FEDERAL MARITIME COMMISSION

No. 882

Unapproved Section 15 Agreements—South African Trade

Decided April 9, 1962

1. Respondents (except Baron Iino Line) found during the period 1954-58 to have made and carried out an unfiled and unapproved cooperative working arrangement or agreement for the fixing of transportation rates and related matters affecting the trade between the United States and South and East Africa, in violation of section 15, Shipping Act, 1916. Respondents not found to have entered into or carried out unfiled and unapproved agreements in the trade in violation of said section after September 10, 1958.
2. Respondents Farrell Lines and Robin Line (Division of Moore-McCormack Lines) not found to have operated vessels during 1957-59 in the United States Atlantic/South and East Africa trade, in violation of section 14, Second, Shipping Act, 1916.
3. The permission granted by section 15, Shipping Act, 1916 for activities that would otherwise be unlawful is conditioned upon government supervision and control of such activities. Rigid compliance with the filing and approval provisions of the section is required.
4. Failure immediately to file an agreement within the purview of section 15, Shipping Act, 1916 is a distinct violation of the section.
5. Oral, informal or general agreements are subject to section 15, Shipping Act, 1916.
6. Unapproved discussions and exchanges of rate and similar information among persons subject to section 15, Shipping Act, 1916, clearly indicate the existence of an agreement, understanding or arrangement prohibited by the section.
7. An investigation by the Federal Maritime Commission is an administrative proceeding looking to the regulation of present or future activity. It is not a penal or criminal trial for past violation of law and should not be conducted as such. Matters in extenuation or mitigation of punishment for such violation are not relevant in a Commission investigation.
8. Strict evidentiary rules do not apply in proceedings before the Federal Maritime Commission. Contemporaneous letters and memoranda

from respondents' files which showed or tended to show the existence of a cooperative rate-fixing arrangement were not objectionable as hearsay or otherwise, but were relevant, reliable and probative evidence.

9. A restricted or fragmented approach to the evidence is likely to defeat the objectives of an investigation, particularly one concerning informal, secret or general agreements subject to section 15, Shipping Act, 1916.

10. Only the Federal Maritime Board was empowered to modify its orders instituting the investigation and establishing the issues of fact and law involved. It was improper to direct the public Counsel in effect do so by filing statements particularizing such issues, and otherwise to circumscribe his efforts to fully develop the pertinent information.

Edwin Longcope and *Morton Liftin* for respondent Louis Dreyfus Lines.

Elmer C. Maddy and *Ronald A. Capone* for respondent Farrell Lines Inc.

John W. Douglas and *Peter S. Craig* for respondent Lykes Bros. Steamship Co., Inc.

Burton H. White and *Elliott B. Nixon* for respondent Nedlloyd Line.

Ira L. Ewers, W. B. Ewers and *Albert Chrystal* for respondent Robin Line (Division of Moore-McCormack Lines, Inc.).

Wharton Poor and *R. Glen Bauer* for respondent South African Marine Corporation, Ltd.

Morton Zuckerman for respondent Baron Iino Line.

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

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner.*

BY THE COMMISSION:

By order of January 7, 1960 and amendment of January 15, 1960, our predecessor the Federal Maritime Board initiated an investigation to determine whether any of the named respondents, Louis Dreyfus Lines (Dreyfus), Farrell Lines, Inc. (Farrell), Lykes Bros. Steamship Co., Inc. (Lykes), Nedlloyd Line (Nedlloyd), Robin Line (Division of Moore-McCormack Lines, Inc.), and South African Marine Corp., Ltd. (Safmarine), during the period 1954 through 1959, had entered into and effectuated without approval under section 15 of the Shipping Act, 1916 (the "Act"), any agreements affecting trade between the United States

and East Africa requiring such approval.[1] Robin Line has been a division of Moore-McCormack since about May 1, 1957, at which time Mormac acquired the equipment of Seas Shipping Co., Inc. Robin is identified herein as Robin/Mormac as to events after May 1, 1957 and Robin/Seas as to events prior thereto:

The Board's amended order of January 15, 1960 also enlarged the investigation to determine whether respondents Farrell and/or Robin/Mormac had operated vessels in violation of section 14, Second, of the Act during 1957, 1958, or 1959 in the U. S. Atlantic-South and East Africa trade. By supplemental order of June 27, 1960, the proceeding was further enlarged to determine whether any of the original respondents and Baron Iino Line, therein named an additional respondent, during 1958 and 1959 and thereafter through the date of the supplemental order, had entered into and carried out prior to approval under section 15 agreements fixing or controlling freight rates on certain commodities in this trade.

Testimony was taken at hearings held August 2 through 5, 1960 in Washington and October 13 and 14, 1960 in New York. Further sessions were held in New York on October 17 and 18, 1960 for the sole purpose of considering the admissibility of exhibits theretofore tendered, following which the hearings were concluded. In accordance with his responsibility in proceedings of this type for assembling and presenting evidence relating to the investigation the agency has ordered, Public Counsel subpenaed relevant documents of the respondents and produced during the hearings some 160 exhibits which had originated in their files. With the exception of one Maritime employee, all of the witnesses in the case were officers or agents of the respondents subpenaed by Public Counsel. They were called to the stand by him and identified exhibits which they had either authored, received, or were otherwise able to authenticate, and in many instances they were examined regarding the contents of exhibits.

On rulings of the Examiner, pursuant to respondents' requests, respondents (1) were furnished by Public Counsel six weeks before the hearings commenced a statement particularizing the "charges" or "violations" intended to be asserted; (2) were furnished another such statement by Public Counsel on September 6, 1960, during the interval between the Washington and New York

[1] Louis Dreyfus Lines is a joint service of Louis Dreyfus et Cie., Buries Markest, Ltd., and Nedlloyd Line is a joint service of N.V. Stoomvaart Maatschappij "Nederland" Koniklije Rotterdamsche Lloyd, N.V.

sessions; and (3) all of their cross-examination was deferred until Public Counsel had finished presenting his case in chief. Upon the completion of such presentation, respondents' counsel cross-examined respondents' officers and agents regarding the exhibits and testimony given on direct examination, and also took the occasion to present additional exhibits and develop other testimony through these witnesses. At the conclusion thereof, respondents elected to offer no further evidence. Public Counsel then offered into evidence, *seriatim*, 142 of the exhibits previously identified and testified to, but the Examiner, sustaining numerous objections by respondents, admitted only 29 of them. The rejected exhibits were made the subject of an offer of proof by Public Counsel in the manner provided by Rule 10(l) of our Rules of Practice and Procedure, and are therefore before us for consideration.

Briefs were filed by all parties and thereafter, on August 3, 1961, the Examiner issued a Recommended Decision. His ultimate conclusions were "that none of the respondents has entered into or carried out" during the period 1954-59 "any agreement as described in the Board's orders of investigation" in violation of section 15 of the Act, that respondents Robin/Mormac and Farrell had not operated vessels during 1957-59 in the Atlantic portion of that trade in violation of section 14 of the Act, and that "the charges against respondents" should be dismissed. Public Counsel filed exceptions to the section 15 segment of this decision and respondents replied objecting to the exceptions. Oral argument before us was not requested, nor have we deemed such argument necessary to the proper disposition of the case.

We are compelled to overrule the Examiner's recommended decision that no section 15 violations occurred, and to reverse his rejection of the documentary evidence tendered by Public Counsel. While entitled to weight, any recommended or initial decision which comes before us for our review remains only a recommendation. Upon review thereof we possess and must exercise when the situation requires "all the powers [we] would have in making the initial decision," including determinations of law, fact, policy and discretion. Where, as here, we find upon consideration of the entire record before us that substantial errors were committed, we must alter the Examiner's disposition of the case to whatever extent is necessary in our judgment to cure the errors and discharge our responsibility for insuring that the ultimate decision is correct. See section 8(a) of the Administrative Procedure Act,

5 U.S.C. 1007(a); Davis, Administrative Law Treatise, sec. 10.03; *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951); *F.C.C.* v. *Allentown Broadcasting Corp.*, 349 U.S. 358 (1955).

During most of the period encompassed by the orders of investigation herein, respondents comprised the only common carriers in the United States/South and East Africa trade. By the early part of 1954 Lykes, Safmarine and Dreyfus were the only common carriers engaged in the USA Gulf/South and East Africa portion of the trade. Lykes was the surviving and hence the only member of an approved conference for this portion of the trade (Gulf/South and East Africa Conference, Agreement No. 7780).

The only common carriers operating at the time in the United States Atlantic/South and East Africa portion of the trade were the respondents Farrell, Robin Line, Dreyfus and Safmarine, and a nonrespondent, the British South & East Africa Group. Only Farrell and the British Group were members of an approved conference for the Atlantic portion, namely, USA/South Africa Conference (outbound) Agreement No. 3578, and South Africa/USA (inbound) Agreement No. 3579. In 1955 the British Group discontinued service leaving Farrell the sole surviving member of such conferences. Beginning in January of 1954, Nedlloyd served South African ports with one sailing per month from United States Pacific Coast ports. On return it provided inbound service to the North Atlantic before proceeding to the Pacific Coast. Dreyfus suspended its service in the trade in February 1957. Later, in December 1957, Baron Line entered the trade and was succeeded in early 1959 by the respondent Baron Iino.

Pursuant to section 15 of the Act, Farrell and Robin/Seas in March 1956 submitted to the Federal Maritime Board and on July 2, 1956 the Board approved an agreement, No. 8054, permitting these two lines to confer together and agree on rates and other tariff matters in the trade, with the reservation that either of them could alter for itself the agreed rates and related matters on giving the other party at least 48 hours' notice. Robin/Mormac (as successor to Robin/Seas), Lykes, Nedlloyd and Safmarine subsequently became parties to the agreement, on August 19, 1957 in the case of Mormac and on April 3, July 28 and September 10, 1958, respectively, in the case of the others. Neither Dreyfus nor Baron Iino ever became parties. Agreement 8054 is currently in existence and is the sole section 15 agreement respect-

ing the United States/South and East Africa trade which has included the mentioned respondents.

Section 15 of the Act requires every ocean common carrier to file immediately with the agency administering the Act a true copy, or if oral a true and complete memorandum, of every agreement with another such carrier to which it is a party or conforms in whole or in part, fixing or regulating transportation rates or fares; controlling, regulating, preventing or destroying competition; or in any manner providing for a cooperative working arrangement. The section defines "agreement" to include "understandings, conferences, and other arrangements." It also makes it unlawful for any common carrier to carry out any such "agreement" prior to approval of the agency, in this instance the Board.

The respondents severally deny being parties to any agreement covered by these provisions except agreement 8054. They also argue matters in extenuation or mitigation of their activities. These are commented upon at the end of this report, since they are not relevant to the question whether respondents have acted in violation of the statute. On that question, so far as it concerns section 15, our conclusion is that Agreement 8054 simply formalized an unfiled, unsanctioned and therefore unlawful cooperative working arrangement or agreement for the fixing of rates and related matters which existed between and was implemented by the respondents (other than Baron Iino) long prior to Agreement 8054 and which thereafter continued to exist as to Dreyfus, until it withdrew its service in February 1957, and as to the remaining respondents, until Safmarine, the last of the respondents to sign, did so on September 10, 1958.

Nature of the Case—Procedure. Initially we must review and discuss, at some unavoidable length, the more important procedural and evidentiary errors that pervaded this case from its inception. In this connection, citation of some specific examples of the evidence received and rejected will be helpful. These errors appear to have been generated mainly by a basic misconception of the nature and purpose of the proceeding.

Respondents repeatedly portrayed the case as a penal or criminal proceeding involving the possible imposition upon them of heavy sanctions. In that connection they laid down a steady barrage of procedural and evidentiary demands and objections. It was a serious mistake for the Examiner to adopt respondents' view of the case. This gave rise to other errors and adversely

influenced the entire course of the proceeding. The case was in no sense penal and respondents were "charged" with nothing. It was an administrative inquiry into activity possibly violative of the Shipping Act, instituted by the Board pursuant to its responsibilities under the Act to regulate present or future conduct through the issuance of appropriate orders or rules.

The agency administering the Act has no power to punish past conduct. It cannot impose penalties, monetary or otherwise, for violating the Act's provisions. That may be done only in a penalty suit brought in a district court by the Department of Justice. The character of such a suit is distinctly different from that of an administrative inquiry. Its trial is governed by different and more strict principles, procedures and evidentiary rules which are wholly unnecessary to the objectives and proper conduct of our proceedings. This same subject was dealt with by the Board in its 1955 decision in *Alleged Practices of Fabre Line and Gulf/ Mediterranean Ports Conf.*, 4 F.M.B. 611 (1955), which was also an investigation on the agency's own motion and from which we quote the following (p. 636):

> Nor do we consider, as argued by Fabre, that the nature of this proceeding requires application of evidentiary standards proper in criminal or "quasi-criminal" proceedings. Although section 16—Second of the 1916 Act provides criminal penalties, those penalties may only be imposed in a proceeding commenced by the Department of Justice* in a court of competent criminal jurisdiction. No penalties may be imposed in this proceeding nor may the record here be used as the basis for collection of fines.**

Under the Shipping Act, the Board's primary function was, and ours is, to regulate, not to punish, and it does seem to us that there is no room for any further confusion on this point. Investigation is indispensable to the administrative regulatory function and may be undertaken "merely on suspicion that the law is being violated, or even just because [the agency] wants assurance that it is not." *United States* v. *Morton Salt Co.*, 338 U. S. 632, 642-43 (1950). Where, as here, the agency investigation is a formal one, the essentials of a full and fair hearing can easily be observed without attempting to convert the proceeding into some sort of penal or criminal trial.

The respondents also made frequent demands for particularization of what they called the "charges" against them. It was in

* 28 U S.C.A. 507.

** See Davis, Administrative Law, 1951, at pp. 305, 306, on the constitutional requirement for trial by jury in criminal matters.

response to these demands that the Examiner, as previously noted, required Public Counsel to furnish respondents on two separate occasions with detailed statements of "charges" or "violations" intended to be urged, and in addition, postponed respondents' cross examination until completion of Public Counsel's entire evidentiary presentation. These extraordinary measures on respondents' behalf were not warranted by anything in the nature and purpose of the proceeding, nor indeed by any actual ignorance on respondents' part of the matters under investigation.

Respondents were notified by the Board's orders of the possible proscribed activity, the areas of their operations and the periods of time to be investigated. These orders clearly satisfied the requirements of subsection 5(a)(3) of the Administrative Procedure Act (5 U.S.C. 1004(a)(3)) and the Board's Rule 10(c) which only provide that notice be given of "the matters of fact and law asserted," *i.e.*, the legal and factual issues involved, and that sufficient time be allowed to prepare to meet such issues.[3] Nearly seven months elapsed between the issuance of the orders and the commencement of the hearings, so that respondents manifestly had adequate opportunity to prepare. The facts, moreover, were exclusively in the respondents', not the Board's, possession. Documents in respondents' files and knowledge possessed by their officers and agents constituted virtually all the evidence. No basis existed at any time for the inference that respondents did not know what the Board proceeding concerned or were unable fully to represent their interests.

It is apparent that in demanding the aforesaid statements from Public Counsel respondents were seeking to have him in effect modify the issues of fact and law stated in the Board's orders of investigation, whereas only the Board could have done so. Public Counsel neither initiated nor was responsible for the contents of the orders and he could not amend them. If respondents believed them lacking in any respect, their recourses were solely to the Board. Respondents recognized the orders were controlling where they thought it to their advantage. In other instances they sought to exclude issues or evidence within the scope of the orders on the ground that Public Counsel's statements did not specify them. The Examiner himself was not entirely consistent in this matter.

In a formal investigation ordered by the agency, Public Counsel

---

[3] See Attorney General's Manual on the Administrative Procedure Act (1947), p. 47, 129.

has the duty to insure that the relevant and probative evidence is developed to the fullest possible extent. His primary mission is to get the pertinent information, often from the persons least interested in giving it. In the proper pursuit of this mission it would seem to be obvious that he should be encouraged, not circumscribed, if the investigative aims are to be achieved. The various demands that were here permitted to be made upon Public Counsel amounted to putting him on trial for the fact that an investigation had been ordered. The statements he was required to furnish interfered with the performance of his duty to develop the evidence, as the respondents themselves demonstrated by their attempts to hamstring his submissions. Moreover, if viewed simply as position papers, the statements at best represented only tentative estimates of possible ultimate findings. One was prepared before, the other during the hearings, without benefit of all the evidence and respondents' positions thereon. In such circumstances, we fail to see how they could have contributed usefully to the case, and they plainly were not germane to an investigative proceeding. On the other hand, they disadvantaged the presentation of evidence and caused delay and some confusion, although certainly nothing about which the respondents could justifiably complain. Such statements are not provided for in the rules but were an undesirable innovation in this case. Since then it appears they have been required in a few other investigations. We think it is clear that the practice should be discontinued.

