carriers. On local cargo terminal charges will be billed as follow.

Wharfage	50¢ per 2,000 lb. until October 1 and 70¢ thereafter.
Car Loading	$2.63 per 2,000 lb. including dunnaging and blocking.
Handling	(According to Steamship Conference Tariffs) $1.35 per 2,000 lb. or 40 cu. ft. Maximum of $2.00 per 2,000 lb.

We very much appreciate your inquiry and have handled a good deal of your material which has been sold to other people and we hope you see fit to make use of our facilities.

Very truly yours,

PORT OF LONGVIEW,
HARVEY B. HART,
Manager.

HBH:jr

"APPENDIX C

APRIL 5, 1954.

AIRMAIL.

Mr. J. P. OHLER,
Assistant General Traffic Manager,
Singer Sewing Machine Co.,
149 Broadway,
New York, N.Y.

DEAR MR. OHLER: At the request of Mr. Julius R. Jensen, Manager, Cowlitz County Industrial Bureau, we are sending you a brochure outlining the facilities of the Port of Longview, and also Terminal Tariff #2 outlining charges and services.

Tariffs, as you know, are of a general nature and I feel that if you have a particular type of movement in mind and can give us details—volume, origin, and possible destination—we can quote you much more satisfactorily. I hope you will give us this privilege.

It is our understanding that Mr. Jensen is attempting to prevail upon your company to locate a warehousing operation at Longview. We have much to offer from a transportation standpoint and will be happy to assist you in any way possible.

Very truly yours,

PORT OF LONGVIEW,
H. B. HART,
Manager.

HBH: mij
cc:
Mr. Julius Jensen
Mr. William Cavanaugh
Encl."

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 13th day of December A.D. 1960

No. 879

STORAGE PRACTICES OF THE PORT OF LONGVIEW COMMISSION AT THE PORT OF LONGVIEW, WASHINGTON

This proceeding having been initiated by the Board upon its own motion, as authorized by section 22 of the Shipping Act, 1916 (46 U.S.C. 821), and having been duly heard and submitted, and investigation of the things and matters involved having been made, and the Board, on the date hereof, having made and entered of record a report containing its conclusions and decision thereon, which report is hereby referred to and made a part hereof:

It is ordered, That:

1. Respondent be, and it is hereby, notified and required (a) to hereafter abstain from the practices herein found to be unlawful under sections 16 and 17 of the Shipping Act, 1916, as amended, and (b) to notify the Board within ten (10) days from the date of service hereof whether respondent has complied with this order, and if so, the manner in which compliance has been made, pursuant to Rule 1(c) of the Board's Rules of Practice and Procedure (46 CFR § 201.3).

2. The proceeding be, and it is hereby, discontinued.

By the Board.

(Sgd.) THOMAS LISI,
Secretary.

FEDERAL MARITIME BOARD

No. 853

RAYMOND INTERNATIONAL, INC.

v.

VENEZUELAN LINE

Decided January 3, 1961

Classification of fibre forms for concrete found to be correct. Rate charged on a shipment of fibre concrete forms from the port of New York, N.Y., to Las Piedras, Venezuela, found not to be in violation of sections 15, 16, or 17 of the Shipping Act, 1916. Reparation denied. Complaint dismissed.

Gerald H. Ulman for Raymond International, Inc., complainant.

John R. Mahoney and *David Orlin* for Venezuelan Line, respondent.

REPORT OF THE BOARD

RALPH E. WILSON, *Chairman;* THOMAS E. STAKEM, *Vice Chairman;* SIGFRID B. UNANDER, *Member*

BY THE BOARD:

I. PROCEEDINGS

This is a complaint by a shipper against a common carrier by water alleging discriminatory overcharges on a shipment in 1957 of fibre tubes called "Sonovoids", from New York, New York to Las Piedras, Venezuela on the Venezuelan line. Detriment to the commerce of the United States and unreasonable prejudice and disadvantage to the complainant in violation of Sections 15, 16, and 17 of the Shipping Act, 1916, (Act) are alleged. The answer denies these charges. Hearings were held followed by briefs and a recommended decision by an Examiner dated May 31, 1960. The recommended decision was that none of the charges and allegations had been proven. Exceptions and a reply were filed, followed by oral argument.

II. FACTS

Complainant, Raymond International, Inc. (Raymond) in November 1957 delivered to respondent, Venezuelan Line, (Venezuelan) 412 pieces of hollow fibre tubes known as "Sonovoids" for transportation to Las Piedras, Venezuela. The shipment was described in an ocean bill of lading showing Raymond as the shipper and "Compania Shell de Venezuela Ltda." as the consignee. The bill of lading described the property as "fibre conduit" and handwritten above these typewritten words is: "concrete molding forms".

The "Sonovoids" comprising the shipment in question were fibre tubes from 20′ to 20′ 8″ long and from 14″ to 18.7″ in outside diameter with a wall thickness of .250″ and .300″ made of plies of paper spirally wound into a round tube. A special ply of kraft paper and asphalt is incorporated into the layers and the interior and exterior surfaces are uniformly wax impregnated. The tubes were used by the shipper to create empty spaces or voids inside pre-cast or cast-in-place concrete slabs, columns, walls and piles to make them lighter and to use less concrete. They were advertised and sold for this purpose as shown by descriptive leaflets and pages for insertion in standard product specification catalogues. The evidence showed they could also be used for conduits or pipes where durability was not required but were not extensively used for these purposes nor are they currently advertised or sold for such purpose.

There were four potentially applicable tariff rates observed by the carrier. The rates were those of the United States-Atlantic and Gulf Venezuela and Netherlands-Antilles Conference which the Venezuelan Line had agreed to maintain even though it did not belong to this conference (see Venezuelan agreement of June 19, 1950 and F.M.B. Agreement No. 7777, approved August 3, 1950). The rates they agreed to maintain are found in Freight Tariff VEN 7, Item 1000. A classification was used reading "Forms, viz.: Fibre . . . (for concrete columns), Classification 8. This rate was the lowest of the three considered by the carrier. The tariff also provided for a measurement by weight and by volume with the measurement producing the highest revenue to be used. Since the tubes were relatively light, the volume measurement was used.

The complainant contends that the fourth available rate should have been applied covering "Conduits, fibre, viz.: . . . over 12″ but not over 20″ inside diameter . . . weight" Class 3 rate. The Class 3 rate was $48.00 per ton weight.

III. DISCUSSION

None of the classifications in the tariff exactly fits the property transported. The question is whether the classification applied by the carrier reasonably describes the property. We have held that descriptive words in tariffs must be construed in the sense they are generally understood and accepted commercially. Shippers cannot be permitted to avail themselves of a strained and unnatural construction. *Thomas G. Crowe et al v. Southern S.S. et al* 1 U.S.S.B. 145, 147 (1929). The proper test is the "meaning which the words used might reasonably carry to the shippers to whom they are addressed". *U.S. v. Missouri Pac. RR Co.*, 250 F 2d 805, 807 (5th Cir. 1958). Use in a few isolated instances does not contradict the essential characteristics of the property. *Misclassification and Misbilling of Glass Tumblers and Other Manufactured Glassware Items as Jars.* 6 F.M.B. 155 (1960). In our opinion the reasonable construction of the tariff language is the tubes are forms for concrete and are made of fibre.

Since the property was not precisely described in the tariff, reference was made to the manufacturer's descriptive literature which calls them "laminated fibre tubes" and shows how they are used with concrete. The complainant's traffic manager referred to them as "cardboard fibre concrete forms" hence the "forms classification" was considered proper. The "forms" description was sought to be excluded from consideration because forms are used outside and concrete is poured into them. The tubes on the other hand were used on the inside and concrete was poured around them. For this reason they were said to be fillers or displacers of concrete. While this is partly true, we concur with the Examiner that it is likewise true that they are internal forms for shaping the concrete that is poured around them. Under the circumstances the selection of the fibre forms classification in conjunction with their use with concrete was reasonable and was the closest description in the tariff applicable to these particular objects. The fact that the bill of lading used the word "conduit" does not alter the essential characteristics of the product as understood by the shipper, who used them with concrete.

We also agree with the Examiner that in view of the shipping characteristics of the tubes the rate charged by the respondent on a measurement basis was not excessive and therefore was not detrimental to the commerce of the United States in violation of Section 15 of the Shipping Act, 1916. The fact that the rate charged by respondent on a measurement basis was 225% of the value of the shipment is not conclusive, in view of the amount of space taken on board a ship, its requirements for a protective tarpaulin covering, and the difficulties of handling the property.

The validity of the tariff regulation is not compromised by the excessive ratio of value of the products to freight rate resulting from the application of a volume measurement rate instead of a weight rate. The cargo has what are known as "balloon" characteristics because the cargo takes up a large amount of space in relation to its weight and is not compressible. Historical concepts of rate making have established the validity of using volume measurement rates where the measurement ton rates to weight ton rates ratio is extreme as in this case.

The respondent was also shown to have given a rate on a weight basis under the "conduits, fibre" classification to the Orangeburg Manufacturing Company for a shipment of pipe instead of on a measurement basis as it did to complainant. This was complained of as being a discrimination between shippers entitling the complainant to reparations for violations of Sections 16 and 17 of the Act. Orangeburg, however, is not a competitive product because of its different characteristics and use. It is a different product altogether. In the manufacture of so-called Orangeburg fibre conduits "fluid pulp is built into tubular shape on a rotating mandrel and at the same time is felted under pressure" which produces a "dense and strong" pipe which is later placed in tanks where it is thoroughly impregnated under high vacuum with hard coal tar pitch. Finished it is 75% pitch and 25% fibre by weight which makes it much denser than the cardboard forms. It is used primarily as an electric cable conduit after being encased in concrete. Its shipping characteristics are entirely different being heavier and more durable. Its smaller size and greater density make a weight measurement as a basis of rate charges appropriate.

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 3rd day of January 1961.

No. 853

RAYMOND INTERNATONAL, INC.

v.

VENEZUELAN LINE

This proceeding being at issue on complaint and answer on file, and having been duly heard and submitted, by the parties, and full investigation having been had, and the Board, on the date hereof, having made and entered of record a report containing its conclusions and decision thereon, which said report is hereby referred to and made part hereof:

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

By the Board.

(Sgd.) THOMAS LISI,
Secretary.

(SEAL)

FEDERAL MARITIME BOARD

No. S–91

GRACE LINE, INC.—APPLICATION TO SERVE PORT-AU-PRINCE, HAITI, FROM U.S. ATLANTIC PORTS

Decided January 13, 1961

Grace Line, Inc. service to Port-au-Prince, Haiti, from United States Atlantic ports approved. Existing service by vessels of United States Registry operated on a service, route or line served by citizens of the United States determined to be inadequate and that in the accomplishment of the purposes and policy of the Merchant Marine Act of 1936, additional vessels should be operated thereon.

Odell Kominers, J. Alton Boyer, E. R. Lutz, and *T. B. Westfall,* for Applicant Grace Line, Inc.

Paul A. Bentz, David J. Markun, and *Theodore P. Daly,* for Intervener Panama Canal Company.

Robert E. Mitchell, Edward Aptaker, and *Robert B. Hood, Jr.,* Public Counsel.

REPORT OF THE BOARD

RALPH E. WILSON, *Chairman,* THOMAS E. STAKEM, *Vice Chairman,* SIGFRID B. UNANDER, *Member*

BY THE BOARD:

Grace Line, Inc. (Grace Line) as required by its Operating Differential Subsidy Agreement with the Federal Maritime Board (Contract No. FMB–49) by letters of February 26 and March 3, 1959 has requested permission (the Contract refers to obtaining "the prior approval of the United States") to commence service from U. S. Atlantic ports to Port-au-Prince, Haiti, in accordance with a proposed schedule which accompanied its request.

732-047 O-64—14

By an order dated March 23, 1959 we gave public notice of the Grace Line application and requested those having any interest in the application and desiring a hearing thereon to notify the Secretary (24 F.R. 2374 published March 26, 1959). The Panama Canal Company (Panama Canal) by its President was the only petitioner for a hearing. Hearings were held before an Examiner and a Recommended Decision was served May 5, 1960. In this decision service provided by ships of United States registry was found to be adequate.

Exceptions were filed by Grace Lines and by public counsel. Thereafter the Panama Canal, sole intervener and opponent of the Grace Line application, asked for and was granted leave to withdraw from the proceeding.

Thereafter, it appearing 1. that Panama Canal had withdrawn from the proceeding, and 2. that the facts and circumstances upon which the recommended decision was based may have materially changed, we ordered that the proceeding be remanded to the Examiner for a further hearing and recommendation. A further hearing was held November 23, 1960. As a result of this hearing the Examiner found in an initial decision served December 13, 1960 that U. S. flag service to Port-au-Prince, Haiti, was now inadequate.*

The Merchant Marine Act, 1936, clearly requires the development and operation of a privately owned merchant marine under U. S. registry sufficient to carry a substantial portion of the water borne export and import foreign commerce of the United States, and to provide shipping service on all routes essential for maintaining the flow of such commerce at all times. Title V and Title VI provide the forms of aid which Congress deemed essential for accomplishing this.

