FEDERAL MARITIME BOARD

No. 815

COMMON CARRIERS BY WATER—STATUS OF EXPRESS COMPANIES, TRUCK LINES AND OTHER NON-VESSEL CARRIERS

Decided March 2, 1961

Found that any person or business association may be classified as a common carrier by water who holds himself out by the establishment and maintenance of tariffs, by advertisement and solicitation, and otherwise, to provide transportation for hire by water in interstate or foreign commerce as defined in the Shipping Act, 1916; assumes responsibility or has liability imposed by law for the safe transportation of the shipments; and arranges in his own name with underlying water carriers for the performance of such transportation, whether or not owning or controlling the means by which such transportation is effected, is a common carrier by water as defined in the Shipping Act, 1916.

Status of individual respondents determined in accordance with above conclusion except as to Weaver Bros. Inc. and Railway Express Agency, and except as otherwise noted as to other respondents named in the report.

William J. Lippman and *Robert N. Kharasch* for American Red Ball Transit Company, Inc., Burnham Van Service, Inc., Ford Van Lines, Incorporated, Global Van Lines, Inc., Gray Moving & Storage, Inc., Greyvan Lines, Inc., Lyon Van Lines, Inc., Lyon Van & Storage Co., Martin Van Lines, Inc., Neptune Storage, Inc., North American Van Lines, Inc., Rocky Ford Moving Vans, Salt Lake Transfer Company, Sourdough Express, Inc., and Wheaton Van Lines, Inc., respondents, and Household Goods Carriers' Bureau and Movers' Conference of America, interveners.

Donald Macleay and *Harold E. Mesirow* for Bekins Household Shipping Company, Bekins Van Lines Co., Bekins Van and Storage Co., Bekins Van Lines, Inc., Bekins Moving and Storage Co. (Washington), and Bekins Moving and Storage Co. (Oregon), respondents.

Alan F. Wohlstetter and *Joseph F. Mullins, Jr.*, for Smyth Hawaiian Van Lines, Inc., Smyth International Van Lines, Inc., Smyth Overseas Van Lines, Inc., Aero Mayflower Transit Company, Inc., and Allied Van Lines, Inc., respondents.

Carroll F. Genovese for Carroll F. Genovese, Movers and Warehousemen's Association of America, King Van Lines, Inc., Trans-American Van Service, Inc., Von Der Ahe Van Lines, Inc., Airline Vans, Allied Pittsburgh Warehouse & Van Company, Inc., Paul Arpin Van Lines, Inc., Atlas Van Lines, Inc., Dean Van Lines, Delcher Bros. Storage Company, DeWitt Transfer & Storage Company, Imperial Van & Storage, Inc., Mollerup Van Lines doing business as Mollerup Van Lines & Mollerup Moving & Storage Company, Pan American Van Lines, Inc., Pyramid Van Lines, Inc., Republic Van & Storage Company, Inc., Security Storage & Van Company, Inc., Suddath Moving & Storage Company, Inc., and Weather Bros. Transfer, Inc., respondents.

Herbert Burstein, for Paul Arpin Van Lines, Inc., Columbia Van Lines, Inc., Suddath Moving & Storage Co., Mover's and Warehousemen's Association of America, Inc., Dean Van Lines, Inc., Security Storage and Van Company, Inc., and Von Der Ahe Van Lines, Inc., respondents.

John R. Mahoney and *Eugene T. Liipfert* for Consolidated Freightways, Inc., and its divisions, Garrison Fast Freight and Foster Freight Lines, Inc., respondents.

Ramon S. Regan for United States Van Lines, Inc., respondent.

B. W. LaTourette and *G. M. Rebman* for United Van Lines, Inc., respondent.

Robert E. Johnson for Railway Express Agency, Incorporated, respondent.

Frank L. Ippolito for Porto Rican Express Company, respondent.

Harry C. Ames and *James L. Givan* for Universal Carloading and Distributing Company, respondent.

Paul J. Coughlin for National Carloading Corporation, respondent.

Ira L. Ewers and *William B. Ewers* for Alaska Steamship Company, respondent.

Odell Kominers and *J. Alton Boyer* for Pacific Far East Line, Inc., respondent.

Willis R. Deming and *Alvin J. Rockwell* for Matson Navigation Company and the Oceanic Steamship Company, respondents.

Warner W. Gardner and *Vern Countryman* for American President Lines, Ltd., respondent.

Alphonsus E. Novick for Global Van Lines and Trans-Ocean Van Services, respondents.

Richard M. Hartsock for Military Traffic Management Agency, intervener.

Laurence E. Masoner, Henry A. Cockrum, and *J. C. Kinney,* Office of the Judge Advocate General, on behalf of the Secretary of the Army, for the Department of Defense, intervener.

Clarence J. Koontz, Malcolm D. Miller, and *J. H. Macomber, Jr.,* for Administrator of General Services, intervener.

Mark P. Schlefer and *John Cunningham* for Bull-Insular Line, Inc., and Alcoa Steamship Company, Inc., interveners.

Robert B. Hood., Jr., Edward Aptaker and *Robert E. Mitchell* as Public Counsel.

REPORT OF THE BOARD

THOS. E. STAKEM, *Chairman*, SIGFRID B. UNANDER, *Member*, RALPH E. WILSON, *Member*.

BY THE BOARD:

I. PROCEEDINGS

This is a report on the results of a hearing and an investigation ordered by the Board by an order dated March 14, 1957,[1] to determine (1) the classification and status of motor truck companies, freight forwarders and express companies under the Shipping Act, 1916, as amended, (Act) and the Intercoastal Shipping Act, 1933, as amended (Intercoastal Act) in order to arrive at a general rule or interpretation applicable in the future to all persons, and (2) the lawfulness of agreements filed under Sec. 15 of the Act in which the aforesaid classes of carriers are parties. Seventy-seven parties were made respondents and six parties not named as respondents intervened. Evidence was taken in the form of verified statements and exhibits in response to questionnaires promulgated by the Board. The submission of briefs was followed by a recommended decision of an Examiner and by exceptions thereto.

II. FACTS

Many motor truck companies, freight forwarders and express companies as part of their business, provide the service of moving household goods and other personal property from points in the United States to points overseas using both trucks or vans which they own or operate and ocean ships which they do not own and operate. Such companies and forwarders are the initial carriers. Truck and rail service may be used overseas. The initial carriers offer this service to the public by advertisement and solicitation. The service consists of taking property from the shipper at his home or place of business, carrying it by motor vehicle or rail car to a port, having it loaded on a ship, transported overseas, and by further land transportation delivered to the consignee. Household goods are frequently packed by the mover and generally protected from damage in transit by appropriate padding and placed in vans, sent to a port, unloaded and repacked into specially built contain-

[1] 22 FR 1788; Federal Register, No. 53, March 19, 1957, as amended in 24 FR 7340; Federal Register, No. 178, September 11, 1959.

ers which are used for the ocean shipment of household goods. They either own or lease the containers. The loaded containers are delivered into the custody of ship operators at the pier. Any needed stevedoring is handled by the initial carriers. Railway Express business is essentially a small package business. Railway Express transports packages under a single bill of lading naming the Express Company as shipper. Both types of carriers issue their own through bills of lading to the original shipper-consignor. By the bill's terms they agree to deliver the goods to the final destination named by the shipper and generally assumed liability for safe arrival. The extent of their monetary liability, however, might be limited. Claims for loss or damage are submitted to the initial carriers. Charges for these services and for the obligations undertaken are those specified in the carriers' tariff schedules and regulations. The tariff charges are for a combination of the costs for preliminary packing in the case of household goods, for land transportation from origin to a port, for over water transportation including the cost of packing and unpacking of household goods containers, and for land transportation to the final destination and delivery to the consignee, and for overhead and profit. The initial carriers collect the freight charges based on this tariff. The services have proven useful, desired by the public and extensively used.

Agreements have been filed with the Board by such motor truck companies, freight forwarders and express companies, on the assumption that the signers were common carriers by water and required to do so by Sec. 15 of the Act.

An agreement between 30 motor truck companies was placed in the record of this proceeding. The agreement designates a "Bureau" (A private corporation) to administer the agreement and obligates the parties: (1) to file with the Board a tariff specifying the rates, charges, rules and regulations applicable to the transportation of household goods between points covered by the agreement; (2) to quote, charge and collect rates and other charges only in accordance with the tariff adopted by the members pursuant to the agreement; (3) to furnish the bureau all information required for its records; (4) to cooperate by following prescribed procedures in voting on proposals for the establishment or revision of rates, rules, regulations or practices; and (5) to furnish the Board copies of various documents evidencing bureau action including the joint tariff observed by the signatory carriers. This agreement and others having the same objective have been per-

formed by the filing of various tariffs containing charges for overseas transportation of household goods.

The general purpose of all the agreements is to require the signatory carriers to charge uniform rates for moving household goods as specified in the mutually agreed upon tariffs that are adopted as part of the performance of the agreements.

III. DISCUSSION

The result to be achieved by our inquiry is to determine the extent to which these facts bring the respondents within the ambit of Sec. 15 of the Act, and in so doing to provide an interpretation thereof which may be used as a guide in determining its effect on other carriers and on future agreements involving similar services.

Sec. 15 of the Act requires that "every common carrier by water, or other person subject to the Act shall file immediately a true copy . . . of every agreement with another such carrier or other person subject to this Act . . . fixing or regulating transportation rates . . . controlling, regulating, preventing or destroying competition . . . or in any manner providing for an exclusive, preferential, or cooperative working arrangement." Agreements are lawful "only when and as long as approved by the Board." Before approval or after disapproval it is unlawful to perform the agreement. Lawful agreements are "excepted" from the provisions of the Federal laws relating to combinations in restraint of trade and monopolies, contracts which may be construed to create restraints of trade or monopolies are declared to be illegal [2] and under certain circumstances agreements among several carriers providing for the establishment of uniform rates, for cooperation and for an exchange of information may constitute such illegal contracts.

A determination of the extent to which respondents must comply with Sec. 15 and come within its exception depends upon whether the motor truck companies, freight forwarders, and express companies that make agreements among themselves fixing through rates for moving personal property overseas should be classified as, and have the status of, "common carriers by water" [3] or "Com-

[2] 15 USC §§ 1 and 2

[3] "A 'common carrier by water' is defined in the first section of the Shipping Act, 1916, to mean 'a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.'" (39 Stat. 728, 46 U.S.C. 843, as amended.)

mon carriers by water in intercoastal commerce" [4] and therefore must file [5] such agreements with the Board. If respondents must comply, then the lawfulness [6] of the agreements, and whether respondents may be excepted from the so-called anti-monopoly restraint of trade laws [7] must be determined.

The entity which constitutes a "common carrier by water in foreign commerce" as defined in the first section of the Act is subject to the provisions of the Act. The term "common carrier" is not defined but the legislative history of the Act indicates that the person to be regulated is the common carrier at common law: One who holds himself out to carry for hire the goods of those who choose to employ him. *Banana Distributors, Inc. v. Grace Line, Inc.*, 5 F.M.B. 615, 620 (1959). We have also held that a respondent's status as "common carrier" does not depend on its ownership or control or means of transportation, but rather on the nature of its undertaking with the business which it serves. Where a party "undertakes to transport from door to door it is a common carrier over the entire limits of its routes, both the portion over land and the portion over sea". Where the respondent assumed complete responsibility for the safe transportation and delivery of goods entrusted to it from the time of receipt from the shipper until arrival at ultimate destination, it was held to be a common carrier by water. *Bernhard Ulmann Co., Inc.*, 3 F.M.B. 771 (1952).

Railway Express Agency, Inc., was classified as a common carrier by water when it published a tariff naming rates and charges applicable, but restricted, to shipments transported by ship between ports in the United States and ports in Alaska pursuant to

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[4] A "common carrier by water in intercoastal commerce" is defined in the Intercoastal Shipping Act, 1933, to include "every common and contract carrier by water engaged in the transportation for hire of passengers or property between one State of the United States and any other State of the United States by way of the Panama Canal. (47 Stat. 1425, 46 U.S.C. 843, as amended.)

[5] Sec. 15 of the Shipping Act, 1916, provides: "That every common carrier by water . . . shall file immediately with the Board a true copy . . . of every agreement with another carrier . . . fixing or regulating transportation rates . . ." (first par.)

[6] Sec. 15 of the Shipping Act, 1916, provides: "All agreements, modifications or cancellations made after the organization of the Board shall be lawful only when and as long as approved by the Board, . . ." (fourth par.)

[7] "Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act approved July second, eighteen hundred ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes', and amendments and acts supplementary thereto." Sec. 15, (fifth par.)

an agreement with a steamship company. The agreement provided that the company received one half of the gross revenue under the tariff. The company did not issue a bill of lading or freight bills (i.e., enter into an agreement with shippers). *Alaskan Rates,* 2 USMC 558, 582 (1941).

In response to a disclaimer of common carrier by water status because the carrier owned nothing that floats and carried nothing across the water, we held that such status "does not depend on its ownership or control or means of transportation but rather on the nature of its undertaking with the public which it serves." The Act regulates those who perform or agree to perform water transportation service regardless of ship operation. *Bernhard Ulmann Co. Inc. v. Porto Rican Express Co., supra.* In the Ulmann case we reported, as to the respondent therein, "Since it undertakes to transport from door to door it is a common carrier over the entire limits of its route, both the portion over land and the portion over sea". The facts indicated that the respondent's freight bill to shippers showed total transportation charges and respondent undertook, by its information furnished to the public and by agreements with shippers, to assume complete responsibility for the safe transportation of goods entrusted to it from the time of receipt from the shipper at his "store door" in New York until arrival at ultimate destination in Puerto Rico. It was decided that the respondent came within the definition of the term "common carrier by water" in foreign or interstate commerce, as the term is used in Sec. 15 of the Act and in the Intercoastal Act, within the meaning of the first section of the Act.[8] Both of these decisions involved intercoastal operations or non-foreign commerce. The present operations involve foreign commerce.

The principal question here is which of the respondents likewise comes within the definition of common carrier by water as a result of the conformance or non-conformance of its activities with the foregoing standards as applied to foreign commerce. The Examiner found that our standards might be summarized as follows: ". . . a person who holds himself out by the establishment and maintenance of tariffs, by advertisement and solicitation, and otherwise, to provide transportation for hire by water in interstate or foreign commerce, as defined in the Shipping Act; assumes responsibility for the safe water transportation of the shipments;

[8] Sec. 5 of the Intercoastal Act provides that "the provisions of the Act are extended to and shall apply to every common carrier by water in interstate commerce as defined in section 1 of the Shipping Act, 1916."

and arranges in his own name with underlying water carriers for the performance of such transportation, whether or not owning or controlling the means by which such transportation is effected, is a common carrier by water as defined in the Shipping Act . . ."

The Examiner found that most of the respondent motor carriers, freight forwarders and express companies were "common carriers by water" within the meaning of such term in the first section of the Act, as a result of the application of these tests to their activities as shown by the record before him.

He concluded that their agreements fixing through transportation rates had to be filed immediately and approved by us to be lawful as required by Sec. 15 of the Act.

The exceptions relate only (1) to the extent to which certain motor carriers, because of the facts of their operations as shown in the record, were found not to be "common carriers by water" when engaged in transporting household goods in foreign commerce or in intercoastal commerce; (2) to the failure to find that respondents should also be considered as "forwarders, in the ordinary sense of the word, in their relationship with vessel operators"; and (3) to the Examiner's reference to "the 'eligibility' of the different kinds of carriers" instead of to the problem of "whether such agreements may exist between such persons, on the one hand, and vessel-operating common carriers or other persons subject to the Act, on the other hand . . ."

The excluded carriers were Carrol F. Genovese; Movers & Warehousemen's Association of America, Inc.; Allied Pittsburg Warehouse & Van Co., Inc.; Atlas Van Service, Inc.; Howard Van Lines, Inc.; Pacific Freight Corporation; Pan American Van Lines, Inc.; Puerto Rico Freight Delivery Co.; Smyth International Van Lines, Inc.; Bekins Moving & Storage Co. (Oregon); Bekins Van Lines, Inc. (California); Bekins Van & Storage Co. (California); and Weaver Bros., Inc. After the date of the recommended decision the Bekins companies withdrew from the tariff fixing agreements to which they were a party and which had been filed pursuant to Sec. 15. Of the remaining excluded carriers only Weaver Bros., after the Examiner filed his recommended decision, submitted an affidavit showing that their operations had been materially changed since the time of their verified statement of their activities, used as a basis for the Examiner's conclusions. The record is reopened for receiving this document. The sworn statement of Weaver's general traffic manager was that it now (1) "consolidates" freight by picking up parts of whole shipments from sup-

pliers or delivering carriers for assembling into single lots; (2) "containerizes" shipments in "sealed vans"; and (3) moves freight under through bills of lading issued by Weaver Bros. under its published through tariff schedules. By the issue of its own bill of lading, Weaver has arranged in its own name for the performance of transportation obligations in line with the Examiner's test. According to its affidavit, charges for the entire movement are collected by Weaver and Weaver "assumes sole responsibility to the shipper for the safe water transportation of the shipment as well as land functions at both origin and destination". Weaver's agreement with shippers as evidenced by the "terms and conditions" which constitute the contract of carriage shown in the bill of lading which was a part of the affidavit, however, are at variance with the sworn statement. It is agreed in Sec. 3 of the bill of lading that "Carrier shall in no event be liable in any capacity whatsoever for any delay, nondelivery or misdelivery or for any damage or loss occurring while the property is not in its actual custody." [9] The property is not in Weaver's custody when it is in the custody of the vessel operator. In Sec. 12 of Weaver's bill of lading the obligation of the carrier is as follows:

"Any carrier hereunder in making arrangements for any transshipping or forwarding by any vessel or other means of transportation not operated by such carrier shall be considered only as a forwarding agent, acting solely for the convenience of the shipper without any responsibility whatsoever. The carriage by any transshipping or forwarding carrier, and all transshipment or forwarding, shall be subject to all terms and conditions whatsoever in the regular form of bill of lading, freight note, contract or other shipping document used at the time by such carrier, whether issued for property or not, and even though such terms may be less favorable to the shipper or consignee than the terms of this bill of lading and may contain more stringent requirements as to notice or claim or commencement of suit, and may exempt the on-carrier from liability for negligence . . ."

These provisions show that Weaver has not assumed sole responsibility to the shipper for the safe water transportation of shipments. Instead, it is a "forwarding agent" for the "convenience" of the shipper insofar as the water transportation part of the journey is concerned. Because of the restricted nature of its undertaking with the public as evidenced by its agreement with shippers, we find that Weaver has failed to bring itself within the the definition of a common carrier by water.

[9] The "Terms and Conditions" may have been mistakenly used since it is noted that they refer to "said Puget Sound Alaska Van Lines, Inc.", a party which is nowhere else referred to on the face of the "Bill of Lading" document headed "Weaver Bros."

The Examiner found that Railway Express "assumes liability for the safe through transportation of the shipment." It is noted, however, that its "Uniform Through Export Bill of Lading" (Form 2100—(4–57)) in evidence contains, under the heading "Additional Provisions as to Transportation to be Performed Beyond the Boundaries of the United States" and after the statement "The terms and conditions of this Order Bill of Lading under which the shipment is accepted are printed on the back hereof", paragraph 10 therein which is on the back and reads as follows: "The company shall not be liable for any loss, damage, or delay in said shipments over ocean routes and their foreign connections, the destination of which is in a foreign country, occurring outside the boundaries of the United States, which may be occasioned by any such acts, ladings, laws, regulations, or customs. Claims for loss, damage, or delay must be made in writing to the carrier issuing this bill of lading or its agent within nine months after delivery of the property or in case of failure to make such delivery then within nine months and fifteen days after date of shipment; and claims so made shall be deemed to have been made against any carrier which may be liable hereunder. Suits shall be instituted only within two years and one day after the date when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof. Where claims are not so made, and or suits are not instituted thereon in accordance with the foregoing provisions, the carrier shall not be liable."

Unlike the Weaver Bros.' bill of lading terms which expressly create an agency relationship between the shipper and the ocean carrier for the water portions of the transit, Railway Express terms appear to make it a principal as far as the ocean carrier is concerned, but with a disclaimer of liability. The legal effect of such an obligation is not clear.

The Uniform Through Export Bill of Lading of Railway Express is also made "subject to Classification and Tariffs in effect on the date hereof." The "International Tariff No. 5–A" in the Exhibits, and filed with the Board, limits liability in Rule 13:

"Railway Express Agency will assume full common carrier liability from origin to destination in the amount of $50.00 for any shipment of 100 pounds or less, and 50¢ per pound for any shipment in excess of 100 pounds." Railway Express might, however, accept "the terms and conditions of the receipts or bills of lading of ocean carriers" involving a different liability.

We do not pass on the legality of these disclaimers of liability. Railway Express did not file a brief and the effect of these provisions was not explored. If the provisions are valid, Railway Express does not assume liability and would not be a common carrier by water under the Examiner's tests. But if Railway Express as a common carrier has liability imposed on it notwithstanding these provisions, then it may be a common carrier by water. In view of the unresolved status of Railway Express' liability to shippers on the over-the-water portion of the transportation which it handles, we are unable to come to any conclusion about the status of Railway Express as a common carrier by water. Until such a conclusion can be clearly reached based on an unequivocal assumption of liability to shippers or a showing of an imposition of liability by the courts, we conclude Railway Express is not a common carrier by water and its rate fixing agreement may not be received for filing. To permit further examination of the liability issue this proceeding is held open as to Railway Express, so that further proof, in the form of briefs or oral argument, may be received and considered by the Board. Upon completion of such a review a report will be issued as to Railway Express.

As regards the Examiner's recommended decision, we conclude, however, that the assumption or attempted assumption of liability should not be the sole test of common carrier by water status. Rather, the actual existence or imposition of liability is also a significant factor. Actual liability as a common carrier over the entire journey including the water portion is essential.

In the absence of exceptions by the remaining carriers excluded from being considered as common carriers by water, the recommended decision is adopted as to such carriers. All of the remaining respondents are classified as, and found to have the status of, common carriers by water as we interpret such term in the first section of the Act or as common carriers by water in intercoastal commerce as we interpret such term in the Intercoastal Shipping Act, 1933.

We conclude that a person or business association may be classified as a common carrier by water who holds himself out by the establishment and maintenance of tariffs, by advertisement and solicitation, and otherwise, to provide transportation for hire by water in interstate or foreign commerce, as defined in the Shipping Act, 1916; assumes responsibility or has liability imposed by law for the safe transportation of the shipments; and arranges in his

own name with underlying water carriers for the performance of such transportation, whether or not owning or controlling the means by which such transportation is effected, is a common carrier by water as defined in the Shipping Act, 1916.

One of the purposes of the proceeding was also to investigate the lawfulness of all agreements filed under Sec. 15 of the Act in which motor truck companies, freight forwarders, and express companies are parties thereto. This does not appear to be possible on the record before us since it includes only one agreement. To the extent that agreements are being filed,[10] they are subject to review and approval or disapproval on a case by case basis pursuant to 46 CFR § 222.14. This procedure will be continued, and nothing herein shall affect any approval specifically granted heretofore by the Board.

[10] Filing is required by Sec. 15 of the Act and implementing regulations contained in 46 CFR §§ 222.11—222.16.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 2nd day of March 1961

No. 815

COMMON CARRIERS BY WATER—STATUS OF EXPRESS COMPANIES, TRUCK LINES AND OTHER NON-VESSEL CARRIERS

This proceeding having been entered upon 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 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 this proceeding be, and it is hereby, discontinued as to all respondents named herein except Railway Express Agency, and

It is further ordered, That this proceeding be, and it is hereby, held open as to Railway Express Agency for a period of 30 days from the date hereof for the submission of such further proof as may be offered by Railway Express Agency to determine its status as a common carrier by water as defined in the Shipping Act, 1916, as amended.

By the Board.

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. S–122

Moore-McCormack Lines, Inc.— Application Under Section 805(a)

Decided March 24, 1961

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 eastbound intercoastal voyage carrying a cargo of lumber and/or lumber products from United States North Pacific ports to United States Atlantic ports, commencing on or about April 2, 1961, 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 Merchant Marine Act, 1936, as amended.

Ira L. Ewers, for applicant.

Donald Brunner, 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. 1223) (the Act)[1] for its vessel, the SS. MORMACSUN, presently under time charter to States Marine Lines, Inc., to engage in one eastbound intercoastal voyage carrying a cargo of lumber and/or lumber products commencing at United States North Pacific ports on or about April 2, 1961, for discharge at United States Atlantic ports.

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

732-047 O-64—18

The application was duly noticed in the Federal Register of March 18, 1961, (26 F.R. 2324). Hearing was held on March 24, 1961. No parties intervened in opposition to the granting of the requested permission.

The testimony in this case shows that States Marine has cargo bookings of approximately 6¼ million feet of lumber and lumber products. States Marine has been unable to obtain any other suitable ship for an early April departure. This sailing, which is scheduled to commence shortly after loading on April 2, 1961, will not increase the normal pattern of scheduling in States Marine Lines, Inc. eastbound intercoastal service.

On this record 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.

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. 827

PHILIP R. CONSOLO

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

No. 827 (Sub. No. 1)

PHILIP R. CONSOLO

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

Decided March 28, 1961

Complainant found injured to the extent of $143,370.98 by respondent's refusal to allocate, between August 23, 1957 and July 12, 1959, refrigerated space on respondent's ships for the carriage of bananas from Ecuador to North Atlantic ports of the United States, and reparation in such amount is awarded.

Robert N. Kharasch and *William J. Lippman* for complainant, Philip R. Consolo.

Odell Kominers, Renato C. Giallorenzi and *John H. Dougherty* for respondent, Flota Mercante Grancolombiana, S. A.

REPORT OF THE BOARD

THOMAS E. STAKEM, *Chairman;* SIGFRID B. UNANDER, *Vice Chairman;* RALPH E. WILSON, *Member*

BY THE BOARD:

I. PROCEEDINGS

By an order on June 22, 1959 the Board ordered that the proceeding docketed as No. 827 be held open for further proceedings

on the claim of the complainant, Philip R. Consolo (Consolo), for reparations, if any, (5 F.M.B. 633, 641) pursuant to Sec. 22 of the Shipping Act, 1916, as amended (Act). The present proceedings are in response to a complaint to Docket No. 827 filed November 15, 1957 by Consolo requesting an order by the Board ordering Flota Mercante Grancolombiana, S. A. (Flota) to pay reparation for damages during the period November 4, 1955 through November 4, 1957 in the amount of $600,000 and other relief and to a supplemental complaint filed November 18, 1959 (Docket No. 827, sub. No. 1) by Consolo requesting an order by the Board ordering Flota to pay reparation for damages during the period November 15, 1957 through September 1, 1959, in the sum of $250,000, and for other relief.

By its report and order of June 22, 1959, served July 2, 1959, in *Philip R. Consolo et al v. Flota Mercante Grancolombiana, S. A.*, 5 F.M.B. 633 (1959) the Board found Flota to be a common carrier by water in the operation of ships between the west coast ports of South America and United States Atlantic ports and found Flota's practice of contracting all of its refrigerated space on its ships operating between Ecuador and ports on the North Atlantic coast of the United States to a single shipper to be unjustly discriminatory and unreasonably prejudicial in violation of the Act.

The further proceedings and hearing on the claim for reparations were had by an examiner who, on October 5, 1960, submitted a recommended decision that reparations were due in the amount of $259,812.26. Exceptions and replies thereto were filed. Oral argument before the Board was held on January 25, 1961.

II. FACTS

Consolo, an experienced and qualified shipper of bananas for many years between Ecuador and the United States was found to have proven his complaint that Flota's practice of excluding him was in violation of Secs. 14 and 16 of the Act. The Board's findings of fact, conclusions, decision and order on this phase of the proceedings were entered of record and reported in *Philip R. Consolo et al v. Flota Mercante Grancolombiana, S.A.* (Supra).

In its report the Board found that Flota in the operation of its freight ships between Ecuador and the U.S. North Atlantic ports and U.S. Gulf of Mexico ports is a common carrier by water in the foreign commerce of the U.S. (page 638). No date was established for the beginning of such status, but Flota was shown to have operated since July 20, 1955 between Ecuador and the U.S. on an

approximately weekly schedule with 5 ships and that it now operates 6 ships. Consolo did not use any of these ships until September 1, 1959.

Consolo first expressed an interest in space in the Spring of 1955 when he had a conference with Flota officers and "made inquiry as to the height of each chamber [for banana storage] and then the rate they were asking for the ships." He inspected a ship later and found fault with the height of the storage chamber. Consolo was given figures as to what Flota "wanted for the ships in its entirety" (sic) but he asked for a reduced rate on the lower chamber or for the two upper chambers at the proposed rates. The counter offers were rejected. Other negotiations, for a contract by correspondence and by conversations in 1956 and 1957, did not result in a mutually acceptable arrangement. At no time before August 23, 1957 did Consolo ask for an allotment of space at a regular tariff rate, but accepted the prevalent trade custom of either bidding or negotiating for space on a contractual basis.

Consolo proved that he could have bought and sold 5,000 to 15,000 additional stems of bananas if Flota had allotted him space.

By a letter dated August 23, 1957, addressed to Flota at Bogata, Colombia, Consolo wrote asking "to be considered for a fair and reasonable amount" of space on Flota's ships. The letter referred to our dockets Nos. 771 and 775 as the basis for this request. Flota's reply dated October 7, 1957, was that "reefer space on our vessels has been committed for the next two years".

By its order of June 22, 1959, served July 2, 1959, the Board ordered Flota "to cease and desist and to abstain from entering into, or continuing or performing any of the contracts, agreements, or understandings for the carriage of bananas, found herein to be in violation of sections 14 and 16 of the Shipping Act, 1916 as amended, not later than August 1, 1959." Respondent was also ordered to offer, within 10 days after July 2, 1959, all qualified banana shippers refrigerated space for the carriage of bananas. No proofs were introduced in the present proceeding to show how this order was complied with. An allotment of space was made by Flota September 1, 1959, when Consolo was one of five qualified shippers who applied for and were allotted space.

III. DISCUSSION

Sec. 22 of the Act authorizes any person to file a sworn complaint "asking reparation for the injury, if any," caused by any violation of the Act. Exclusion of complainant, Consolo, from the

use of Flota's common carrier service from Ecuador has been found to be a violation of the Act. Consolo filed a sworn complaint asking for reparations. An examiner conducted proceedings in which the issues were limited to ascertaining the period of injury and the computation of the amount due as damages for injury. The examiner recommended that complainant is entitled to reparation in the amount of $259,812.56 based on 105 voyages during the period August 23, 1957, to September 1, 1959, yielding a net profit of $779,436.78 of which Consolo was entitled to one-third.

In interpreting Sec. 22 in *R. Hernandez v. A. Bernstein Schiffahrtgesellschaft* 1 U.S.M.C. 686 (1937) the U.S. Maritime Commission held that defendants unjustly discriminated against complainant in violation of paragraph Fourth of Sec. 14 of the Act by refusing to book cargo in response to applications by complainants for the transportation of automobiles. Complainant was shown to have exported unboxed automobiles by securing steamship booking and then purchasing the automobiles therefor. Complainant was also shown to have the ability to obtain automobiles for shipment. In some cases complainant also had small lots of automobiles available in New York ready to ship to Bilbao, Spain, before booking. Defendants were shown to have held themselves out as common carriers of unboxed automobiles from New York to Bilbao. Their ships were constructed to accommodate automobiles and capacity was available. The number of automobiles required to fulfill complainant's contract to sell to a dealer in Spain was shown. Complainant proved a loss of 15% profit on prospective shipments. Proximate injury was held to have been caused complainant because of his inability to supply automobiles pursuant to an agreement with the importer in Spain. The case was assigned further hearing to determine the amount of reparations due, in the absence of evidence (1) that all the cars upon which reparation was based could have been carried by defendants, (2) as to the amount of space which was available and, (3) as to the value of the cars which could have been carried in such available space.

In *Roberto Hernandez, Inc. v. Arnold Bernstein S., M.B.H.* 2 U.S.M.C. 62 (1939) the above elements were proven and reparations equal to the estimated net profits that would have been earned during the reparations period were established.

The defendants having failed to comply with the order, the appellant brought suit for enforcement pursuant to Sec. 30 of the Act. The defendants resisted enforcement on the ground that

(1) there was no basis for the plaintiff's claim and (2), it was plaintiff's duty to mitigate any damages. The District Court agreed in *Roberto Hernandez, Inc. v. Arnold Bernstein S., M.B.H.*, 31 F. Supp. 76 (D.C.N.Y. 1940), but on appeal Circuit Court, reversed in 116 F. 2d 849, 851 (2nd Cir., 1941) stating that the District Court raised too high a standard on which to test the proof as to damages as found by the Commission. The Court held that where the Commission's findings "are supported by substantial evidence . . . and where no new evidence on the subject is introduced . . . it is the duty of the court to accept and give them effect". The duty of the court is equally that of the Board. The basis for plaintiff's claim was found to exist and the Court stated that the "burden to show a failure to mitigate the damages was upon the defendants".

In the reparation hearing in *Waterman et al. v. Stockholms Rederiaktiebolag Svea et al.*, 3 F.M.B. 248 (1950), the Board found that the complainants had not sustained the burden of proof because of want of proof on "cost, outturn and selling price" but in so holding acknowledged that damages are to be based on the difference between cost and selling price, where there was a refusal to furnish refrigerated space to the complaining fruit shippers.

The Supreme Court has held that ordinarily "the measure of damages in such case [refusal to carry] is the difference between the value of the goods at the point of tender and their value at the proposed destination, less the cost of carriage." *McLean v. Denver & Rio Grande R.R. Co.*, 203 U.S. 38, 49, 27 S. Ct. 1, 3 (1906). In accord are 9 Am. Jur. Carriers, § 314, 3 Hutchinson on Carriers (3rd Ed.) §§ 1359, 1370, 2 Moore on Carriers § 609, 13 C.J.S. Carriers, § 33, and see *Sonken-Galamba Corp. v. Atchinson, T. & S.F. Ry Co.*, 124 F. 2d 952, 958 (8th Cir., 1942).

In the present case proof of damages meeting the specific standards of cost, outturn and selling price was offered in detail. Witnesses were agreed on the availability of bananas in Ecuador and the existence of a market for them in the United States. Consolo was shown to have the resources to buy and ship bananas. The loading sheets showing actual purchases and the outturn sheets showing actual sales and "liquidation sheets" (report of commission merchant to importer showing proceeds of sale, expenses, commission and net proceeds) were used, for each shipment of bananas by Consolo on Grace Line ships during the reparation period. The space that would have been used on Flota

ships at Flota's freight rates during the reparation period was shown. Costs in Ecuador were taken from actual loading sheets showing actual purchases week-by-week. Freight charges were supplied from Flota's records of actual freight collected on its voyages during the reparation period. Stevedoring costs came from testimony of banana shippers as to actual costs at New York. We find the figures used in the reparation computation to be fully supported in the record. The computation itself, using the above data, established a dollar figure for profit or loss per banana stem shipped before stevedoring and freight. From the amount of profit per voyage the freight stevedoring and incidental administrative overhead and other expenses have been deducted. The examiner's conclusions were based on these fully documented facts.

Consolo excepted to the examiner's recommendation that the reparation period did not begin until August 23, 1957, and to the failure to recommend that Consolo be awarded reparation for the period November 15, 1955, through September 1959 inclusive. Consolo also excepted to an error in computing damages within the period August 23, 1957, to September 1, 1959, on the ground that the deduction from profit for stevedoring costs should be the cost for stevedoring in Philadelphia instead of New York. The New York costs were shown to be 48.8 cents per stem whereas the actual Philadelphia costs were later shown to be 35.15 cents per stem.

Flota excepted to the following:

1. The Examiner's ultimate recommendation.

2. The Examiner's failure to recognize that the Board's decision of June 22, 1959 did not purport to determine liability for the period prior thereto.

3. The incompleteness of the Examiner's findings as to the facts and circumstances confronting Flota prior to and during the period for which reparations are sought, and to his failure to consider and make complete findings thereon, as contained in Flota's opening brief on reparations, and in the present brief; and his failure to find that in light of such circumstances Flota's actions were completely reasonable and violated no provision of the Act, and no obligation to Consolo.

4. The Examiner's failure to find that in any event award of reparations would be inequitable and unjust, and for that reason should be denied.

5. The Examiner's inclusion of voyages subsequent to the Board's report of June 22, 1959, in calculating reparations, and to his failure to find that Flota acted promptly thereafter to comply with the Board's order, and therefore incurred no liability during that period.

6. The Examiner's failure to find that the burden of proof upon all issues was upon Consolo, including the alleged violation prior to compliance with the Board's order of June 22, 1959; the alleged injury to Consolo during the period; and the extent of any such injury; and to his failure to impose that burden on Consolo.

7. The Examiner's failure to find that the record proves there was no injury to Consolo and that Consolo's claim of injury is not bona fide.

8. The Examiner's failure to find that Consolo's claimed losses are speculative.

9. The application by the Examiner of an incorrect measure of damages.

10. The Examiner's incorrect computation of reparations, including his arbitrary allocation to Consolo of one third of Flota's space, for calculation purposes; his failure to appreciate the significance of the 18.46 percent figure representing the allocation to Consolo following the Board's order of June 22, 1959.

11. The Examiner's failure to hold that Consolo is not the proper party complainant.

12. The Examiner's conclusion that Consolo could not have minimized his damages, if any, by utilizing other available transportation, including specifically Grace Line, Chilean Line, and chartered vessels.

13. The recommended award of interest on reparations.

14. The Examiner's subsidiary findings, or the possible implications therefrom, inconsistent with the foregoing exceptions, listing certain findings of fact.

15. The Examiner's failure to find that the renewal of Panama Ecuador's (Panama-Ecuador Shipping Corporation, exclusive shipper on Flota's ships) contract in 1957 was based upon an option contained in the 1955 contract between Flota and Panama Ecuador, and upon Flota's action determining that Panama Ecuador's bid was the most favorable to it, all of which occurred prior to the Board's decision in *Banana Distributors, Inc. v. Grace Line Inc.*, 5 F.M.B. 278 (1957).

16. The Examiner's failure to find that there was no significant competition between Consolo and Panama Ecuador.

17. The method of ascertaining damages employed by the Examiner.

18. The Examiner's failure to make subsidiary findings as to the components of the recommended $259,812.26 reparations.

19. The Examiner's failure to enter findings in accordance with the facts recited by Flota in its opening brief on reparations.

The arguments supporting the exceptions are essentially (1) that the Board did not, in *Philip R. Consolo et al v. Flota Mercante Grancolombiana, supra,* find Flota guilty of violating the Act before June 22, 1959; (2) that in contracting all of its refrigerated space for bananas to a single shipper before then, Flota acted legally; (3) that the failure of the Board or the Board's staff, prior to June 22, 1959, to give Flota a legal opinion, in response to a petition for declaratory relief, as to the validity of Flota's exclusive patronage contract prevents the Board from considering Flota as having acted wrongfully; (4) that the complaint and request for the losses are speculative, the claim for reparation is not bona fide, and the burden of proving loss has not been sustained; and, (5) the damages were incorrectly measured and computed and interest should not be added.

For the reasons given below, we agree in part only with the respondent's exceptions as to the computation of reparations and to the award of interest on reparations. The remaining exceptions are rejected. Exceptions and proposed findings not discussed in this report nor reflected in our findings have been considered and found not justified.

The first and thirteenth exceptions refer to the award of interest on reparations. We find that it would be inequitable to award interest on an unliquidated claim before it was due and disallow any interest on the award herein.

In exception two respondent argues that it acted reasonably and did not unjustly, unfairly or unreasonably discriminate against Consolo and therefore did not violate any statute during the period before the Board's order of June 22, 1959. In exception three the incompleteness of the findings is averred and in exception four failure to find inequity in an award is excepted to. Our report in 5 F.M.B. 633 has already held that in the past "Flota has acted in violation of Secs. 14, Fourth and 16 of the Act." (639). The facts and circumstances omitted all relate to more arguments that Flota did not violate the Act before June 22, 1959. Such facts and the issues they raise have already been considered and decided in the first proceeding and are not appropriate sub-

jects for exceptions in the reparations phase of this docket. The examiner properly did not review these facts nor retry the issues they raise. The previous report on these issues is plain and is final as far as the Board is concerned. The only remaining issue was the measure of the reparation Consolo is entitled to under Sec. 22 of the Act. Facts bearing on this issue alone were all the examiner was required to consider.

The exceptions are also based on the argument that because Flota had contracted all of its space to another single shipper during the period involved reparations would be inequitable and unjust and the inclusion of voyages before June 22, 1959, when the favored shipper's contract was still being performed, was not proper. This argument, too, uses the erroneous premise that performance of the exclusive patronage contract, during a time when Flota unjustly discriminated against a shipper in the matter of cargo space and gave undue and unreasonable preference or advantage to particular persons, was a valid excuse for nonperformance of obligations under Secs. 14 and 16 of the Act. The performance of the contract is the very act which constitutes the violation of such sections. We have held that such conduct was improper in the following words: "It is . . . clear that they (Consolo and Banana Distributors, Inc.) were denied reefer space accommodations by Flota, to their prejudice and disadvantage, and that Panama Ecuador, in receiving and using that space, was favored and advantaged. We find no justification for this conduct on the part of Flota and conclude that in denying reefer space to complainants, and in granting that space to a single favored shipper, Flota has acted in violation of Secs. 14, Fourth and 16 of the Act." *Philip R. Consolo et al v. Flota Mercante Grancolombiana, supra,* at 638. In other words, as long as the contract caused the denial of space there was a violation. The violation did not begin June 22, 1959, but long before this. There can be no question of inequity or unjustness to a respondent who violates the Act by means of an exclusionary contract. It is the excluded shipper who has the equities on his side under the Act, not the favored shipper nor the discriminatory and preference-giving carrier.

One of the arguments advanced to prove absence of fault in failing to offer non-discriminatory and non-preferential service was (1) that Flota had filed a petition for declaratory relief (Docket No. 835, decided in *Philip R. Consolo et al v. Flota Mercante Grancolombiana*, 5 F.M.B. 633 (1959)) asking the

Board to determine the validity of Flota's contracts and to terminate the uncertainty that had arisen as a result of the conflicting demands upon Flota following the decision in *Banana Distributors, Inc. v. Grace Line Inc.* 5 F.M.B. 278 and 5 F.M.B. 615 (1959) and, (2) that the Board failed to make a timely response thereto. It was not incumbent on the Board, however, to give Flota a legal opinion on the effect of its conduct on shippers. The demands were conflicting only to the extent that Flota made them so by continuing to serve favored shippers. The subsequent uncertainty was the consequence of Flota's own position that it could continue to contract refrigerated space to preferred shippers and to exclude complainants without violating the Act as was contended in *Grace Line Inc. v. Federal Maritime Board*, 280 F. 2d 790 (2nd Cir., 1960). In *Philip R. Consolo v. Grace Line, Inc.*, 4 F.M.B. 293 (1953) and *Banana Distributors, Inc. v. Grace Line, Inc.*, 5 F.M.B. 278 (1957) the Board decided that Grace Line, Inc. was a common carrier by water under sufficiently similar facts as to lead the Board to state in the present case (5 F.M.B. 633) that what we said in the *Banana Distributors* case "is appropriate here, and we feel is dispositive of the issues in this proceeding". Instead of accepting the *Grace Line* cases as providing a rule for its guidance, Flota refused to offer service and litigated the issues relying on "arguments relating to the differences between Flota's vessels and Grace's vessels" (635) to justify such refusal. Flota was eventually found to have violated Secs. 14, Fourth, and 16 of the Act. No delay converted its past violations into lawful conduct and Flota must take the consequences of its refusal, (it became a common carrier in 1955) to take Consolo's cargo after Consolo asked for non-preferential service in 1957. Common carrier status is not created by nor are violations of the Act nonexistent until the Board's report is served. Both are brought about by Flota's own actions beginning in 1955.

The 5th exception relates to the inclusion in the reparations calculations, of voyages after June 22, 1959, which is the date our decision in No. 827 was made. The examiner extended the damage period to September 1, 1959, when Consolo was actually allotted space in response to the Board's order served on July 2, 1959. Respondents were ordered, within 10 days after the date of service of the order, to offer refrigerated space for the carriage of bananas on its ships to all qualified banana shippers. Flota made no offers between June 22 and July 12, 1959, but we have no reason to doubt that Flota would have offered space on July 12 if bananas

had been tendered in Guayaquil at that time. None were tendered before then, as far as this record shows. No shipments were ready until September, but this does not furnish a reason for extending the damage period beyond the date when the Board's order should have been complied with, in the absence of any offer of proof by complainant of a refusal, after July 12, 1959, and in the absence of proof of its own willingness to ship, nor of a tender of cargo. The damage period should not be extended to the time when the complainant shipper was ready to provide a cargo, but is limited to voyages departing from Guayaquil through July 12, 1959, the date when compliance should have begun. Cf. *Swift & Company and Swift and Company Packers v. Gulf and South Atlantic Havana SS Conference et al,* Docket No. 854 Decided February 2, 1961.

The sixth, seventh, and eighth exceptions all concern the proofs of injury offered by complainant and allege a failure to maintain the burden of proof or to show actual damage. The burden of proof was maintained by extensive testimony and exhibits showing availability of bananas, cost, selling price (226 quotations over a period of four years were shown) and freight, stevedoring and other expenses as noted above. The actual damages were shown to be a proximate result of violations of the statute. *Waterman v. Stockholms Rederiaktiebolag Svea et al.,* 3 F.M.B. 248, 249 (1950). The losses shown were not speculative, but fairly inferrable from the data supplied and testimony of witnesses that complainant would have shipped on Flota ships if he had not been excluded.

The ninth, tenth and seventeenth exceptions deal with the method of measuring and comupting the damages. The examiner began the measure of damages from August 23, 1957, instead of 1955 as claimed. We agree with the examiner's date and with the finding that Consolo's offers and counter-offers for service before then were for contract carriage and not for space on a non-preferential basis. He was not excluded before then because he never sought an allocation of space on an equal basis with other shippers; rather, Flota's facilities or charges for services were not acceptable to the complainant on complainant's terms. These negotiations may not be translated into requests for a non-perferential allocation of space on a common carrier by water. What Flota refused during this period was the demand for a special contract which would make Consolo a favored shipper too.

The examiner found Consolo entitled to one-third of Flota's space based on the fact that complainant was one of three qualified applicants for space. Other applicants were declared to be

unqualified. When space was finally allocated five shippers actually qualified and measurement by Flota's technical adviser showed that in actual practice over a period of time there had been an allotment to, and use by, Consolo of 18.46% of the cubic capacity of Flota's ships on the U.S. Atlantic run. This actual experience with Flota appears to be a just and reasonable guide of what Consolo was entitled to for the purpose of measuring his past damages and it is adopted. Respondent's exception on this point is valid.

The eleventh exception is found unsupported.

The twelfth exception deals with complainant's failure to minimize damages by using other means of transportation. Once the failure to perform common carrier obligations and exclusion is shown, "the burden to show a failure to mitigate the damages was upon the defendants". *Hernandez v. Bernstein,* 116 F. 2d 849, 851, 852 (2nd Cir., 1941). Flota offered no such proof other than a suggestion that chartered ships might be used, but no suitable ones were shown to be available. Respondents have failed to show any mitigating factors.

Exception fourteen relates to the examiner's subsidiary findings of fact on which the award of reparations is based. None is shown to be wrong, and all have been fully established in this docket.

The fifteenth exception likewise assumes the untenable premise that discriminatory and perferential conduct did not exist until after the Board's decision on Consolo's complaint against Flota, and that the contract which caused such conduct excused the disregard of statutory obligations.

The sixteenth exception is unsupported by the record.

The eighteenth and nineteenth exceptions relate to the ascertainment of damages. Complainant submitted extensive evidence of lost profits in the form of schedules of about 226 individual voyages between 1955 and 1959 showing for each voyage the number of banana stems actually carried by named ships on specified dates between Guayaquil, Ecuador, and Philadelphia, Penna. (with the exception of two ships which discharged at Charleston, S.C., and Baltimore, Md., respectively because of a strike at Philadelphia, Penna.) In the absence of other proven data and of any disproof of the complainant's data or challenge of complainant's figures, such data and figures have been used in the computation of reparations found to be due.

The complainant's profit per stem of bananas is the difference in cost at Guayaquil and the value or sale price at Philadelphia which is taken to be the total gross profit per stem. This amount

has been multiplied by the number of stems on each shipment and the products added to get the gross profit. From such total gross profit there has been deducted (1) the total freight cost and (2) the total estimated cost of handling the bananas at Philadelphia. The latter amount is 50.15 cents a stem (35.15¢ for stevedoring, plus 3¢ for overhead, plus 12¢ for insecticides, rope and bags) multiplied by 1,061,286 stems carried during the reparation period. Complainant did not show the 3¢ a stem deduction for overhead in its claim, but this amount was deducted by the examiner with the subsequent admission by the complainant that it was a proper amount. The examiner's computation was also based upon the use of New York instead of Philadelphia stevedoring costs and omitted the deduction of the estimated incidental costs of handling bananas at Philadelphia in the amount of 12 cents. The latter figure was also furnished by complainant.

Based upon the shipment of 1,061,286 stems of bananas on 98 voyages between August 23, 1957, and July 12, 1959, the use of the complainant's statement of profits per voyage totaling $2,513,236.43 on all voyages allowed, and the subtraction therefrom of total freight in the amount of $1,204,343.95 and incidental costs in the amount of $532,234.93, as proven by complainant, we find the remainder is the proper net profit of $776,657.55. Consolo is entitled to 18.46% of the net profit. An award is hereby made and shall be paid to complainant Philip R. Consolo of 4425 North Michigan Avenue, Miami Beach, Florida, on or before 60 days from the date hereof, in the amount of $143,370.98, with interest at the rate of 6% per annum on any amounts unpaid after 60 days, as reparation for the injury caused by respondent's violation of Secs. 14 and 16 of the Shipping Act, 1916, as amended.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 28th day of March, 1961.

NOS. 827 & 827 (SUB-1)

PHILIP R. CONSOLO

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

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

It is Ordered, That respondent Flota Mercante Grancolombiana, S.A. be, and it is hereby notified and directed to pay unto complainant Philip R. Consolo of 4425 North Michigan Avenue, Miami Beach, Florida, on or before 60 days from the date hereof, $143,370.98, with interest at the rate of 6% per annum on any amounts unpaid after 60 days, as reparation for the injury caused by respondent's violation of Secs. 14 and 16 of the Shipping Act, 1916, as amended.

By the Board.

(Sgd.) THOMAS LISI,
Secretary.

732-047 O-64—19

MARITIME ADMINISTRATION

No. S–123

THE OCEANIC STEAMSHIP COMPANY
APPLICATION UNDER SECTION 805(a)

Decided March 31, 1961

The Oceanic Steamship Company should be granted written permission under Section 805(a) of the Merchant Marine Act, 1936, as amended, to permit its parent company, Matson Navigation Company, to charter the latter's owned SS HAWAIIAN BANKER to Pope & Talbot, Inc., for a period of from 2 to 4 months for operation in the intercoastal service, such charter period to commence on or about April 1, 1961, 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 Merchant Marine Act, 1936, as amended.

Willis R. Deming and *Alvin J. Rockwell* for applicant.

J. Alton Boyer for Pope & Talbot, Inc.

Richard W. Kurrus for Isbrandtsen Company, intervener.

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

William Jarrel Smith as Public Counsel.

REPORT OF THE ADMINISTRATOR
THOS. E. STAKEM, *Maritime Administrator*

The Oceanic Steamship Company filed an application for written permission under Section 805 (a) of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1223), to permit its parent company, Matson Navigation Company, to charter its owned C2-type ship the SS HAWAIIAN BANKER to Pope & Talbot, Inc., for operation in the Intercoastal Service for a period of

from 2 to 4 months, such charter period to commence on or about April 1, 1961. The application was duly noticed in the Federal Register of March 24, 1961, (26 F.R. 2536). Waterman Steamship Corporation (Waterman) and Isbrandtsen Company, Inc. (Isbrandtsen) intervened in opposition to the granting of the requested permission and hearing was held on March 30, 1961. Subsequent to the hearing Isbrandtsen Company withdrew its opposition to the granting of the permission.

The Administrator on March 31, 1961 also received a communication from Waterman waiving its right to file exceptions and stating that Waterman will not object to the initial decision becoming final. In view of these cited circumstances the examiner's initial decision is hereby adopted as the decision of the Administrator.

This report will constitute the written permission required.

FEDERAL MARITIME BOARD

No. S–65

LYKES BROS. STEAMSHIP CO., INC. AND BLOOMFIELD STEAMSHIP COMPANY—APPLICATIONS TO EXTEND SERVICES ON TRADE ROUTE NO. 21

Decided May 5, 1961

Service already provided by vessels of United States registry from East Gulf ports other than Tampa, Port Tampa and Boca Grande is inadequate, and in the accomplishment of the purposes and policy of the Merchant Marine Act, 1936, as amended, additional vessels should be operated in service between these ports and East Coast U.K./Continent.

Section 605(c) of said Act is no bar to granting of applications of Lykes Bros. Steamship Co., Inc., and Bloomfield Steamship Company for extension of service in said trade.

John Mason and *Andrew A. Normandeau* for Applicant Bloomfield Steamship Company.

Walter Carroll and *Odell Kominers* for Applicant Lykes Bros. Steamship Co., Inc.

M. C. Cunningham and *L. A. Parish* for Intervener Alabama State Docks Department.

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

Robert E. Mitchell, Edward Aptaker, and *Wm. Jarrel Smith, Jr.*, Public Counsel.

REPORT OF THE BOARD

THOS. E. STAKEM, *Chairman*; SIGFRID B. UNANDER, *Vice Chairman*; RALPH E. WILSON, *Member*

BY THE BOARD:

I. PROCEEDINGS.

By letter dated July 19, 1955, Lykes Bros. SS Co., Inc. (Lykes) applied for permission to provide service from East Gulf (Gulf of

Mexico) Ports (Port St. Joe/Gulfport Range, both inclusive) to the East Coast United Kingdom and Continent and in the event the application is approved, requested an addendum to its Operating Differential Subsidy Agreement to cover the extension of its B–2 Service to include East Gulf Ports in the loading and discharging area for its Line B–2 ships. By letter dated June 26, 1958, Lykes amended its application to request that the United States area on Lykes' Line B–2 (Trade Route 21, Freight Service No. 2) be described as "Between United States Gulf ports (Key West-Mexican Border)".