Evidence. Section 7(c) of the Administrative Procedure Act permits the *receipt* in evidence of "any oral or documentary evidence," subject only to the admonition that irrelevant, immaterial or unduly repetitious evidence should be excluded. (5 U.S.C. 1006(c)). This exclusion is provided for in the Board's Rules of Practice and Procedure (now adopted by us) and, conversely, they authorize the admission of "all evidence which is relevant, material, reliable and probative" (Rules 10(g) and (h)). The statute and the rules are consistent with the long-established principle that the technical evidentiary requirements, sometimes also called "the common law exclusionary rules," do not apply in proceedings before administrative agencies (unless of course the agency's organic statute so requires, and ours does not). A major reason for this is that administrative agencies, unlike the lay juries for whom the exclusionary rules were meant, are presumed competent to judge the weight that should be given evidence. The

Board in its *Fabre Line* decision, *supra,* also reviewed this subject, and at some length, 4 F.M.B. 611, 633-36.[3]

The efficient performance of our regulatory functions demands that we find the truth as expeditiously as possible. Strict evidentiary rules are not conducive to expedition if, as here, they are made the vehicle for innumerable objections which result in much delay and confusion. Since as indicated the rules are not necessary in the proper conduct of our proceedings, controversy over evidentiary niceties and formalities should not be invited by attempting to apply them. We do not, of course, suggest the substitution of an overly-relaxed approach to acceptable evidence nor anything which lacks essential fairness, having due and correct regard for the nature and purpose of our proceedings. We simply point out that evidence which appears to satisfy the nonrigorous standards of our rule ought to be received promptly and without controversy grounded upon technical exclusionary rules. If upon consideration of the whole record it is found that some of the evidence so admitted is not substantial and should be disregarded in formulating the proposed agency action, that can readily be done. We doubt that any harm flows from such procedure but if it does it is small indeed in comparison with that occasioned by needless squabbles over strict evidentiary principles. As the Court of Appeals for the Second Circuit stated, in *Samuel H. Moss, Inc.* v. *F.T.C.,* 148 F. 2d 378, 380 (1945), cert. den. 326 U.S. 734:

> Why either he [the Examiner] or the Commission's attorney should have thought it desirable to be so formal about the admission of evidence, we cannot understand. Even in criminal trials to a jury it is better, nine times out of ten, to admit, than to exclude, evidence and in such proceedings as these the only conceivable interest that can suffer by admitting any evidence is the time lost, which is seldom as much as that inevitably lost by idle bickering about irrelevancy or incompetence. In the case at bar it chances that no injustice was done, but we take this occasion to point out the danger always involved in conducting such a proceeding in such a spirit, and the absence of any advantage in depriving either the Commission or ourselves of all evidence which can conceivably throw any light upon the controversy.

(See also *Donnelly Garment Co.* v. *N.L.R.B.,* 123 F. 2d 215, 224 (1942))

In the instant proceeding "idle bickering" about technical niceties in connection with the evidence consumed much of the

[3] See also Attorney General's Manual, *supra,* p. 76, 134; *F.T.C.* v. *Cement Institute,* 333 U.S. 683 (1948), reh den. 334 U.S. 839; *Willapoint Oysters* v. *Ewing,* 174 F. 2d 676 (CA 9, 1949), cert. den. 338 U.S. 860; *Concrete Materials Corp.* v. *F.T.C.,* 189 F. 2d 359 (CA 7, 1951); *Rhodes Pharmacal Co.* v. *F.T.C.,* 208 F. 2d 382 (CA 7, 1954), mod. other grounds, 348 U.S. 940; *Buchwalter* v. *F.T.C.,* 235 F. 2d 344 (CA 2, 1956); *Yiannopoulos* v. *Robinson,* 247 F. 2d 655 (CA 7, 1957); *O'Boyle* v. *Coe,* 155 F. Supp. 581 (D.C.D.C., 1957); *Smith* v. *General Truck Drivers, etc.,* 181 F. Supp. 14 (DC.Cal., 1960).

hearing time and resulted eventually in the exclusion of about 80 percent of the evidence, all of it of relatively good quality. Rejected were more than 100 undeniably-authentic, contemporaneously-written letters and memoranda from the files of respondents or their agents which were relevant and probative on the questions under investigation. There was considerable erroneous reliance upon the hearsay rule. In some instances, the exhibit in question did not, in our judgment, constitute hearsay. In others, we believe the exhibits could have been received, even under strict evidentiary principles, as being within one of the exceptions to the hearsay rule, *e.g.*, as an admission or statement against interest, or as part of the *res gestae*.

More importantly, however, hearsay objections were not tenable as a basis for exclusion of evidence in this administrative investigation. Neither the Administrative Procedure Act nor the Board's rules excluded hearsay and the hearsay rule has been expressly held inapplicable in administrative proceedings. For example, see *I.C.C.* v. *Baird*, 194 U.S. 25 (1904); *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126 (1941). The Board so held in the *Fabre Line* case as follows:

> Fabre states that the examiner erred in overruling objections to the introduction of hearsay evidence, arguing that the decision in *Edison Co.* v. *Labor Board*, *supra*, [305 U.S. 197 (1938)] on which the examiner relied, was based on a statute which specifically relaxed the rules of evidence, which has since been amended, and which does not represent the law applicable to proceedings before this agency. These contentions are unsound; hearsay evidence is clearly *admissible* under the terms of the APA and under our rules which, as hereinbefore stated, follow the APA. Further, the cited decision was relied on in drafting section (10) (e) of the APA. 4 F.M.B. 611, 635-36.

The weight to be accorded the statement of someone not on the witness stand (*i.e.*, hearsay) does not govern and should not be confused with its admissibility. If competent under the criteria applicable in an administrative proceeding, the statement is receivable in evidence and may be used to support agency action if there is at least some other supporting proof in the record of a direct nature. There is no question here as to the exclusive use of hearsay. To the contrary, there is more than ample proof in the record, both oral and written and often squarely related to and corroborative of the hearsay evidence, to justify according the latter credibility and weight. See *N.L.R.B.* v. *Remington Rand*, 94 F. 2d 862, 873 (CA 2, 1938), cert. den. 304 U.S. 576.

The record reveals evidentiary positions, rulings and results

which are quite inconsistent. Contributing to this, no doubt, were the number and variety of objections respondents saw fit to urge at every turn. Comments on specific aspects of this situation appear at a later stage of this report, following the evidentiary examples below. At this point we simply note our inability to discern any material distinction between the quality and competency of the evidence the Examiner properly received and that of the evidence he rejected.

Set forth in the following paragraphs are examples of the admitted and excluded exhibits and testimony thereon by respondents' officers and agents. These are instructive as to the evidence which was offered and are quite illuminating as to the unapproved rate activity. It will be noted that the several respondents (other than Baron Iino) constantly name one another in these samples of their contemporaneous comments on their discussions, arrangements and agreements. References to Dreyfus will be found in pars. 3, 4, 6, 11-13, 15-18, 20; to both Farrell and Robin in each of the 22 pars. except No. 4; to Lykes in pars. 1-4, 6-9, 11-20; to Nedlloyd (which was concerned only with the inbound traffic from Africa) in pars. 6, 16, 17, 22; and to Safmarine (which was concerned only with the outbound traffic to Africa) in pars. 1-3, 7-9, 11, 13, 17-21.

Examples of Admitted Evidence.

1. The following is from a memorandum by President James Farrell, Jr., of Farrell Lines to Messrs. Shields and Unver of his company dated February 11, 1954 (Ex. 43), regarding a possible rate reduction on lubricating products he had discussed with Mr. Ray Vaughn, a representative of Standard Vacuum Oil Co.:

> I then said to Mr. Vaughn [of Standard Vacuum] I was sympathetic to such a reduction but could not and would not put the rate into effect without the concurrence of both our Conference and non-Conference colleagues. I said that since Safmarine, Robin, and Lykes were not in conference with us, it would be best if before we undertake to explore the matter with these carriers [sic], making it clear that I had made no commitment to him, nor would I make any commitment to him without their agreement and support. . . .
>
> Mr. Vaughan undertook to lay the ground work in accordance with my suggestion. . . .
>
> In order that the question of a possible reduction in rates on lubricating products may be considered without any misunderstanding as to the position of Farrell Lines, Inc. or of me personally, I now suggest that Mr. Unver bring Mr. McCracken up to date and that Mr. Shields discuss the matter with appropriate representatives of Robin, Safmarine and Lykes. I have

made no commitment. Unless all concerned share my view as to the advisability of a reduction, I do not intend to make any.[4]

On direct examination in connection with this memorandum, Mr. Farrell stated that he and his personnel had conversations with the lines therein mentioned which resulted in "concurrence" among the lines on rate matters.

2. On August 13, 1954, Mr. Farrell wrote a letter to a shipper, Wilbur-Ellis Co., regarding a reduction on rates on fishmeal, which stated (Ex. 47):

We are also pleased to advise that this rate has been concurred to by the Robin Line, Lykes and SAFMarine.

On direct examination concerning this statement Mr. Farrell testified "it was furtherance of our cooperative efforts with Robin Line and Lykes and, of necessity, with Safmarine" and further said:

It was not unusual for someone in our company to contact someone in their company and ask if such rate was agreeable.

3. In February 1955 Lykes' assistant secretary O'Kelley in New York sent to Lykes' New Orleans office a series of teletypes. These concerned exceptions to the 15 percent general rate increase, which respondents (other than Nedlloyd and Baron Iino) had agreed to put into effect March 1, 1955 in the outbound trade and which in fact became effective that date, and the 48-hour notice of rate changes the respondents had concurrently agreed to give one another. In one of these (Ex. 99) the following appears:

"UNDERSTANDING SO. AFRICA SPECIFICALLY CARRIES COMMITMT EA LYKES DEYFUS SAF MARINE NOTIFY OTHERS INCLUDG CONF. [Farrell] & ROBIN 48 HOURS BEFORE MKG ANY RATE CHANGES AND CERTAINLY ONCE WE HAD EXCEPTNS CLEAR . . . IT WAS UNDERSTOOD NO MORE EXCEPTIONS WLD BE MADE AT LEAST UNTIL MARCH 1 ACCT ABSOLUTE NECESSITY HOLD THE LINE BECAUSE ALRDY PRESSURE IS GREAT FOR EXCEPTNS SHIPPERS CLAIMG DISCRIMINATION ETC . . . WE HONESTLY DO NOT FEEL SAFMARINE OR DRYFUS HAVE FAILED LIVE UP UNDERSTANDG AND WE THINK IT IS THEIR INTENTN TO DO SO ON BASIS WE ALL AHEAD FINANCIALLY. . . ."

When queried as to the nature of the "understanding" he felt the other respondents would live up to, Mr. O'Kelley testified:

although there might have been some areas of differences of opinion, that basically we felt that we all had a common interest and to that end, which would be increase of revenue, rate stability, that the other lines, as their best judgment dictated, would proceed in accordance with the thoughts expressed by them during our conversations.

---

[4] Bracketed matter in quotations supplied.

775-794 O-65-13

4. Another such Lykes' New York—New Orleans memorandum by Mr. O'Kelley in February 1955 (Ex. 101), on the question whether Dreyfus was required by the "agreement" to quote the same rates as Lykes, contains the following:

PLS REMEMBER THAT OUR AGREEMENT WAS THAT WE WLD INCREASE ALL RATES 15 PCT AND NEVER DID WE EVER AGREE THAT RATES WLD BE QUOTED ON PARITY HOWEVER BELIEVE PARITY CAN BE ACHIEVED ONCE WE GET LOOK AT TARIFF AND NEGOTIATE ON INDIVIDUAL RATE BASIS WITH DREYFUS.

5. On July 1, 1955 Mr. Farrell wrote a memorandum (Ex. 69) to W. C. Shields of his company about a meeting he had June 29, 1955 with Mr. Cook, president of Robin/Seas, on the possibility of having Robin and other lines join the USA/South Africa Conference, of which Farrell was then the only surviving member containing the following:

Cook then said that his position remained unchanged. Robin would join the Conference if *all* Lines were in.

Mr. Cook dwelt at some length upon the fact that Mr. Maguire now occupies senior position [in Robin/Seas] and we could expect full cooperation on rates and no rate cutting. He said that Mr. Maguire had been instructed to keep in touch with W.C.S. [W. C. Shields] and keep the rate situation to our mutual satisfaction.

6. By letters of January 23 and 27, 1956, Mr. J. C. Severiens, president of Java Pacific Line, Nedlloyd's general agent in the United States, addressed Farrell, Robin/Seas, Dreyfus and Lykes about increasing the rate on sisal tow in the Africa/Atlantic trade, in which Nedlloyd operated inbound before returning to the Pacific, and about a proposed general increase in the rate from Africa to Pacific Coast ports (Exs. 62, 131–34). Mr. Severiens' letter of January 23, 1956 to Mr. Farrell (Ex. 62) reads in part as follows:

I shall be glad to hear whether you agree with us that an increase under the circumstances, is fully warranted. I am addressing similarly Messrs. Robin, Dreyfus and Lykes Lines.

For your guidance I wish to inform you that, as far as our rates from Africa to Pacific Coast ports are concerned, we are contemplating announcing an increase amounting to 15% to 20% effective March 1st.

Looking forward to your advices, . . .

Mr. Farrell, by letter of January 30, 1956 (Ex. 63), replied regarding the increase to Pacific Coast ports in part as follows:

[I]n agreement with Robin Line (Seas Shipping Company, Inc.) we have already raised our through bill of lading rates to Pacific Coast ports from South and East Africa via New York, to the levels which you have suggested.

7. On December 6, 1957, Mr. J. M. Phillips as Secretary, USA/ South Africa Conference, who was acting in reality as agent for Farrell, the sole member of that conference, sent out a notice which states (Ex. 34):

USA/SOUTH AFRICA CONFERENCE

TO ALL LINES: DECEMBER 6, 1957

ASPHALT OR ASPHALTUM

Further to my circular of November 21st on the above subject please note that it has now been proposed that the present rates on Asphalt or Asphaltum be made effective through June 30, 1958.

Please advise if you concur.

Among other respondents who received this notice was Robin/ Mormac, whose freight agent, Harold Flad (also previously employed by Robin/Seas), testified that on the bottom thereof he had written, "All lines agreed," and that "all lines" meant Farrell, Robin/Mormac, Lykes and Safmarine. At the time only Farrell and Robin/Mormac were parties to Agreement No. 8054 approved July 2, 1956, as hereinbefore mentioned.

8. Mr. Flad of Robin/Mormac also prepared detailed memoranda of rate meetings he attended in September and October 1957 and March of 1958 (Exs. 35-38), at which times as before indicated Farrell and Robin/Mormac were the sole signatories of Agreement 8054. One of these memos, dated September 11, 1957 (Ex. 35), states in part:

Subject: RATE MEETING—SEPTEMBER 10, 1957

Meeting convened at 2:30 p.m. at the USA/South Africa Conference Room, 26 Beaver Street.

Attended by:

J. Phillips—Chairman USA/South Africa Conf.
J. Unver—Farrell Lines
V. O'Neill—Farrell Lines
L. Buser—SAF Marine
P. O'Kelly—Lykes Bros.
J. Kelly—Robin/Moore-McCormack
H. Flad—Robin/Moore-McCormack

Thereafter follows a listing of 11 rate, classification and related items which were discussed, with agreement reached as to the action to be taken on over half of them and the balance "tabled for further study."

9. Another such memorandum by Mr. Flad (Ex. 36) states in part:

Subject—RATE MEETING—SEPTEMBER 16, 1957

Meeting convened at 2:30 p.m. at the USA/South Africa Conference Room, 26 Beaver Street.

Attended by:
J. Phillips—Chairman USA/South African Conf.
F. Unver—Farrell Lines
V. O'Neill—Farrell Lines
L. Buser—SAF Marine
P. O'Kelly—Lykes Bros.
J. McAvoy—Robin/Moore-McCormack
J. Kelly—Robin/Moore-McCormack
H. Flad—Robin/Moore-McCormack

Thereafter follows a listing of 13 separate rate, classification and related items discussed and the action which those attending agreed upon. An example of these entries is as follows:

(13) POWDERED MILK

This item has been under review by all the lines and after a full discussion it was decided to amend tariff as follows:

MILK, POWDERED (including Dietetic) $42.25
FOOD, INFANT DIETETIC, N.O.S. 59.75
(effective Sept. 17, 1957)

Examples of Excluded Evidence.