Provisions of Sections 704 and 705 of the Act become increasingly significant in translating the mandate of Congress that a privately owned merchant fleet be developed and maintained. These sections emphasize that the government owned vessels then being operated were to be removed from service as soon as practicable.

* It is to be noted that after February 10, 1961 the activities of Panama Canal Line will be confined solely to the transportation of passengers and freight for the account of the Panama Canal Company and the Canal Zone government pursuant to a directive by the President in a memorandum dated December 21, 1960 to the Secretary of the Army. If any consideration is to be given to this limitation on Panama Canal's service it would be to further increase the inadequacy of non-governmental service to Port-au-Prince, Haiti, and to create a corresponding need for Grace Lines' proposed service.

The establishment of any steamship line by the United States Maritime Commission could only be accomplished if the foreign trade of the United States was not served adequately by privately owned and operated U.S. flag steamship lines. (Section 705) And where any such line may have been established, the Congress declared in that same section of the law, "it shall be the policy . . . to encourage *private operation* . . . by selling such lines to citizens of the United States . . ." (Emphasis added). Grace Line is a privately owned shipping line and in reaching our conclusions on inadequacy of service, competing government owned service should not be considered.

Even if we should include Panama's carryings we find the service provided by U. S. flag carriers to be inadequate.

The overall participation by U. S.-flag vessels (including Panama's) in the entire North Atlantic/Port-au-Prince Trade both outbound and inbound fell from 50% for the period 1955-1958 to 40.7% in 1959. It declined to 57% in 1958 from 64% in 1957.

Exception was made to the Examiner's finding that U. S.-flag service in the New York segment of the North Atlantic/Haiti trade is adequate. We do not agree with the Examiner that our decision in *Gulf & South American Steamship Co., Inc.—Service Extension Route 31*, 5 F.M.B 747 (1959), is controlling in this case.

1. New York is not the dominant port to the extent that New Orleans is for the movement of outbound cargo as compared with other Gulf ports. New York's percentage share of total North Atlantic outbound traffic in 1959 was 51.1% and appears to be declining (93% in 1957 and 78% in 1958). New Orleans' corresponding share in the first 6 months of 1958 was 72% of the total tonnage of liner commercial cargo against the remainder for other Gulf ports.

2. U. S. flag participation in commercial cargo (including Panama's carryings outbound) in liner service is not as dominant from New York as it was from New Orleans, being most recently 60.6% in 1959 as against 83% from New Orleans.

3. In the total North Atlantic trade U. S.-flag outbound participation for the latest period (1959) is 31% and has declined the last 3 years. The comparable U. S. flag participation in the Gulf area was 61% for the last six months in 1958.

We find that Grace Line is not operating an existing service on Trade Route No. 4 between U. S. North Atlantic ports and ports in Haiti and that the service already provided by ships or vessels of U. S. registry in such service is inadequate within the meaning of Sec. 605 (c) and that in the accomplishment of the purposes and policy of the Act the additional service proposed by Grace Line should be permitted; and that Sec. 605 (c) is not a bar to the granting of an operating-differential subsidy to Grace Line for the operation of additional vessels on the route in accordance with its proposed schedule.

FEDERAL MARITIME BOARD

No. 833

MAATSCHAPPIJ "ZEETRANSPORT" N. V. (ORANJE LINE) ET AL.

v.

ANCHOR LINE LIMITED ET AL.

Decided January 23, 1961

1. Upon complaint, respondents Anchor Line, Ltd., The Bristol City Line of Steamships Ltd., Canadian Pacific Ry. Co., The Cunard Steamship Co. Ltd., Furness, Withy & Co. Ltd., Manchester Liners, Ltd., The Ulster Steamship Co. Ltd.—Head Line & Lord Line, found to have violated the provisions of Sec. 15 of the Shipping Act, 1916, as amended, which require common carriers by water to file immediately with the Federal Maritime Board a true copy or a true and complete memorandum of every agreement with another such carrier to which it may be a party or conform to, in whole or in part, fixing or regulating transportation rates.

2. Upon complaint, respondents Anchor Line, The Bristol City Line of Steamships Ltd., Canadian Pacific Ry. Co., The Cunard Steamship Co. Ltd., Furness, Withy & Co. Ltd., The Ulster Steamship Co. Ltd.—Head Line & Lord Line, found to have violated the provisions of Sec. 15 of the Shipping Act, 1916, as amended, which require common carriers by water to file immediately with the Federal Maritime Board a true copy or a true and complete memorandum of every agreement with another such carrier to which it may be a party or conform to in whole or in part, allotting ports or restricting or otherwise regulating the number and character of sailings between ports, and providing for exclusive, preferential or cooperative working arrangements.

George F. Galland, G. Nathan Calkins, Jr., Robert N. Kharasch, and *Thomas K. Roche* for Oranje Line et al.

Ronald A. Capone, Cletus Keating, Elmer C. Maddy, and *Robert E. Kline, Jr.,* for Anchor Line Limited et al.

Edward Schmeltzer, Edward Aptaker, and *Robert E. Mitchell* as Public Counsel.

REPORT OF THE BOARD

RALPH E. WILSON, *Chairman;* THOMAS E. STAKEM, *Vice Chairman;* SIGFRID B. UNANDER, *Member*

BY THE BOARD:

I. PROCEEDINGS

This is a reopened proceeding resulting from an order of September 19, 1960, ordering re-argument in the matter if requested by any of the parties. On September 21, 1960, the attorneys for the complainants requested re-argument.

The complainants are a group of common carriers by water in the foreign commerce of the United States operating between ports of the United Kingdom of Great Britain and Great Lakes and St. Lawrence River ports in the United States and Canada. They consist of the following companies: Maatschappij "Zeetransport" N. V., a Netherlands Corporation, (Oranje Line); A/S Luksfjell, A/S Dovrefjell, A/S Falkefjell and A.S Rudolph, Norwegian corporations (Fjell Line); and Smith Rederi A/B and Rederiaktiebolaget Ragne, Swedish Corporations (Swedish Chicago Line); Liverpool Liners Limited, a British corporation; and, A/B R. Nordstrom & Co. OY, a Finnish corporation (Nordlake Line).

The case has been considered on the present record and on oral re-argument. Our previous report on such record appeared in 5 F.M.B. 714, was decided December 14, 1959 and served March 2, 1960. Re-argument was ordered as the result of an appeal from the Board's report filed in the United States Circuit Court of Appeals for the District of Columbia in No. 15,700. The appeal contends that the Board's order was unlawful for want of a majority vote on the issues involved in Docket No. 833. Oral argument was held on November 30, 1960. The issues were limited to the complaint in No. 833 alleging violations of sections 14 and 15 of the Shipping Act, 1916, as amended, (Act), (39 Stat. 733, 46 U.S.C. 812, 814) as follows:

1. The respondents, Anchor Line Limited (Anchor); The Bristol City Line of Steamships Ltd. (Bristol City); Canadian Pacific Railway Company (Canadian Pacific); The Cunard Steamship Co. Ltd. (Cunard); Ellerman's Wilson Line Limited (Ellerman); Furness, Withy & Co. Limited (Furness); Manchester Liners Ltd. (Manchester); The Ulster Steamship Company, Ltd.—Head Line & Lord Line (Head & Lord); between January 1958 and March

28, 1958, acting in concert, notified shippers in the trade from the United Kingdom to United States Great Lakes ports of freight rates contained in a jointly agreed upon tariff and quoted rates therefrom without the Board's approval.

2. The Ulster Steamship Company, Ltd., Head Line & Lord Line, The Anchor Line, Limited and The Bristol City Line of Steamships Ltd. without Board approval entered into a cooperative working arrangement calling for a pooling of vessels, alternation of sailings and joint service from the port of Glasgow for the 1958 navigation season together with understandings for the maintenance of uniform rates.

3. The respondents executed Agreement No. 8400 controlling and regulating competition and filed it with the Board for approval on November 5, 1957, knowing at the time that there was then in existence Agreement No. 8140 which had created with the Board's approval a conference in substantially the same trade which Agreement No. 8400 purports to cover. Agreement No. 8400 is alleged to be unlawful.

4. The aforesaid violations and Agreement No. 8400 are elements of a conspiracy to drive complainants from the trade between the United States and Canadian Great Lakes and St. Lawrence River ports on the one hand and ports in the United Kingdom on the other.

5. The respondents are also parties to agreements, understandings, and cooperative working arrangements, whereby they have apportioned among various of their members ports or ranges of ports on the United States Great Lakes in conjunction with ports or ranges of ports on the Canadian shore of the Great Lakes as well as Canadian ports on the St. Lawrence River. Such agreements, understandings and arrangements seriously restrict competition between the respondents and others in foreign commerce of the United States and eliminates or destroys competition among the respondents in such commerce of the United States between the Great Lakes and the United Kingdom and Eire. None of the foregoing agreements, understandings or arrangements is reflected in Agreement No. 8400.

These proceedings are further limited to a review of the alleged violations of Sec. 15 of the Act.

II. FACTS

The facts relate to the evidence showing: (a) alleged unapproved agreements fixing or regulating transportation rates; (b) unapproved agreements controlling, regulating, preventing or destroying competition, or allotting ports or restricting or otherwise regulating the number and character of sailings between ports or providing a cooperative working arrangement; and (c) possible conspiracy to drive complainants from the trade between United States and Canadian Great Lakes and St. Lawrence River ports on the one hand and ports in the United Kingdom of Great Britain on the other hand.

On January 18, 1958, the Board published a notice in the Federal Register (23 FR 349) that the respondents had filed for approval under Sec. 15 of the Act, a proposed agreement No. 8400 to create a new conference to be known as the British Westbound Conference from Great Britain and Northern Ireland and Eire to Great Lakes ports in the United States. In preliminary meetings leading to the organization of a conference, secretaries were designated to draft the conference agreement and to proceed with the compilation of a draft tariff to be used by the conference. A draft in at least 79 serially numbered copies was prepared and submitted to the member lines in the proposed conference. Revisions were circulated bearing effective dates. Each line keeps a copy and receives amendments keeping the tariff up to date. The secretary is notified each day of the rates each line quotes "in competition with non-conference outsiders". The cover page describes the tariff as applicable to traffic to the same ports as the ports covered by the proposed conference agreement. A draft tariff was issued some time prior to February 7, 1958. The date on the cover of the more recent tariff in evidence is April 1958. The tariff was described by the secretary as the basic tariff under the proposed agreement and the one which would be printed when the agreement was approved. The secretary said the lines "naturally refer to the tariff" in quoting rates and that the tariff "would likely be a tariff that they were free to use if they like . . . something they normally refer to to find out what would be somewhere about the basis of the rates." None of the respondents suggested that they had any other tariff.

Thereafter, the record showed that six different carriers in the conference quoted, with two exceptions, identical rates in response to many shippers' inquiries relative to specified commodities to designated ports. Rate quotation letters written in April 1958 to shippers covering twelve commodities or commodity classifications showed identical quotations in each case where two or more lines quoted rates on a particular commodity to a particular destination. In the case of every commodity except linoleum tiles the proposed tariff rates were quoted, but even on the tiles the four quoting carriers gave identical rates. The tariff rates were not available to nonconference members. A variation in rate quotations on two commodities by one of the members was shown.

There are two groups of alleged cooperative arrangements. The first is the Anchor-Bristol City-Head & Lord lines arrangement and the second is the Canadian Pacific-Cunard-Furness lines arrangement.

The second group of lines is not explicitly identified by their names in the complaint, but the names of the participating lines were established during the hearing and such lines are considered as being covered by the part of the complaint referred to in item 5 above.

With regard to the first, four ships, the M. V. *Korbach, Fair Head, Urania* and *Ballygally Head* were advertised to provide freight service by three lines, Bristol City, Anchor and Head & Lord from the three ports of Avonmouth, Glasgow and Liverpool to American ports in the Great Lakes. The M. V. *Urania* was a German registered ship chartered to The Ulster Steamship Company Ltd.—(Head & Lord Line) and the MV *Korbach* was a German registered ship chartered to Bristol City. The M.V.s *Fair Head* and *Ballygally Head* are British registered ships owned by the Ulster Steamship Co. Ltd. (Head & Lord Line). The advertisements appeared in various publications and by announcements in 1958. Closing dates for cargo at Glasgow were from March 27, 1958 through October 11, 1958. The M.V. *Korbach* was advertised by Anchor Line for closing of cargo from Glasgow and by Bristol City Line for closing of cargo from Avonmouth 6 days later, destined for Detroit and Chicago and on an "if inducement" basis for Cleveland and Milwaukee. The same vessel was similarly advertised for a voyage, with a two day interval between Avonmouth and Glasgow, about a month later by the same two lines. Next, the M.V. *Fair Head* was advertised by Anchor Line with a closing for cargo from Glasgow five days after the same vessel was advertised by Head & Lord Line for closing for cargo from Bristol. The same vessel and the same companies offered similarly spaced departures from the same cities in June and August. The

M.V. *Urania* was advertised by all three lines from the cities they served (Bristol City: Avonmouth, Head & Lord: Liverpool, and Anchor: Glasgow) with about a 5 day interval between each city for departures in April and June and a Liverpool-Glagow departure in August. The M.V. *Ballygally Head* was advertised by Anchor Line and Head & Lord for Glasgow-Liverpool cargo closings at about three to seven day intervals in May, July and September. The result of such voyages is that three of the four vessels were used by two companies and one vessel was used by three companies from the cities served by each of the lines.