By letter dated August 11, 1955, Bloomfield SS Co. (Bloomfield) stated that it was "willing to undertake 8 sailings a year serving the East Gulf if the other subsidized operator . . . will furnish 16 sailings for East Gulf ports and will in the future comply . . . with subsidy contract requirements by coordinating its sailings with ours." By letter dated September 23, 1955, Bloomfield expressed its belief that the port of Mobile "is not being furnished adequate service." By letter dated October 13, 1955, the letter of application was supplemented "by asking that our request for an increase in our annual subsidized sailings . . . be acted upon independently of our intention to serve Mobile . . ."

Waterman SS Corp. (Waterman) and the Alabama State Docks (State Docks) intervened. Hearings were held and briefs filed, followed by a recommended decision by an Examiner served December 23, 1960. Exceptions and replies have been filed. Oral argument was scheduled for March 21, 1961, when the parties appeared and waived argument.

II. FACTS

Trade Route No. 21-U.S. Gulf/United Kingdom and Continent covers service between ports in the U.S. Gulf of Mexico ports from Key West, Florida, to the Mexican border and ports in the United Kingdom, Eire and Continental Europe North of Portugal. The Administrator determined that U.S. flag sailing requirements on Trade Route No. 21 are 13 to 15 per month. One to two sailings are on Service No. 1 to the west coast of the United Kingdom, and Eire and 12 to 13 sailings are on Service No. 2 to the East Coast United Kingdom and Continental Europe North of Portugal. It has been found that the C–2 ships now operated on this route are suitable and efficient ships for operation on Trade Route 21 and that 26 to 30 freighters of this type are required to provide adequate U.S. flag service. The primary U.S. flag operators on this

route are Bloomfield, Lykes, Waterman and States Marine Lines, Inc. (States Marine). Lykes is a party to an Operating Differential Subsidy Agreement with the U.S. (Contract No. FMB 59) which authorizes service on Route 21 (a) "between U.S. Gulf ports (Key West-Mexican Border) and ports on the west coast of the United Kingdom (including Northern Ireland) and Ireland (Republic of) with the privilege of calling at ports in the West Indies and on the east coast of Mexico"; (b) "between U.S. Gulf ports (west of but not including Gulfport, Miss.) and ports on the east coast of the United Kingdom and Continental Europe" with permissive calls at Tampa, Port Tampa and Boca Grande, Fla.

Bloomfield is a party to an Operating Differential Subsidy Agreement with the U.S. (Contract No. FMB 27) which authorizes service on Trade Route 21 "between a U.S. Gulf Port or ports (west of but not including Gulfport, Miss.) and a port or ports on the East Coast of the United Kingdom and/or a port or ports in Continental Europe (north of but not including Bordeaux) including Baltic and Scandinavian ports, with the privilege of calling at Tampa, Port Tampa, Boca Grande and ports in the West Indies and Mexico."

East Gulf Ports are Mobile, Ala., Gulfport and Pascagoula, Miss. and Pensacola, Panama City, Tampa, Boca Grande and Port Tampa, Fla. These ports are not involved since applicant Lykes may now make permissive calls at such ports and applicant Bloomfield has the privilege of calling at such ports pursuant to their respective operating differential subsidy contracts. At the present time neither applicant furnishes regular subsidized service to the other East Gulf Ports. The ports of Mobile, Ala., Gulfport and Pascagoula, Miss. and Pensacola and Panama City, Florida are the subjects of these applications.

At the present time Waterman and States Marine also operate on Route 21, but without operating differential subsidy contracts.

Waterman, the intervenor, currently makes regular calls at Mobile, Ala. and Tampa, Fla. Since 1954 it has averaged approximately 32 sailings annually. It called at Mobile outbound an average of 22 times per year during the period 1954 through first half of 1958; at Panama City 6.5 times per year, and at Pensacola once in 1954. Between July 1949 and July 1957, it provided no service from the Gulf to United Kingdom ports, chartered vessels to other operators on numerous occasions, and resigned from the Gulf/U.K. Conference in 1950, rejoining in 1957 after its subsidy application was filed. In 1957, States Marine had a sailing from

the Gulf to Antwerp and Bremerhaven approximately every two months. Its service since, if any, is not of record.

There are eleven foreign-flag lines (ten if two lines providing joint service are counted as one) operating on Trade Route 21, each of which serves both East Gulf and West Gulf ports, the latter predominantly. Four of these lines call regularly at East Gulf ports other than Tampa, and principally at Mobile, Ala. Foreign-flag lines serving Mobile provided twice as many sailings as U.S.-flag vessels (1958-1959), and carried four times as much liner commercial cargo outbound and inbound (1953-1958). There is only one U.S.-flag line, Waterman, operating in the East Gulf (except the privilege ports).

Commercial cargoes carried in liner service between the East Gulf ports (excluding Tampa, Port Tampa and Boca Grande) and Continental Europe north of Portugal to the Danish border and including the English coast and channel ports for the years 1953-1958 (provided almost exclusively by Waterman), was a total average of 24.88 percent outbound, and 37.11 percent inbound. Phosphate rock is the principal export from the excluded ports. From the excluded ports, which originate about 70 percent of all liner cargo from East Gulf ports and which are served by Lykes but not by Bloomfield, the total average U.S. flag participation between 1953 and 1958 was 61.27 percent outbound, and 29.61 percent inbound. From the entire East Gulf, including Tampa, Port Tampa and Boca Grande, U.S.-flag participation was 51.17 percent outbound and 32.38 percent inbound during the 1953-1958 period. Participation in the outbound movement dropped from 51.15 percent in 1957 to 34.97 percent in 1958 when Lykes curtailed its calls at Tampa, Port Tampa and Boca Grande.

The free space (i.e., not utilized) during the period 1957-1959 of Lykes and Bloomfield averaged approximately 6 percent of cubic capacity. Waterman, in 1959, had deadweight capacity for an additional 66,000 tons of cargo, and utilized 69 percent of its cubic capacity.

The records showed that outbound liner tonnage from East Gulf Ports to the East Coast of the United Kingdom and to the Continent had increased from 339,470 long tons in 1955 to 465,103 long tons in 1957, with a setback in 1958 to 393,586 long tons. Liner carriage of bulk commodities influences this traffic.

American flag participation in bulk cargo carriage is very small in comparison with foreign flag participation. In 1957 U.S. flag

ships carried 25,474 tons while foreign ships carried 74,561 tons. Defense cargo is a very small part of total outbound tonnage.

Factual data in exhibits prepared by the Maritime Administration Staff showed U.S. flag carriage in liner commercial traffic at East Gulf ports inbound declining from 42.93 percent in 1953 to 20.26 percent in 1958 and outbound declining from 52.65 percent in 1953 to 34.97 percent in 1958 after reaching a high outbound of 60.71 percent in 1954, and 60.85 percent in 1955. A comparison of inbound and outbound tonnage shows that exports exceed imports by a 3 to 1 ratio.

For the East Gulf trade U.S. flag-liner participation for the six years of record (1953-1958) exceeded 50% in all but two years (1956 and 1958). U.S. flag participation averaged more than 50% outbound during the entire period. Cargo carried between East Gulf ports (excluding Tampa, Port Tampa and Boca Grande) and Europe by U.S. flag liners has been well below 50% outbound and except for 1954 below 50% inbound during such six years.

The decline in U.S. flag participation on the entire route is explained to some extent by the fact that Lykes curtailed its phosphate movement from Tampa (the largest traffic generating port and the commodity providing the largest tonnage making up the statistics). Lykes also reduced its calls at Tampa for loading of the predominant commodity available to liners on the East Gulf coast; because the rates were not attractive for carrying phosphate rock. Lykes was responsible in part for the decline in U.S. flag liner participation figures or percentages for the route as a whole.

With regard to the ports which may be served, the following additional specific facts are found:

Mobile—Waterman concedes that U.S. flag service to Mobile is inadequate. Mobile is the most important port on the East Gulf as far as general cargo is concerned. U.S. flag carriage of outbound general cargo at Mobile declined from 48% in 1953 to 18% in 1958.

Gulfport—Witnesses testified as to industrial growth in this city, as offering prospects for added service.

Panama City—In 1958 approximately 32,000 tons of cargo moved outbound compared with only 4,800 tons for all other East Gulf ports except Mobile and Tampa. For the years 1953-1958 U.S. flag participation outbound was 53%, in 1958 U.S. flag participation was 52% in liner commercial cargo. There is an expanding paper mill industry at Panama City.

Pascagoula—There are fertilizer and chemical plants at this city. The traffic director of Lykes testified they have had general requests from this port regarding inauguration of service with respect to these plants. This testimony is somewhat supported by other testimony that cargo figures for the route have been better in the last 6 months of record.

III. DISCUSSION

We recently found service on Trade Route No. 21 is inadequate and in the accomplishment of the purposes and policy of the Act additional ships should be operated thereon. *Waterman Steamship Corp. Application for Operating Differential Subsidy (Sec. 605(c) Issues Only)* 5 FMB 771 (1960).

Since the present proceeding applies only to the East Gulf portion of Trade Route No. 21, the issues in this proceeding will be to determine if there is any inadequacy at the present time on such route particularly at the East Gulf ports.

The Lykes-Bloomfield applications request additions to existing service on a route serviced by intervenors, Waterman and by States Marine, citizens of the U.S. using vessels of U.S. registry and request amendments to applicants' operating differential subsidy contracts for such purpose.

Section 605(c) of the Act provides that "no contract shall be made under this title [Title VI—Operating Differential Subsidy] with respect to vessel to be operated on a service, route, or line served by citizens of the U.S. which would be in addition to the existing service, or services, unless the Commission [Board] shall determine after proper hearing of all parties that the service already provided by vessels of United States registry in such service, route, or line is inadequate, and that in the accomplishment of the purposes and policy of this Act additional vessels should be operated thereon; . . ."

In *Bloomfield Steamship Company—Subsidy Routes 13 and 21*, 4 F.M.B. 305, 317-318 (1953), the Board stated that:

> the adequacy of services under consideration in section 605(c) is adequacy of berth or liner service on the particular trade route in question. What may be considered adequate United States-flag service on one route may be quite inadequate on another. The standard of adequacy must be consistent with the realities of each particular route and with the purposes of the Act. . . . [T]he United States-flag service [on Trade Route 21] must be deemed inadequate unless dependable United States-flag liner sailings are available sufficient to carry at least one-half of the outbound commercial cargo that may be expected to move in liner service.

Past inadequacy on the route has been demonstrated by the fact that American-flag ships carried approximately 25% of the outbound and 37% inbound commercial cargo from the ports in issue and that only Waterman has operated on this portion of Route No. 21 according to schedules prepared by the Maritime Administration staff and put in the record. American flag participation on the route has also declined recently. Applicants propose to call at East Gulf ports with available space on their ships. An increase of available space on American-flag ships will give these East Gulf ports the benefit of more adequate service. Witnesses testified that exports on liners should increase moderately over the next few years and have already increased somewhat since 1958, the last year for which figures are available.

"The most valuable guide to measure adequacy of service in the future is necessarily adequacy of service in the past, modified to such extent as may appear justified by the best available judgment as to what the future may have in store." Bloomfield SS Co. —Subsidy, Routes 13 (1) and 21 (5) 4 F.M.B. 305 (1953).

The record shows that Amercian flag carriers are not the principal carriers of exports any longer in this area. If there is to be an increase, American flag ships should be available to share in the development. The future increases, while inevitably speculative, seem to be based on tangible factors of industrial expansion supported by some shipper demand for present service.

The above is consistent with the examiner's decision with which we concur.

The intervenor, Waterman, has excepted to the following findings in the recommended decision of the examiner:

1. that there are 11 foreign-flag lines operating on Trade Route 21 each of which serves both East Gulf and West Gulf ports;

2. that support for Lykes East Gulf service comes from George H. MacFadden Bros. for a service from Mobile to French ports and Military Sea Transportation Service for the entire Lykes application;

3. that there should be an increase in the future in traffic from East Gulf areas;

4. that Tampa, Port Tampa and Boca Grande should not be included in determining adequacy or inadequacy of service for the East Gulf;

5. that applicants would have sufficient free space for additional service to and from East Gulf ports;

6. that U.S. flag service from East Gulf ports other than Tampa, Port Tampa and Boca Grande is inadequate and that additional vessels should be operated in the service between said ports and East Coast United Kingdom/Continent in the accomplishment of the purposes and policy of the act; and,

7. that Sec. 605 (c) is not a bar to the granting of the applications involved in this proceeding.

Waterman also excepted to the failure to find the U.S.-flag service at Panama City is adequate.

The first exception involved no material facts since it depends on the method of counting the number of lines in this service. Moreover, the presence of American-flag vessels on the route is the determinative factor for showing adequacy or inadequacy of service, not foreign lines.

The second exception is supported by an allegation that supporting letters were admitted in evidence instead of direct testimony and that the letters are hearsay evidence. Administrative agencies customarily accept letters of this type.

The third exception is also a contention that the testimony of Lykes' witness as to expansion of industrial activity is hearsay. The Examiner gave this appropriate weight along with other evidence.

The fourth exception protested the exclusion of three of the Florida ports in considering inadequacy. Lykes and Bloomfield currently have authority to call at these ports as well as other ports on Trade Route No. 21. Under such circumstance we hold that adequacy of U.S. flag service should be co-extensive with the service proposed.

The fifth, sixth and seventh exceptions either repeat prior exceptions or involve matters covered in the opening reply briefs. In any event, the Examiner found persuasive evidence that Lykes has sufficient space for the proposed service, and that both Lykes and Bloomfield proposed to serve an existing inadequacy.

The final exception is essentially to the Examiner's formula for determining inadequacy of service to the East Gulf ports in question and is a claim that adequacy should be examined port by port. Since inadequacy of service to all the remaining East Gulf ports is in issue it is concluded that the Examiner properly determined the issue on the only relevant basis which was the application itself. Panama City need not be considered alone, but as a part of the remaining range of ports in the East Gulf area. In *American President Lines—Calls, Round the World Service,* 4 F.M.B.

681 (1955) applicants served New York and Boston within the East Coast Range and proposed to call at other ports within the range. The Board held that adequacy was to be considered in conjunction with the applicant's proposed service and excluded cargo data applicable to New York and Boston. The Board found there was inadequacy of service at the remaining ports of Philadelphia, Baltimore and Hampton Roads. The situation is similar to this one.

The finding of inadequacy by inference answers affirmatively the issue of whether in the accomplishment of the purposes and policy of the Act additional ships should be operated in the service in question and disposes of any question of undue prejudice against the existing operator. We conclude that Sec. 605 (c) is no bar to the granting of the applications in question for extension of service in said trade.

FEDERAL MARITIME BOARD

No. 815

COMMON CARRIERS BY WATER—STATUS OF EXPRESS COMPANIES, TRUCK LINES AND OTHER NON-VESSEL CARRIERS

Decided June 1, 1961

Status of respondents Weaver Bros. Inc. and Railway Express Agency determined in accordance with Report "served" March 3, 1961.

SUPPLEMENTAL REPORT OF THE BOARD

THOS. E. STAKEM, *Chairman;* SIGFRID B. UNANDER, *Vice Chairman*; RALPH E. WILSON, *Member*

BY THE BOARD:

The Federal Maritime Board on March 2, 1961 decided that certain trucking companies, freight forwarders and express companies might be classified as common carriers by water pursuant to the Shipping Act, 1916, as amended (Act) and to the Intercoastal Shipping Act, 1933, as amended (Intercoastal Act). Two of the respondents, Railway Express Agency, Inc. (Railway Express) and Weaver Bros. Inc. (Weaver) were found not to be classifiable as common carriers by water.

The proceeding was held open as to Railway Express so that further proofs in the form of briefs or oral argument might be received and considered by the Board. Railway Express submitted, on April 3, 1961, a petition for reconsideration of our order of March 2 in relation to its status as a common carrier by water and incorporated therein a supplement to "Official Express Classification 36 containing ratings, rules and regulations applying on express traffic covered by tariffs issued subject thereto" (Supplement 23) issued August 19, 1960 and effective September 26, 1960 and the Board was also informed that the Railway Express Agency "Uniform Through Export Bill of Lading, Form

2100" had been revised effective May 1, 1960. Both documents show that Railway Express assumes full common carrier liability from origin to destination based on the value of property shipped as declared by the shipper and certain limitations on liability contained in the bill of lading placed in evidence in the original proceeding have been eliminated. Based on the above-filed documents, we find that effective May 2, 1961 respondent Railway Express is included within the classification of motor carriers, freight forwarders and express companies which are "common carriers by water" within the meaning of such term in the first section of the Act.

Weaver submitted a late filed motion for leave to file a petition for reopening under the Board's Rules of Practice and Procedure. At the same time and without waiting for leave to be granted, a petition was filed "For Reopening, For Leave to Supplement the Record and For Reconsideration." We hereby accept the petition. The petition is in the form of a brief containing arguments and exhibits showing that Weaver may be a common carrier by water within the Board's test. The principal exhibits are revised pages of Weaver's tariff, modifying Weaver's bill of lading form effective April 28, 1961, to eliminate the provisions of disclaimer of liability that were held to preclude Weaver from being a common carrier by water. Based on the above-filed documents, we find that effective May 2, 1961 respondent Weaver is included within the classification of motor carriers, freight forwarders and express companies which are "common carriers by water" within the meaning of such term in the first section of the Act.

FEDERAL MARITIME BOARD

No. 868

MISCLASSIFICATION OF DIATOMACEOUS OR INFUSORIAL EARTH AS SILICA

Decided June 1, 1961

Shipper and forwarder respondents found not to have knowingly and willfully by means of false classification obtained transportation by water for diatomaceous silica from New Orleans, La. to European and South African destinations at less than the rates or charges which would otherwise be applicable in violation of the first paragraph of Sec. 16 of the Shipping Act, 1916, as amended.

Carrier respondents found not to have allowed shippers and forwarders to obtain transportation for diatomaceous silica from New Orleans, La. to European and South African destinations at less than the regular rates or charges then established and enforced on the line of such carriers by means of false classification in violation of the second paragraph of Sec. 16 of the Shipping Act, 1916, as amended.

James A. Thomas, Jr. and *Herbert Morton Ball* for respondent Johns-Manville International Corporation.

Frederick G. Poeter for respondent Great Lakes Carbon Corporation.

Walter Carroll for respondent Lykes Bros. Steamship Co., Inc.

Morton Zuckerman for respondents Baron Iino Line and U.S. Navigation Co., Inc.

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

REPORT OF THE BOARD

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

BY THE BOARD:

I. PROCEEDINGS

The Board by an order of September 3, 1959, supplemented October 30, 1959 (24 F.R. 8977, No. 216, November 4, 1959), in-

stituted an investigation, as authorized by Sec. 22 of the Shipping Act, 1916, as amended, (Act), to determine whether a misclassification of infusorial or diatomaceous earth as silica had occurred in violation of Sec. 16 of the Act.

The following parties were made respondents:

1. Great Lakes Carbon Corporation and its subsidiary F. W. Berk and Company, Inc. (Great Lakes) a shipper of diatomaceous silica (also called diatomaceous or infusorial earth); 2. Johns-Manville International Co. (Johns-Manville) a shipper of diatomaceous silica; 3. Mattoon and Company, Inc. (Mattoon) a forwarder for the shipper, Great Lakes; 4. H. P. Lambert Company, Inc. (Lambert) a forwarder for the shipper, Johns-Manville; 5. Aktiebolaget Svenska Amerika Linien (Swedish American Line); Wilhelmsen Line—Joint service of Wilhelmsens Dampskibsaktieselskab (Wilhelmsen); Zim, Israel America Lines—Joint service of Zim Israel Navigation Co., Ltd. (Zim); Lykes Bros. Steamship Co., Inc. (Lykes); Baron Iino Line (Baron), common carriers by water which transported the aforesaid property; 6. Strachan Shipping Co. (Strachan) agent for the common carriers Swedish American, Zim and Lykes; and 7. U.S. Navigation Co. Inc. (Navigation) agent for Baron.

Hearings were held before an Examiner who, in a recommended decision, found: 1. that respondent shippers and freight forwarders have falsely classified and billed shipments of diatomaceous earth in violation of the first paragraph of Sec. 16 of the Act, 2. that respondent steamship lines have not violated the second paragraph, subparagraph "Second" of Sec. 16 of the Act.

Exceptions to the recommended decision were filed, followed by oral argument.

II. FACTS

Great Lakes is the manufacturer of a high speed filtering product which has the basic trade name of "Dicalite" and is marketed under a variety of other trade names, such as "Dicalite Speedflow," "Dicalite Superaid," "Dicalite Speed Plus," "Speedex" and "Dicalite 4200." Johns-Manville is also the manufacturer of the same product which is marketed under the trade names of "Celite," "Super Cel," "Hyflo," "Micro Cel" and "Filter Cel."

Both shippers obtained the raw materials for these products

from openpit mines of diatomaceous silica located at Lompoc, Calif. The raw material is mined by machinery, conveyed to a processing plant, mechanically pulverized, dried and packed in bags for shipment. Neither the pulverizing nor the drying changes the chemical nature of the product. The bags bear the trade names noted above. The packaged product is in all respects the same as the product fresh from the mine except for the elimination of water in the drying process.

The product was shipped by railroad from Lompoc, Calif. to New Orleans, La. subject to inland bills of lading describing it as a specified number of "bags infusorial earth ground" or abbreviations of these words.

The packaged product has a low density which gives it a stowage factor of from 150 cu. ft. to 160 cu. ft. per ton while silica in crystalline state or in the form of sand stows at 35 cu. ft. to 40 cu. ft. per ton. The amorphous character of the product as distinguished from the crystalline character of silica in sand form causes this difference in their densities.

Between January 1958 and September 1959 each shipper made about 110 shipments on ships of the respondent common carriers by water from New Orleans, La. to ports in Europe, South Africa and the Mediterranean area.

Great Lakes by its forwarder Mattoon described its shipments as follows in bills of lading of the designated carriers under the heading "Particulars Furnished by Shipper of Goods" and under columns headed "Marks and Numbers" and "Description of Packages and Goods" (subject to changes in the number of bags):

Swedish American Line

"DICALITE—Superaid, Special Speedflow, Speedex, Speedplus
604 BAGS SILICA"

Baron Iino Line

"DICALITE—Speedplus
400 BAGS—SILICA"

Johns-Manville by its forwarder Lambert described its shipments as follows (with changes in the number of bags), in bills of lading of the carriers under the same headings:

Swedish American Line

"CELITE 281,
86 BAGS, SILICA"

Baron Iino Line

"HYFLO
2000 BAGS, POWDERED SILICA, BAGS"

Lykes Bros. Steamship Co., Inc.

"MATERIAL, 432 BAGS, JM CELITE (white label) 545
432 " " " (pink label) 503
432 " " STANDARD SUPER-CEL (green label)
1296 " SILICA"

The forwarders, Mattoon and Lambert, prepared all of the shippers' bills of lading containing the allegedly false classifications. The bills of lading were prepared in accordance with written instructions from the respondent shippers. The instructions were in the form of a letter transmitting listed documents and specifying the particulars to be followed in handling the shipment, including the name of the consignee, the destination and the bill of lading description. Great Lakes' letter of instructions was in the form of a memorandum under its letterhead addressed to the forwarder and over the signature of its traffic manager. The instructions specified the name of the ship, the sailing date and the port of discharge. The following, is a typical example of an instruction as to the bill of lading description: "No. of bags: 604, Commodity SILICA." Opposite "Special Instructions" is written: "Note Commodity Description." Other details, such as weight, marks and numbers and the documents enclosed, are also written in the instructions. The instructions by Johns-Manville are in the form of a letter under its letter-head addressed to the forwarder, over the signature of its traffic manager or his designee. Generally similar information is contained in the letter and opposite the words "Bill of Lading Description" is written: "SILICA" or "SILICA-EXP. DEC. SILICA (CELITE-TRADEMARK)" or "Powdered Silica in Bags." The forwarders at the time of preparing the bills of lading also had delivery and approval notices from the inland rail carriers describing the products as "Diatomaceous or Infusorial Earth." The forwarders did not solicit advice of the carriers involved as to the proper classifications unless requested to do so by the shipper. They did not question the vari-

ance in the descriptions. Their witnesses testified variously "We are not one to question our shippers as to how to describe their shipments" and that in this particular transaction they were "like a clerk" and were only doing "exactly what we were told" or were facilitating the handling of paper "by being able to sign on their (shippers) behalf."

In its statement of facts the shipper Great Lakes asserted that "the respondent freight forwarder who acted on behalf of Great Lakes did so in accordance with its instructions and [Great Lakes] assumes complete responsibility for these instructions, for the acts of the forwarder in preparing the documents and delivering them to the carriers."

On bills of lading of Zim, Hellenic and Fern Ville lines the products were described as "Infusorial Earth Powder."

The tariff descriptions, rates and regulations used as a source of the rates to be applied to the bill of lading descriptions are those of the Gulf/French Atlantic Hamburg Range Freight Conference, Gulf Continental Tariff No. 7, The Gulf/South & East African Conference, The Gulf/United Kingdom Conference, The Gulf/Mediterranean Ports Conference and The Gulf/Scandinavian and Baltic Sea Ports Conference. The rates for diatomaceous silica and for silica are on different pages of the book because the commodities are listed alphabetically. The classifications read, typically, as follows:

Gulf/Continental Tariff No. 7		*Page 39*
	A/G/R/A	H/B
***		
Earth, Viz:		
Diatomaceous	2.20	2.35
Fullers—See Clay Infusorial	2.20	2.35
***		
		Page 128
Silica—Apply Sand, Silica Rate Flour— Apply Sand, Silica Rate Sand— See Sand, Silica		
***		
		Page 121
Sand, Viz:		
***		
Silica or Quartz	1.25	1.40

Gulf/South & East African Tariff No. 6 *Page 31*

	Cape Town Basis	*Mombasa Tanga Zanzibar Dar-es Salam*	*Tamatave Majunga Port Louis Pointe De Galets*
***			
Earth, Diatomaceous	70.50W	74.50W	82.00W
***			
Earth, Infusorial	70.50W	74.50W	82.00W
***			
			Page 82
***			
Silica	31.50W	35.50W	50.50W
Silica Sand—See Sand Silica			
***			
			Page 80
Sand, Alumina, Flint, Green Mineral Sand Silica, in drums	39.25W	43.25W	52.00W

The above are fairly typical of the choices that would have been available to the shippers if the tariff book had been given to them for examination. Later in 1959 after this dispute arose the traiffs were revised by adding a measurement factor to the information under each classification. For example the Gulf/South East Africa Tariff reads under "Earth, diatomaceous":

"Meas. up to & "incl. 50′ per 2240# $28.00W (2240#)"
and "over 50′ per 2240# $50.00W (2240#)"

on the Capetown basis. Similar differentials were made in the other tariffs except the Gulf/Scandinavian and Baltic Sea Ports Conference tariff, which had not been changed as of November 23, 1959. None of the tariffs have a classification for "diatomaceous silica." All of the tariffs provide a considerably lower rate for transporting silica as sand, than for transporting diatomaceous or infusorial earth.

Diatomaceous earth, or infusorial earth or diatomaceous silica technically known as "diatomite" is a hydrous or opaline form of silica generally about 90% to 96% pure amorphous silica and inert. It is distinguished from silica by the presence of fossil remains of single-celled marine organisms known as diatoms.

X-ray diffraction pictures were taken of the product and of cristobalite, which is pure silica ($Si O_2$ or Silicon Dioxide). One picture showed a broad halo and an almost complete lack of sharp lines indicating that the material is amorphous or non-crystalline. This material was identified as natural diatomaceous earth or diatomaceous silica. The second picture, identified as a sample of cristobalite, shows very sharp lines which characterized the pattern typical of the crystalline material. A third film, taken of diatomaceous silica known as Celite, showed a pattern which was identical with the second indicating that it was composed of cristobalite. Counsel for one of the respondents represented one of its experts as saying "the pattern of pure silica and our product (Celite) is the same."

The tariffs of the various Conferences were not generally available, were "not public," and the shippers' employees never saw the traiffs and were not "freely . . . able to get the tariffs." Agents of the conference carriers verbally advised shippers about rates in response to inquiries and told the shippers the rates on silica and diatomaceous earth or infusorial earth, after being asked if they had such a rate.

About April 19, 1959, the carrier Lykes, through its New York representatives discussed the "silica" shipments with the shipper Johns-Manville. The carrier said it would not accept cargo described as silica because of a variance with its export declaration description as "infusorial [diatomaceous] earth." In response, the shipper said it would make other arrangements for shipment. The next day Lykes said it would move the shipment as originally booked. On receiving more information about the product the carrier advised that it "did not contemplate raising any question as to his [the shipper's] description on the bills of lading . . ." and "the matter now seems to be that we accept Johns-Manville International description of silica."

III. DISCUSSION

Sec. 16 of the Act provides "That it shall be unlawful for any shipper . . . forwarder . . . or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of . . . false classification . . . 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, . . . directly or indirectly:

* * * "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 classification . . ."

The shipper classifies the product by the description written in the bill of lading. Here, the word "Silica" was written in bills of lading to describe the product.

The product shipped is found to be properly described as diatomaceous silica, diatomaceous earth, or infusorial earth, all of which have amorphous characteristics and is not properly classifiable as silica which is similar to sand in its most common form. The products were falsely classified as the examiner has found.

Sec. 16 is not violated by shippers or forwarders unless the false classification is knowingly and willfully made. The exceptions to the examiner's conclusions, that the false classification was knowing and willful, are substantially that the tariff was sufficiently ambiguous as to preclude any precise choice between the two tariff descriptions or that it could not be said that one or the other was completely inapplicable and that the shipper was entitled to select the one giving the lower rate.

The "Sand-silica" rates were almost one half the "Earth, diatomaceous" rates, because of the stowage factor. Where both commodity rates are adequately descriptive the one making the lower charge is applicable. *Cone Bros. Construction Co. v. Georgia R.R. et al.*, 159 I.C.C. 342 (1929). Ambiguities should be resolved against the carriers writing the tariff. *Rubber Development Corp. v. Booth S.S. Co. et al*, 2 U.S.M.C. 746, 748 (1945).

The significant fact of this case is that the books containing the written tariff descriptions were not available and "requests to examine the tariffs at the offices of the Carriers and Conferences were refused." The two respondent shippers and their forwarders are not in the position of parties who have the opportunity to make a visual inspection of the words contained in tariffs which are available to the public. *Misclassification and Misbilling of Glass Tumblers and other Manufactured Glassware Items as Jars*, 6 F.M.B. 155 (1960). *Classification of Paper Products by Rubin, Rubin & Rubin Corp. et al*, Docket No. 848, decided February 20, 1961. As a result of this lack the shippers and the forwarders

could not make up their minds about the proper thing to do on the basis of an accurate understanding of the tariff.

As a result of the unavailability of the carriers' tariffs these shippers could not take the printed descriptions and compare them with what they knew about the characteristics of their products. Instead, they had to depend on verbal statements about the tariff rates for various commodities in response to their inquiries and to depend on what meager information the carrier conference was willing to furnish. One of the descriptions furnished by the carriers was for a silica product, or "Silica" and it was used in preference to the "Earth" description. To the respondent shippers who had to rely on verbal statements about the contents of the tariff, the tariff was quite ambiguous, in the sense that two interpretations were possible for this product: The first was based on its diatomaceous characteristics and the second was based on its dominantly silica composition. The first could reasonably be rejected because it was not essentially "earth" to the shippers, but was essentially "Silica."

The writers of the tariff recognized the existence of an ambiguity also when they decided to apply a stowage factor to the "earth" classification. From the carriers' point of view the amount of space a product takes and its weight is far more important than labels. They recognized that both "earth" and "silica" had stowage problems and eventually applied the same rate to each depending on volume in order to eliminate the freight rate consequences of the ambiguity.

There is no justification for holding that the "earth" classification, at least as presented to these shippers by the carriers, "is so clearly right and the other wrong that willful and knowing intent to misclassify is the only fair conclusion." *Continental Can Co. v. United States of America and Federal Maritime Board,* 272 F. 2d 312, 316 (1959).

There was also sufficient confusion about the classification as to justify the Bureau of Census to authorize the use of a "Silica (Celite Trademark)" description in export declarations as a compliance with its "Schedule B" instructions and at the same time to use a code number covering "Diatomaceous Earth and Products." Both were thought to be applicable.

When these difficulties are joined with the fact that there was considerable doubt as to what the product really was in view of its dominant silica composition, the shippers had reason to give themselves the benefit of any doubt as to which tariff description

should be applied to their product. An expert witness testified on the subject of "X-ray diffraction patterns . . . of pure silica and . . . of Johns-Manville's diatomaceous silica . . . and demonstrated that they were exactly the same . . .", as the respondent Johns-Manville stated.

The shipping instructions given to the forwarders were undoubtedly given against this background and with a natural desire to obtain the lowest possible freight rate. The only available information for the carriers plus the information they had about the silica content of the product shipped was such as to create enough of an ambiguity in their minds which could be resolved in favor of the lower rate.

Shippers and forwarders, faced with an ambiguity under the circumstances of this case, may not be held to have committed a misdemeanor by violating the provisions of Sec. 16 of the Act covering knowing and willful false classification if they place their own reasonable interpretation on a tariff which has been made ambiguous by the publishing carriers' actions.

Respondents Swedish American, Wilhelmsen, Zim, Lykes, Baron, Strachan and Navigation, as carriers violate Sec. 16 only if they allow transportation at less than regular rates by means of false classification. An employee of Strachan, line manager of Swedish American and Wilhelmsen admitted that their ships carried the product described as silica. Strachan was presented with bills of lading, booking contracts, dock receipts and export declarations which all describe the shipments as "silica". The inland bills of lading and other papers describing the shipments as "diatomaceous or infusorial earth" were not examined by Strachan. There was no discussion about the shipments.

Baron and its agents likewise only had documents for examination which describe the product as silica. Two days before the issuance of the supplemental order in this case, Baron asked Great Lakes and Mattoon to witness a sampling of the product, but neither made any representative available. Samples were drawn, analyzed and found to be diatomaceous earth. Baron advised that the shipment would not be loaded unless it was reclassified. Great Lakes thereafter removed the shipment from the pier. Baron did not knowingly allow any misclassified shipments to be made.

There is no evidence in the record that Zim carried any misclassified cargo.

On these facts, we find that respondents Swedish American, Wilhelmsen, Zim and Baron have not violated Sec. 16 of the Act. Respondents Strachan and Navigation were not shown to be common carriers by water and do not come within the terms of the Act. The proceeding is dismissed as to them.

The finding that Lykes was not found to have allowed the shipper to obtain transportation by water for property at less than the applicable rates then enforced and established by Lykes was excepted to.

The property shipped is a specialized product. Its exact characteristics must be determined by miscroscopic analysis by trained scientists to determine its precise classification as either earth or silica. With this difficulty of determining its composition, proper classification is not within the knowledge of the average agent or employee of the carriers. Lykes' chief traffic official was concerned only with establishing a compensatory rate for shipping the product based on its weight, volume and other shipping characteristics. He was confused by the various descriptions of the product which were furnished him and promptly took action to have the product investigated and the rate adjusted once the confusion had been brought to his attention. A revision of the tariff regulations was undertaken. We don't believe that Lykes showed any wanton disregard of the duty to exercise reasonable diligence to collect applicable rates as to amount to an intent to collect less than the applicable charges. *Practices of Fabre Line and Gulf/Mediterranean Conf.*, 4 F.M.B. 611 (1955).

To prevent tariffs from being construed contrary to the interests of the carriers formulating them, more care should be taken in making definitions clear and precisely descriptive of the commodities covered and in specifying the freight rates applicable thereto. In the present case a less confusing tariff description and one which showed more clearly the difference between earth and silica, as well as prescribing stowage factors as was belatedly done, would have resulted in the assessment of proper charges and eliminated ambiguity of descriptions.

It is concluded that the carrier respondents have not allowed shippers and forwarders to obtain transportation for diatomaceous silica from New Orleans, La. to European and South African destinations at less than the regular rates or charges then established and enforced on the lines of such carriers by means of false classification in violation of the second paragraph of Sec. 16 of the Shipping Act, 1916, as amended.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C. on the 1st day of June, 1961.

No. 868

MISCLASSIFICATION OF DIATOMACEOUS OR INFUSORIAL EARTH AS SILICA

This proceeding having been instituted by the Board upon its own motion, and having been duly heard and submitted, and 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 this proceeding be, and it is hereby, discontinued.

By the Board.

(Sgd.) THOMAS LISI,
Secretary.

FEDERAL MARITIME BOARD

No. 871

INVESTIGATION OF CERTAIN STORAGE PRACTICES OF PACIFIC FAR EAST LINE, INC., TRANS-OCEANIC AGENCIES, STATES STEAMSHIP COMPANY, AND HOWARD TERMINALS AT THE PORTS OF STOCKTON AND OAKLAND, CALIFORNIA

Decided June 1, 1961

Respondents Pacific Far East Lines and States Steamship Company, common carriers by water, found, in conjunction with other persons, (a) to have given undue or unreasonable preference or advantage to particular persons, localities and descriptions of traffic and to have subjected particular persons, localities and descriptions of traffic to undue and unreasonable prejudice and disadvantage; and, (b) to have allowed persons to obtain transportation for property at less than the regular rates or charges then established on the line of such carriers by an unjust or unfair means in violation of Sec. 16 of the Shipping Act, 1916, as amended.

Respondents Trans-Oceanic Agencies, as a partnership of two individuals, and Trans-Oceanic Agencies Inc. and Howard Terminals, other persons subject to the Shipping Act, 1916, as amended, found to have given undue or unreasonable preference or advantage to particular persons, localities and descriptions of traffic and to have subjected particular persons, localities and descriptions of traffic to undue and unreasonable prejudice and disadvantage, in violation of Sec. 16 of the Shipping Act, 1916, as amended.

Respondents Pacific Far East Lines and States Steamship Company, common carriers by water, found, to have failed to establish, observe and enforce just and reasonable practices relating to or connected with the receiving, handling, storing or delivering of property in violation of Sec. 17 of the Shipping Act, 1916, as amended. Just and reasonable practices ordered enforced.

Respondents Trans-Oceanic Agencies, as a partnership of two individuals, and Trans-Oceanic Agencies, Inc. and Howard Terminals other persons subject to the Shipping Act, 1916, as amended, found, to have failed to establish, observe and enforce just and reasonable practices relating to

or connected with the receiving, handling, storing or delivering of property in violation of Sec. 17 of the Shipping Act, 1916, as amended. Just and reasonable practices ordered enforced.

John Hays, for Pacific Far East Lines, Respondent.

J. Richard Townsend, for Albert W. Gatov and Warren H. Atherton, a partnership d.b.a. Trans-Oceanic Agencies and Trans-Oceanic Agencies, Inc., Respondents.

Gilbert C. Wheat and *H. Donald Harris, Jr.*, for States Steamship Company, Respondent.

Gerald H. Trautman and *William W. Schwarzer*, for Howard Terminal, Respondent.

Robert J. Blackwell and *Edward Aptaker*, Public Counsel.

REPORT OF THE BOARD

THOS. E. STAKEM, *Chairman;* SIGFRID B. UNANDER, *Vice Chairman;* RALPH E. WILSON, *Member*

BY THE BOARD:

I. PROCEEDINGS

The Board, as authorized by Sec. 22 of the Shipping Act, 1916, as amended (Act) (46 U.S.C. § 801 et. seq.) by its order dated September 23, 1959 (24 F.R. 7839, September 29, 1959) upon its own motion entered upon a proceeding of inquiry and investigation to determine whether certain storage practices of the Pacific Far East Line, Inc. (PFEL) and Trans-Oceanic Agencies (TOA) at Stockton, Calif. and of States Steamship Co. (States) and Howard Terminals (Howard) at Oakland, Calif. are in violation of Secs. 16 and 17 of the Act.

Hearings were held and briefs received, followed by a recommended decision of an Examiner served on December 27, 1960. Exceptions and replies were filed followed by oral argument on March 22, 1961.

II. FACTS

Respondent PFEL, a common carrier by water in the foreign commerce of the U.S., was approached in early 1957 by Albert W. Gatov, a San Francisco businessman, with a plan whereby his organization known as "Trans-Oceanic Agencies" would "work up a distribution arrangement for importers which would make it economical for them to route shipments via the Port of Stockton". The arrangement is more fully described below. The ensuing discussions, in about 12 meetings with PFEL's President

and its General Traffic Manager in the office of the President, resulted in the execution of a "Husbanding Agency Agreement" signed by Warren H. Atherton, a Stockton attorney and partner in TOA and a PFEL Vice President and a "Booking Agency Agreement" signed by the same parties and both dated June 1, 1957. The husbanding agency agreement authorizes and appoints TOA as agent "to act as exclusive husbanding agent for the Principal in Port of Stockton, Calif., performing only the usual husbanding activities for principal's vessels". Usually husbanding activities consist of making arrangements for pilots and tugs to bring a ship up to a dock, obtaining entry and clearance of a ship by port authorities, ordering of work gangs, dealing with problems of manning, replacing sick crew members, providing local repairs to a ship and furnishing lines, bunkers, provisions, stores and dunnage and related work for a ship. Compensation was to be $50.00 for each 24 hours for each vessel of principal while it is berthed at Stockton with a minimum compensation per vessel of $150.00 and a maximum compensation per vessel of $250.00. PFEL also agreed to pay all accounts for vessel husbanding and such other items as may be arranged by the agent and on request to advance funds to the agent for anticipated charges. For the 33 month period, commencing June 1, 1957 through February 29, 1960, PFEL paid fees of $24,350.00. The fees were paid whether or not services were rendered to a specific ship. The record discloses no specific details of any husbanding services actually performed for and reimbursement or advances by PFEL. A TOA official was unfamiliar with significant details of port activity at Stockton which a husbanding agent would normally know. The record did not show whether the attorney-partner or the Traffic Manager knew anything about husbanding or did any such work.

The Booking Agency Agreement authorized TOA to develop, solicit, procure and book cargoes through its general offices for the principal's ships. PFEL was required to pay 3% of the gross freight on all inbound general cargo whether booked or not, 5% on all outbound general cargo and 1½% on outbound and inbound bulk cargo (with certain exceptions). Total payments were subject to a minimum of $300.00 per month. During the same 33 month period PFEL paid commissions on inbound general cargo of $45,425.05 and on outbound bulk cargo of $23,060.95 plus $1,200.00 in monthly minimums. Total payments were $115,158.93. Nothing was paid on inbound bulk cargo.

PFEL was kept fully informed about TOA activities through the receipt of copies of almost all of TOA's solicitation letters during 1958 and 1959. PFEL cargo soliciting agents also wrote letters describing the TOA plan to shippers and asked a shipper "if he would consider storing all his cargo free at Stockton instead of moving these cars to 44 different warehouses and then drawing on Stockton for the individual LCL (less than carload) lots required at the $1.50 rate and receive store/door delivery". Another PFEL letter told TOA that an importer using Los Angeles would bring his cargo to Stockton if the "free storage offsets the trucking charges Stockton/Los Angeles . . ." An exchange of correspondence between PFEL and TOA suggested TOA tell an importer how to save money by using Stockton instead of Seattle as a port, because of the availability of free storage. Other correspondence indicates PFEL employees talked with potential shippers about what was available in Stockton through TOA activities.

TOA was organized in June 1957 as a partnership consisting of Albert W. Gatov and Warren H. Atherton. Wherever "TOA" is referred to herein, it shall be taken to refer also to each of these persons as individuals, to the partnership and to the corporation formed later. In February 1959 the parnership became a corporation with the two former partners as sole stockholders. The violations charged cover both periods.

The San Francisco partner was engaged in warehousing activities. TOA had a Post Office Box at Stockton and an office in Stockton which was the same as the office in which one partner conducted his law practice. It had no employees or records or files in this office. TOA also has an office in San Francisco where its only employee, the Traffic Manager, performed his services without stenographic assistance. He also worked part of the time for another company controlled by the San Francisco partner. This company has the same telephone number as TOA. TOA's Booking Agency Agreement contained a recital representing it as having offices in Sacramento, Madera, Milpitas, Calif. and Reno, Nev. Its stationery also referred to such offices in the letterhead. The record shows it had no such offices.

The majority of the cargo handled was booked in Japan, where TOA has no cargo solicitors, and control of the routing of cargo was in persons located east of the Rocky Mountains where TOA was not required to maintain freight solicitors.

By letter dated April 30, 1957, the President of TOA wrote to the Director of the Port of Stockton confirming a conversation informing the Director that the President "was undertaking to act as agent for ocean carriers in the Central Valley area and [am] doing business as Trans-Oceanic Agencies" and offering to "lease" on a monthly basis a minimum of 5,000 sq. ft. of first class warehouse space within the confines of the Port of Stockton area. The director by letter of May 13, 1957, assigned the north two-thirds of Warehouse G comprising 10,300 sq. ft. on a month to month basis at a "rental" of $500. per month. The agreement was verbally revised June 1, 1958 to increase the assigned space to 30,000 sq. ft. and the "rent" to $1500.00 per month and again verbally on September 1, 1959 to 130,000 sq. ft. to rent at $3000.00 per month. The agreement provides that any services performed by the Port of Stockton shall be charged for in accordance with applicable tariffs of the Port of Stockton. The rates are contained in the "Port of Stockton (Warehouse Division) Warehouse Tariff No. 1", effective July 1, 1949 and as revised from time to time.

TOA solicited the business of shippers by telephone, by personal contact and by letter over the signature of its traffic manager. The letters followed a standard pattern and stated that TOA: 1. is an agent for PFEL; 2. has warehouse facilities at Stockton in which the shipper's needs can be accommodated; 3. would hold merchandise for the period of time the shipper required without charge and that this arrangement applied both to local cargo and to "over-land common point" cargo (O.C.P. cargo); 4. would prepare without charge bills of lading on shipments from its facilities; 5. would furnish, prepare and apply tags at the rate of 6¼¢ per tag if required and if the shipper furnished the tag, only a modest charge would be made for applying it; 6. would make no charge for movement of cargo from shipside to storage location and the goods would be stored and segregated according to the inbound markings; and 7. would extend these arrangements only to cargo carried by PFEL and discharged at the Port of Stockton. The foregoing constitute the "distribution" services. TOA's solicitation letters contained no information concerning PFEL's service. No mention is made of the ship size, speed, transit time, loading points, schedules, accommodations or any of the other operating details of a carrier's service. TOA's letter did not disclose that it was only a husband-

ing and a solicitation agent and was not PFEL's agent as regards the services it offered to perform.

Between December 1957 and March 1960 TOA secured 64 accounts using the aforesaid services. During the period December 1957 to the fall of 1958 free and unlimited storage was accorded to all customers with charges only for marking, tagging, stenciling, sorting or other accessorial services if they were specifically requested by the customer. From the fall of 1958 to September 1959, TOA instituted a 7½¢ service charge per package on some cargo but this decision was not put into effect right away so that on storage provided through 1958, storage was still rendered free of charge and without time limit. During the 9 month period from January 1959 to September 1959 the service charge was not assessed on cargo in the warehouse at the time of the inception of the plan; it was sometimes levied whether or not the shipper required any service and it was assessed against some customers but not against others so that some customers still received free storage. From September 1959 to the time of the proceeding in March 1960, TOA assessed a service charge per package on all cargo using its facilities. This practice began on September 1, 1959 shortly after a visit by an investigator for the Board. The charge has varied between customers running from 2½¢ to 25¢ per package depending on different customer requirements, were based on negotiations with customers, and are not related to the length of time goods remain in storage. TOA's booking agency agreement authorizes advertisement of its services subject to the approval of PFEL and PFEL agrees to reimburse its agent for the expense. There has been no advertising, however.

TOA obtains custody of shippers' goods after unloading by PFEL's contract stevedores and at the end of Stockton's 7-day free time period or when the goods are moved to TOA's assigned space. The moving is done by draymen employed by the Port of Stockton. No documents were produced to evidence any transfer of custody or possession to TOA. Before April 1959 the Port of Stockton billed TOA for the moving service at the rate of 60¢ per hundred pounds pursuant to the tariff. Since then the Port has absorbed this cost. Thereafter stenciling, marking, inventory control and other services are also performed on goods by port personnel and TOA is billed for such service at tariff rates. Stockton, without charge to TOA, also provides labor and supervision to move cargo from the assigned space to connecting carriers for

further transportation and prepares bills of lading for TOA customers. Stockton maintains in its administration building the business records concerning TOA operations. TOA has no tariff or other schedule of rates for its services.

The record showed that shipments in TOA custody had remained in Port of Stockton warehouses for periods up to 108 days beyond the normal free storage time without any special charge to consignees or shippers for storage. Fourteen shipments of earthenware were shown to have been held an average of 15 days, 76 shipments of plywood were held an average of 25 days, 78 shipments of rattan furniture were held an average of 44 days and 30 shipments of toys were held an average of 28 days.

The Warehouse Division of the Port of Stockton Tariff contains rates and regulations for storage including therein rates for the same services as TOA offered to perform and rules stating how the rates should be applied. Seven days free time is allowed by Stockton on inbound general cargo. Thereafter monthly storage and storage handling rates apply on various descriptions of commodities and packages. These facilities and services were available at the Port of Stockton for all shippers. TOA's practice was to order handling services in response to shippers' instructions and to pay Stockton for them at the established rates as required by its agreement with the Port Director.

TOA services for consignees were referred to in the record by one shipper as an offer of warehousing at "a fantastically low figure" in fact it would be cheaper "to use Stockton than to use his own company warehouse".

One toy shipper had portions of 11 shipments in TOA facilities. The shortest storage period on any of these was 53 days and the longest about 5 months.

A shipper paid, since August 1959, 7½¢ per carton for marking, segregation and storage of goods. This is one and one quarter cents more than tagging charges alone and comparable services in San Francisco would cost 21¢ per carton plus costs of drayage to a warehouse.

States, by letter dated April 23, 1959, accepted a proposal by Smyth Storage Inc. (Smyth) that Smyth act as its "solicitation and distribution agent in the San Francisco Bay area". States agreed to guarantee Smyth's expenses for the 90 day trial period beginning May 1, 1959 and to pay $300.00 a month as a retainer.

Under the plan storage and accessorial services would be provided at Howard Terminals in Oakland. Howard would bill Smyth

for services. After Smyth paid Howard, Smyth billed and was reimbused by States. Fourteen shippers were provided services which began in April 1959 and terminated in February 1960.

Howard, a public wharfinger in Oakland, Calif. performed its work for shippers pursuant to its Marine Terminals Association of California Tariff No. 1A containing terminal rates and charges. There are no written agreements with Howard in evidence, but Howard officials and States officials had discussions about the arrangement. Howard had discussions with States about the preparation of invoices and followed the discussions by sending its invoices for services addressed to shippers "c/o Smyth Storage Inc., 1798 Timothy Drive, San Leandro, Calif." and Smyth paid Howard. States later paid Smyth. This sequence of furnishing services, rendering invoices, and receiving payments was followed in other transactions. The respondents States, and Howard acknowledge the arrangement and do not contest that free storage was provided as far as 14 shippers are concerned before the practice was discontinued February 29, 1960.

III. DISCUSSION

The order of investigation recites practices which may constitute the granting of undue or unreasonable perference or advantage to certain persons and localities, in violation of Sec. 16 of the Act or which may be unjustly discriminatory between shippers or ports or may constitute unjust or unreasonable practices in violation of Sec. 17 of the Act.

The second paragraph of Sec. 16 makes it unlawful for any common carrier by water or other person subject to the Act, either alone or in conjunction with any other person, directly or indirectly, to give undue or unreasonable preference or advantage to any particular person or locality or to subject any particular person or locality to any undue or unreasonable prejudice or disadvantage or to allow any person to obtain transportation for property at less than the regular rates or charges established and enforced on the line of a carrier by any other unjust or unfair device or means. Violators of any provision of this section are guilty of a misdemeanor.

Sec. 17 provides: that every common carrier by water and every other person subject to the Act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing or delivering of

property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable, it may determine, prescribe and order enforced a just and reasonable regulation or practice.

Based on his review of this record and testimony, the Examiner recomended that the practices of PFEL, TOA, States and Howard be found unduly and unreasonably prejudicial and perferential and that the aforesaid respondents be found to have allowed persons to obtain transportation for property at less than the regular rates or charges and that such practices be found unjust and unreasonable in violation of Secs. 16 and 17 of the Act.

PFEL excepts to the recommended finding that PFEL acted in concert with TOA in soliciting, promoting, fostering, as well as participating in TOA's storage and distribution services insofar as such services were limited to imported cargo distributed only by PFEL ships at Stockton and that such practices violated Secs. 16 and 17 of the Act. PFEL also excepted to the recommended finding that TOA was an "other person" as defined in Sec. 1 of the Act and as the term is used in Sec. 16, and to the statements in support thereof. PFEL excepted to the Examiner's statement that it was aware of the limitation TOA's distribution services to imports discharged only from PFEL ships.

TOA excepts to the following conclusions in the recommended decision:

1. TOA is furnishing warehouse or other terminal facilities in connection with a common carrier by water and is an "other person" subject to the Act.

2. TOA's practices at Stockton were and are unreasonably prejudicial and preferential in violation of Sec. 16, and were and are unjust and unreasonable practices related to or connected with the receiving, handling, storing, or delivering of property in violation of Sec. 17.

3. TOA's failure to publish a tariff and its practices in connection with its storage and distribution services afforded opportunity for, and TOA provided, unequal treatment for shippers and preferred treatment for certain classes of cargo.

4. Whether TOA had a tariff and ignored it, or had no tariff, does not change the lack of uniformity in the application of its charges for storage and distribution services.

5. By limiting its services to cargoes discharged by PFEL, TOA was, and is, giving an undue and unreasonable perference and advantage to PFEL, and was, and is, subjecting other carriers, such

as States and American President Lines, Ltd. (APL) to an undue and unreasonable prejudice and disadvantage.

6. In providing its storage and distribution services on imports, TOA limited them to cargo discharged from PFEL vessels. PFEL was aware of this limitation. Insofar as this limitation of the services to one carrier was unlawful, by either providing for or condoning in the limitation, TOA and PFEL acted in concert in violating the Act.

7. PFEL acted in concert with TOA in soliciting, promoting, fostering, as well as participating in TOA's storage and distribution services insofar as such services were limited to imported cargo discharged only by PFEL vessels at Stockton. PFEL's practices were and are unduly and unreasonably prejudicial and preferential, and allowed persons to obtain transportation for property at less than the regular rates or charges, in violation of section 16, and PFEL's practices were and are unjust and unreasonable practices related to or connected with the receiving, handling, storing, or delivering of property in violation of section 17.

8. An appropriate order should be entered by the Board, requiring respondents to cease and desist from the violations herein found to exist.

States makes the same exception as to illegality as TOA in its exception No. 6.

Public Counsel excepts to the Examiner's conclusion that it is unnecessary to find that TOA was the agent of PFEL in providing storage and distribution services at Stockton.

We find these exceptions not sustained and our conclusions are in accord with those of the Examiner.