10. A memorandum (Ex. 5) written on February 11, 1954 to one of Robin's traffic employees by Mr. S. J. Maddock, then vice president for traffic of Robins/Seas (later deceased and succeeded by Mr. C. H. McGuire), contains this comment:

Fred Unver [general traffic manager for Farrell] called today and advised they have a letter from Clarence Provost of the International General Electric Co. asking for rates on three Diesel locomotives for shipment to Durban. . . . I have not seen it but would like to have a copy of this rate request.

You can tell Provost that it is customary procedure with most shippers to send us a copy of their request for rate reductions to the Conference [Farrell] and that we and Farrells usually discuss such rate requests before anything is decided and then we always quote the same rates.

11. A letter to Safmarine dated April 6, 1954, by Mr. W. H. McGrath, a States Marine Lines vice president, in charge of the latter's Safmarine Agency (Ex. 116), discusses the rate reduction proposal made by Mr. Vaughn of Standard Vacuum Oil Co., the same subject mentioned above in par. 1, and contains the following:

As a result of all of this we advised both Farrell and Robin and Ray Vaughn that we could not see a rate reduction at this time and that we were

fearful that such a reduction might initiate some of the oil companies taking advantage of Dreyfus' offerings and there was no telling where the rate would finally end.

Previously on direct examination Mr. McGrath conceded he had held rate discussions as Safmarine's agent with Robin, Farrell, Lykes and Dreyfus.

12. On September 1, 1954 Mr. Maddock of Robin/Seas wrote that line's agent at Mombasa a letter (Ex. 18) reading in part as follows:

This same propaganda was spread around New York about a month ago and if it were not for the fact that the Robin Line had just made an agreement with Dreyfus to work together on rates, it is probable that Farrells, Robin and the others would have reduced the rates unnecessarily. . . .
We have been intending to write to you and London about our very recent negotiations with the Louis Dreyfus Line and their New York agents, Ponchelet & Company. . . . There is a man working for them and in charge of traffic, by the name of John Boyes. . . .

I told Mr. Boyes that we would be most happy to work with the Dreyfus Line on rates if we could depend on them but that our experience in the past had not assured us on this matter. I told Mr. Boyes that it would probably only work if Paris would agree not to reduce any rate without first submitting it to Mr. Boyes to discuss it with us. . . . Mr. Boyes offered to submit the proposal to his principals in Paris and endeavor to obtain their concurrence. . . . We received a message a few days later from Mr. Ponchelet that Mr. Moine had confirmed that the Dreyfus Line in Paris had agreed to this arrangement. This is now in effect and before we reduce any rate on any commodity being shipped to or from Madagascar or South and East Africa, we call Mr. John Boyes and discuss it with him, just as we have been doing with Farrells and Lykes. Mr. Boyes now telephones us when he has any proposal for reducing rates and we exchange information as to whether or not it is advisable to grant the reduction.

Farrell and Lykes have been informed by me of this working arrangement that we have with Dreyfus and they are very pleased about it. Farrells and Lykes always consult us before reducing rates and we now discuss the matter with Dreyfus before giving any decision to Farrells or Lykes.

13. In a teletype from New Orleans to his New York office dated December 23, 1954 (Ex. 81), Lykes' vice president for traffic, Alec C. Cocke, stated:

"AS YOU RECALL SOMETIME BACK WE WERE FORCED REDUCE GULF RATE ACCT MADDOCK'S [of Robin/Seas] INSISTENCE IN DOING IT OVR OUR OBJECTION THAT GULF ASPHALT RATE MUST BE THE SAME AS TRINIDAD. AS I VIEW YOUR TELETYPE HE IS NOW ABOUT-FACE THIS SITN. WE ARE PERFECTLY WILLG NOTIFY ALL CONCERNED AS TO LONG-RANGE COMMITMNTS WE HV ON OUTWARD RATES. THIS IS A DEF AGRMNT BETWEEN THE LINES AND WE ARE FIRMLY OF THE OPIN SOME SORT OF AGRMNT BE-

TWEEN ALL THE LINES INVOLVED MUST B FILED WITH THE FMB AND AM WONDERING HOW STATES MARINE [agent of Safmarine] WL VIEW THIS AS THEY HAVE STEADFASTLY NOT BN WLG TO CONSDR ANY CONFRNC SETUP SO TO SPEAK."

Mr. Cocke on the witness stand identified "all concerned" as being Farrell, Robin, Safmarine and Dreyfus.

14. A memorandum written by Mr. Cocke on December 29, 1954 to Lykes' Durban office (Ex. 82), refers to respondents' agreement on the 15 percent general rate increase and the 48-hour notice of rate changes, stating in regard to the latter:

This is really an informal agreement and I still think something should be filed with the Maritime Administration but Messrs. Robin and Farrell feel otherwise, and in this connection New York advised us on December 27 as follows:

"ROBIN AND FARRELL CONSIDER EXCHANGE TARIFFS AND DISCUSSIONS PRIOR RATE CHANGES BETWEEN GULF LINES NO DIFFERENT FROM PRACTICE BETWEEN NO. ATL LINES WHICH HAS WORKED OUT SATISFACTORILY WITHOUT FMB FILING."

15. On January 20, 1955 Dreyfus' principal in Paris by Mr. Jean Cassegrain wrote Mr. J. E. Ponchelet of Ponchelet Marine Corp., New York, Dreyfus' general agent in the United States (Ex. 140), regarding among other things the aforesaid 15 percent general increase which was due to become effective March 1, 1955, as follows:

As regards the general increase of 15% it seems that this is now as good as done with the only exceptions so being: Bitumen, Petroleum Products, Synthetic Rubber. . . .

As regards our relations with LYKES, we agree with your viewpoint that for the present it is a sufficient step to start an agreement on rates similar to that which we now have with ROBIN and FARRELL, but we have indicated to you that you should leave the door open to something more comprehensive. The idea is that, if and when the rate agreement works satisfactorily, for some time, your contacts with LYKES should become more frequent and more friendly and, then, it might be easier to bring about something closer to what is our main purpose, i.e.: an agreement to limit direct competition.

16. On March 24, 1955 Mr. Arend Drost, treasurer of the Java Pacific Line, Nedlloyd's general agent in the United States, wrote his principal in Amsterdam regarding inbound rate increases (Ex. 124), in part as follows:

Enclosed please find copy of a circular dated March 22nd of the South Africa/USA Conference [Farrell], indicating increases and changes in freight rates which have been tentatively agreed upon between the Conference Lines and Robin, who are still in communication regarding same

with Dreyfus Line and Lykes, besides ourselves. The matter is expected to be finalized shortly, at which time it will also be decided when the new rates will become effective.

[I]t is our idea to increase rates to the Pacific Coast on a dollar for dollar basis with those arranged to the Atlantic.

17. Mr. Drost on May 13, 1955 also wrote his principal, Nedlloyd (Ex. 125), in part as follows:

We wish to confirm the following cables sent you and Capetown Agents on May 11th:

FARRELL ROBIN DREYFUS SAFMARINE LYKES WE AGREED INCREASES AS PER CIRCULARS ATTACHED OURLETS AMSTERDAM MARCH 24 28 MAY 9 BECOMING EFFECTIVE JUNE FIFTEENTH AS PER TARIFF RULE ONE G

18. On November 2, 1955 Mr. C. H. McGuire, Mr. Maddock's successor as traffic vice president of Robin/Seas, and later in the same post with Robin/Mormac, sent Robin's London representative a cablegram (Ex. 6) which states in part:

REFERENCE CONVERSATION ASPHALT BITUMEN RATES LYKES FARRELL SAFMARINE DREYFUS OURSELVES HAVE AGREED FOLLOWING NEW RATES . . . ALL NEW RATES WOULD BE EFFECTIVE FROM JANUARY FIRST THROUGH JUNE THIRTIETH 1956

On direct examination Mr. McGuire stated that rate changes were often prefaced by conversations with Farrell, Lykes, Safmarine and Dreyfus.

19. On June 6, 1956 Mr. McGuire wrote a memorandum for the file (Ex. 9) reading in part as follows:

As requested by Mr. Farrell and Mr. Mercer [Safmarine] during our general discussion this morning, I called Alec Cocke of Lykes Bros. on the telephone this afternoon and outlined to him the views of Farrell, Safmarine and ourselves with respect to specific increases on automobiles and agriculturals and on container board/Kraft paper as well as the suggested 5% general rate increase after adjustment of the aforementioned specific rates. . . .

Upon being pressed by me for a definite statement of his position on the several proposed rate increases, he advised that he would support (provided all other lines did so as well) the upward adjustment proposed for automobiles and agriculturals and for container board/Kraft paper and would also agree to the proposed 5% general rate increase after adjustment of those individual items. . . .

20. On June 27, 1956 Messrs. Flad and McAvoy of Robin/Seas, later of Robin/Mormac, wrote a memorandum to Mr. McGuire (Ex. 14) which states in part:

In accordance with decision taken at meeting of Friday, June 22nd the undersigned met on June 25th and 26th at the office of the Conference with repre-

sentatives from Farrell Line (F. Unver), Safmarine (F. DeMarco), Lykes (P. O'Kelly) and Dreyfus (G. Connelly) to set up uniform and accurate new rates based upon an anticipated 5% increase over rates presently in effect. Copy of the new schedule is attached hereto.

The memorandum then details various other rate and tariff actions agreed upon by the respondents. On direct examination Mr. McGuire testified that the meetings referred to took place and that what he described as "generally similar action" was later taken by Robin/Seas, Farrell, Lykes, Dreyfus and Safmarine.

21. Mr. W. H. McGrath of the States Marine agency for Safmarine, wrote his principal Safmarine on November 6, 1957 (Ex. 118), at which time Farrell and Robin/Mormac but not Safmarine were members of Agreement No. 8054 approved July 2, 1956, in part as follows:

I am going to have lunch today with Hugh TenEyck [of International Ore & Fertilizer] along with Robin and Farrell, in the hope that we can all agree with him on equitable freight rate on his business and keep him away from U. S. Navigation. . . .

On direct examination Mr. McGrath affirmed that this meeting took place, with Mr. McGuire representing Robin/Mormac and Mr. Gorman representing Farrell Lines, but stated the meeting was fruitless because "we never did get from Mr. TenEyck what he felt was a rate which . . . he was willing that the lines each charge for participating in the carriage of this particular commodity."

22. On November 25, 1957 Mr. McGuire, by this date traffic vice president of Robin/Mormac, wrote a memorandum to J. E. Fee of his company (Ex. 15) reading in part as follows:

In company with John Gorman of Farrell Lines I met this afternoon with Charles McLagan of Turnbull Gibson and Company (London) and Frank Marick and Al Shields of American Metal Company at the latter's office to resume our negotiations on Copper rates for the coming year.

* * *

With respect to our competition I had the assurance before going into this meeting from Mr. Hans Severiens of Nedlloyd that his company would agree and abide by any rate that Mr. Gorman and I negotiated with the Copper people and I have advised him as to the outcome of the meeting. . . .

On direct examination Mr. McGuire acknowledge that he had the conversation referred to with Mr. Severiens of Nedlloyd and that his recollection of it was in accord with the statement made in this memorandum.

Evidentiary Errors. The general nature and extent of this problem has already been indicated. We shall here comment on

some of the specific evidentiary faults we find. The matter unfortunately does not lend itself to brevity but we shall to the extent possible strive for it.

The four exhibits discussed in pars. 3, 4, 13 and 14 were part of a series of 27 from the files of respondent Lykes (Exs. 81, 82, 84-92, 94, 95, 98-104, 106-111, 113). All 27 were authored by Lykes' Messrs. Cocke or O'Kelley who, as above indicated, were vice president for traffic in New Orleans and assistant secretary handling traffic matters in New York, respectively. Both men were called as witnesses in the case by Public Counsel and were subjected to direct and cross examination regarding the exhibits and otherwise. Respondents succeeded in having 13 of Mr. Cocke's writings excluded, contending, *inter alia,* that they contained hearsay and opinions and were intra-company communications not admissible against third parties (Exs. 81, 82, 84-92, 94, 95).

Similar objections were then urged against one of the O'Kelley writings and it was excluded (Ex. 98). The same attack was then made on 10 more O'Kelley writings, all comparable to the foregoing rejected exhibits (Exs. 99-104, 106-109). This group was admitted, as all of these exhibits should have been, and the ruling was adhered to despite respondents' lengthy protests that the exhibits were in precisely the same class as those just rejected. Immediately thereafter three similar O'Kelley writings were excluded (Exs. 110, 111, 113). At another stage of the proceeding 21 more Cocke-O'Kelley communications, all comparable to those here discussed, were excluded (Exs. 146 -148B, 151-156, 158-163B).

The memorandum of Mr. Farrell quoted in par. 1, an admitted exhibit (Ex. 43), discusses the identical matter Safmarine's agent, Mr. W. H. McGrath, discussed in the letter partially quoted in par. 11, namely, Standard Vacuum's request for a rate reduction on lubricating products (Ex. 116). Mr. McGrath, a States Marine Lines vice president in charge of the Safmarine agency, was a witness in the case, like Mr. Farrell. The McGrath letter was excluded, the objections being that it antedated Public Counsel's "specification of charges" (as did Mr. Farrell's letter), that States Marine was not a party to the case, and that Mr. McGrath testified nothing resulted from the rate discussions, which immaterial fact the letter itself showed. Next, there was admitted, over objections, a similar McGrath letter, but of a later date, regarding discussions among respondents on the rate for tobacco

leaf (Ex. 117). Another such McGrath letter, which is quoted ir par. 21, was then rejected (Ex. 118). It was objected to not a being authored by States Marine, a non-party, but as being ar "intra-company" Safmarine communication. It was objected to also, on the same immaterial ground that Mr. McGrath had testi fied that no result came out of the rate conference therein men tioned.

The letter to Mr. Farrell by Nedlloyd's agent, Mr. Severiens quoted in par. 6 as an admitted exhibit, was one of a group o similar letters that Severiens concurrently sent Farrell, Robin, Seas, Dreyfus and Lykes. When more of the group were offere (Exs. 131-134), Farrell's counsel objected, asserting Severien had not been called as a witness and the letters were "hearsa and unilateral." They were thereupon excluded. Mr. Farrell' reply to Mr. Severiens, also an admitted exhibit quoted in par. 6 shows that these objections had no substance. Ten additiona Nedlloyd communications, two of which are quoted in pars. 1 and 17, written by its agent Mr. Drost, who was a witness in th case, were excluded as hearsay because Drost said he got th information for these communications from the USA/Sout Africa Conference secretary, Mr. Phillips. If that was so, Dros had a reliable contact. Phillips was the agent of Farrell, the sol member of the conference, and was at times the focal point fo unapproved rate activity among the respondents, as shown by th admitted evidence in pars. 7 to 9. The exhibit in par. 17 was als objected to as at variance with Drost's testimony that when h wrote "we agreed," he meant only that he had concurred fo Nedlloyd in a rate understanding Phillips told him the other re spondents had reached. If there is a variation between thi explanation and "we agreed," we do not detect it.

About 40 exhibits from the files of Robin Line were offere in evidence by Public Counsel. They had been produced by re spondent Moore-McCormack which it will be recalled acquire Robin's property in May 1957 from the since-inactive Seas Ship ping Company. All but a handful of these exhibits were rejecte principally on the theory that they constituted "admissions" o Seas Shipping, which had not been made a respondent. Mormac' counsel suggested this theory when he reminded that his clien had purchased Seas' property, "not its sins." However, to pro ceed from this technically accurate point to the sweeping notio that these documents were incompetent and inadmissible for an purpose, was quite unjustified.

For one thing, about half the exhibits were written by two of the witnesses in the case, namely, Messrs. Charles H. McGuire and Harold C. Flad who were, as before noted, vice president in charge of traffic and freight agent for Robin, respectively. At least as to this group, therefore, no basis existed for the suggestion that the exhibits were hearsay or the work of an absent or disinterested person. Four of these rejected exhibits are quoted in pars. 18, 19, 20 and 22. Three others involving or written by Mr. Flad had previously been admitted, as shown in pars. 7 to 9. Of the remaining rejected Robin exhibits some were messages sent to Messrs. McGuire or Flad, and the balance were virtually all letters or memos authored by Mr. S. J. Maddock, McGuire's predecessor as Robin's traffic vice president. See pars. 10 and 12 for two Maddock writings.

Mr. Maddock is deceased and could not be called to testify. The same was true of Mr. F. J. Unver, Farrell's general traffic manager at some of the times in question. There were other participants who for one reason or another could not be called. But their writings were not thereby stripped of all evidentiary value. The authenticity of the documents was beyond question, other indisputable evidence corroborated them by depicting the same rate cooperation among respondents to which the unavailable parties had addressed themselves, giving their writings credibility and trustworthiness. As indicated in our prior comments on hearsay, such exhibits were plainly admissible in this administrative proceeding as being reliable, relevant and probative. They were admissible, moreover, not only against the authoring respondent but against other respondents named therein because they showed or tended to show the existence of an agreement among respondents, and that was the heart of the matter under investigation.