An Anchor Line handbill stated its "pleasure in announcing their Freight Service between Glasgow and the American ports—the Great Lakes during the 1958 open water season" and listed the above named ships. The handbill stated that "freight engagements and all cargo received and shipped will be subject to the terms, conditions, exceptions and liberties of the Company's usual form of Wharfinger's Receipt and/or Bill of Lading". Other exhibits in the record showed Anchor Lines' offers of service for the season and generally describe it as a carrier although somewhat later in May 1958 it began calling itself "Loading Brokers". This change occurred after the complaint was filed in this case and after the Conference Secretary told the managing director of Anchor that their circular would be misinterpreted.

Although a ship used by Bristol City called at Glasgow, the advertising of Bristol City did not describe Anchor as an agent or loading broker or make any reference to Anchor or to Glasgow, but did list its agents in other ports than Glasgow. Anchor Line quoted its rates in response to shippers' inquiries and referred to "details of our sailing for the 1958 season."

Bristol City also advertised departures from Avonmouth, to Detroit and Chicago "and vice versa" and other "American Great Lakes ports if inducement". Head & Lord advertised departures from Liverpool to "U.S.A. Great Lakes Ports, Chicago and Detroit (also Cleveland and Milwaukee, if inducement)". The M.V.s *Korbach, Fair Head, Ballygally Head* and *Urania* were used as noted above.

With regard to the second group, service to United States Great Lakes ports in 1957 was also offered in advertisements by Canadian Pacific, Cunard and Furness. A handbill announcement and advertisements in Lloyd's Loading List Supplement and the Handy Shipping Guide announced service "London-Great Lakes Direct Canadian Pacific-Cunard-Furness to . . . Cleveland, Detroit, Chicago", listed the locations of the loading berths of each line in London and stated "For Rates of Freight and other information apply to" giving three London addresses and telephone numbers "Or any other Canadian Pacific, Cunard and Furness Line Office or Agency". At least fourteen such notices and others of similar import were shown for the months of March through May 1957. There was evidence in the announcements of an exchange of ships between Cunard and Canadian Pacific, but not in the service to Cleveland, Detroit and Chicago. The service to these ports, however, was alternated between the Cunard and Furness ships at about one week intervals. Cunard ships called at both Canadian and Great Lakes ports in the U.S. but Furness ships never called at Canadian ports and Canadian Pacific ships never called at Great Lakes U.S. ports. As regards American ports Cunard ships never called at Chicago. The proposed conference agreement disclosed still further refinements in restrictions on service to Great Lakes ports in the United States.

The following ships were German registered ships chartered in 1958 as noted: M.V.s *Erin Nuebel* and*Berni Nuebel* to Cunard, *Otto Nuebel* and *August Schulte* to Canadian Pacific, *Lissy Schulte* and *Maria Schulte* to Furness. The *Erin Nuebel* was advertised for cargo as both a Canadian Pacific and a Cunard ship. The *Otto Nuebel* was likewise advertised for cargo by these two lines.

The Chairman of Furness in his annual review of the Company's affairs at the annual General Meeting on September 25, 1957 had the following to say with possible reference to these arrangements:

> "For two years prior to 1957 we have operated a service, in conjunction with others, from London to ports in the Great Lakes. We consider this to be a necessary development, partly in protection of our Canadian business and partly to ensure our participating in the expansion of trade which it is anticipated will occur when the St. Lawrence Deepwater Seaway is opened for traffic in 1959. From the commencement of the current season, i.e., the opening of the St. Lawrence River to navigation, we have established our own direct service from London to Canadian and United States Lakes ports, including Toronto, Hamilton, Cleveland, Detroit, Milwaukee and Chicago in friendly association with the Cunard Steam-Ship Co., Ltd., and the Canadian Pacific Railway Co. Only small ships can be employed until the St. Lawrence Seaway is completed, after which date larger and consequently more economical tonnage will be introduced into the service provided developments justify such expansion."

The foregoing was explained as follows in a stipulation: "The statement was made to Furness, Withy & Company Stockholders and was intended to let our Stockholders know that we had entered this trade in our own right, in place of the earlier service to Canadian Lake ports which was previously operated in conjunction with others.

"The phrase 'in friendly co-operation' (sic) means precisely what it says, no more and no less, and friendly means the opposite of unfriendly. There is no agreement written or verbal, but without any obligation to do so, we endeavor not to tread on their toes in the hope that they similarly will endeavor to avoid treading on ours. That is all there is to it."

Another cooperative arrangement is thought to be shown by a joint notice entitled "Notice to Shippers and Consignees" dated March 1, 1958, as follows:

"Shippers and Consignees are hereby notified that the undernoted Lines will each operate regular Westbound services from their customary berth ports in the United Kingdom and Eire DIRECT to the United States Great Lakes ports, principally Cleveland, Detroit, Chicago and Milwaukee.

"The direct services will commence with the opening of the St. Lawrence Navigation this year, i.e., approximately 1st April, 1958, and interested Shippers or Consignees are invited to apply direct to the individual Lines for information concerning the frequency of service and the freight rates applicable on traffic shipped by the selected Line's Direct vessels.

Anchor Line Ltd.	Ellerman's Wilson Line Ltd.
Bristol City Line	Furness, Withy & Co. Ltd.
Canadian Pacific Railway Co.	Head Line & Lord Line
Cunard Steam-Ship Co. Ltd.	Manchester Liners Ltd."

In October 1956 the member lines of the North Atlantic Westbound Freight Association recorded in a minute that several of them (Anchor, Cunard, Furness, Head & Lord and Manchester) were operating independently to United States of America Great Lakes ports, that others intended to do the same and that McDiarmid & Co. had been instructed to draft an appropriate conference agreement. (McDiarmid & Co. is a professional organization of conference secretaries who administer conference agreements). This is the same agreement that was prepared in connection with the tariff rates and regulations noted above. Anchor, however, denied it operated any such independent service.

By letter of December 30, 1957, McDiarmid submitted for Board approval a signed agreement identified as F.M.B. No. 8400 covering Westbound trade. Agreement No. 8440 was submitted later and covered Eastbound trade. In Dockets 834 and 843 the Board refused to approve the two agreements. The agreements were in preparation for operations in 1958 to the Great Lakes.

The respondents are participants in a system of territorial divisions and of port assignments covering the routes of their vessels in the areas served by the proposed conference agreement. The

United Kingdom ports are served as follows: Anchor Line serves only Glasgow; Bristol City Line serves only Avonmouth and Bristol channel ports; Manchester Liners serves only Manchester; Head & Lord serve only Liverpool, Belfast and Dublin; Cunard, Furness and Canadian Pacific serve London and Liverpool. Canadian and United States Great Lakes ports are served as follows: Anchor, Bristol City, Manchester Liners and Head & Lord serve the full range of United States Great Lakes ports; Cunard and Canadian Pacific serve the United States Great Lakes ports only as far as Detroit; Furness serves these ports and Milwaukee and Chicago.

In addition to these United States Great Lakes ports the evidence disclosed that the same lines were participants in a pattern of port allocation along the United States Atlantic coast and appear to be restricted so as to not serve areas served by other British lines.

III. DISCUSSION

The violations complained of concern the failure of the respondents, to the extent that they are common carriers by water in the foreign commerce of the United States, to file immediately with the Board a true copy, or, if oral, a true and complete memorandum, of every agreement with another common carrier by water to which it may be a party or conform in whole or in part, dealing with certain subjects. The subjects of this proceeding are agreements fixing or regulating transportation rates or fares; controlling, regulating, preventing or destroying competition; and allotting ports or restricting or otherwise regulating the number and characteristics of sailings between ports; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" under Sec. 15, and in this report, "includes understandings, conferences and other arrangements". The Board may by order approve or disapprove agreements. Before approval and after disapproval agreements are unlawful.

The basis of the complaint is, that the respondents herein, were acting as though they were carrying out the proposed but unapproved conference agreement's obligations, by using the freight rates contained in the draft tariff which had been prepared. First, the respondents distributed 79 copies of the tariff among themselves and second, the respondents quoted the tariff rates to shippers.

The respondents were shown to have quoted rates exactly as they appear in the tariff which contains detailed and complex rates and regulations. The tariff was not on file anywhere so it could not be consulted by everyone. All respondents received notices of changes and all reported their quotations from time to time. One line could not find out what another was doing without consultation. The rates used were the same as each other's and were the same as the tariff rates with one or two exceptions. Without the exchange of information they couldn't conceivably quote the same rates. Even in the case of the exceptions, the lines used a uniform rate. Apparently, as respondent's counsel indicated in oral argument, "it would have been foolish to have waited Board approval" (sic.) before preparing, and presumably using, the tariff.

Three of the respondents' advertisements covering about a year state: "For rates of freight and other information apply: Canadian Pacific Railroad" or "Cunard Line" or "Furness, Withy & Company", giving the address and telephone number of each. Under this it says to apply to: "Any other Canadian Pacific, Cunard or Furness Line office or agency". It is a fair inference that a shipper would not call each line for its own rates in response to such an advertisement but that a shipper could call any one of the lines or their agents and obtain an applicable rate. It would have been very easy to rebut any such uniformity of rates by bringing in bills of lading showing variations but this was not done.

Such uniformity of action is consistent only with some sort of previous understanding that the carriers would conform to an agreed course of action. Independent activity without any understanding normally would produce differing and non-conforming actions by each carrier. The result was that transportation rates were fixed and regulated.

No evidence of any such agreement in the form of a true copy, or of any understanding in the form of a memorandum was ever filed with the Board as required by Sec. 15. The legislative history of the Act makes it clear that Congress was interested in oral understandings, tacit agreements and gentlemen's agreements between common carriers by water such as those involved here. (*The Alexander Report*, House Doc. 805, 63d Cong. (1914) see vol. 4 pp. 295–304, 416–418). The purpose of Sec. 15 was to place in Board custody information and proofs which the Board could review and analyze and make up its mind about whether the requirements of the second paragraph of Sec. 15 were being followed. In this case the respondents have not put in Board hands evidence of understandings to which they are a party or to which they conform. The complaint of a violation of the requirement in Sec. 15 as to filing agreements relating to fixing or regulating transportation rates has been proven. See: *Wharfage Charges and Practices at Boston, Mass.* 2 U.S.M.C. 245 (1940).

The basis of the second major complaint is directed at the regulation of the number and character of sailings between ports and at cooperative working agreements. The result of the schedules observed by six of the respondents is a coordinated westbound service between the United Kingdom and United States Great Lakes ports during the 1957 and 1958 navigation seasons. Two groups of sailing arrangements are shown: Those between Anchor, Bristol City and Head & Lord lines covering the ports of Glasgow, Bristol City, Avonmouth and Liverpool during 1958 and those between Canadian Pacific, Cunard and Furness departing from London, during 1957 and 1958, destined to United States Great Lakes ports.

The significance of the notices described herein is not that they involve joint advertising which by itself does not justify finding that the action was taken pursuant to agreement. *Los Angeles By-Products Co. et al. v. Barber SS Lines Co. Inc., et al.* 2 U.S.M.C. 106, 108 (1939). The significance is that the information contained in the notices requires cooperative arrangements to carry out the commitments made to the public. The commitments also require activity going far beyond that which occurs simply as the result of respect for the historic position of each line in a port as far as the United Kingdom is concerned. In the United States there could be no such tacitly respected historic position in the Great Lakes.

The work involved in preparing the advertisements and schedules bespeaks mutual understandings among the participating lines as to how ports should be allotted, what schedules to print and about the timing, destination and other description of service to United States ports. The subsequent detailed alternation of departures and arrival of ships from the allotted ports in accordance with the public notice, the use of berths, the loading of cargo and the allocation of revenues and costs all require coordinated activity which could only be accomplished by a policy of cooperation followed by arrangements made at the managerial level among the participating companies. A highly sophisticated plan of operations has resulted. It is inconceivable that the administrative organization connected with the use of so much money, the movements of so many ships, or of so much cargo, and of so many ports between different carriers during a full season could be conducted without some explicit understandings as to cooperative activity to regulate sailings between the allotted ports, and as to the distribution of revenues and the sharing of expenses.

There was evidence that the respondents passed ships from one company to the other to enable each line to carry cargo to the ports each served including United States Great Lakes ports. There was no break in this pattern of exclusive and preferential service from various ports. The uniform characteristics of the service preclude any inference of independent operation. Mutual agreement is essential to the effective accomplishment of the operations shown in this record. When all of this coordinated activity follows statements of a corporate official reading "service in conjunction with others" and the careful coordination required to avoid treading on others' toes is considered, the existence of agreements is inescapable.

No evidence of the required agreements in the form of true copies or memorandums describing these undertakings were ever filed with the Board pursuant to Sec. 15. The complaint of a violation of the requirement in Sec. 15 as to the filing of agreements relating to the allotment of ports, the restriction or regulation of the number and character of sailings between ports and to exclusive, preferential or cooperative working arrangements has likewise been proven.