The unlawful acts covered by the second paragraph of Sec. 16 apply to a common carrier by water acting "either alone or in conjunction with any other person" and applies to indirect as well as direct actions.

PFEL obligated itself by means of two contracts to pay monthly to TOA substantial sums of money in return for the latter's agreement to act as its agent and to perform certain services. The record shows, however, that PFEL had the facilities to perform and did in fact perform the identical services TOA was obligated to perform.

The initiating meetings between PFEL officials and TOA organizers, the receipt of TOA correspondence, PFEL's correspondence with TOA, and the representations to shippers by PFEL em-

ployees concerning TOA services all show that PFEL had full knowledge of how TOA performed the agency agreement and what TOA did with the payments it received. PFEL's subsequent lack of concern about the TOA organization and facilities and failure to insist on any bona fide services pursuant to the two contracts shows that PFEL was not concerned with the use of PFEL payments for other unstated yet well understood purposes; namely, payment of Stockton's charges for services to shippers as ordered by TOA. Statements by PFEL officials to shippers establish that PFEL understood what TOA was doing for shippers, and that it was solicitation only to the extent that it presented the obvious economic advantages of what TOA was doing with PFEL payments. It was not the customary type of solicitation for shippers' cargoes. The lack of advertising tends to show that the economic appeal of the plan obviated the need. The failure to point out features of PFEL ships and services showed that the normal attractions of a line for a shipper were secondary to the economic advantage TOA offered.

The facts are that PFEL (1) made two agreements with two persons, associated, as far as this record shows, for the sole purpose of receiving substantial amounts of money over a period of about 33 months, (2) failed to obtain any performance of the contracts remotely commensurate with the amounts paid, (3) knowing what was going on, permitted the use of its payments to such persons for buying storage and other services for its shippers or consignees, which they would normally have had to buy from Stockton, and (4) acted with the knowledge that TOA limited its storage services to PFEL cargoes discharged at Stockton. Such facts establish that PFEL as a common carrier by water in conjunction with another person, and indirectly (i.e. through the intervention of TOA) (a) gave undue preference and advantage to inbound traffic through the Port of Stockton and thereby subjected other ports such as San Francisco to undue prejudice and disadvantage and (b) allowed shippers or consignees of inbound property on its ships to obtain transportation for property at less than the regular rates or charges then established by PFEL by an unjust or unfair means, contrary to the requirements of Sec. 16 of the Act.

PFEL shippers' charges would normally be the applicable Conference tariff rates plus the cost of services required at Stockton in accordance with the Stockton Warehouse Tariff manual. The latter costs were avoided by diverting part of the ocean freight

charges back to the shippers or consignees by means of the benefit received from the intermediary TOA.

The preference and advantage to Stockton and the prejudice and disadvantage to other ports is "undue" because substantial economic advantages of the plan were available only through the TOA organization and only at one port to the exclusion of all other ports and shippers.

The substantial economic advantage which shippers got from PFEL via TOA payments, is the unfair means which caused the cost of transportation to shippers to be less than established rates.

The fact that TOA operated independently in furnishing services to shippers and PFEL had nothing to do with TOA's operations or TOA's limitations on its service or with other business decisions, are not material because PFEL, regardless of TOA's independence, had a duty to terminate its payments when it knew how they were being used. The Examiner correctly evaluated the evidence to prove that PFEL knew what was going on. The further fact that PFEL collected full freight from the shipper or consignee and paid the Port of Stockton compensation properly due the port for acting as terminal agent are equally immaterial, since indirect actions and actions "in conjunction with" others are also prohibited by Sec. 16. The complete interchange of information between the two respondents and the financial dependence of TOA on PFEL evidences that they were working in conjunction with each other. The Examiner's conclusions on this point are correct and the exceptions thereto are not well taken. *Baltimore & Ohio R.R. Co. v. United States et al.*, 305 U.S. 507 (1939); *Propriety of Operating Practices New York Warehousing*, 198 I.C.C. 134 (1933); *Practices of San Francisco Bay Terminals*, 2 U.S.M.C. 588 (1941); *Storage Charges Under Agreements 6205, 6215*, 2 U.S.M.C. 48 (1939); *Storage of Import Property*, 1 U.S.M.C. 676 (1937).

The facts show that both PFEL and States participated in the arrangements for receiving, handling, storing and delivering shippers' or consignees' property in such a way that the latter would not have to pay normal charges for handling, storing and delivering the property in addition to established freight charges for transportation. Such practices are unjust and unreasonable because of the discriminations and preferences they create as discussed more fully herein.

TOA argues (1) that when it takes custody of merchandise at the end of the 7-day free time period the "terminal" aspects of

water transportation of property are complete; (2) that the wharfage, dock and warehouse facilities referred to in the first section of the Act must be "terminal" in character and (3) if the furnishing of "terminal facilities" is ended at or before the time TOA places goods in its assigned warehouse space then, TOA is not furnishing terminal type services and is not an "other person" under the Act. Therefore, TOA is not subject to the Board's jurisdiction because it does not meet the description in the first section of the Act.

The first section of the Act states that the term "other person subject to this act" means any person not included in the term "common carrier by water", carrying on the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water. The term "person" includes corporations and partnerships.

In *Wharfage Charges and Practices at Boston, Mass.*, 2 U.S.M.C. 245 (1940), the U.S. Maritime Commission held that the Commonwealth of Massachusetts was an "other person" within the definition contained in the Act "insofar as it engages in the activities of an other person" as defined in the Act. The activities were not otherwise described but the record showed they related to the unloading of ships and warehousing of cargoes. In *Practices Etc., of San Francisco Bay Area Terminals*, 2 U.S.M.C. 588 (1941), the respondents Board of Port Commissioners of the City of Oakland and the Stockton Port District were "admonished that any space rental device used for the purpose of unduly discriminating between storers of cargo in water transportation is strictly in violation of section 16 of the Shipping Act, 1916, as amended". *Id.*, at 608. Respondent here seeks to limit the warehouse storage related to furnishing terminal facilities to the free time period. This test is too limited and is a too conceptualistic description of the consequences of what TOA was doing.

TOA has furnished its customers the identical facilities and related services Stockton furnished its customers subject to the latter's "Warehouse Tariff No. 1". All TOA has done is place itself between Stockton and its consignee customers for the purpose of ordering or obtaining such services for them. If Stockton furnishes warehouse or other terminal facilities in connection with a common carrier by water, so does TOA. It is implicit in *Practices Etc., of San Francisco Bay Area Terminals* that Stockton furnishes terminal facilities in connection with common carriers by water. We hold that a person is furnishing ware-

house or other terminal facilities in connection with a common carrier by water who: 1. receives custody of property from a common carrier by water or its agent after unloading at a dock or pier, and 2. keeps custody thereof within the geographical confines of an ocean terminal facility, such as a warehouse adjacent to a dock or pier, until custody of the property is relinquished to an inland carrier or to the consignee. TOA meets this description. The terminal character of the facilities furnished continues until the inland carrier takes possession. The Board has assumed jurisdiction up to this point. *Investigation of Certain Storage Practices of the Port of Longview Commission at the Port of Longview, Washington,* 6 F.M.B. 178 (1960). We note that public terminals were thought to be subject to regulation by the terms of the Act according to the understanding of Congressman Alexander, one of the framers of the Act. (See: Debates on H.R. 15455 in the House of Representatives, 53 Cong. Rec. 8276). The terminal aspect of handling property is not complete at the time goods are delivered by Stockton to the "lessee" of its assigned warehouse space. Other facts may also constitute one an "other person", but the foregoing principle is applicable to the facts of this case.

Based on the facts that TOA, (1) rented warehouse space, (2) offered the warehouse and terminal services and facilities described in its letters to potential clients and (3) contracted for Stockton's warehouse and terminal services for TOA clients, TOA was properly found to be carrying on the business of furnishing warehouse or other terminal facilities. TOA (1) by receiving consignees' cargoes from PFEL, (2) by its agreements with PFEL, and (3) by its arrangement with shippers using PFEL transportation was also properly found to be acting "in connection with a common carrier by water". TOA is, therefore, an "other person subject to this act" within the definition of such term in the fourth paragraph of the first section of the Act and as the term is used in the second paragraph of Sec. 16 of the Act. The first exception is rejected.

TOA practices at Stockton were related to and connected with the receiving, handling, storing and delivering of property, since TOA received property unloaded from PFEL ships, handled the property by having it moved to TOA's assigned space in the terminal area, stored the property and performed further handling operations on the property and delivered it to an inland carrier.

These practices involve services related to the provision of warehouse and terminal facilities.

TOA's method of soliciting freight was to offer shippers warehouse facilities at Stockton in which it would hold merchandise without charge and would perform certain other services without charge, except a charge for putting tags on packages. Later TOA made small charges per package but did not specify what particular service the charges were for. The charges were never related to the value of the service performed and were far below its normal cost. TOA solicitation representations were directed entirely to the presentation of these services, to the low charges, and to the fact that shippers would thereby avoid substantial expenses which they would normally have to pay when their shipments pass through a warehouse, and are processed in various ways between the unloading from a common carrier by water and onto an inland carrier. The only charges were for expressly requested special services and such charges were at cost. The essence of the TOA appeal was "free storage". TOA never mentioned any details about PFEL services which solicitors usually present to shippers and which shippers are usually interested in. Nor did it maintain any soliciting personnel at any of the places where potential shipper clients were located.

TOA's performance for PFEL on one hand and charges to shippers on the other disclose a complete discrepancy between the value of the services rendered by TOA to each and the amounts charged for its services. Shippers, through the intervention of TOA, were the beneficiaries of PFEL's payments, and PFEL in return was the recipient of the shippers' business. TOA was the instrument for channelling PFEL money so that this result could be achieved.

These actions establish that TOA as an "other person" subject to the Act gave economic preference to shipments to the locality of Stockton and to shippers using PFEL at Stockton. As a result, other localities than Stockton and other shippers were subjected to prejudice and disadvantage and shippers through Stockton were allowed to obtain transportation at less than PFEL's established rates.

TOA argues that the arrangement was a trial to obtain cost experience before making compensatory charges later on. The Act, however, would be violated at the time of the first offending action and without reference to motivation.

TOA, by using money paid to it by PFEL and obtained by PFEL from its freight revenues from shippers, both with the full knowledge of each party, also indirectly allowed its shipper-clients to obtain transportation for property on PFEL ships at less than the regular rates or charges then established and enforced on the line of PFEL by an unjust and unfair means. The unjust and unfair means consist of making representations that it would perform certain services and concealing the fact that Stockton performed the services pursuant to the latter's tariff, and of absorbing, on behalf of shippers, the normally applicable warehouse service costs with payments by the carrier.

TOA's assumption of custody over shippers' and consignees' property without, as far as this record shows, executing any receipt therefor or being named as agent in any shipping documents covering particular property and its assertion of power to direct Stockton as to the movement of and services to the property without furnishing proofs of its interest in the property constitutes a failure to establish a just practice relating to the receiving, handling, storing, and delivering of property within the meaning of Sec. 17.

The practices shown establish violations of Secs. 16 and 17 as the examiner found and the second exception is rejected.

Preferred treatment, by differing charges for certain classes of cargo, results in discrimination against other cargo. *Practices, etc. of San Francisco Bay Area Terminals,* 2 U.S.M.C. 588, 603 (1944). TOA insulated its clients from Stockton's Warehouse Tariff No. 1 and did not publish its own tariff for furnishing identical services, but made varying charges based on negotiation. Negotiation is the antithesis of tariff uniformity. The erratic method of charging shippers or consignees shows that the charges were an unimportant part of the arrangement and that the recapture of costs from shippers or consignees was not a significant factor in TOA's operations. The Examiner was correct in finding that the absence of a tariff was a device or means which was unfair or unjust. The third and fourth exceptions are rejected.

By limiting its services to PFEL cargoes and excluding cargoes of other carriers from the economic advantages of its warehouse and terminal facilities TOA was properly found to be prejudicing the excluded carriers and placing them at an unreasonable disadvantage in the competition for cargoes. The fifth exception is rejected.

The facts clearly establish that PFEL and TOA acted in conjunction with each other in providing money and services which enabled each to perform actions in violation of the Act hence the sixth and seventh exceptions relating to actions in concert in violating the Act are not well taken.

The remaining exception is to the failure to find that TOA was an agent of PFEL because the latter knew that TOA practices "were at best of dubious legality" and that the two "collaborated in establishing the scheme as a joint venture". Neither establishes agency, nor is such relation essential. We agree with the Examiner in effect each is an independent contractor and as such has acted in conjunction with each other and with Stockton. To prove acts "in conjunction" it is not necessary to show agency.

The Act applies to such specific actions by the individual respondents. Whether a party is a "dummy", as contended, or whose idea the plan was, or whether PFEL successfully disassociated itself from TOA activities, is not controlling. The substantial effect of the actions of each respondent on transportation have been considered and found to be contrary to the terms of the Act as indicated herein without regard to their status as agents or principals.

States simply made a forthright agreement with an intermediary, Smyth, analogous to TOA whereby Smyth, like TOA, would pay storage and other warehouse charges normally chargeable to shippers and would be reimbursed by the carrier, States. Pursuant to the arrangement, 14 shippers did not have to pay storage charges. The only substantial difference is that PFEL paid TOA without regard to the cost of the services and apparently paid ahead of time instead of afterwards based on actual costs. The result of the two procedures is identical and States has not seriously contested its consequences, relying rather on a showing that if its plan is not authorized, neither is that of TOA.

States made arrangements with Smyth and Howard whereby 14 shippers were relieved of paying storage charges. States used Smyth as agent to pay the charges and Smyth was later reimbursed. Inasmuch as such concessions on storage charges were not available to all shippers and because different periods of storage were required by different shippers, discriminatory treatment was involved and such actions are likewise unreasonable practices connected with the receiving, storing, and handling of cargo. Although States problem of meeting PFEL competition may be considered as a mitigating factor, it does not exculpate

the respondent from being found in violation of statutory obligations.

Howard is a public terminal and wharfinger subject to the Act. Although Howard received the proper charges for all storage services rendered to the 14 customers of States, it nevertheless engaged in an arrangement whereby the common carrier by water, States, would absolve the shipper of storage charges. The record supports a finding that Howard was aware that States and not the shipper would pay for Howard's services. Howard's submission of invoices to Smyth which it knew would be paid by States and its participation in the arrangement constitutes an unjust and unreasonable practice connected with the receiving, handling and storing of property in violation of Sec. 17 of the Act.

We conclude: 1. that each of the persons comprising the partnership and the sole stockholders of the business association identified as TOA and Howard as other persons subject to the Act, and PFEL and States, as common carriers by water, have violated the the provisions of Sec. 16 of the Act and each is guilty of a misdemeanor; 2. that each of the persons comprising the partnership and the sole stockholders in the business association identified as TOA and Howard, as other persons subject to the Act and PFEL and States as common carriers by water, have violated the second paragraph of Sec. 17 of the Act by not observing, establishing and enforcing just and reasonable practices relating to the receiving, handling, storing or delivering of property; and, 3. that this proceeding should be discontinued.

The facts and findings herein relative to such violations shall be referred to the Department of Justice for appropriate action. An appropriate order will be entered.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 1st day of June, 1961.

No. 871

INVESTIGATION OF CERTAIN STORAGE PRACTICES OF PACIFIC FAR EAST LINE, INC., TRANS-OCEANIC AGENCIES, STATES STEAMSHIP COMPANY, AND HOWARD TERMINALS AT THE PORTS OF STOCKTON AND OAKLAND, CALIFORNIA

This proceeding of inquiry and investigation having been entered upon by the Board on 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 respondents Pacific Far East Line, Inc., States Steamship Company, Trans-Oceanic Agencies and Howard Terminals be and each one is hereby notified and required to hereafter abstain from the practices herein found to be unlawful under Sec. 16 and Sec. 17 of the Shipping Act, 1916, as amended, and 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).

It is Further Ordered, That the proceeding be, and is hereby, discontinued.

By the Board.

(Sgd.) THOMAS LISI,
Secretary.

FEDERAL MARITIME BOARD

No. 889

UNAPPROVED SECTION 15 AGREEMENT—

NORTH ATLANTIC/BALTIC TRADE

Decided June 19, 1961

Respondents found not to have entered into or carried out before approval under Section 15 of the Shipping Act, 1916, as amended, during 1958 or prior thereto an agreement affecting westbound trade from Gothenburg, Sweden, to the United States North Atlantic Coast.

Agreement No. 7549, as amended, found to have been lawfully carried out in a fashion consistent with its terms, as heretofore approved by the Board, and Agreement No. 7549, as amended, should not be disapproved.

A. F. Chrystal, Ira L. Ewers and *W. B. Ewers* for respondent Moore-McCormack Lines, Inc.

T. K. Roche for respondents Swedish American Line and Transatlantic Steamship Co., Ltd.

William J. Smith, Jr., as Public Counsel.

REPORT OF THE BOARD

THOS. E. STAKEM, *Chairman;* SIGFRID B. UNANDER, *Vice Chairman;* RALPH E. WILSON, *Member*

BY THE BOARD:

The Board by an order dated January 15, 1960 and supplemented April 4, 1960 ordered that an investigation be instituted to determine: 1. whether any of the persons named as respondents have carried out before approval under Sec. 15 any agreement requiring such approval in violation of Sec. 15; 2. whether Agreement No. 7549 as amended has been lawfully carried out; and 3. whether Agreement No. 7549 should be disapproved. Hearings were held and briefs filed followed by a recommended decision of the Examiner. Exceptions and replies were filed and we have heard oral argument.

The Examiner concluded that the respondents should be found not to have entered into or carried out before approval under Sec. 15 of the Shipping Act, 1916, as amended (Act) during 1958 or prior thereto an agreement affecting the westbound trade from Sweden to the United States and that Agreement No. 7549 as amended has been lawfully carried out consistently with its terms and should not be disapproved.

The Examiner found that Agreement No. 7549 dated October 17, 1945 had been approved by the Board on December 4, 1945, and has never been considered by the parties to be inoperable. Amendment No. 1 of the agreement was likewise filed and approved March 5, 1946, and is also still in effect.

The agreement provides that beginning October 27, 1945 "and continuing until cancelled by 30 days' notice the Lines agree to alternate sailings under Swedish and American flag (every Friday from New York)." "Ships are to sail as scheduled, loaded or not loaded . . ." The purpose of the alternating sailings "is to maintain a regular service to Sweden with an approximately even division of Swedish and U.S. freight, East and West bound, originating from or destined to U.S. North Atlantic Ports, between Swedish and American flag ships, both from a freight revenue point of view and of volume." The amendment provides that "the previously agreed alternate sailings under Swedish and American flags every Friday from New York . . . be increased from time to time as mutually agreed by the two parties in such a manner as . . . to carry out the purpose of the Agreement as to an even distribution of freight."

In 1946 trade prospects changed and the parties amended the original agreement to provide that alternate sailings be increased from time to time as mutually agreed in such a manner as to best serve the trade. As trade has developed, Swedish American sails out of New York weekly and Moore-McCormack now goes out about 3 times a month, weather permitting.

None of the respondents has ever considered the agreements to be inoperative and the changes in departures have improved services.

By a letter dated July 28, 1958, the President of Moore-McCormack wrote to the Director of Swedish American concerning the former's desire to serve Gothenburg westbound. Moore-McCormack indicated an intention to have a sailing a month westbound from Gothenburg with the time of the month to be decided upon

after consultation. A copy of this letter was not filed with the Board.

The foregoing facts were found by the Examiner and the Board takes no exception thereto.

Objection is made to the finding of the Examiner—1. that the subject agreement has never been considered by the parties to be inoperative, and 2. that the discontinuance of alternating sailings by Moore-McCormack and Swedish American was consistent with the amended agreement. Under these circumstances, Public Counsel excepts to the failure of the examiner to find that respondents have violated Sec. 15 of the Act by modifying or cancelling Agreement No. 7549 without Board approval.

We find however that the changes in respondents' pattern of sailings are consistent with their undertakings and represent adjustments to the circumstances. The changes are operating matters comparable to current rate changes which need not be filed as agreements under Sec. 15.

The correspondence between the officers of the two respondent lines is merely an implementation of the basic agreement which has been approved and which is still operative.

In conclusion we find that no agreement of the type described in Sec. 15 of the Act affecting westbound trade from Gothenburg, Sweden to the United States North Atlantic coast was entered into or carried on without approval of the Board during 1958 or prior thereto by the respondents and that Agreement No. 7549 has been performed according to its terms as heretofore approved by the Board and that said Agreement No. 7549 as amended should not be disapproved.

An order discontinuing this proceeding will be entered.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 19th day of June, 1961.

No. 889

UNAPPROVED SECTION 15 AGREEMENT—

NORTH ATLANTIC/BALTIC TRADE

This proceeding having been instituted by the Board upon its own motion, and having been duly heard and submitted, and 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 this proceeding be, and it is hereby, discontinued.

BY THE BOARD.

(Sgd.) THOMAS LISI,
Secretary.

732-047 O-64—22

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. S–125

MOORE-MCCORMACK LINES, INC.—

APPLICATION UNDER SECTION 805(a)

Decided June 23, 1961

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 MOWBRAY, presently under time charter to States Marine Lines, Inc., to engage in one eastbound intercoastal voyage carrying a cargo of lumber and/or lumber products from United States Pacific North West ports to Wilmington, Del., Camden, N. J., and Baltimore, Md., commencing on or about June 26, 1961, 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 Merchant Marine Act, 1936, as amended.

John R. Ewers, for applicant.

Donald Brunner, 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. 1223) (the Act)[1] for its vessel, the SS ROBIN MOWBRAY, presently under time charter to States Marine Lines, Inc., to engage in one eastbound intercoastal voyage carrying a cargo of lumber and/or lumber products commencing at United States Pacific North West ports on or about June 26, 1961, for discharge at Wilmington, Del., Camden, N. J., and Baltimore, Md.

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

The application was duly noticed in the Federal Register of June 17, 1961, (26 F.R. 5438). Hearing was held on June 23, 1961. No parties intervened in opposition to the granting of the requested permission.

The testimony in this case shows that States Marine has cargo bookings of approximately 6½ million feet of lumber and lumber products. States Marine advises that it has been unable to obtain any other suitable ship for this position. This sailing, which is scheduled to commence shortly after loading on June 26, 1961, will not increase the normal pattern of scheduling in States Marine Lines, Inc. eastbound intercoastal service.

On this record 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.

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 prejudical 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. 765

INVESTIGATION OF PRACTICES, OPERATIONS, ACTIONS, AND AGREEMENTS OF OCEAN FREIGHT FORWARDERS AND RELATED MATTERS, AND PROPOSED REVISION OF GENERAL ORDER 72 (46 CFR 244)

No. 831

INVESTIGATION OF PRACTICES AND AGREEMENTS OF COMMON CARRIERS BY WATER IN CONNECTION WITH PAYMENT OF BROKERAGE OR OTHER FEES TO OCEAN FREIGHT FORWARDERS AND FREIGHT BROKERS

Decided June 29, 1961

1. Performance by forwarders of forwarding services free of charge or at non-compensatory charges to shippers, and receipt of brokerage from carriers on the shipments, found to violate section 16 of the Shipping Act, 1916, as amended.
2. Forwarders, in assessing charges to shippers in varying amounts, adding disguised markups to charges for accessorial services procured for their shippers, and performing forwarding services free or at non-compensatory charges for some shippers and not for others, found to give undue or unreasonable preference to some shippers and subject others to undue or unreasonable prejudice or disadvantage, in violation of section 16 First of the Act, and to engage in unjust and unreasonable practices in violation of section 17 of the Act.
3. Forwarders found to have failed to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property and the practices of forwarders in connection therewith found unjust and unreasonable, in violation of section 17 of the Act.
4. Performance by carriers of forwarding services free or at non-compensatory charges to shippers found to violate section 16 Second of the Act.

5. Payments by carriers to forwarders of brokerage, resulting in indirect rebates to shippers through the performance by forwarders of forwarding services free or at non-compensatory charges in violation of section 16 of the Act, found to be an unjust and unreasonable practice in violation of section 17 of the Act.
6. Violations of the Act as shown above found to have occurred regularly, and unjust and unreasonable practices relating to and in connection with the receiving, handling, storing, and delivering of property found to exist. Just and reasonable rules and regulations in connection therewith determined, prescribed, and ordered enforced.
7. Forwarders and carriers found to have entered into, and carried out, agreements or arrangements providing for the regulation of competition, pooling or apportioning of earnings, or cooperative working arrangements, without prior approval of the Board, in violation of section 15 of the Act.
8. Findings in prior decisions cited in order in No. 831 that agreements between carriers prohibiting payment of brokerage, or limiting brokerage to less than 1¼ percent of freight charges, are or would be detrimental to the commerce of the United States, found no longer valid.

Benjamin M. Altschuler for Customs Brokers and Forwarders Association of America, Inc., respondent and intervener, and International Expediters, Inc., respondent.

J. Richard Townsend for Pacific Coast Customs and Freight Brokers Association and Los Angeles Customs and Freight Brokers Association, Inc., respondents and interveners.

Gerald H. Ullman for New York Foreign Freight Forwarders and Brokers Association, Inc., respondent and intervener, and Port of New York Ocean Freight Forwarders Conference, respondent.

G. M. Footner for Baltimore Custom House Brokers and Forwarders Association, respondent and intervener.

Robert Eikel and *E. C. Leutsch* for Texas Ocean Freight Forwarders Association, respondent.

Ramon S. Regan for United States Van Lines, Inc., respondent.

Paul J. Coughlin for Judson Sheldon International, Division of National Carloading Corporation, respondent.

Edward M. Alfano for Pan American Van Lines, Inc., respondent.

Richard G. Green for Oxford Agency of N. Y., Ltd., respondent.

Frank G. Wittenberg for Universal Transport Corporation, respondent.

George F. Galland for American Union Transport, Inc., respondent.

Hyman I. Malatzky, respondent and intervener, *pro se*.

Paul A. Roge for D. B. Dearborn & Co., respondent.

Roger Roughton for Thomson & Earle, Inc., respondent.

Charles I. Runi for Parker Commission Co., respondent.

J. Bertram Wegman and *Myron L. Shapiro* for D. C. Andrews & Co., Inc., respondent.

R. E. Johnson for Railway Express Agency, Inc., respondent.

Cyrus C. Guidry for Board of Commissioners of the Port of New Orleans, intervener.

Chas. R. Seal for Virginia State Ports Authority, Intervener.

Charles B. Myers, Robert N. Burchmore, John S. Burchmore, and *Martin E. Coughlin* for National Industrial Traffic League, intervener.

T. W. Titsworth for Ebasco Services Incorporated, respondent.

G. M. Rebman for United Van Lines, Inc., respondent.

Arthur Lieberstein for Atlas Van Lines, Inc., respondent.

Leonard G. James for Capca Freight Conference, Pacific Coast/Caribbean Sea Ports Conference, Pacific Coast European Freight Conference, Pacific Coast/Mexico Freight Conference, Pacific Coast/Panama Canal Freight Conference, Pacific Coast/River Plate Brazil Freight Conference, Pacific Indonesian Conference, Pacific Straits Conference, and Pacific/West Coast of South America Conference, respondents.

Alex C. Cocke for Gulf/French Atlantic Hamburg Range Freight Conference, Gulf/United Kingdom Conference, Gulf Scandinavian and Baltic Sea Ports Conference, Gulf/Mediterranean Ports Conference, and Gulf/South and East African Conference, respondents.

Odell Kominers, Mark P. Schlefer, J. Alton Boyer, and *John Cunningham* for United States Atlantic & Gulf-Puerto Rico Conference, respondent.

John R. Mahoney for Associated Latin American Steamship Conferences, respondent.

Allen E. Charles and *Gilbert C. Wheat* for Pacific Westbound Conference, respondent and intervener.

John Tilney Carpenter for States Marine Corporation, States Marine Corporation of Delaware, Isthmian Lines, Inc., Irish Shipping, Ltd., Mitsubishi Shipping Co., and South African Marine Corporation, respondents.

Herman Goldman, Elkan Turk, and *Elkan Turk, Jr.,* for Wilhelmsens Dampskibsaktieselskab; A/S Den Norske Afrika-O.

Australielinie; A/S Tonsberg; A/S Tankfart I; A/S Tankfart IV; A/S Tankfart V; A/S Tankfart VI; Compagnie Maritime Belge, S. A. Compagnie Maritime Congolaise, S.C.R.L.; Skibsaktieselskapet Varild; Skibsaktieselskapet Marina; Skibsaktieselskapet Sangstad; Skibsaktieselskapet Solstad; Aktieselskabet Glittre; Dampskibsinteressentskabet Garonne; Aktieselskabet Standard; Fearnley & Egers Befragtningsforretning A/S; Skibsaktieselskapet Siljestad; Dampskibsaktieselskabet International; Skibsaktieselskapet Mandeville; and Skibsaktieselskapet Goodwill, respondents.

William L. Hamm for Alcoa Steamship Co., Inc., respondent.

Alan B. Aldwell for Matson Navigation Company and The Oceanic Steamship Company, respondents.

Clarence J. Koontz, Malcolm D. Miller, F. W. Denniston, and *J. H. Macomber, Jr.,* for Administrator of General Services, intervener.

Louis J. Lefkowitz and *J. Bruce McDonald* for State of New York, intervener.

William D. Rodgers and *John T. Rigby* for Commonwealth of Puerto Rico, intervener.

Charles H. Tenney, Samuel Mandell, and *Sidney Brandes* for City of New York, intervener.

Walter J. Myskowski, Arthur L. Winn, Jr., Sidney Goldstein, F. A. Mulhern, Samuel H. Moerman, J. Stanley Payne, and *Frank E. Mullen* for Port of New York Authority, intervener.

Joseph A. Sinclair and *Stephen Tinghitella* for Commerce and Industry Association of New York, Inc., intervener.

T. R. Stetson, Edwin A. McDonald, Jr., F. Alan Lesser, Omar L. Crook, and *Leonard G. James* for United States Borax & Chemical Corporation, intervener.

Thomas F. Lynch for United States Steel Export Company, intervener.

Leonard G. James for Sunkist Growers, Inc., intervener.

Elmer C. Maddy for witness George F. Foley appearing under subpoena.

C. Leonard Gordon for witness George H. Bernard appearing under subpoena.

Elliott B. Nixon for witness C. R. Andrews appearing under subpoena.

Richard J. Gage, Robert B. Hood, Jr., Frank W. Gormley, Edward Aptaker, and *Robert E. Mitchell* as Public Counsel.

REPORT OF THE BOARD

THOS. E. STAKEM, *Chairman;* SIGFRID B. UNANDER, *Vice Chairman;* RALPH E. WILSON, *Member*

BY THE BOARD:

These proceedings were consolidated for hearing, present related issues, and will be disposed of in one report.

In No. 765, we instituted a general investigation into the practices of ocean freight forwarders by order of October 6, 1954, with the view of amending or supplementing General Order 72 regulating the business practices of such freight forwarders, 46 CFR Part 244, or taking such other action as might be warranted by the record. Subsequently, by notice of proposed rule making issued March 11, 1957, and published in the Federal Register of March 19, 1957, 22 F.R. 1779, we instituted a rule-making proceeding pursuant to section 4 of the Administrative Procedure Act, 5 U.S.C. 1003, proposing a revision of General Order 72.

Petitions were filed by interested ocean freight forwarder associations, requesting that the rule-making proceeding be dismissed for lack of jurisdiction. These petitions were denied, *Proposed Rules Governing Freight Forwarders*, 5 F.M.B. 328 (1957), on the ground, among others, that certain of the arguments advanced were premature. The jurisdictional issues were accordingly again raised at the outset of the hearings herein.

In an order of January 3, 1958, in No. 765, published in the Federal Register of January 15, 1958, 23 F.R. 277, we stated that the final form and scope of the rules and regulations which would ultimately be promulgated in the rule-making proceeding should properly await the conclusion of our investigation of forwarder practices, and that the rule-making proceeding should be consolidated with the investigation.

In No. 831, published in the Federal Register of January 15, 1958, 23 F.R. 278, we instituted an investigation of the practices and agreements of common carriers by water in connection with the payment of brokerage or other fees to ocean freight forwarders and freight brokers.

Hearings were held at New York, N. Y., San Francisco, Calif., and New Orleans, La., during the period November 5, 1958, through February 18, 1959. United States Steel Export Company and the Pacific Westbound Conference intervened in No. 765; Commerce and Industry Association of New York, Inc., the Ad-

ministrator of General Services, National Industrial Traffic League, United States Borax and Chemical Corp., Sunkist Growers, Inc., Port of New York Authority, and Board of Commissioners of the Port of New Orleans intervened in Nos. 765 and 831; and Hyman I. Malatsky, doing business as Bergen Shipping Service, Baltimore Custom House Brokers and Forwarders Association, New York Foreign Freight Forwarders and Brokers Association, Inc., Customs Brokers and Forwarders Association of America, Inc., Pacific Coast Customs and Freight Brokers Association, Los Angeles Customs and Freight Brokers Association, Inc., and the Commonwealth of Puerto Rico intervened in No. 831. Subsequent to the hearing, the People of the State of New York through its Department of Commerce, the City of New York, and the Virginia State Ports Authority were permitted to intervene in both proceedings. Requested findings and conclusions pursuant to Rule 13(a) of the Board's Rules of Practice and Procedure, 46 CFR (1958 Supp.) sec. 201.221, were filed by Public Counsel, and opening and reply briefs were filed by the parties.

Our order in No. 765, including the consolidation therewith of the rule-making proceeding, contemplated a broad investigation into the practices of the ocean freight forwarding industry as a whole, with the view of promulgating revised regulations pursuant to the Shipping Act, 1916 (the Act), as might be warranted by the record. The proceeding in No. 831, on the other hand, contemplated only a reappraisal of prior holdings to the effect that concerted action by common carriers in the foreign commerce of the United States which prohibits the payment of brokerage, or limits brokerage payments to less than 1¼ percent of the ocean freight charges, is detrimental to the commerce of the United States within the meaning of section 15 of the Act; and a determination of the extent to which we may control or limit the payment of brokerage by individual common carriers. This order was issued with the view of issuing rules or regulations which may be required in the public interest, or taking such other action as might be warranted by the record. While the application of prior decisions was limited to steamship conferences engaged in foreign commerce (see *Agreements and Practices Re Brokerage*, 3 U.S.M.C. 170, 172), the order in No. 831 includes as respondents carriers and conferences engaged exclusively in the domestic offshore trades, and a petition to discontinue the investigation as to them was denied.

In aid of the investigation in No. 765, questionnaires were promulgated by orders of February 17, 1958, to the ocean freight forwarder respondents and to named steamship companies, and abstracts of the information thus secured were presented in evidence.

Ocean freight forwarders, hereinafter called forwarders, are persons subject to the Act, see *U.S.* v. *American Union Transport,* 327 U.S. 437 (1946). The Act does not require permission from the Board to enter into the business of ocean freight forwarding, and, accordingly, the present regulations provide merely for registration by forwarders with the Board, see 46 CFR, sec. 244.2, *et seq.* As a consequence, it is easy for a person to open business as a forwarder, and the industry is overcrowded and extremely competitive. This makes it possible for employees of a forwarder to divert clients from their employer and to set up their own forwarding businesses. One forwarder located in New York has seen eight forwarding firms started by his ex-employees.

THE FORWARDING INDUSTRY

Forwarders are generally located in port cities, although some maintain offices in principal interior cities such as Denver, Colo., Minneapolis, Minn., and Washington, D. C., and there are forwarders registered with the Board at every port of commercial significance in the United States and its possessions. In essence, they act as the export departments for their shipper clients. In making export shipments, it is necessary that the cargo be booked aboard a carrier and moved to shipside, that shipping documents be prepared and processed, that in the case of foreign shipments export declarations be prepared and cleared through the United States Customs Bureau, that in some instances consular invoices required by the country of destination be prepared and processed, and in some cases accessorial services such as crating, recoopering, and warehousing be furnished or provided at the port city.

In almost every instance shown of record, the services of forwarders are engaged by the shipper or consignee of the cargo, and there is no indication that any contractual relationship exists between the forwarders as such and carriers. A few large shippers, engaged extensively in foreign commerce, maintain their own export departments, and perform their own forwarding, but in the great majority of instances the volume of freight exported by the average exporter does not justify the maintenance by him of a full-time export traffic department at the ports. For example,

there are more than 17,000 merchants who have executed exclusive service contracts with the Trans-Atlantic Associated Freight Conferences, but only about 20 of these maintain export departments at the port of New York.

Except in the instances noted above, exporters in the United States are dependent upon the forwarders to perform the essential services required to accomplish the exportation of their goods. For the most part, the exporters are themselves unfamiliar with the technical aspects of forwarding, and even when they are located in port cities they rely upon forwarders to handle these matters. It can be said, therefore, as this record bears out, that the forwarding industry is an integral part of the commerce of the United States, and makes a valuable contribution to foreign trade through its function of relieving exporters from many details and formalities connected with export shipments. See *Agreements and Practices Re Brokerage, supra,* at 173-4.

The record discloses in detail the various services provided by forwarders. While not all of them are necessary with regard to each export shipment, the principal ones enumerated above must be performed in every instance, either by a forwarder or by the shipper. The forwarders' services include the following: (1) Preliminary to movement of the cargo, advising the shipper-client as to the best port to use, based on a consideration of inland freight rates, frequency of vessel services, congestion at the various ports, and the availability at a particular port of heavy-lift equipment or other special equipment required; securing an export license if required, or reviewing the export license obtained by the shipper; and examination of the letter of credit to insure that compliance therewith can be effected. (2) Tracing the movement of the cargo to the port, and taking action to expedite it if necessary. (3) Reserving vessel space. (4) Preparation of a dock receipt, an export declaration, a delivery order directing the movement of the cargo to the pier and delivery thereof to the inland carrier, and an ocean bill of lading in the number of copies required for the use of the shipper and carrier. (5) Clearing the export declaration with the Customs Bureau, delivering the bill of lading and copy of the export declaration to the carrier, preparing and processing through consular officials the consular invoice, and making a complete set of the documents to conform with the letter of credit. (6) Coordinating the movement of the cargo to shipside to coincide with the loading schedules of the carrier. (7) Consolidating separate cargo lots for one shipment

or consolidating several small shipments for movement on one bill of lading to avoid minimum charges. (8) Arranging for accessorial services, such as the placement of marine insurance, cartage on small shipments, cooperage to repair damaged packages or for export packing or crating at the port city, and storage or warehousing to await the arrival of additional cargo lots or to accommodate cargo missing the vessel. (9) Payment of the ocean freight to the carrier on behalf of the shipper. (10) Assembling the documents in compliance with the letter of credit and delivering them to the bank.

With respect to a substantial portion of the shipments handled by forwarders, they are authorized by their shipper clients to arrange for the booking of the cargo, and to select the carrier over whose line the shipment will move. In performing this function, the forwarder testimony of record is unanimously to the effect that the forwarder's primary obligation is to the shipper, and that selection of the carrier is generally made with the view of securing the earliest possible delivery at destination consistent with good service. It is clear, however, that the forwarders are in a position with respect to shipments for which they have booking authority to favor one carrier over another where there is competitive service to the destination port. For this reason, the forwarders are regularly solicited for business by the carriers. On rare occasions, forwarders are requested by carriers to secure so-called "spot" cargo when a particular vessel is in danger of sailing light, and they are sometimes able to secure from their shipper clients such spot cargo, but specific instances cited of record are few. Shippers are likewise directly solicited for spot cargo.

Some forwarders also perform functions not directly related to the handling of specific shipments, which tend to develop foreign trade. In connection with the solicitation of business for their own account, they sometimes induce shippers to enter into the export business. Some of them prepare bulletins compiling the sailing schedules and rates of different carriers, port handling charges, and inland rates, for dissemination to their shipper clients. A few maintain representation abroad for the solicitation of business from foreign consignees, or travel abroad for the same purpose, and are sometimes instrumental in bringing together foreign consumers and domestic producers. The record indicates, however, that the growth and development of our foreign export trade depend primarily upon the sales efforts of the exporters

themselves. Forwarders sometimes intercede on behalf of their shipper clients for rate adjustments by the carriers, both inland and ocean, in order to facilitate the movement of goods produced in the United States at landed costs competitive with goods produced elsewhere. Forwarders are also instrumental in securing from their shipper clients the execution of exclusive service contracts with steamship conferences, in order that their clients may be entitled to the lower contract rates in those situations where conferences maintain dual rate systems.

Forwarders generally receive their revenues from two sources. Except as noted below, they bill their shipper clients for the various services performed by them, as discussed in detail *infra*. In addition, on the great majority of the shipments handled by them, they receive so-called brokerage[1] payments from the ocean carriers. The importance of the brokerage payments to the revenue position of the forwarders is indicated by Table I below, which consists of a compilation of the data furnished by the forwarders responding to the questionnaires mentioned above. The brokerage received as shown in the table corresponds closely with the total amount of brokerage reported as paid by the carriers in 1957 of $11,284,748.

TABLE I.—*Activity and Revenues of Forwarders in 1957*

	No. of forwarders	No. of shipments forwarded	No. on which brokerage received	Brokerage received	Forwardg-fees collected
ATLANTIC COAST	897	1,550,621	1,166,702	$ 7,946,425	$19,246,931
GULF COAST	150	238,790	163,411	2,105,758	2,963,560
PACIFIC COAST	146	155,307	101,071	929,536	1,621,208
NON-OCEAN	80	51,502	23,771	127,462	482,395
TOTALS	1,273	1,996,220	1,454,955	11,109,181	24,314,094

There is substantial variation in the size and activity of the individual forwarders. More than 500 forwarders handled less than 100 shipments each in 1957, while several processed over 20,000 shipments. Of the 1,273 forwarders responding to the questionnaires, 283 or 22 percent handled no shipments at all in 1957, 221 or 17 percent handled between 1 and 99 shipments, and 219 or 17 percent handled between 100 and 499 shipments. Forwarders in order to function efficiently must keep abreast of

[1] Whether "brokerage" as used in this report can be construed to mean brokerage fees in the strict sense of the latter term is doubtful, in view of the discussion *infra*.

changes in traffic patterns and in the regulations of our own and foreign governments. There is evidence of record to the effect that a forwarder should handle a substantial volume of traffic, 500 shipments or more annually, in order to maintain current acquaintance with changing conditions in the trades. Some of the larger forwarders employ persons specializing in the commercial practices of the various trade areas.

Table II below shows the extent of forwarder activity at the major ports of the United States in 1957, and the extent of the dependence of forwarders at the various ports and as a whole upon brokerage payments. Of the total of 919 forwarders reporting income from brokerage and forwarding fees separately, 124 received more than 50 percent of their income from brokerage.

TABLE II.—*Forwarder Activity at Major Ports in 1957*

	No. of forwarders	Shipments handled	Percent of brokerage to total income
Boston, Mass.	21	2,621	22
New York, N. Y.	732	1,407,454	28
Philadelphia, Pa.	25	31,798	37
Baltimore, Md.	13	29,175	43
Norfolk, Va.	12	10,358	56
New Orleans, La.	77	113,680	40
Houston, Tex.	16	71,369	42
Seattle, Wash.	16	16,529	48
San Francisco, Calif.	51	87,183	41
Los Angeles, Calif.	61	39,493	23
Total United States.	1,273	1,996,220	31

As is indicated by the data shown in Table II, the port of New York is by far the leading center of activity in the forwarding industry. New York is the leading general cargo port in the United States, handling about 13 million tons annually in foreign trades. About 80 percent of the general cargo passing through the port of New York for export originates at interior ports, and the physical situation at the port requires complicated and exacting procedures to coordinate the arrival of the cargo at the port and its delivery to the pier. The tracks of most of the railroads terminate on the New Jersey side of the port, while most of the steamship piers are located on the New York side. Rail cargo therefore generally requires lighterage in order to effect delivery at shipside. In order to avoid congestion of lighters at

the piers, the steamship companies require the issuance of loading permits and the railroads require that delivery orders and accompanying vessel permits be presented at least 48 hours prior to the time of lighterage delivery specified. There are also rail tariff provisions permitting split lighterage deliveries of individual shipments combined into a single carload, which necessitates close coordination at the port in order to effect delivery at shipside.

Because of their connections with shippers located in the interior, forwarders located at New York not only handle cargo passing through that port, but they also control a substantial amount of cargo moving through ports elsewhere in the United States. To a substantial degree, the New York forwarders through such control affect the operations of carriers and forwarders at ports other than New York, giving rise to arrangements which are discussed more fully hereafter. The influence of the New York forwarders extends even to the Pacific Coast. For example, the Pacific Coast European Conference requires that forwarders be specifically designated by their shippers before brokerage may be paid to the forwarders. At the time of the hearing, there were 308 such designations on file, and only 123 of these forwarders were located on the Pacific Coast, with the remaining 185 being located elsewhere, principally at New York.

PRACTICES OF FORWARDERS

Forwarding fees and billing.—The record in these proceedings, despite its size, discloses no discernible pattern of forwarding fees within the forwarding industry, or by any one forwarder individually. Apparently, the charges made by a forwarder to his shipper clients are established by negotiation, and vary from shipper to shipper. As testified by one forwarder, a fee of $10 for a particular service may be charged one shipper, but another who "drives a hard bargain" may get the same service for $7.50. There is intense competition within the forwarding industry, and this tends to drive the overt forwarding fees, labeled as such in the forwarder's billing, to the lowest possible levels. There are examples in the record of the printed billing forms used by several forwarders. One of these shows separate items covering inland freight; cartage; ocean freight; insurance; consular fees; preparation and/or presentation of consular documents, translations, blanks, etc.; preparation of bills of lading; forwarding fee;

customs clearance; handling draft and collections; cables, telegrams and air mail postage; and storage and/or demurrage charges. This form includes a statement that inland freight, ocean freight, or consular fees, if included, are net disbursements.

Another billing form shows separate items for inland freight, cartage, charges, ocean freight and charges, insurance charges, consular fees, cost of consular blanks, preparation of consular invoices, preparation of certificates of origin, preparation of bills of lading, forwarding fee, customs entry fee, customs duty, customs clearance, special services, postage, petties and taxes, and banking documents. This form includes the statement "Items appearing on our invoice are cash advances as an accommodation to you. We are obliged to insist upon immediate payment of our invoice of expenses otherwise it will be impossible for us to extend you credit facilities on future transactions."

A third billing form shows items of ocean freight; foreign port, government, surcharges, landing charges; consular fees and blank consular forms; preparation and handling consular invoices; certification; messenger service; inland freight and charges; insurance; arranging insurance under consignee's or shipper's policy; cartage; storage; arranging transportation, preparation and handling bill of lading and attendance; customs clearance, checking and verification for export control; cables, telegrams and telephone toll charges; postage and airmail; banking service and preparation of draft for collection; banking service, preparation of documents and handling against letter of credit; advancing ocean freight and charges; and arranging confirmation and payment to suppliers. This bill includes no forwarding fee as such, and it is the only bill form indicated of record which informs the shipper client that brokerage payments from the carriers might be received. This form includes the statement:

> The charges separately listed above for "Ocean Freight", "Inland Freight", "Consular Fees", and "Foreign Port, Government, Surcharges, Landing Charges" are the exact amounts actually paid out by us in each instance for your account. In accordance with our agreement with you, and as specified in the terms and conditions of our Acknowledgment of Shipping Instructions heretofore sent you, our profit, in addition to our direct costs, expenses and disbursements incurred for your account, is a component of the other items detailed in this Bill of Charges. As agreed as aforesaid, we are separately compensated for our services to the ocean carrier in respect of this shipment by the steamship company's payment to us of a commission at the rate of 1¼% of such carrier's charge (itemized above) for Ocean Freight.

The present regulations (46 CFR sec. 244.7[2]) require, among other things, that forwarders shall use invoices or other forms of billing which state separately the amount of insurance premiums actually disbursed for insurance bought in the name of the shipper or consignee, and the amount charged for each accessorial service performed. A common practice, particularly among the New York forwarders, is for the forwarder to mark up the charges for these accessorial services above the amounts actually disbursed in his billing to the shipper client. In numerous instances, marine insurance is secured by the shipper under his own policy, leaving the actual placement of the insurance upon specific shipments and the payment of the premiums to the forwarder. In these circumstances, there is no indication that the billing to the shipper includes markups in contravention of the regulation. In other cases, however, insurance is placed by the forwarder under his own open marine insurance policy, and the forwarder charges the shipper more than the cost of the insurance, generally without advising the shipper that the latter is paying more than the cost of the insurance alone. These markups, so far as this record shows, are imposed in a random fashion, vary from shipper to shipper and from shipment to shipment, and appear to bear no relation to the cost to the forwarder for his services of placing the insurance, despite the testimony of some forwarders that the markups represent legitimate service charges covering the work necessary to secure insurance coverage,

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[2] This section provides:

244.7 Billing Practices. All forwarders shall use invoices or other forms of billing which state separately and specifically, as to each shipment:

(a) the amount of ocean freight assessed by the carrier;

(b) the amount of consular fees paid to consular authorities;

(c) the amount of insurance premiums actually disbursed for insurance bought in the name of the shipper or consignee;

(d) The amount charged for each accessorial service performed in connection with the shipment;

(e) other charges.

Provided, however, that forwarders who offer to the public at large to forward small shipments for uniform charges available to all and duly filed with the Federal Maritime Board, shall not be required to itemize the components of such uniform charges on shipments as to which the charges shall have been stated to the shipper at time of shipment, and accepted by the shipper by payment; but if such forwarders procure marine insurance to cover such shipments, they must state their total charge for such insurance, inclusive of premiums and placing fees, separately from the aforementioned uniform charge.

preparation of insurance certificates, and handling of claims where necessary. Table III below illustrates the practices of the forwarders in this respect, showing the more extreme amounts of markup from among the instances shown of record.

TABLE III.—*Markup of Insurance Charges by Forwarders*

Forwarder	Insurance premium	Markup	Percent of markup
Hasman Shipping Corporation	$ 26.25	$ 36.75	140
Do.	46.17	9.48	21
Cosmos Shipping Co., Inc.	44.15	15.80	36
Do.	22.47	none	0
Presto Shipping Agency	10.69	.20	2
Do.	18.30	1.20	7
D. C. Andrews & Co., Inc.	30.77	none	0
Do.	144.40	115.52	80
M. Weisel & Co.	221.87	53.15	24
Do.	225.00	10.00	4
International Expediters, Inc.	32.43	23.53	73
Do.	23 90	4.71	20

The extent of variation in the practice of marking up insurance charges as between different shippers by one forwarder is illustrated by evidence concerning D. C. Andrews & Co., Inc. During November 1957 this forwarder marked up the insurance charges on 9 shipments of one shipper 76 percent or a total of $54.71, and on 4 shipments of another shipper 56 percent or a total of $50.87, while on 16 shipments handled for two other shippers there was no markup at all. The alertness of shippers in dealing with forwarders is a factor in determining whether a markup will be imposed, and its amount. If a shipper is not aware of the practice, he is more likely to bear the added charge. There is testimony to the effect that the markup is based on what the traffic will bear, and that there is no standard basis for determining the amount of the markup. One forwarder testified that as a matter of policy he attempted to mark up the insurance charges on shipments to a particular area by one percent of the insured value of the shipments, but the evidence as to specific shipments shows wide variations from this policy. Because of their volume of shipments, forwarders under their own open policies are sometimes able to obtain insurance at lower costs, including the markups, to the shippers than could be obtained by the shippers themselves. In instances where shippers maintain their own marine insurance policies, they sometimes request the forwarders to place insurance under the forwarders' policies when

the claim experience on particular types of shipments or to particular areas is unfavorable, in order to protect the loss ratio under the shippers' own policies which bears on the premium rates.

Forwarders are frequently requested to arrange for cartage within the port area on shipments. As in the case of insurance, it is common for the New York forwarders to mark up the cartage charges to the shippers above the amounts disbursed for this purpose. There is evidence that in one instance ocean freight charges were also marked up, in contravention of the regulation, but no indication that this practice is widespread, since freight rates are generally readily ascertainable by the shippers.

The record leaves little doubt that the practice of marking up accessorial charges is induced by intense competition within the forwarding industry, which as indicated above tends to drive forwarding fees to unremunerative levels, and the markups provide a means for the forwarders to recover their costs of arranging for the accessorial services and of other forwarding services without endangering their competitive position, since the marked up charges are disguised and the amounts thereof unknown to the shippers.

The responses of the forwarders to the questionnaires show that of 1,273 forwarders responding, 226 or about 18 percent admitted doing some free forwarding during 1957. Under this practice, the forwarding services are provided without charge to the shipper. It is likewise caused by competition between forwarders, and is made possible by the receipt of so called brokerage payments from the carriers. Obviously, free forwarding services are furnished only to those shippers whose shipments earn sufficient brokerage to pay the cost of forwarding, others being charged fees even though brokerage is collected on their shipments. One Pacific coast forwarder provides free forwarding services for 11 of his shipper clients. During the last six months of 1958 the amount of brokerage received on these 11 accounts was $19,073, and was $29 on one account and ranged from $465 to $5,536 on the other 10 accounts. Generally only the larger shippers are favored with free forwarding services.

The General Services Administration handles export shipments for a number of Federal agencies. Until May 1958 it utilized forwarders registered with the Board and included in a special list, who applied for the privilege of performing free forwarding services. These free forwarding services were not actively solicited

by the General Services Administration. During 1957, free forwarding services were offered by 128 forwarders, 96 on the Atlantic and Gulf coasts, and 32 on the Pacific coast. The shipments were rotated among the various forwarders every 30 days at New York, Philadelphia, and Baltimore, and every 60 days at other ports. In 1957, 82 such forwarders handled 3,274 shipments for the General Services Administration under their offers to perform free forwarding, and the total ocean freight charges on these shipments were $4,364,870. If so called brokerage was received on all of these shipments by the forwarders at the usual rate of 1¼ percent, it amounted to $54,561, or an average of $16.66 per shipment. Table I indicates that the average income per shipment from forwarding fees and brokerage combined in 1957 was $17.75.

In March 1958 the Comptroller General ruled in *Transportation —Freight Forwarders—Free or Reduced Rates for Services,* 37 Comp. Gen. 601, that the acceptance by a Federal agency of free forwarding services or forwarding at rates reduced by the forwarder in contemplation of the receipt of brokerage, would be in violation of section 16 of the Act. Upon receipt of this ruling, the General Services Administration changed its policies regarding forwarding, and issued invitations to forwarders to bid for the performance of such services. The services sought included preparation and processing of export declarations; preparation and processing of ocean bills of lading, dock receipts, and delivery orders; and processing of consular invoices. The specifications included a condition that any bid submitted which stated that it is conditioned upon the receipt of a brokerage charge for performing, in part or in whole, the forwarding services outlined would be disqualified. On berth general cargo, the bids received from east coast forwarders and opened on September 23, 1958, ranged from no charge and 1 cent per shipment to $25 per shipment, and one New York forwarder offered to pay the Government 25 cents per shipment for the privilege of handling the shipments. East coast bids accepted under this invitation were no charge at Savannah, 1 cent per shipment at New York, 10 cents per shipment at Baltimore, and ranged from $5 to $10 per shipment at other ports. Bids accepted at Gulf and Pacific coast ports ranged from no charge at Los Angeles and $1.50 per shipment at New Orleans upward to $7.50 per shipment.