The activities of Robin did not change with the passing of Mr. Maddock, nor with the Lines' acquisition by Mormac. On the contrary, as one of the admitted exhibits shows (see par. 5), Robin informed Farrell in June 1955 that with Mr. McGuire's succession to senior position in Robin, Farrell "could expect full cooperation on rates and no rate cutting." Mr. McGuire, Mr. Flad and others who had been employed by Robins/Seas were employed by Mormac when it purchased Robin's property in May 1957 and continued to handle its traffic and rate matters in the trade between the United States and Africa just as they had before. See pars. 7 to 9 and 22.

Public Counsel was able to subpoena material witnesses from each respondent except Louis Dreyfus Lines. A French corporation, Dreyfus' traffic interests in the US/South Africa trade were handled by principals located in Paris, including Mr. Jean Cassegrain, and by its general agent in the United States, Ponchelet Marine Corp. of New York, chiefly Mr. J. E. Ponchelet. Mr. Ponchelet was reportedly not connected with Dreyfus at the time of the hearings and his whereabouts were unknown. As in the case of the other respondents, a subpoena was addressed to Dreyfus and its agent, Ponchelet Marine, for relevant documents in the possession or control of Dreyfus or its agent, and in response thereto Dreyfus' counsel produced various files together with an affidavit by their custodian that they contained all documents of the kind described in the subpoena.

Five documents from these Dreyfus files, being principal-agent correspondence written by Messrs. Ponchelet or Cassegrain, were offered in evidence (Exs. 140-144). The exhibits were objected to by Dreyfus' counsel as "not authenticated by any witness who was produced by the Government." He and other counsel also questioned whether the communications "were actually sent or received" and indeed whether they even related to Dreyfus. The exhibits were thereupon rejected. That they were admissible seems hardly debatable. It was obvious on their face and from the circumstances surrounding their production that the exhibits were authentic and what they purported to be, namely, official Dreyfus correspondence concerning Dreyfus participation in the same concerted rate activity in the US/South Africa trade which was the subject of numerous exhibits in the case composed by other respondents. For an example of this rejected Dreyfus correspondence, see par. 15. For ample additional evidence of Dreyfus participation, see pars. 3, 4, 6, 11-13, 16-18 and 20. What we have said previously as to the evidentiary value of such exhibits, even though no witness was available to testify concerning them, applies with equal force here.

A restricted or fragmented approach to the evidence, which was usually the one taken in this section 15 investigation, can defeat the very purpose for which the investigation was instituted. The conduct proscribed by section 15 includes oral and informal agreements, understandings and arrangements which by their nature can be difficult to detect and prove and may well require the putting together of numerous individual evidentiary items so as to construct an integrated whole that will provide the basis for

a conclusion. The respondents here should not have been allowed to isolate and attempt to destroy the documentary proof link by link, in disregard of the interrelated and complementary character of the various links as well as their cumulative delineation of respondents' common course of unapproved activity. But for the abundance of the proof that happens to be available here, such an approach might have transformed the entire proceeding into an academic exercise.

We would add one final, and perhaps obvious, comment on the quality of the excluded exhibits. They were authored in the main by experienced, highly-placed officials who were responsible for the all-important traffic phases of large and complex ocean transportation enterprises, in what was a very competitive trade area. Like many a businessman with less at stake, we are quite sure these officials of respondents and their agents had the capacity to know and state accurately anything so significant to their operations as the fact that they had reached an agreement, understanding or arrangement relating to rates with one or more of their competitors. Contrary to contentions advanced by respondents' counsel, such statements did not constitute expressions of legal opinion, nor opinion as to what someone else meant. Respondents' counsel also complained often, even where the author had been examined on the witness stand, that the exhibits were intra-company communications, which was true as to many of them. However, in our view this enhanced rather than detracted from their evidentiary validity because the communications contained completely candid utterances bearing directly on the subject of the inquiry.

We find that the 113 exhibits the Examiner rejected were reliable, relevant and probative and should have been admitted in this proceeding. The Examiner is accordingly overruled and the exhibits are received in evidence. Anticipating the possibility of this result, some of the respondents argue that they should be given the opportunity to meet the evidence thus admitted. The argument is misleading and without substance. No rulings were made on the exhibits until the end of the hearings, in line with procedure the respondents themselves urged. The exhibits had previously been tendered and identified and were for all practical purposes a part of the case. Many of the exhibits were the subject of both direct and cross examination, and in the course thereof the material contents of some of them were also read into the record.

It is to be recalled, moreover, that all the proof in the case relating to possible violations originated with the respondents, so that could have been no surprises. Respondents not only had full opportunity to meet Public Counsel's presentation, they were peculiarly well situated to demolish it if any such evidence existed. They in fact undertook to meet the presentation to the extent they had something to offer. Additionally, at the conclusion of the testimony, but before the admissibility of the exhibits was ruled upon, the Examiner specifically inquired if the respondents had "any further affirmative offerings" and received negative replies. While most of the exhibits respondents had tendered were ultimately withdrawn, they remained physically a part of the record and have been reviewed by us. They do not, however, contain material that could affect our conclusion.

Findings and Conclusions—Section 15 Violations Not Involving Baron Iino. The evidence, of which pars. 1–22 above are but samples, clearly establishes and we find with respect to section 15 violations of respondents other than Baron Iino, in the United States/South and East Africa trade during the years 1954-58, inclusive, the following:

An agreement, or cooperative working arrangement, for the exchange of information relating to rates and related matters and for the fixing of rates, existed during the entire five-year period. It was participated in by all of the respondents and often resulted in the establishment of identical rates adhered to by each of them. From the beginning of 1954 this arrangement included on a regular basis Farrell and Robin/Seas, operators in the Atlantic portion of the trade, and to a lesser extent, Lykes, their American counterpart in the Gulf portion of the trade. By no later than April of that year, the arrangement included Safmarine, which operated in both the Atlantic and Gulf portions and for most of the relevant period was a common carrier only outbound from the United States.

At first the cooperation in the Gulf portion of the trade involving Lykes, Dreyfus and Safmarine was less firm, chiefly because of Dreyfus, but even so the discussions and exchanges of rate information resulted in considerable parity of rates. About August 1954, Robin/Seas persuaded Dreyfus, an operator also in the Atlantic segment "to work together on rates" and thus participate more completely in the arrangement. By the end of 1954 there was much closer Gulf cooperation between Lykes,

Dreyfus and Safmarine. By January 1955 Dreyfus was ready to work with the other respondents for a comprehensive "agreement to limit direct competition." Nedlloyd's interests mainly concerned a limited number of commodities moving in the inbound U. S. Atlantic trade. It sailed to Africa from the U. S. Pacific Coast. During 1954 and thereafter it exchanged rate information with the other lines, usually through Farrell's agent, the secretary of the USA/South Africa Conference. This included consultation and concurrence in rate changes, as well as the initiation itself of rate proposals on which it directly secured agreement from the other respondents.

In late 1954 and early 1955 Farrell, Robin/Seas, Lykes, Dreyfus and Safmarine considered in concert and finally agreed to a 15 percent general rate increase for the outbound trade. They put this into effect on March 1, 1955, with exceptions as to a few commodities. They also concurrently firmed up an understanding for the giving to each other of 48 hours' notice and opportunity for advance discussion of any rate alteration, in which Nedlloyd likewise concurred. In March 1955, shortly after the outbound increase became effective, Dreyfus, Farrell, Robin/Seas and Lykes (Safmarine having no interest here) began joint consideration of rate increases for the inbound trade, and certain other tariff matters, and reached agreement thereon by May of 1955. Nedlloyd participated in these negotiations to the extent of its commodity interests through its liaison with Farrell's agent, the conference secretary.

The cooperative arrangement was thereafter maintained between the respondents along the same lines but with ever-increasing closeness. The numerous discussions and conferences they held brought about agreement on the rate levels for specified commodities and groups of commodities, and from time to time on general rate increases, and resulted in their tariff rates being identical on most items by early 1956. The filing by Farrell and Robin/Seas of Agreement 8054, approved by the Board July 2, 1956, changed nothing except possibly to step up the tempo of activity between the signatories. The arrangement continued among all the respondents, whether or not signatory to 8054.

The arrangement was terminated as to Dreyfus, which never signed 8054, upon its suspension of service in the trade in February 1957. Mormac became an active party in the arrangement after it acquired Robin's property and personnel in May 1957, and was such both before and after it signed 8054 in August 1957.

Lykes, Nedlloyd and Safmarine, all of whom had continued their regular participation, did not sign 8054 until April 3, 1958, July 28, 1958, and September 10, 1958, respectively, on which latter date the respondents at last brought their long-standing agreement or cooperative working arrangement into compliance with section 15.

We further find and conclude that the respondents did not file immediately with the Board their cooperative working arrangement nor any of their numerous subsidiary rate agreements and understandings, as aforesaid, contrary to section 15 of the Shipping Act, 1916; that the sole agreement which was filed, No. 8054, was not a true and complete copy or memorandum of the arrangement in that it failed to disclose all of the parties thereto, never disclosed Dreyfus' participation, and did not fully reveal the remaining parties until September 10, 1958, contrary to section 15; that the arrangement and subsidiary agreements and understandings were carried out by the respondents in the manner aforesaid during the years 1954-58, without the knowledge much less the approval of the Board, contrary to section 15; and that all of the respondents were in violation of section 15 of the Act beginning at the approximate times indicated in 1954 until September 10, 1958, except that Dreyfus' period of violation ended in February 1957.

Discussion—Section 15 Violations Not Involving Baron Iino. No one would doubt that Agreement 8054, approved July 2, 1956 with Farrell and Robin/Seas as signatories, and adopted on various dates over the next two-plus years by Robin/Mormac, Lykes, Nedlloyd and Safmarine, is an agreement which was required to be filed and approved under section 15 of the Act, failing which the activities therein described were unlawful. It will be recalled that the agreement, which is quite brief in its terms, authorized the parties thereto to discuss and agree on rates to be charged by them and related tariff matters, and also stated that any party might itself alter any rate or tariff matter upon giving at least 48 hours' notice to the other parties. Although essentially the same as the informal arrangement or agreement under which the signatories to 8054, and also Dreyfus, operated throughout the five-year period involved, respondents managed to convince the Examiner that their arrangement did not violate section 15 because, as he puts it, they had "no meeting of the minds" and were not "legally obligated" before 8054.

Inconsistent on its face, this result in our judgment is insup-

portable on any ground, factual or legal, and it must be set aside. Factually, even the limited proof admitted by the Examiner indicates clearly that the respondents had a meeting of the minds for a cooperative rate arrangement and when the entire record is brought into focus the picture of it is most convincing. That record, as has been noted, was largely built of highly incriminating evidence from the files of each respondent (except Baron Iino). Respondents did not offer and could not have had any real answer to that evidence. It is, or at least should be, next to impossible to overcome statements repeatedly written in company correspondence by the president, vice president for traffic, or other official that an "agreement," "commitment," "concurrence" or "understanding" has been reached with one or more competitors regarding the rate level at which transportation will be furnished. It appears to us respondents' inability to provide any answer was why from the outset they fought so strenuously to keep the evidence out of the case, and is why in their argument they only attempt to interpret it.

The Examiner likewise had difficulty in this respect. His report acknowledges that respondents held numerous rate discussions and conferences and that these covered various rate matters including the 15 percent general increase that all of them put into effect on March 1, 1955 and the plan for 48 hours' advance notice of a rate change. The Examiner further found that respondents' discussions and conferences "generally, but not always, resulted in the quotation of similar rates," and by February 1956 had resulted in Robin, Farrell, Lykes, Dreyfus, Nedlloyd and Safmarine having rates "on most items [that] were identical." In our view, such findings logically lead to a conclusion just the opposite from the one the Examiner reached.

We cannot regard obvious anticompetitive activity as though it were normal business conduct. Nor can we regard the use of parallel rates following joint rate discussions as though it were the fortuitous product of "independent judgment" or just the result of "business economics." Both law and reason demand of us a considerably more realistic approach than this. Persons subject to the Act who expect us to give credence to such claims should conduct their activities in a way that is consistent with the claims. As we recently stated in *Unapproved Section 15 Agreements—West Coast South America Trade*, 7 F.M.C. 22, 25 (1961), which was found not to be a rate-fixing situation:

[W]e deem it a serious matter for parties subject to the Act to engage in exchanging rate information without our knowledge. In some circumstances, the exchange of rate information may not affect the public interest. But the natural consequences of such activity can clearly be a step toward or the very basis of improper practices, and the activity should therefore be avoided.

Here the respondents, in their frequent communications, were not simply keeping one another posted, any more than they were exchanging reminiscences. They were engaged in what is most aptly described as a cooperative working arrangement for the joint fixing or regulating of transportation rates, which was unauthorized and therefore improper. The manifest objective of this arrangement was to achieve agreement or understanding on the level of such rates and the record everywhere shows that respondents accomplished this to a substantial degree. It is quite immaterial that the arrangement did not in every instance produce firm or complete accord. Even if no firm results had been reached—a highly unlikely situation—the agreement to cooperate in attempting to fix rates would have been improper. However, respondents' arrangement, encompassing as it did all the common carriers in the trade during much of the relevant period, was quite successful in producing concrete results. It "generally . . . resulted in the quotation of similar rates" by all of them, as the Examiner himself found.

It may also be recalled at this juncture that 8054, the section 15 agreement by which respondents finally formalized their arrangement, stipulates that a party may individually alter a rate subject to giving at least 48 hours' notice to the other parties. This is exactly the same sort of reservation of so-called "independence" that influenced the Examiner to conclude the respondents had "no meeting of the minds" and no agreement, although 8054 is plainly an agreement. Such a notice provision, moreover, does not reflect independence. It demonstrates anticompetitive agreement. Its effect is to assure the parties an opportunity either to institute simultaneously the proposed rate change, dissuade the proponent from effectuating it, or at the least talk him into an acceptable compromise.

As a matter of law the Examiner's decision decimates section 15. It would read out of the section oral, tacit or general agreements, understandings and arrangements. These, however, are even more effective anti-competitive vehicles than formal, detailed and legally-binding agreements. Section 15 is not concerned with formality but with the actual effect of the arrangement. The

Examiner's construction of the section cannot be reconciled with its language or its history. It reflects, moreover, a fundamentally erroneous concept of the section's meaning and function which we must emphatically reject. As to that meaning and function, we made the following pertinent comments in the *Pacific Coast European Conference* case, 7 F.M.C. 27, 33-35 (1961):

> Section 15 is a grant of limited legislative permission for carriers and others operating in this Nation's foreign water-borne commerce to engage in certain forms of concerted activity which would otherwise be unlawful under the antitrust laws, but only if and to the extent approved by the Commission and only so long as approved by it. . . . This appears from the face of the statute. In addition, the legislative history of section 15 makes plain that Congress granted an antitrust exemption only because it envisioned that the permitted activities would be subjected to constant and effective government control and regulation.
>
> The House Merchant Marine and Fisheries Committee in the report of its Investigation of Shipping Combinations, the legislative study underlying the Shipping Act, 1916, made an exhaustive analysis of the problems presented by anticompetitive combinations in our water-borne foreign commerce. The Committee pointed out that Congress had but two courses. It could either restore unrestricted competition by prohibiting the anti-competitive agreements and understandings then widely used, or it could recognize these agreements and understandings along lines which would eliminate the evils flowing therefrom. While admitting the advantages of allowing steamship agreements and conferences in our foreign commerce, the Committee was not disposed to recognize them "unless the same are brought under some form of effective government supervision." The Committee pointed out that to permit such agreements without this supervision would mean giving the parties an unrestricted right of action, which it definitely did not favor.*
>
> This philosophy took shape and was enacted as section 15 of the Shipping Act, 1916, confiding to the agency administering the Act extensive powers of supervision and control as the condition precedent to any of the concerted activities covered by the section's rather all-inclusive language. As was pointed out by the court in *Isbrandtsen Co., Inc.* v. *United States*, 211 F. 2d 51 (D.C. Cir. 1954), in discussing the authority to permit antitrust exemptions under section 15:
>
> > "The condition upon which such authority is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the regulatory statute." (211 F. 2d 51, 57).