The final charge of violations was that the proposed agreements F.M.B. 8400 and 8440 are not full agreements between the parties, therefore, they do not qualify for approval. A larger pattern of operations which restricts or destroys competition is charged. Since we are not revising the earlier report disapproving the proposed agreements, no review of these charges is undertaken.

Other than the inferences of conspiracy sought to be drawn from the route and port call pattern of the respondents, no proof of conspiratorial actions against the complainants was produced. More than this is needed and such complaint is found to be unproven.

The defense was interposed that respondent Anchor was not a common carrier by water. Generally, Bristol City's [1] and Head &

[1] Bristol City is not a common carrier as to the M.V. *Urania* which was identified as a "Head Line" ship using "Head Line Bills of Lading". (Ex 35).

Lord's common carrier status as regards this joint undertaking is not in issue. The other lines are also concededly common carriers by water. The defense is based solely on the assertion that Anchor's advertisements did not show them to be common carriers by water, but rather loading brokers, and a statement by the conference secretary as a witness that Anchor was not considered a common carrier. The advertisements, however, did not indicate the status of Anchor as a loading broker until after the complaint was filed. Anchor stated in its handbill issued to the public that cargo would be subject to "the Company's usual form of Wharfinger's receipt and/or bill of lading". This referred to its own bill of lading. This is what it told to prospective shippers. Anchor is also signatory to the proposed conference agreement in which it is described as a common carrier in the trade. The conference secretary advised the Board staff that "several Shipowners who have been engaged in the Liner trade between the United Kingdom and the United States of America for over 50 years . . . have recently each inaugurated independent Liner service direct from United Kingdom ports to the ports on the U.S.A. Great Lakes." In October 1957, when this was written, there was no indication that Anchor was anything other than a common carrier. In none of the following correspondence relating to revisions in the agreement prior to Board approval is there any indication that Anchor's status had changed. In correspondence to shippers under its own letterhead Anchor enclosed "our sailing card" and referred to "details of our sailings for the 1958 season" and quotes its own rates. All of the lines including Anchor, which are signatories to the proposed conference agreement as participating carriers use the same name as they used in the advertisements and notices, without change or qualification.

In the handbill subscribed to by all of the 8 respondents involved in this proceeding reference is made to the fact that: "the undernoted lines will each operate regular westbound services from their customary berth ports in the United Kingdom and Eire direct to United States Great Lakes ports . . ." Anchor is referred to as a "line" with no other qualification to distinguish its status from that of other subscribers.

In *Agreement No. 7620,* 2 U.S.M.C 749 (1945) the Kerr Steamship Co. sought to be considered as a proper party to a conference agreement as a common carrier by water. Kerr was excluded, however, as not being a common carrier by water, but an agent. Agency status was established because Kerr had not owned any

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vessels since 1936, operated only as a "berth owner" (i.e.: had contacts with, and enjoyed the good will of, shippers in the trade) and, as a result of its ability to attract business, acted as loading brokers for ships belonging to others. Kerr signed dock receipts and bills of lading as agent for the ship owners. Kerr advertised itself as "loading brokers" and "general agent". Kerr had a detailed agreement with the Silver Line Ltd. and Lief Hoegh & Co., A/S of Oslo, providing for the furnishing of cargo, the use of other vessels and the division of gross freights.

The opposite status was found in *Agreements No. 6210, 6210–A, 6210–B, 6210–C,* and *6105,* 2 U.S.M.C. 166 (1939) where the Consolidated Olympic Line as a conference member used the ships of James Griffith & Sons, Inc. and other ship owners. Consolidated Olympic issued its own bill of lading as agents for the carriers. The Commission reported: this "company handles the cargo from start to finish; assumes all the responsibility and obligations of a common carrier; and considers itself a common carrier." The Commission stated that "the contract between Consolidated and the various vessel owners, and also the bill of lading form used by Consolidated, are confusing. They are also inconsistent with the contentions of the parties that Consolidated is a common carrier. We conclude from all the facts that Consolidated is a common carrier". To distinguish the Kerr case and the Consolidated Olympic Line case, the Commission found that Consolidated undertook toward shippers the obligations of common carriage and was therefore a carrier, but Kerr apparently did not.

Anchor appears to have held itself out, so far as the public is concerned, as a common carrier. It advertised its schedule for the entire season for the 4 ships which were passed between companies. Its advertisements and shipping publication information all refer to Anchor Line service. While the evidence is not entirely clear the preponderance of unrepudiated evidence shows that Anchor wanted to be known as the carrier of shippers' goods tendered to it.

No other evidence was introduced showing that Anchor was not a common carrier by water other than the loading broker designation in its notices after the end of April 1958 and the statement by the conference secretary. The respondent merely sought to use claimed shortcomings in complainant's proofs to show absence of proof of such status. On the proofs offered we are convinced that Anchor is a common carrier by water and was required to file its agreements along with the other respondents.

Respondent Ellerman's Wilson Line Ltd., was not shown to have offered service to the United States Great Lakes ports nor to have participated in any of the transportation rate fixing or joint services. Accordingly, this respondent has not been shown to have violated Sec. 15. Respondent Manchester Liners Ltd. operated to Cleveland, Detroit, Milwaukee and Chicago and quoted the proposed tariff rates, but does not appear to have participated in any of the joint services through an exchange of ships or cooperative sailing arrangements. Accordingly, this respondent has not been shown to have violated Sec. 15 insofar as it relates to agreements for allotting ports, restricting or regulating sailings and providing for exclusive, preferential or cooperative arrangements. Of the remaining respondents, all have violated Sec. 15 insofar as it requires the filing of agreements relating to fixing or regulating transportation rates. Anchor Line, Ltd., The Bristol City Line of Steamships Ltd., Canadian Pacific Railway Company, The Cunard Steamship Co. Ltd., Furness, Withy & Co. Limited and The Ulster Steamship Company, Ltd. (Head Line & Lord Line) have violated Sec. 15 insofar as it requires filing of agreements relating to the allotment of ports, the restriction or regulation of the number and character of sailings between ports and to cooperative working arrangements.

The precise dates when any of the agreements complained of were made is not clear from the record. As regards agreements regulating transportation rates, it appears that full agreement on the use of the tariff must have been reached by April 1 in view of the date on the cover, its prior distribution and the fact that all of the carriers' letters quoting identical rates were after such time, the first such letter being dated April 10, 1958. We establish April 1, 1958 as the date when the common carriers by water began to violate the requirement as to the immediate filing of agreements regulating transportation rates.

The Anchor-Bristol City-Head & Lord Line agreement about departure and port calls seems to have become final at the latest by February 3, 1958 when the Bristol City Line advertised departures under the arrangement in Lloyd's Loading List. Anchor and Head & Lord advertised in the Journal of Commerce February 22, 1958, with reference to the ships involved in the arrangement. The first closing date for any cargo was March 27, 1958 which would allow time to arrange the use of the four ships involved. We establish February 3, 1958 as the date when the aforesaid common carriers by water began to violate the requirement as to the immediate filing of agreements relating to the allotment of ports, the regulation of sailings and to cooperative arrangements.

The Canadian Pacific-Cunard-Furness agreement about departures and port calls must have become final at the latest by February 18, 1957 when the Liverpool Journal of Commerce carried notices both by Furness separately and by Canadian Pacific-Cunard-Furness jointly. Joint notices of the service in question herein appear in several publications thereafter. Existence of the understandings is confirmed by the Furness report to its stockholders. Continuation of the service for the 1958 season is contained in a joint announcement dated March 1, 1958, subscribed by these carriers among others. We establish February 18, 1957 as the date when the aforesaid common carriers by water began to violate the requirement as to the immediate filing of agreements relating to the allotment of ports, the regulation of sailings and to cooperative arrangements.

The aforesaid respondents which have violated Sec. 15 are liable to penalties as provided in the last paragraph of Sec. 15. The facts and findings herein shall be referred to the Department of Justice for appropriate action.

FEDERAL MARITIME BOARD

No. 849

AGREEMENT AND PRACTICES PERTAINING TO FREIGHTING AGREEMENT—GULF AND SOUTH ATLANTIC HAVANA STEAMSHIP CONFERENCE (AGREEMENT NO. 4188)

No. 851

APPROVAL OF ARTICLE 1 OF FREIGHTING AGREEMENT (G–13) OF GULF AND SOUTH ATLANTIC HAVANA STEAMSHIP CONFERENCE (AGREEMENT NO. 4188)

No. 854

SWIFT & COMPANY AND SWIFT & COMPANY PACKERS

v.

GULF AND SOUTH ATLANTIC HAVANA STEAMSHIP CONFERENCE, ET AL.

Decided February 2, 1961

Provision of freighting agreement proposed by the members of the Gulf and South Atlantic Havana Steamship Conference to cover cargo originating at any inland port or place and moving via or exported by way of any river or inland waterway terminating at, touching, or flowing through any Gulf or South Atlantic port of the United States found to constitute a modification of an agreement by a common carrier by water with another such carrier under Sec. 15 of the Shipping Act, 1916 and must be filed with the Board.

Provision of freighting agreement proposed by the members of the Gulf and South Atlantic Havana Steamship Conference to cover cargo originating at any inland port or place and moving via or exported by way of any river or inland waterway terminating at, touching or flowing through any Gulf or South Atlantic port of the United States found to be unjustly discriminatory or unfair as between shippers and ports and to operate to the detriment of the commerce of the United States, under Sec. 15 of the Shipping Act, 1916.

Common carriers by water found to have subjected particular persons, localities and descriptions of traffic, to undue or unreasonable prejudice or disadvantage by preventing (1.) shippers from using economical transportation alternatives, (2.) river port cities from obtaining cargo, and (3.) traffic inland by barge transportation, in violation of Sec. 16 of the Shipping Act, 1916.

Common carriers by water found to have demanded, charged and collected a rate which is unjustly discriminatory between shippers and ports by compelling shippers to pay rates based on shipments from ports served by respondents instead of rates from ports and by transportation methods chosen by shippers, in violation of Sec. 17 of the Shipping Act, 1916.

Gulf and South Atlantic Havana Steamship Conference's attempt to extend dual rate system to cargo shipped from inland ports not served by conference members found to be unlawful under Sec. 14 Third of the Shipping Act, 1916, because it was (a) not in effect on May 19, 1958 and (b) was for the purpose of stifling the competition of independent carriers.

Swift & Co. and Swift and Company Packers, complainants entitled, under Sec. 22 of the Shipping Act, 1916, to full reparation for the injury caused by the violation of said Act equal to the actual damages to the complainant during the period from January 1, 1959 through the close of business on January 21, 1959.

Walter Carroll, Esq. and *Edward S. Bagley,* Esq. for Compania Naviera Cubamar, S.A., Lykes Bros. Steamship Co. Inc., Naviera Garcia, S.A., Standard Fruit and Steamship Company, United Fruit Company, and West India Fruit and Steamship Co., Inc., members of the Gulf and South Atlantic Havana Steamship Conference, Respondents in Nos. 849 and 851.

Clarke Munn, Jr., Esq., *George F. Galland,* Esq., and *Robert N. Kharasch,* Esq., for Swift & Company, Swift & Company Packers and White Gold Barge Line Corporation; *John S. Burchmore,* Esq., *Robert N. Burchmore,* Esq. and *Charles B. Myers,* Esq., for The National Industrial Traffic League; *Braxton B. Carr* and *William L. Kohler,* Esq., for The American Waterways Operators, Inc.; *G. E. Franzen* for The Chicago Association of Commerce and Industry; *C. M. Langham* and *James W. Lee* for Port of Palm Beach District; *F. G. Robinson* for Board of Trustees of the Galveston Wharves; *G. B. Perry* for Houston Port Bureau, Inc.; *David B. Green* for Florida East Coast Railway, *C. B. Corey* for Seaboard Air Line Railroad Company, *E. C. Hicks, Jr.* for Atlantic Coast Line Railroad Company, *J. E. Power* for Louisville and Nashville Railroad Company and *D. F. McCullough* for Gulf, Mobile and

Ohio Railroad Co.; *O. J. Williford, Jr.* for Illinois Central Railroad, and *H. W. Talmadge* for Southern Railway System; and *James W. Wrape* for Frank E. Aiple, Interveners in Nos. 849 and 851.

Clarke Munn, Jr. Esq., *George F. Galland,* Esq. and *Robert N. Kharasch,* Esq. for Swift & Company and Swift & Co. Packers, Complainants in No. 854.

Walter Carroll, Esq. for Gulf and South Atlantic Havana Steamship Conference, Compania Naviera Cubamar, S. A.; Lykes Bros. Steamship Co., Inc., Naviera Garcia, S. A.; Standard Fruit and Steamship Co., United Fruit Co., West India Fruit and Steamship Co., Inc., and Daniel E. Taylor; and *Odell Kominers,* Esq. and *J. Alton Boyer,* Esq. for West India Fruit and Steamship Co., Respondents in No. 854.

H. L. Shaffer, for Dubuque Packing Company; *W. L. Fidler,* for Hygrade Food Products Corp.; *H. C. Brockel,* for Great Lakes Harbors Association and for Board of Harbor Commissioners, City of Milwaukee; Interveners in Nos. 849, 851 and 854.