While there is no definitive cost evidence of record, there is an indication that at some time prior to 1955 forwarder costs at New

York averaged $2.76 for preparation and processing of the export declaration, $4.28 for preparation and processing of consular invoices, and $8.89 for preparation and processing of ocean bills of lading and related dock receipts and delivery orders, or a total of $15.93 per shipment for these services alone. There is also substantial evidence clearly indicating that as a whole, forwarding fees as such, including markups on accessorial charges, do not fully cover the costs of performance by the forwarders of the services performed by them, and that the receipt of brokerage is necessary in order for them to recover their costs of operation and realize a profit.

Monarch Finer Foods,[3] a west coast manufacturer of food products, located at San Francisco, exports from numerous ports throughout the country. It maintains its own export department in San Francisco and there performs all of its own forwarding services, and retains a forwarder in New York to handle shipments moving through the latter port. This shipper formerly paid its New York forwarder $300 per month on a retainer basis. In December 1953, Gentry Shipping Co., a New York forwarder, was given the account for a retainer of $150 per month, and a promise of brokerage on shipments moving through San Francisco. At the time, the shipper was still performing its own forwarding at San Francisco, and no forwarder was collecting brokerage on the shipments. In order to accomplish the arrangement, a fictitious branch office of the forwarder was set up in San Francisco, headed by the shipper's office manager, who received a fee from Gentry. Brokerage thereafter was collected from west coast carriers on west coast shipments, even though the forwarder performed no services thereon, and claims for brokerage were made upon the carriers, and paid by the latter, on shipments which moved prior to the date of certification of the forwarder to the west coast carriers by the shipper. In this instance, forwarding services at New York for the shipper were partially compensated for by the receipt of unearned brokerage on west coast shipments.

Agreements.—Frequently a forwarder in one port will control the traffic of a shipper who exports from other ports, and this situation is most prevalent among the New York forwarders. In these instances, the New York forwarders have entered into agreements or arrangements with forwarders at other ports, such

[3] The name was changed to Consolidated Food Products during the course of the events here related.

as Baltimore, New Orleans, and San Francisco, under which the out port forwarders will handle the shipments. Compensation to the outport forwarder is usually made by a split of the brokerage payments received from the carriers. About 80 such agreements have been filed with and approved by the Board under section 15 of the Act, but the record indicates that there are numerous such agreements in existence which have not been submitted for approval.

In order to avoid, where possible, the necessity of splitting brokerage payments, the New York forwarders have also entered into arrangements with the ocean carriers under which the work necessary to complete forwarding services, such as clearance of the export declarations and processing of consular invoices, is accomplished by the ocean carriers without charge at ports such as Boston and Baltimore, and the Southern U.S. Atlantic ports of Charleston and Savannah. Pursuant to these arrangements, the New York forwarders have diverted cargo from New Orleans to Savannah and Charleston in order to avoid the splitting of brokerage with New Orleans forwarders, because carriers have refused to perform outport forwarding services or the completion thereof at New Orleans. The forwarders at Boston and Baltimore have requested that the carriers discontinue their performance of free forwarding services for the New York forwarders, or alternatively that like services be performed at New York on behalf of the Boston and Baltimore forwarders, but these requests have been refused. It has been estimated that the Baltimore forwarders are deprived of revenues amounting to about $125,000 annually because of these practices.

Relationship between forwarders and shippers.—Several instances are shown of record wherein relationships exist between forwarders and shippers or employees and stockholders of shippers to the extent that the receipt by the forwarders of brokerage payments may constitute direct or indirect rebates in violation of section 16 of the Act, as found by the Board in *Samuel Kaye—Collection of Brokerage/Misclassification,* 5 F.M.B. 385 (1958), and *Luis (Louis) A. Pereira—Collection of Brokerage,* 5 F.M.B. 400 (1958). The Ford Motor Company employs a forwarder, the J. R. Willever Company, which prior to 1958 performed no services whatsoever, all of the forwarding work being performed by the Ford Motor Company, but which was permitted to collect brokerage payments on all of the shipments exported by Ford. Brokerage payments amounted to almost $200,000 in 1957. Prior

to 1956, 90 percent of the stock of Willever was held by members of the Ford family. The record does not disclose the present relationship between Willever and the Ford Motor Company, but Willever now books all Ford Motor Company shipments with the carriers and collects brokerage thereon, without charge to the Ford Motor Company, and all other forwarding services are performed by the latter.

The situation with regard to Monarch Finer Foods has previously been detailed. Studebaker-Packard Corporation does practically all of its own forwarding work, and permits its forwarder, Commercial Shipping Company, to obtain brokerage on the shipments. From 1944 to 1955, an official of the Studebaker-Packard Corporation owned a partnership interest in Commercial Shipping Company. The Jahrett Shipping Co., Inc., a forwarder, is commonly owned, in part, with Henry R. Jahn & Son, Inc., and Cooper-Jahn, Inc., shippers. Brokerage is received by this forwarder on shipments of the commonly owned shippers. Similarly, Banho Shipping Corporation, a forwarder, has common stockholders with Banho Export Co., Inc., a shipper.

BROKERAGE

General.—The practice of the payment of brokerage by ocean carriers to forwarders is of long standing, going back 60 years or more. It is a matter of prime importance in these proceedings, since brokerage constitutes a substantial portion of the revenues of forwarders as previously detailed. Therefore, before making findings concerning brokerage practices, it is necessary to determine as precisely as possible the exact nature of the relationship between forwarders and carriers, and whether the brokerage payments here involved are actually brokerage fees. Past decisions of the Board and its predecessors and of the courts have accepted the premise that forwarders, in their dealings with carriers, act in the capacity of freight brokers. See, for example, *In re Gulf Brokerage and Forwarding Agreements,* 1 U.S.S.B.B. 533 (1936); *Agreements and Practices re Brokerage,* 3 U.S.M.C. 170 (1949); and *U.S. v. American Union Transport, supra,* at p. 442, f.n. 6. It has consistently been held by the Board and its predecessors that brokerage is compensation for securing cargo for a vessel, see *Pacific Coast European Conf.—Payment of Brokerage,* 5 F.M.B. 225, 233-4 (1957), and the proceedings there cited.

In none of these decisions, however, was there any reference to the accepted definition of a broker, and the elements necessary to establish a brokerage relationship. In *American Union Transport* v. *River Plate & Brazil Confs.*, 5 F.M.B. 216 (1957), upheld in *American Union Transport* v. *United States,* 257 F. 2d 607 (1958), cert. den. 358 U.S. 828, an attempt was made to distinguish between the forwarding and so-called brokerage activities of a forwarder, but this proceeding involved only the activities of a single forwarder with respect to a specific series of shipments, and the Board relied upon its prior definition of brokerage as securing cargo for the ship. The principles there enunciated are relevant, however, in determining the issues here.

A broker is an agent employed to make bargains and contracts between other persons in matters of trade, commerce, and navigation for a compensation, commonly called brokerage. 12 C.J.S. § 11. A broker may act as agent for his customer only where he has been engaged to do so by a contract of appointment or employment, which may be either express or implied. 12 C.J.S. § 12. The right of a broker to recover commissions or other remuneration for his services must be predicated on a contractual relation, he must have been employed to negotiate the contract or transaction in connection with which his services were rendered, and the employment must have been by the person from whom the commission is claimed or by some one acting for him. Where there is no employment or binding contract for the payment of commissions and the broker acts as a mere volunteer, he is not entitled to compensation for his services, although such services are the efficient cause of bringing the parties together and they result in a sale or other contract between them. 12 C.J.S. § 60.

The court in *American Union Transport* v. *United States, supra,* stated, p. 613:

> The appointment of AUT [the forwarder] as a broker by Central [the shipper] could not create any liability on the part of the ocean carriers. There was no agreement by the carriers authorizing the appointment, and certainly no agreement by the members of the Conference to incur liability to AUT, with whom it had engaged in competition for the very business for which it now claims compensation by way of reparations. AUT was not the broker for the carriers to obtain the contract and there was no agreement at any time between AUT and the members of the Conference to pay brokerage.

As previously stated, in almost every instance shown of record, the services of forwarders are engaged by the shippers or consignees of the cargo, and there is no indication that any contrac-

tual relationships exist between the forwarders as such and carriers. The rates of ocean carriers generally apply at ship's tackle, and it is the duty of the shipper to bring the cargo alongside the vessel ready for shipment, and not that of the ship. See *American Union Transport* v. *River Plate & Brazil Confs., supra,* at 223. The services of forwarders detailed above are almost entirely directed toward performance of the shipper's duty. Much stress is laid, in the briefs and in the testimony, upon the fact that it is the duty of the carrier under the Harter Act, 46 U.S.C. 193, and the Bills of Lading Act, 49 U.S.C. 100, to issue bills of lading, and that in preparing bills of lading the forwarders are acting on behalf of the carriers. See *In re Gulf Brokerage and Forwarding Agreements, supra,* at 534-5, and *Puerto Rican Rates,* 2 U.S.M.C. 117, 133 (1939). This duty of the carriers is accomplished, however, by the issuance of an original bill of lading for each shipment. The record here discloses, on the other hand, that for the use of the shipper a number of copies of the bill of lading are required, as many as 25 or 30, that the bills of lading are prepared at the request of the shipper, that a charge for this service is ordinarily made to the shipper, and that in no instance are the forwarders employed by the carriers to perform this function. The benefits to the carriers from this service are therefore merely incidential to the needs of the shippers.

In the light of the comprehensive record made herein, it is concluded that, except in those rare instances in which forwarders are retained by carriers, under either express or implied agreements, to secure spot cargo, forwarders are not brokers. It is urged by some that the long accepted definitions of "broker" and "brokerage", as such, are no longer valid in relation to the services performed by forwarders. Brokers are specifically named in section 16 of the Act among those who are forbidden to obtain or attempt to obtain rebates, and there is no indication that this term was used by the Congress in any other than its accepted sense. Settled principles of law are not so lightly discarded.

Brokerage practices.—In the great majority of instances, steamship conferences limit, by agreement, the payment of brokerage to 1¼ percent of the ocean freight charges, and all carriers members of such conferences pay brokerage at such rate. Only two instances of deviation from this rate are shown. The North Atlantic Continental Freight Conference tariff permits the payment of brokerage at 1¼ percent on rates up to and including $19.99 per ton, 2½ percent on rates of $20 up to and including $22.99 per

ton, and 5 percent on rates of $23 per ton or over.[4] These higher rates of brokerage are required by severe competition from non-conference lines, which in this trade pay brokerage as high as 10 percent. The Pacific Coast European Conference tariff limits the payment of brokerage on grain and grain products to ¾ of 1 percent, on lumber and open rate commodities to 1 percent, and on certain commodities included in a net rate list prohibits the payment of brokerage. These tariff provisions were at issue in *Pacific Coast European Conf.—Payment of Brokerage, supra,* and the Board found that the prohibitions and limitations on brokerage to less than 1¼ percent were similar to those condemned in *Agreements and Practices re Brokerage, supra,* but withheld action with respect thereto pending the outcome of the instant proceedings.

In the trades from the Pacific Coast to East and South Africa, and to Australia, the carriers by individual action do not pay brokerage. The evidence is that, in the event any one of the carriers in those trades commenced the payment of brokerage, the the others in order to remain competitive would need to do likewise. Non-conference carriers generally pay brokerage at the rate of 2½ percent, although there are instances cited of record where brokerage payments as high as 16 percent were made, and the non-conference carriers consider their higher rates of brokerage as a competitive advantage.

Steamship conferences, as indicated above, generally fix the upper limits of brokerage rates. They recognize that brokerage payments are a competitive device to attract cargo to a particular steamship line, and that in the absence of agreed limits, if maximum rates of brokerage were left to the individual action of the carriers, brokerage would soon get out of hand.

Methods of payment of brokerage.—In the majority of instances, forwarders present invoices to carriers for brokerage claimed, and are paid by the carriers on the basis of these invoices. Generally, the carriers check only to insure that the shipments invoiced actually moved, and that no more than one brokerage payment is made on any one shipment. The carriers make no effort to ascertain that the forwarders have performed any services with respect to any shipments, and do not attempt to determine

[4] Tariff No. 24 of the North Atlantic Continental Freight Conference, of which official notice is taken pursuant to Rule 13(g) of the Board's Rules of Practice and Procedure, 46 CFR § 201.227, increased the respective upper limits of the rates, effective January 1, 1960, to $21.99, $24.99, and $25, or over.

whether there are any relationships between forwarders and their shipper clients which would make the payment of brokerage on the shipments of such shippers rebates in violation of section 16 of the Act. The carriers insist that they rely primarily upon the fact that a particular forwarder is registered with the Board, that it is impossible for them to inquire into any possible relationships of forwarders with the shipper and an onerous burden would be imposed upon them were they to be required to ascertain whether the forwarders actually performed any services on shipments on which brokerage is claimed, in view of the great number of shipments handled by the forwarders.

With the recent development of machine accounting systems, several carriers have instituted an automatic method of payment of brokerage. Under this method, all bills of lading showing on their face that a registered forwarder is in any way connected with the shipments are collected together, information showing the name of the forwarder, the bill of lading number, and the ocean freight charges are transcribed to machine records, computations as to the amount of brokerage due are automatically made and checks issued to the forwarders, all without requiring the forwarders to submit any claims or invoices for brokerage. This automatic method of payment results in cost savings to the carriers, in that it eliminates the necessity of checking numerous forwarder invoices against carrier records, and is regarded by some as a favorable competitive device in that it results in more prompt payment of brokerage to the forwarders.

The present regulations (46 CFR § 244.13[5]) prohibit forwarders from receiving brokerage in cases where payment thereof would constitute a rebate, or from sharing any part of the brokerage

[5] This sections provides:

244.13 *Brokerage.* No forwarder, after the date on which he is required to register, shall accept brokerage from ocean carriers unless and until such forwarder has been assigned a registration number pursuant to these rules. Registration shall not entitle a forwarder to collect brokerage from a common carrier by water in cases where payment thereof would constitute a rebate—i.e., where the forwarder is a shipper or consignee or is the seller or purchaser of the shipment, or has any beneficial interest therein or where the forwarder directly or indirectly controls or is controlled by the shipper or consignee, or by any person having a beneficial interest in the shipment. A forwarder shall not share any part of the brokerage received from a common carrier by water with a shipper or consignee. No fowarder shall demand or accept brokerage during the period his registration number is under suspension or after his registration number has been cancelled pursuant to these rules.

with a shipper or consignee. In an attempt to insure that, so far as possible, the carriers will be protected against inadvertent rebates, they generally require a certification on the invoices of forwarders to the effect that, in compliance with section 16 of the Act, payment by the carrier and acceptance of brokerage by the forwarder are on the strict understanding that no part of the brokerage shall revert to the shipper or consignee, and that the business of the forwarder is in no sense subsidiary to that of the shipper or consignee. In the case of automatic brokerage payments, the checks of the carriers include a similar certification as a part of the endorsement, which must be executed by the forwarders when negotiating the checks. The record leaves little doubt that these certificates are executed indiscriminately by the forwarders, and that the present regulation and the certificates are ineffective in preventing rebates, direct or indirect, in cases where forwarders provide forwarding services free of charge to their shipper clients, as in *American Union Transport* v. *River Plate & Brazil Confs., supra,* or in cases where there is an identity of interest between a particular forwarder and his shipper clients, as in *Samuel Kaye—Collection of Brokerage/Misclassification, supra,* and *Luis (Louis) A. Pereira—Collection of Brokerage, supra.*

Some shippers have requested that the carriers of their shipments do not pay brokerage to the forwarders employed by them. So far as the record discloses, these requests are honored by the carriers. A number of shippers, as indicated above, perform on their own behalf all of the services normally provided by forwarders. Such shippers do not receive brokerage payments. Some of these shippers testifying of record herein, are of the opinion that in the performance of forwarding services, their activities redound to the benefit of the carriers in exactly the same manner as the normal operations of forwarders, and that if the forwarders are entitled to brokerage, the shippers are entitled to the same privilege. All parties of record recognize that the direct or indirect payment by a carrier to a shipper of any portion of the ocean freight charges would constitute an unlawful rebate in violation of section 16 of the Act. See *Payments to Shippers by Wis. & Mich. Steamship Co.,* 1 U.S.M.C. 744 (1938), and *Rates, Charges, and Practices of L. & A. Garcia and Co.,* 2 U.S.M.C. 615 (1941). See also *Lehigh Valley R.R. Co.* v. *United States,* 243 U.S. 444 (1917), involving a similar situation under the Interstate Commerce Act.

Unearned brokerage.—The record discloses a number of instances in which brokerage, in substantial amounts, is paid by carriers to forwarders on shipments as to which the forwarders have done little or no work. The circumstances under which the forwarders employed by Ford Motor Company, Monarch Finer Foods, and Studebaker-Packard Corporation receive brokerage have previously been detailed. Anderson, Clayton and Company, the largest cotton shipper in the Gulf, performs all of its own forwarding services at New Orleans and Houston, and the annual ocean freight charges paid are about $5 million. Forwarders perform no service whatever on the great majority of the shipments. However, Anderson Clayton certifies 10 forwarders in Houston and 20 in New Orleans on a rotating basis for the payment of brokerage.

Balfour Guthrie & Company, Ltd., exports shipments through the port of New York on which its annual freight charges are about $1 million. It maintains an export department by which the forwarding services are largely performed. Since 1945 its freight forwarder has been Nyos Incorporated. From 1948 until about 1955 Nyos performed no services whatsoever on these shipments, but was furnished with a copy of all ocean bills of lading, on the basis of which Nyos collected brokerage from the carriers. Beginning in 1955 Nyos took over the function of performing messenger service for Balfour Guthrie in connection with the forwarding of shipments, with the remainder of the forwarding work still being performed by Balfour Guthrie. Nyos is paid for the messenger service an amount in excess of the cost to Balfour Guthrie for the same service. Nyos continues to receive brokerage on all the shipments. The vice president of Balfour Guthrie and the controlling stockholder of Nyos are husband and wife, respectively.

H. A. Gogarty, Inc., a forwarder, performs forwarding services for American Paper Exports, Inc., at New Orleans, for which it receives forwarding fees. At New York, forwarding services on shipments moving through that port are all performed by the shipper. After completion of the shipments, a list of the shipments and applicable freight charges are furnished to Gogarty on the New York shipments, in order that Gogarty may collect brokerage thereon, even though the forwarder has performed no services. American Cyanamid Company has an annual freight bill of from $2 to $3 million, and does all of its own forwarding, but certifies M. J. Corbett Co. as its forwarder for the payment of brokerage. Corbett's only service is that it occasionally gives

information to the shipper about available carrier services, without charge. Nestles Products has an office at San Francisco which performs all of the forwarding on shipments moving through that port, but it certifies its New York forwarder, Fred P. Gaskell & Co., for payment of brokerage on the San Francisco shipments. Gaskell does not maintain an office on the West coast.

There is reference in the record to additional instances in which similar practices are followed. The shippers apparently permit the collection of unearned brokerage by their forwarders as a good will gesture or as a favor, although in some of the instances cited the receipt of unearned brokerage constitutes direct or indirect rebates. The record contains no direct evidence as to why the carriers continue the payment of unearned brokerage, but the inference is unavoidable that the forwarders to whom it is paid control the routing of important cargo of other shippers, and that these forwarders are in a position to divert such cargo away from any carrier who would refuse payment of brokerage.

Domestic trades.—Brokerage is not paid by the carriers in the domestic trades, such as those between the continental United States and Hawaii and Puerto Rico regulated by the Board, and the coastwise and intercoastal trades regulated by the Interstate Commerce Commission. In these trades rate regulation is much more comprehensive than in the case of foreign trades. Brokerage in the domestic off-shore trades subject to regulation by the Board is generally prohibited by the conference agreements.

Cargo documentation is generally less complicated in the domestic trades, in that no export declarations are required in the Hawaiian trade, and in the Puerto Rican trade need not be authenticated by the Customs Bureau prior to loading of the cargo; no consular invoices or export licenses are required; and there are no currency exchange problems. There are a limited number of carriers in these trades, and their schedules and itineraries are widely known.

As a result of the non-payment of brokerage, the forwarders do not generally solicit traffic in the domestic trades, and there is evidence to the effect that forwarders will refuse to handle shipments in these trades except as an accommodation to those of their shippers who also export in foreign commerce. Bills of lading are generally prepared by the carriers, and other forwarding services are performed by the shippers themselves, or by the carriers at charges stated in their tariffs. For example, United States Atlantic & Gulf-Puerto Rico Conference Outward

Freight Tariff No. 7, in item 18, names service charges covering the preparation and handling of extra copies of bills of lading, preparing and clearing export declarations, preparing and completing drafts or commercial invoices, arranging for transfer of cargo from terminal inland carrier to carrier's pier, and securing permits.

Competition and comprehensive regulation in the domestic trades tend to hold the freight rates to relatively low levels. The carriers engaged in the Puerto Rican trade, supported by the Commonwealth of Puerto Rico, express the fear that, were the carriers now to be prevented from prohibiting the payment of brokerage, the added expenses occasioned by brokerage payments to forwarders would require immediate increases in the freight rates. There is no indication that commerce in the domestic trades is adversely affected by the existing prohibitions against the payment of brokerage, and the forwarders have expressed little or no interest in these trades.

Positions of parties regarding brokerage.—There is a wealth of testimony from carriers, forwarders, and public bodies to the effect that brokerage payments constitute compensation by the carriers for the performance by forwarders of services of value to, or redounding to the benefit of, carriers, particularly the services of booking cargo or otherwise arranging cargo space, solicitation of traffic, coordination of cargo movement to shipside, preparation and processing of bills of lading, preparation and processing of dock receipts and delivery orders, preparation and processing of consular documents or export declarations, and payment of ocean freight charges. When pressed, however, none of the witnesses could specify with particularity any service which was performed for the carriers, with the exception of the preparation of the bills of lading. It has previously been found that, in the performance of this function, the forwarders are acting for their shipper clients. The carriers likewise testified unanimously that the brokerage rate of 1¼ percent, solely by reason of its long standing, was fair and reasonable. In fact, no individual carrier, other than those engaged in the Pacific Coast/East and South Africa trade where no brokerage is paid, opposed on this record the payment of brokerage to forwarders.

Conference chairmen and officials on the Atlantic and Gulf Coasts generally supported the payment of brokerage, except in those instances where, prior to the decision in *Agreements and Practices Re Brokerage, supra,* the conference agreements had

contained a prohibition against such payment. On the other hand, the conferences on the Pacific Coast which had, prior to that decision, generally prohibited the payment of brokerage except on overland shipments which were susceptible of movement by any coast, generally opposed the payment of brokerage. The majority of all conference officials, however, were of the opinion that rates of brokerage should be left to conference action, rather than be held to a stated minimum by Board action.

The testimony above summarized, which occupies a substantial portion of the record herein, lends little to a determination of the actual reasons for, and the nature of, brokerage payments. In our complex economy, the successful fruition of any particular business endeavor depends upon the efficient performance of many related activities. Thus, the carriers benefit as much from the efficient performance by inland carriers of port lighterage and port delivery services as they do from the efficient functioning of the forwarder industry. Brokerage, however, is paid only to the latter. It must be concluded that brokerage does not constitute compensation by the carriers for any of the services of the forwarders, since the services of the latter must necessarily be performed for the shippers in order to bring shipments into position for export.

The overwhelming conclusion drawn from the record as a whole, as found by the Examiner, is that brokerage is primarily a competitive device, utilized by the carriers to attract to themselves as much as possible of the traffic as to which the forwarders, by authorization of their shipper clients, control the routing. It is apparent that, to the extent that brokerage payments by all members of carrier conferences are generally limited to 1¼ percent, the competitive impact of brokerage is largely nullified. It comes into play only in preventing any one carrier, by individual action, from refusing to pay brokerage, since such a carrier would immediately be faced with diversion away from it of all traffic controlled by the forwarders to the maximum extent possible.

Effect of brokerage prohibitions upon commerce.—As stated in the order in Docket No. 831, it was held in *Agreements and Practices Re Brokerage, supra,* that conference agreements in foreign commerce which prohibit the payment of brokerage, or limit brokerage payments to less than 1¼ percent of the ocean freight charges, would be detrimental to the commerce of the United States within the meaning of section 15 of the Act, and this decision was thereafter followed by our predecessors until it was

732-047 O-64—24

announced, in *Pacific Coast European Conf.—Payment of Brokerage, supra,* that action looking to a reconsideration thereof would be taken.

The record has been searched in vain for any probative evidence indicating that the prohibition of brokerage payments would have any adverse or detrimental effect upon the foreign commerce of the United States, limiting the definition of "foreign commerce" to the actual movement of goods in the export trades, and the promotion and development of such trades. There are numerous general assertions in the record, by forwarders and others, that if brokerage is eliminated entirely the forwarders will perforce need to increase their charges to shippers in order to recoup the lost revenues, that numerous commodities move in export on which the profit margins are narrow which could not stand the imposition of increased forwarding charges, and that the movement of such commodities would thus be adversely affected. No shipper testimony to this effect was adduced, and the shipper testimony of record, from shippers who perform their own forwarding services and do not receive brokerage, indicates to the contrary.

The record, in fact, supports the conclusion that increased forwarding charges, to the extent necessary to provide full compensation to the forwarders and a reasonable profit, should have no substantial deleterious effect upon the movement of goods in export. Such increases in forwarder charges, established to compensate for the loss of brokerage, would not have an adverse effect on our export commerce. In all trades, in recent years, increased costs of the carriers have compelled substantial increases in ocean freight rates in excess of 1 percent, without noticeable decreases in traffic attributable to this cause alone. There are, in this connection, numerous statements on the record by carriers and conference officials that brokerage payments, as such, are not reflected in the ocean freight rates, and that the cessation of such payments would not induce an immediate concurrent decrease in the rates. They recognize, however, that brokerage payments are items of expense to the carriers, and it is reasonable to assume that, if relieved of this expense, the impact of other cost increases would be minimized, and that ultimately the savings realized by the carriers from the cessation of brokerage payments would be reflected in rates which would be lower relatively. This assumption is borne out by the position of the carriers in the Puerto

Rican trade, who show that increased expenses by reason of brokerage payments would necessitate rate increases in that trade.

The carriers generally fear that, were the forwarding industry to be crippled, the necessary functions performed by the forwarders on behalf of their shippers would need to be performed in large part by the carriers themselves. In this connection, it is necessary to point out here that, as stated above, ocean freight rates generally apply at ship's tackle, and the carriers' obligations, in return for the freight charges, are limited to the receipt, transportation, and delivery of tendered shipments. It is the duty of the shipper, as pointed out in *American Union Transport* v. *River Plate & Brazil Confs., supra,* to perform all of the functions normally performed by a forwarder to bring cargo alongside a vessel ready for shipment, and this finding was expressly upheld in *American Union Transport* v. *United States, supra,* at p. 612. It necessarily follows, therefore, that if brokerage payments providing the sole compensation for the performance of forwarding functions constitute an indirect rebate to the shipper in violation of section 16 of the Act, the performance of such functions by the carriers for shippers free or at non-compensatory charges would result in direct rebates likewise in violation of the statute. Cf. *Propriety of Operating Practices—New York Warehousing,* 198 I.C.C. 134, 216 I.C.C. 291. The testimony of carriers upon this point generally recognizes that if carriers were required to perform forwarding services, they would be entitled to establish charges therefor, and the statute would require that such charges be compensatory.

Many forwarders testified at length concerning the probable impact upon their operations should they lose the revenues received from the carriers in the form of brokerage payments. This impact would undoubtedly be severe, since it has previously been found that as a whole in the forwarding industry, fees charged to the shippers do not fully cover the costs of forwarders for the services performed by them. The forwarders point to the efforts of some members of their industry directed to the promotion of foreign trades, which they contend will be hampered by losses in revenue from brokerage, but the impact of these efforts upon the foreign commerce of the United States has heretofore been found to be negligible, and stem largely from the sales efforts of the forwarders in the furtherance of their own pursuits, which can logically be expected to continue.

DISCUSSION AND CONCLUSIONS

Jurisdiction.—As indicated at the outset, several contentions relating to the jurisdiction of the Board have been raised by the forwarders. The first of these, to the effect that we have no statutory authority to institute a rule-making proceeding per se, under section 4 of the Administrative Procedure Act, was specifically overruled in *Proposed Rules Governing Freight Forwarders, supra,* and has been rendered moot by the consolidation of the rule-making proceeding with the proceeding in No. 765, an investigation to determine the lawfulness of the practices of forwarders with the view of amending or supplementing General Order 72 as may be warranted by the record. The forwarders agree that, upon findings of unlawfulness, we are authorized to issue rules under the Act prescribing corrective action for the future. See *California* v. *United States,* 320 U.S. 577 (1944).

The forwarders further contend that brokers are not persons subject to the Act, as held in *In re Gulf Brokerage and Forwarding Agreements, supra,* and that we have no authority to establish definitions for "broker," "brokerage," or "brokerage service." These contentions are based upon the premise that forwarders, in relation to carriers, are brokers, which premise was heretofore found to be erroneous in law and in fact. As was held by the court in *American Union Transport* v. *United States, supra,* at 613:

> Even if it be true that the Conference has heretofore paid brokerage wherever the broker forwarder was "identified with the cargo", no reason exists why the Board, under its broad power, should not have authority to distinguish between the services of a broker and those of a freight forwarder.

It is further contended that we lack jurisdiction under section 15 of the Act to review agreements by carriers prohibiting brokerage or limiting it to less than 1¼ percent of the freight charges, on the ground that such agreements are designed merely to prevent the expenditure of funds which, in the absence of such agreements, would be expended, and are therefore not the type of agreements contemplated by the statute. Section 15 of the Act specifically authorizes approval of agreements regulating competition between carriers, and this record establishes conclusively that the payments by carriers to forwarders are utilized by the carriers as a competitive device, and are recognized by them as such. In the circumstances, our jurisdiction is clear.

Discrimination, preference and prejudice, and unreasonable practices by forwarders.—Section 16 First of the Act makes it

unlawful for forwarders, as persons subject to the Act, directly or indirectly, to make or give any undue or unreasonable preference or advantage to any particular person or description of traffic in any respect whatsoever, or to subject any person or description of traffic to any undue or unreasonable prejudice or disadvantage. Section 17 of the Act, which is particularly applicable to the activities of forwarders as found by the Supreme Court in *U. S.* v. *American Union Transport, supra,* requires that forwarders shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property, and provides that whenever the Board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

The record compels the conclusion that, in the assessment of charges by forwarders to their shippers, the practice of discrimination, preference, and prejudice is the rule rather than the exception. The charges vary from shipper to shipper for identical services, some shippers receive forwarding services free of charge or at nominal charges, and in billing for accessorial services, such as insurance and carting, most New York forwarders, who constitute the majority by far, practice unlimited discrimination in that disguised markups in some cases are added in varying amounts and in others are not added, with no apparent regard for cost of service or any other factors which should enter into the establishment and maintenance of just and reasonable charges. Such practices 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.

Rather than offer any justification for their practices as shown in the assessment of their charges, most forwarders opposed on the record any attempt to inquire into the levels of their charges, and the methods of assessment, on the ground that it would disclose the confidential relationships between the forwarders and their shipper clients. There can be nothing private or confidential in the operations of a carrier engaged in interstate commerce, *U. S. Atlantic and Gulf/Puerto Rico Rate Increase,* 5 F.M.B. 426 (1958), and the same is true with regard to any industry operating in a public calling and regulated by the Congress in the public interest, to the extent that the operations are made subject to regulation. *Smith* v. *Interstate Com. Comm.,* 245 U.S. 33 (1917).

Rebates.—It is now well settled that the performance by a freight forwarder of forwarding services free of charge to the shipper, and the concurrent receipt by the forwarder of brokerage from the carriers for the handling of the shipments, constitutes an indirect rebate to the shipper. *American Union Transport* v. *United States, supra.* The forwarders contend that the holdings of the court in that case should be narrowly construed, on the ground that it related to a specific set of facts surrounding specific shipments, and covered the operations of only one forwarder with respect to those particular shipments. To the contrary, this record discloses that the forwarding services performed in that case are the normal services performed by all forwarders, and that the relationship between forwarder and carrier there shown is the normal relationship between forwarders and carriers.

This record discloses that of the 1,273 forwarders responding, of which 283 did not actively engage in forwarding during 1957, 226 or almost 23 percent of the active forwarders in 1957 performed some free forwarding. Rebating of this type therefore cannot be said to occur only in isolated cases. Even more prevalent is the furnishing of forwarding services by forwarders to shippers at nominal charges, or at charges below the costs of such services. There is no real distinction, except in degree, between the furnishing of forwarding services free, and the furnishing of such services at nominal charges such as 1 cent and 10 cents per shipment in the case of the General Services Administration contracts shown or at charges lower than cost. If the former constitutes rebating, the latter does likewise, since the overall result is that the shipper, to the extent that brokerage payments subsidize the cost of forwarding services performed for him, receives his transportation for less than the rates and charges regularly established and maintained by the carriers. See *Lehigh Valley R.R. Co.* v. *United States, supra.*

The forwarders are generally agreed that the furnishing of forwarding services free or at non-compensatory rates is improper, and that some action should be taken to prohibit this practice, but they proposed no rules to accomplish this purpose, or suggested any other action than the exercise of our power, in situations of this character, to prescribe minimum charges for the forwarders.

The record also supports the conclusion that some carriers in the foreign export trades, though not identified of record, engage regularly in the performance of forwarding services for shippers,

and for some forwarders, free of charge. As previously indicated, such practices constitute direct rebates.

Agreements.—The record leaves little doubt that there are numerous arrangements between forwarders under which a forwarder at one port who controls the routing of a shipment refers that shipment to a forwarder at an out-port, the latter completes the forwarding services necessary, and brokerage and other fees are divided between the two. The forwarders contend that these arrangements are not agreements of the type contemplated by section 15 of the Act as requiring prior approval. They argue that the statute is directed principally to agreements which purport to regulate competition as between two or more persons subject to the Act. Section 15 provides among other things that all agreements controlling, regulating, preventing, or destroying competition, pooling or apportioning earnings, or providing for exclusive, preferential, or cooperative working arrangements, between persons subject to the Act, shall be filed for approval, and that operations under such agreements shall be unlawful until they are approved.

The agreements between forwarders here under consideration fall within these provisions. To the extent that referral to one forwarder at an outport is accomplished under such an agreement, other forwarders are denied an opportunity to compete for the traffic. The arrangements constitute cooperative working arrangements between the forwarders parties thereto for the performance of forwarding services. The arrangements contemplate, in almost every instance cited of record, a division of the revenues accruing from the performance of forwarding services between the forwarders parties thereto on an agreed basis. As shown, a number of such agreements or arrangements have been filed for approval, and no forwarder has questioned our authority to act under the statute with respect thereto. The forwarders contend that, since there may be a large number of such agreements in existence, the filing of them will create a burden for the forwarders and for us. The statute clearly places upon the parties to such arrangements the duty of filing them for approval, and proscribes operations thereunder until approval has been secured. We are required by the Act to take action with respect to such filings, and we may not shirk this duty because of its magnitude.

No parties to the proceedings have made mention of the arrangements shown of record between some forwarders and some carriers under which carriers perform the completion of forward-

ing services at outports for forwarders. These arrangements are likewise cooperative working arrangements, required by the statute to be filed.

The record does not indicate with particularity the parties to the arrangements of both types which are in existence, but it may be concluded that the practices are rather widespread. All forwarders, and all carriers engaged in foreign commerce in the outbound trades from the United States, its territories and possessions, and the Commonwealth of Puerto Rico are respondents in one or the other of the proceedings here involved. All such agreements should be filed with us pursuant to Section 15.

Brokerage.—This record discloses that the payment by carriers of so-called brokerage to forwarders who render freight forwarding service to shippers of the cargo leads the forwarders into the practices of discrimination, preference, and prejudice as found above, that such payments almost always result in indirect rebates to the shippers through the performance by forwarders of forwarding services free or at non-compensatory rates or charges, that consequently the payment of brokerage by carriers is an unjust and unreasonable practice related to or connected with the receiving, handling, storing, or delivering of property prohibited by section 17 of the Act. It follows that the payment of any fees or commissions to forwarders in connection with cargo with respect to which they render freight forwarding service by carriers must be prohibited. As to the inevitability of rebating under the present practices of forwarders, it has previously been found that at present in the forwarding industry as a whole, forwarding fees charged by forwarders to shippers do not fully cover the costs of performance by the forwarders of their forwarding services for the shippers. This is tacitly recognized in the brief of one forwarder, Universal Transport Corporation, which states:

> For many years commission on freight, paid by carriers to forwarders compensated forwarders for their services to shippers, consignees and carriers. The practice is an open one, known to all parties concerned and connected with the export of goods. It has reduced to a nominal sum and, in part, completely eliminated forwarding as a cost in the export of American products.

Reconsideration of prior decisions in No. 831.—The principal basis for the prior decisions in holding that conference prohibitions against the payment of brokerage, or limiting brokerage to less than 1¼ percent of ocean freight charges, would be detrimental to the commerce of the United States, is found in the finding in

Agreements and Practices Re Brokerage, supra, at p. 177 that such conference actions had had and will have a serious effect upon the forwarding industry. This finding can be supported on this record, as urged by the forwarders and a number of other parties, but only if it is assumed that forwarding fees must remain at unremunerative levels with resulting indirect rebates to shippers and general disregard of the requirements of section 16 of the Act prohibiting rebates, discrimination, preference, and prejudice. On the other hand, the unregulated payment of brokerage has resulted in substantial payment by the carriers of unearned brokerage, as disclosed on this record, with consequent unnecessary dissipation of carrier revenues creating upward pressures upon ocean freight charges to the detriment of the commerce of the nation.

In addition, the prior decisions failed to recognize the true nature of brokerage of the type here involved as voluntary payments, made by the carriers as a competitive device to attract traffic or as a protective device to prevent the diversion of cargo over which the forwarders have control of routing. The continuance and recurrence of the widespread rebating resulting therefrom which this record shows to exist must cease. The safeguards included in the prior decisions to insure that an individual carrier should be free to pay or not to pay brokerage as it sees fit are, according to this record, generally of no avail, in view of the competitive pressures which prevail in the event that any brokerage is paid in a trade. There is in logic no sound reason why carriers acting in concert should be free to limit or regulate competition among themselves by imposing upper limits upon rates of brokerage, but at the same time be prevented from limiting or regulating competition among themselves by prohibiting in its entirety the payment of brokerage.

This record discloses with certainty that brokerage payments lead indirectly, through the forwarder recipients, to undesirable and unlawful practices. It must be concluded, therefore, that the prior findings under reconsideration in No. 831 are no longer valid, and are overruled.

In addition, in view of our findings above as to the violations of sections 16 and 17 of the Act which result from the payment of brokerage, and the consequent necessity for the imposition of a rule prohibiting such payments in connection with cargo with respect to which the freight forwarder renders freight forwarding service, the prior findings would be of no further material effect.

Rules.—In *California* v. *United States, supra,* it was held that when our predecessor, the Maritime Commission, found a breach of the duty imposed on those subject to the Shipping Act, 1916, by section 17 of the Act, the Commission was authorized and charged with a duty to determine and prescribe a just and reasonable regulation, and order it enforced. We have found a breach of this duty to establish, observe and enforce just and reasonable regulations and practices relating to and in connection with the handling, storing or delivering of property. We have further found that existing practices on the part of both forwarders and common carriers relating to and in connection with the receiving, handling, storing and delivering of property are unjust and unreasonable.

The report of the Examiner contains a comprehensive discussion of the rules originally proposed by us, the positions of the parties with respect thereto and amendments proposed by them, the rules proposed by Public Counsel, and those recommended to us by the Examiner. It is clear that the Examiner, because of his view that the prohibition of brokerage constitutes a drastic remedy which should not be resorted to until all other measures have failed, attempted to devise rules which in his opinion would, with the cooperation of the forwarding industry, eliminate the violations of law which have been shown to stem from the payment of brokerage by the carriers. We are convinced that such half-measures will not suffice, and are of the opinion that the widespread rebating and discrimination here shown cannot reasonably be expected to cease without the total prohibition of brokerage payments to forwarders in connection with cargo with respect to which they render forwarding service. The nature of the brokerage practices and the practices of the forwarders in connection therewith, and the obvious attractions of inherently unearned compensation require this conclusion.

The Examiner proposed a rule requiring the establishment of minimum freight forwarding fees by forwarders, in order that such fees should not fall below remunerative levels with resulting indirect rebates of brokerage received by forwarders from carriers, and to eliminate discrimination, preference, and prejudice as found to exist in the charges of forwarders to shippers. These practices stem almost entirely from the brokerage practices, and elimination of the latter as found by us to be necessary should result in the establishment by the forwarders of realistic forwarding fees. We feel that the forwarders should, in their managerial discretion, be free to recast their charges to their clients, after dis-

continuance of brokerage, without prejudice to further action by us with respect thereto, upon complaint or upon our own initiative, should it be brought to our attention that the discriminations have not been eliminated.

There is set forth in the Appendix hereto the revision of General Order 72 which we find to be necessary. The rules reflect a number of the suggestions made by the parties hereto, and have been revised to eliminate redundancy. They are largely self-explanatory, and discussion herein will be limited to the most important features thereof. The definition of "freight forwarder" is similar to that originally proposed. In view of the lack of authority on the part of the Board to regulate entry into the business of freight forwarding, as previously indicated, the suggestions that only independent freight forwarders be permitted to operate cannot be given effect.

The definitions of broker, brokerage, and brokerage service are revised to conform with the recognized and settled principles of law referred to heretofore. Although the suspension or cancellation of registration numbers need not be made subject to notice and hearing since the registration numbers do not constitute licenses to do business, but are issued only to insure that those engaging in the forwarding business are made known to the Board, we feel that notice and an opportunity to be heard should be accorded before a registration is cancelled or suspended. Accordingly, section 244.5(b) provides for notice and hearing in such cases.

In section 244.5(d) registration is confined to the issuance of only one registration number to a particular forwarder, or only one of a group of forwarders under common control. The possibility of discrimination is obvious should recognition be granted to more than one business entity in such circumstances.

In section 244.7, the present regulations relating to the billing practices of forwarders are brought forward, and modified to prohibit the assessment of disguised markups in all instances which are shown on this record to result in violation of sections 16 and 17 of the Act.

Section 244.13, relating to brokerage payments, reflects our conclusions above that the receipt by forwarders and payment by carriers of brokerage in connection with shipments as to which the forwarders have performed forwarding services is violative of the statute, and is intended to prohibit brokerage payments in such instances. The provisions are not intended to prohibit the payment

of brokerage in those instances where the recipient has no other connection with the cargo than to perform the true functions of a broker. Despite the fact that section 244.14 of the rules amounts in effect to a restatement of the requirements of section 15 of the Act, we feel that they will serve to impress upon the forwarders the statutory requirements, in view of the fact that a copy of the rules will be served upon all active forwarders.

We are requiring that the revised General Order 72 will go into effect 120 days after promulgation, in order to provide a reasonable period of time for the forwarders, who will thereafter be prohibited from receipt of brokerage, to revise their charges to their clients in order to make up for the consequent loss of revenues. In fixing the effective date we assume that the forwarders will accordingly proceed forthwith.

Proposed findings and conclusions, and exceptions to the Examiner's recommended decision, have been fully considered, and except to the extent they are given effect in this report and our regulatory order, they are denied and overruled.

We conclude and specifically find, in the light of the foregoing:

1. That the performance by forwarders of forwarding services free of charge or at non-compensatory charges on shipments moving in the commerce of the United States, subject to the Act, and the receipt of so-called brokerage from common carriers by water subject to the Act on such shipments, constitute a violation of section 16 of the Act.

2. That forwarders, in assessing varying charges for like forwarding services to their shippers, in adding disguised markups to charges for accessorial services procured for their shippers, and in performing forwarding services free of charge or at non-compensatory charges for some shippers and not for others, thereby give undue and unreasonable preference or advantage to some of their shippers, and subject others of their shippers to undue and unreasonable prejudice or disadvantage, in violation of section 16 First of the Act, and engage in unjust and unreasonable practices relating to or connected with the receiving, handling, storing, or delivering of property, in violation of section 17 of the Act.

3. That forwarders have failed to establish, observe and enforce just and reasonable regulations and practices relating to and connected with the receiving, handling, storing and delivering of property; and that the practices of forwarders as found in this record relating to and connected with the receiving, handling,

storing and delivering of property are unjust and unreasonable practices in violation of section 17 of the Act.

4. That the performance by common carriers subject to the Act of forwarding services free of charge or at non-compensatory charges on shipments transported by such carriers constitutes a violation of section 16 Second of the Act.

5. That payments by carriers to forwarders of brokerage relating to and in connection with the receiving, handling, storing and delivering of property result in indirect rebates to shippers through the performance by forwarders of forwarding services free or at non-compensatory rates or charges, in violation of section 16 of the Act, and that the payment of brokerage by carriers to forwarders in connection with cargo with respect to which the forwarders render freight forwarding services is an unjust and unreasonable practice in violation of section 17 of the Act.

6. That violations of the Act found herein have occurred regularly and unjust and unreasonable practices exist relating to and in connection with the receiving, handling, storing and delivering of property, as found above, and that the rules and regulations shown in the Appendix hereto are just and reasonable in connection therewith, and are determined, prescribed and ordered enforced to prevent the continuance and recurrence of such violations.

7. That forwarders and carriers, not specifically identified on the record in all instances, have entered into, failed to file, carried out agreements or arrangements providing, in connection with the performance of forwarding services, for the regulation of competition, pooling or apportioning of earnings, and cooperative working arrangements, and have not secured the approval of the Board, in violation of section 15 of the Act.

8. That the findings in the prior decisions cited in the order in Docket No. 831, to the effect that agreements between common carriers by water subject to the Act prohibiting the payment of brokerage, or limiting the payment of brokerage to less than 1¼ percent of freight charges, are or would be detrimental to the commerce of the United States in violation of section 15 of the Act, are no longer valid. Orders in the proceedings cited carrying such findings into effect will no longer be considered effective.

An order discontinuing these proceedings will be entered.

APPENDIX

RULES

BUSINESS PRACTICES OF FREIGHT FORWARDERS AND OF CARRIERS IN RELATION THERETO

(GENERAL ORDER 72, REVISED)

Sec.

AUTHORITY: § 244.1 to 244.18 issued under sec. 204, 49 Stat. 1987, as amended, 46 U.S.C. 1114; sec. 19, 41 Stat. 995, 46 U.S.C. 876. Interprets or applies 39 Stat. 728; 46 U.S.C. 814, 815, 816, 820.

Sec. 244.1 *Definitions.* (a) "Freight forwarder" means any person engaged in the business of dispatching or facilitating shipments on behalf of other persons, by common carrier by water in transportation as defined in this part, and of handling the formalities incident to such shipments. This definition includes, without limitation, independent freight forwarders, common carriers, manufacturers, exporters, export traders, manufacturers' agents, resident buyers, brokers, commission merchants, and any other persons when they engage for and on behalf of any person other than themselves, in the aforementioned activity.

(b) "Common carrier by water" means any person engaged in transportation as defined in this part.

(c) "Transportation" means transportation of property by common carrier by water on ocean-going vessels in commerce from the United States, its territories and possessions, and the Commonwealth of Puerto Rico, to foreign countries, or between the United States, its territories and possessions, and the Commonwealth of Puerto Rico.

(d) "Freight forwarding service" means a service rendered by a freight forwarder, as defined in this part, in the process of dispatching or facilitating shipments on behalf of other persons, as authorized by such other persons. Such services include, but are not limited to: Examining instructions and documents received from shippers; ordering cargo to port; preparing

export declarations; booking cargo space; preparing and processing delivery orders and dock receipts; preparing instructions to truckman or lighterman, and arranging for or furnishing such facilities; preparing and processing ocean bills of lading; preparing consular documents, and arranging for their certification; arranging for or furnishing warehouse storage; arranging for insurance; clearing shipments in accordance with United States Government regulations; preparing advice notices of shipments, sending copies to bank, shipper, or consignee, as required; sending completed documents to shipper, bank, or consignee, as required; advancing necessary funds in connection with the foregoing; providing supervision in the coordination of services rendered to the shipment from origin to vessel; and giving expert advice to exporters as regards letters of credit, licenses, and inspection.

(e) "Freight forwarding fee" means any compensation paid by the shipper or consignee, or the agent of either, who engages the freight forwarder for the performance of a freight forwarding service.

(f) "Broker" means any person, not a common carrier by water and not regularly employed by any common carrier by water, who is engaged by such carrier to sell or offer for sale transportation, or who holds himself out by solicitation, advertisement, or otherwise as one who negotiates between shipper and carrier for the purchase or sale of transportation.

(g) "Brokerage service" means securing cargo for a vessel engaged in transportation as defined in this part by selling transportation or by negotiating for the purchase or sale of transportation.

(h) "Brokerage" or "brokerage fee" means compensation paid by a common carrier by water for the performance of a brokerage service.

(i) "Person" includes individuals, and corporations, partnerships, associations, and other legal entities existing under or authorized by the laws of the United States, or any State, Territory, District, or possession thereof, or the Commonwealth of Puerto Rico, or any foreign country.

Sec. 244.2 *Registration.* (a) Each person who engages in business as a freight forwarder shall register with the Federal Maritime Board before engaging in such business. Registration shall be accomplished by executing and filing with the Federal Maritime Board Freight Forwarder Registration Form FMB–21 (set forth in paragraph (b) of this section), which will be furnished by the Federal Maritime Board upon request. All freight forwarders currently engaged in business as freight forwarders and holding registration numbers heretofore issued by the Federal Maritime Board shall, within 30 days from the effective date of the rules in this part, execute and file with the Federal Maritime Board Form FMB–21 as prescribed in this part.

(b) Form FMB–21, appended hereto, is hereby prescribed for registration under this section.

Sec. 244.3 *Additional information.* Registrants shall submit such additional information as the Federal Maritime Board may request from time to time, and shall notify the Federal Maritime Board of any change in facts reported to it under this part within ten days after such change occurs. Failure to comply with this section by a freight forwarder will be deemed sufficient reason to cancel his registration.

Sec. 244.4 *Information available to public.* Information set forth in Freight Forwarder Registration Form FMB-21 shall be public information and available for public inspection at the offices of the Federal Maritime Board.

Sec. 244.5 *Registration numbers.* (a) Each person who intends to engage in business as a freight forwarder and has filed the required information will be issued a registration number by the Federal Maritime Board after examination and verification of the information submitted by him and a determination that the issuance of a registration number will not be inconsistent with this part or the Shipping Act, 1916. Thereafter, such registration number shall be set forth on the registrant's letterheads, invoices, advertising, and all other documents relating to his forwarding business. The issuance of a registration number by the Federal Maritime Board to a freight forwarder is for identification and informational purposes and does not mean that the Board has investigated and found that the freight forwarder is qualified. Use of these registration numbers in any manner other than to indicate the fact of registration with the Federal Maritime Board is prohibited.

(b) A freight forwarder's registration may be suspended or cancelled after notice and hearing, if the Federal Maritime Board finds that the registrant has violated the rules in this part or the Shipping Act, 1916.

(c) A freight forwarder may not transfer or assign his registration number.

(d) A freight forwarder shall not be entitled to register under more than one name or to obtain more than one registration number regardless of the number of names under which he may be doing business. When two or more entities are owned or controlled by substantially the same interests they shall be treated as one entity for the purpose of registration and they shall not be entitled to separate numbers.

Sec. 244.6 *Registration lists.* The Board will compile periodically, and make available to the public upon request, lists of all registrants with their respective registration numbers.

Sec. 244.7 *Billing practices.* All freight forwarding shall use invoices or other forms of billing which state separately and specifically, as to each shipment:

(a) The amount of ocean freight assessed by the carrier;

(b) The amount of consular fees paid to consular authorities;

(c) The actual cost to the forwarder of insuring the shipment whether by a policy bought in the name of the shipper or by an open policy or otherwise;

(d) The amount charged for each accessorial service performed in connection with the shipment;

(e) Other charges.

Provided, however, That freight forwarders who offer to the public at large to forward small shipments for uniform charges available to all and duly filed with the Federal Maritime Board, shall not be required to itemize the components of such uniform charges on shipments as to which the charges shall have been stated to the shipper at time of shipment, and accepted by

the shipper for payment; but if such freight forwarders procure marine insurance to cover such shipments, they must state their total charge for such insurance, inclusive of premiums and placing fees, separately from the aforementioned uniform charge.

Sec. 244.8 *Consolidated shipments.* In the case of individual shipments consolidated with other individual shipments, the invoice or other form of billing concerning each shipment shall state the minimum ocean freight and consular fees that would have been payable on each shipment if shipped separately, and the amounts actually charged for these items by the freight forwarder, on the shipment in question.

Sec. 244.9 *Special Contracts.* All special agreements or contracts between freight forwarders and shippers or consignees shall be in writing and shall be filed with the Board within 10 days after they are signed.

Sec. 244.10 *Nondiscriminatory treatment required.* To the extent that special agreements or contracts are entered into by a freight forwarder with individual shippers or consignees, such freight forwarders shall not deny to other shippers or consignees similarly situated, and whose shipments are accepted by such freight forwarder, equal charges for forwarding and accessorial services to be rendered by the freight forwarder, insofar as such forwarding and accessorial services are similar to those performed for shippers or consignees holding special contracts.

Sec. 244.11 *Exceptions as to special contracts.* In the case of special contracts whereby the parties have agreed in advance as to the charges for services in connection with the forwarding of a shipment, the invoice or other form of billing shall refer to the agreement, in which event the charges need not be itemized.

Sec. 244.12 *Forwarders' receipts.* Freight forwarders' receipts for cargo shall be clearly identified as such and shall not be in form purporting to be ocean carriers' bills of lading.

Sec. 244.13 *Brokerage payments.* (a) No common carrier by water shall pay to a freight forwarder, and no freight forwarder shall charge or receive from any common carrier by water, either directly or indirectly, any compensation or payment of any kind whatsoever, whether called "brokerage", "commission", "fees", or by any other name, in connection with any cargo as to which the freight forwarder has performed any forwarding service as defined in paragraph 244.1(d) of this part.

(b) No freight forwarder may render, or offer to render, any forwarding service free of charge or at reduced rates in consideration of the shipper or carrier agreeing to allow or allowing the freight forwarder to receive brokerage on the shipment.