Congress was fully aware, furthermore, that its plan for "effective government supervision" would be largely frustrated unless the Act were made broadly applicable to all agreements, understandings and arrangements including particularly the kind of

"* Committee on the Merchant Marine and Fisheries, House of Representatives, 63rd Congress, Report of Investigation of Shipping Combinations under House Resolution 587 in 4 volumes, hereinatfer referred to as the 'Alexander Report,' Vol. 4, pp. 415-17."

informal arrangement which existed among the respondents here. The Alexander Report, *supra*, summarized the problem as follows (pp. 293-94):

Reference should here be made (1) to the tendency toward oral understandings, instead of written agreements, between the lines operating to and from ports of the Unitd States, and (2) the care which has been exercised to prevent agreements and understandings from becoming public. Oral understandings were described by various witnesses as "safer" than written agreements, and the preceding chapters refer not only to many agreements which were of an oral nature from their inception but to several instances where written agreements were terminated and oral understandings substituted, the witnesses however admitting that the lines continue to follow the same rates and conditions which were previously observed under the written agreements. In fact, witnesses repeatedly drew the distinction between formal written agreements and oral or "tacit" understandings.

While not involving as strong a moral obligation as written agreements, the evidence shows that for all practical purposes oral arrangements are quite as effective. Judging from the manner in which the lines observe the same, the existing oral understandings give unmistakable evidence of the high order of integrity prevailing in modern business, and justify fully the phrase "gentlemen's agreements." Written agreements seem to have accomplished their purpose in many trades and are apparently no longer needed. The lines in some instances need not even meet in conference; they may avoid every appearance and every act which would seem to show the existence of an agreement or understanding; and yet operate in the same spirit of harmony that would prevail if a written agreement existed.

Accordingly, section 15 requires—as it has for the 45 years since enacted—the filing of a copy, or "if oral" a true and complete memorandum, of "every agreement" covering any of the wide range of anticompetitive activities therein mentioned, "or in any manner providing for an exclusive, preferential, or cooperative working arrangement." The word "agreement" is specifically defined to include "conferences, understandings, and other arrangements."[5] The language of the section thus clearly embraces every agreement, understanding, or arrangement, whether

[5] The relevant portion of section 15 of the Shipping Act, 1916 (46 U.S.C. 814), which was not changed by the amendments of October 3, 1961 (Public Law 87-346, 75 Stat. 762) except to substitute "Commission" for "board," reads as follows:

"SEC. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the Board [now Commission] a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements."

formal or informal, written or oral, detailed or general. The section has been applied in other cases to informal working arrangements not nearly so conspicuous as this one. For example, see *In the Matter of Wharfage Charges & Practices at Boston, Mass.*, 2 U.S.M.C. 245, 248, 251 (1940) and *Maatschappij "Zeetransport N.V. et al.* v. *Anchor Line Ltd. et al.*, 6 F.M.B. 199 (1961); aff'd sub. nom *Anchor Line Ltd.* v. *F.M.C.*, 299 F. 2d 124, (D.C. Cir. 1962).

Respondents Farrell, Nedlloyd and Safmarine, and to some extent Lykes, object to having been "charged" with "failure to file" agreements.[6] They argue that section 15 only makes it an offense "to carry out" an agreement, citing in support thereof certain Board decisions and testimony given before a Congressional Committee by two Board officials. We are aware that on occasion past there has been some *obiter dicta* on this subject that might comfort respondents but we have found no cases actually ruling on the question until early 1961, and they reject rather than support respondents' interpretation, as the statute itself does. If there has been any past doubt, we fail to see why.[7]

At the root of respondents' position is the following language which was included in the fourth paragraph of the original section 15, and is retained in the same paragraph by the amendments to the section added by Public Law 87-346 approved October 3, 1961 (75 Stat. 762):

> [B]efore approval or after disapproval it shall be unlawful to carry out * * * any such agreement, modification, or cancellation.

On the other hand, section 15 opens with the flat command that agreements "shall" be filed "immediately," which obviously means without delay or at once, if not sooner. Moreover, by the final paragraph of section 15 a penalty is imposed for violating "any

---

[6] Respondents Farrell and Nedlloyd also contend the Board's orders posed no question of failure to file agreements. We think they did, both expressly and by necessary implication. The orders recited that agreements might have existed among respondents which "have not been filed" and that they might have been "carried out before approval." Even assuming they lacked some precision, they were orders of invstigation, not an indictment nor a penal complaint, and not required to be drawn with the specificity usually found in such papers. Moreover, respondents' position was and is that no agreements but 8054 existed. It is undisputed that the Board's orders raised the question of respondents' effectuating unapproved section 15 agreements other than 8054. They necessarily put into issue whether any such other agreements existed and had not been filed.

[7] Respondents' citations are: *In re Pan-American S.S. Co., et al.*, 2 U.S.M.C. 693, 697 (1943); *City of Portland* v. *Pacific Westbound Conf.*, 4 F.M.B. 664, 674 (1955); *Pacific Coast European Conf.—Limitation of Membership*, 5 F.M.B. 39, 45 (1956); *American-Union Transport* v. *River Plate & Brazil Confs.*, 5 F.M.B. 216, 224 (1957); *Pacific Coast European Conf.—Limitation on Membership*, 5 F.M.B. 247 (1957); *Associated-Banning Co.* v. *Matson Nav. Co.*, 5 F.M.B. 336, 343 (1957); *Monopoly Problems in Regulated Industries*, Hearings of Antitrust Subcommittee (Celler Committee) of House Judiciary Committee, 86th Cong., 1st Sess., Part 1, Vol. 1, pp. 71-75.

provision" of the section. Unless the filing requirement is somehow to be interpreted out of the section, it must be given effect as a provision and quite a positive one, for violation of which the penalty applies. We will not make any such attempt to expunge the provision but will construe it as written, fortified by the belief that failure immediately to file an anticompetitive agreement was intended by Congress to be a distinct violation of section 15.

There is nothing perfunctory about the language in question. It does not say file if and when you plan to effectuate, nor does it indulge in the fantasy that an anticompetitive arrangement will be kept on ice and not effectuated. On the contrary, it assumes effectuation is a foregone conclusion and that it is likely to be clandestine. The language is therefore an urgent injunction with a clear purpose. Effective government supervision, which was the cornerstone of the whole regulatory plan Congress embodied in section 15, would be greatly handicapped if not defeated were parties to anticompetitive agreements allowed to file them at their convenience, which could be never. Supervision cannot be effective, and may well be nonexistent, if the supervisor is uninformed.

As before noted, Congress took particular cognizance of the industry's tendency toward the widespread use of informal, tacit and secret agreements and of the difficulties of detecting them. We think it did not want the parties to such arrangements in a position to effectuate them at will, under a clandestine cloak. It therefore undertook to compel immediate disclosure of anticompetitive arrangements by requiring that they be put on record and exposed to government supervision forthwith, otherwise the statute was violated.

The Board ruled over a year ago that failure to file an agreement is a violation of section 15. *Maatschappij "Zeetransport"*, *supra; Agreements and Practices Pertaining to Freighting Agreement—Gulf & Atl. Havana Conf.*, 6 F.M.B. 215 (1961). And, though it may not have expressly so held, we think the Supreme Court as long ago as 1932 clearly indicated that section 15 was violated by failure to file an agreement. *U. S. Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 486-87 (1932). We note, also, that Congress, apparently troubled by the same *obiter* which we mentioned above, added language to section 15 in its recent revision thereof (Public Law 87-346, *supra*) making it even more plain (if that is possible) that failure to file immediately is a violation.

Statutory Violations Involving Baron Iino. The Board's orders of January 15 and June 27, 1960 enlarged this proceeding to include investigation into (1) possible violation of section 14, Second of the Act (*i.e.*, use of a vessel or vessels for the purpose of preventing competition by driving another carrier out of the trade) by Farrell and/or Robin/Mormac during 1957-59 in the African trade, the other carrier being Baron Iino or its predecessor Baron Line; and (2) possible violation of section 15 by reason of agreements covering certain commodities in the same trade during 1958-59 and thereafter, between the six original respondents and Baron Iino.

Baron Iino in January 1959 succeeded Baron Line in the trade, the latter having operated therein since the end of 1957. Both Barons were represented in the United States by U. S. Navigation Co. and both gave the respondents what might be termed in the vernacular "a hard time" by undercutting their rates, at least on some commodities, and by refusing to join Agreement 8054 unless given rate concessions. The evidence adduced with respect to the section 14 violation indicated that Farrell and Robin/Mormac considered taking measures against Baron such as "blanketing" its sailings and might have made threats to do so, but these were not carried out.

The question of possible section 15 violations involved Kraft paper, wool and bulk tallow and stemmed from conversations on a few occasions over a period of about 18 months, initially between Baron's agent and Farrell, Robin/Mormac and Lykes and later between Baron's agent and Safmarine's agent, the latter acting as representative of the other respondents. The conversations were initiated by the respondents because of their desire to have Baron join the group, and included the lesser possibility that some understanding might be obtained on specific commodities. However, Baron, as before noted, appears to have remained generally uncooperative, at least absent concessions. Baron's agent denied having any agreement, understanding or arrangement with the other respondents at any time. The proof tends to support this claim except as to tallow, where it casts some doubt on the claim, but does not destroy it as occurred in the section 15 violations discussed above.

With respect to tallow only, Public Counsel urges that section 15 was violated. The tallow rate had been driven down deeply during 1958 and was $18 per long ton by early 1959, which was less than break-even for at least one of the 8054 carriers. Pre-

cisely what happened from this time on is controversial and, to us, somewhat confusing. The 8054 group apparently decided to publish a $20 rate effective May 1, 1959 and beginning in February 1959 filed tariff amendments covering same. We are unable to find, however, as we are asked to do, that prior to this the 8054 group had a "commitment" from Baron Iino that it would use the $20 rate. Nor can we find that a subsequent increase in the rate to $22 effective July 1, 1959, was based on Baron Iino's agreement.

It is true that a couple of the conversations between the agents of Baron Iino and Safmarine occurred during this period but it is not clear from the testimony of the participants that Baron Iino could be said to have agreed on tallow rates. In view of such testimony, and Baron's record of disagreeing rather than agreeing, we are disposed to view the remaining evidence on this matter as insufficient to establish the violation. This is another instance, however, where a carrier who claims to be free of unapproved anticompetitive alliance, has come close to potentially serious difficulty by failing to avoid questionable involvement with its competitors.

In accord with the foregoing, respondents Farrell and Robin/Mormac are found not to have violated section 14, Second of the Act, and Baron Iino and the other respondents are found not to have violated section 15 of the Act, in respect of the matters referred to in the Board's orders of January 15 and June 27, 1960 which involve Baron Iino or its predecessor Baron Line.

Matters in Extenuation. While we have stated our findings and conclusions and the reasons therefor, there remain undiscussed several contentions which are particularly urged by the American respondents, both defensively and in extenuation or mitigation. In reality they are matters in extenuation and as such may be material to the question of punishment for past violations but are not relevant to anything within the jurisdiction or intent of this administrative investigation. Nevertheless, some discussion of the contentions appears in order in view of the misleading and erroneous influence they had on the Examiner. He accepted as justifying completely the conduct of Farrell, Robin and Lykes the theory that their activities had been directed or sanctioned by the former Maritime Commission, the Board, or their representatives continuously since back in 1938 and up to and inclusive of the 1954-58 period under investigation. The background of this is as follows:

Operating subsidy contracts in the United States/South and East Africa trade were concurrently sought after passage of the Merchant Marine Act, 1936 (46 U.S.C. 1101, 1171) by both Robin/Seas and Farrell's predecessor, American South African Line, Inc., then the only American carriers in the trade. The former Commission in 1938 decided that both carriers should receive subsidy on an experimental basis but that efforts to effect their merger should continue and if not successful, arrangements should be worked out "covering sailing dates, rates, and pooling of homebound cargo" so as to eliminate to the extent possible competition between two subsidized American lines and enable them "to cooperate in competing against the foreign lines now carrying the bulk of the commerce in this trade." *American South African Line, Inc.—Subsidy S. and E. Africa*, 3 U.S.M.C. 277, 287 (1938). Conformable to this decision, subsidy contracts were awarded the two companies which stipulated they would "establish, publish, and maintain rates, charges" etc. on a basis "satisfactory to the Commission."

Lykes entered the Gulf portion of the trade in January 1941, there being no other American carrier in it at the time. Because subsidized in other trades, Lykes had to and did obtain Commission permission for this venture. The Commission required it to carry certain homebound cargoes. Lykes' vice president testified that it was told by Commission employees to consult with Farrell and Robin on rates for certain strategic inbound, and certain competitives outbound, commodities. During the war years Farrell, Robin and Lykes operated ships in the trade as general agents of the War Shipping Administration, and received copies of the same W.S.A. rate advices. For a time after the war, when they had resumed operations for their own account, they voluntarily continued, at W.S.A.'s suggestion, to maintain rates established by W.S.A. in its tariffs. After the war, also, Lykes obtained subsidy for its Gulf/Africa service.

When Mormac took over the Robin operation in 1957, its subsidy contract was amended initially to include the same provision that had been inserted as aforesaid in the Farrell and Robin/Seas subsidy contracts back in 1938 but this was almost immediately changed, at the request of Maritime's Office of Government Aid, in favor of a "coordination" clause similar to one Mormac already had in another subsidy contract. This substituted clause was likewise inserted in Farrell's contract in lieu of the prior provision. The clause states that the operator will from time to time

as required by the United States "coordinate the spacing, regularity and frequency of its sailings" in conjunction with other subsidized services on the trade route, and gives the Government's consent to such prescribed coordination for the purposes of Art. II–18(c) of the subsidy contract and any other contractual or statutory provision requiring that consent. Besides the foregoing, it appears there occurred through the years sporadic contacts or discussions, of uncertain content, between the subsidized operators and Maritime personnel.

The mere recital of this background seems to us to show that it in no way supports the subsidized respondents' claim of agency knowledge and consent to the rate-fixing activities hereinabove set forth, nor the Examiner's finding that these respondents were only maintaining uniform rates "in compliance with" subsidy contracts and agency advices. The 1957 coordination clause is a routine subsidy contract provision covering sailings and does not mention rates. Assuming the prior 1938 provision and the advice Lykes says it received, were factors in the early rate cooperation among Farrell, Robin/Seas and Lykes, that cooperation was not authorized to be undertaken without reference to section 15's requirements. One of its purposes, also, was to provide for competition against the foreign lines.

The record does not show that Maritime personnel told respondents section 15 could be disregarded, or even that the subject came up. The burden was on respondents to raise it, and in any event to file under section 15 and set forth the arrangement they had. It is interesting to recall in this regard that Lykes did raise the subject with its colleagues in December 1954, and expressed its opinion that a "definite agreement" existed and "must be filed with the FMB." The record likewise does not show that anything like the arrangement which prevailed during the 1954-58 period was revealed to or known to the Board or its personnel, as successors to the Commission, much less that it was directed or approved by them. That arrangement, involving as it mostly did, widespread rate-fixing among all carriers in the trade, citizen and non-citizen alike, was not at all what the 1938 provision of the subsidy contracts envisaged. The American carriers were not united to compete with the foreign-flag lines, they were acting in concert with such lines to eliminate competition.

Respondents' argument that the arrangement "promoted stability," aided the subsidy program, was "in the public interest," and not objectionable under section 15, is quite beside the point. Such

matters were for the Board, the agency administering the Shipping Act, to weigh and determine before and during the time the anticompetitive activities occurred. They were not for the respondents to decide themselves. Respondents prevented any Board consideration by ignoring the eminently clear requirements of section 15 and thus frustrated it for years. We think it impossible for anyone now to state that what transpired between respondents was all well and good but even if this were not so, the impact of the statute manifestly cannot be made to depend on the *ex post facto* chance that the violation was not harmful. Section 15 may as well be scrapped as to attempt to administer it in this fashion.

It goes without saying that we find untenable the suggestion that respondents' arrangement constituted a "technical" violation of the law. It should be noted, furthermore, that section 15 affords little room for so-called technical violations. To us the breadth and force of its language literally implore attention and obedience, or at the very least inquiry if in any doubt as to the propriety of proposed conduct.

Since the respondents are not currently acting contrary to section 15, we have no occasion to issue an order against them and the proceeding will be discontinued. In accordance with our usual practice where statutory violations have been found, the matter will be referred to the Department of Justice for appropriate action.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION held at its office in Washington, D.C., this 9th day of April, 1962.

No. 882

UNAPPROVED SECTION 15 AGREEMENTS—SOUTH AFRICAN TRADE

This proceeding was instituted by our predecessor, the Federal Maritime Board, upon its own motion. Investigation of the matters involved having been completed by the entry, on the date hereof, of the Commission's report containing its findings and conclusions, which report is made a part hereof by reference:

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

BY THE COMMISSION.