Robert E. Mitchell, Edward Aptaker and *Edward Schmeltzer,* Esqs., Public Counsel.

REPORT OF THE BOARD

RALPH E. WILSON, *Chairman;* THOMAS E. STAKEM, *Vice Chairman;* SIGFRID B. UNANDER, *Member*

BY THE BOARD:

I. PROCEEDINGS

The Board, upon its own motion as authorized by Sec. 22 of the Shipping Act, 1916, as amended (Act), on January 12, 1959, entered into an investigation and hearing to determine whether a provision (Article 1 (b)) in the 1959 Freighting Agreement (No. G–13), (1959 Agreement), adopted and submitted to shippers by the Gulf and South Atlantic Havana Steamship Conference (Conference), "(1) constitutes a new Sec. 15 agreement and/or (2) would be unjustly discriminatory, unfair, or operate to the detriment of the commerce of the United States within the meaning of Sec. 15 of the Shipping Act, 1916, or would be in violation of Sections 14, 16 or 17 of said Act."[1] Article 1(b) provides:

"1. * * * The aforesaid cargo and shipments covered by this

[1] Order dated January 16, 1959, entered in Docket No. 849 on January 12, 1959, 24 F.R. 482, January 21, 1959; as amended by order dated February 27, 1959, entered on February 19, 1959, 24 F.R. 1662, March 5, 1959.

agreement shall include all cargo and shipments which the shipper may ship or cause to be shipped directly or indirectly as follows:

* * *

"(b) That portion of the carriage between Gulf and South Atlantic ports of the United States and the Cuban ports hereinabove described in respect of all cargo originating at or from any inland port or place and moving via or exported by way of any river or inland waterway terminating at, touching, or flowing through any Gulf or South Atlantic port of the United States."

Compania Naviera Cubamar, S. A., Lykes Bros. Steamship Co., Inc., Naviera Garcia, S. A. (Ward-Garcia), Standard Fruit and Steamship Company, United Fruit Co., and West India Fruit and Steamship Co., Inc., (West India) parties to the agreement and acting jointly as the Conference, were all made respondents in the proceeding. The Board's order dated January 16, 1959, as amended February 27, 1959, ordered them to cease and desist from effectuating the quoted provision. On April 3, 1959, by further order, the Board, upon its own motion, entered upon another investigation and hearing "to determine whether (1) the whole of Article 1 of the 1959 Freighting Agreement No. G–13 . . . constitutes a new agreement and/or . . . would be in violation of Sections 14, 16 and 17 of said Act . . . . or should be approved pursuant to Sec. 15 of said Act . . ."[2] Thereafter, on May 20, 1959, Swift and Co. and Swift & Co. Packers (Swift), shippers of lard and meat products to Cuba, filed a complaint[3] asking: 1. for reparation, 2. that its complaint be consolidated with the two investigations and, 3. for other relief as the result of damage suffered from the enforcement by the Conference of Article 1 (b) against Swift. The two investigations and the complaint were consolidated for hearing by the Examiner's notice dated June 11, 1959.

The proceedings were heard by an Examiner who, in a decision served on March 31, 1960, recommended that the Board find:

1. that the 1958 Freighting Agreement (G–12), (1958 Agreement), did not apply to shipments from St. Louis to Havana;

2. that the Conference and its members have violated section 15 of the Shipping Act, 1916, (a) by their attempted interpretation of the 1958 Freighting Agreement to contain a routing restriction precluding direct shipment from St. Louis, and (b) by their adop-

[2] Order dated April 15, 1959, entered in Docket No. 851, on April 3, 1959, 24 F.R. 3058, April 21, 1959.

[3] Docket No. 854.

tion of the 1959 Freighting Agreement, both without Board approval.

3. that Article 1 of the 1959 Freighting Agreement (G–13) is a new section 15 agreement and/or a modification of the organic Conference Agreement (No. 4188), (Conference Agreement), and the 1958 Freighting Agreement.

4. that the shipper's freighting agreements in question, past and proposed, insofar as they are applied to impose a routing restriction on shipments from inland ports which the Conference lines do not serve, results (a) in detriment to the commerce of the United States as well as unjust discrimination against such ports and shippers therefrom in contravention of section 15 of the Shipping Act, 1916, and (b) in undue prejudice and unjust discrimination against such ports and shippers in violation of sections 16 and 17 of said Act.

5. that the attempt by the Conference to extend the dual rate system to inland ports not served by its members was made for the purpose of stifling non-conference competition in violation of section 14, Third, Shipping Act, 1916.

6. that complainants were damaged in the amount of the difference between the charges paid at non-contract rates on shipments made between January 1, 1959, and January 12, 1959, and those which would have accrued at the contract rates contemporaneously in effect thereby; and they are entitled to reparation on such shipments, with interest. All other claims for reparation were denied. Reparation statement should be filed in accordance with Rule 15 of Rules of Practice and Procedure.

Exceptions to the recommended decision and replies thereto were filed and oral argument was heard. Exceptions and proposed findings not discussed in this report nor reflected in our findings have been considered and found not justified.

II. FACTS

Since 1935 the Conference has existed under F.M.B. Agreement No. 4188 approved in its original form on April 24, 1935, pursuant to Sec. 15 of the Shipping Act, 1916. The Agreement authorized a dual rate contract arrangement whereby tariffs were established at two levels, the lower of which was charged to shippers who agree to ship cargoes on members' ships only. Others paid the higher rates. Swift had been a party to such a contract for over 30 years. Beginning June 25, 1958, a company known as "White

Gold Barge Line Corporation", which is not a Conference member, made five trips carrying full barge loads of lard from St. Louis, Mo., to Havana, Cuba, and Swift was the shipper on the first voyage. Since September 1958 the barges have not operated because of a Cuban government decree prohibiting the use of the barges for lard imports. The Conference by letter dated July 10, 1958 told Swift it considered Swift's shipments by such barges a violation of its agreement to ship on Conference members' ships because St. Louis was a Gulf and South Atlantic port covered by the agreement to ship from such ports exclusively on such ships. This interpretation of the agreement, embodied in a revision of the 1959 Agreement, was the basis for initiating Docket No. 849 on the ground that the revision contained in paragraph (b) of Article 1 of the 1959 Agreement was really a new agreement and not an interpretation of what had existed all along. If this was shown to be the case, the revision would have to be filed under Sec. 15. Notwithstanding its argument that the existing agreement impliedly covered the port of St. Louis, the Conference thereafter filed the revised 1959 agreement for approval by the Board presumably as a modification of the Conference Agreement. After such filing Docket No. 851 was initiated to determine if the entire Article 1 (not just the interpretation in paragraph (b) thereof) was a new agreement which must be approved pursuant to Sec. 15 of the Act.

Prior to the barge shipments Swift had its lard transported to Havana, Cuba, from West Palm Beach, Fla., in freight cars on respondent West India's freight car ferry ships. Before the paragraph was added to the 1959 Agreement, but after Swift changed over to the use of barges, the Conference and its members had contended Article 1 meant that the transportation of lard on barges from St. Louis to Havana violated the freighting agreement as they interpreted it, by a failure to offer, during the period January 1, 1958, to December 31, 1958, "all cargo which shipper may have, or may cause to be shipped directly or indirectly from Gulf and South Atlantic ports of the United States to the Port of Havana, Cuba" and claimed damages (under Article 7) for failure to ship. As noted above, a cargo shipment from St. Louis to Havana "constitutes a shipment from a Gulf port" according to a Conference interpretation of Article 1. The claim based on this interpretation was arbitrated and Swift lost. On October 28, 1958, Swift notified the Conference it would not extend the 1958 Agreement to 1959. On December 31, 1958, Swift refused to sign the 1959 Agreement submitted to it on December 8, 1958. It would not sign until the paragraph (b), which specifically covered shipments from St. Louis, had been removed and, if removed, unless the interpretation of Article 1 giving it such effect was revoked. The Conference refused both conditions. The Board's order dated January 16, 1959, as amended February 27, 1959, to cease and desist from effectuating the new provision of the 1959 Freighting Agreement was served on the respondents January 20, 1959 and was published in the Federal Register issue of January 21, 1959. The Conference on March 10, 1959 notified all of its contract shippers, but not Swift, that it would "comply with the order of the Board". Swift was notified on April 27, 1959. On May 8, 1959, Swift signed the 1959 Agreement effective May 11, 1959. Between January 1, 1959 and May 11, 1959, Swift was charged and paid the non-contract rates on lard and paid about $28,000 more than contract rates.

III. DISCUSSION

The Examiner concluded that the meaning of the 1958 Agreement was in issue, and that its interpretation by the Board was not precluded by the arbitrators' decision. Exception is taken to this conclusion.

The meaning of the 1958 Agreement is relevant insofar as it also establishes the meaning of the agreement between common carriers by water or other persons subject to the Act, which must be filed pursuant to Sec. 15, i.e. the Conference Agreement. Only conference agreements, modifications or cancellations approved by the Board are lawful, under Sec. 15. To the extent any interpretation of the 1958 Agreement extends its scope beyond that allowed by the authorizing Conference Agreement heretofore filed and approved by the Board, the 1958 Agreement must modify the Conference Agreement and thus make it a "new Sec. 15 agreement". Such modified agreement is unlawful until it is filed and the Board approves it. Therefore, the meaning of the 1958 Agreement is in issue under Docket Nos. 849 and 851, since the respondents are in effect saying that the arbitrators' decision is more than just a finding that Swift "violated" the Freighting Agreement, because the arbitrators must first find the existence of an obligation to be violated. Thus, it is also a final opinion that the 1958 Agreement is not a modification of the Conference Agreement which we have already approved but an interpretation of what has existed all along. If the provision is a modification, the arbitrators' decision is a final opinion that the arbitrators, not the Board may approve the provision and may go on to find it has been violated. Sec. 15 is quite clear that only the Board may approve agreements or modifications. Our responsibilities and the common carriers' duties are not discharged by any other technique of administering Sec. 15, hence the exception to this extent is not valid.

Relying on the United States Arbitration Act (9 U.S.C. §§ 1–14) respondents urge that the Board has no authority to place its interpretation on the 1958 Agreement, but must give final and binding effect to the results of the arbitration between the Conference and Swift. It is stated that the Arbitration Act provides "for finality of arbitration decisions of the very kind here in issue". No authority is cited for this proposition. We find no provision of the Arbitration Act which expressly or impliedly enacts any rule of law which expressly provides for such finality or limits our authority under the Act, nor any court decision which holds that it does so by implication. There is no provision in the Act which does so either. This part of the exception is invalid as we have an independent responsibility to determine the scope of agreements which we approve under Sec. 15.

The Examiner found the 1958 Agreement did not apply to cargo shipped from St. Louis, Mo. to Havana, Cuba and outports. West India and the Conference except to this. The 1958 Agreement contains no provision naming St. Louis (see above), but the respondents argue it reasonably may be interpreted to extend to this port because of the word "indirectly" as applied to cargo shipped from Gulf and South Atlantic ports. This, it is argued, proves that cargo originating inland and passing through the Gulf port of New Orleans as a Gulf port is covered. Another aspect of the exception is that the shipper's obligation to use Conference ships is not dependent on the origin of the cargo or mode of transportation to a Gulf port. By passing through New Orleans a cargo automatically becomes cargo the Conference member ships are entitled to carry and should be offered to them for carrying. Quite apart from these considerations our reasons and conclusions stated below that such a provision, whether by interpretation or by express modification, is a restriction on cargo routing, contrary to our decision in *Contract Routing Restrictions*, 2 U.S.M.C. 220 (1939), makes the issue of the applicability of Article 1 of the 1958 Agreement immaterial because the provision itself is invalid and requires no interpretation. Since the restriction is invalid, the Examiner correctly held the agreement did not apply to shipments from St. Louis, nor is it applicable to shipments through New Orleans.

To the extent that the Conference attempted before filing with the Board, to make the 1959 Agreement extend to St. Louis by the addition of an express provision as paragraph (b) in Article 1 of the 1959 form of Agreement, the Examiner found such provision is a "new agreement" or modification of the Conference Agreement.

The scope of any freighting agreement is necessarily limited by the agreements between common carriers by water, or other persons subject to the Act, which are filed and approved as required by the first sentence of Sec. 15 of the Act. The Agreement creating the Gulf and South Atlantic Havana Steamship Conference regulating its activities governs the 1958 and 1959 Agreements in question and limits the scope of Conference authority. The 1958 and 1959 Agreements do not name any port located on an inland waterway or not located on the Atlantic or Gulf coast. It is argued that, nevertheless, the 1958 Agreement, as interpreted, or as revised in 1959 implies that, without naming the port, it covers the carriage of cargo originating at or from any inland port, in this case St. Louis, exported by way of any river, flowing through any Gulf port such as New Orleans, i.e. the Mississippi River. The Conference Agreement names other ports, however, such as Savannah, Ga., Port of Palm Beach, Fla., Tampa, Fla., Panama City, Fla., and Pensacola, Fla., all "South Atlantic" ports, and New Orleans, La., Lake Charles, La., Orange, Tex., Beaumont, Tex., Port Neches, Tex., Port Arthur, Tex., Galveston, Tex., and Houston, Tex., all "Gulf . . . ports". These ports are named in Article 15 after the statement declaring the intention of the members to maintain service under this Agreement. The Agreement also names Havana, Cuba, and service "to Cuban Mainland Outports . . . namely Mariel and Matanzas . . . and nothing herein contained shall be construed to extend the provisions of this agreement to ports or territories other than as described herein . . ." None of the Conference members serves or has ships to serve St. Louis, Mo. The issue of calling St. Louis a Gulf port never arose until White Gold began its tug and barge service. We see no escape, in the light of the way the 1958 Agreement was drafted and of the foregoing, from the Examiner's conclusion that the "interpretation" by the Conference is not an interpretation at all, but is in effect a fundamental modification of the scope of the Conference Agreement and hence, of its terms.