(c) Common carriers by water when acting in accordance with approved section 15 agreements or an individual carrier may make rules and regulations to assure that brokerage will not be paid under circumstances which will violate the Shipping Act, 1916, or the rules in this part.

(d) No freight forwarder or other person shall collect brokerage from a common carrier by water, and no such carrier shall pay brokerage to any freight forwarder or other person, in cases where payment thereof would

732-047 O-64—25

constitute a rebate, such as, for example, where the freight forwarder or other person: (1) Is the shipper or consignee or is the seller or purchaser or purchasing agent of the shipment, (2) advances the purchase price of the goods shipped or guarantees payment therefor, or has any beneficial interest therein, (3) directly or indirectly, by stock ownership or otherwise, controls or is controlled by the shipper or consignee, or seller or purchaser or purchasing agent of the shipment or by any person having a beneficial interest in the shipment or person advancing the purchase price of the goods shipped or guaranteeing payment therefor, and (4) where the freight forwarder and the shipper, consignee, seller or purchaser or purchasing agent, or person advancing the purchase price of the goods shipped or guaranteeing payment therefor are owned or controlled by substantially the same interests.

(e) No freight forwarder shall share directly or indirectly any part of the brokerage deceived from a common carrier by water with a shipper, consignee, or an employee of a shipper or consignee or seller or purchaser or purchasing agent of the shipment or person advancing the purchase price of the goods shipped or guaranteeing payment therefor, or with any person having a beneficial interest in the shipment.

(f) No common carrier by water shall pay brokerage to a freight forwarder or other person when receipt of such brokerage by the freight forwarder is prohibited by the rules in this part or the Shipping Act, 1916, as amended.

Sec. 244.14 *Section 15 agreements.* (a) Copies of written agreements and true and complete memoranda of oral agreements between a freight forwarder and another freight forwarder or carrier or other person subject to the Shipping Act, 1916, or modifications or cancellations thereof, which relate to one or more of the following subjects must be filed with the Board:

(1) Fixing or regulating transportation rates or fares;

(2) Giving or receiving special rates, accommodations or other special privileges or advantages;

(3) Controlling, regulating, preventing or destroying competition;

(4) Pooling or apportioning earnings, losses, or traffic (including sharing or dividing forwarding or brokerage fees with another forwarder);

(5) Alloting ports or restricting or otherwise regulating the number and character of sailings between ports;

(6) Limiting or regulating in any way the volume or character of freight or passenger traffic to be carried;

(7) In any manner providing for an exclusive, preferential or cooperative working arrangement.

(b) Copies of all such agreements referred to in paragraph (a) of this section are required to be filed with the Federal Maritime Board accompanied by a letter stating that they are offered for filing in compliance with section 15 of the Shipping Act, 1916, specifically requesting the Board's approval and addressed as follows:

Federal Maritime Board,
Office of Regulations
Washington 25, D. C.

(c) All copies of memoranda or agreements, modifications or cancellations thereof submitted for the Board's approval under section 15 shall clearly show (preferably in the opening paragraph), their nature, the parties, ports and subject matter in detail, and reference to any previously filed agreements to which they may relate.

(d) All such agreements, or modifications or cancellations thereof, shall not be carried out without the prior express approval of the Board.

Sec. 244.15 *Carrier performing forwarding services.* Any common carrier by water performing forwarding services shall specify in his tariff the kinds of forwarding services performed by him and the charges made for such services.

Sec. 244.16 *Penalties for violations.* Penalties for violations of this part are prescribed by section 806 (d) of the Merchant Marine Act, 1936, 46 U.S.C. 1228.

Sec. 244.17 *Separability.* The provisions of this order are not interdependent. If any portion hereof shall be enjoined, set aside, suspended, or held invalid, the validity and enforceability of all other parts shall be unaffected thereby, and shall to the full extent practicable, remain in full force and effect unless and until it is otherwise provided by a court of competent jurisdiction.

Sec. 244.18 *Effective date.* The rules in this part shall take effect 120 days after publication in the Federal Register.

By order of the Federal Maritime Board.

(SEAL)

(Sgd.) THOMAS LISI,
Secretary.

Date:
USCOMM-MA-DC

Form FMB–21 (Revised)
(6-29-61)

Form Approved
Budget Bureau No. 41–R1550.2

U. S. DEPARTMENT OF COMMERCE
Federal Maritime Board

FREIGHT FORWARDER REGISTRATION

1. Name of registrant (if trade name is used by individual, show the words "doing business as" or the abbreviation therefor "d/b/a", and the trade name)

2. Form of organization (corporation, partnership, individual, etc.)

3. If answer to 2 is "corporation", state where organized.

4. Date organization established (Month) (Day) (Year)

5. If new registrant, show date freight forwarding operations will begin (Month) (Day) (Year)

INSTRUCTIONS

This form is prescribed for ocean freight forwarder registration and shall be executed and filed with the Office of Regulations, Federal Maritime Board, U.S. Dept. of Commerce, Washington 25, D.C. pursuant to Federal Maritime Board General Order 72, revised. If additional space is needed to answer questions, extra sheets may be attached to this form.

6. *Principal Office—Street and number, and room number, if any, (P. O. Box is not regarded as complete address).

City or Post Office and State

7. *Branch Offices

Name under which operated	Business Address	Date Eastablished (Month) (Day) (Year)

8. Average number of employees in the principal office and each branch office who handle freight forwarding work and matters incident thereto.

Number of Employees	Office	Name of Person in Charge and Home Address
	Principal Office	
	Branch Office	

9. Other Registered Forwarders with whom registrant does business.

Name	Address	Reg. No.

10. Names, addresses, and citizenship of principal stockholders, owners and officers, and extent of stock ownership or other interest of each.

Name - Title	Home Address	Citizenship (Name of Country)	Extent of Stock Ownership or Other Interest

11. Total Stock Authorized: Total Stock Issued:

12. (a) Is registrant a parent corporation, subsidiary or affiliate of any other business? ☐ Yes ☐ No

(b) Is registrant connected with any other business through common ownership of stock or other interest, employment, or otherwise? ☐ Yes ☐ No

If answer to (a) and/or (b) is "Yes", state name, address and description thereof.

	Name	Address	Description
(a)			
(b)			

13. (a) Does registrant or any officer, stockholder, or employee of the registrant control or engage, directly or indirectly, in any business other than forwarding? ☐ Yes ☐ No

(b) If answer is "Yes", (1) describe nature of such business, and (2) affirm that the provisions of General Order 72, revised, have been read and understood and that registrant will comply therewith, making specific reference to Rule 244.13 setting forth certain requirements for and certain restrictions against the collection of ocean freight brokerage.

14. Does registrant specialize in handling particular commodities, or in particular trades? ☐ Yes ☐ No If "Yes" give details.

Date

Signature of Official

Title

The above statements are made subject to penalties prescribed by statute for any person who knowingly and willingly makes a false statement on any matter within the jurisdiction of an agency of the United States (18 U.S.C. 1001).

**Note:*

"Branch office" means an office where the registrant maintains one or more full-time, salaried employees engaged in the business of furnishing forwarding services.

"Principal office" means the office designated by the registrant as its principal office engaged in the business of furnishing forwarding services, and at which the registrant maintains one or more full-time, salaried employees, or engages in such business as full-time owner or partner. Each registrant may designate only one office as principal office.

ORDER

At a Session of the FEDERAL MARITIME BOARD, Held at its office in Washington, D.C., on the 29th day of June, 1961

No. 765

INVESTIGATION OF PRACTICES, OPERATIONS, ACTIONS AND AGREEMENTS OF OCEAN FREIGHT FORWARDERS AND RELATED MATTERS, AND PROPOSED REVISION OF GENERAL ORDER 72 (46 CFR 244)

No. 831

INVESTIGATION OF PRACTICES AND AGREEMENTS OF COMMON CARRIERS BY WATER IN CONNECTION WITH PAYMENT OF BROKERAGE OR OTHER FEES TO OCEAN FREIGHT FORWARDERS AND FREIGHT BROKERS

These proceedings having been instituted 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 these proceedings be, and they are hereby, discontinued.

By the Board

(Sgd.) THOMAS LISI,
Secretary.

FEDERAL MARITIME BOARD

No. S-57 (Sub. No. 5)

Application of States Marine Lines, Inc. for Permission Under Section 805(a), Merchant Marine Act, 1936

Decided June 29, 1961

States Marine Lines, Inc. granted written permission under section 805 (a) of the Merchant Marine Act, 1936, as amended, (A) permitting continuance, in the event an operating-differential subsidy is awarded States Marine Lines, Inc., of the operation of the *SS Alaskan*, a tanker owned by Oil Transport, Incorporated, an affiliate of States Marine Lines, Inc., in the transportation of chemicals, petro-chemicals and lubricating oil in domestic commerce between U. S. Pacific ports on the one hand and U. S. Gulf and Atlantic ports on the other; and (B) permitting the *Alaskan* to be chartered or sub-chartered for the carriage of petroleum or petroleum products in the domestic intercoastal and coastwide commerce of the United States, 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.

Elkan Turk, George F. Galland and *Robert N. Kharasch* for applicant States Marine Lines, Inc.

Mark P. Schlefer for intervenors Marine Navigation Company, Inc. and Marine Transport Lines, Inc.

Robert Blackwell and *Donald Brunner*, Public Counsel.

Report of the Board

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

By the Board:

I. PROCEEDINGS

By an application dated July 18, 1960, States Marine Lines, Inc. (States Marine) requested: (a) permission under Sec. 805 (a) of the Merchant Marine Act, 1936, as amended, (Act) for continued

operation of the *SS Alaskan,* by Oil Transport, Inc., after the award of an operating-differential subsidy to States Marine; (b) the issuance of a notice with respect to this application to limit the time within which intervention may be filed; and (c) the issuance of a notice of hearing to the effect that an initial decision will be issued.

Marine Navigation Co., Inc. (Marine Navigation) and Marine Transport Lines, Inc. (Marine Transport) requested and were granted permission to intervene.

Hearings were held in January 1961, followed without the filing of briefs by an initial decision of an Examiner served April 13, 1961.

The initial decision favored written permission under Sec. 805 (a) of the Act permitting continuance of the operation of the *SS Alaskan* in the event an operating-differential subsidy contract is awarded States Marine and permitting the *SS Alaskan* to be chartered or sub-chartered, in such event. Exceptions and replies were filed. The Board heard oral argument on June 21, 1961. The Examiner's decision is affirmed.

II. FACTS

An application by States Marine for an operating-differential subsidy under Title VI of the Act is pending before the Board. Hearings on such application involving issues under Secs. 605 (a), 804 and 805 (a) of the Act have been held and concluded in Docket S–57 and subsidiary proceedings upon which the Board has issued its reports.

Oil Transport, Inc. (Oil Transport) now proposes to operate the *SS Alaskan* as a contract carrier of chemicals, petro-chemicals and lubricating oil in domestic commerce between U.S. Pacific ports and U.S. Gulf and Atlantic ports. The *SS Alaskan* is an American-flag T–2 tanker. Oil Transport is a corporation, the stock of which is owned 50% by Global Bulk Transport Corp. and 50% by Joshua Hendy Corp. The owners of the majority of the stock of Global Bulk Transport Corp. also own a majority of the stock of States Marine. Oil Transport is considered to be an affiliate or associate of States Marine, the subsidy applicant.

Of 15 U.S. flag ships owned by Marine Transport, only 2 are confined to domestic service. These 2 ships are not in competition with the *SS Alaskan.* Of 7 ships chartered, only 4 are under U.S. flag and none of the 4 is confined to domestic service and of 48

ships managed for owners or charterers, only 12 are under U.S. flag and only 1 of the 12 is confined to domestic service. This one ship is not one of the 3 chemical carriers involved here. The 3 ships are not engaged exclusively in domestic trades and are privileged under their charters to engage in world wide service and actually operate in world-wide service. The decision to engage in domestic or international trade apparently rests with Dow, not with the intervenor. Three Marine Transport ships carry chemicals, but the *Alaskan* as a conventional tanker cannot carry the specialized chemicals which these ships, the *Marine Chemist*, the *Marine Dow* and the *Leland I. Doan* can carry. Each ship is owned by a separate corporation and bareboat chartered to Marine Transport. Marine Transport chartered the ships to Dow Chemical Corporation and operates the ships as agent for Dow Chemical Corp. Dow uses them for its own purposes and makes them available as a proprietary carrier when its cargoes are not enough to use the ships fully. None of these ships has been engaged exclusively in coastwise or intercoastal trade over the two years covered by an exhibit showing their operations. There is no conclusive evidence in this proceeding that they will so operate in the future.

The three tankers which carry chemicals because of specially lined tanks are capable of carrying chemicals which the ordinary T–2 tankers such as the *Alaskan* could not possibly carry.

The *Alaskan* was taken out of lay-up, employs American seamen, and carries products which are important to the economy of the country.

III. DISCUSSION

The jurisdiction of the Board is not challenged.

The application is for written permission pursuant to Sec. 805 (a) of the Act. This section provides that it shall be unlawful to pay any subsidy to States Marine if States Marine or any holding company, subsidiary, affiliate or associate or any officer, director, agent or executive thereof, directly or indirectly, shall own or operate any vessel engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns or operates any vessel in the domestic intercoastal or coastwise service without the written permission of the Board. This provision makes it unlawful to award or pay any subsidy to States Marine if its associate Oil Transport, Inc. operates the *SS Alaskan*, in the domestic intercoastal or coast-

wise service, unless we give permission. Our findings must be related to (1) whether the intervenors have shown that any person, firm or corporation operates exclusively in the coastwise or intercoastal service, and if so, (2) whether the granting of the application (a) will result in unfair competition with such operator or (b) would be prejudicial to the objects and policy of the Act. The Examiner found that none of these circumstances existed and that the application for permission should be granted.

Marine Transport and Marine Navigation made the following exceptions to the initial decision:

1. The Examiner erroneously failed to dismiss the application because all the testimony in its support was hearsay, did not constitute "reliable, probative and substantial evidence" as required by the Administrative Procedure Act, and deprived intervenors of the right of effective cross-examination and hence a fair hearing.

2. The Examiner erroneously failed to dismiss the application on the ground that even if the hearsay is accepted as substantial evidence, applicant has failed to prove its case, as the record is bare of evidence of the essential relation for which permission is required.

3. The Examiner erroneously failed to find the application should be dismissed for lack of evidence as to the scope and competitive effect of the proposed domestic service and the lack of any showing of a need or desire for the service by the shipping public.

4. The Examiner erroneously failed to deny the permission sought on the ground that it would result in overtonnaging the chemical trade, causing the foreign transfer of an especially built U.S.-flag vessel and therefore prejudicial to the objects and policy of the Act.

5. The Examiner erroneously failed to find that intervenor has pioneered and developed the coastwise and intercoastal chemical trades with both newly constructed vessels and specially converted vessels operating under U.S. registry, and therefore should be protected against the predatory operations for which applicant seeks permission.

6. The Examiner erroneously failed to find that, in the absence of evidence as to Sttaes Marine's intentions in the event the permission sought should be denied, it was impossible to make the determination that the proposed operation would not be prejudicial to the objects and policy of the Act.

7. Joshua Hendy, the 50% owner of Oil Transport, is a "partner" of States Marine and should have been held to be its "associate" within the meaning of Section 805 (a).

8. The initial decision shows that the Examiner erroneously failed to place the burden of proof where it belongs, namely on the applicant, States Marine.

9. The Examiner's conclusion that the competitive effect of the proposed operation would be no different if Joshua Hendy were either to buy the *Alaskan* or charter another T–2 tanker, or if States Marine obtained a subsidy, was unsupported by the record and erroneous.

10. The Examiner erroneously found that Marine Transport is not operating exclusively in the domestic trades.

The first, second, third and eighth exceptions relate to the use of hearsay in the proceedings and to the burden of proof. The standards for denial of permission under Sec. 805 (a) of the Act are unfair competition or prejudice to the objects and policy of the Act. Applicants sustained their part of the burden of proof by showing that neither the applicant States Marine, nor any affiliate or subsidiary solicits cargo for the *SS Alaskan,* nor takes any from the *SS Alaskan,* that no subsidy can be diverted and that no advantage or preference could accrue to the applicant or to its associate. Thereafter the burden of proving unfairness and prejudice rested on the intervenor who asserts the unfairness and prejudice. *Grace Line, Inc.—Subsidy, Route 4,* 3 FMB 731, 737 1952 ("Any evidence on this issue [undue advantage or undue prejudice] should come from parties claiming prejudice under this section." [Sec. 605 (c)]) ; *American Export Lines, Inc.—Increased Sailings, Route 10,* 4 FMB 568, 572 (1955) ; *States Steamship Co.—Subsidy, Pacific Coast/Far East,* 5 FMB 304, 309 (1957). In its earliest decision on the point, the Board applied this rule as to proof of unfair competition under Sec. 805 (a). *Balto. Mail Steamship Co. —Use of Vessels,* 3 USMC 294, 297 (1938). The same burden was imposed on an intervenor in claiming protection of the "purposes and policy" clause of Sec. 805 (a) *T. J. McCarthy Steamship Co. —Sec. 805 (a) Application,* 5 FMB 666, 670 (1959). The Board's only decision placing the burden of proof under Sec. 805 (a) on the applicant, *Pacific Far East Line, Inc.—Sec. 805 (a) Calls at Hawaii,* 5 FMB—MA 287, 297 (1957) was reversed in *Pacific Far East Line v. Federal Maritime Board,* 275 F. 2d 184 (D.C. Cir. 1960).

Intervenors' need was facts proving something on their side. The alleged hearsay evidence did not preclude intervenors from bringing in their own evidence of the circumstances which were the subject of testimony. The Examiner evaluated what testimony there was and used what was relevant and material. The exceptions are not sustained.

The last paragraph of the third exception, the fourth exception and the sixth exception all relate to the objects and policy of the Act. The following considerations are advanced as affecting this issue:

(1) the shipping public's need for the service is the fundamental consideration in evaluating the objects and policy of the Act;

(2) overtonnaging of the chemical trade would be prejudicial to the objects and policy of the Act; and

(3) if States Marine would be willing to terminate its affiliation with the operation of the *SS Alaskan* and still accept subsidy the objects and policy of the Act require that permission be withheld.

The intervenors contend that the shipping public's need is being met by the intervenors who are virtually exclusive suppliers of this service, and that overtonnaging will destroy the value of their exclusive service. Service and need, however, are not relevant here in accordance with the decision of the Court of Appeals in *Pacific Far East Lines v. Federal Maritime Board,* 275 F. 2d 184, at 186 (1960): "Service and need would be important if the Board were a public utility commission passing upon an application to enter a regulated field, but have nothing to do with the question whether PFEL's competition with Matson would be 'unfair'."

The issue of exclusive supply of the services and of the inevitable overtones of monopoly were dealt with in the PFEL case as follows (275 F 2d, 186–7):

> The Board has disclosed no basis for its finding the PFEL's entry into the trade would be 'prejudicial to the objects and policy of the Act'. Preservation of Matson's monopoly is not an object or policy of the Act. On the contrary, the public interest in ending this monopoly should be considered. The Act does not exempt the California-Hawaii trade from the anti-monopoly policy which Congress has often expressed.

Intervenors also claim they will create a situation adverse to the objects and policies of the Act by transferring a ship to foreign registry if there is overtonnaging.

The objects and policy of the Act do not call for the termination of the applicant's affiliation with the operators of the *SS Alaskan* if subsidy is accepted, so that the intervenors can operate a ship instead.

This ground for passing on an application was dealt with in *T. J. McCarthy Steamship Co.—Sec 805 (a) Application, supra,* at 672 as follows:

> Nor can we find that the granting of the permission would be prejudicial to the objects and policy of the Act. The denial of the application on this ground would, as the examiner found, result merely in the deactivation of McCarthy's three automobile carriers and the reactivation of Nicholson's three carriers. This would not constitute a furtherance of the policy of the Act, and would result in a denial to the principal shipper of his choice of carriers. We therefore find that permission to engage in the automobile carrying business from Detroit to Buffalo and to Cleveland, in the event subsidy is awarded, would not be prejudicial to the objects and policy of the Act. Section 805 (a) permission for this service will be granted, as a separate and distinct service from the proposed subsidized service.

The fifth, ninth and tenth exceptions are addressed to the issue of unfair competition and to the exclusively domestic character of the competition. These are general complaints about "predatory" operations, but without any substantiating facts. Without such facts in the record, it is impossible to pass on the validity of the complaints in the exception. In support of the contention of unfair competition, intervenor's witness testified that "Marine Transport has been primarily engaged in the domestic trades." The evidence is to the effect that intervenor is not primarily engaged in the domestic trades.

The facts showing that intervenors' ships were not in domestic intercoastal or coastwise service and that their charters permitted international operations are not responsive to the statutory requirement that the objector is operating "exclusively" in coastwise or intercoastal trade. There was also ample testimony in addition that differences in ships' characteristics, the types of products carried, and work performed by allegedly competing ships were such that the competition would not be substantial, much less unfair. These exceptions are rejected.

The seventh exception is an argument that Joshua Hendy should be found to be an associate of States Marine. The grant of permission to the applicant, States Marine, would be proper if the applicant owned the *SS Alaskan* and operated it in the manner shown on this record. The intervenors would not be entitled to protection against the activities of the *SS Alaskan* no matter who owned it, nor of Joshua Hendy's status, since they have no right to exclusive service in the domestic bulk trade and they are not entitled to displace a competitor's ship. See, *Pacific Far East Line, Inc.—Sec. 805 (a) Calls at Hawaii, supra* and *T. J. McCarthy Steamship Co.—Sec. 805 (a) Application, supra.*

This report shall serve as written permission under Sec. 805 (a) of the Merchant Marine Act, 1936, as amended, for continued operation of the *SS Alaskan* by Oil Transport, Inc. after the award of an operating-differential subsidy to States Marine Lines, Inc.

FEDERAL MARITIME BOARD

No. S-114

IN RE: GULF & SOUTH AMERICAN STEAMSHIP CO., INC.

Decided June 29, 1961

Operation of northbound Chinese flag ships by CSAV on Trade Route No. 31 found not to constitute liner or berth service and should not be given effect in determining substantiality and extent of foreign flag competition for purpose of determining operating-differential subsidy rates.

Odell Kominers and *J. Alton Boyer* for Gulf & South American Steamship Co., Inc.

John R. Tankard, Louis Zimmet, M. W. Belcher, Jr., and *Benjamin R. Wolman* as Public Counsel.

REPORT OF THE BOARD

THOS. E. STAKEM, *Chairman;* SIGFRID B. UNANDER, *Vice Chairman*

BY THE BOARD:

The Board by an Order dated July 11, 1960, ordered a hearing pursuant to the request of Gulf & South American Steamship Co., Inc. (G & SA) for a review and readjustment of certain operating differential subsidy rates in accordance with the provisions of Section 606(1) of the Merchant Marine Act, 1936, as amended (the "Act"). It was the contention of G & SA that certain operating differential subsidy rates for the items of Maintenance and Repair and Hull and Machinery Insurance for the Calendar year 1959 were not correctly determined by the Board in that said rates did not include the costs of operation of the Chinese-flag ships of the Chilean Line (Compania Sud America Vapores) ("CSAV"), which G & SA contends was, during the calendar year 1958, a substantial competitor engaged in a "liner operation" on

the Essential Trade Route No. 31 (United States Gulf Coast/West Coast South America).

A hearing was held before an examiner who, in a recommended decision, found: "G&SA has the right to have considered the costs of CSAV's Chinese-flag vessels and their cargo carryings northbound as well as southbound in 1958 in this trade, as factors in the calculation of its operating-differential subsidy rates for 1959."

Exceptions to the recommended decision were filed, followed by oral argument.

FACTS

Briefly stated, the facts are: G & SA is a subsidized American-flag operator on Essential Trade Route No. 31 (United States Gulf Coast/West Coast South America) under Operating Differential Subsidy Agreement No. FMB-75. The issue in the matter at hand is whether the subsidy rates for 1959 operations of the operator's ships on this trade route have been correctly calculated in terms of existing Maritime manuals and procedures. Specifically, the question is whether there was justification for the exclusion from the determination of foreign-flag competition of the northbound carryings of the Chinese-flag ships of CSAV. It is the contention of the G & SA that such operations should have been included and that thereby the Chinese-flag operations would have been in excess of 15% participation in the trade, thereby requiring inclusion of their operating costs in the determination of the rates to be applied to the G & SA results for 1959. It is the contention of counsel for Maritime that the CSAV Chinese-flag operations were not "liner", or regular, northbound and that, therefore, they were properly excluded.

Section 603(b) of the Act provides for the payment of an operating differential subsidy for the items of wages, subsistence, insurance, maintenance and any other item at which the operator is at a substantial disadvantage in competing with vessels of a foreign country whose "... vessels are *substantial competitors* of the vessel or vessels covered by the contract." It is apparent from the statements of the Examiner, in the recommended decision and G & SA, through the record and arguments presented before this Board, that they misconstrue the issue in this proceeding as being whether the CSAV Chinese-flag ships are "substantial competitors". This presumption is not correct. The sole issue presented before this Board is whether the Chinese-

flag ships are engaged in a "liner" operation and thereby to be counted, northbound, in the determination of the substantiality and extent of foreign-flag competition on Trade Route No. 31.

The error of those contending that the issue is other than as herein-before set forth, apparently stems from their failure to recognize that the Board has already, for the purposes of proceedings such as this, resolved the basic isue of what shall constitute "substantial" competition by the promulgation and adoption of the "Manual of General Procedures for Determining Substantiality and Extent of Foreign-Flag Competition" and the application of the Manual of Essential United States Foreign Trade Routes. Specifically, the Board has used its specific powers, as set forth in Section 204 of the Act, to establish criteria for the determination of what shall constitute "substantial" competition and has published these criteria in the aforementioned Manual of General Procedures and applied said procedures in each subsidy rate determination presented for adoption.

The Board, in Docket S-29, 4 FMB 40, recognized that the language of Section 603(b) was not, in and of itself, sufficient to determine specific rates and that to do so required clarification and amplification of the term "substantial competitor". Thus, in Docket S-29 the Board said, at page 44, that "Congress has not provided a definition of the term 'substantial competition' as it applies to foreign-flag operators." In the exercise of its statutory authority (Section 204) and to clarify the indefinite term "substantial competition" the Board adopted the Manual of General Procedures wherein it is spelled out that there shall be counted "... carryings by ships of all foreign flags *engaged in liner operation.*" (emphasis added). Any argument that this is not sufficiently clear to establish operating criteria is answered by referral to that portion of the Manual of Essential Trade Routes, a formally adopted and published document, which defines berth, or liner service as follows:

> *Liner, berth, or regular service*
>
> These terms, often used interchangeably, have reference to a service, *operating on a definite, advertised schedule,* giving relatively frequent sailings at regular intervals between specific United States ports or range and designated foreign ports or range. (Emphasis supplied.)

It is, therefore, the opinion of the Board that to the extent that Section 603(b) requires clarification, such has been accomplished by the Board through the adoption, publication and application

of the aforementioned Manuals. While it has been argued that the criteria set forth in Exhibit 7 have not been formally adopted, the Board does not have to pass upon the correctness of such a statement since there are embodied in Board's manuals sufficiently clear criteria to resolve the issue in this proceeding. Any contention, therefore, that the Board has been arbitrary or otherwise acted without authority in its application of criteria for the determination of what constitutes "substantial competition" is wholly without merit and clearly erroneous in light of the existence of the aforementioned manuals and the past practice of the Board in acting upon final subsidy rate recommendations for each subsidized operator.

In an application of the criteria contained in the Manual of General Procedures and the Manual of Essential Trade Routes, to the facts in this case, it is the opinion of this Board that CSAV has not so operated its northbound ships as to constitute a liner service. Specifically, nothing has been presented which supports a contention that the Chinese-flag ships, in 1958, were ". . . operating on a definite, advertised schedule . . ." in such manner as to afford a northbound shipper of general cargo any indication that the Chinese-flag ships were desirous of carrying, or in a position to carry, general cargoes on a definite basis.

Specifically, nothing which these ships do or the manner in which they are operated would lend support to a conclusion that they seek general cargo, either by their nature of operation or by their means of solicitation. Reduced to basics, the question to be asked is whether a shipper northbound could know with certainty that a CSAV ship under the Chinese-flag would, one, two, or six months hence, be able to carry his cargo from one point to another on the general trade route. The facts in this proceeding lead to the conclusion that such a shipper could not so rely upon the operations, space availability, or ports of discharge as to make plans for deliveries in the future.

It is here important to compare the operations of the G & SA ships and the CSAV Chinese-flag ships. G & SA operates a fleet of C-2 type ships, having a deadweight capacity of between 10,000 and 10,600 tons; CSAV ships are C1-MAV-1 type ships with a deadweight capacity of approximately 5,800 tons. In 1958 G & SA had thirty-three (33) northbound sailings, with a capacity of approximately 330,000 tons. Its ships carried only a total of 129,429 tons, being composed of 39,429 tons of general (representing 30.41% of total carried) and 90,000 of bulk. Utilization, on an

average basis and with little variation for each individual sailing, was somewhat less than 50%. Chinese ships of CSAV, on the other hand had nine (9) sailings northbound, with a capacity of approximately 52,000 tons. Its ships carried a total of approximately 50,263 tons, being composed of 811 tons of general (representing 3% of total) and 49,452 tons of bulk. Utilization, on an average basis and with little variation for each individual sailing was approximately 96%.

The bulk cargoes carried by CSAV Chinese-flag ships were primarily carried under contracts of affreightment which were of such duration that CSAV knew well in advance that each northbound sailing would have bulk utilization of the ship of approximately 96% of total available. Such cargo as may have been carried was in such small amounts as to appear to be on the basis of last-minute convenience rather than active solicitation. It does not appear that the materials submitted by G & SA in support of its contention that CSAV did advertise justify such a conclusion in light of all of the facts.

The contracts of affreightment referred to hereinabove are significant in an evaluation of whether the CSAV operation was a liner operation. A comparison of the respective contracts of affreightment (Ex. No. 3, Attachments 3 and 4) of CSAV and G & SA shows that in the latter there are specific reservations of the right to forego such bulk cargo as may have been available in the event the berth nature of the service was threatened. CSAV's contract, on the other hand, contains no such provision and places the greater emphasis upon the carriage of the bulk cargoes covered by the affreightments.

The applicant herein seeks to inject statements of the Board in its decisions in Dockets Nos. S-57, 5 FMB 537, and S-73, 5 FMB 771, to the effect that the carriage of only four tons of general cargo constitutes that sailing as "liner". Applicant misconstrues the prior statements as applying to the matter here under consideration. Such use as may have been made of a so-called "four ton" concept was solely for the purpose of determining whether the general cargo placed on top of military was sufficient to justify the conclusion that such a sailing was a part of an existing service. It was not directed to the question of whether such operations were competitive. Since the sole issue here is whether the competitive operations of CSAV were of a liner nature, there can be no reliance upon prior statements as to the significance of a given ship carrying as little as four tons of general cargo. It could not

be seriously contended that ships each carrying as little as four tons in a service which generated for another carrier in excess of 39,000 tons of general cargo in one year was a substantial competitor. Nor would the fact that such ship carried as little as four tons possibly represent a substitute for the requirement specified in the Manual and of the long established criterion of the Board that there be advertisement considerably before sailing. Thus, while the Board here reaffirms its reliance upon the criteria hereinabove stated as the determinant of whether an operation was "liner", the Board need only look to the type of service rendered by CSAV to see that it did not solicit general cargo and was not in a position to carry significant amounts of such cargo even if it was offered.

That G & SA would have liked to carry the bulk carried by CSAV, and would have been in a position to do so, does not override the fact that, to be counted in the determination of the extent of substantial foreign-flag competition an operation must be within the standards heretofore established by the Board and consistently followed in the determination of the subsidy rates for the five subsidized items for each subsidized operator on an annual basis.

CONCLUSION

The Board, therefore, finds that the CSAV northbound operation with Chinese-flag ships on Trade Route No. 31 was not "liner" and that such operations should not be counted in determining the substantiality and extent of foreign-flag competition for determining applicable rates for G & SA. Requested findings not made have been considered and found immaterial or not supported by the evidence. An Order of dismissal will be entered.

BOARD MEMBER WILSON, *dissenting:*

I find it necessary to dissent from this decision of the Board, which reverses the recommended decision of the Examiner, based on the premise:

> That the operation of the Chinese-flag ships by CSAV in northbound service did not represent substantial competition to G & SA because this northbound service did not constitute berth liner service in accordance with criteria established by the staff.

This report defends the Board's previous action in establishing, in the Manual of General Procedure for Determining Substantial-

ity and Extent of Foreign Flag Competition, March 1959, the "Techniques Used in Determining Extent of Foreign Flag Competition." I concur in the necessity for the Board to establish certain criteria as a guide in implementing the provisions of Section 603(b) of the Merchant Marine Act, 1936. However, such established criteria should not be used to prejudice the Board's evaluation of the data reported or the application of legal standards to the facts of any individual calculation. Section 603(b) does not restrict "substantial competitors" only to those ships under foreign registry which are engaged in berth liner service. This restriction is added only by strict adherence to the Manual. The result is a variation in the terms of the statute as mentioned by the Examiner.

The record shows that both G & SA and CSAV handled sizable quantities of bulk cargo on their northbound sailings. They are in direct competition for this cargo. In the case of iron ore from the principal shipper, G & SA in 1958 suffered a sharp decline in the amount carried while CSAV substantially increased its carriage. The comparative figures for 1958 are 21,763 tons for G & SA and 44,834 tons for CSAV. This can scarcely be said not to represent substantial competition. They are also competitive for other ores and nitrates.

In the general cargo area, there is one significant difference between the two lines taken note of by the Examiner but not referred to in the Report. G & SA serves Colombia, from which country originates about 98 percent of the coffee exported from the South American west coast. CSAV does not serve Colombia. The two lines are competitive for all other types of general cargo. The coffee shipments handled by G & SA are sizable and represent a large portion of the total general cargo tonnage for that line. A direct comparison of the percentage of general cargo carried by the two lines in competition is therefore misleading unless adjustment is made for the non-competitive coffee tonnage.

Even if the premise that substantial foreign competition can be legally restricted to berth liner operation were accepted, where the facts otherwise show its existence under one foreign flag, the exclusion of the Chinese-flag CSAV ships cannot, in my opinion, be justified.

The criteria used by the staff in determining what constitutes berth liner service have never been approved by the Board. It

therefore cannot be regarded as having legal standing in terms of the authorization contained in Section 204 of the Act.

The Report concedes that all of the staff criteria for determining what constitutes berth liner service were met by CSAV's Chinese-flag ships with the exception, based primarily on the method of advertising, that they do not seek or solicit general cargo.

The Record shows that both lines advertise in the same media in accordance with South American practice, the only significant difference being in the amount of advance notice given to shippers. The minimum advance notice given by the CSAV was 5 days. Conceding this to be relatively short, it still allows sufficient time for available cargo to be booked. The Record also shows that general cargo was booked and carried in most of the Chinese-flag sailings in quantities far in excess of the minimum previously used by the staff in other cases for determining whether or not a particular sailing qualified for liner service.

The Record shows that the position first taken by the staff to disqualify the northbound Chinese-flag sailings from berth liner service was based on data taken from statements contained on Forms 7801 submitted by CSAV. That this data was meager and could be supplied by people with widely varying degrees of responsibility was not denied. As the matter progressed, other reasons were injected by the staff to support their original contention. Great reliance was later placed on the lack of proper advertising, although the staff admitted that at the time the original position was taken no information was available or sought in regard to CSAV's advertising.

I cite the methods used by the staff in this case because they represent an arbitrary and bureaucratic approach to a problem which should not be condoned. I deplore the fact that the Board has not seen fit to take cognizance of it.

To the extent that it is held that the Board by strict adherence to an administrative manual may limit the character of the competition it will recognize and may exclude consideration of other competition, the Board has exceeded its authority. The use of manual provisions showing "techniques used in determining the extent of foreign flag competition" to determine rights of carriers under the statute is improper even though the manual provisions may have been uncontested for many years. It is never too late to correct errors of this type.

The Board should determine rights by the law, not by strict adherence to guiding manual provisions on unapproved staff criteria. The law states simply that the amount of the operating differential subsidy shall not exceed the excess of certain costs and items of expense which the Board finds "that the applicant is at a substantial disadvantage in competition with vessels" of a foreign country over the estimated fair and reasonable cost of the same items if the vessel were operated "under the registry of a foreign country whose vessels are substantial competitors of the vessel or vessels" covered by an operating differential subsidy contract. Substantial disadvantage in competition has been shown and the applicant is entitled to the cost difference.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C. on the 29th day of June, 1961

No. S-114

GULF & SOUTH AMERICAN STEAMSHIP CO., INC.

The Board, on the date hereof, having made and entered of record its report in this proceeding, which report is hereby referred to and made a part hereof:

It is Ordered, That the proceeding be, and it is hereby, dismissed.

By the Board

(Sgd.) THOMAS LISI
Secretary.

FEDERAL MARITIME BOARD

No. 877

FILING OF FREIGHT RATES IN THE FOREIGN COMMERCE OF THE U. S.

No. 878

PUBLIC DISTRIBUTION OF FREIGHT TARIFFS

Decided June 29, 1961

Elmer C. Maddy, for River Plate and Brazil Conferences, River Plate/United States-Canada Freight Conference, North Brazil/United States-Canada Freight Conference, Mid Brazil/United States-Canada Freight Conference, River Plate and Brazil/United States Reefer Conference, Brazil/United States-Canada Freight Conference.

John R. Mahoney, for Havana Steamship Conference, Havana Northbound Rate Agreement, Santiago De Cuba Conference, East Coast Colombia Conference, Leeward & Wind-Ward Islands & Guianas Conference, United States Atlantic & Gulf-Haiti Conference, United States/Atlantic & Gulf-Bermuda Freight Conference, Atlantic & Gulf/Panama Canal Zone, Colon & Panama City Conference, Atlantic & Gulf/West Coast of Central America & Mexico Conference, Atlantic & Gulf/West Coast of South America Conference, West Coast South America Northbound Conference, U. S. Atlantic & Gulf-Venezuela and Netherlands Antilles Conference, U. S. Atlantic & Gulf Ports-Jamaica (B.W.I.) S.S. Conference.

Burton H. White, for Continental North Atlantic Westbound Freight Conference, Marseilles/North Atlantic U.S.A. Freight Conference, The West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference (W.I.N.A.C.), North Atlantic

Westbound Freight Association, North Atlantic Baltic Freight Conference, North Atlantic Continental Freight Conference, North Atlantic French Atlantic Freight Conference, North Atlantic Mediterranean Freight Conference, Atlantic and Gulf Red Sea and Gulf of Aden Freight Conference, North Atlantic United Kingdom Freight Conference, American Great Lakes-Mediterranean Eastbound Freight Conference.

Leonard G. James, for CAMEXCO Freight Conference, Canal, Central America Northbound Conference, Capca Freight Conference, Caribbean/Pacific Northbound Freight Conference, Colpac Freight Conference, Japan-Puerto Rico & Virgin Islands Freight Conference, Outward Continental North Pacific Freight Conference, Pacific Coast/Caribbean Sea Ports Conference, Pacific Coast European Conference, Pacific Coast/Mexico Freight Conference, Pacific Coast/Panama Canal Freight Conference, Pacific Coast River Plate Brazil Conference, Pacific Indonesian Conference, Pacific Straits Conference, Pacific/West Coast of South America Conference, Trans-Pacific Freight Conference of Japan, United Kingdom/United States Pacific Freight Association, West Coast South America/North Pacific Coast Conference.

William R. Daly, for Harbor Commission, City of San Diego, California.

Elkan Turk, Jr., for Far East Conference, Straits/New York Conference, Associated Steamship Lines, New York Freight Bureau (Hong Kong), Siam/New York Conference, Japan-Atlantic and Gulf Freight Conference.

Robert N. Burchmore, for National Industrial Traffic League.

Gordon L. Poole, and *William H. King,* for Pacific Westbound Conference.

Charles R. Seal, for North Atlantic Ports Conference.

Robert Kharasch, for French North Atlantic Westbound Freight Conference.

Walter J. Myskowski, for The Port of New York Authority.

Thomas K. Roche, for United States Great Lakes Bordeaux/Hamburg Range Eastbound Conference, United States Great Lakes Bordeaux/Hamburg Range Westbound Conference, United States Great Lakes Scandinavian & Baltic Eastbound Conference, Scandinavian/Baltic Great Lakes Westbound Conference, Great Lakes United Kingdom Eastbound Conference, Great Lakes United Kingdom Westbound Conference.

Frank J. Mahoney, for Automobile Manufacturers Association, Inc.

REPORT OF THE BOARD

THOS. E. STAKEM, *Chairman*, and RALPH E. WILSON, *Member*

BY THE BOARD:

In response to a "Notice of Proposed Rule Making" published in the Federal Register on January 5, 1960 (25 FR 60), the Federal Maritime Board has received and reviewed the public's comments on proposed rules requiring every common carrier by water in the foreign commerce (1) to file schedules showing rates and charges and related regulations for transporting property (except full shiploads of bulk cargo) and (2) to establish a system for the distribution of schedules on rates and charges and rules and regulations for the transportation of property in the foreign trade.

After reviewing the written comments the Board listened to oral arguments on August 23, 1960, relative to the regulations proposed in Docket No. 877 and on August 24, 1960, relative to the regulations proposed in Docket No. 878.

The comments and arguments challenge the Board's statutory authority to adopt the proposed regulations and point out certain burdens and hardships that will occur in the administration of the regulations if adopted. Changes were suggested.

The regulations are fully authorized by Sec. 204 of the Merchant Marine Act, 1936 (1936 Act) and Sec. 21 of the Shipping Act, 1916 (Act). Sec. 204 (b) of the 1936 Act authorizes the Board to adopt "all necessary rules and regulations to carry out the powers, duties and functions vested in it by this Act." Pursuant to Sec. 204 of the Merchant Marine Act, 1936, the functions, powers and duties vested by the 1936 Act were transferred to the U. S. Maritime Commission. Section 105(5) of Reorganization Plan 21 of 1950 transferred to the Federal Maritime Board so much of the functions with respect to adopting rules and regulations as relate to the functions of the Board under the provisions of the reorganization plan.

It is considered that the foregoing authorizations and assignment of functions give the Board power to adopt regulations for

the administration of Sec. 21 of the Act and to aid in the enforcement of Secs. 16, 17 and 21 of the Act.

By Sec. 21 of the Act, the Board may require any common carrier by water, or any agent or employee to file with it any report, or any account, record, rate or charge appertaining to the business of such carrier, and to furnish such documents in the form and within the time prescribed by the Board. The reporting requirement as to the filing of rate schedules for transporting property in foreign commerce is sustained under Sec. 21. A filing with respect to rate increases at least 30 days before the effective date thereof is needed to enforce better the prohibitions in Sec. 16 against giving undue or unreasonable preferences or advantage and to prevent evasions of the prohibition against providing transportation at less than regularly established and enforced rates. Under the existing regulation, which requires filing within 30 days after a change in rates, shippers could be charged varying rates which would not appear in a reported tariff as long as the rate was reported later because the regular rate or charge established and enforced by a carrier would always be the rate actually charged to a shipper instead of the one in the printed tariff. The tariffs reported to the Board only reflected past charges; the advance reporting of charges will protect shippers against being charged a rate that does not appear in a reported tariff and the "regular" rates referred to in Sec. 16 of the Act are now made the reported rates.

Sec. 17 of the Act refers to the "demand" of unjustly discriminatory rates. A rate or charge may be demanded under Sec. 17 not only by means of the printed tariff which a carrier maintains but also verbally or by letter if the tariff may be changed subject only to subsequent reporting. If the tariff rates are reported before a demand, however, the Board is in a position to discover possible discriminatory rates and to require correction as it is required to do by Sec. 17 before the injury is done to shippers. The purpose of a regulation requiring a report is to aid in this function of the Board.

The regulation requiring the establishment of a distribution system for schedules of rates is necessary for the enforcement and administration of provisions which prohibit false classification of property under Sec. 16 and the demand of unjustly discriminatory rates under Sec. 17.

Sec. 16 is violated only if a false classification is knowing and willful. Where shippers have not had written tariff descriptions

of commodities to read and compare, it is virtually impossible to establish knowing and willful misclassification by shippers where two or more closely related commodities are involved. Dissemination of tariffs among shippers will eliminate this excuse for misclassification to obtain lower rates and will remove doubts as to whether such actions are taken knowingly and willfully. Recent proceedings before the Board have demonstrated the difficulties shippers and their agent forwarders have in applying the correct rates to their shipments as the result of inability to determine the proper classification because the tariff publication was not readily available to them.

Section 17 is violated if a common carrier by water in foreign commerce demands a rate or charge which is unjustly discriminatory between shippers. If the Board finds such a rate is being demanded it may alter the rate to the extent necessary to correct the unjust discrimination. The correction cannot be made in time to protect the shipper if the rate is filed after it becomes effective. The regulation requiring distribution of tariffs will enable shippers to detect allegedly discriminatory rates and to protect themselves by application to the Board.

General Orders in conformance with this report will be duly published in the Federal Register.

VICE CHAIRMAN UNANDER, *dissenting:*

The majority of the Board has adopted two rules requiring common carriers by water in foreign commerce to file their tariffs with the Board before the date they become effective and to distribute their tariffs to interested persons. In my opinion, the Board has not been authorized by Congress to adopt either of these rules.

FILING RULE

The practical effect of the filing rule in Docket No. 877 is that a shipper may now be charged only what appears in a tariff filed with the Board. Before this rule was adopted, a shipper could be charged a different rate than that shown in the tariff report filed with the Board because the reports were not made until after a new tariff rate became effective. The new rule is a vital and fundamental change from a reporting requirement to a tariff filing requirement. The Board cites Sec. 21 of the Shipping Act,

1916, as amended, as authority for its action. The pertinent part of Sec. 21 is:

> The Federal Maritime Board . . . may require any common carrier by water . . . to file with it any periodical or special report, or any . . . rate, or charge . . . appertaining to the business of such carrier. . . . Such report . . . rate, charge . . . shall be furnished in the form and within the time prescribed by the Board. . . .

Any general authorization such as Sec. 21 would seem to be insufficient as involving an unconstitutional assumption of rule making or legislative powers by the Board without sufficiently specific standards. A rule which is so fundamental that it changes a reporting requirement into a tariff filing requirement should derive validity from a more express statutory authorization than Sec. 21. The purposes of Sec. 21 were stated as follows in *Isbrandtsen-Moller Co.* v. *U.S.* 300 U.S. 139, 144, 145 (1937).

> The purpose of Section 21 is not far to seek. Other sections forbid allowance of rebates, require the filing of agreements fixing or regulating rates, granting special rates, accommodations or privileges, which may be disapproved, cancelled or modified if the board finds them unjustly discriminatory or violative of the act, prohibit undue or unreasonable preferences or the cutting of established rates and unjust discrimination between shippers and ports. To enable it to perform its functions the board may well need such information as that which the section gives it power to demand.

Traditionally a tariff is a written statement containing (a) a list of commodities which may be transported and (b) a schedule of rates and implementing regulations governing the application of the rates. A tariff states the common carrier's future charges for performing his undertaking to the public. A tariff is not the same thing as the reports, accounts, records, rates or charges or memorandums of facts and transactions appertaining to the business of a carrier which are referred to in Sec. 21 of the Act. The reports referred to in Sec. 21 are informative and contain evidence of past facts. They are not required to be filed until after the events which are reported have occurred. This has been the consistent interpretation placed on Sec. 21 by the Board and its predecessor agencies and is the premise for the adoption of the order which preceded the present regulation. The order was originally adopted in 1935 and reads in part as follows: "It is ordered, in pursuance of the powers conferred by Sec. 21 of the Shipping Act, 1916, that [a carrier] . . . is . . . required to file with the Division of Regulations. . . each port-to-port and transhipment rate charged and/or collected . . . for the transportation of property, except cargo loaded and carried in bulk without mark or

count, from all points in continental United States of America to all points in foreign countries; indicating plainly as to each such rate, the place from and to which it was charged and/or collected, the effective date thereof, . . . and any rules or regulations which in any wise changed, affected, or determined any part of any such aforesaid rate . . . ." This is the reporting requirement that was sustained in *Isbrandtsen-Moller Co.* v. *United States, supra.*

The Court in referring to "other sections" is referring to the regulatory features of the Shipping Act, 1916, embodied in Sections 14 through 19 of the Act (46 U.S.C. §§ 812-818). Section 21 grants the Board merely an ancillary power, related to these other sections, to require the production of information necessary to the accomplishment of the Board's duties under these other sections. Section 21 grants *no* substantive, regulatory powers, additional to those set forth in the other sections. The rule adopted by the majority, however, seeks to impose a substantive, regulatory burden on carriers, additional to the duties imposed in the other sections.

The legislative history of the Shipping Act, 1916, sufficiently illustrates the intent of Congress not to regulate to any degree the ratemaking power of the water carriers in the foreign commerce of the United States. The Alexander Committee in its recommendations stated:

> it might prove injurious to both ship owners and American exporters to require the lines to file their rates and not be permitted to lower them until after a stipulated period of notice to change rates had been given. *Investigation of Shipping Combinations Before the House Committee on Merchant Marine and Fisheries*, 63d Cong., Vol. 4, p. 420 (1914).

At the hearings on H.R. 14337, a bill to regulate carriers by water in the foreign and interstate commerce of the United States, Dr. Emory R. Johnson commented that:

> The law, however, does not provide that the board shall require carriers by water in foreign commerce to file their rates or tariffs.
>
> This bill leaves it to the steamship line to work out its rates, which it does not have to print, even if it does not choose to; certainly it does not have to file them. . . . There is no requirement that he has to notify anybody about it, except the party who is interested in it.
>
> Under this bill the carrier not only has the power to make the rate, but it does not have to publish or file it. *Hearings on H.R. 14337 Before the House Committee on Merchant Marine and Fisheries*, 64th Cong., 1st Sess., (1916), pp 10, 12, 35, and 38.

Dr. Johnson's comment is equally applicable to the present statute, for Section 10 of H.R. 14337 was substantially identical with what is now Section 21 of the 1916 Act.

The Board's lack of authority to require the filing of tariffs in foreign commerce is highlighted by the express provision for such authority which Congress enacted with respect to tariffs in the domestic trades. The Intercoastal Shipping Act, 1933, 46 U.S.C. Sections 843-848, enacts such a requirement. It requires no elaboration of reasoning to conclude that where Congress wished to impose a tariff filing requirement instead of a reporting requirement upon carriers, it knew how to express this requirement with clarity.

The provision in the filing rule which requires reports to be filed "before the date such schedule, change, modification, or cancellation becomes effective" instead of afterwards converts the former reporting requirement into a fundamentally new type of provision, namely, a tariff filing requirement which Congress has heretofore always authorized in express terms. The general language of Sec. 21 may not be converted into such an important authorization simply by telescoping the present 30 day after the effective date reporting requirement into an "on or before" reporting requirement which has the significant practical effect on shippers and carriers noted above.

It may be that some such control over the freedom of carriers to adopt rates should be imposed. As we have held in *Afghan-American Trading Company, Inc.* v. *Isbrandtsen,* 3 F.M.B. 622, 624 (1951), and *United Nations, et al.* v. *Hellenic Lines, Ltd., et al.,* 3 F.M.B. 781, 786 (1952), no liability attaches to a carrier merely because it has charged a rate different from that reflected in its schedules as subsequently reported to the Board. The carrier, in short, has no legal obligation to adhere to any particular schedule of rates. If some more rigid requirement ought to be imposed upon carriers, it must be imposed by legislation, candidly requested, and openly canvassed in the proper legislative forum. Then, and only then, can it fully be explored whether such a degree of greater economic regulation is desired. In short, if the majority of the Board believes its powers to be too limited under the existing statute, and that the public interest will be served by a tariff filing requirement, these objectives should be achieved by express legislation, and not by the questionable avenue of patching up the statute by Board-announced rules.

732-047 O-64—27

TARIFF DISTRIBUTION RULE

The Notice of Proposed Rule Making cites section 204, Merchant Marine Act, 1936, as one source of authority for the second proposed rule in Docket No. 878. In *Carrier-Imposed Time Limits for Freight Adjustments*, 4 F.M.B. 29, 34-35 (1952), we stated:

> [Counsel for the Board] urges that Section 204 (b) is a source of substantive and novel powers. It is true that Section 204 (b) gives to the Board authority to adopt rules which the Board did not have before, but the section limits the power to making such rules as are necessary "to carry out the powers, duties, and functions" vested in the Board.

Neither the Shipping Act, 1916, as amended nor any subsequent legislation has vested any "power, duty, or function" in the Board concerning the distribution to the public of freight tariffs of a common carrier by water in the foreign commerce of the United States. The legislative history of the Shipping Act, 1916, on the contrary, indicates a directly opposite intent on the part of the legislative draftsmen as noted above in the testimony of Dr. Johnson.

The comments are particularly persuasive when the Shipping Act, 1916, is compared with other statutes regulating transportation. In the Intercoastal Shipping Act, 1933, the only requirement as to tariff publicity is that carriers shall file their tariffs with the Board and keep them open to public inspection and "such schedules shall be plainly printed and copies shall be kept posted in a public and conspicuous place at every wharf, dock, and office of such carriers where passengers or freight are received for transportation, in such manner that they will be readily accessible to the public and can be conveniently inspected." Section 2, Intercoastal Shipping Act, 1933, 46 U.S.C. Section 844. In the Interstate Commerce Act, section 6 (6), 49 U.S.C. Section 6 (6), makes a substantially similar requirement as to rail carriers; while section 217 (a), 306 (b), and 405 (b), 49 U.S.C. sections 317 (a), 906 (b), 1005 (b), expressly vest the I.C.C. with authority to make regulations as to posting requirements relative to tariffs of motor carriers, water carriers, and freight forwarders respectively. Likewise the Federal Aviation Act vests the agency responsible for the regulation of air common carriers with authority to make regulations as to tariff posting requirements. 49 U.S.C. section 1373 (a).

These statutory provisions, dealing expressly with tariff posting requirements in transportation fields where federal regula-

tion is comprehensive and exacting, have no counterpart in the field of transportation by common carriers in foreign commerce. The Shipping Act does not set up nearly as comprehensive or exacting a regulatory scheme. Yet, by the proposed rule, the Board would establish tariff distribution requirements which go beyond those expressly required in these other, more extensively regulated transportation fields. What was stated above with regard to the need for express delegations of authority on such an important subject is equally applicable.

The notice of Proposed Rule Making, Docket No. 878, also cites sections 15, 16, and 17, Shipping Act, 1916, as authority for the proposed rule.

Section 16 of the 1916 Act confers no rulemaking power on the Board. It merely prohibits certain practices with the principal objective of assuring like treatment to all shippers who apply for and receive the same service.