(Signed) THOMAS LISI,
Secretary

FEDERAL MARITIME COMMISSION

No. 988

AGREEMENTS 8745 AND 8745-1,
PURCHASE OF VESSELS "ALICIA" AND "DOROTHY"

Decided April 16, 1962

Agreements 8745 and 8745-1 found not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors. Further found that said agreements are not in violation of the Shipping Act, 1916, will not operate to the detriment of the commerce of the United States, and are not contrary to the public interest.

Agreements 8745 and 8745-1 approved, pursuant to Section 15 of the Shipping Act, 1916.

Mark P. Schlefer for A. H. Bull Steamship Company.

Sterling Stoudenmire for Waterman Steamship Corporation and Sea-Land Equipment, Inc.

Edmund E. Harvey for Seatrain Lines, Inc.

Gerald A. Malia for Association of Sugar Producers of Puerto Rico, Puerto Rican American Sugar Refinery, Central Roig Refining Company, Western Sugar Refining Company, and Olavaria & Co., Inc.

John Rigby for the Commonwealth of Puerto Rico.

Donald J. Brunner as Hearing Counsel.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner;* JAMES V. DAY, *Commissioner.*

BY THE COMMISSION:

By our action herein we approve two agreements (Nos. 8745 and 8745-1) which, taken together, constitute one and are herein-

after referred to as "the Agreement." The parties to the agreement are Commonwealth Steamship, Inc. (Commonwealth). A. H. Bull Steamship Company (Bull), Bull Lines, Inc. (Bull Lines), A. H. Bull & Co. (A. H.), Waterman Steamship Company of Puerto Rico (Puerto Rico), and Sea-Land Equipment, Inc. (Sea-Land). The agreement provides *inter alia* that Commonwealth will sell Puerto Rico two partially containerized C4-3-B2 vessels, "Alicia" and "Dorothy", and that for one year after the sale Bull will not compete with Puerto Rico in the Gulf-Puerto Rico trade. This agreement then is an agreement which regulates, prevents and destroys competition, and being between parties subject to the Shipping Act, 1916 (Act), it is required by Section 15 of the Act to be filed immediately with the Commission, as it was. The Commission is authorized and directed by Section 15 of the Act to approve all such agreements not found by the Commission to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest or to violate the Act. *In the Matter of Agreement No. 8555 between Isbrandtsen Steamship Company, Inc., Isbrandtsen Company, Inc., and American Export Lines, Inc.*, 7 F.M.C. 125 (1962).

When the agreement was filed and approval requested the matter was publicized in the Federal Register. Written comments pursuant to this publication were received. Public hearing was held before us on April 11, 1962. Prior to the hearing, the Commission invited the views and comments of the Department of Justice. The head of the Antitrust Division advised us that the Department interposed no objection to our approval of the agreement.

The two vessels here involved were acquired from the government pursuant to the provisions of Section 510(i) of the Merchant Marine Act of 1936. They are under conversion into partially containerized ships, and the conversion is practically completed. Such vessels are particularly qualified for efficient, economical operation in the U.S./Puerto Rican trade, both from North Atlantic and from Gulf ports. Originally intended for operation from North Atlantic ports in the Bull service, the "Alicia" and the "Dorothy" are now intended for operation from Gulf ports by Waterman. This being the intended effect of the agreement, we will first consider if we would be justified in making findings that the agreement will on this account or for any other reason operate to the

detriment of the commerce of the United States, or be contrary to the public interest. We would not, in our opinion, be justified in making either finding.

The "Alicia" and the "Dorothy" are to be operated in United States/Puerto Rican service from Gulf ports. There, as stated by the Commonwealth, "the economies and conveniencies afforded by such vessels will redound to the benefit of both the carrier and the public." It appears distinctly beneficial to the commerce of the United States, and the public interest for the shippers of both the Gulf and the North Atlantic areas to Puerto Rico to have container ships available, which will be the situation if this agreement is carried out, rather than to have container ships available only from North Atlantic ports, as is now the case. There is of course no indication in the record that performance of the agreement will make the North Atlantic/Puerto Rican service inadequate, or overtonnage the Gulf/Puerto Rican service.

There is neither allegation nor evidence that the agreement is unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or as between exporters from the United States and their foreign competitors, or that it violates the Act. No finding to such effect is made or could be made.

One carrier (Seatrain Lines, Inc.) was apprehensive lest "Alicia" and "Dorothy" may be diverted from the Puerto Rican service and put in competition with Seatrain ships on other routes, and supports as a condition of approving the agreement a requirement that Waterman agree to operate "Alicia" and "Dorothy" in the Puerto Rican trade as long as that operation is profitable, and shall not place them in competition with Seatrain unless after notice and hearing, in which Seatrain and others shall be entitled to participate, the Commission shall approve such operation. It cannot be—and it has not here been—contended that, absent such an agreement, the contract is unjustly discriminatory or unfair between carriers simply because it is possible that at some later date Waterman may put "Alicia" and "Dorothy" in competition with Seatrain ships. Nor has anything been advanced which persuades us that the agreement is contrary to the public interest because this may happen, or will operate to the detriment of the commerce of the United States if (and because) it does happen.

It has also been suggested that an agreement by Waterman to operate "Alicia" and "Dorothy" in the United States/Puerto Rican trade for a period of years should be insisted upon in the public interest. If the ships were now so obligated, such an agreement

might be justifiably insisted upon in order that the agreement should not deprive the government of a right at least theoretically valuable. But our attention has not been called to any such obligation. Under the circumstances of this case, we do not believe we should impose upon Commonwealth's vendee a burden not imposed on Commonwealth. Our approval therefore should be, and is, unconditional.

Having fully considered application, protests, affidavits, statements of position and oral argument, the Commission finds upon the whole record that Agreements Nos. 8745 and 8745-1 are not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors; that said agreements will not operate to the detriment but to the benefit of the commerce of the United States; do not violate the Act; and are not contrary but beneficial to the public interest. It follows that we should approve the agreements, and we do approve them.

Protests and arguments not discussed herein are considered unsubstantial or irrelevant.

An appropriate order will be entered.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION, held at its office in Washington, D.C., on the 16th day of April, 1962.

No. 988

IN THE MATTER OF AGREEMENTS 8745 AND 8745-1, PURCHASE OF VESSELS "ALICIA" AND "DOROTHY"

Whereas, the Commission, on the 16th day of April, 1962, issued its report herein, which is made a part hereof,

Now therefore, for the reasons stated in said report, *it is ordered* that Agreements 8745 and 8745-1 be and they are hereby approved, and this proceeding is discontinued.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

(SEAL)

775-794 O-65-15

FEDERAL MARITIME COMMISSION

No. 920 and No. 920 (Sub. 1)

States Marine Lines, Inc. and Global Bulk Transport Corporation

v.

Trans-Pacific Freight Conference of Japan, et al.

Decided April 16, 1962

1. Respondents found to have violated section 15 of the Shipping Act, 1916 by the establishment and operation of a "Neutral Body" self-policing system which did not conform to the agreement that was approved by the Federal Maritime Board.
2. Respondents ordered to cancel fines found to be unlawful and to cease and desist from attempting to collect these fines or any other fines assessed by the "Neutral Body" and to cease and desist from carrying out the Neutral Body amendment to the conference agreement in any manner inconsistent with the amendment approved by the Federal Maritime Board or the Commission's Report.

George F. Galland and *Amy Scupi* for complainants States Marine Lines, Inc., and Global Bulk Transport Corporation.

Chalmers G. Graham, Leonard G. James, Alexander D. Calhoun, Jr. Dan F. Henderson, and *Charles F. Warren* for respondent Trans-Pacific Freight Conference of Japan and its member lines.

Robert B. Hood, Jr. Public Counsel.

Report of the Commission

Thos. E. Stakem, *Chairman;* John Harllee, *Vice Chairman;* Ashton C. Barrett, *Commissioner;* John S. Patterson, *Commissioner*

By the Commission:

The consolidated proceedings arise out of complaints filed on November 7, 1960 (No. 920) and April 7, 1961 (920 Sub. 1).

The respondents are a conference of ocean common carriers and its member lines[1] engaged in trade from Japan, Korea and Okinawa to Alaska, Hawaii, ports on the West Coast of the United States and Canada. Complainants are affiliated steamship lines jointly holding a membership in respondent conference. These two complaints were filed after fines were assessed against complainant States Marine Lines, Inc., by a self-policing unit of the conference, called the Neutral Body, which had been established by the conference to investigate complaints of violations of the conference agreement and empowered to fine conference members for violations that it discovered. Subsequent to the filing of the second complaint, our predecessor Federal Maritime Board by its order served May 31, 1961 ordered respondents to cease and desist from collecting or assessing any fines against complainants or to take any action to collect fines heretofore assessed against complainants.

The allegations of the complaints filed in Dockets 920 and 920 (Sub. 1) were, in substance, that actions taken by the Neutral Body and respondents were in violation of section 15, Shipping Act, 1916; that the granting of access to records as requested by the Neutral Body would violate section 20, of the Shipping Act, 1916; that the Board's approval of the Neutral Body agreement was arbitrary and capricious constituting an abuse of the Board's discretion and an unlawful delegation of statutory authority under the Shipping Act, and a denial of rights of appeal granted by the Shipping Act, the Hobbs Act and the Administrative Procedure Act.

Hearings were held before an examiner and briefs were submitted. The Examiner served his initial decision on the parties on October 19, 1961. Exceptions to the Examiner's decision were filed and oral argument was heard by the Federal Maritime Commission on December 18, 1961.

1. Respondent Trans-Pacific Freight Conference of Japan is a conference of common carriers engaged in the trade from Japan,

---

[1] Respondent member lines are: American Mail Line, Ltd., Waterman Steamship Corp., American President Lines, Ltd., Barber-Wilhelmsen Line, Fernville Far East Lines, Daido Kaiun Kaisha, Ltd., Iino Kaiun Kaisha, Ltd., Kawasaki Kisen Kaisha, Ltd., Knutsen Line, Maersk Line, Maritime Company of the Philippines, Mitsubishi Shipping Co., Ltd., Mitsui Line, Nippon Yusen Kaisha, Nissan Kisen Kaisha, Ltd., Nitto Shosen Co., Ltd., Osaka Shosen Kaisha, Ltd., Pacific Far East Line, Inc., United States Lines Co., Pacific Orient Express Lines, Philippine National Lines, United Philippine Lines, Inc., Shinnihan Steamship Co., Ltd., States Steamship Company, Yamashita Steamship Co., Ltd., Ivaran Lines.

Korea and Okinawa to Alaska, Hawaii, and West Coast ports of the United States and Canada. It operates under a basic conference agreement that was filed with and approved by the Federal Maritime Board pursuant to section 15, Shipping Act, 1916 (46 U.S.C. 814). The conference agreement, in addition to providing for the setting of rates for the carriage of cargoes in this trade, prohibits the member lines from granting rebates or special privileges and engaging in other unfair practices.

2. Prior to March 1958, several members of the conference had threatened to resign because of alleged breaches of conference obligations by other members. A conference meeting was held in Japan in March of 1958 and as a result of the threatened resignations and possible dissolution of the conference the members agreed to establish a self-policing unit to enforce the conference obligations. By written agreement which was styled "Undertaking of Principals" a Neutral Body was created to perform this self-policing function.

3. The Neutral Body was given broad powers to receive and investigate complaints and report violations, and it was to have "absolute discretion" to determine whether there had been an infringement of the conference agreement and assess a fine therefor. The fines that could be assessed were substantial,[2] and all member lines agreed "to accept the decision(s) and any assessment(s) of fines thereof by the Neutral Body as final and binding." It could "engage agents, lawyers or other experts in connection with its investigation and consideration of complaints . . . ." Any fines that were assessed were payable by the offending line to the conference and if not paid by the line could be levied against a $25,000 performance bond that had already been posted with the conference by each member.

4. The Neutral Body was to be "selected and appointed by the conference from responsible accountants or other person or persons, not a party to nor employed by or financially interested in any party to the agreement upon such terms as are agreed between the conference and the Neutral Body."

5. When the conference established its neutral body system, it did not file the agreement covering same with the Federal Mari-

[2] $10,000 maximum for a first offense, $15,000 and $20,000 maximum for second and third offenses, and $30,000 maximum for fourth and subsequent offenses.

time Board for approval under section 15.[3] The Board's Office of Regulation discovered the existence of the neutral body plan in the minutes of the conference meeting and advised the conference that the plan could not be effectuated until filed with and approved by the Board. The conference subsequently filed the plan as an amendment to its conference agreement and the Board approved it on March 12, 1959. However, the conference had appointed its Neutral Body and it had begun operating before the Board had given its approval.

6. Shortly after establishing the neutral body system, but prior to Board approval, the conference retained the international accounting firm of Lowe, Bingham and Thomsons (Lowe), which had been selected by a committee of conference members. Initially the committee had some reservations about the selection of Lowe, since the conference agreement stipulated that the Neutral Body could "not be a party to nor employed by nor financially interested

[3] The following is the text of section 15 as it read prior to its amendment in 1961 by P.L. 87-346 (75 Stat. 762 *et seq.*). The amendments will be discussed herein where pertinent to this case.

SEC. 15 That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages [sic]; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; alloting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement The term "ageement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously pproved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

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, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act approved July second, eighteen hundred and 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

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

in any party to the (conference) agreement," and the committee had been informed that Lowe was the Tokyo correspondent of Price, Waterhouse & Co. (Price), the regular auditor of United States Lines, which was a member of the conference. However, United States Lines informed the committee that it had no objections to the appointment of Lowe as the Neutral Body. The relationships between these two accounting firms and United States Lines were not within the general knowledge of the conference membership nor known to complainants at the time Lowe was selected and appointed to serve as the Neutral Body.

7. Lowe received a complaint of alleged rebating in connection with States Marine's carriage of mandarin oranges from Japan to Canada during the year 1958. In January 1959, Lowe visited the Tokyo office of States Marine and stated it wanted to inspect records relating to said movement of mandarin oranges. States Marine made its Tokyo records available, but the only indication of possible malpractice that Lowe discovered was the solicitation of States Marine by two shippers of mandarin oranges for free passage from San Francisco to Japan.

8. Lowe's Tokyo investigation having failed to produce evidence that free passage was granted to these shippers in response to their requests, Lowe directed its New York correspondent Price to continue the investigation in New York. On April 28, 1959, Price approached States Marine and requested access to its head office records to continue the investigation. States Marine refused to permit Price to inspect these records, initially stating that this would interfere with its annual audit, then suggesting that its own auditors make the inspection and report whatever facts were required by Price. Lowe declined the offer and insisted that Price conduct the examination of States Marine's records. On July 27, 1959 States Marine informed the conference that it understood Lowe and Price were employed as accountants by at least one member of the conference, that under the terms of the conference agreement they were disqualified to act as the Neutral Body, and that the investigation itself was of doubtful legality since it involved matters which occurred prior to the Federal Maritime Board's approval of the neutral body system. States Marine also suggested that audits required by a qualified Neutral Body should be obtained through the regular auditors of the conference member concerned, as this would "tend to avoid possible violation" of section 20 of the Shipping Act, 1916 which prohibits the disclosure

of certain information.[4] Lowe also informed the conference that it now had doubts about its qualifications to serve as the Neutral Body under the standards set by the conference agreement.

9. At a regular conference meeting held on August 19, 1959, the conference adopted what they termed an "official interpretation" of the neutral body provision of the conference agreement requiring that the party selected as the Neutral Body not be "a party to or employed by or financially interested in any party" to the conference agreement. The "interpretation" was that this requirement did not apply to agents employed by the Neutral Body. Isthmian and States Marine voted against this action.

10. By letter dated August 28, 1959, Lowe advised States Marine that it was assessing a fine of $10,000 against it for refusing to grant Price access to records. This assessment led to the complaint filed in Docket No. 920.

11. The complaint in Docket No. 920 (Sub. 1) was filed after Lowe called at States Marine's Tokyo office on February 27, 1961, requesting that States Marine make available records in connection with the carriage of mandarin oranges from Japan to British Columbia during the year 1960. States Marine refused this request on the basis that this new investigation should be held in abeyance pending the final determination of the issues raised in Docket No. 920. Lowe thereupon assessed a second fine of $15,000 against States Marine for its refusal to grant access to records.

12. After the filing of this second complaint, the Board issued a cease and desist order directing respondents not to assess further fines against complainants, or make efforts to collect those already assessed pending the determination of the issues raised in these proceedings.

DISCUSSION AND CONCLUSIONS

The disputes which led to these proceedings raise issues that directly concern United States foreign commerce and the Commission's regulatory functions under the Shipping Act, 1916 (the Act). Before we touch upon the aspects of Canadian com-

[4] Section 20 (46 U.S.C. 819) makes it unlawful for a "common carrier * * * to disclose to or permit to be acquired by any person other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee or routing of any property tendered or delivered to such common carrier * * * for transportation * * * in foreign commerce which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor or which may be used to the detriment or prejudice of any carrier * * *."

merce which respondents claim preclude us from jurisdiction in this case, we believe it necessary to briefly consider the duties and responsibilities imposed by the Act upon both this Commission and the respondents.