Sec. 15 requires every common carrier by water to file immediately with tht Board a true copy or memorandum of such modification. This was not done until February 26, 1959. We find that between July 10, 1958 when the Conference first asserted its claim that shipments by barge from St. Louis constituted a breach of the 1958 Agreement thus modifying the Conference Agreement, and February 26, 1959 when the Conference filed the revised 1959 Agreement provisions with the Board and requested approval thereof, the respondent common carriers by water members of the Conference violated the provisions of Sec. 15 of the Act by failing to file the modification of an agreement with another such carrier fixing or regulating transportation rates, giving or receiving special rates or special privileges or regulating the character of freight traffic to be carried.

West India and the Conference seek to avoid the filing requirements of Sec. 15 by citing paragraph 16 of the Conference Agreement authorizing dual rates for stabilization purposes and the absence of any provision containing "any limitation upon the Conference's contract rate authority in terms of origin of the cargo, mode of transportation to ports served by the Conference or in any other terms." The Examiner found and we have agreed that the "Gulf and South Atlantic ports" and Havana, Cuba ports provision in Article 1 coupled with the meaning of such ports in Article 15 and the statement in the opening clause of the Conference Agreement that "nothing herein contained shall be construed to extend the provisions of this Agreement to ports or territories other than as described herein" constitutes such a limitation.

Exception is taken to the Examiner's disregard of the cases of *Hymen I. Malatzky d.b.a. Himala International v. American Export Lines*, 3 F.M.B. 232 (1950), and *Isbrandtsen Co., Inc., v. North Atlantic Continental Freight Conference, et al*, 3 F.M.B. 235 (1950). These cases involved no issue as to the port coverage of the Conference Agreements in question which is the issue involved here, but attacked the dual rate system. The dual rate system is not challenged here. The cases are not authority for any recognizable issue in this case and were properly disregarded.

Further, West India claims the right to receive Swift's cargo pursuant to its contract on the ground that the cargo "is first hauled to New Orleans by a river tug, and then transferred to a deep sea tug" thus making the cargo a shipment from a Gulf port just as though it were sent there "by locomotive and then transshipped to the ocean vessel." The more correct analogy is that of the freight train which changes or adds locomotives at the foot of a steep grade. No cargo transfer is involved. There is a continuous movement in the same barge and neither the change from river to ocean tugs nor even a temporary halt in the barge movement converts the cargo to a shipment from an ocean port.

The Examiner found that the modification of the Conference Agreement constituted a routing restriction which was detrimental to the commerce of the United States and unjustly discriminatory as between shippers or ports and subject to disapproval by the Board pursuant to Sec. 15 of the Act. He also found the modification (1) subjected particular persons, i.e. shippers, and localities, i.e. ports, to undue prejudice or disadvantage in violation of Sec. 16, second paragraph, First., and (2) involved the demand charge or collection of a rate, fare or charge which is unjustly discriminatory between shippers or ports in violation of Sec. 17 of the Act. West India, the Conference and an intervener Board of Trustees of the Galveston Wharves except to this and to the fact that the Examiner did not dispose of West India's contentions touching on the subject.

The basis for the Examiner's conclusion was that the restriction by the respondent common carriers by water acting together prevented, (1) shippers from using the Mississippi River, on which large amounts of public money have been spent for navigation and harbor improvements, (2) river port cities from obtaining cargo for shipment therefrom and (3) traffic in lard by barge transportation from being used by shippers when it has certain economic advantages. The restrictions tended to compel shippers to forego these advantages in favor of using conference line ships from the ports they served. The facts support such conclusions. The compulsion exists, because, in the words of a respondent's counsel "with respect to this other traffic [other commodities Swift ships to Cuba and an occasional tank car of lard], if the Conference position is sustained, Swift would be reduced to the choice of shipping by Conference ships at non-contract rates. . . ." We think this choice involves an undue disadvantage to shippers. Since the shipper can't sell more lard if its sale price includes the higher freight rates, the shipper either complies with Conference terms or gets out of this line of business. Counsel says the result of the barge service alternative is that "Swift will be in a position almost immediately to monopolize the Cuban lard market . . ." Assuming relevance to respondent's monopoly charge the record did not bear out these fears. Swift once enjoyed 18% to 20% of the trade; it now has 12% to 14%. Barge traffic should not be prejudiced until more evidence of detriment to commerce is shown.

The other contentions and considerations urged by respondents to prove detriment to commerce are (1) the "havoc barge competition would cause" in the existing stable business situation, or "chaos in the Cuban trade" through lack of rate stability, presumably through lowered freight rates, (2) the damage to West India, whose services are needed by Cubans to market their fruits and vegetables, (3) lack of appearance by port interests in support of Swift, (4) support by Gulf port cities and Palm Beach Port District for the Conference, (5) unwillingness of the barge industry to commit equipment to the Cuba trade, (6) damage to West India from loss of the lard trade, (7) threat to other Conference carriers from the expansion of barge use to other commodities, (8) diversion of traffic from rail carriers, (9) advantages of rail and car ferry over through barge movement, and (10) encouragement of the use of barges subverts the national defense interest in having a specialized fleet of self-propelled ships suitable for use in transporting tanks. The contentions that barges will be damaging to the business of respondents, but that the service provided by respondents is better anyway, exemplifies the contradictions involved in considering either one as a dominating consideration in a study of detriments to the commerce of the United States. The interests and needs of shippers in foreign commerce should dominate where competing methods and new techniques of water transportation are involved. An arrangement would seem to operate to the detriment of the commerce of the United States or be unfair as between shippers and exporters from the United States and their foreign competitors which prevents the former from having a free choice among competing methods of transportation for cost advantages. Anything which impedes such free choice among constantly changing alternatives provided by technical changes in traffic and transportation methods is a detriment to commerce in the long run. There is no inherently more advantageous method of transportation such as common carriage over private carriage or the use of self propelled ships, that must be protected regardless of the context of any situation, in the name of avoiding detriment to the commerce of the United States. None of the considerations listed by respondents take the shipper's freedom of choice into account, all are designed to protect the status quo or the particular interests of the respondents, hence they are of little weight in countering all the conflicting carrier, shipper and port interest considerations the Examiner used as the basis for his findings about prejudice and discrimination against ports, shippers and traffic.

The authority of the Conference to institute the contract rate system in Agreement No. 4188 is not in issue. Rather, the justness and fairness of a particular contract obligation in the Freighting Agreements as applied to Swift and the use of barges, the discriminatory or prejudicial aspects of such obligation and the effect on the commerce of the United States of such obligation when it limits a shipper's choice of transportation alternatives (such as through barge movements from St. Louis) are the principal issues. No overriding consideration which would resolve the issues in favor of the proposed 1959 Agreement obligation, consistently with statutory standards, has been shown.

The Examiner found that the contract obligation in issue restricted a shipper's choice to the point where it was not consistent with the Maritime Commission's interpretation of Sec. 15 of the Act in the *Contract Routing Restrictions* case, *supra.* There, the contract obligation sought to be imposed on shippers required contract signers to offer respondent conference members all cargo and shipments to certain European ports "which shipments move via any United States or Canadian North Atlantic port or waterway (Great Lakes, River St. Lawrence and other waters tributary to North Atlantic included)." If a shipment be made in violation of the contract the carriers may terminate the contract and charge the higher non-contract rates. This obligation is comparable to the one in question. In this proceeding shipments are to Havana, Cuba, instead of to European ports. Shipments subject to the contract are those moving via Gulf ports instead of North Atlantic ports which are qualified to include those moving "by way of any river or inland waterway" such as the Mississippi instead of "any . . . waterway" such as the Great Lakes and River St. Lawrence. The only arguable difference is whether the change from a river tug to an ocean tug at the Gulf port of New Orleans or the non-use of ocean going ships up to St. Louis, which was not done in the Great Lakes-St. Lawrence transit, makes any difference, and whether the use of ocean-going, deep-draft, self-propelled ships to Montreal makes a difference. As noted above we do not consider that the change of tugs or the use of barges instead of deep-draft ships alters the character of the transportation as far as the shipper and his shipment are concerned. It is stated "that shoal draft inland barge transportation and deep sea movement

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are not the same thing in fact". They are different, of course, but the difference does not provide any distinction relevant to the existence of shipper and port discrimination under Sec. 15 of the Act as interpreted in the *Contract Routing* case. Inferences are sought to be drawn from the fact that, (1) Great Lakes ports are accessible to ocean shipping while St. Louis is not, (2) there were other discriminatory practices involved in the *Contract Routing* case such as discriminatory shipper contracts, and (3) shippers testified against the restriction in the *Contract Routing* case, (supra) but here "almost the reverse is true." Such facts are not controlling since we find the contract obligation which restricts a shipper's choice regardless of these background factors has the effect of eliminating St. Louis as a port for ocean cargoes which can be put on barges there. The obligation is thus unjustly discriminatory against the port of St. Louis and unfair to potential shippers therefrom who have cargo suited to barge transportation. The same facts insofar as they create a discrimination against shippers and ports also involve the demand, charge or collection of a rate which is unjustly in violation of Sec. 17 by compelling shippers to pay rates based on shipments from the ports served by the respondent common carriers instead of rates from ports and by transportation methods chosen by shippers.

Public interest in the stability of rates is also urged as a basis for upholding the contract obligation, assuming it will produce such stability. The same argument for stability was present in the *Contract Routing* case (supra) and found not to be controlling there. We have never held stability of rates to be an end in itself. It is a significant factor in upholding the dual rate system, but not a justification for otherwise discriminatory or unfair practices or for other illegal activity. The dual rate system remains intact without the provision in question unless in a factual context the system is also found to stifle competition in violation of Sec. 14, Third of the Act. This is the basis of the next exception.

The examiner concluded that the attempt, through the 1958 and 1959 Agreements, to extend the dual rate system to cargo shipped from inland ports not served by Conference members was made for the purpose of stifling non-conference competition. The Examiner made precise findings that the present system under the proposed modification was applied for the purpose of stifling competition. *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481 (1958). The *Isbrandtsen* case holds that Sec. 14, Third strikes down dual rate systems where they are used as predatory devices.

The Examiner found that the modifying contract provision extending the dual rate system to St. Louis was not in use and not filed with the Board until February 27, 1959 and thus, was not made lawful by Congress in spite of the *Isbrandtsen* case. The interpretation embodied in the written modification was first asserted in a letter to Swift from the Conference dated July 10, 1958. (Public Law 85–626, 74 Stat. 253, 46 U.S.C. 812), amended Sec. 14 to validate, notwithstanding the *Isbrandtsen* case, any dual rate contract arrangement "in use" by Conference members on May 19, 1958. This Act is in effect until June 30, 1961 (P.L. 86–542, 74 Stat. 253). Even assuming the agreement could be in use without Board approval, it does not meet the test of P.L. 85–626. We don't think arguments, unsupported by any evidence, as to the meaning of the Conference Agreement prior to July 10, 1958 constitute a dual rate arrangement in use by Conference members.

While it might not be essential to pass on respondents' several exceptions as to the Examiner's findings with regard to the applicability of Sec. 14 of the Act because we have held that our interpretation of Sec. 15 of the Act as applied to the facts in the *Contract Routing Restrictions* case (supra) is equally applicable to the facts in this case making the restriction in question invalid, we do so in fulfillment of our original order in Dockets 849 and 851 raising this issue. To the finding that the extension of the dual rate system to inland ports not served by members was a predatory device made to stifle competition in violation Sec. 14 Third, respondents make the following exceptions: (1) a dual rate provision was "in use" on May 19, 1958 having been a part of the Conference Contract at least since 1935 and is thus protected by the amendment of Sec. 14 contained in P.L. 85–626 (supra) and (2) that the *Isbrandtsen*, case, *supra*, interpretation of Sec. 14 applies only to dual rate obligations which stifle "independent non-conference common carrier or berth operations." This dual rate provision covering cargo originating at an inland port and moving by way of a river flowing through a Gulf port was not in effect until the respondents asserted it for the first time July 10, 1958. The exception under (1) is not well taken for this reason. As to the second exception, *Isbrandtsen,* the plaintiff was an independent non-conference common carrier, but the language of the decision is nowhere limited to such carriers as suggested by the respondent in stating that the decision was concerned only with stifling competition by such carriers. Justice Brennan said "The Congress in § 14 has flatly prohibited practices of conferences which have the effect of stifling the competition of independent carriers." There is no further qualification in the decision such as "common carrier" or "berth operations." The sole qualification is found in the word "independent". We take this to mean any carrier not a conference member. Swift's contract carrier "White Gold" meets this description.