Section 15 of the 1916 Act exempts from antitrust statutes agreements of common carriers by water among themselves or with other persons subject to the Act. In this section the Board is granted the power to:

> disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or as unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Nothing in this section grants the authority to the Board to promulgate a rule requiring the distribution of carriers' tariff to interested parties. In addition, the Board cannot under this section determine *a priori* that the failure of the conference carriers to furnish such tariffs to interested parties is either unjustly discriminatory, unfair, to the detriment of the commerce of the United States, or in violation of the Act. The section clearly states that the Board may disapprove, cancel or modify an agreement only "if [the Board] finds" that the agreement has the harmful effects enumerated in the statute. Upon such a finding the Board may modify such agreements; but here there has been no such finding. Hence, no rule may be promulgated pursuant to this section.

Finally, section 17 also cited in the notice, gives no support to the proposed rule. It is true that the first paragraph of section

17 of the 1916 Act places "an obligation on every common carrier by water in foreign commerce to make its rates public and available on equal terms to all shippers". *Section 19 Investigation, 1935*, 1 U.S.S.B. 470, 502 (1935). But there has been no finding by the Board that the carriers do not do so. On the contrary, from all indications the opposite appears to be true. All carriers heard at oral argument before the Board on this subject stated that at the very least, rates are available to all shippers at the carriers' offices; and a number of carriers stated that they do in fact voluntarily distribute their tariffs to interested parties.

The second paragraph of section 17 deals with the establishment, observance and enforcement by the carriers of reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. The Board is then authorized to determine, prescribe, and order enforced a just and reasonable regulation or practice when it finds any regulation or practice to be unjust or unreasonable. While this paragraph does confer a sort of rule-making authority upon the Board, such authority does not relate to carrying or transporting, but only receiving, handling, storing and delivering by the carrier. *Los Angeles By-Products Co.* v. *Barber S.S. Lines, Inc.*, 2 U.S. M.C. 106, 113, 114 (1939). Since the proposed rule is primarily associated with the transportation by carrier, the paragraph does not confer upon the Board the necessary authority to promulgate the rule.

For these reasons, I conclude that the Board lacks the authority to issue a rule establishing any requirement of distribution of freight tariffs to the public by common carriers by water in the foreign commerce of the United States. Lacking necessary authority, the Board cannot promulgate such a rule regardless of how desirous it may be and irrespective of the advisability in the public interest in the promulgation of such a rule.

FEDERAL MARITIME BOARD

No. 897

FILING OF PASSENGER FARES IN THE FOREIGN COMMERCE OF THE U.S.

Decided June 29, 1961

Charles F. Warren for CAMEXCO Freight Conference; Canal, Central America Northbound Conference; CAPCA Freight Conference; Caribbean/Pacific Northbound Freight Conference; COLPAC Freight Conference; Pacific Coast/Caribbean Sea Ports Conference, Pacific Coast European Conference; Pacific Coast/Mexico Freight Conference; Pacific Coast/Panama Canal Freight Conference; Pacific Coast River Plate Brazil Conference; Pacific/West Coast of South America Conference, and West Coast South America/North Pacific Coast Conference.

Edward D. Ransom for Trans-Pacific Passenger Conference.

Ronald A. Capone for U. S. Lines.

Frank B. Stone for American Export Lines, Inc.

John R. Mahoney for Western Hemisphere Passenger Conference.

Burton H. White for Trans Atlantic Passenger Steamship Conference; Atlantic Passenger Steamship Conference.

John Robert Ewers for Black Ball Transport, Inc.

William B. Ewers for Moore McCormack Lines.

W. H. Parsons for Canadian Pacific Railway Company.

REPORT OF THE BOARD

THOS. E. STAKEM, *Chairman;* SIGFRID B. UNANDER, *Vice Chairman,* RALPH E. WILSON, *Member*

BY THE BOARD:

In response to a "Notice of Proposed Rule Making" published in the Federal Register April 22, 1960 (25 F.R. 2401), the Federal

Maritime Board has received and reviewed the public's comments on proposed rules requiring every common carrier by water in the foreign commerce (1) to file its schedules of passenger fares and charges, and (2) to file reports with respect to persons carried free or at reduced fares.

After reviewing the written comments, the Board heard oral arguments on August 30, 1960, relative to the regulations proposed.

The comments and arguments challenged the Board's authority to adopt the proposed regulations and point out certain expenses, burdens and hardships that will occur in the administration of the regulations if adopted. Changes were suggested.

The regulations are fully authorized by Sec. 204 of the Merchant Marine Act, 1936, as amended (Merchant Marine Act) and by Sec. 21 of the Shipping Act, 1916, as amended (Shipping Act). Sec 204(b) of the Merchant Marine Act authorizes the Board to adopt "all necessary rules and regulations to carry out the powers, duties and functions vested in it by this act." Pursuant to Sec. 204 of the Merchant Marine Act, 1936, the functions, powers and duties vested by the Merchant Marine Act were transferred to the U. S. Maritime Commission. Section 105(5) of Reorganization Plan No. 21 of 1950 transferred to the Federal Maritime Board so much of the functions with respect to adopting rules and regulations as relate to the functions of the Board under the provisions of the reorganization plan.

It is considered that the foregoing authorizations and assignment of functions give the Board the power to adopt regulations for the administration of Sec. 21 and to aid in the enforcement of Secs. 16, 17 and 21 of the Shipping Act.

By Sec. 21 of the Shipping Act the Board may require any common carrier by water or any agent or employee to file with it any report, record, rate or charge or any memorandum of transactions appertaining to the business of such carrier. The documents must be furnished in the form and within the time prescribed by the Board. The regulations prescribe a filing "at least 30 days before the date" any schedule, change, modification or cancellation becomes effective.

Sec. 16 of the Act makes it unlawful for any common carrier by water, either directly or indirectly, (a) to give any undue preference or advantage to any person in any respect whatsoever and (b) 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 any unjust or unfair device or means. Sec. 17 makes it unlawful for any common carrier by water in foreign commerce to charge any rate which is discriminatory between shippers or prejudicial to exporters of the U. S. as compared with their foreign competitors.

Heretofore discovery of violations of these provisions has depended upon complaint to the Board. This procedure has not resulted in the detection of violations which have recently been shown to exist.

The Board considers that a report of passenger fares and free and reduced rate privileges submitted pursuant to Sec. 21 of the Act will provide information required to discharge its regulatory responsibilities. An examination of the reports of passenger fares and rates applicable to various accommodations and classes will enable the Board staff to determine first whether undue preferential or advantageous treatment is being accorded any particular person; second, whether shippers are, through the economic advantage derived thereby, getting transportation by water for property at less than the rates or charges otherwise applicable and, third, whether transportation has been obtained by an unjust or unfair device or means. The giving of free or reduced fare transportation to shippers, consignees, their officers, agents or employees and members of their families may cause a discrimination between shippers and may prejudicially influence the routing of cargo and may constitute an unfair device or means within the meaning of the Act.

A General Order in conformance with this report will be duly published in the Federal Register.

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. S–126

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

Decided July 21, 1961

Moore-McCormack Lines, Inc. granted written permission under Section 805 (a) of the Merchant Marine Act, 1936, as amended, for its owned vessel, the SS MORMACSUN, which is under time charter to States Marine Lines, Inc., to permit States Marine Lines, Inc., to subcharter said vessel to Matson Line of San Francisco for one voyage of approximately one month's duration commencing on or about July 22, 1961, in Matson Line's regular liner service in the domestic trade of the United States between Hawaii and U. S. Atlantic ports, since grant of 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 Merchant Marine Act, 1936, as amended.

John Robert Ewers, Ira L. Ewers and *Willis R. Deming*, of counsel, for Applicant.

Wm. Jarrel Smith, Jr., Public Counsel.

REPORT OF THE ACTING DEPUTY ADMINISTRATOR

BY THE ACTING DEPUTY ADMINISTRATOR:

Moore-McCormack Lines, Inc. (Mormac) 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) [1] for its owned vessel, the SS MORMACSUN, which is under time charter to States Marine Lines, Inc., for a period of three to five months

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

from May 10, 1961, to permit States Marine Lines, Inc., to subcharter said vessel to Matson Line of San Francisco for one voyage of approximately one month's duration commencing on or about July 22, 1961, in Matson Line's regular liner service in the domestic trade of the United States between Hawaii and U. S. Atlantic ports.

The application was duly noticed in the *Federal Register* of July 18, 1961, *26* F.R. *6457*.

No petitions to intervene in the proceeding were received.

After hearing on July 21, 1961, written permission for one voyage was granted.

The record establishes that there is a demand for increased cargo space to accommodate the movement of commodities, particularly pineapple, between Hawaii and U. S. Atlantic ports.

On this record it is found that the granting of the permission for one voyage will not result in unfair competition to any person, firm or corporation operating exclusively in the domestic coastwise or intercoastal trades or be prejudicial to the objects of the Act.

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–127

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

Decided July 28, 1961

One voyage by the SS ROBIN KIRK, commencing on or about July 30, 1961 carrying a cargo of lumber and/or lumber products from United States North Pacific ports to United States Atlantic ports, found not to result in unfair competition to any person, firm, or corporation engaged exclusively in coastwise or intercoastal services, and not to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended.

Ira L. Ewers and *John Robert Ewers* for Moore-McCormack Lines, Inc.

William Jarrell Smith, as Public Counsel.

REPORT OF THE ACTING DEPUTY MARITIME ADMINSITRATOR

BY THE ACTING 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 *Robin Kirk,* which is under time charter to States Marine Lines Inc. (States Marine), to engage in one eastbound intercoastal voyage commencing at a United States North Pacific port on or about July 30, 1961, carrying a cargo of lumber and/or lumber products for discharge at United States Atlantic ports. Notice of hearing was published in the Federal Register of July 28, 1961, and hearing has been held before the Acting Deputy Maritime Administrator. No petitions to intervene were filed and no one appeared in opposition to the application.

States Marine, the charterer of the SS *Robin Kirk,* conducts as a part of its regular steamship operations an eastbound intercoastal lumber service. For this sailing it has been unable to get any other suitable ship. No exclusively domestic operators in this trade have objected to the use of this ship for this sailing.

Upon this record, it is found and concluded that the granting of written permission under section 805(a) of the Act for the Mormac owned ship SS *Robin Kirk* which is under time charter to States Marine, to engage in one intercoastal voyage commencing at a United States North Pacific port on or about July 30, 1961, carrying a cargo of lumber and/or lumber products to United States Atlantic ports 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. 857

EVANS COOPERAGE CO., INC. v. BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS

Decided August 4, 1961

The practice of assessing a wharf tollage charge on cargo transferred from barge to ocean vessel moored at respondent's wharf, without cargo moving across wharf, found not unreasonable or unduly prejudicial. Complaint dismissed.

Rene A. Stiegler for complainant Evans Cooperage Co., Inc., Evans Transportation Co., Inc., and Hess Terminal Corp., interveners; and *C. C. Dehne, Sr.*, for The Arkansas Rice Growers Cooperative Association and Arkansas Grain Corporation, interveners.

Cyrus C. Guidry for respondent Board of Commissioners of the Port of New Orleans, *F. G. Robinson* for Board of Trustees of the Galveston Wharves, *G. B. Perry* for Gulf Atlantic Warehouse Company and Manchester Terminal Corporation, *Ewell P. Walther, Jr.*, for Atlas Lubricant Corporation, *William V. Dunne* for International Lubricant Corporation, and *Thomas A. Maxwell* for Delta Petroleum Company, Inc., Interveners.

REPORT OF THE BOARD

THOS E. STAKEM, *Chairman;* RALPH E. WILSON, *Member*

BY THE BOARD:

I. PROCEEDINGS

Evans Cooperage Co., Inc. (Evans) filed a complaint against the Board of Commissioners of the Port of New Orleans (Commis-

sioners) on June 10, 1959, alleging violations of Secs. 16 and 17 of the Shipping Act, 1916, as amended (Act). Evans Transportation Co., the Arkansas Rice Growers Cooperative Association and Arkansas Grain Corp., Gulf Atlantic Warehouse Co. and Manchester Terminal Corp., Hess Terminal Corp., the Board of Trustees of Galveston Wharves, International Lubricant Corp., Delta Petroleum Co., and Atlas Lubricant Corp. petitioned and were granted leave to intervene.

Hearings were held before an Examiner, followed by an initial decision served on May 19, 1961. Exceptions and replies have been filed but oral argument was not requested.

II. FACTS

Complainant manufactures and reconditions steel shipping drums and barrels and barrels liquid commodities such as vegetable and lubricating oil for shippers in the export trade. Complainant places the shipments on barges which are towed from its plant across the Mississippi to New Orleans and tied to the stream side of ships moored at respondents wharf. The shipments are loaded from the barge by the ship's gear without passing over the wharf.

The respondent's tariffs provide that vessels engaged in foreign and coastwise trade shall be assessed a harbor fee to assist in defraying the expense of administration and maintenance of the port and harbor. All cargo or freight, including mail, is also subject to a "Wharf Tollage Charge, as follows: * * * 3. Such cargo or freight is delivered to or received from vessels by other water craft, or when transferred over the side of vessels directly to or from the water: * * * (B) When said vessels are moored outside of other water craft occupying berths at wharves, docks, landings, mooring facilities or other structures; * * *". The rate of wharf tollage is 28¢ per ton of 2000 lbs. or fraction thereof. "Wharf Tollage" is defined as "A charge against cargo, based on the number of tons received or discharged by vessels".

The tariff also provides that mined products in bulk transferred directly from barge to a vessel, while such vessel is moored to a public facility within the port, are exempted from the payment of wharf tollage. We concur in these and the other findings of fact by the Examiner.

III. DISCUSSION

Insofar as pertinent Sec. 16 of the Act provides that it shall be unlawful for any person subject to the Act directly or indirectly 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 and Sec. 17 provides that every person subject to the Act shall establish, observe and enforce just and reasonable regulations and practices related to or connected with the receiving, handling, storing or delivering of property. The respondent commissioners do not question that they are "other persons subject to the Act" and therefore subject to the Board's jurisdiction.

The Examiner found that the practice of assessing a wharf tollage charge on cargo transferred from a barge to a ship moored at respondent's wharf was not unreasonable or unduly prejudicial. The complainant excepts as follows:

1. To the conclusion that the evidence is convincing that the wharf tollage charge was not designed to cover specific services.

2. To the conclusion that the cargo and the barge here involved enjoy substantial benefits from the services and facilities provided by respondent.

3. To the failure to discuss undue preference and prejudice against the complainant as the result of exempting from tollage bulk mineral cargoes.

4. To the finding that complainant makes use of the wharf which is designed and constructed to stand the stress and strain of barges tied to ships moored at the wharf.

5. To the failure of the Examiner to give weight to certain testimony that the handling of barge to ship cargo at Houston and Galveston was inconsequential and therefore there is none of such traffic that they could lose.

6. To the failure of the Examiner to discuss other charges paid by the ship at New Orleans whereby it is already being charged for all of the services it is claimed complainant should pay for.

7. To the failure of the Examiner to consider the special tollage rate on liquids loaded via pipelines that actually use the wharf.

8. To the finding of the Examiner that the practice complained of is more or less uniform throughout the country.

9. To the failure to consider the expense on the commission for 30 days free time on the wharf for lots of 5000 tons or more.

10. To the finding that no evidence of unreasonableness of charges exists and that the record affords no basis upon which a reallocation of costs, charges and services could be made if unreasonableness were shown.

11. This is a general exception to the decision.

Exceptions 1, 2, 4, 5, 6, 8, 9 and 10 all deal with the unreasonableness of the charges under Sec. 17 of the Act and exceptions 3 and 7 deal with the competitive inequality issues under Sec. 16.

The first, second, fourth, sixth and tenth exceptions in effect say that the charges are unreasonable because no specific service is rendered to the complainant and that the Examiner did not consider the evidence showing this. The Examiner, however, considered evidence that wharf tollage does not necessarily cover expenses and services directly rendered to the cargo and also gave weight to the opinions of complainant's witness on this point. The Examiner found that complainant's barge and the cargo involved enjoyed substantial benefits from the services and facilities provided by the respondent. Complainant's barge was tied to the ship and such mooring would not be possible unless the water berth was dredged deep enough to accommodate the ship and unless the mooring facilities were adequate for the ship. Police protection was also present and not denied to the complainant regardless of the fact that direct vision by the policeman might be difficult. The fire tug was available for protection without extra charge having been levied thus far except for the cost of chemicals used in fire fighting. Both forms of protection had to be paid for by users of respondent's property as well as those who shared in overall benefits, including incidental benefits, of the commission's facilities. The fact that the operators of the ship must also pay charges was considered and not found to be controlling.

Complainant contends that by definition it is an essential element of wharf tollage that the cargo pass over the wharf and that the charge should be for the use of the wharf to avoid being unreasonable. We do not need to be too concerned about other definitions of wharf tollage. The commission has made a charge to help defray its costs of operating facilities as measured by cargo handled in the area and the only question is whether its facilities are being used and the commission is performing a serv-

ice reasonably related to its charges. The Examiner considered the evidence and found that it was.

In view of the finding that there can be no precise equivalence between services rendered and the charges, we would agree with the Examiner that the record contains no basis upon which reasonable allocation of costs could be made. *Terminal Rate Structure—California Ports*, 3 U. S. M. C. 57, 60, 69 (1948).

The subject of the third and seventh exceptions was considered by the Examiner when he compared the exemption of mined products with the liquid products handled by the complainant as well as the special tollage rates on liquids moved through pipelines under the wharves. The evidence showed that this type of service is different from that given to the complainants'. The police and fire protection given the different services likewise differs. Since the services are not comparable, no discrimination or prejudice is involved in establishing different charges therefor as the Examiner concluded. Moreover, the greater value of the liquid products in drums or barrels was shown to preclude any competitive relationship as well as justify different charges.

The testimony of the other port witnesses referred to in the fifth exception was considered by the Examiner. The fact that the transfer of cargo from barge to the ship was inconsequential or small does not lessen the probative value of the testimony as noted in the Examiner's decision. The fact is that a charge is assessed at Galveston and Houston for the same type of services and the elimination of the charge at New Orleans would be adverse to the practices observed at these two ports. Its use at these and other ports tends to establish this type of charge as an accepted and reasonable trade practice.

With regard to the eighth exception, complainant cites the practices in New York where there is no wharfage or tollage on cargo that is lightered alongside of ships. However, it does appear to be the practice in the Gulf area to make such a charge; the New York area undoubtedly reflects such costs in charges for other services.

With regard to the ninth exception, complainant appears to contend that because it does not burden wharf space with its cargo it releases such space for other cargo and accordingly should be allowed credit to the extent that it should not be charged for wharf tollage. Whether the specific space alongside the ship being serviced is so utilized by others or not does not alter the obligation of

732-047 O-64—28

maintaining the facility and of assessing users of the facility reasonable charges which will provide continued existence of the facility.

The initial decision of the Examiner is sustained.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 4th day of August 1961

No. 857

EVANS COOPERAGE CO., INC. v. BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Board, on the date hereof, having made and entered of record a report stating its conclusions and decision thereon.

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

By the Board.

(Sgd.) THOMAS LISI,
Secretary.

FEDERAL MARITIME BOARD

No. 726

ISBRANDTSEN CO., INC.
v.
STATES MARINE CORPORATION OF DELAWARE, ET AL.

No. 732

H. KEMPNER
v.
LYKES BROS. STEAMSHIP CO., INC., ET AL.

No. 733

H. KEMPNER
v.
LYKES BROS. STEAMSHIP CO., INC., ET AL.

No. 734

GALVESTON COTTON COMPANY
v.
LYKES BROS. STEAMSHIP CO., INC., ET AL.

No. 735

TEXAS COTTON INDUSTRIES
v.
LYKES BROS. STEAMSHIP CO., INC., ET AL.

Decided August 4, 1961

Exclusive Patronage Contracts and Dual Rate Systems used by the Far East Conference and by the Gulf-Mediterranean Ports Conference found to be pursuant to agreements filed with the Federal Maritime Board and approved by the Board. The agreements filed by Far East Conference and Gulf-Mediterranean Ports Conference found not to be unjustly discriminatory or unfair as between shippers or carriers, or to operate to the detriment of the commerce of the United States, or to be in violation of Sec. 15 of the Shipping Act, 1916, as amended.

States Marine Corporation of Delaware, a common carrier by water, found to have demanded, charged and collected a rate which is unjustly discriminatory between shippers in violation of Sec. 17 of the Shipping Act, 1916, as amended.

Waterman SS Corp., a common carrier by water, found to have demanded, charged and collected a rate which is unjustly discriminatory between shippers in violation of Sec. 17 of the Shipping Act, 1916, as amended.

Isbrandtsen Co., Inc., complainant, entitled under Sec. 22 of the Shipping Act, 1916, as amended, to reparation for the injury caused by the violation of said Act by States Marine Corporation of Delaware and Waterman SS. Corp. in the amount of $6,687.28.

Isbrandtsen Co., Inc., found not to have proven violations of the Shipping Act, 1916, as amended, including Secs. 14, 15 and 16 thereof, by the Far East Conference or by any of its members.

Complainants, Harris L. Kempner, Trustee, Galveston Cotton Co. and Texas Cotton Industries, Inc., shippers, found not to have proven violations of the Shipping Act, 1916, as amended, including Secs. 14, 15, 16 and 17 by the Far East Conference or by the Gulf-Mediterranean Conference or by any of the members thereof.

Motion of respondents, other than Isthmian Steamship Company, to remand the record and the recommended decision to the chief examiner with directions to rule on additional findings denied.

John J. O'Connor and *John J. O'Connor, Jr.* for Isbrandtsen Co., Inc.

Richard W. Kurrus for Isbrandtsen Co., Inc.

Delmar W. Holloman and *Shelby Fitze* for Harris L. Kempner, Trustee, Galveston Cotton Co. and Texas Cotton Industries, Inc.

Herman Goldman, Elkan Turk, Elkan Turk, Jr., Seymour H. Kligler and *Sol D. Bromberg* for Far East Conference and its members, other than Isthmian Steamship Co.

Walter Carroll for Gulf-Mediterranean Ports Conference and its members.

Frank Gormley, Robert B. Hood, Jr., Robert C. Bamford, Edward Aptaker and *Robert E. Mitchell,* Public Counsel.

REPORT OF THE BOARD

THOS. E. STAKEM, *Chairman,* RALPH E. WILSON, *Member*

BY THE BOARD:

I. PROCEEDINGS

These proceedings involve five complaints of excessive freight charges for the shipment of cotton from Gulf of Mexico ports in 1951, 1952 and 1953.

In Docket No. 726 Isbrandtsen Co. Inc. (Isbrandtsen), as a shipper, complains that the Far East Conference (Far East) and its twenty member and five associate lines violated Secs. 14, 15, 16 and 17 of the Shipping Act, 1916, as amended (Act) by a refusal to carry cotton to Japan either pursuant to an exclusive patronage contract or subject to the lower freight charges applicable to shippers having such a contract. Isbrandtsen also complains that Far East's "system" of requiring an exclusive patronage contract as a prerequisite to lower freight rates had not been filed with the Board and in any event may not be approved by the Board if it is filed. Overcharges by specified carriers on bills of lading "to the prejudice of, and in discrimination against Complainant, and in violation of the Shipping Act, 1916, and other laws of the United States" are charged by Isbrandtsen in Docket No. 726.

In Docket No. 732 Harris L. Kempner, Trustee (Kempner) as a shipper complains that specified common carriers by water, the Gulf-Mediterranean Ports Conference (Mediterranean) and its members violated the same sections of the Act by a refusal to carry cotton to Italy, Yugoslavia and Spain under similar conditions.

In Docket No. 733 Kempner, as a shipper, complains that specified common carriers by water, the Far East Conference and its members violated the same sections of the Act by a refusal to carry cotton to Japan, Indo China and the Philippines under similar conditions.

In Docket No. 734 the Galveston Cotton Co. (Galveston Cotton) as a shipper, complains that specified common carriers by water, the Far East Conference and its members violated the same sections of the Act by a refusal to carry cotton to Japan under similar conditions.

In Docket No. 735 Texas Cotton Industries Inc. (Texas Cotton) as a shipper, complains that specified common carriers by water, the Far East Conference and its members violated the same sections of the Act by a refusal to carry cotton to Japan under similar circumstances.

The complaints in Docket Nos. 732, 733, 734 and 735 also alleged that actions complained of "will constitute violations of the Shipping Act and the Sherman Anti-Trust Act". Reparations damages and other relief are asked for by all of the complainants.

At a prehearing conference June 25, 1953, the five separate proceedings were consolidated for hearing on a single record.

Docket Nos. 726, 733, 734 and 735 contain complaints against the Far East Conference and its members and Docket No. 732 contains a complaint against the Mediterranean Conference members. An Examiner submitted a recommended decision on November 8, 1957. The recommended decision was followed by the submission of exceptions and replies thereto, followed by oral argument before the Board on February 10, 1959. No report was issued in view of pending litigation and Congressional legislation and subsequently two new members of the Board were appointed. The present Board decided to hear oral argument on the existing record prior to making its decision. We heard further oral argument on May 3, 1961.

II. FACTS

Isbrandtsen's complaint is directed primarily at States Marine Corporation of Delaware (States Marine) and Waterman Steamship Corp. (Waterman), common carriers by water, and members of Far East, to recover $6,687.28 as reparations for excess freight charges in the amount of $4.00 a ton on 6320 bales or about 1,672 short tons of cotton carried to Japan. Far East, since February 1950, has followed the practice of charging shippers who sign exclusive patronage contracts $4.00 per short ton less than its established tariff rates for shipments of cotton. Isbrandtsen was not a party to an exclusive patronage contract at the time of the shipments in question. Isbrandtsen became a shipper of cotton as the result of its inability to charter a ship to carry cotton which Kempner had booked with Isbrandtsen as a common carrier by water. Isbrandtsen sought to discharge its obligation to Kempner by having the cotton shipped by States Marine and Waterman. The shipments were transported to Japan pursuant to 51 bills of lading showing Isbrandtsen as the shipper and dated from August 3, 1952 to September 18, 1952. Reparations were claimed in the amount of $5,455. from States Marine and $1,232.28 from Waterman. Isbrandtsen paid the freight at non-contract rates.

Kempner's complaint in No. 732 is directed primarily at six common carriers by water, members of Mediterranean, to recover reparations indicated for overcharges on bills of lading as follows:

Lykes Bros. Steamship Co. (Lykes) $6,861.19
(26 bills of lading dated from 3-15-51 to 10-27-52)

Kerr Steamship Company (Kerr) (2 bills of lading dated 12-31-51)	$1,836.86
States Marine (22 bills of lading dated from 3-27-51 to 12-15-52)	4,763.99
Societa Italiano de Armamento "SIDARMA" (Sidarma) (10 bills of lading all dated 6-7-51)	1,779.06
Compania Maritima del Nervion (Nervion) (1 bill of lading dated 8-26-52)	1,562.68
Sociata Anonima Navigazione Alta Italia (Creole Line) (17 bills of lading dated from 2-23-51 to 1-29-52)	2,436.78

The cotton was shipped to Italy, Yugoslavia and Spain. Mediterranean charges 25c, 30c and 35c per 100 lbs. extra for cotton not shipped pursuant to an exclusive patronage contract.

Kempner's complaint in No. 733 covers a similar cause of action naming the following common carriers by water, and is for the purpose of recovering the reparations indicated for overcharges on bills of lading as follows:

Lykes (69 bills of lading dated 2-15-51 to 12-31-52)	$19,288.66
States Marine (77 bills of lading dated from 2-28-51 to 9-30-52)	12,737.67
Kokusai Lines et al (Kokusai) (12 bills of lading dated 11-13-51 to 9-30-52)	1,860.82
Mitsui Steamship Co. Ltd. (Mitsui) (13 bills of lading dated 11-30-51 to 8-25-52)	2,374.84
Kawasaki Kisen Kaisha, Ltd. (Kawasaki) (1 bill of lading dated 11-15-52)	103.97
Nippon Yusen Kaisha Ltd. (Nippon) (23 bills of lading dated 9-19-51 to 11-28-52)	4,708.24
Fern-Ville Far East Lines et al (Fern-Ville) (10 bills of lading dated 5-31-52 to 9-9-52)	2,408.23

Galveston Cotton's complaint in No. 734 covers a similar cause of action naming the following common carriers by water and is for the purpose of recovering the reparations indicated for overcharges on bills of lading as follows:

Lykes (77 bills of lading dated 2-9-51 to 12-31-52)	$8,787.13
Nippon (38 bills of lading dated 9-19-51 to 11-26-52)	4,828.99
Fern-Ville (7 bills of lading dated 5-31-52 to 12-18-52)	1,079.86

Waterman (1 bill of lading dated 7-12-51)	$ 10.17
Kokusai (9 bills of lading dated 11-11-51 to 9-30-52)	1,286.62
Mitsui (12 bills of lading dated 11-30-51 to 7-26-52)	2,290.35
States Marine (90 bills of lading dated 4-30-51 to 11-22-52)	11,483.17

Texas Cotton's complaint in No. 735 covers a similar cause of action naming the following common carriers by water and is for the purpose of recovering the reparations indicated for overcharges on bills of lading as follows:

Lykes (9 bills of lading dated 4-15-52 to 8-4-52)	$1,139.30
Nippon (1 bill of lading dated 11-28-52)	518.86
Fern-Ville (1 bill of lading dated 7-31-52)	311.42
Kokusai (1 bill of lading dated 9-30-52)	106.78
States Marine (3 bills of lading dated 5-27-52 to 8-15-52)	379.64

The carriers in docket Nos. 733, 734 and 735 were members of the Far East Conference.

The Mediterranean Conference is associated pursuant to a contract made on the 28th day of December 1929, first approved by the U.S. Shipping Board on January 23, 1930. It has operated under successive agreements and amendments, the latest of which was approved June 2, 1954 (Agreement No. 134-19). During the period of the actions covered by the complaint Mediterranean was operating under the conference contract as amended and approved to July 21, 1950. The conference contract of Mediterranean has never and does not now contain any provisions expressly authorizing the use of an exclusive patronage contract nor differentials in freight rates for contracting shippers. The record did not contain any minutes of meetings at which the contract and "dual" rate system was formally adopted by Mediterranean but the following two extracts from minutes establish the existence of the practice on the dates of the actions referred to in the complaint:

1. *TUESDAY, JUNE 21, 1949*
10:30 A.M.

E. S. BINNINGS
CHAIRMAN

* * *

CONFERENCE CONTRACTS ON COTTON
Gulf/French Atlantic Hamburg Range Freight Conference
Gulf/Mediterranean Ports Conference

The Executive Secretary reported, verbally, to the meeting on what transpired since the joint meeting of the Conferences on June 16, 1949, in connection with the Conference contracts on Cotton.

* * *

Considerable discussion was had and the States Marine Corporation was informed that the Conference Contract System on Cotton, which was unanimously approved by all members of the two Conferences, had already actually been established to become effective as of July 1, 1949, at the request of the Special Committee of the American Cotton Shippers Association, and after careful consideration and study by that Committee and the Cotton Committee of the Conferences.

* * *

None of the other Member Lines of the Conferences would agree to suspending the contracts, for various reasons, including the fact that the contracts had been definitely announced to commence July 1, 1949 and, at the time of the meeting, more than forty-five (45) shippers had accepted the contracts.

* * *

This subject was continued on the docket and the meeting recessed, subject to call by the Executive Secretary of the Conferences.

2. CONFERENCE MEETING OF FEBRUARY 1, 1950 * * *

Recordation is herein made that the Joint Conference Cotton Contract Committee and the Special Committee of the American Cotton Shippers Association, late in the afternoon of February 1, 1950, agreed on the following which was officially announced on behalf of the Gulf/French Atlantic Hamburg Range Freight Conference and the Gulf/Mediterranean Ports Conference by the Executive Secretary of those Conferences in a special letter dated Wednesday evening, February 1, 1950, to the Member Lines of the Conferences:

Effective as of February 2, 1950, through June 30, 1951, (repeat, nineteen fifty*one*), the date of the bill of lading to govern application of rates, *COTTON*, Basis High Density Bales, contract basis, $1.40 per 100 lbs., (Standard Compressed Bales $1.90 per 100 lbs.) to all ports in the French Atlantic (Bordeaux/Dunkirk range), and Antwerp, Ghent, Rotterdam, Amsterdam, Bremen, Hamburg and all Mediterranean Base ports, including Spanish Mediterranean Base ports.

An addendum, in the form of a letter from the Executive Secretary, to cover this extension of the Conference Cotton Contracts, is being prepared

and will be forwarded to all Cotton Contract signers (both shippers and receivers) for their necessary and prompt acceptance.

All other conditions of the Conference Cotton Contracts (Bordeaux/Hamburg range and Mediterranean) remain unchanged.

The record disclosed no denial that Mediterranean followed the practice of offering exclusive patronage contracts and dual rates.

Far East is an association of common carriers by water in the foreign commerce of the United States acting pursuant to a "Memorandum of Agreement" made between the parties signatory on the first day of September 1922, approved by the U.S. Shipping Board on November 14, 1922 (Agreement No. 17). At the times referred to in the complaints Far East was operating under such agreement as amended and approved through September 7, 1951. The contract contains no provisions expressly authorizing the use of an exclusive patronage contract or differentials in freight rates for contracting shippers.

Prior to the association evidenced by the 1922 memorandum of agreement, an agreement was reached in a conference of representatives of steamship lines and a representative of the U.S. Shipping Board Emergency Fleet Corporation at meetings on April 12 and April 19, 1920 concerning the obligations of carriers to each other with respect to their operations between North Atlantic ports in the U.S. and the Far East. The transcript of the minutes is the only evidence of the agreement. The minutes of the meeting refer to the assemblage as "Conference No. 17". At that time the carriers were all companies acting as managing agents of ships operated by the U.S. Shipping Board Emergency Fleet Corporation. A letter dated May 5, 1920 "relative to legality of the conferences" signed by the "Examiner in Charge, DIVISION OF REGULATIONS" of the Shipping Board refers to the transcript of minutes as follows:

. . . An examination of these papers does not disclose any objectionable features, they will be accepted and filed under Sec. 15 of the Federal Shipping Act and may be regarded as tentatively approved. Proceedings within the scope of this Conference as outlined in these papers will be lawful unless you shall be hereafter notified to the contrary.

I note that you will arrange to forward to this office copies of future minutes, agreements, tariffs and rates as may be authorized by the Conference. . . .

The record does not contain any further directives by the government concerning the filing of transcripts of minutes but the

practice of submitting such papers to the government appears to have been followed thereafter. The Board's General Order No. 76, promulgated November 1952, however, requires filing of statements concerning the initiation of dual rate-contract arrangements by carriers. (See *Sec. 15 Inquiry*, 1 U.S.S.B. 121 (1927)).

At the conclusion of hostilities in World War II cotton freight rates were controlled by a government agency until 1949 when commercial shipments of cotton were resumed but there was no offer of a rate differential until 1950.

The transcript of an extract from the minutes of a special meeting of Far East held on February 16, 1950 contains a statement that "This Special Meeting was called to hear further report of Conference Counsel with respect to Cotton contracts; and the following:

"On the question as to whether or not the Conference should proceed with the contract on Cotton, upon Motion seconded and carried it was unanimously agreed that the Chairman be instructed to mail the contract to the Cotton Shippers for their signature."

Special rate differentials for cotton shipped pursuant to exclusive patronage contracts are first evidenced by a routine tariff revision effective as of February 7, 1950 approved at a meeting on February 14, 1950 which was followed by the February 16 action noted above relative to the issue of a contract to put the dual rate into effect.

Minutes of Conference meetings are reduced to writing and copies have been transmitted to the Federal Maritime Board or its predecessor agencies. Standard Board practice is to review these documents and, if action believed to be contrary to law is shown, to make the matter a subject of official correspondence or of formal proceedings. If no illegal actions are shown, the papers are filed and no further administrative action is taken. A transcript of minutes showing the action of Far East in extending its contract rate practice to include cotton was filed with the Board.

No minutes or memorandum or other evidence of any agreement to revise, rescind or revoke the foregoing action by either Conference had been filed with the Board by January 1, 1953.

Isbrandtsen (in No. 726) signed a "Memorandum of Agreement" made the 10th day of January 1946 with Far East and member carriers agreeing "in consideration of the rates and

other conditions stated . . . to forward by vessels of the Carriers all shipments . . . to ports in Japan". Far East under date of October 1, 1948 sent contract shippers including Isbrandtsen proposed "Amendments to Conference Freight Contract" with the condition that "if you should omit to accept this proposal on or before November 1, 1948, we shall . . . terminate this agreement effective December 1, 1948 . . . Isbrandtsen omitted to accept the proposal. No new agreement was made covering the period of the bills of lading in evidence. Isbrandtsen asked Far East for a contract for its August 1952 shipments but the Conference representative advised that it would not permit Isbrandtsent to sign a contract to cover these shipments and States Marine advised that even if Isbrandtsen obtained a freight contract, States Marine would not carry the cotton Isbrandtsen tendered.

Kempner (in No. 732) signed a "Memorandum of Agreement" made the 12th day of July 1949 with Mediterranean and member carriers agreeing "in consideration of the rates and other conditions stated . . . to offer . . . to the Carriers for transportation by them to all ports . . . served on the Mediterranean Sea . . ." On May 16, 1950 Kempner was alleged to have shipped cotton on a nonconference ship and thereby to have failed to offer his cargo to the member carriers. After an exchange of telegrams and correspondence, beginning June 27, 1950, regarding this failure, Mediterranean by letter dated July 14, 1950 assessed damages pursuant to the agreement in the amount of $6,010.20, against Kempner and advised that failure to pay in 30 days would be cause for termination of Kempner's right to "contract rates" until paid as provided in the agreement. On July 27, 1950 Mediterranean advised Kempner that "the 'non-contract' basis of rates will be applicable effective on and after August 17, 1950". Kempner did not pay the damages assessed against it and has paid non-contract rates since August 17, 1950.

Kempner (in No. 733) signed a "Memorandum of Agreement" made the 7th day of February 1950 with Far East and member carriers designating therein under its signature as "Subsidiary Associated and/or Parent Companies" Galveston Cotton Company and agreeing "in consideration of the rates and other conditions stated . . . to forward by vessels of the Carriers all shipments made . . . to ports in Japan". By letter dated September 25, 1950 Kempner wrote Far East "we herewith tender our resignation from the Far East Conference Agreement". The agree-

ment provides that it "may be terminated upon 90 days written notice by the Shipper" (Kempner). The "resignation" was construed as a "termination" by the parties effective December 24, 1950. No new agreement was made covering the period of the bills of lading in evidence.

Neither Galveston (in No. 734) nor Texas Cotton (in No. 735) is a party in its own name to an exclusive patronage contract with either Far East or Mediterranean. Galveston is a Texas Corporation which is a wholly owned subsidiary of H. Kempner, a Massachusetts Trust. Texas Cotton is a Texas corporation and 50% of its stock is owned by H. Kempner.

Kempner never asked for a new shippers' contract and until this action never claimed a right to ship at contract rates.

On the dates of all the shipments forming the basis of complaints herein, no other adequate means were available to complainants to transport the shipments of cotton.

The differential between tariff rates for persons having exclusive patronage contracts for the transportation of cotton by Far East members and for those not having such contracts was $4.00 per ton and by Mediterranean carrier members was 20%.

Far East Conference carriers had however allowed shipments of other commodities by Isbrandtsen between New York and Japan at contract rates for a period of time immediately preceding August 1952. Such contract rates were extended to Isbrandtsen even though its was not a party to a shipper's exclusive patronage contract.

On the ships which carried Isbrandtsen's cotton at non contract rates, in August and September 1952, all of the other cotton on board was carried at contract rates. During the period in question, the conference lines also shipped cotton for "spot" cotton brokers and forwarders at contract rates and considered such persons as shippers even though they did not own the cotton they shipped.

Isbrandtsen paid $13,373.96, the difference between the rate Kempner paid Isbrandtsen and the non contract rate paid by Isbrandtsen for shipping Kempner's cotton. Isbrandtsen did not pass on to the buyer the extra freight paid to the conference lines.

The following is a summary of outside competition met by conference lines in the Gulf-Far East trade during the period 1949-1955: In 1949, 4 non-conference liner sailings and 34 tramp sailings; in 1950, 15 non-conference liner sailings, and 29 tramp

sailings; in 1951; a non-conference liner sailing applying conference contract rates, and 38 tramp sailings; in 1952, 54 tramp sailings; in 1953, 5 non-conference liner sailings, and 68 tramp sailings; in 1954, one non-conference liner sailing, and 77 tramp sailings; and in 1955, 61 tramp sailings.

DISCUSSION

The complainants in all five of these proceedings seek to have the "dual rate contract arrangement" in use by Far East and Mediterranean made illegal under the Act.

The complainants after alleging the use of "dual rate, contract/non-contract system" in the Far East and Mediterranean trades state that such system is unlawful for the following reasons: 1. the use of the system contravenes the provisions of Sec. 14 of the Act; 2. the use of the form of shipper's contract and of rate differentials in the tariffs of the conferences has never been approved by the Board under Sec. 15 of the Act and may not be approved under Sec. 15; 3. the system and the dual rates used are unduly and unreasonably prejudicial and disadvantageous to persons in violation of Sec. 16 of the Act; and 4. the system (this term is used herein interchangeably with "arrangement") and the dual rates used are unjustly discriminatory between shippers and are unjustly prejudicial to exporters of the United States in violation of Sec. 17 of the Act.

If the arrangements have been agreed to by common carriers by water and thereafter carried out in whole or in part without Board approval, the arrangements are illegal for this reason under Sec. 15 and for no other reason. If the arrangements embodied in agreements have been approved by the Board, on the other hand, it cannot be argued here that the arrangements are illegal unless a court has interpreted the Act to say so, notwithstanding the Board's approval. If any Court has done so, we hold as hereinafter noted, that Sec. 14 of the Act restricts our authority to construe or apply the Act to make unlawful any dual rate contract arrangement in use on May 19, 1958. (The "arrangement" or "system" referred to herein consists of conference action to (1) adopt and tender to shippers an exclusive patronage contract and (2) issue tariffs containing rate differentials for contracting shippers.)

The procedure by which agreements between carriers are declared legal or illegal under the Act is that they be 1. filed with the Board pursuant to Sec. 15; 2. reviewed; and 3. passed on for

legality. There is no filing requirement until there is an agreement or a meeting of minds by two or more common carriers by water or other persons subject to the Act regarding activities described in Sec. 15. Until common carriers by water or other persons subject to the Act agree to put rate differentials into effect and to tender shippers exclusive patronage contracts, the so-called "arrangement" is a trade practice or simply a part of the commercial environment in which common carriers by water and other persons subject to the Act operate. The trade practice must be distinguished from agreements. The "arrangement" is put into effect through agreements, commodity by commodity, as the needs of the trade appear to dictate. In the present case the cotton shippers wanted a contract and the conference, as the minutes herein show, put the arrangement into effect by the actions at conference meetings. Agreements came into being at the time the common carriers by water which are members of Far East and Mediterranean agreed to offer cotton shippers rate differentials by means of tariff revisions and to tender them exclusive patronage contracts. Complainants, in effect, challenged the validity of the actions evidenced by the meetings of Far East on February 16, 1950, and of Mediterranean on February 1, 1950, when they assert the unlawfulness of the "dual rate exclusive patronage contract." If the agreements reached at these meetings violate any provision of the Act or operate to the detriment of the commerce of the United States or are unjustly discriminatory or unfair as between carriers and shippers they may be disapproved by the Board. If the "practice", "system" or "arrangement" resulting from these agreements violates any provision of the Act the Board may also award complainants reparations under Sec. 22 for the injury, if any, caused by the violation.

The facts showing that Mediterranean filed and obtained Board approval of a conference contract and filed transcripts of minutes of its meetings showing agreement among its members for the adoption of the practice of offering dual rates and exclusive patronage contracts and filed tariffs containing dual rate provisions establishes that Mediterranean has filed an agreement pursuant to Sec. 15. The fact that Far East also filed transcripts of extracts from the minutes of its meetings showing adoption of the practice of offering dual rates and exclusive patronage contracts for cotton shippers as well as the filing of tariffs showing dual rates established that Far East filed its agreements purs-

suant to Sec. 15. These transcripts have been reviewed by the Board's staff and no exception taken thereto. Board approval of both agreements is required, *Isbrandtsen Co. Inc.* v. *U.S.*, 211 F. 2d 51 (D.C. Cir. 1954), cert. den. 347 U.S. 990 (1954), and approval has been given. The Board's approval was neither subsequent nor retroactive, but existed at the time it accepted tariff changes showing dual rates and did not disapprove the results of the conference meetings and the tariff revisions by order. *Empire State Highway Transport Assn.* v. *F.M.B., U.S.A. and American Export Lines, Inc.*, 291 F. 2d 336 (D.C. Cir. 1961).

The Board has followed for many years the administrative practice of initiating proceedings and of issuing orders where agreements were to be disapproved under Sec. 15 and where organic agreements and modifications thereof are approved. *Section 15 Inquiry*, 1 U.S.S.B. 121 (1927).

Sec. 15 authorizes the Board to disapprove by order, but not approve by order. All other agreements may simply be approved. Approval has been tacit where no action was taken and no order was issued, and this has always been considered as appropriate and consistent with Sec. 15. *Section 15 Inquiry, supra.* Other forms of approval by the issue of written statements have heretofore not been considered a necessary technique of administering the Act. Limitations of staff compelled the use of the technique which was followed. Since the decision in *Isbrandtsen Co. Inc.* v. *U.S. supra* and *River Plate & Brazil Conferences* v. *Pressed Steel Car Co. Inc.*, 227 F. 2d 60 (2d Cir. 1955), however, new approval procedures have been instituted.

The purpose of filing agreements under Sec. 15 of the Act is to give the Board the opportunity to review the agreements to determine their conformity with the standards specified in Sec. 15. The complaint is that such a review will show the agreement to use the dual rate exclusive patronage contract system by common carriers by water does not conform; and particularly that it violates Sec. 14 of the Act. This contention has been reviewed in the past by the courts in several cases, but none of the cases declare the practice or system unauthorized under all circumstances. In *U.S. Nav. Co.* v. *Cunard S.S. Co.*, 284 U.S. 474 (1932), the plaintiff sought to enjoin the defendant steamship lines from using the contract rate system on the ground that such practice violated the Sherman Anti-Trust Act, C. 647, 26 Stat. 209, Title 15, U.S.C. §§ 1-7 and the Clayton Act, C. 323, 38 Stat. 730, Title 15, U.S.C. §§ 12-27. The decree dismissing the bill of

complaint was affirmed on the ground that the Act covers the dominant facts alleged as constituting a violation of the Anti-Trust Acts, particularly Sec. 14 of the Act which prohibits retaliation by common carriers by water against a shipper by resorting to discriminating or unfair methods. If the system were illegal under any circumstances, the dismissal because of the Board's primary jurisdiction would have been a useless action and the court should have passed on the issue then and there. The case of *Swayne & Hoyt Ltd.* v. *U.S.*, 300 U.S. 297 (1937), involved an appeal from an order of the Secretary of Commerce. The Secretary's order had enjoined the use of the exclusive patronage contract rate system in the intercoastal trade on the ground that, as he interpreted the evidence, the operation of the contract system in the circumstances of the case would not differ substantially from the deferred rebate system outlawed in both foreign and coastwise shipping by Sec. 14 of the Act. This case is not authority for the conclusion that any contract rate system is unlawful. The court said: "Even though, as appellants seem to argue, the evidence may lend itself to support a different inference, we are without authority to substitute our judgment for that of the Secretary that the discrimination was unreasonable." at 307. Unreasonable discrimination, not illegality under any circumstance, was the basis of the decision.

In *Isbrandtsen Co. Inc.*, v. *United States et al,* 96 F. Supp 883 (U.S.D.C.S.D. N.Y., 1951), aff'd., 342 U.S 950 (1952), the facts showed that the North Atlantic Continental Freight Conference on October 1, 1948, "sent notices to all known shippers in the North Atlantic trade that effective November 1, 1948, the exclusive patronage contract-noncontract rate system would be inaugurated and that shippers who refused to enter into contracts to ship with the conference lines exclusively when they could provide transportation were to be charged 20% to 30% higher than the contract rates." The Board by its order of December 1, 1950 (3 F.M.B. 235) dismissed a complaint alleging illegality in such action. The plaintiff Isbrandtsen, the Attorney General and the Secretary of Agriculture joined in contending "that in no circumstances can a dual rate provision (i.e., exclusive patronage, or dual rate, or contract noncontract provision) in a conference agreement be valid" under Sec. 14. The court said "for the purposes of this decision we assume that, as the Board contends, under some circumstances the Board may, pursuant to 46 U.S.

C.A. § 814 approve a conference agreement containing such a provision."

The court however set aside the Board's order and enjoined the conference from acting pursuant to the dual rate provision on the ground that the 20% to 30% differential in rates had been arbitrarily selected and decided that the Board itself made the examiner's finding to this effect its own. The case was appealed to the Supreme Court which affirmed the decision of the District Court without opinion in *A/S J. Ludwig Mowinckels Redeir.* v. *Isbrandtsen Co.*, 342 U.S. 950, (1952). In *Far East Conference* v. *United States*, 342 U.S. 570 (1952), the Attorney General brought a suit under the Sherman Anti-Trust Act, *supra*, to enjoin defendants from using the exclusive patronage contract rate system. The important distinction between this case and the *Cunard* case above was that now the government rather than a private shipper was seeking to enjoin the maintenance of dual rates. This fact was held to be immaterial and since the Board was the expert agency responsible for administering the Act, the court held that administrative remedies before the Board must be exhausted before resort may be had before the courts. Here again the court declined to hold that the contract rate system was unlawful under any circumstances.

Up to this point we do not construe any of these decisions as outlawing the trade practice of common carriers by water agreeing to tender shippers exclusive patronage contracts which provide for less than tariff rates and of issuing tariffs containing rate differentials for shippers having exclusive patronage contracts. We construe the present status of the law as follows: 1. where an issue as to the validity of agreements among common carriers by water to use exclusive patronage contracts and dual rates is concerned, the complaint and facts must first be presented to the Board for decision; 2. where we find the operation of an exclusive patronage dual rate system has the effect of creating deferred rebates or unreasonable discrimination, we must hold the agreement to maintain the system is unlawful; 3. dual rate differentials which are arbitrarily selected must be held invalid; and 4. a dual rate system which is agreed to for the purpose of curtailing competition and an agreement to offer an exclusive patronage contract containing provisions tying shippers in such a way as to have the effect of stifling outside competition must both be held unlawful.

Finally on May 19, 1958, the Supreme Court in *Maritime Board*

v. *Isbrandtsen Co. Inc.*, 356 U.S. 481 (1958), passed on the issue of illegality under all circumstances. Isbrandtsen filed a petition to review an order of the Board in Docket No. 730, *Contract Rates-Japan/Atlantic-Gulf Freight Conference*, 4 F.M.B. 706 (1955), which order approved under §15 the agreement embodied in a statement filed by the Conference. The Conference's statement proposed to initiate an exclusive patronage contract/non-contract freight rate system (dual rate system) in the trade from Japan, Korea and Okinawa to U.S. Gulf Ports and Atlantic Coast Ports. The Court held: "In view of the fact that in the present case the dual-rate system was instituted for the purpose of curtailing Isbrandtsen's competition, thus becoming a device made illegal by Congress in §14 Third, we need not give controlling weight to the various treatments of dual rates by the Board under different circumstances." The Court had stated that: "Ties to shippers not designed to have the effect of stifling outside competition are not made unlawful. Whether a particular tie is designed to have the effect of stifling outside competition is a question for the Board in the first instance to determine." The circumstances here were that the conference was trying to stifle outside competition.

Our approval of the Mediterranean and Far East conference agreements and of their subsequent agreements to initiate the exclusive patronage contract dual rate system to the carriage of cotton, and the consistency of such approval with court decisions has been noted above. The main question now is whether our former approval must be revised as a result of the last Isbrandtsen decision.

The complainants' claim is that we now lack authority to approve a dual rate system because Sec. 14 Third provides that no common carrier by water shall "Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier * * * or for any other reason."

The Circuit Court had stated "since the dual rate system here constitutes retaliation it must be condemned without regard to the question of its reasonableness, as are deferred rebates." *Isbrandtsen Co. Inc.* v. *United States*, 239 F. 2d 933 (D.C. Cir., 1956), Cert. granted, 353 U.S. 908 (1957). The Supreme Court affirmed the result which was to set aside the Board's orders "insofar as they approve the exclusive patronage contract/non-

contract rate system" of the Japan-Atlantic & Gulf Freight Conference, but for different reasons it held that Sec. 14 Third "strikes down dual-rate systems only where they are employed as predatory devices", and precise findings by the Board "as to a particular system's intent and effect" are essential to a judicial determination of a system's validity under the statute. *Isbrandtsen* at 499.

We are called on to make precise findings as to the intent and effect of the arrangement as a result of the *Isbrandtsen* decision, and of respondents' (Far East) motion to remand the record and the recommended decision filed November 3, 1958 after the *Isbrandtsen* decision, to decide whether the arrangement should now be disapproved as a result of the findings herein about the system's intent and effect and to decide whether our former approval should be revoked.

On August 12, 1958, Congress enacted P.L. 85–626, 72 Stat. 574 "amending the section of the Shipping Act on which the *Isbrandtsen* decision was based, [Sec. 14] so as to hold valid any dual rate contract arrangement in use by the members of a Conference on May 19, 1958" *Anglo Canadian Shipping Co. Ltd. et al* v. *United States,* 264 F. 2d 405, 409 (9th Cir., 1959).

Before discussing the effect of P.L. 85–626 and the amendment of Sec. 14 Third on complainants' claims, on the precise findings required and on the Isbrandtsen decisions a short summary of the history of the trade practice and of agreements relating to exclusive patronage contracts and dual rates will throw some light on the retaliatory, predatory and discriminatory aspects of the arrangement and on its intent and effect.

Steamship freight conferences came into being in 1875 to provide regular services and fixed rates of freight which were the same to all shippers. In return for regular service and stable rates, the associated steamship lines sought assurances from shippers of their exclusive support for all members of the conference. Shippers supporting the conferences also sought preferential freight rates over those who did not. The assurances of support took two forms: the deferred rebate system and the contract system and rate differential. Under the deferred rebate system, shippers who confined their shipments to conference lines for stated periods can claim a rebate at the end of each period measured as a percentage of the freight paid and payable at a later date. Under the contract system shippers are

required to sign a contract in advance and to confine all their shipments to conference lines. In return they either receive a discount on freight rates or else lower rates of freight than noncontractors. Penalties are usually prescribed for violation of the contract.