Respondents operate as a conference under an agreement approved pursuant to section 15 of the Act. When they decided to inaugurate a self-policing system and adopted their neutral body plan, they were amending or modifying the basic conference agreement. Modifications must be approved under section 15 before they can lawfully be carried out.

After the Federal Maritime Board approved the neutral body provision, the conference could lawfully establish the neutral body system, but only in conformity with the provisions of the conference agreement as thus amended and approved. Any departure from the approved system would be unlawful.

Section 15 is an exception to the general philosophy of American jurisprudence as expressed in our antitrust statutes that monopolistic or anticompetitive practices are *per se* contrary to the public interest. It grants antitrust immunity to certain agreements and actions authorized thereunder if the agency administering the Act approves such agreements. It necessarily follows that agreements authorized and approved under this statute should be strictly construed, and the parties' actions must be limited to such conduct as is authorized under the agreement.

In conjunction with the grant of power to approve agreements that fall within the scope of section 15 Congress has imposed upon this Commission, as upon its predecessors, the continuing responsibility of regulating and supervising action carrying out these agreements.[5] It is vitally necessary that the Commission maintain a constant vigil over the operations of the parties under approved section 15 agreements to insure that their activities conform to the agreements as approved and warrant continued exemption from the provisions of the antitrust laws, and we of course have the powers necessary to perform this regulatory function.

Before recent amendments to section 15 the agency administering the Act could disapprove, cancel or modify any agreement, or any modification thereof whether or not previously approved by it that it found to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports or between exporters from the United States and their foreign competitors or to

[5] For an extensive discussion of our obligations in respect to continued supervision see Pacific Coast European Conference, Docket 948 (Report served December 22, 1961).

operate to the detriment of the commerce of the United States or to be in violation of the Act.

When Congress amended section 15 (Public Law 87–346, 75 Stat. 763–64), it reëmphasized our responsibilities in this regard by directing that—

> The Commission *shall* by order after notice and hearing, 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 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 contrary to the public interest, or to be in violation of this Act . . . (Emphasis supplied)

Congress also added the following provision which is pertinent to the discussion at hand:

> The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it. . . .

Thus not only must we insure that the parties are properly operating *within* the scope of the agreements as approved, we must disapprove agreements when the parties are not fulfilling their obligations thereunder.

Viewing the instant case in light of our regulatory responsibilities under the Act, it is quite clear that the effectuation of neutral body agreements is of vital and proper concern to us. If the respondents departed, intentionally or unintentionally, from the approved agreement, the Commission in its regulatory capacity was duty bound to discover this and take steps to remedy the situation and prevent continued or future departures from the approved agreement. The Commission cannot operate in a vacuum or blindly. It must be cognizant not only of what the parties to these agreements have said they are going to do, but what they actually are doing.

Respondents' neutral body plan as approved provided for an impartial individual or group independent of any conference member to serve as the Neutral Body. If the person selected was not actually neutral or impartial, then unquestionably there was a departure from that which the Board had approved and to which the conference membership had agreed.

Not only was the Commission duty-bound to prevent such departure, any conference member was entitled to raise the same objection and could turn to the Board for relief. Whether or not a conference member protested or filed a complaint, section 22

of the Act (46 U.S.C. 821) empowered the Board to institute an investigation into the matter on its own motion.

While it seems quite clear that the issues raised by the complaints are well within our jurisdiction, the respondents have argued in these proceedings, and in a petition for review of our cease and desist order,[6] that we do not have the jurisdiction, solely because the Neutral Body was investigating alleged malpractices that occurred in the Japan to Canada mandarin orange trade. It is contended that we would be attempting to regulate foreign to foreign commerce if we asserted jurisdiction.

It is true that these controversies had their inception in Lowe's efforts to investigate alleged malpractices in the Japan to Canada mandarin orange trade, but this does not support the claim of no jurisdiction. The manner in which the dispute arose is, in our opinion, immaterial for factually the issues are much broader in scope and concern the very heart of respondents' neutral body system and the proper functioning of the conference under its approved section 15 agreement. These matters are wholly unrelated to the cargo or trade route involved in a particular investigation, and complainants would be entitled to object to an unqualified Neutral Body regardless of the cargo or trade involved. Actually, if the Board had received information that the conference had appointed a Neutral Body that did not meet the standards of the conference agreement, it could have instituted an investigation on its own motion and have taken action before the Neutral Body even commenced its operations. Similarly, any conference member could have filed a complaint with the Board based upon the same facts, for a member certainly has standing to insist that a conference limit its actions to those which are authorized by the conference agreement. We do not see any valid basis for now saying that complainants cannot challenge the Neutral Body's qualifications, or that we do not have jurisdiction to hear and determine these complaints, simply because an investigation of transportation between Japan and Canada first brought to light the question of Lowe's neutrality.

The nature of the fines asssesed against States Marine by the Neutral Body must also be considered. They were not assessed for alleged malpractices in foreign to foreign commerce, but were

---

[6] *Trans-Pacific Freight Conference of Japan et al.* v. *Federal Maritime Board and United States of America*, 302 F. 2d 875 (1962) Order reversed.

based solely upon States Marine's refusals to grant Lowe access to its records. When States Marine refused to permit Lowe or its correspondent to inspect its records, it challenged Lowe's qualifications to act as the Neutral Body under any circumstances. That challenge raised the principal issue to be determined in this proceeding: Did the conference carry out its neutral body system in conformity with the agreement which the Board had approved? As noted previously, this was purely a question of the proper effectuation of the agreement and we are duty bound to insure that approved agreements are properly effectuated. That is exactly what we must determine herein. We are not called upon to rule on malpractices in commerce between Japan to Canada or regulate that trade and we do not here attempt to do so.

The respondents themselves created the situation of which they now complain. As a matter of their own convenience, they established one conference covering the entire Pacific Coast of the United States and Canada. Their conference agreement does not differentiate between traffic to Canadian ports and United States ports. The Neutral Body was set up to function in exactly the same manner in both trades. United States foreign commerce not only was involved, it predominates in the trade. The conference agreement and its amendments therefore require the Board's approval and continuing supervision under the Act. One obvious answer to respondents' objections, and a course we may have to follow if arguments of this sort are made in the future, would be the elimination of the Canadian trade from agreements presented to us. This would mean that respondents would have to establish a separate conference for the Canadian aspects of their operations, assuming they wanted to operate in concert in that trade. It was an alternative that they could have initially chosen. Having rejected that alternative, we do not think that they may now persuasively or validly contend that we must treat the conference agreement as if it were really two agreements; one applicable to Canadian commerce and the other applicable to United States commerce. The conference agreement itself fails to make such distinction. Nor will we.

The next question before us is whether respondents' use of Lowe, Bingham and Thomsons as the "Neutral Body" was a violation of the approved agreement. The qualifications of this firm to act as the Neutral Body must be determined upon the standards the conference set forth in the agreement submitted

to and approved by the Board. That agreement specifically provides:

> There shall be a Neutral Body selected and appointed by the Conference from responsible accountants or other person or persons, not a party to, nor employed by or financially interested in any party to the agreement upon such terms as are agreed, between the Conference and the Neutral Body.

Unquestionably neither Lowe nor Price "were parties to the agreement." Nor does it appear that either firm had any financial interest in any conference member, in the sense of equitable or legal ownership which, we believe, was the intended construction to be placed on this phrase. The first two standards of neutrality are therefore satisfied, but neither firm meets the third. As we interpret the agreement, both are "employed by" a Conference member, United States Lines: Price as the regular auditor and Lowe as Price's Tokyo correspondent or agent.

In some instances the term "employed by" may connote simply a master-servant relationship but that is not the sense in which the term was used in this Neutral Body provision, as is evident on the face of the provision. Even though Lowe and Price may function as independent contractors, they are "employed by" a party to the agreement, namely, United States Lines. They have the same confidential relationship of employment that usually exists between accounting firms and business concerns that employ them to audit their records. They are squarely within the words "responsible accountants . . . employed by" a conference member, the standards established by the conference agreement itself. They are therefore precluded from serving as the Neutral Body of this conference under the approved agreement so long as they continue in a member's employment. The obvious purpose of the clause setting forth the neutrality requirements was to insure impartiality by eliminating any possibility of bias or influence. It would not be consistent with the broad scope of this provision to construe the term "employed by" as applicable only to a master-servant situation, particularly in view of the fact that accountants are specifically named therein as persons who if appointed are to have no employment relationship with a conference member.

The conference's "interpretation," issued after the neutrality of Lowe was questioned, was not an interpretation at all but was a modification or amendment of the Neutral Body provision and as such required Board approval before it could be lawfully effectuated.

Respondents argue that complainants could not in these proceedings validly challenge the selection of Lowe as the Neutral Body since the committee which selected Lowe had knowledge of the relationships here in question. This argument stretches theories of agency and imputed knowledge too far. The committee was only authorized to select as a Neutral Body an individual or organization that was qualified according to the terms of the conference agreement. This they failed to do and for that reason their action is not binding upon the complainants, and would not be even if complainants had known of the relationships. The parties to agreements approved under section 15 are not empowered to alter their terms *inter se*. They must file an amendment and secure Commission approval.

This case, of course, in no way concerns the conduct or ethics of the accounting firms involved. Lowe does not qualify as the Neutral Body simply because it does not meet the specifications set forth by the conference itself and approved by the Board. Nor is there any question here as to whether a firm of accountants that also serves as the auditor for a conference member could properly be appointed as a conference policing agent in the absence of a provision such as the one here.

Although we have not ruled in favor of the contentions of the respondents, we do not hereby intend to condemn the neutral body concept in general. As we have stated previously in this opinion, Congress has only recently amended section 15 to require self-policing of conference agreements which indicates quite specifically that a proper self-policing system is not only desirable but necessary. We do not concur with the Examiner that the conference must amend its neutral body provision. It has several choices; it may appoint a Neutral Body which conforms to the requirements of its existing agreement or it may modify the conference agreement (subject to Commission approval) to permit the use of Lowe, Bingham and Thomsons or another international accounting firm as the Neutral Body or adopt some other effective method of self-policing. The choice of the appropriate course of action should remain with the conference and its members, but they must take action in this regard as soon as possible.

Several collateral issues were raised by the parties, on which some comment is appropriate for guidance of the future conduct of this and other conferences and their members.

The question was raised: Must a Neutral Body in its investigations only operate prospectively or may it investigate events

that transpired prior to the approved establishment of the neutral body system? This conference agreement was silent on this question; however, if it is the purpose of a conference to have its neutral body or other self-policing system deal with past events, this purpose should be specifically included in the agreement establishing the self-policing system when it is submitted for approval.

In addition to challenging the neutrality of Lowe, complainants attacked the basic neutral body system itself claiming that the procedures as approved by the Board deprived them of a fair hearing; and the Board unlawfully delegated its authority to the Neutral Body, and that they were deprived of any right to appeal in violation of the Shipping Act, 1916,[7] the Hobbs Act,[8] and the Administrative Procedure Act.[9] All of the foregoing contentions are based upon the premise that functions of the agency administering the Shipping Act were delegated to the Neutral Body. This, of course, is not the case. Investigations and findings made by the Neutral Body do not in any way preclude a separate hearing before this Commission nor are the findings of the Neutral Body binding upon us. The functions and powers of the Commission remain the same and the mere fact that the conference members have elected to discipline themselves does not and cannot bar or control appropriate proceedings before us. Moreover, Congress has determined that self-policing is a requisite of proper conference operation and specifically incorporated this requirement in the recent amendments to section 15.

There were a number of issues raised in these proceedings that either because of our previous findings or irrelevancy do not require our determination at this time. Complainants raised the questions of the validity of the conference two-third's vote procedure for amending the conference agreement and its secret ballot. It is our opinion that this record does not require resolution of these questions. It is also unnecessary to judge the effects of this neutral body system upon United States foreign commerce for Lowe was not a properly qualified Neutral Body. Since we have found that States Marine was justified in refusing to grant access to its records, it is not essential that we determine whether these refusals were violations of the conference agreement or whether the Neutral Body's demands for information were limited to the mandarin orange trade or were more general. In the

[7] 46 U.S.C. 830
[8] 5 U.S.C. 1031, *et seq.*
[9] 5 U.S.C. 1009

same vein, it would add nothing to this opinion to rule on the contention that States Marine would be violating section 20 of the Act by permitting the Neutral Body free access to its business records. That section of the Act has also recently been amended to clearly authorize the giving of information to a Neutral Body or other conference policing unit (P.L. 87–346, 75 Stat. 765–66).

Although we have not dwelt in length upon the activities of the Neutral Body prior to Board approval of this system, it should be noted that the neutral body plan was not immediately filed with the Board for approval and was effectuated before it was approved which are both distinct violations of section 15 of the Act. However, while we do not excuse or condone these violations, we have been primarily concerned with the improper effectuation of the agreement which would be contrary to the Act regardless of when it was filed with and approved by the Board.

Having found that the Neutral Body appointed by the conference does not conform to the requirements of the conference agreement, we hereby find that the conference has violated section 15, Shipping Act, 1916, and the fines levied against States Marine are unlawful and unenforceable; therefore, they must be cancelled and respondents must cease and desist from attempting to collect these fines either in proceedings to deduct the fines from the States Marine bond or in any other manner.

An order shall be entered in conformity with the findings and conclusions herein.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION held at its office in Washington, D.C., this 16th day of April, 1962

NOS. 920 and 920 (Sub. 1)

STATES MARINE LINES, INC. AND GLOBAL BULK TRANSPORT CORPORATION

v.

TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN, ET AL.

These consolidated proceedings were instituted after complaints were filed with our predecessor, the Federal Maritime Board. Having been duly heard and submitted and the Federal Maritime Commission, having fully considered these matters, has this date made and entered of record a Report containing its conclusions and decision thereon, which report is hereby referred to and made a part hereof.

Having found that respondents have violated section 15 of the Shipping Act, 1916:

It is ordered, That respondents Trans-Pacific Freight Conference of Japan and its members:

(1) cancel the fines that were found to be unlawful in these proceedings; and

(2) cease and desist from attempting to collect these fines or any fines assessed by the Neutral Body (Lowe, Bingham and Thomsons) in any manner; and

It is further ordered, That respondents cease and desist from carrying out the amendment to the conference agreement approved by the Federal Maritime Board on March 12, 1959 in any manner inconsistent with (1) said amendment as approved by the Board or (2) the Commission's Report in these proceedings.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 947

INTERNATIONAL TRADING CORPORATION OF VIRGINIA, INC.
v.
FALL RIVER LINE PIER, INC.

Decided April 16, 1962

Fall River Line Pier, Inc. found to be "another person" subject to the Shipping Act, 1916, and subject to the jurisdiction of the Commission.
Fall River Line Pier, Inc. found not to have violated Sec. 16 or 17 of the Shipping Act in the matter of berthing and storage space allocation.
Fall River Line Pier, Inc. found to have violated Sec. 16 First and Sec. 17 in the matter of free time allowances and storage charges.
I.T.C. Virginia found not to have proved that the 10-day billing requirement imposed on I.T.C. New England to be unlawful.
Proceeding remanded to Hearing Examiner for the purpose of determining reparation, if any, due to complainant.

W. B. Ewers, for complainant

Frank L. Orfanello and *John F. Dargin, Jr.*, for respondent

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice-Chairman;* *Commissioners* ASHTON C. BARRETT, JOHN S. PATTERSON AND JAMES V. DAY

BY THE COMMISSION:

FACTS

Complainant, International Trading Corporation of Virginia (I.T.C. Virginia) is a Virginia corporation with its place of business in Norfolk, Va., engaged in the business of importing cement. By complaint filed on June 8, 1961, and amended on June 30, it alleges that respondent, Fall River Line Pier, Inc. (the Pier) has violated Sections 16 and 17 of the Shipping Act, 1916, (1)

775-794 O-65-16

by giving undue and unreasonable preference and advantage to complainant's competitor in the allocation of berthing space and pier storage space at respondent's pier during 1959, 1960, 1961; (2) by charging complainant storage rates greater than that charged other persons for the same type of cargo; and (3) by subjecting complainant to undue and unreasonable prejudice and disadvantage through certain practices concerning payment of terminal charges. Complainant further alleges that it has been damaged in the amount of $14,265.50 by respondent's unlawful acts, and seeks reparation in that amount. Complainant also seeks an order directing respondent to cease and desist its alleged unlawful activities.