We find the present case indistinguishable for any significant reason or circumstance from the *Isbrandtsen* case. The *Isbrandtsen* case concerned inbound cargoes from the Far East while this one concerns outbound cargoes to Cuba. No provision of the Act or the Supreme Court's discussion of the *Isbrandtsen* case makes the direction or origin of cargoes a significant factor in interpreting the law. The exception under (2) is not well taken either and we agree that the proposed contract violates Sec. 14 Third of the Act.

Swift, West India and the Conference except to the award of reparations. Swift objects to the limited period from January 1 to January 12, West Indies objects to basing the measure of reparations on the difference between the non-contract rates and the contract rates applicable if Swift had been given a contract, and the Conference objects to the conclusion that Swift was damaged by the 1958 or by the 1959 Agreements and to the assessment against them during all periods of non-conference rates when they were not signatory to a Conference contract.

Sec. 22 provides that the Board "may direct the payment on or before a day named, of full reparation to the complainant for the injury caused by such violation", i.e. a violation of the Act which the complainant proves. Swift has proven a violation and is entitled to reparation. Our rule on the proper measure is set forth as follows in *Eden Mining Co. v. Bluefields Fruit & S.S. Co.*, 1 U.S.S.B. 41 (1922), wherein the Board rejected as a measure the difference between the freight actually paid and "the sum which would have been paid had the complainants been given a discount . . . as were contract shippers":

"It cannot be inferred from the language used [in Sec. 22] that compensation for other than the actual damage incurred is to be granted." Such damage is payable only where it results from discrimination against the complainant. Overcharges and discriminations have quite different consequences as far as reparation is concerned. A different measure of recovery applies where the shipper has paid the applicable rate (non-contract) and sues upon the discrimination caused by other shippers having to pay less or by being unjustly refused the contract rate. The Examiner concluded that there was no discrimination because Swift could not "produce any documentary evidence . . . which would show its comparative costs . . ." Discrimination depends on what the respondents do, not on loss by the complainant; even assuming the incorrect statement that evidence thereof must be "documentary". Here enforcement of the respondent's proposed contract was found by the Examiner to result in discrimination against shippers (i.e. Swift) "in contravention of Section 15," and a "discrimination against . . . shippers in violation of sections 16 and 17 of said Act." We concur. Accordingly Swift should be given the opportunity to prove its damages in accordance with the rule in the *Eden* case, *supra.* A further hearing on this is essential.

Exception is taken to the period during which the right to reparation accrued. The Examiner allowed the extra freight paid from January 1 to January 12, 1959 on the ground that on January 12 Swift "had prompt notice" of the Board's order suspending Article 1 (b) of the 1959 Agreement pursuant to Docket No. 849. The evidence of notice consisted of a statement by a Swift official during cross-examination that he first learned "that there had been a cease and desist order" from "their Washington attorney" in "early January". In response to the question "So that virtually at the same time that it (the order) was issued, you knew about it?" The witness said: "Practically." Further on, light is shed on the meaning of "practically." The witness was asked, after a statement about the above testimony: "So I assume that you learned about it, say, at the middle of January?" A. "Somewhere around that date, yes, sir." The Examiner held that on January 12, 1959 the situation changed and "Swift could have obtained the contract rates with the assurance that the lawfulness of the agreement would be duly determined by the Board . . ." Swift excepts on the ground that it did not know whether the Conference intended to obey the Board's January 12 order. This is not material. Assuming the Conference did not intend to obey the order, the result at the end of the Board's process would be to correct the effect of any such disobedience as far as Swift was concerned. As the Examiner found, the lawfulness of the agreement would be determined regardless of respondent's opinion or actions and our order would be based on such determination. Hence we are not willing to extend the period of injury to May 11, 1959, when the new contract was finally signed. We do not agree, however, that the period should end as the result of supposed knowledge of our order based on an informal communication from its Washington attorney. Formal notice of the order was first given pursuant to the Administrative Procedure Act by publication in the Federal Register. The Board's order appeared in the January 21, 1959 issue (24 F.R. 482). The order itself was dated January 16, 1959. On January 21, 1959, there could be no doubt of notice since notice is to be presumed after the official publication. Before then Swift was justified in refusing to sign; after that it was not. We hold that Swift is entitled to show damages from January 1, 1959 through the close of business on January 21, 1959. A further hearing to determine the amount of damages will be necessary. The damages found to be due shall be paid within 30 days from the date of our order fixing the respondents' liability.

Exception is taken to the fact that the Examiner disregarded our precedent in *Himala International v. American Export Lines, supra* that the granting of a lower contract rate when there was no contract would be a discrimination in favor of the complainant by the carrier. The case is not in point because the failure to grant a lower "contract" rate is not Swift's complaint. Its complaint is based on the respondent's refusal to sign a valid contract, the various illegal consequences of such action, and the discrimination against Swift caused by the refusal to grant contract rates because of its barge shipments.

The final exception is to the failure of the Examiner to find that the dual rate system as applied by the Conference was unlawful as a single carrier monopoly. Since we have already held the proposed contract obligation is an unauthorized routing restriction and not in effect on March 19, 1958 pursuant to P.L. 85–626 we find it is not necessary to pass on this issue.

The proceedings will be held open for further proceedings to determine the exact amount of the reparations found to be due. An appropriate order, consonant with this report, will be issued.

The Respondents, in Docket No. 849, who have violated Sec. 15 of the Act are liable to penalties as provided by the last paragraph thereof. The facts and findings herein shall be referred to the Department of Justice for appropriate action.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 2nd day of February 1961.

No. 849

AGREEMENT AND PRACTICES PERTAINING TO FREIGHTING AGREEMENT GULF AND SOUTH ATLANTIC HAVANA STEAMSHIP CONFERENCE (AGREEMENT NO. 4188)

No. 851

IN THE MATTER OF APPROVAL OF ARTICLE 1 OF FREIGHTING AGREEMENT (G–13) OF GULF AND SOUTH ATLANTIC HAVANA STEAMSHIP CONFERENCE (AGREEMENT NO. 4188)

No. 854

SWIFT & COMPANY AND SWIFT & COMPANY PACKERS

v.

GULF AND SOUTH ATLANTIC HAVANA STEAMSHIP CONFERENCE, ET AL

An investigation docketed as Nos. 849 and 851 having been entered upon by the Board on its own motion and the proceeding docketed as No. 854 being at issue upon complaint and answer on file, and the investigation and proceedings having been consolidated and duly heard with respect to all issues other than reparation, after full investigation of the matters and things involved having been had, and the Board, on the date hereof having made and entered a report stating its conclusions, decision, and findings therein, which report is hereby referred to and made a part hereof:

It is ordered, That:

1. Respondents be, and they are hereby, notified, and required immediately to cease and desist and to abstain from entering into, or continuing or performing any of the contracts, agreements, or modification thereof restricting shipments of cargo originating at any inland port or place and moving via river or inland waterway terminating at, touching or flowing through any Gulf or South Atlantic port of the United States, found herein to be in violation of Sec. 15, Shipping Act, 1916, as amended.

2. Respondents be, and they are hereby, notified, and required immediately to cease and desist and to abstain from (a) subjecting particular persons, localities and descriptions of traffic to undue or unreasonable prejudice or disadvantage, (b) demanding, charging and collecting a rate which is unjustly discriminatory between shippers and ports found herein to be in violation of Secs. 16 and 17 of the Shipping Act, 1916, as amended.

3. Respondents be, and they are hereby, notified and required, immediately to cease and desist and abstain from extending a dual rate system to cargo shipped from inland ports not served by conference members found herein to be unlawful under Sec. 14, Third of the Shipping Act, 1916, as amended.

It is further ordered, That, the proceedings docketed as No. 849 and No. 851 be, and they are hereby, discontinued; and

It is further ordered, That, the proceeding docketed as No. 854 be, and it is hereby, held open for further proceedings on the claims of complainants for reparation, if any.

BY THE BOARD.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME BOARD

No. 848

IN RE: RUBIN, RUBIN & RUBIN CORP., N. N. SERPER & COMPANY, ACADEMY FORWARDING COMPANY

Decided February 20, 1961

Respondents, Rubin, Rubin & Rubin Corp., N. N. Serper & Company, shippers, and Academy Forwarding Company, forwarders of paper products from New York to Puerto Rico, found to have knowingly and willfully, by means of false classification, obtained transportation by water for property at less than the rates or charges which would otherwise be applicable, in violation of Sec. 16 of the Shipping Act, 1916, as amended.

Herman L. Weisman and *Burton R. Rubin* for Rubin, Rubin & Rubin Corporation, Respondent.

John B. Forrest for N. N. Serper & Co., Respondent.

Max J. Dym for Academy Forwarding Corp., Respondent.

Mark P. Schlefer and *Harrison D. Hutson* for Bull-Insular Line, Inc., Intervener.

Frank Gormley and *Robert C. Bamford* as Public Counsel.

REPORT OF THE BOARD

RALPH E. WILSON, *Chairman;* THOMAS E. STAKEM, *Vice Chairman;* SIGFRID B. UNANDER, *Member*

BY THE BOARD:

I. PROCEEDINGS

The Board, as authorized by Sec. 22 of the Shipping Act, 1916, as amended, (Act), instituted upon its own motion an investigation of the lawfulness of certain shipments under Sec. 16 of the Act to determine whether respondent Rubin, Rubin & Rubin Corp. (Rubin), a shipper and a printer and manufacturer of printed products, and respondent N. N. Serper & Company (Serper) a shipper of printed products, and respondent Academy Forwarding Co. (Academy), a forwarder, had obtained transportation between April 1955 and February 1957 for property consisting of paper products, by water, from the United States to Puerto Rico at less than the charges which otherwise would be applicable.

Although not named as a respondent, the intervener, Bull Insular Line, Inc. (Bull Line) filed a brief, as the result of statements made during the course of the hearing, imputing to it knowledge of the alleged misclassification of shipments. Under Sec. 16, Second of the Act, it is unlawful for any common carrier by water to allow any person to obtain transportation for property at less than the regular rates established and enforced by the line of such carrier by means of false billing, false classification or by any other unjust or unfair device or means. No evidence developed to convince the Examiner that the carrier should also be made a respondent.

The Examiner recommended that the shippers Rubin and Serper be found to have committed unlawful acts and that the forwarder Academy be found not to have committed any unlawful acts under Sec. 16. Exceptions and replies to the Examiner's recommended decision were filed and oral argument has been held.

II. FACTS

1. The shipper Rubin is a printer and manufacturer of composition books, columnar ruled pads, business blanks in tablet form, receipt books, merchandise order books, loose leaf fillers, stenographer notebooks, quarter bound composition paper, salesmen's order books, memorandum books, and various other school and business paper products. These products are described in a catalogue issued by Rubin. Rubin does not advertise the availability of, or ship, nor does his catalogue describe, blank paper for printers. Rubin has shipped his products, consisting primarily of composition books and paper items for use in schools since about 1950. In 1953 during a visit to Puerto Rico, Leon Rubin, Vice President of Rubin, learned that a loss of sales was caused by lower competitive prices made possible by competitors shipping their products as "printing paper" which may be shipped for a lower freight rate under the applicable tariffs of the common carriers by water. Before 1953 Rubin prepared bills of lading describing its products as "stationery" or "composition books". After this Rubin described similar merchandise as "printing

paper". Rubin ordered the change in the description in the bill of lading which was prepared to obtain the lower freight rate and so instructed its forwarder, Academy.

The procedure for instructing the forwarder was to send the forwarder a copy of Rubin's invoice to which was stapled a sheet of paper on which was handwritten or typed the words "no insurance, Bull Line, printing paper", or words or abbreviations to this effect and giving the name of the ship together with a copy of an order by the buyer in Puerto Rico. The invoice described the products as "Trop" (meaning "tropical"—a quality of paper) followed by a number or "Agate" (a description of the cover designs) followed by a number or "pads" or "green tint-stenos" or "8½ x 11 pads, ruled, white" or "200 page marble comps." (marble is also a description of the cover design), or simply a number referring to items in its catalogue. There were from one to fifteen differently numbered and priced items on the invoices. Opposite each item were prices for each item and an extension of the totals of each order.

The instructions as to the printing paper designation were begun after Rubin learned the reason for the lower competitive prices of these products in Puerto Rico and after a discussion of the correct classification of the products with a representative from the Bull Lines. The evidence was not clear as to the details of the discussion with Bull Lines, nor as to when it occurred. Rubin made such classifications on about 85 shipments in 1955, 1956 and 1957.