Two significant conclusions emerge from this summary: first, the use of exclusive patronage contracts providing for less than tariff rates was an established trade practice long before the Act, in 1916, and existed at the time of the Act, and, second, the trade practice was brought about principally in response to demands of shippers rather than as a result of conference efforts to improve the members' competitive position vis-a-vis outsiders. The intent and effect of the dual rate contract traditionally is not to meet ouside competition. The conference agreements between carriers may have been designed to regulate competition, but not the exclusive patronage contract between carriers and shippers nor the differential in freight rates which the contract provided. The carrier-shipper relation is the only one involved here. The inter-carrier relation was involved in the *Isbrandtsen* case.

The trade practice of requiring a shipper tie to a conference by means of the contract and rate differentials for contracting shippers is what has come to be known as a "contract system" or as the "dual rate system" or the "exclusive patronage, dual rate, contract/noncontract system" or a "dual rate contract arrangement".

Since this trade practice was so well known in American and British ocean commerce by 1916, it would have been anomalous for Congress in 1916 to outlaw the system by inference rather than expressly as it did in the case of rebates.

Since 1916 the public policy aspects of shippers' contracts and rate differentials as trade practices have not been successfully challenged. Certain aspects of the arrangement such as excessive rate differentials have been invalidated because they were "arbitrarily" selected, *A/S J. Ludwig Monwinckels Redair* v. *Isbrandtsen Co., supra,* or were undue or unreasonable, *Swayne and Hoyt Ltd.* v. *United States, supra;* the administrative procedures or formality of approval under Sec. 15 have been declared improper, *River Plate & Brazil Conferences* v. *Pressed Steel Car Co. Inc., supra* and the U.S. Shipping Board has condemned the arrangement where it operates solely to effect a monopoly, *Eden*

Mining Co. v. *Bluefields Fruit & SS Co.*, 1 U.S.S.B. 41 (1922), but the trade practice itself had never been declared invalid "per se" until the Court of Appeals said so in the *Isbrandtsen* case (239 F. 2d 933) in 1956. This unqualified holding however does not appear to us to have been fully sustained by the Supreme Court in 1958.

We are inclined to believe that the latest *Isbrandtsen* case did not affirm that part of the Circuit Court decision (239 F. 2d 933) which set aside the Board's orders "in so far as they approve the exclusive patronage contract/non-contract rate system" as a general proposition, but affirmed such decision only to the extent of disapproving the Japan-Atlantic and Gulf Freight Conference arrangement which used the particular shippers' contract to injure the plaintiff, an independent common carrier by water.

Up to this point and until 1958, a period of about 83 years following the formation of the first shipping conference in 1875, the shippers' exclusive patronage contract and rate differentials have survived legislative inquiry and judicial scrutiny in both Great Britain and America without being found to be a retaliatory device and as such sufficiently contrary to public policy to justify remedial legislation or adverse court orders.

In 1958, in the *Isbrandtsen* case, the Supreme Court concluded, on the premise of our finding the dual rate contract of the Japan-Atlantic and Gulf Freight Conference was a necessary competitive means to offset the effect of Isbrandtsen's non-conference competition, that the arrangement was a resort to other discriminatory or unfair methods in violation of Sec. 14 Third of the Act.

Notwithstanding 1. the special facts of the present case showing there have been no unjustified reductions in freight rates (i.e. "rate cutting"), 2. the fact that shippers, and not carriers, are complainants herein, and 3. the absence of significant independent liner competition for cotton out of the Gulf since World War II, all of which alter the premises herein, the complainants and respondents adopted differing views about the effect of the *Isbrandtsen* decision.

Insofar as the decision invalidated practices heretofore generally used for over 83 years in the seaborne foreign commerce of the U.S., it had a profound effect upon the industry and action by Congress followed. The cause for Congressional action was stated in the report of the Senate Committee on Interstate and Foreign Commerce to accompany S. 3916 (Report 1709, Senate, 85th Cong., 2d Sess.) as follows: "Whether the above language

from the Court's opinion would justify operation of a dual-rate system if it is not directed at a non-conference competitor or competitors, or whether, as Justice Frankfurter construed it in a dissenting opinion, it declares illegal all dual-rate systems, is certainly not clear. About the only point rendered unmistakably clear by the two opinions is that, as a result of the Court's decision, the shipping industry is likely to be plagued with widespread confusion and endless litigation over the months, and possibly years, ahead."

After the Supreme Court decision on May 19, 1958, and the Committee's Report on June 13, 1958, Congress enacted Public Law 85–626 (72 Stat. 574) which, as amended by Public Law 86–542 (74 Stat. 253), and by Public Law 87–75 (75 Stat. 195), amended Sec. 14 Third of the Act to provide that nothing in the Act "shall be construed or applied to forbid or make unlawful any dual rate contract arrangement in use by the members of a conference on May 19, 1958 which conference is organized under an agreement approved under section 15 of this Act" by the Board unless and until the Board disapproves or modifies the arrangement in accordance with the standards of Sec. 15 of the Act. This amendment is in effect until September 15, 1961.

The Committee's action put a stop to litigation over the effect of the *Isbrandtsen* decision, but in its place, litigation began over the interpretation of the amendment of Sec. 14 Third of the Act. The New York Supreme Court in *Pasch* v. *Chemoleum Corp.* 209 N.Y. Supp. 2d 191 (N.Y. Sup. Ct. Oct. 11, 1960) had the following to say about the effect of the amendment:

> The legislative history of this amendment makes plain the intention of Congress, by this legislation, to provide the industry with a moratorium during which Congress might study and investigate, to the end that appropriate legislation might thereafter be enacted. Petitioner asserts the amendment preserves the validity of the dual rate contracts now under consideration. Respondents argue to the contrary and contend the amendment was intended to do no more than preserve the status quo that had been disturbed by the adjudication of the Supreme Court of the United States in the later *Isbrandtsen* case; that it was not the intention of Congress to limit the effects of the adjudication in the earlier *Isbrandtsen* case, and, as a consequence, the amendment must be deemed to include the qualification that exclusive patronage-dual rate contracts must, in any event, have been approved by the Federal Maritime Board to acquire validity.
>
> I reach a different conclusion. Respondents' contention as to the meaning of the amendment works a distortion in the language employed by Congress which plainly states * * * unless and until such regulatory body disapproves, cancels or modifies such arrangement in accordance with the standards set forth in section 15 of this Act. It would have been a simple

matter for Congress, if it desired to do so, to insert appropriate language in the amendment limiting the validity of the dual rate contracts to those actually approved by the Board. It is incredible to assume that Congress was wholly unaware of the earlier *Isbrandtsen* case when it enacted the legislation. I conclude Congress neither intended nor desired to limit the effect of the amendment in the manner suggested by respondents.

Later the following on this case was stated by Justice McGivern in *Pasch* v. *Chemoleum Corporation,* 210 N.Y.S. 2d 738 (1960) before the Appellate Division of the Supreme Court:

In any event, any infirmity which may have existed in the contract was cured by the enactment on August 12, 1958, of Public Law 85–626 (72 Stat. 574) which amended section 14 of the Shipping Act (46 U.S.C. 812).

The dual rate contract arrangement of petitioner was in existence on May 19, 1958, and it is conceded that the conference was one organized under an agreement approved under section 15 of the Shipping Act by the regulatory body administering the act. Under the circumstances, in the absence of any evidence that the regulatory body has disapproved, canceled, or modified the dual rate contract form theretofore filed with it on February 26, 1953, by petitioner in compliance with the regulatory body's General Order 76, directing it to supply complete information as to the dual rate contract arrangement then in force, this court must find the contract executed by petitioner and respondent valid. (P. 742).

More recent support for this conclusion is found in the Report of the Committee on Merchant Marine and Fisheries to accompany H.R. 6775, on June 8, 1961 (87th Cong. 1st Sess. House of Representatives, Report No. 498) interpreting Sec. 14 Third of the Act as amended by P.L. 85–626 in 1958 and P.L. 86–542 in 1959, as follows:

In view of the grave doubts cast by the Supreme Court decision upon the legality of the dual rate system and the possible detrimental results to both American shipping and American foreign commerce, legislation was enacted in the 2d session of the 85th Congress to authorize the *continuation in force* of any existing dual rate contract arrangement until June 30, 1960. (emphasis supplied).

The arrangement of Far East and Mediterranean was in use by members of the Conference on May 19, 1958. The Conferences were organized under agreements approved under Sec. 15 of the Act. Sec. 15 requires an order if the Board is to disapprove an agreement. The standards for determining the lawfulness of an arrangement set forth in Sec. 15 are: 1. is the arrangement unjustly discriminatory or unfair as between shippers and carriers; 2. does the arrangement operate to the detriment of the commerce of the U.S.; and 3. is the arrangement in violation of the Act?

We have found that the arrangements of Mediterranean and

Far East are embodied in arrangements heretofore approved by the Board and in use by the members of the conferences on May 19, 1958. The question now is whether we should disapprove or modify these arrangements by revoking our prior approval.

On the present record no independent common carrier by water is complaining of the retaliatory or predatory effect of the arrangement. Instead, as shown in complainant's memorandum, in recent oral argument before us and in the exceptions and replies filed after the Isbrandtsen decision, it is argued by a group of shippers that the historically established trade practices are contrary to public policy and were outlawed by Congress in Sec. 14 of the Act. The Supreme Court, however, only found that the arrangement of the Japan-Atlantic and Gulf Freight Conference used the shippers' contract and its dual rates as a predatory device and as evidence thereof referred to a shippers' exclusive patronage contract containing oppressive conditions. The Court stated: " . . . the dual-rate contracts here require the carriers to carry the shipper's cargo only 'so far as their regular services are available'; rates are 'subject to reasonable increase' within two calendar months plus the unexpired portion of the month after notice of increase is given; '[e]ach member of the Conference is responsible for its own part only in this Agreement'; the agreement is terminable by either party on three months' notice; and for a breach, 'the Shipper shall pay as liquidated damages to the Carriers fifty per centum (50%) of the amount of freight which the Shipper would have paid had such shipment been made in a vessel of the Carriers at the Contract rate currently in effect.' Until payment of the liquidated damages the shipper is denied the reduced rate, and if he violates the agreement more than once in 12 months, he suffers cancellation of the agreement and the denial of another until all liquidated damages have been paid in full." The shippers' contracts in this record are similar to the shippers' contracts before the Supreme Court.

Because of this similarity with the contracts in this record and the Court's inference therefrom that such an oppressive contract plus a dual rate system constitutes a predatory device, it is argued that we should hold that the actions of Mediterranean and Far East violate Sec. 14 although as far as this record is concerned there is no evidence whatever that the carrier's actions in adopting the shippers' contract and the dual rate was directed at any other carrier.

The circumstances of this case are that the shippers' contract was asked for by the shippers themselves. The contract was not adopted as an anti-outside-carrier device but as an accommodation to shippers desiring stable conditions in the trade which would give them assured service at reasonably firm and level rates for predictable periods. We find no evidence in this record to show that the drafting and tender of the shippers' contract or that the rate differential established in the published and filed tariffs was a competitive device, was designed to stifle outside competition or even had this effect. No carrier introduced any evidence to this effect.

The absence of substantial non-conference liner competition and the absence of any complaint by carriers in independent non-conference liner service and the circumstances under which cotton shippers negotiated the exclusive patronage contracts, leads us to conclude that the arrangement herein was not unjustly discriminatory or unfair between shippers and carriers, was not retaliatory, did not stifle outside carrier competition and does not violate the Act.

The Examiner has found that the differentials in rates of each conference are not discriminatory or unfair or detrimental to the commerce of the U.S. or in violation of the Act. We have reviewed the record of the facts on which this finding is based, have no disagreement therewith and concur with the Examiner's finding.

In view of the history of the exclusive patronage contract and rate differential arrangements, we conclude that such arrangement does not operate to the detriment of the commerce of the U.S. We conclude further that the dual rate and exclusive patronage contract herein was not a resort to other discriminatory or unfair methods against the shipper complainants herein in violation of Sec. 14 of the Act. We find no reason to disapprove the agreements of Far East and Mediterranean heretofore filed with the Board.

We conclude further that "system and rates thereunder" are not unduly and unreasonably prejudicial and disadvantageous to persons in violation of Sec. 16 of the Act and are not unjustly discriminatory between shippers and unjustly prejudicial to exporters of the United States in violation of Sec. 17 of the Act as claimed in respondents' complaints.

The complainants also asked for reparations based on violations of the Act.

The facts showing that APL, East Asiatic, Maersk and NYK gave Isbrandtsen the lower contract rates without the necessity for a contract and then in August and September other conference members demanded the payment of non-contract rates established that Isbrandtsen was discriminated against by States Marine and Waterman in violation of Sec. 17 of the Act. Sec. 17 forbids any common carrier by water in foreign commerce from charging any rate which is unjustly discriminatory between shippers. States Marine and Waterman as members of Far East failed to extend to Isbrandtsen the same rates which other conference members had granted earlier.

Respondents claim that Isbrandtsen is not a shipper and therefore cannot claim that he has been discriminated against as a shipper. Isbrandtsen's name appears as the shipper on the bills of lading in evidence, signed by the masters of respondent's ships, the cargo described thereon was taken aboard and transported and Isbrandtsen's freight payments as shipper were accepted. Isbrandtsen's name also appears on all other shipping documents. As a shipper Isbrandtsen tried to get a contract and contract rates but was refused both. At the same time, States Marine and Waterman were carrying the same kind of cotton for other shippers at contract rates, under identical conditions. States Marine and Waterman refused to give Isbrandtsen similar rates. As a result of these actions, Isbrandtsen was charged a rate which was unjustly discriminatory between shippers. Isbrandtsen showed further that it incurred expenses, lost profits and suffered damage to the extent of its out-of-pocket expenses at the result of the denial of a contract and payment of the higher rates. *Eden Mining v. Bluefields* at 1 U.S.S.B. 41 (1922). Respondents did not prove any mitigating factors affecting Isbrandtsen's damage although the burden was on them to do so. *Roberto Hernandez Inc. v. Arnold Bernstein, Etc.*, 116 F. 2d 849 (2nd Cir. 1941; cert. den. 313 U.S. 582 (1941).

Kempner and Galveston signed a shippers' contract on February 7, 1950, and terminated their contract September 25, 1950, effective 90 days later on December 24, 1950, as shown. Unlike Isbrandtsen, no new contract was requested. These respondents were never unjustly refused a contract rate. Consequently, for shipments made during and after January 1951, Kempner and Galveston could not claim status as contract shippers and were not discriminated against. Kempner and Galveston were not

given the lower contract rates during any period when they did not have a contract.

Texas Cotton never had a shippers' contract with either Mediterranean or Far East. Kempner in the only Far East shippers' contract it had did not list Texas Cotton as a subsidiary, affiliate or parent company. No contract existed at any time on which Texas Cotton either assumed the obligations to patronize the conference exclusively or acquired the right to ship at the lower contract rates either independently or as a subsidiary. This respondent was never unjustly refused a contract rate.

Since none of the complainants in Dockets No. 732, 733, 734 and 735 could validly claim status as contract shippers, nor ever received contract shippers' rates during a period when they did not have a contract, there has been no discrimination against such complainants.

Isbrandtsen's claim for reparations under Sec. 22 of the Act has been found to be the result of discrimination. We have recently held that "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." *Swift & Co. and Swift & Co. Packers v. Gulf & South Atlantic Havana SS Co. et al,* 6 F.M.B. 215 (1961). In the *Swift* case the complainant was given the opportunity to prove its damages at a further hearing. Although the basis for the decisions are the same, such further proceeding is not necessary here because Isbrandtsen has only asked for the sum of $5,455, with interest, from respondent States Marine Corp. of Delaware and $1,232.28, with interest, from the respondent Waterman SS Corp. In the *Swift* case complainants had asked for reparations and other relief as a result of the damage suffered from the enforcement by the conference of certain contract provisions against Swift. Accordingly, States Marine and Waterman will be ordered to pay to complainant Isbrandtsen on or before 60 days from the date of our Order $6,687.-28 with interest at the rate of 6% per annum on any amount unpaid after 60 days as reparation from the injury caused by the respondent's violation of Sec. 17 of the Act.

We have reviewed the record as well as the conclusions of the Supreme Court in the second *Isbrandtsen* case and the subse-

quent relevant Acts of Congress. Under the circumstances, it is not considered that the motion of respondents, other than Isthmian Steamship Company, to remand the record and the recommended decision to the examiner with the directions to rule on additional findings should be granted. The motion will be denied.

After due investigation and hearing, our conclusions in respect to the five complaints are as follows:

1. Complainant Isbrandtsen in Docket No. 726:

a. has proven its complaint of a violation of Sec. 17 of the Act by States Marine Corp. of Delaware, a common carrier by water, and shall be paid on or before 60 days from the date of our order herein with interest at the rate of 6% per annum for every day after such 60 days until paid, the sum of $5,455. as reparation for the injury caused by said violation;

b. has proven its complaint of a violation of Sec. 17 of the Act by Waterman SS Corp., a common carrier by water, and shall be paid on or before 60 days from the date of our order herein with interest at the rate of 6% per annum for every day after such 60 days until paid, the sum of $1,232.28 as reparation for the injury caused by said violation;

c. has not established that respondents should be ordered to cease and desist from using the exclusive patronage dual rate contract/non-contract system, or such contracts with shippers, or from using the spread and differential of four dollars ($4.00) per ton and any other spread or differential between contract. and non-contract tariff rates or participating in such contracts;

d. is not entitled to any other additional and further relief.

2. Complainant Kempner in Docket No. 732:

a. has not proven its complaint of a violation of the Act by Lykes Bros. SS Co. Inc;

b. has not proven its complaint of a violation of the Act by Kerr Steamship Company;

c. has not proven its complaint of a violation of the Act by States Marine Corporation of Delaware;

d. has not proven its complaint of a violation of the Act by Societa Italiana de Armamento "SIDARMA";

e. has not proven its complaint of a violation of the Act by Compania Maritima del Nervion;

f. has not proven its complaint of a violation of the Act by Societa Anonima Navigazione Alta Italia, Ltd., Genoa (Creole Line);

g. has not established that respondents should be ordered to cease and desist from the violations of the Act complained of or from using a dual rate contract/non-contract type of tariff involving a spread or differential now being charged or any other differential or charge which will not be available to contract and non-contract shippers alike;

h. is not entitled to any other and further relief.

An order dismissing the complaint will be entered.

3. Complainant Kempner in Docket No. 733:

a. has not proven its complaint of a violation of the Act against Lykes Bros. Steamship Co., Inc.;

b. has not proven its complaint of a violation of the Act by States Marine Corp. of Delaware;

c. has not proven its complaint of a violation of the Act by Kokusai Lines Joint Service;

d. has not proven its complaint of a violation of the Act by Mitsui Steamship Co., Ltd.;

e. has not proven its complaint of a violation of the Act by Kawasaki Kisen Kaisha, Ltd.;

f. has not proven its complaint of a violation of the Act by Nippon Yusen Kaisha, Ltd.;

g. has not proven its complaint of a violation of the Act by Fern-Ville Far East Lines/Barber-Fern-Ville Lines—Fearnley & Eger and A. F. Klaveness & Co., A/S;

h. has not established that respondents should be ordered to cease and desist from the violations of the Act complained of or from using a dual rate contract/non-contract type of tariff involving a spread or differential now being charged or any other differential or charge which will not be available to contract non-contract shippers alike;

i. is not entitled to any other and further relief.

An order dismissing the complaint will be entered.

4. Complainant Galveston Cotton Co. in Docket No. 734:

a. has not proven its complaint of a violation of the Act by Lykes Bros. Steamship Co., Inc.;

b. has not proven its complaint of a violation of the Act by Nippon Yusen Kaisha, Ltd.;

c. has not proven its complaint of a violation of the Act by Fern-Ville Far East Lines/Barber-Fern-Ville Lines—Fearnley & Eger and A. F. Klaveness & Company, A/S;

d. has not proven its complaint of a violation of the Act by Waterman Steamship Corp.;

e. has not proven its complaint of a violation of the Act by Kokusai Lines Joint Service;

f. has not proven its complaint of a violation of the Act by Mitsui Steamship Company, Ltd.;

g. has not proven its complaint of a violation of the Act by States Marine Corp. of Delaware;

h. has not established that respondents should be ordered to cease and desist from the violations of the Act complained of or from using a dual rate contract/non-contract type of tariff involving a spread or differential now being charged or any other differential or charge which will not be available to contract and non-contract shippers alike;

i. is not entitled to any other and further relief.

An order dismissing the complaint will be entered.

5. Complainant Texas Cotton Industries in Docket No. 735:

a. has not proven its complaint of a violation of the Act by Lykes Bros. Steamship Co., Inc., et al;

b. has not established that respondent should be ordered to cease and desist from the violations of the Act complained of or from using a dual rate contract/non-contract type of tariff involving a spread or differential now being charged or any other differential or charge which will not be available to contract and non-contract shippers alike;

c. is not entitled to any other and further relief.

An order dismissing the complaint will be entered.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 4th day of August 1961.

No. 726

ISBRANDTSEN CO., INC.
v.
STATES MARINE CORPORATION OF DELAWARE, ET AL.

No. 732

H. KEMPNER
v.
LYKES BROS. STEAMSHIP CO., INC., ET AL.

No. 733

H. KEMPNER
v.
LYKES BROS. STEAMSHIP CO., INC., ET AL.

No. 734

GALVESTON COTTON COMPANY
v.
LYKES BROS. STEAMSHIP CO., INC., ET AL.

No. 735

TEXAS COTTON INDUSTRIES
v.
LYKES BROS. STEAMSHIP CO., INC., ET AL.

These proceedings being at issue upon complaints and answers 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, as follows:

1. That respondent, States Marine Corporation of Delaware, be, and it is hereby, notified and directed to pay unto complainant Isbrandtsen Co. Inc., of 26 Broadway, New York 4, New York, on or before 60 days from the date hereof, $5,455. with interest at the rate of 6% per annum on any amounts unpaid after 60 days, as reparation for the injury caused by respondent's violation of Sec. 17 of the Shipping Act of 1916, as amended;

2. That respondent, Waterman Steamship Company, be and it is hereby notified and directed to pay unto complainant, Isbrandtsen Co. Inc., of 26 Broadway, New York 4, New York, on or before 60 days from the date hereof, $1,232.28 with interest at the rate of 6% per annum on any amounts unpaid after 60 days, as reparation for the injury caused by respondent's violation of Sec. 17 of the Shipping Act of 1916, as amended; and

3. That the motion of the respondents, other than Isthmian Steamship Company, to remand the record and recommended decision to the examiner with directions to rule on additional findings, be, and it is hereby, denied.

The proceedings are dismissed.

By the Board.

(Sgd.) THOMAS LISI
Secretary

TABLE OF COMMODITIES

INDEX DIGEST

[Numbers in parentheses following citations indicate pages on which the particular subjects are considered]

respect to discrimination, unfairness or detriment to the commerce of the United States. Since the respondents had not put in the Board's hands evidence of understandings to which they were parties or to which they conformed, the complaint of a violation of the requirement in section 15 as to filing agreements relating to fixing or regulating transportation rates was proven. Oranje Line *v.* Anchor Line, Ltd., 199 (208, 209).

The provisions of section 15 of the Shipping Act of 1916 requiring the filing of agreements relating to allotment of ports, the restriction or regulation of the number and character of sailings between ports and to exclusive, preferential or cooperative working arrangements were proven to have been violated where no evidence of such agreements was ever filed with the Board and such agreements were shown to have been carried out. Id. (210).

Where, subsequent to approval by the Board of an agreement between carriers in the North Atlantic/Baltic Trade to alternate their Swedish and American flag sailings, and of an amendment providing for an increase in sailings from time to time as might be mutually agreed to carry out the purpose of the agreement as to an even distribution of freight, alternate sailings were discontinued, the changes in operating pattern were consistent with the parties' undertakings and were operating matters comparable to current rate changes which need not be filed. Correspondence between the officers of the lines concerning the desire and intention of the American line to institute a monthly sailing from Gothenburg, Sweden, with the time of the month to be decided upon after consultation, was merely an implementation of the basic agreement. Unapproved Section 15 Agreement—North Atlantic/Baltic Trade, 320 (321, 322).

—Approval of agreements

Where a conference has filed and obtained approval of an agreement and filed transcripts of minutes of its meetings showing agreement among its members for adoption of the dual-rate system and filed tariffs containing dual-rate provisions, the conference has filed an agreement pursuant to section 15 for which approval is required. When the Board took no action its approval was neither subsequent nor retroactive but existed at the time it accepted the tariff changes showing the dual rates and did not disapprove the results of the meetings and the tariff revisions by order. Section 15 authorizes the Board to disapprove by order, but not approve by order. Limitations of staff compelled the use, in the past, of the technique of tacit approval. Isbrandtsen Co., Inc. *v.* States Marine Corp. of Delaware, 422 (434, 435).

—Arbitration decisions, effect of

There is no provision in the United States Arbitration Act which limits the authority of the Board to interpret a freighting agreement to determine whether it is a modification of an approved conference agreement. Arbitration decisions are not binding on the Board. Swift & Co. *v.* Gulf and South Atlantic Havana S.S. Conference, 215 (222).

—Evidence of existence

The significance of joint notices issued by steamship lines, relating to the number and character of sailings between ports, was not that they involved joint advertising, which by itself does not justify finding that the action was taken pursuant to agreement, but that the information contained in the notices required cooperative arrangements to carry out the commitments made to the public. Oranje Line *v.* Anchor Line, Ltd., 199 (209).

Carriers' joint advertising of services does not justify per se a finding by the Board that cooperative working arrangements exist, but in this case the information contained in such advertisements showed that cooperative arrangements were necessary to carry out the commitments made to the public and that such commitments required activity going far beyond that which occurred simply as a result of respect by carriers for the historic position of each line in a port. Id. (209, 210).

Carriers must have had explicit understandings among themselves as to cooperative activity to regulate sailings between allotted ports, and as to distribution of revenues and sharing of expenses, where their advertisements and schedules bespoke mutual understandings as to allotment of ports, printing and timing of schedules, and destination and other services to ports; departures and arrivals from allotted ports were in accordance with public notice; and use of berths, loading of cargo and allocation of revenues and costs required coordinated activity which could only be accomplished by a policy of cooperation followed by arrangements made at the managerial level by participating carriers. Id. (209, 210).

Where carriers denied that they had entered into an agreement, but the evidence showed that departures and arrivals of ships from allotted ports in accordance with a joint notice, the use of berths, the loading of cargo and the allocation of revenue all required coordinated activity which could only be accomplished by a policy of cooperation followed by arrangements made at the managerial level, the complaint of a violation of section 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 exclusive, preferential or cooperative working arrangements was proven. Id. (209, 210).

Where carriers passed ships from one company to another to enable each to carry cargo to ports each served; there was no break in the pattern of exclusive and preferential service from various ports; no inference of independent operation was possible; mutual agreement was essential to the effective accomplishment of the operations shown of record; and one carrier's officer stated that service was operated in conjunction with others and to avoid treading on others' toes, the conclusion is inescapable that agreements existed among the carriers. Id. (210).

—Modification of agreements

To the extent any interpretation of a freighting agreement extended its scope beyond that allowed by the authorized conference agreement, the freighting agreement would modify the conference agreement and would be a new section 15 agreement. Such modified agreement is unlawful until it is filed and the Board approves it. Therefore, the meaning of the freighting agreement was properly in issue before the Board, since respondents were saying that a decision upon arbitration between the shipper and the conference was more than just a finding that the shipper violated the freighting agreement because the arbitrators must first have found the existence of an obligation to be violated. Thus the arbitrators' decision was a final opinion that the freighting agreement was not a modification of the conference agreement but an interpretation of what had 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. Only the Board may approve agreements or modifications. Swift & Co., *v.* Gulf and South Atlantic Havana S.S. Conference, 215 (221, 222).

Where the language of an approved conference agreement relating to shipments to Cuba from named Gulf and Atlantic ports was clear, an attempt to extend its terms to shipments from St. Louis, Mo., by an "interpretation" by the conference was in effect a fundamental modification of the scope of the agreement and of its terms, and conference members were guilty of violating section 15 in failing to file immediately with the Board a true copy or memorandum of such modification. Id. (223, 224).

Provision of conference agreement authorizing dual rates for stabilization purposes and the absence of a provision containing "any limitation upon the Conference's contract rate authority in terms of origin of cargo, mode of transportation to ports served by the Conference or in any other terms", did not justify the conference in not filing a modification of the agreement which extended its coverage to an inland port (St. Louis) not named in the agreement. 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 agreement that "nothing herein shall be construed to extend the provisions of this Agreement to ports or territories other than as described herein" constituted such a limitation. Id. (224).

—Rates and Tariffs

Transportation rates were fixed and regulated where carriers distributed copies of a tariff among themselves and quoted rates to shippers exactly as they appeared therein; the tariff was not on file anywhere; the rates used were uniform, even when they differed on one or two occasions from the tariff rates; carriers' advertisements asked shippers to call any one of them for rate information; and no evidence of any agreement for such fixing and regulating of rates was filed with the Board. Oranje Line *v.* Anchor Line, Ltd., 199 (208).

Carrier which quoted proposed tariff rates under agreement not filed with Board, but which did not participate in any of the joint services of other carriers through an exchange of ships or cooperative sailing arrangements has not violated section 15 of the Shipping Act of 1916 insofar as it relates to agreements for alloting ports, restricting or regulating sailings and providing for exclusive, preferential or cooperative arrangements. Id. (213).

—Scope of agreements

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 section 15 of the Act. Swift & Co. *v.* Gulf and South Atlantic Havana S.S. Conference, 215 (223).

Where there is a continuous movement of cargo shipped in the same barge from St. Louis, Mo., to Cuba, neither the change from river to ocean tugs at the port of New Orleans nor a temporary halt in the barge movement converts the cargo to a shipment from an ocean port, so as to require compliance with the provisions of a conference agreement covering only shipments from ocean ports. Id. (224, 225).

AGREEMENTS WITH SHIPPERS. See Contract Rates.

ARBITRATION. See Agreements under Section 15.

BILLS OF LADING. See Classifications; Forwarders and Forwarding.

BILLS OF LADING ACT. See Forwarders and Forwarding.

BOOKING. See Terminal Facilities.

BROKERAGE. See also Forwarders and Forwarding.

A broker is an agent employed to make contracts between others for a compensation, commonly called brokerage. A broker may act as agent for his customer only under an express or implied contract. His right to recover commissions must be predicated on a contractual relation. Freight Forwarder Investigation, 327 (347).

Carriers' agreements prohibiting or limiting brokerage are subject to the Board's jurisdiction under section 15 in circumstances where it is shown that payments by carriers to forwarders are utilized by the carriers as a competitive device, since section 15 specifically authorizes approval of agreements regulating competition between carriers. Id. (358).

Brokerage payments by carriers to forwarders who render freight forwarding service to shippers are voluntary payments made by the carriers as a competitive device to attact traffic or as a protective device to prevent diversion of cargo over which the forwarders have control of routing. The resultant violations of sections 16 and 17 of the Shipping Act must be curbed by imposing a rule prohibiting such payments. All prior contrary findings are overruled. Id. (362–364).

The provisions of the rule relating to brokerage payments are not intended to prohibit the payment of brokerage in those instances where the recipient has no other connection with the cargo than to perform the true functions of a broker. Id. (365, 366).

BROKERS. See Brokerage.

CLASSIFICATIONS. See also Tariffs; Volume Rates.

In determining the proper tariff classification of articles 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. Misclassification and Misbilling of Glass Articles, 155 (158).

The essential character of articles is not changed by possible other use and such possible use is not a lawful basis for a difference in freight charges. This is particularly true in the present case where tumblers (classified as empty jars or jugs instead of glassware) were not shown to have been sold for packaging but were sold as table glassware. Id. (159).

Drinking glasses, notwithstanding any adaptability as containers when capped, are more correctly described by common usage as "tumblers" rather than "jars". The controlling use as a drinking glass determines the correctness of the tumbler classification. The "jars" classification used to describe tumblers was factually incorrect. Drinking glasses or tumblers were falsely classified as jars. Id. (159).

False classification resulted in the billing and payment of a lower freight rate than would have been applicable to tumblers and glassware. To the extent the billing depended 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. Id. (159).

Shipper and freight forwarder obtained transportation at less than the rate and charge otherwise applicable where they knew of a variance between what was being shipped and what was described in bills of lading calling attention to section 16; the variances were willfully created; the tariff was studied and a classification chosen giving the lowest rate; and the improper description was consistently and continually chosen. The choice involved willfully ignoring a printed warning, as well as a more descriptive classification of the articles

shipped with full knowledge of the characteristics and normal use of the articles and of the proper classification therefor. Id. (160, 161).

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. 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. Id. (161, 162).

Descriptions of commodities in export declarations do not necessarily conform to those in tariffs, and it is 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 and can lead to discovery of a misclassification. Id. (164).

That there is no law or regulation requiring comparison by a carrier of documents describing articles shipped is not essential or material in determining whether section 16 of the Shipping Act of 1916 has been violated since the carrier's liability is not for violation of a nonexistent law or regulation but for allowing illegal transportation by a wanton disregard of duty. Id. (166).

A background of widespread false billing need not always be shown as an essential ingredient in an offense under section 16 of the Shipping Act of 1916. Id. (166).

Carriers violated section 16 of the Shipping Act of 1916 when they allowed shipper to obtain transportation of articles at less than the applicable rate established and enforced by them, as a result of ineffective office procedures, total reliance on shippers for discovery of the truth, and failure to inspect cargo when alerted. Id. (166).

Carriers cannot avoid responsibility under section 16 of the Shipping Act of 1916 by inaction, ineffective internal procedures and inexpert personnel. Intent to avoid such duty will be inferred from the carriers' refusal to rely on their own processes of discovery and on their own personnel, and from placing of 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 under section 16. Id. (166).

Use by a carrier of a tariff classification of "forms-fibre" for fibre tubes, rather than "conduits-fibre", was reasonable where the essential characteristics of the product as understood by the shipper more closely fitted the carrier's classification, although the bill of lading description was "fibre conduit" and the product had some use as such but was not so advertised or sold. Raymond International, Inc. *v.* Venezuelan Line, 189 (190–192).

Shipper, a printer and manufacturer of composition books, business blanks, receipt books, and other school and business paper products, was guilty of false billing within the meaning of section 16 of the Shipping Act of 1916, where such goods were described as "printing paper" for the purpose of obtaining lower freight rates. Rubin, Rubin & Rubin Corp., 235 (239).

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 rates or charges otherwise applicable by means of a false classification. Id. (239).

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. "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 section 16." A persistent failure to inform one's 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 forwarders. Id. (239, 240).

Shipper is not exonerated from willful conduct tending to obtain lower rates by false billing by fact that he was attempting to meet unfair competition of others doing the same thing. Id. (240).

Shipper obtained lower rates by means of false billing "knowingly and willfully" where it was found that for a while shipper correctly classified its products in bills of lading in accordance with the tariff and paid the correct charges, and, after he found out that he was losing business because of high freight, misdescribed the products to get a lower freight rate, in the meantime continuing to have the cartons containing his product correctly stenciled and to prepare invoices with accurate references to what they were. Id. (240).

Shipper's choice in the preparation of inaccurate bill of lading involved willful and knowing conduct, where though he might not be well informed about the preparation of the bill of lading, he knew that he was not shipping merchandise as described and made no effort to obtain enlightenment about the obvious discrepancy between the description and both the facts and the correct description he saw on the invoices. Id. (241).

Forwarder's conduct in forwarding misdescribed goods was willful, where it was expert in preparing shipping documents; same goods had been shipped under different designation calling for higher freight rate; when there was a change in description, but no change in product; forwarder conformed to the change without inquiry; and where, though the incorrect classification was adopted for the purpose of obtaining lower freight rates, the goods were properly classified for the purpose of statistical classification of commodities exported from the United States. Id. (241, 242).

Unquestioning reliance by a carrier on shippers for the truth as to information on bills of lading is not enough. Where, for years, stencils on boxes accurately and properly described their contents to the carrier, the carrier was bound to inquire why, such stencils remaining the same, the description in the bill of lading called for a lower freight rate. Id. (243).

Where (1) shippers and their forwarders falsely classified dried diatomaceous earth (obtained from mines of diatomaceous silica) as silica on bills of lading, thus obtaining a lower rate for transportation, (2) the products are distinguishable mainly by their densities (so that silica stows at 35 to 40 cu. ft. per ton compared to 150 to 160 cu. ft. for diatomaceous earth), (3) the carriers' written tariff descriptions, which when the dispute arose did not contain a measurement factor, were not made available and requests to examine the tariffs were refused, (4) the Bureau of Census authorized a silica description in export declarations for diatomaceous earth and at the same time used a code number covering diatomaceous earth and products, and (5) the carriers' meager verbal statements about the tariffs, together with the known high silica content of the product shipped, were sufficient to create an ambiguity in the minds of the shippers, the shippers and forwarders did not knowingly and will-

fully misclassify in violation of section 16 of the Act. Misclassification of Diatomaceous Earth as Silica, 289 (296–298).

Where the precise classification of a product as earth or silica could be determined only by microscopic analysis, the carrier's official was concerned only with establishing a compensatory rate for shipping the product (diatomaceous earth), the official was confused by various descriptions furnished to him but, when the confusion was brought to his attention, he took steps promptly to have the product investigated and the rate adjusted, the carrier in allowing transportation of the product at less than the regular established rate did not show a wanton disregard of its duty to exercise reasonable diligence to collect applicable rates such as to amount to an intent to collect less than applicable rates. However, carriers should take more care in making definitions clear and precisely descriptive of the commodities covered and in specifying rates applicable thereto. Id. (299).

COMMON CARRIERS.

—Who is common carrier

A steamship line was operating as a bona-fide common carrier between California and Hawaii from 1935 to 1938 when it 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, although under an agreement with another line, it carried passengers and cargo as agent and paid half the gross domestic revenue to the other line, did not advertise for or solicit cargo or passengers, turned inquiries for transportation over to the other line, and did not have a cargo tariff on file, due apparently to an oversight. American President Lines, Ltd.—Hawaii Passenger Service, 6 (9).

Carriers which, through the medium of conference tariffs, (1) hold themselves out to transport explosives and establish rates applicable thereto, subject only to such restrictive conditions as are required by the cargo, (2) apply the restrictive conditions alike to all shippers, (3) enter into no special contracts for such cargo, and (4) transport the explosives at tariff rates and in accordance with tariff conditions are common carriers. A common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he rests. Absorption or Equalization on Explosives, 138 (148).

A carrier may be both a common and a contract carrier, but not, however, on one vessel on the same voyage. Id. (148).

Where respondent claimed it was not a common carrier on the grounds that its advertisements showed that it was a loading broker and that the conference secretary testified that it was not considered a common carrier, but respondent's advertisements did not indicate its status as a loading broker until after the complaint was filed; it appeared to have held itself out to the public as a common carrier; it advertised its schedule for an entire season for four ships which were passed between companies; and, while the evidence was not entirely clear, the preponderance of unrepudiated evidence showed that it wanted to be known as the carrier of shippers' goods tendered to it, respondent was shown to be a common carrier by water. Oranje Line *v.* Anchor Line Ltd., 199 (211, 212).

A nonvessel carrier which, by the terms of its bill of lading and agreement with the vessel carrier does not assume sole responsibility to the shipper for the safe water transportation of shipments, but is, instead a "forwarding agent" for the "convenience of the shipper" insofar as the water transportation part of the journey is concerned, does not come within the definition of a common carrier by water. Determination of Common Carrier Status, 245 (254).

The term "common carrier" is not defined by the Shipping Act but the legislative history of the Act indicates that the person to be regulated is the common carrier at common law: One who holds himself out to carry for hire the goods of those who choose to employ him. Id. (251).

Common carrier status does not depend on ownership or control or means of transportation, but rather on the nature of the undertaking with the business served. Where complete responsibility for the safe transportation and delivery of goods entrusted from time of receipt from the shipper to arrival at ultimate destination is assumed, common carrier status exists. Id. (251, 252).

An express company is not a common carrier by water although it acts as a principal and not as agent for the shipper insofar as the water transportation part of the journey is concerned unless it is shown that, although it disclaimed liability to the shipper for that part of the journey, the disclaimers of liability are invalid or liability is otherwise imposed by law. Assumption or attempted assumption of liability should not be sole test of common carrier by water status. The actual existence or imposition of liability is also a significant factor. Actual liability as a common carrier over the entire journey, including the water portion, is essential. Id. (255, 256).

A person who holds himself out by establishment and maintenance of tariffs, by advertisement and solicitation, and otherwise, to provide transportation for hire by water in interstate or foreign commerce, assumes responsibility for the safe water transportation of the shipments, and arranges in his own name with underlying water carriers for the performance of such transportation, whether or not owning or controlling the means by which such transportation is effected, is a common carrier by water as defined in the Shipping Act. Id. (256, 257).

Express company and freight forwarder assuming full common carrier liability from origin to destination based on value of property shipped as declared by the shipper, and having eliminated restrictions on or disclaimers of liability contained previously in their bills of lading, are "common carriers by water" within the meaning of section 1 of the Shipping Act of 1916, insofar as the water transportation part of the journey is concerned. Determination of Common Carrier Status, 287.

CONTRACT RATES. See also Agreements under Section 15; Discrimination.

—In general

A conference agreement (or its modification) which bars shippers of lard by barge to Cuba from the port of St. Louis, Mo., from the benefit of obtaining contract rates on other traffic, where conference members do not provide barge service nor any other service from river ports but only service by ships from ocean ports, prevents (1) shippers from using the Mississippi River, (2) river port cities from obtaining cargo for shipment therefrom, and (3) traffic in lard by barge transportation when it has certain economic advantages, since it tends to compel shippers either to forego these advantages and ship lard on conference ships from the ports they serve, or, as to other traffic, to ship by conference ships at noncontract rates. Consequently, such an agreement would be subject to disapproval by the Board pursuant to section 15 in that it constitutes a routing restriction detrimental to the commerce of the United States and unjustly discriminatory as between shippers or ports. Furthermore, such an agreement (1) subjects particular persons, i.e. shippers, and localities, i.e. ports, to undue prejudice or disadvantage, in violation of section 16, second paragraph, First, and (2) involves the demand, charge or collection of a rate, fare or charge which is

unjustly discriminatory between shippers or ports in violation of section 17. Swift & Co. *v.* Gulf and South Atlantic Havana S.S. Conference, 215 (225).

Contentions of conference carriers urged to prove detriment to the commerce of the United States (if dual-rate contract routing restriction is not approved) that barges will be damaging to their business, but that their service 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 transportations 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 is a detriment to commerce in the long run. Id. 226.

Dual-rate contract obligation requiring shippers to offer conference members all cargoes to Cuban ports, including those originating at inland or river ports not served by the carriers, is inconsistent with the decision in Contract Routing Restrictions, 2 U.S.M.C. 220. The use of barge transportation in the instant case as opposed to ocean-going, deep-draft ships in the earlier case does not provide any distinction relevant to the existence of shipper and port discrimination under section 15 as interpreted in the Contract Routing case. Since the contract obligation herein has the effect of eliminating St. Louis as a port for ocean cargoes which can be put on barges there, the obligation unjustly discriminates against the port of St. Louis and is unfair to potential shippers therefrom who have cargo suited to barge transportation. The same facts insofar as they create discrimination against shippers and ports also involve the demand, charge or collection of a rate which is unjust in violation of section 17 by compelling shippers to pay rates based on shipments from the ports served by the carriers instead of rates from ports and by transportation methods chosen by shippers. Id. (227, 228).

Performance of an exclusive-patronage contract, during a time when the carrier unjustly discriminated against a shipper in the matter of cargo space and gave undue and unreasonable prejudice or advantage to particular persons, was not a valid excuse for nonperformance of obligations under sections 14 and 16 of the Act. The performance of the contract was the very act which constituted violations of the sections. Such conduct had previously been held improper in the proceeding. There can be no question of inequity to the carrier in such a case. It is the excluded shipper who has the equities on his side, not the favored shipper nor the discriminatory and preference-giving carrier. Philip R. Consolo *v.* Flota Mercante Grancolombiana S.A., 262 (270).

Until carriers agree to put rate differentials into effect and to tender shippers exclusive patronage contracts, the "arrangement" is a trade practice which must be distinguished from an agreement. When cotton shippers requested a contract and the conference agreed to offer them rate differentials and exclusive-patronage contracts, agreements came into being. If such agreements violate any provision of the Shipping Act, operate to the detriment of United States Commerce, or are unjustly discriminatory or unfair as between carriers and shippers, they may be disapproved. If the "practice", "system", or "arrangement" resulting from such agreements violates any provision of the Act, reparations may be awarded under section 22 for the injury, if any, caused by the violation. Isbrandtsen Co., Inc. *v.* States Marine Corp. of Delaware, 422 (434).

Where a dual-rate contract, similar to that reviewed by the Supreme Court in *Isbrandtsen*, was requested by the shippers themselves, there was no substantial nonconference liner competition, and no carriers in independent nonconference liner service were complaining, the arrangement was not unjustly discriminatory or unfair between shippers and carriers, was not retaliatory, did not stifle outside carrier competition, and did not violate the Act. When, in addition, the rate differentials were not discriminatory or unfair or detrimental to the commerce of the United States or in violation of the Act, such an arrangement does not operate to the detriment of the commerce of the United States, and the conference agreements will not be disapproved. Moreover, "systems and rates" under the agreement are not unduly and unreasonably prejudicial and disadvantageous to persons in violation of section 16 and are not unjustly discriminatory between shippers and unjustly prejudicial to exporters in violation of section 17. Id. (444, 445).

—Effect of Public Law 85–626

Where a dual-rate conference agreement did not extend to inland ports not served by conference members, and an attempt was made so to extend it for the first time on July 10, 1958, by a conference "interpretation" and, subsequently, by a modification of the agreement, the dual-rate system covering cargo originating from inland ports was not "in use" on May 19, 1958, and thus is not protected by the amendment of section 14 contained in Public Law 85–626. Swift & Co. v. Gulf and South Atlantic Havana S.S. Conference, 215 (229).

The dual-rate system has never been held to be illegal in all circumstances. As a result of the Supreme Court's decision in *Isbrandtsen*, the Board must make precise findings as to the intent and effect of the arrangement, which findings are essential to a judicial determination of a system's validity under the Act. The effect of the amendment of section 14 by Public Law 85–626 was to authorize the continuation in force of any dual-rate arrangement in use by members of a conference on May 19, 1958, which conference was organized under an agreement approved under section 15, unless and until the Board disapproved or modified the arrangement. Isbrandtsen Co., Inc. *v.* States Marine Corp. of Delaware, 422 (435–443).

—Retaliation

The extension by a shipping conference of a dual-rate system to inland ports not served by conference members is in violation of section 14 where it is shown that it was used as a predatory device for the purpose of stifling competition by nonconference carriers. Swift & Co. *v.* Gulf and South Atlantic Havana S.S. Conference, 215 (229).

Isbrandtsen (356 U.S. 481) does not apply only to dual-rate obligations which stifle "independent non-conference common carrier or berth operations". The language of the decision is not limited to such carriers. The decision referred to "stifling the competition of independent carriers". The sole qualification is found in the word "independent". This means any carrier not a conference member. A contract carrier carrying cargo by barge meets this description. Moreover, no provision of the Act or of the Supreme Court's discussion of the Isbrandtsen case makes the direction or origin of cargoes a significant factor in interpreting the law. Extension of dual-rate system to inland ports not served by conference members violates section 14—Third of the Act. Id. (229, 230).

—Stability of Rates

Stability of rates is not an end in itself. It is a significant factor in upholding a dual-rate system but not a justification for otherwise discriminatory or unfair

The duty of the carrier under the Harter Act and the Bills of Lading Act to issue bills of lading, together with preparations of bills of lading by forwarders, does not make the forwarders agents of the carriers. The duty of the carriers is accomplished by the issuance of the original bill of lading and additional copies are prepared for use of the shipper, ordinarily at the shipper's expense, and forwarders are not employed by the carriers to perform this function. Id. (348).

Forwarders' contentions that brokers are not persons subject to the Act and that the Board has no authority to establish definitions for "broker", "brokerage", or "brokerage service" are based on the erroneous premise that forwarders, in relation to carriers, are brokers. Id. (358).

Where forwarders' charges vary from shipper to shipper for identical services, some shippers receive services free or at nominal charges, and in billing for accessorial charges, such as insurance and carting, most New York forwarders (who constitute the majority) follow a practice of disguising markups, the forwarders' practices are prima facie discriminatory and thus unreasonable in the absence of justification. Failure to offer any justification cannot be excused on the ground that a confidential relationship exists between forwarders and their shipper clients. Id. (359).

Performance by a freight forwarder of forwarding services free to the shipper, with concurrent receipt by the forwarder of brokerage from the carrier, constitutes an indirect rebate, and there is distinction in degree only between furnishing services free, at nominal charges, or lower than cost. The practices of some carriers in the foreign export trade of performing forwarding services free for shippers, and for forwarders, constitute direct rebates. Id. (360, 361).

Arrangements between forwarders under which a forwarder at one port who controls the routing of a shipment refers that shipment to a forwarder at an outport, the latter completing the forwarding services, brokerage and other fees being divided between the two, are cooperative working arrangements requiring approval under section 15. Likewise, arrangements between forwarders and carriers under which carriers complete the forwarding services at outports are cooperative working arrangements and must be filed with the Board. Id. (361, 362).

Since the Board cannot regulate entry into the business of freight forwarding, suggestions that only independent freight forwarders be permitted to operate cannot be given effect. Id. (365).

Although suspension or cancellation of freight forwarders' registration numbers does not require notice and hearing since the numbers do not constitute licenses to do business, but are issued to insure that those engaging in the business are known to the Board, notice and opportunity to be heard should be accorded before suspension or cancellation. Id. (365).

Registration will be confined to the issuance of only one registration number to a particular forwarder, or only one to a group of forwarders under common control. The obvious possibility of discrimination requires this procedure. Id. (365).

The rule relating to the billing practices of freight forwarders is designed to prohibit the assessment of disguised markups in all instances shown in the record to have resulted in violations of sections 16 and 17. Id. (365).

The rule requiring the filing of agreements between a freight forwarder and another freight forwarder or carrier or other person subject to the Act is a restatement of the requirements of section 15. Id. (366).

FREE TIME. See Terminal Facilities.

—In general

The argument that denial of section 805(a) permission would force a subsidy applicant to breach its contract to carry ore or to abandon its subsidy application is a pristine example of an "operation boot strap". The requirements of statutes are not subversive to the provisions of private contracts. T. J. McCarthy S.S. Co.—Sec. 805(a) Application, 3 (4).

The Merchant Marine Act of 1936 contains no limitation or directive authorizing the Board to consider the impact of its decision on land or air transportation of any kind. Waterman S.S. Corp.—Sec. 805(a) Application, 115 (133, 134).

Permission was granted under section 805(a) of the Merchant Marine Act of 1936 to charter and subcharter certain vessels for operation in the intercoastal trade where the rates appeared reasonable, no unfair competition to competing operators appeared to exist and no prejudice to the objects and policies of the Act had been shown. Id. (134).

—Agency relationship

Subsidy applicant was granted permission under section 805(a) of the Merchant Marine Act of 1936 to continue agency relation with an affiliate operating vessels in the intercoastal service where no unfair competitive advantage was shown to exist. Waterman S.S. Corp.—Sec. 805(a) Application, 115 (135).

—Competition to domestic operators

Earlier decision (5 FMB 666) denying section 805(a) permission for subsidy applicant to continue to engage in bulk service on the Great Lakes will be modified to permit continuation of ore and coal trades through 1961. Termination of the applicant's ore and coal business would result in little benefit to the primarily domestic intervenors and modification of the earlier decision would not be prejudicial to the objects and policy of the Act. T. J. McCarthy S.S. Co.—Sec. 805(a) Application, 3 (4, 5).

While applicant's proposed service between California and Hawaii after 1962 was in excess of its grandfather rights, the domestic operator had withdrawn a vessel from the service with the result that the vessel capacity is far less than the projected surface passenger movement between California and Hawaii for both 1962 and 1965. Thus granting permission to applicant to carry no more than 6,000 passengers and 3,320 L/T of cargo in 1963 and thereafter would not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal trade. American President Lines, Ltd.—Hawaii Passenger Service, 6 (13).

Where carriers only commenced exclusively domestic services after a section 805(a) application was filed, no question of unfair competition is present. Waterman S.S. Corp.—Sec. 805(a) Application, 115 (121).

Under section 805(a) of the Merchant Marine Act of 1936 unfair competition to an existing service does not result where the new service [container vessels] offered is needed to meet the demands of shippers even though the existing service [break-bulk vessels] has excess capacity and may suffer from the effects

of the new competition. The suffering is not a source of unfairness. The new service proposes to meet the need and the existing service does not. Id. (124).

Under section 805(a) of the Merchant Marine Act of 1936 no unfair competition to an exclusively coastwise operator results where additional service is needed to provide regular and adequate service in the trade, the coastwise carrier has operated at substantial capacity one-way notwithstanding the operation of the additional service, the coastwise operator does not provide reefer space and the coastwise operator will not commit an additional available vessel to the trade on a permanent basis, unless there is sufficient return cargo to make it attractive. The granting of section 805(a) permission in the above circumstances would not be prejudicial to the objects and policy of the Act. Id. (126, 127).

Container service of affiliate of section 805(a) applicant from New Orleans to New York is not needed where the combined tonnage carried by it and an exclusively coastwise operator in 1958 was lower than that carried by the latter alone in 1957, few shipper witnesses indicated they were switching over to the affiliate or had any strong preference for its service, and to the extent service is needed, the domestic operator claimed it would extend its Seamobile service. Id. (128, 129).

Under section 805(a) of the Merchant Marine Act of 1936 no unfair competition to an exclusively coastwise operator results where such operator does not have the physical capacity to carry all of the traffic now moving in the trade and the affiliate of the 805(a) applicant has generated and served a substantial demand for its new service. Id. (130–132).

Facts showing that intervenors' ships were not in domestic intercoastal or coastwise service and that their charters permitted international operations are not responsive to the statutory requirement that the objector is operating "exclusively" in coastwise or intercoastal trade. States Marine Lines, Inc.—Sec. 805 (a) Application, 378 (384).

—Diversion of subsidy

The prohibition in section 805(a) of the Merchant Marine Act of 1936 against direct or indirect diversion of money or property used in foreign trade operations, for which a subsidy is paid, into coastwise or intercoastal operations requires more than threats and speculations as to such use for domestic operations by an affiliate of an applicant for subsidy to make the prohibition effective. As to commingling of subsidy and other funds and the use of subsidy money for nonsubsidy purposes, the Board will see to it that no diversion of subsidy occurs and that requirements on applicants under any loan agreements are separate, distinct, and above those required for subsidy. Waterman S.S. Corp.—Sec. 805(a) Application, 115 (133).