2. The shipper Serper ordered composition books from Rubin for shipment to his customers in Puerto Rico. Serper's orders began around 1953. Rubin, upon receiving a letter or telephone order from Serper, executed the order by having the goods packaged in cartons and delivered to the carrier at the dock. Rubin sent Serper an invoice covering the shipments. The invoices contained the information referred to above. Dock receipts covering Serper's shipments were prepared by either Rubin or Serper. When prepared by Rubin a signed copy of the dock receipt would be sent to Serper with Rubin's invoice. After receiving these papers Serper prepared the bills of lading and export declaration. Serper did not see or handle the products, but he knew what they looked like, he knew what was in Rubin's catalogue, and he knew what his customers ordered.

When Serper, in 1953, began selling composition books, which were the only Rubin products he ordered, he was told by Leon

Rubin that the books should be classified as printing paper and was also told that this was "all right with the Bull Line" pursuant to the conversations which Rubin had with the Bull Line representative. Serper prepared his bills of lading, dock receipts and export declarations to read "printing paper" or "unprinted paper" the same as Rubin. Serper made such classifications on about 29 shipments of composition books and notebooks in 1956 and 1957.

3. The forwarder Academy was engaged by Rubin to prepare its shipping documents. Academy prepared the bill of lading, the dock receipt and the export declaration for Rubin. The documents were prepared on the basis of the written instructions stapled to the commercial invoice as noted above. Such written instructions were followed after a discussion with Rubin as to what to do. The invoices were the same as described above. Academy did not have a copy of Rubin's catalogue and never saw or handled the cartons containing shipments. The invoices, however, described Rubin as "Manufacturing Stationers" and the president of Academy knew that Rubin was in the paper and printing business. Academy had been a forwarder for Rubin since at least September 1953. Academy prepared export declarations containing references by a code number to items in so-called Schedule B of the Bureau of Census which applies to "Fine Paper: Writing Paper" and covers items shipped by Rubin and not to printing paper.

4. The commodity descriptions and classifications in the applicable "United States Atlantic and Gulf-Puerto Rico Conference Tariff", No. 6 (January 1955 through January 9, 1957) and No. 7 (thereafter) refer to 'BOOKS, Blank or Printed", "PAPER and PAPER ARTICLES: Bond. Not Otherwise Specified, Printing, N.O.S., Tablet, ruled, not padded, not bond, and Writing", "PRINTED MATTER, N.O.S. and STATIONERY and SUPPLIES, N.O.S." The tariff shows a considerably lower rate for transporting articles classified as "Printing Paper" than for writing tablets, stationery and similar products.

The classification of "printing paper" or "unprinted paper" appeared in bills of lading of Bull Line and Alcoa Steamship Company (Alcoa) covering Rubin's shipments. The bills of lading were dated various dates from February 25, 1955 to January 1, 1957 insofar as the bills of lading prepared by Academy are concerned.

In preparing his products for shipment Rubin would have them placed in cartons which were stenciled variously as follows: "1 Gr. No. 760 60 pages B. Marble Comps", "½ Gr. 8 x 10 Marble Comps

144 pages No. 972", "All American Agate Comp Books 29 cents", or variations of the foregiong.

III. DISCUSSION

Rubin and Serper both shipped in foreign commerce between 1955 and 1957 many cartons of composition books and other kinds of writing books and paper for school or business use under bills of lading describing them as "printing paper". The bills of lading were prepared by Academy or by Serper but the shippers were responsible for the information in the bill of lading. There is no serious denial that the descriptions of the products shipped were false. The tariff provided a much more descriptive classification covering the articles referred to in 4. above covering blank books, paper articles, ruled tablets, printed matter and stationery supplies and since these classifications were not used, the descriptions chosen by the respondents constituted a false classification.

The false classification resulted in the billing and payment of a lower freight rate than would be applicable to the shipments if they had been correctly classified.

Sec. 16 of the Act is violated by shippers and forwarders if the false classification is knowingly and willfully made.

We have held that where a shipper, with full information about the article shipped, after studying the tariff, chooses an improper description consistently and continually by ignoring a more descriptive classification, and where a shipper knows of the variance between what is being shipped and what has been described, such shipper knowingly and willfully obtains transportation by water for property at less than the rates or charges otherwise applicable, by means of a false classification. *Misclassification and Misbilling of Glass Tumblers and Other Manufactured Glassware Items as Jars,* 6 F.M.B. 155 (1960).

We have also held that where a shipper has doubt as to the proper tariff designation of his commodity, he has a duty to make diligent and good faith inquiry of the carrier or conference publishing the tariff. We also stated that "resort to a definition" of an article "which does such violence to the clear meaning of the tariff, at best, manifests such an indifference and lack of care in construing the tariff as to constitute a deliberate violation of Sec. 16". *Markt Hammacher Co.—Misclassification of Glassware,* 5 F.M.B. 509, 511 (1958). A persistent failure to inform ones' self by means of normal business resources might mean a shipper or forwarder was acting knowingly and willfully. Indifference on the part of shippers is tantamount to outright and active violation and diligent inquiry must be exercised by shippers and by forwarders. *Misclassification of Tissue Paper as Newsprint Paper*, 4 F.M.B., 483 (1954).

Rubin knew exactly what it manufactured and shipped. For a while it correctly classified the products in bills of lading in accordance with the tariff and paid the correct charges. In 1953 after Rubin found out that it was losing business because of high freight, a company official made up his mind to change his previous action and to misdescribe the products in an apparently plausible way to get a lower freight rate. In the meantime, Rubin continued to have the cartons containing its products correctly stenciled and to prepare invoices with accurate references to what they were.

Rubin's concern was not with consistency or with telling the truth about its product regardless of what the tariff contained or with conformity between what its officers knew its products to be and an unambiguous tariff description but only with doing what others were doing. This was a thought out plan of action to achieve a specific result (saving money) which was put into effect by giving new instructions to the forwarder and by continuing an inconsistent course of action with respect to the cartons and the invoices after discussing the subject with others.

Rubin's manager had a clear question in his mind about the proper thing to do, i.e. whether to change a previous "Stationery" and "Composition Books" description. He resolved the question by changed action. This was knowing and willful conduct. The extenuating circumstances, that he was meeting unfair competition of others doing the same thing is not relevant under the statute.

The shipper Serper likewise showed no concern for the truth when it came to typing in the correct information in the bills of lading which he prepared himself. Serper knew also the characteristics of the product he was selling and that it was not printing paper. Serper did not have to see the products to know that the words "printing paper" which he typed on his bills of lading were untrue. Since he claims not to have seen the tariff and to have been unfamiliar with its provisions, its contents are immaterial as regards his knowledge about proper classification. He did not describe the articles correctly and when confronted with a question about the variance between the description and what he had to ship he did not consult the tariff nor the carrier to find out the proper course of action. He failed to seek enlightenment. He resolved any doubt in his mind or lack of knowledge about how to prepare the papers by finding out from Rubin how it was done and whether it would get by, not whether it was accurate.

While Serper might not be well informed about the preparation of a bill of lading, he at least knew he was not shipping printing paper and he made no effort to obtain enlightenment about the obvious discrepancy between both the facts and the correct descriptions he saw on the invoices. He did this above a warning in bold face type on the bill of lading form reading as follows: "ATTENTION OF SHIPPERS is especially directed to Secs. 235–236 U.S. Criminal Code (18 U.S. Code 285–6). Sec. 4472 U.S. Revised Statutes (46 U.S. Code 170), Sec. 16 Shipping Act, 1916 (46 U.S. Code 815), Sec. 3, subdiv. 5, also Sec. 4, subdivs. 5 and 6, of the Carriage of Goods by Sea Act, 1936 (46 U.S. Code 1303, subsec. 5, 46 U.S. Code 1304, subsecs. 5 and 6) which provisions of law subject shippers to substantial penalties, liabilities and disabilities for false classification, misdescription or insufficient description of goods", etc. Serper's conscious choice in the preparation of the inaccurate bills of lading involved knowing and willful conduct.

Academy had just as much information as Serper had and in addition was an expert in the business of preparing shipping documents. Academy also had before it an invoice which clearly varied from its instructions. Academy ignored the variance and translated "200 page marble comps" and similar designations, and a variety of numbers into "Printing Paper". Academy, unlike Serper, had a tariff book available containing words to describe the invoiced articles, but it made no effort to be guided by the book or to discover what the many different invoice numbers and prices referred to. Instead, it assumed they were all "printing paper". Printing paper would rarely have the variety of prices these invoices showed. Academy did this even though for years it had been forwarding Rubin's products under correct bills of lading. Then, there was a change, but Rubin did not change its business or its product. Academy conformed to the change without inquiry. Academy too, failed to resolve the obvious conflict in descriptions and change of descriptions, and used the wrong one over the same bold-face type warning to shippers. Academy consistently and continually ignored a more descriptive classification than printing paper. It was argued that Rubin never asked Academy for advice, never discussed the matter and never told Academy what it was shipping. Rubin didn't have to do this. Academy already knew what was being shipped.

Still further evidence of Academy's knowledge is the fact that in preparing the export declaration, its clerks picked out a substantially correct code number from the Schedule B (Statistical Classification of Domestic and Foreign Commodities Exported from the United States) and used it to designate items actually shipped. While this code number and its heading does not cover "composition books" (apparently covered by other numbers) neither does it cover "printing paper" and the latter may be found under other headings and numbers. The page heading in Schedule B was generally descriptive and covered words like "blank books" and "salesbooks". Even though Academy selected substantially the correct code number covering composition books in preparing the export declaration it also wrote in the words "printing paper" conforming the words with the bill of lading.

The selection of the correct number from this technical publication (Schedule B) requires considerable knowledge of the products and an ability to match their characteristics with the descriptions in the "Schedule". This was done substantially correctly by the forwarder showing that it knew generally what it was shipping and that it was not printing paper which is under another number. The printing paper number was never used indicating a conscious study of the schedule and the selection of a code number to be written in the export declaration to identify products that Academy knew were being shipped. Academy knowing of the variance ignored the more descriptive classification in the tariff book. The effect of this action would be to prevent the carriers, which make word comparisons between export declarations and bills of lading, from discovering any misclassification, yet give the Bureau of the Census, which requires the documents, fairly accurate information through the code number. This is thought-out deception.

We conclude from the foregoing that the shipper Rubin and Serper and the forwarder Academy have knowingly and willfully, directly by means of false classification obtained or attempted to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

Bull Line and Alcoa were not made respondents, but Bull Line intervened to protect its interests. No testimony was taken to obtain a full statement of their responsibility under Sec. 16, but enough evidence was produced to show they followed procedures which might make them responsible under other circumstances.

There was clear evidence that both Bull Lines and Alcoa accept bills of lading under a statement that the carriers have received specified goods and packages and over the signature of the master of the ship, or someone acting in his behalf, without having the true facts checked by anyone directly responsible to the carriers. The closest they got to the goods or packages was to have their "receiving clerk" sign or initial on the back of the bill of lading after an employee of the stevedore, known as the "checker", makes a count of the boxes as they are taken off a truck at the pier. The checker may also measure the shipment. The receiving clerk was not shown to have gone out on the pier floor to make any examination of the shipment. He takes the checker's word and the master of the ship, necessarily, takes the receiving clerk's word. In this case the checker and everyone else failed to notice the clearly stenciled boxes with correct abbreviated descriptions on them. Counsel suggested that "second, third and fourth hand boxes are common" and they can't "go by stencils", but no proof that this was the case here was offered. In fact, the contrary was shown. Moreover, where for years the stencils on the boxes accurately and properly described their contents to the carrier, such excuses are weak at best. We think a reasonable check of cargo should be made by an employee responsible to the carrier when performing such important acts as receiving cargo and signing the bill of lading therefor. Substantial legal rights in property are dependent on the actions of the carriers' employees at these points.

Obviously most cargo can't be opened and inspected, but far more than a blind signing of bills of lading for the ship's master and a comparison of words on papers in the carriers' offices is possible. Moreover unquestioning reliance on shippers for the truth as to the information on bills of lading is not enough. *Misclassification and Misbilling of Glass Tumblers and other Manufactured Glassware Items as Jars, supra.*

All of the respondents herein have violated the provisions of the first paragraph of Sec. 16 of the Act. The facts and findings herein shall be referred to the Department of Justice for appropriate action.

732-047 O-64—17

ORDER

At a Session of the Federal Maritime Board, held at its office in Washington, D.C., on the 20th day of February, 1961.

No. 848

RUBIN, RUBIN & RUBIN CORP., N. N. SERPER & COMPANY, ACADEMY FORWARDING COMPANY

This proceeding having been initiated by the Board upon its own motion, and having been duly heard and submitted after investigation of the things and matters involved having been had, and the Board, on the date hereof, having made and entered of record a report containing its conclusions and decision thereon, which report is hereby referred to and made a part hereof:

It is ordered, That, the following respondents be and each one is hereby notified and required, (a) to hereafter abstain from the practices herein found to be unlawful under Sec. 16 of the Shipping Act, 1916, as amended; and, (b) to notify the Board within ten (10) days from the date of service hereof whether such respondent has complied with this order, and if so, the manner in which compliance has been made, pursuant to Rule 1 (c) of the Rules of Practice and Procedure (46 CFR 201.3):

Rubin, Rubin & Rubin Corp.
N. N. Serper & Company
Academy Forwarding Company

The proceeding be, and it is hereby, discontinued.

By the Board.

(Sgd.) THOMAS LISI,
Secretary.