—"Domestic intercoastal or coastwise service"

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 intervenor could enter the service purely for the purpose of affecting determination under the section. Voyages prior to the filing of an application for section 805(a) permission must be considered as the basis for determination of exclusively domestic status; otherwise an intervenor could gain such status merely by announcing a prospective confining of his operations to domestic ports, thus preventing 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. Waterman S.S. Corp.—Sec. 805(a) Application, 115 (121, 122).

A single foreign call as much as 4 years earlier does not deprive a weekly

North Atlantic/Puerto Rico service of its exclusive coastwise status. Nor do calls at Puerto Rico by vessels in an operator's North Atlantic/Venezuelan service deprive the separate North Atlantic/Puerto Rico service of its exclusively domestic character. Id. (123).

—"Fundamentally entitled" doctrine

Even if certain carriers qualified as exclusively domestic operators in their Gulf-Puerto Rico services, the "fundamentally entitled" doctrine was not applicable. The doctrine will not be extended to deny continuation of an exclusively domestic service by a subsidy applicant where he proposes to operate such service separate from his subsidized service. Waterman S.S. Corp.—Sec. 805(a) Application, 115 (122).

—Grandfather rights

Where carrier in 1935 provided service between California and Hawaii by two ships which operated between California and the Far East and also by five ships which served San Francisco and Hawaii in connection with a service from New York to the Far East, grandfather rights were not limited to the service provided by the two ships, but included service provided by the five ships operating in the New York-Far East service. The fact that 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 vessels in the transpacific service. American President Lines, Ltd.—Hawaii Passenger Service, 6 (9).

Grandfather rights, under section 805(a), were not abandoned in circumstances where a steamship line called at Hawaii with only one of its first six postwar sailings, there was a lapse of 45 days between the first and the second call, and the other five voyages were devoted to urgent postwar needs of carrying displaced persons, repatriates and other passengers to the Far East. Id. (10).

In disposing of the question of section 805(a) grandfather rights, the Board is 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. Id. (11).

Applicant contended that the limitation on its grandfather rights between California and Hawaii was the space left available upon completion of its transpacific bookings, rather than the number of voyages and passengers and cargo actually carried 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. The Board found that subject to the limit of passengers and cargo carried in 1935 and the number of voyages in 1935, the service proposed by applicant was in substantial parity with that maintained by it or its predecessor in 1935. Id. (11).

Under section 805(a), grandfather "rights" (as distinguished from "permission") to participate in the intercoastal trade arise by virtue of the operator's activities in 1935, and since they constitute 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. American President Lines, Ltd.—Hawaii Passenger Service, 95 (96).

Grandfather rights under section 805(a) entitle holders of such rights to substantial parity of operations during the base year 1935. Substantial parity

cannot be equated with growth and a right to maintain the same position in relation to increased volume of travel. Id. (98).

Provision in Motor Carrier Act (section 206(a)) prohibiting the Interstate Commerce Commission from limiting a carrier's rights to add to equipment and facilities as the development of the business and the demands of the public require, which provision has been interpreted by the courts as denying a purpose to freeze the service to its exact status as the base year or precise pattern of prior activities, is not applicable to section 805(a) of the Merchant Marine Act of 1936, otherwise the omission of similar language from the latter Act would be meaningless. The Board will not restore the meaning of omitted words by its decisions. The legislative history of section 805(a) of the Merchant Marine Act of 1936 shows the purpose of the section was to protect those operating exclusively in the coastwise or intercoastal service from the subsidy-aided competition and to allow those who receive operating-differential subsidy aid to continue the coastwise or intercoastal service they were giving in 1935. 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 coastal and intercoastal operators, but only under other parts of section 805(a). Id. (98, 99).

Claim to grandfather rights under section 805(a) as alleged successor in interest is not supported where good will only was purchased for a 10-year period, the predecessor withdrew from the trade, no ships were transferred to or operated by the successor, and no increase in the successor's level of operations resulted from the so-called acquisition. The predecessor's service was abandoned. Waterman S.S. Corp.—Sec. 805(a) Application, 115 (120).

Applicant under section 805(a) of the Merchant Marine Act of 1936 has grandfather rights although the deadweight bale cubic of the vessels presently serving the trade has increased and reefer service has been added since the grandfather clause cannot be so strictly construed as to permit absolutely no flexibility in equipment. Id. (120).

Grandfather rights under section 805(a) of the Merchant Marine Act of 1936 were not destroyed where a break in service occurred to permit conversion of vessels from break bulk to trailerships in order to survive in the trade, there was no intention to abandon the service, the vessels were earmarked for the service and were not used in any other, and the conversion was a means to the continuation of the service. However, a break of over 2 years which was not beyond the control of the carrier and which was not essential in the improvement of its future coastwise service was an abandonment of grandfather rights. Id. (127, 128).

—Intervention and hearing

A subsidy applicant, seeking section 805(a) permission for an associate to operate a vessel in the domestic trade, sustained its burden of proof when it showed that neither it nor any affiliate or subsidiary solicits cargo for the vessel, nor takes any from the vessel, that no subsidy can be diverted and that no advantage or preference could accrue to itself or to its associate. Thereafter the burden of proving unfairness and prejudice rested on the intervenor. The same burden has been placed on an intervenor in claiming protection of the "purposes and policy" clause. States Marine Lines, Inc.—Sec. 805(a) Application, 378 (382).

—Military cargo

Application under section 805(a) of the Merchant Marine Act of 1936 for one voyage to transport military cargo at the request of the Military Sea Transport

Service was granted where there would be no departure from the normal schedule of the vessel involved, MSTS was unable to negotiate transportation of the cargo by other lines, intervenor offered loading on October 15 and 16 but MSTS attributed military importance to a loading on October 14 and intervenor did not object at the hearing to the lifting by the applicant on October 14 of the one cargo involved. Pacific Far East Line, Inc.—Sec. 805(a) Application, 153.

—Prejudice to objects and policy of the Act (See also Competition to domestic operators, infra, and Single voyages; unopposed applications, supra)

Since the record demonstrated that without the proposed carryings of a vessel to be added to applicant's California-Hawaii service in 1963 and thereafter (resulting in service in excess of grandfather rights) there would be insufficient capacity to carry the potential surface passengers, the proposed service would not be prejudicial to the objects and policy of the Act. American President Lines, Ltd.—Hawaii Passenger Service, 6 (13).

To deprive the domestic water-borne commerce between the Gulf and Puerto Rico of an operator who has provided shippers with efficient service for a long time by denying section 805(a) permission might well be prejudicial to the objects and policy of the Merchant Marine Act of 1936; granting such permission is therefore not prejudicial to the objects and policy of the Act. Waterman S.S. Corp.—Sec. 805(a) Application, 115 (122).

To deny section 805(a) permission would be prejudicial to the objects and policy of the Merchant Marine Act of 1936 where shippers need and rely upon the service provided (containership operation), the service is essential to a solution of Puerto Rico's terminal problems and the operation is more efficient than other service available and tends to reduce operating costs. Id. (125).

Where the exclusively domestic operator has the capacity and ability to provide adequate service now and in the foreseeable future, section 805(a) permission should be denied. Otherwise, prejudice to the objects and policy of the Act would result. Id. (129).

Grant of permission under section 805(a) of the Merchant Marine Act of 1936 to a subsidy applicant to engage in a domestic trade is not prejudicial to the objects and policy of the Act where the applicant has expended large sums of money to convert vessels for use in the trade, and the converted vessels represent a forward step in meeting the needs of shippers, increasing efficiency and reducing cost. Denial of permission would be prejudicial because an operator not already subsidized would not consider spending money to improve his vessels used in the domestic trade if he knew that if he later should seek operating subsidy aid he would have to give up his coastwise service, even though adequate capacity in meeting the needs of shippers was not otherwise available. Id. (132).

In considering the question of whether the grant of section 805(a) permission would be prejudicial to the objects and policy of the Act, the shipping public's need for the service, and overtonnaging of the trade with consequent diminution of the value of virtually monopolistic service in the trade being provided by intervenors, are not relevant. Preservation of a monopoly is not an object or policy of the Act. States Marine Lines, Inc.—Sec. 805(a) Application, 378 (383).

The objects and policy of the Act, in the face of a claim by intervenors that they will transfer a ship foreign if there is overtonnaging, do not call for denial of a section 805(a) application, so that intervenors may operate a ship instead. Id. (383).

—Single voyages; unopposed applications

Section 805(a) permission was granted for subcharter of a vessel for one intercoastal eastbound voyage carrying general cargo, where no one objected; no other vessel could be obtained for the sailing in question; and it was found that no unfair competition would result to anyone operating exclusively in the coastwise or intercoastal trade and that there would be no prejudice to the objects and policy of the Act. Farrell Lines, Inc.—Sec. 805(a) Application, 1.

Application for permission under section 805(a) for the operation or charter of tanker vessels in the domestic intercoastal or coastwise service to carry petroleum products was granted, retroactively for a 6-month period and prospectively, where no operating or traffic connection between the applicant and the coastal operator existed or could develop, an important industrial operation otherwise would be seriously handicapped, specialized and rigidly controlled cargo space was required and the subsidy operator could not divert cargo from the operation as its vessels were not equipped for the carriage of liquid commodities in bulk. American President Lines, Ltd.—Sec. 805(a) Application, 59 (61, 62).

Application for permission under section 805(a) of the Merchant Marine Act of 1936 to charter a vessel for one voyage between the west coast of the United States and British Columbia and the Hawaiian Islands, with option for a second voyage was granted where no one appeared in opposition after due publication of notice and the vessel was required for the time involved. Pacific Far East Line, Inc.—Sec. 805(a) Application, 65.

Application for permission under section 805(a) of the Merchant Marine Act of 1936 for single voyage to carry lumber eastbound was granted where no one appeared in opposition after due publication of notice, no other suitable vessel could be obtained, and the normal pattern of scheduling in the service would not be increased. Moore-McCormack Lines, Inc.—Sec. 805(a) Application, 67, 69.

Application under section 805(a) of the Merchant Marine Act of 1936 for single voyage carrying general cargo from Hawaii and California ports to Gulf ports was granted where no one appeared in opposition after due publication of notice, the vessel originally intended for use had been damaged and the vessel proposed to be used was the only one in position to satisfactorily perform the voyage. Moore-McCormack Lines, Inc.—Sec. 805(a) Application, 101.

Permission under section 805(a) of the Merchant Marine Act of 1936 granted to subsidy applicant to continue operation of a coastwise service from Pacific coast ports to Puerto Rico where only limited service would otherwise be available, shippers are dependent on applicant's service, ocean shipments are the life line of Puerto Rico, and no one opposed continuance of the service. No unfair competition or prejudice to the objects and policies of the Act would result. This includes permission for continuation of agency arrangements between applicant and its subsidiary companies in connection with such service and permission for continuation of the interest in applicant corporation of its parent corporation and the interlocking of their officers and directors. Waterman S.S. Corp.—Sec. 805(a) Application, 109 (112).

Permission under section 805(a) of the Merchant Marine Act of 1936 was granted to subsidy contractor for continuance of certain intercoastal and coastwise services by an associate of the contractor, where the said services had previously been authorized by the Board, no one opposed their continuation, and no unfair competition or prejudice to the objects and policies of the Act would result. American Export Lines, Inc.—Sec. 805(a) Application, 172.

Permission under section 805(a) of the Merchant Marine Act of 1936 was granted to subsidy operator for use of one of its vessels under time charter to

The Board has authority to require every common carrier by water in the foreign commerce of the United States to file schedules of passenger fares and charges, and to file reports with respect to persons carried free or at reduced rates. This authority is derived from section 204 of the Merchant Marine Act of 1936, section 21 of the Shipping Act of 1916, and section 105(5) of Reorganization Plan No. 21 of 1950, and the regulations are adopted to aid in enforcing sections 16, 17, and 21 of the Shipping Act. Filing of Passenger Fares in Foreign Commerce of U.S., 407 (408, 409).

PORT EQUALIZATION. See Proportional Rates.

PORTS. See Agreements under Section 15; Contract Rates; Proportional Rates; Terminal Facilities.

PRACTICE AND PROCEDURE.

—Investigations; notice of violations

The Board's order of investigation states the issues, and the examiner's ruling granting discovery and production of documents 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 this stage neither the Board nor its staff is obliged to draw an indictment. It is sufficient that before any affirmative proof of an alleged wrongdoing is presented, respondents be given a fair and adequate notice of what violations of the 1916 Act they will be charged with and an opportunity to defend against them. Unapproved Section 15 Agreements—Spanish/Portuguese Trade, 103 (106).

—Petitions to intervene

Petition to intervene and reopen the record filed three months after submission of the case to the Board was denied under Rule 5(n) of the Rules of Practice and Procedure. Waterman S.S. Corp.—Sec. 805(a) Application, 115 (135).

—Petitions to reopen record

Petition to reopen the record after recommended decision was denied where the evidence sought to be adduced did not relate to anything done or existing during the period of time which was the subject of investigation of violations of section 16 of the Shipping Act of 1916. Misclassification and Misbilling of Glass Articles, 155 (166, 167).

—Prehearing discovery

Examiners' directives for the production of documents pursuant to Rule 12(k) are authorized by the 1936 Act, even though the investigation is initiated pursuant to the 1916 Act. Section 204(a) of the Merchant Marine Act of 1936 transferred to the 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) of 1936 Act authorized the Commission to "adopt all necessary rules and regulations to carry out the powers, duties, and functions vested in it by this Act", which included Shipping Act powers. Investigation of violations is a major function, power, and duty of the agency administering the Shipping Act. Section 104 of Reorganization Plan No. 21 of 1950 transferred to the Federal Maritime Board (established in section 101 thereof) the regulatory functions of the Maritime Commission under the Shipping Act of 1916 and by section 105 of the Plan 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". Unapproved Section 15 Agreements—Spanish/Portuguese Trade, 103 (104 105) ; Unapproved Section 15 Agreements—Japan-Korea-Okinawa Trade, 107.

Power to direct the production of documents in the manner prescribed by Rule 12(k) of the Board's Rules of Practice and Procedure is impliedly contained in the Shipping Act of 1916 as a necessary adjunct to the powers vested in the Board by that Act to conduct administrative proceedings, and section 22 of the 1916 Act authorizes the Board to investigate any violations of the Act's provisions. Rule 12(k) of the Board's Rules of Practice and Procedure was adopted under the Board's rule-making power, as expressly vested in the 1936 Act and as impliedly vested in the 1916 Act. Id. (105) ; 107.

"Good cause" for the direction to produce documents before the Board is shown where the order of investigation reflects that the Board had reason to believe that respondents had entered into and carried out agreements in violation of the Shipping Act and the ground for the directive to produce documents is that such documents are necessary and relevant to the preliminary stages of the inquiry. Id. (105) ; 107.

Public counsel, under the rules of the Board, is a "party" and may invoke Rule 12(k). Id. (105) ; 107.

—Production of documents located overseas

The Board has power to require the production of documents physically located outside the United States in aid of the investigation of violations of provisions of the Shipping Act, since the Act proscribes certain practices and agreements whether accomplished in the United States or abroad and imposes in the Board the responsibility of regulating common carriers by water in foreign commerce regardless of their nationality. Unapproved Section 15 Agreements—Spanish/Portuguese Trade, 103 (106) ; Unapproved Section 15 Agreements—Japan-Korea-Okinawa Trade, 107.

—Rule making

The Board has authority to institute a rule-making proceeding per se, under section 4 of the Administrative Procedure Act. Freight Forwarder Investigation, 327 (358).

PRACTICES. See Forwarders and Forwarding ; Terminal Facilities.

PREDATORY DEVICE. See Contract Rates, Retaliation.

PREFERENCE AND PREJUDICE. See Absorptions ; Contract Rates ; Proportional Rates ; Rates, Filing of ; Terminal Facilities.

PROPORTIONAL RATES. See also Discrimination.

Proportional commodity rates which are unduly prejudicial to a particular port and which unduly prefer another port violate section 16 of the 1916 Act. A port is a "locality" within section 16. It is immaterial that the rates are for through service of shipments loaded in trailer vans at interior origins and not off-loaded at the port from which shipped. From the standpoint of service which it performs, the carrier's status is no different from that of any other ocean carrier, since it exercises no control over, nor participates in, the interior transportation. Proportional Commodity Rates on Cigarettes and Tobacco, 48 (54, 55).

Proposed rates which would establish varying charges for identical services are prima facie discriminatory and are thus unreasonable in the absence of

justification therefor. Predecessors of the Board in earlier decisions approved proportional rates which represented absorptions of inland rate differentials. 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. Id. (55, 56).

Proposed proportional commodity rates for through motor-water trailership transportation, designed to equalize costs between the ports of New York and Baltimore, are unduly preferential of the port of New York and unduly prejudicial to the port of Baltimore in violation of section 16—First of the Shipping Act of 1916, where the traffic would normally move through Baltimore, the proposed rates would operate to divert such traffic, the revenues from such traffic are substantial, there is a gradual trend of traffic away from Baltimore and toward New York under present differentials in inland rates, and the principal Baltimore carrier has found it necessary to eliminate during summer months certain direct service because of insufficient traffic. Equalization rates between ports are not justified by a showing that a new and improved type of through sea-land service would be made available when there was no evidence that shippers needed or desired such service, or that the present service was inadequate or unsatisfactory in any respect. Id. (56).

PUBLIC LAW 85-626. See Contract Rates.

RATE MAKING.

—Allocation of voyage expenses

In rate-making proceedings, where allocation of voyage expenses is necessary as between the regulated and nonregulated trades to determine the adequacy of revenue in the regulated trade, allocations made principally on the basis of ton-mile prorate formulae were proper. The use of revenue prorate formulae in the case of integrated operations in the trade to Puerto Rico and to the Dominican Republic would cause distortion of the results in the Puerto Rican trade since the revenue per ton in this trade is lower and the costs of discharge of cargo higher than in the Dominican trade. Atlantic Gulf/Puerto Rico General Rate Increases, 14 (27).

—Depreciation charges on vessels

In determining results of operations in a trade the use of depreciation charges on vessels as an item of expense, which charges were made in conformity with usual tax practices and with the Board's General Order 24, was proper since to adopt a standard based upon economic residual values as reflected by the fluctuating market values as shown in the record, would be to substitute speculation for certainty, as depreciation charges would vary with differing judgments as to possible future residual values which may be affected by unforeseen circumstances. Atlantic-Gulf/Puerto Rico General Rate Increases, 14 (29).

In rate-making proceedings, vessel depreciation charges based upon the costs of acquisition, rather than on book values maintained by the seller prior to such acquisition, were proper where the seller and purchaser dealt at arm's length and the book values maintained by the purchaser reflected the true acquisition costs of the vessels. A.T. & T. Co. *v.* United States, 299 U.S. 232, holding that the proper guide to book value of a utility's property is the cost as of the time when the property was first acquired or dedicated to the public use is also authority 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. Id. (30).

—Dominant carrier

In rate-making proceedings the dominant carrier in a noncontiguous domestic trade will be taken as the rate-making line. A carrier is by far the dominant one where its gross revenues exceed those of the other three carriers and are approximately two and a half times those of the next largest carrier. Atlantic-Gulf/Puerto Rico General Rate Increases, 14 (43).

—Operating expenses

In rate-making proceedings general operating expenses, but not depreciation expenses, incurred by a carrier during a strike are to be excluded from expenses for the year in question since the strike, a jurisdictional dispute, was unrelated to ordinary labor-management controversies. Atlantic-Gulf/Puerto Rico General Rate Increases, 14 (39).

In rate-making proceedings the expenses of a carrier incurred as a result of actions brought in Puerto Rican courts for overtime wages by stevedore foremen are properly included in operating expenses related to the carrier's Puerto Rican trade. The suits arose from a difference of opinion as to the carrier's liability for overtime payments and the resulting expense is not imporperly attributed to operating expenses on the ground that a violation of law by the carrier was involved. Id. (40).

In rate-making proceedings the charter hire paid for a vessel not included in the rate base is properly included in operating expenses, but interest paid on a vessel mortgage is a cost of capital employed which must be borne out of profits earned. Id. (41).

—Operating results—revenues

In rate-making proceedings, revenues of a carrier for the year preceding a further rate increase do not have to be restated so as to reflect actual operating results for that year during which an initial increase in rates was effective, since such operating results do not enter into projections for the future and thus would serve no useful purpose. Atlantic-Gulf/Puerto Rico General Rate Increases, 14 (39).

In rate-making proceedings, earnings of a carrier derived from interest on a mortgage on a terminal unrelated to earnings derived from a Puerto Rican service, and earnings from carrying bagged sugar and from conducting stevedoring operations resulting from a strike the expenses for which have been disallowed by the Board, are to be excluded from revenues assigned to the service. Id. (39, 40).

—Rate of return

In determining the reasonableness of rates, the fair-return-on-fair-value standard used by the Board and its predecessors will not be departed from, and the operating ratios experienced by the carriers will be rejected as a method of determining rates. A rate of return of not in excess of 7.5 percent after income taxes of the rate bases determined as set forth in the Board's findings is fair and reasonable. Atlantic-Gulf/Puerto Rico General Rate Increases, 14 (43, 44).

—Regulated and nonregulated trades—separation required

In rate-making proceedings it is the justness and reasonableness of rates in the regulated trade, not the profit accruing as a result of operations which include nonregulated service, which must be decided on the basis of the adequacy of the revenues derived therefrom, and the Board in making its determinations may adopt appropriate means of effectuating a separation of the regulated

and nonregulated portions of an integrated service. Atlantic-Gulf/Puerto Rico General Rate Increases, 14 (27).

—Statutory reserve funds

Statutory reserve funds should not be considered as property devoted to the Puerto Rican service and are not to be included in a rate base. Atlantic-Gulf/Puerto Rico General Rate Increases, 14 (33).

—Vessel and other property values

In rate-making proceedings, where the Board had before it the results of a rate increase for almost a full year and the results of a further increase for almost 6 months, property values for the purpose of calculating the rate of return will be determined as of the end of year following the first increase and the resulting rate bases will be applied to the actual operating results as determinable for that year and to the projected results for the next year. Extreme precision is not required and it is doubtful that the result of using the above method would vary substantially from the result of using average values of property employed during the first year, applying operating results for that year to the resulting figures to determine rates of return actually earned, and then to ascertain values as of the last day of the year, applying projected operating results for the next year, based on actual operations during the first 6 months of that year, to the ascertained values as of the last day of the preceding year. Atlantic-Gulf/Puerto Rico General Rate Increases, 14 (31).

For rate-making purposes the value of vessels on the domestic market at the time the rate increase is requested with adjustments to eliminate short term peaks in value, is the proper method (not weighting based on 70 percent of reproduction costs depreciated, and 30 percent of acquisition costs, depreciated; or an average of original costs and reproduction costs) for determining the reasonable value of the property being used for the public; it will not be assumed for rate-making purposes that a carrier has reproduced its vessels and 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 conclusions in prior cases disagree with the above they are expressly overruled. Id. (34, 35).

The value of nonowned property used by a carrier will not be included in rate bases since carriers are not devoting their capital to the shipping public insofar as such property is concerned; it is proper to include in allowable expenses the rental paid and other expenses of the carriers which arise by reason of the use of such property. There is no binding precedent requiring inclusion of such property in a rate base. It was error to include the value of a chartered vessel in a rate base in General Increases in Alaskan Rates and Charges, 5 FMB 486. Id. (37).

It was proper to include in carrier's rate base the net book value of Puerto Rican terminals owned by it and devoted to the Puerto Rican trade. Rentals from a building located on property adjoining one of the terminals which building occupied about one-twelfth of the area and which was leased for purposes unrelated to the Puerto Rican trade, as well as any profit realized from the operation of the terminal will be credited to the carrier's Puerto Rican service. Id. (38).

—Working capital

In rate-making proceedings, in determining a fair and reasonable allowance for working capital as an element of the rate bases, the Board will limit the

amount to that determined under Limitation 4 of General Order 31 and give no consideration to limitation 3 of that Order (clarifying General Increase in Hawaiian Rates, 5 FMB 347 and General Increases in Alaskan Rates and Charges, 5 FMB 486 (1958)). Atlantic-Gulf/Puerto Rico General Rate Increases, 14 (35, 36).

RATES, FILING OF. See also Contract Rates; Passenger Fares; Proportional Rates; Rate Making; Volume Rates.

The Board has authority to require every common carrier by water in the foreign commerce of the United States to file schedules showing rates and charges and related regulations for transporting property and to establish a system for the distribution of schedules on rates and charges and rules and regulations for the transportation of property in the foreign trade. This authority is derived from section 204 of the Merchant Marine Act of 1936, section 21 of the Shipping Act of 1916, and section 105(5) of Reorganization Plan 21 of 1950, and the regulations are adopted to aid in enforcing sections 16, 17, and 21 of the Shipping Act. Filing of Freight Rates in Foreign Commerce of U.S., 396 (397, 398).

By section 21 of the Act, the Board may require any common carrier to file with it any report or any account, record, rate, or charge pertaining to its business, and to furnish such documents in the form and within the time prescribed by the Board. The reporting requirement as to the filing of rate schedules for transporting property in foreign commerce is sustained under section 21. Id. (399).

Filing of rate schedules for transportation of property in foreign commerce 30 days before the effective date is needed for the better enforcement of the prohibitions of section 16 against giving undue or unreasonable preference or advantage and to prevent evasions of the prohibition against providing transportation at less than regularly established and enforced rates. The "regular rates" referred to in section 16 henceforth will be reported rates. Id. (399).

The purpose of the Board, vis-a-vis section 17 of the Shipping Act, in requiring the filing of rate schedules in foreign commerce 30 days before their effective date, is to aid the Board in discovering possible discriminatory rates, and require correction as it must do under section 17 before the injury is done to shippers. Id. (399).

REBATES. See Forwarders and Forwarding.

RECEIVING OF PROPERTY. See Terminal Facilities.

REGISTRATION OF FREIGHT FORWARDERS. See Forwarders and Forwarding.

REORGANIZATION PLAN NO. 21 OF 1950. See Passenger Fares; Practice and Procedure; Rates, Filing of.

REPARATION. See also Contract Rates.

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 and sues upon the discrimination caused by other shippers having to pay less or by being unjustly refused a contract rate. Discrimination depends on what the carriers do, not on loss by the complainant. Swift & Co. *v.* Gulf and South Atlantic Havana S.S. Conference 215 (230, 231).

It was error for an examiner to conclude that there was no discrimination against complainant because complainant "could not produce any documentary evidence which would show its comparative costs," where the examiner had found that enforcement of the proposed contract resulted in discrimination

against shippers (i.e. complainant) in violation of sections 15, 16, and 17. Complainant should be given an opportunity to prove its damages, and not necessarily by documentary proof. The measure of damages, if any, for the enforcement of an unlawful dual-rate system is not the difference between the freight actually paid and the sum which would have been paid. Id. (230, 231).

Where claim to reparation is based on allegation that complainant could not obtain lower contract rates because of unlawful discriminatory practices by conference members, complainant could not recover extra-freight paid after publication in the Federal Register of Board's order enjoining such practices, since from that date complainant was charged with notice of the fact that he could obtain the lower contract rates. The fact that the conference had not notified complainant of its intention to obey the order to cease and desist, is immaterial. Id. (231, 232).

The measure of damages for carrier's refusal to carry a shipper's cargo is the difference between the value of the goods at the point of tender and their value at the proposed destination, less the cost of carriage. Philip R. Consolo *v.* Flota Mercante Grancolombiana, S.A., 262 (266).

In action for reparation for carrier's refusal to carry a shipper's cargo the burden of proof is on the complainant to show cost, outturn and selling price. Id. (266).

Proof of damages deriving from carrier's failure to carry shipper's cargoes of bananas, meeting the specific standards of cost, outturn and selling price, was sufficient where: (1) witnesses were agreed on the availability of bananas in Ecuador and the existence of a market for them in the United States; (2) complainant was shown to have the resources to buy and ship bananas; (3) loading sheets showed actual purchases, and outturn sheets and liquidation sheets showed actual sales, expenses and net proceeds for each shipment by compainant on ships other than of respondent's during the reparation period; (4) the space that would have been used on respondent's ships at respondent's rates was shown; (5) costs in Ecuador were taken from actual loading sheets showing actual purchases week-by-week; (6) freight charges were supplied from respondent's records; and (7) stevedoring costs were established by testimony of banana shippers as to actual cost at New York. Id. (266, 267).

Damages by shipper for carrier's failure to carry shipper's cargoes of bananas are properly computed by establishing, from data supported in the record, a dollar figure for profit per banana stem shipped before stevedoring and freight, and by deducting from the amount of profit per voyage the freight, stevedoring and incidental administrative overhead and other expenses. Id. (267).

No interest should be allowed on an award for reparations for damages suffered by a shipper as a result of carrier's refusal to carry its cargo, since it would be inequitable to award interest on an unliquidated claim before it was due. Id. (269).

Reparations for failure to allot space to a shipper in violation of sections 14-Fourth and 16 of the Shipping Act are due for the period commencing when space was denied, not for the period commencing when the Board found that the denial of space was in violation of sections 14-Fourth and 16 of the Shipping Act, and awarded reparations to the shipper for the injury caused by such violations. Id. (270).

A carrier is not excused from payment of reparations to shipper (for failure to offer nondiscriminatory and nonpreferential service for the carriage of bananas in refrigerated compartments) because (1) it had filed a petition for declaratory relief asking the Board to determine the validity of exclusive contract carriage

and (2) the Board failed to make a timely response thereto. This is so especially where the same issue had been disposed of by the Board in a similar case, and, instead of accepting the Board's ruling for its guidance, the carrier refused to offer service and litigated the issues relying on arguments relating to the alleged differences between respondents' vessels in the two cases. It was not incumbent on the Board to give a carrier a legal opinion on the effect of its conduct upon shippers. Common carrier status is not created nor are violations of the Act nonexistent until the Board's report is served. Id. (270, 271).

The reparation period for carrier's failure to offer nondiscriminatory service for the carriage of bananas should not be extended beyond the effective date of the Board's order requiring the carrier to offer space to all qualified shippers, to the date when complainant shipper was ready to provide a cargo where there was no proof that, after the effective date of the order, the carrier refused to accept cargo and that the shipper was willing and ready to provide a cargo or that cargo had been tendered. Id. (271, 272).

The reparation period for carrier's failure to offer nondiscriminatory service for the carriage of bananas was properly computed from the date when carrier refused space on a nonpreferential basis, not from the date of offers and counteroffers by complainant shipper for special contract carriage which would make complainant a favored shipper too. Id. (272).

In measuring shipper's past damages for carrier's failure to offer nondiscriminatory service for the carriage of bananas, it was improper for the examiner to find complainant entitled to one-third of carrier's space, based on the fact that complainant was one of three qualified applicants and that other applicants were declared to be unqualified, where, when space was finally allocated, five shippers actually qualified and measurement by carrier's technical adviser showed that in actual practice over a period of time there had been an allotment to, and use by, complainant of 18.46 percent of the cubic capacity of carrier's ships. The actual experience with the respondent was a just and reasonable guide of what complainant was entitled to for the purpose of measuring his past damages. Id. (272, 273).

Once the failure to perform common carrier obligations to provide nondiscriminatory service to a shipper was shown, the burden to show a failure to mitigate the damages was upon the respondents. Respondents had failed to show any mitigating factors where they suggested that chartered ships might be used but offered no proof that suitable ones were available. Id. (273).

Where a shipper's claim for reparations under section 22 has been found to be the result of discrimination, and the damages sought are the difference between rates charged and the lower noncontract rates, plus interest, a further proceeding is not necessary and reparations will be ordered paid on the basis of the amounts claimed, with interest at the rate of 6 percent on any amounts unpaid after 60 days from the date of the order. Isbrandsten Co., Inc. *v.* States Marine Corp. of Delaware, 422 (447).

ROUTING RESTRICTIONS. See Contract Rates.

RULE MAKING. See Practice and Procedure.

SAILINGS, REGULATION OF. See Agreements under Section 15.

SECTION 804 WAIVERS.

The term "service" in section 804 of the Merchant Marine Act of 1936 embraces much more than vessels; it includes the scope, regularity, and 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. States Marine Lines, Inc.—Sec. 804 Waiver, 71 (75).

Section 804 of the Merchant Marine Act of 1936 requires only that American-flag service be determined to be essential under section 211 of the Act. To be essential, service of American-flag vessels need not be identical with service supplied by foreign-flag vessels if the same products are carried to and from the same areas. Id. (75); Isbrandtsen Co., Inc.—Sec. 804 Waivers, 89 (92, 93).

Lack of American-flag vessels of a particular type does not preclude a finding of competition by foreign-flag vessels with American-flag service under section 804 of the Merchant Marine Act of 1936 where transportation service is provided by American-flag vessels of a different type. Id. (75); Isbrandtsen Co., Inc.—Sec. 804 Waivers, 89 (92).

The existence, not the degree, of competition is the test under section 804 of the Merchant Marine Act of 1936; it is immaterial that there would be no harm to particular intervenors, or that some of them do not object, or that other carriers failed to intervene; lack of vessel to vessel competition is equally immaterial. Id. (76); Isbrandtsen Co. Inc.—Sec. 804 Waivers, 89 (93).

The Board's responsibility in connection with section 804 of the Merchant Marine Act of 1936 exists regardless of whether there are intervenors or not. Failure of anyone to intervene shows only lack of interest and does not create an inference of lack of competition. Id. (76); Isbrandtsen Co., Inc.—Sec. 804 Waivers, 89 (93).

Considering the legislative history, the primary purpose of section 804 of the Merchant Marine Act of 1936 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. The purpose was not to prohibit the use of foreign-flag vessels. The Board will not prohibit the use of foreign-flag vessels by refusing to grant waivers where the applicant can show special circumstances and good cause. Id. (76, 77).

The phrase "under special circumstances and for good cause" in section 804 of the Merchant Marine Act of 1936 calls for the exercise of the Board's discretion consistent with the declaration of policy of the Act since there appears to be no legislative history of the meaning of the phrase. Id. (78).

A special circumstance exists for waiver of the provisions of section 804 of the Merchant Marine Act of 1936 where the proposed foreign-flag vessel use will not adversely affect subsidy payments or the subsidy service and the applicant would suffer a hardship if the prohibition was enforced; and good cause is shown if the proposed vessel use will have an insignificant effect on American-flag service, if ownership or operation of the vessels under United States registry by citizens is not practicable, and there is an insufficiency of American-flag vessels of the right type to serve the purpose. Other good causes and special circumstances may exist for the granting of a waiver. Waiver of the provisions of section 804 was granted where the record disclosed that the above special circumstances and good cause were shown. Id. (78, 81); Isbrandtsen Co., Inc.—Sec. 804 Waivers, 89(93).

A request for a waiver made at a hearing but not in the application for waiver under section 804 of the Merchant Marine Act of 1936 will be acted upon outside the scope of the proceeding and will be granted in accordance with prior practice of the Board, since section 804 does not require a hearing. Id. (80).

It has been suggested by intervenors that they may inquire into the foreign-flag vessel operation of any other associates not named in the application for

waiver of section 804. The Board deals only with the application presented, that is, only with 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. Id. (80).

A waiver under section 804 of the Merchant Marine Act of 1936 will be granted for a husbanding agency where the owner of the vessels does his own solicitation, makes his own bookings and calls on the agency for clerical, mechanical or housekeeping services when the vessel is in a United States port. Id. (80).

Where a husbanding agency involved limited noncompetitive activities, had existed for a long time, and was a valuable business connection; and lighterage service operations were both necessary to the efficient use of port facilities and were local in nature, having a minimum competitive effect, special circumstances and good cause have been shown for section 804 waivers. Id. (81).

Application for waiver of the provisions of section 804 of the Merchant Marine Act of 1936 to permit the president and director of applicant company to retain substantial ownership of stock in company operating foreign-flag vessels was granted for two years subject to cancellation upon 90 days' notice where such retention would not adversely affect subsidy payments or the subsidized service, the president would suffer a hardship through the sacrifice of personal holdings, the effect on American-flag service would be insignificant, and American-flag vessels of the right type are insufficient to serve the purpose of carrying the cargo which is vital to American industry. Isbrandtsen Co., Inc.—Sec. 804 Waivers, 89(94).

A waiver under section 804 of the Merchant Marine Act of 1936 is not required to permit a subsidiary of a subsidy contractor to act as agent for foreign-flag vessel operators where no competition exists with American-flag service determined to be essential under section 211 of the Act. Waterman S.S., Corp.—Sec. 804 Application, 174 (175).

Circumstances justifying a waiver of section 804 are that the proposed foreign-flag vessel use will not adversely affect subsidy payments on the subsidized line, the applicant would suffer hardship if the prohibition is enforced, and the proposed vessel use will have an insignificant effect on American-flag service. Id. (175).

Application for waiver of section 804 of the Merchant Marine Act of 1936, to permit subsidiary of applicant to act as agent for foreign-flag vessel operator, was granted where there was no evidence that increased subsidy would be needed, the effect of applicant's foreign-flag agency operation on its regular operation would be minimal, the unsubsidized subsidiary would not receive any benefit from subsidy payment to the applicant, termination of the agency account would be a hardship to the applicant with no provable gain to any other subsidized American carrier and the possible effect on another American-flag operator was apparently so slight that such operator did not intervene in the proceeding. Special circumstances and good cause were shown for the waiver. Id. (175).

STORAGE. See Terminal Facilities.

SUBSIDIES, CONSTRUCTION—DIFFERENTIAL. [No cases]

SUBSIDIES, OPERATING—DIFFERENTIAL. See also Intercoastal Operations (Sec. 805(a)).

—In general

Letters in support of a subsidy application are admissible in evidence. Administrative agencies customarily accept letters of such type. Lykes Bros. S.S. Co., Inc. and Bloomfield S.S. Co.—Extension of Service, Route 21, 278 (285).

—Adequacy of service

In view of the provisions of sections 704 and 705 of the Merchant Marine Act of 1936 calling for the removal of Government-owned vessels from service as soon as practicable and for the development of a privately owned merchant fleet, competing Government-owned service should not be considered in reaching conclusions as to the inadequacy of service within the meaning of section 605(c) of the Act. Grace Line, Inc.—Application to Serve Haiti from U.S., 194 (196, 197).

United States-flag service in the North Atlantic/Port-au-Prince trade is inadequate within the meaning of section 605(c) of the Merchant Marine Act of 1936, where even including the carryings of a Government-owned line, overall participation by such flag vessels fell from 50% for the period 1955–1958 to 40.7% in 1959 and declined to 57% in 1958 from 64% in 1957. United States-flag service in the New York segment of the North Atlantic/Haiti trade is inadequate where New York is not the dominant port as was New Orleans with respect to other Gulf ports in another case (5 FMB 747). New York's percentage share of total North Atlantic outbound cargo in 1959 was 51.1% and appears to be declining (versus 72% in the New Orleans case), United States-flag participation in commerical cargo in liner service from New York is most recently 60.6% (versus 83%), and in the total North Atlantic trade United States-flag outbound participation is 31% and has declined the last three years (versus 61%). Id. (197).

Existing service to ports of Mobile, Ala., Gulfport and Pascagoula, Miss., and Pensacola and Panama City, Fla., is inadequate where United States-flag ships carried approximately 25% of the outbound and 37% of the inbound commercial cargo during the years 1953 to 1958; United States-flag participation has declined recently; an increase of available space on United States-flag ships will give the ports the benefit of more adequate service; and while future increases in exports are inevitably speculative, they appear to be based on tangible factors of industrial expansion, supported by some shipper demand for present service. The presence of American-flag vessels on a route is the determinative factor for showing adequacy or inadequacy of service, not foreign lines. Lykes Bros. S.S. Co., Inc. and Bloomfield S.S. Co.—Extension of Service, Route 21, 278 (284).

Where applicants proposed to extend services to East Gulf ports, service to other East Gulf ports already served by them will not be considered in determining adequacy of service to the former ports. Under such circumstances adequacy of United States-flag service should be coextensive with the service proposed. Id. (285).

Where adequacy of service to a number of ports is in issue, and the proposal is to serve all of such ports, adequacy of service will not be examined port by port, but all the ports will be considered together. Id. (285).

—Foreign-flag competition—subsidy rates

The issue in the proceeding (subsidy rates) was not to determine whether foreign-flag vessels were "substantial competitors" of the subsidy operator's vessels but whether the foreign-flag ships were engaged in "liner" operation and were therefore to be counted in the determination of the substantially and extent of foreign-flag competition for subsidy rate purposes. The Board, exercising its powers under section 204, adopted the Manual of General Procedures for Determining Substantiality and Extent of Foreign-Flag Competition to clarify the indefinite term "substantial competition" as used in section 603(b), and provided in the Manual for counting "carryings of all foreign flags engaged in liner operation." Considered in conjunction with the definition of liner service in the

Manual of Essential United States Foreign Trade Routes, clear criteria have been adopted by the Board to determine the issue of whether a foreign-flag operation is liner service or not. Thus, whether or not criteria used by the staff have been formally adopted by the Board is immaterial, and any contention that the Board acted arbitrarily or without authority in applying criteria for determining what constitutes "substantial competition" is without merit and erroneous in the light of the Manuals and the past practice of the Board in acting upon final subsidy rate recommendations for each subsidized operator. Gulf & South American S.S. Co., Inc., 386 (387–389).

Where Chinese-flag ships of a Chilean line carried in one year 49,452 tons of bulk cargo, representing 96% of the total cargo carried, because of the contracts of affreightment, the line knew well in advance that each sailing would have approximately 96% bulk utilization, and carried general cargo on the basis of last-minute convenience, the ships were not providing liner service in competition with a subsidized operator. Liner service requires operation on "a definite, advertised schedule" so that shippers of general cargo may so rely upon the operations, space availability, or ports of discharge as to permit the making of plans for deliveries in the future. Publication of the sailings of the ships was not "advertising." Id. (389, 390).

In determining whether a foreign-flag operation is liner operation a comparison of its contracts of affreightment with those of the subsidized operator, claiming the existence of competition, is significant. Where the subsidized operator's contracts specifically reserve the right to forego available bulk cargo in the event the berth nature of the service is threatened, while the foreign-flag carrier's contracts contain no such provision and emphasize the carriage of bulk cargoes, and the latter carrier was not in a position to carry significant amounts of general cargo, the foreign-flag operations will not be counted in determining the extent of substantial foreign-flag competition encountered by the subsidized operator. The carrying of a small amount of general cargo on a sailing may constitute the sailing as "liner" for the purpose of determining whether there was an existing service, but is not determinative where the issue is whether such an operation is competitive. Id (390, 391).

—Modification of contract—unprofitable operation

In passing on an application under section 606(4) of the 1936 Act for modification of an operating-differential subsidy agreement so as to relieve the operator from the obligation to maintain service on a particular route or line, the Board must take into consideration the profit projection and experience under the entire contract. The operator does not prove that it cannot maintain and operate its vessels with a reasonable profit on its investment unless it establishes that it cannot operate under the contract with a reasonable profit on its entire investment devoted to performance of the contract. The contention that the "investment" referred to in section 606(4) relates only to a specified "service, route, or line" is rejected. Grace Line, Inc.—Contract Modification, Route 33, 82 (83).

Section 211 of the Merchant Marine Act of 1936 indicates that the Act contemplates subsidy contracts covering American-flag service on routes and lines which may be unprofitable. Such service could not be obtained if section 606(4) of the Act were interpreted as granting relief when a profit cannot be obtained in one particular trade route. The Act must be construed to give meaning to the over-all policy sought to be achieved. Congress did not intend to guarantee a subsidized operator a profit on each trade route, nor on the whole contract. Id. 84.

Section 211 (a) and (b) of the Merchant Marine Act of 1936 shows plainly that a service or route may be determined to be essential to the foreign commerce of the United States even though operation on the service or route will result in substantial losses, if such losses are not disproportionate to benefits accruing to such foreign commerce. Id. (85).

The words "upon his investment" in section 606(4) should be construed to mean upon the investment under the entire 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." These words must be construed to mean the investment under the entire 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. The Board construes 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). Id. (85, 86).

Interpreting "service, route, or line" as "services, routes, or lines" and contracting for more than one service, route, or line in a single contract, permits the averaging for recapture purposes of profits and losses from all services, routes, and lines 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 and thus assists in obtaining service on the less profitable services, routes, and lines. Id. (86).

Under Article II–32, Part II (modification or rescission clause) of the subsidy contract, 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 this is the correct construction of Article II–32. Id. (87).

Modification of an operating-differential subsidy contract to permit discontinuance of operation on a particular trade line was granted with conditions where the applicant therefor had suffered and would continue to suffer losses on its investment on the line and no American shipper or exporter had objected, even though the applicant had no right under section 606(4) to such a contract modification. Id. (87).

—Undue advantage or prejudice as between citizens

Finding of inadequacy of service disposes by inference of the issue of whether additional vessels should be operated in the service in question and the question of whether there would be undue prejudice against an existing operator. Lykes Bros. S.S. Co. and Bloomfield S.S. Co.—Extension of Service, Route 21, 278 (286).

TARIFFS. See also Agreements under Section 15; Classifications; Terminal Facilities; Volume Rates.

Tariffs must be read in whole and not in part. An item in a port terminal tariff which provided that the tariff was notice to all concerned that the rates, rules and charges apply to all traffic and to arrangements with shippers takes precedence over another item reserving to the port the right to make agreements with shippers concerning rates and services. Storage Practices at Longview, Washington, 178 (182).

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. The proper test is the "meaning which the words used might reasonably carry to the shippers to whom they are addressed." Use in a few isolated instances does not contradict the essential characteristics of the property. Raymond International, Inc. *v.* Venezuelan Line, 189 (191).

Where two commodity rates are adequately descriptive the one making the lower charge is applicable. Ambiguities should be resolved against the carrier writing the tariff. Misclassification of Diatomaceous Earth as Silica, 289 (296).

Establishment of a distribution system for tariffs in foreign commerce is necessary for the enforcement and administration of provisions which prohibit false classification of property under section 16 and the demand of unjustly discriminatory rates under section 17. Where shippers have not had written tariff descriptions of commodities to read and compare it is virtually impossible to establish knowing and willful misclassification where closely related commodities are involved. Distribution of tariffs will enabel shippers to detect allegedly discriminatory rates and to protect themselves by application to the Board which can alter the rates to the extent necessary to correct unjust discrimination. Filing of Freight Rates in Foreign Commerce of U.S., 396 (399, 400).

TERMINAL FACILITIES. See also Tariffs.

The practices of a port terminal in allowing free time for cargo to occupy wharf premises or storage facilities in excess of that fixed by its tariff, which free time varied greatly from shipper to shipper and from commodity to commodity, so as to afford the port an opportunity to provide unequal treatment of shippers and preferred treatment of certain classes of cargo, are clearly unduly prejudicial and preferential in violation of section 16, and unjust and unreasonable in violation of section 17 of the Shipping Act, notwithstanding there were no complaints and no competition between terminals was involved. Storage Practices at Longview, Washington, 178(183, 184).

Where carrier entered into arrangement with a firm, ostensibly for husbanding and booking agency services, but, in fact, paid the firm substantial amounts of money to provide free or low cost storage and other terminal services exclusively for shippers which the firm solicited for the carrier, and normally such shippers would have had to buy such terminal services from the port from which the firm rented space, the carrier gave undue preference and advantage to traffic through the port and subjected other ports to undue prejudice and disadvantage, and allowed shippers or consignees to obtain transportation of property at less than the regular rates then established by the carrier by an unjust or unfair means, contrary to requirements of section 16 of the Shipping Act. The preference and advantage to the one port and the prejudice and disadvantage to other ports was "undue" because substantial economic advantages were available only through the firm and only at the one port. The substantial economic advantage was the unfair means. It was immaterial that the firm acted independently in furnishing services because the carrier had a duty to terminate its payments when it knew how they were being used. The further facts that the carrier collected full freight from the shipper or consignee and paid the port compensation properly due to it for acting as terminal agent were also immaterial, since indirect actions and actions "in conjunction with" others are also prohibited by section 16. Storage Practices at Stockton and Oakland, California, 301 (311, 312).

A person is furnishing warehouse or other terminal facilities in connection with a common carrier by water who receives custody of property from such carrier or its agent after unloading at dock or pier, and keeps custody within

the geographical confines of an ocean terminal facility until relinquished to an inland carrier or to the consignee. The terminal aspect of handling property is not complete at the time goods are delivered by a port furnishing terminal facilities to a lessee of its assigned warehouse space. Id. (313, 314).

Firm which rented warehouse space; offered warehouse and terminal services to potential clients; contracted for the lessor's terminal services for its clients; and received consignees' cargoes from a carrier under arrangement with the carrier which, in fact, paid for most of the services, was carrying on business of furnishing warehouse or other terminal facilities, was acting "in connection with a common carrier by water", and was, therefore, an "other person subject to this Act" within the definition in section 1 and as the term is used in the second paragraph of section 16 of the Shipping Act. Id. (314).

Practices of a firm were related to and connected with the receiving, handling, storing and delivery of property where the firm received property unloaded from a carrier's ship, handled the property by having it moved to the firm's assigned space in the terminal area, stored the property and performed further handling operations on the property and delivered it to an inland carrier. These practices involve services related to the provision of warehouse and terminal facilities. Id. (314, 315).

Firm which, under an arrangement with a common carrier, in essence solicited shippers by offering "free storage", which made noncompensatory charges for its terminal services, and which received from the carrier amounts not remotely commensurate with its services, all with the result that shippers were the beneficiaries of the carrier's payments to the firm and the carrier was the recipient of the shippers' business, gave economic preference, as an "other person" subject to the Act, to the locality and to shippers using the carrier at the port. As a result other localities and other shippers were subjected to prejudice and disadvantage and shippers through the port were allowed to obtain transportation at less than the carrier's established rates. Id. (315).

Operator of rented terminal space which represented that it would perform certain services, concealing that the terminal operator performed the services pursuant to a tariff, and absorbing on behalf of shippers, the normally applicable warehouse service costs with payments made by a carrier ostensibly but not actually, for husbanding and booking agency services, used unjust and unfair means of allowing, and indirectly allowed, its shipper-clients to obtain transportation for property on the carrier's ships at less than regular and established charges. Id. (316).

Assumption of custody by warehouse or storage operator over shippers' and consignees' property without executing receipt therefor, or being named agent in any shipping documents, and assertion of power to direct terminal operator from which it rented space as to movement of and services to the property without furnishing proof of its interest therein, constituted failure to establish just practice relating to receiving, handling, storing, and delivering of property within the meaning of section 17. Id. (316).

Where firm rented space from port to provide warehousing and distributing services; insulated its clients from port's warehouse tariff; failed to publish its own tariff for furnishing identical service, but made varying charges based on negotiations; and was acting under arrangement with a carrier which resulted in shippers obtaining transportation of cargo at less than established rates, the absence of a tariff was an unfair or unjust device or means. Id. (316).

Firm which rented warehouse space and limited its services to cargoes of one carrier, excluding cargoes of other carriers from the economic advantages of

its facilities, prejudiced the excluded carriers and placed them at an unreasonable disadvantage in the competition for cargoes. Id. (316).

Language in section 16 of the Shipping Act referring to acts "in conjunction with any other person" does not require showing of agency relationship. Carrier and firm collaborating in plan to provide free storage services to carrier's customers were acting as independent contractors and in conjunction with each other. Id. (317).

Where carrier, its agent, and terminal operator made arrangements for operator to bill agent for storage services provided to certain customers of the carrier, and carrier reimbursed agent, the provisions of section 16 of the Shipping Act were violated, since such concessions were not available to all shippers and different periods of storage were required by different shippers. Such actions were likewise unreasonable practices connected with the receiving, storing, and handling of cargo. Id. (317).

Terminal operator's submission to agent of carrier of invoices for storage services rendered to customers of the carrier, with knowledge such invoices would be paid by carrier rather than shippers, and its participation in such an arrangement constituted an unjust and unreasonable practice connected with the receiving, handling and storing of property, in violation of section 17. Id. (318).

Assessment by New Orleans port of a wharf tollage charge on cargo transported by barge to a vessel moored at the port, with the cargo being transferred to the vessel without moving across the wharf, is not an unreasonable practice in violation of section 17 of the 1916 Act. The barge, including its cargo, uses some of the dredged basin alongside ship; the barge and cargo receive the benefits of the mooring facilities; police protection is available; and fire protection is available free except for cost of chemicals used. The Board need not be too concerned with definitions of wharf tollage, e.g., that it is essential that cargo pass over the wharf. The charge was made to help pay costs and the service rendered was reasonably related to the charge. Reasonable allocation of costs could not be made on the record. Evans Cooperage Co., Inc. *v.* Board of Commissioners, 415 (418, 419).

Exemption of bulk mineral cargoes from a tollage charge and a special tollage rate on liquids loaded via pipelines that actually use the wharf were not discriminatory or prejudicial to complainant whose liquid products loaded directly from barge to ship were subject to a wharf tollage charge. The type of service given was different; police and fire protection given the different service likewise differed; and complainant's products were of greater value, thus precluding any competitive relationship and justifying different charges. Id. (419).

Elimination of a wharf tollage charge on barge to ship cargo at New Orleans would be adverse to the practices observed at Galveston and Houston, where a charge is assessed for the same type of service. Its use at the latter ports and other ports tended to establish the type of charge as an accepted and reasonable trade practice. Id. (419).

The fact that complainant does not burden wharf space with its cargo which is loaded from barge to ship does not require that it be allowed credit to the extent that it should not be charged for wharf tollage. Whether the specific space alongside the ship being serviced is utilized by others or not does not alter the obligation of maintaining the facility and of assessing users of the facility charges which will provide continued existence of the facility. Id. (419, 420).

UNJUST OR UNFAIR DEVICES. See Absorptions; Classifications.

VESSEL VALUES. See Rate Making.

VOLUME RATES.

Rates charged by a carrier for fibre forms on the measurement rather than the weight basis are not excessive and thus not detrimental to commerce in violation of section 15 of the Shipping Act in view of the amount of space taken, the requirements for a protective covering and the difficulties of handling the property. Use of volume measurement rates rather than measurement ton rates for the carrying of fibre forms does not violate section 15 of the Shipping Act even though the result is an excessive ratio of value of the product to the freight rate since the cargo has "balloon" characteristics in that it takes up a large amount of space in relation to its weight and is not compressible. Raymond International, Inc. *v.* Venezuelan Line, 189 (192).

No discrimination between shippers, in violation of sections 16 and 17 of the Shipping Act, is shown where a carrier used different tariff classifications (volume v. weight) for fibre forms and pipe since the products were not competitive, their characteristics and use were different, and one was much heavier and more durable than the other. Id. (192).

WAREHOUSE SERVICE. See Terminal Facilities.

WHARF TOLLAGE CHARGE. See Terminal Facilities.

WORKING CAPITAL. See Rate Making.

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