Respondent Pier is a corporation organized under the laws of Massachusetts. Its articles of organization state that its purpose is to hold, lease, sublease, or build a pier and wharf with buildings, storage space, sidings, and other equipment, and to operate said facilities or any other business which may advantageously be carried on in connection with the foregoing in Fall River Harbor; and to do any and all things necessary or incidental thereto with the end in view of stimulating the shipment of freight and merchandise by water to the extent of the pier's capacity, to be equally accessible to all men interested in handling, receiving, and storing freight and merchandise.

There is no evidence in this record as to any advertising of the pier facilities nor of the manner by which Pier's services are held out to the public other than its letterhead. The letterhead, in addition to listing the name, address, and names of the corporate officers, lists under the heading "Facilities" the following information:

Covered Pier Storage—108,000 square feet—35′ depth water—Unlimited length and beam—Full length Toledo Electronic Truck Scale—4 N.Y., N.H. and H.R.R. tracks full length of Pier—Car or truck level shed platform—24 Hour Guard Protection—Sprinkler System—Flood Lights for Night Operation—Quick Turn-around—Minimum Stevedoring Rates—Minimum Insurance Rates—Ample trouble-free Labor.

The letterhead additionally advertises respondent's pier as "New Modern Marine Terminal—Serving All New England". Throughout the entire proceeding the Pier contended that it was not an "other person" subject to the Shipping Act within the meaning of Secs. 1 and 17 because it never rendered terminal services to a common carrier by water. On September 17, 1961, it filed a motion to dismiss the complaint on the aforesaid grounds.

During the period from February 28, 1959 through January 3, 1961, there were 33 ships and 1 barge which docked at respondent's pier. Except for the barge which discharged only paper rolls, one ship which discharged 290.5 tons of general cargo on January 3, 1961, and two ships which in addition to bagged cement also discharged coil wire or office furniture for unknown consignees, the aforesaid ships discharged only bagged cement at Fall River. The cement was imported by complainant or its competitor, Foreston Coal Company (Foreston), and in each case was carried in a ship of foreign registry. Some of the ships of Swedish registry were operated by Thorden Lines which advertised in 1961 the availability of cargo, refrigerated and deep tank space on its vessels sailing between certain Swedish ports and Boston, Philadelphia, Baltimore, Hampton Roads and New York, but not Fall River. The manifest covering one voyage of the Thorden Line's ships in May 1959 shows that in addition to the discharge of bagged cement and office furniture at the Fall River pier miscellaneous general cargo was discharged at New York, Philadelphia, Baltimore, Newport News and Norfolk. The latter freight included diverse commodities ranging from edibles and potables to chemicals and manufactured goods.

There is no evidence in this record as to the arrangements by which Foreston shipped its cement to Fall River, nor is there any proof that the 16 other ships that carried I.T.C. Virginia's cement also carried other cargo even though space may have been available on such ships. Foreston and I.T.C. Virginia are the only regular users of the Fall River pier with respect to ocean borne cargoes. I.T.C. Virginia's prime function is the importation of cement from Northern Europe and Sweden. Its carriage of the cement is under space charter arrangement whereby all the cement available to the foreign factor is loaded on the first available ship. The amount of cement thus carried varied from one third of the ship's capacity to its full capacity. It is alleged that all the cement unloaded at Fall River was consigned to I.T.C. Virginia and that bills of lading were issued by the carriers even though no such document was introduced into evidence by complainant.

I.T.C. Virginia claims to be the sole owner of the International Trading Corporation of New England (I.T.C. New England), a corporation organized under the laws of Rhode Island and having its place of business in Providence, Rhode Island. It is alleged that the latter corporation is merely one of convenience and that its officers are the same as those of complainant, I.T.C. Virginia.

It is alleged that none of the cement unloaded at Fall River was consigned to I.T.C. New England, and that complainant, for the purposes of these transactions, regarded the two corporations as one and the same. I.T.C. New England is not a party to this proceeding since the Examiner refused to permit a second amendment to the complaint in the midst of the taking of testimony some four months after this action initially was instituted.

There is testimony in this record that the Pier billed both I.T.C. Virginia and New England for terminal charges connected with the cement unloaded at Fall River, although no supporting document was offered into evidence. It is alleged that both I.T.C. Virginia and New England paid such charges but again no supporting evidence was offered. None of the officers of I.T.C. New England reside in New England although its General Manager resides in Providence. It was stated that the General Manager only had authority to sign payroll checks and no others. It was further stated that if a bill from the Pier came to I.T.C. New England it had to be sent to I.T.C. Virginia where it was checked and then payment was made. There is no evidence as to which corporation paid what bill, or if I.T.C. Virginia or I.T.C. New England paid all or none of such bills.

Evidence submitted by I.T.C. Virginia relating to the alleged discrimination in the allocation of berthing space is limited to one instance. In May of 1959, it requested space for a ship having an estimated time of arrival of June 1 at Fall River. This request was denied by respondent on the ground that another ship with a prior reservation was due to arrive at that time. Investigation by complainant showed that no ship was scheduled to arrive at Fall River until June 11th. Upon confronting respondent with this information, the requested berthing space was allocated to and used by a ship hauling cement for I.T.C. Virginia, and the cargo was unloaded without delay. The Pier did, however, subject I.T.C. Virginia to some inconvenience by not informing it when asked when pier space would be available. Instead the Pier compelled complainant to submit daily requests for space until it by chance happened to request an open date. At no time was any ship actually delayed or refused a berth when it arrived at Fall River.

The respondent allocated a maximum of 25,000 of the available 100,000 square feet of storage space to I.T.C. Virginia but permitted complainant's competitor, Foreston, to use twice that much space. The space allocated to I.T.C. Virginia was adequate for

storage of the cargoes consigned to it. There is no evidence in this record showing in what manner the respondent's allocation of storage space operated to the undue or unreasonable prejudice or disadvantage of complainant or to its competitor's undue or unreasonable preference or advantage. In one instance I.T.C. Virginia was allowed to, and did, unload a cargo of cement estimated to require about 30,000 square feet of storage space. The Pier at first did object, but upon arrival unloading was permitted. At no time was I.T.C. Virginia precluded from off-loading any cargo because of a lack of storage space.

The Pier did not require Foreston to pay charges on or before a specific date. Foreston paid respondent as late as 62 days after being billed, and frequently paid bills more than 10 days after billing. On the other hand, the respondent required I.T.C. New England, to pay bills within 10 days. If payment was not received by the due date, the Pier would not permit removal of cargo from the pier until payment was made. The Pier claims this was necessitated because of the poor payment record of I.T.C. New England.

Insofar as the prayer for reparation is concerned, the gravamen of the complaint pertains to storage charges assessed by the Pier under different rates and free time allowances. It billed I.T.C. New England, for the storage of cement, at a rate of 1 cent a bag per 30 days, or any portion thereof, after a free time allowance of 5 days, excluding Saturdays, Sundays or holidays. During the same period of time in 1959, 1960 and 1961, the Pier allowed Foreston 35 days free time, excluding Saturdays, Sundays, or holidays, and charged for the storage of cement thereafter at a rate of 6/10 cent a bag per 30 days, or any portion thereof. In June 1961 the Pier began to charge Foreston the same storage rate for cement, after the same free time allowance, as had been used in billing the I.T.C. New England.

The charges billed to I.T.C. New England were allegedly paid by that corporation or by I.T.C. Virginia. The record does not show how much was paid by each corporation but does show that together they would have paid $14,265.50 less, if the Pier had presented bills computed under the free time allowance and storage rate used in connection with charges billed Foreston for like storage of its cement.

In an initial decision the Examiner found (1) that the Pier was an "other person" subject to the Shipping Act, and thereby subject to the jurisdiction of the Federal Maritime Commission;

(2) that the Pier had not prejudiced I.T.C. Virginia, nor preferred another shipper in the allocation of berthing or storage space; (3) that the Pier had subjected I.T.C. Virginia to undue and unreasonable prejudice and disadvantage, and has given a competitor of I.T.C. Virginia an undue and unreasonable advantage, through difference in billing practices, storage rates, and free time allowances in violation of Secs. 16 and 17 of the Act; (4) that on June 19, 1961, the Pier established the same storage rate and free time allowance for all users, thereby ending the unlawful discrimination in rates and free time allowances; and (5) I.T.C. Virginia has failed to prove the nature or extent of its alleged damages.

The Examiner stated that an order requiring the Pier to cease and desist its discriminatory billing practices and to maintain uniform rates, rules, regulations and practices for all users of its facilities should be issued. The Examiner also suggested a further hearing and an order denying reparation at this time. Exceptions to the initial decision were filed and we heard oral argument. Exceptions and proposed findings not discussed herein have been considered and found not justified by the facts or not related to the material issues in this proceeding.

DISCUSSION

Respondent Pier objects to our jurisdiction over it on the ground that it is not an "other person" subject to the Shipping Act, 1916, within the meaning of section 1 thereof. That section declares that any person not included in the term "common carrier by water" who is carrying on the business of "furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water" is an other person subject to the act, and hence our jurisdiction. The Pier does not deny that it carries on the business of furnishing such terminal facilities, but insists that it does not do so in *connection with a common carrier by water*. It is well settled that states and cities, or instrumentalities thereof, are included in the term "other person subject to this Act." *California* v. *United States,* 320 U.S. 577, at 585 (1944); *Greater Baton Rouge Port Commission et al* v. *United States,* 287 F. 2d 86 (CA5-1961); cert. den.—368 U.S. 985, February 19, 1962; *Wharfage Charges and Practices at Boston, Mass.,* 2 U.S.M.C. 245 (1940).

The question to be decided here is whether respondent has furnished its services in connection with a common carrier by

water. There is evidence in this record that common carriers call at respondent's pier at Fall River. In response to a direct question from the Chairman, counsel for respondent admitted that some general cargo was in fact discharged at the pier. There is further evidence, a vessel manifest, that at least one ship carrying general cargo called at respondent's pier during the period under consideration. It is clear that respondent held itself out as a modern terminal capable of servicing any type of ocean common carrier and that it made no effort to restrict its services to contract carriers.

We agree with the Examiner that complainant has not established any undue or unjust discrimination by respondent in the matters of storage space allocation and berthing arrangements. Complaint has shown no injury, nor has it demonstrated wherein those practices have caused it any undue disadvantage. Its ships were berthed on arrival; its cargo was unloaded and stored; and it could not show how its traffic would increase if the practices complained of were different than as demonstrated in this record.

Complainant's allegations concerning the two facets of respondent's billing practices are not so readily decided. There is confusion in the record because of inadequate proof as to who was injured and the extent of such injury caused by respondent's actions. The confusion arises from the existence of, and relationship between, complainant and another corporation, I.T.C. New England. It is alleged that the latter is a wholly owned subsidiary of complainant, and we are asked to consider the two corporations as one in this proceeding.

During the course of the proceeding before the Examiner, respondent objected to evidence offered to establish a parent subsidiary relationship between the two corporations. Over the objection complainant was permitted to state that such a relationship existed but no supporting evidence was offered. Instead, I.T.C. Virginia sought to *amend its complaint* a second time to bring in a new party complainant, I.T.C. New England. The amendment was not permitted by the Examiner because of the then posture of the proceedings and respondent's statement that its case was prepared only against complainant's allegations. We think the Examiner should have permitted the amendment and allowed the Pier adequate time at the conclusion of complainant's case to prepare whatever additional defense it may have required.

While we do find the billing practice of respondent with regard to the matter of storage charges and free time allowances assessed

against complainant and I.T.C. New England to be unjustly discriminatory in comparison with those assessed Foreston, this record does not indicate the extent I.T.C. Virginia was injured thereby. However, since respondent has stopped the discriminatory assessment, there is no reason for us now to issue a cease and desist order in the matter. In view of the confusion in this record concerning the relationship of I.T.C. Virginia and New England we cannot now decide if the 10-day payment requirement imposed on I.T.C. New England, not a party in this proceeding, was unjustly discriminatory or not. There is no proof to show that I.T.C. Virginia was subjected to such a requirement by respondent.

We are therefore remanding this proceeding to the Examiner to authorize an amendment to the complaint to include I.T.C. New England and thereafter for the purposes of determining the amount of reparation due under the complaint as amended.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION, held at its Office in Washington, D.C. on the 16th day of April, 1962.

No. 947

INTERNATIONAL TRADING CORPORATION OF VIRGINIA, INC. v.

FALL RIVER LINE PIER, INC.

The Commission has considered the record, heard oral argument, and has entered a report this date, which is made a part hereof, in which the Commission for reasons stated therein deemed it necessary to take further evidence in the proceeding.

Now therefore, for the reasons stated in the Commission's report, the record is remanded to the Examiner for further proceedings consistent with the Commission's report.

By the Commission

(Sgd.) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 906

AGREEMENTS, CHARGES, COMMISSIONS AND PRACTICES OF THE NORTH ATLANTIC WESTBOUND FREIGHT ASSOCIATION

DENIAL OF APPEAL FROM RULING BY PRESIDING EXAMINER, AND MOTION TO DISMISS

Decided May 3, 1962

Ronald A. Capone, Robert Keari Binder, Cletus Keating and *Elmer C. Maddy* for respondents.

Roger A. McShea and *Robert J. Blackwell* as Hearing Counsel.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner;* JAMES V. DAY, *Commissioner.*

BY THE COMMISSION:

This is an appeal from a ruling of the Examiner granting the motion of Hearing Counsel for the discovery and production of certain documents alleged to be in the custody and control of respondents.[1] The circumstances and events leading to this appeal are set forth below.

[1] The appeal here is taken by Anchor Line, Limited; the Bristol City Line; Cunard Steamship Co.; Ellerman's Wilson Line; Furness, Withy & Co.; Irish Shipping Ltd.; Manchester Liners, Ltd.; Ulster Steamship Company, Ltd.; and United States Lines Company. All are members of the North Atlantic Westbound Freight Association. Two members of the Association, Fjell Line and South Atlantic Steamship Line, did not participate in the appeal. Rule 10(m) of the Commission's Rules of Practice and Procedure provides: "Rulings of presiding officers may not be appealed prior to, or during the course of, hearing except in extraordinary circumstances where prompt decision by the Board is necessary to prevent unusual delay, expense, or detriment to the public interest, in which instances the matter shall be referred forthwith by the presiding officer to the Commission for determination."

On the basis of information referred to it by the Antitrust Subcommittee of the House Judiciary Committee, the Federal Maritime Board instituted this investigation[2] to determine the extent to which the agreements and practices of respondents in the Great Britain, Northern Ireland, and Eire to United States Atlantic Coast trade were in violation of the Shipping Act, 1916. Of particular concern to the Board was the alleged existence of agreements between respondents providing for the payment of commissions to forwarding agents only on shipments to ports south of New York and Boston (for example, Philadelphia, Baltimore and Hampton Roads), and concomitantly that no payments would be made on shipments to either New York or Boston.

On January 13, 1961, the Examiner scheduled a prehearing conference to be held on February 23, 1961; and on January 27, 1961, Hearing Counsel filed their first motion for discovery and production of documents pursuant to Rule 12(k) of the Board's Rules of Practice and Procedure.[3]

At the prehearing conference, after vigorous opposition to Hearing Counsel's motion, counsel for respondents stated that "the British lines would not be unwilling to make a factual statement regarding the payment of commissions provided that a reasonable basis for so doing could be worked out with the Federal Maritime Board." (Prehearing Tr. 85). Hearing Counsel withdrew their motion for discovery and indicated willingness to consult with counsel for respondents as to the area to be covered by the statement. (Prehearing Tr. 101).

On July 12, 1961, the British lines submitted a document entitled "History of the Payment of Commission to Forwarding Agents in the United Kingdom and the Republic of Ireland on Traffic Shipped to East Coast Ports of the United States of America." On November 3, 1961, Hearing Counsel advised counsel for respondents that in their opinion the statement submitted by the British lines did not meet the requirements of the investigation

[2] The investigation was instituted by Board order on May 17, 1960 The order was served on respondents on May 20, 1960, and notice of investigation and hearing was published in the Federal Register June 15, 1960 (25 F.R. 5352).

[3] Rule 12(k) provides: "Upon motion of any party showing good cause therefor and upon notice to all other parties, the Board or presiding officer may direct any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any matter, not privileged, which is relevant to the subject matter involved in the pending proceeding, and which are in his possession, custody or control. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just."

and that Hearing Counsel would have to resort to compulsory process to obtain the information. On January 2, 1962, Hearing Counsel filed their second motion for discovery and production of documents. A second reply by respondents was filed on January 22, 1962, and on January 26, 1962, the Examiner granted hearing counsels' motion.

Respondents, on March 8, 1962, filed a motion with the Examiner for leave to appeal the Examiner's ruling. Simultaneously with the motion for leave to appeal, respondents filed their appeal with the Commission. On March 19, 1962, Hearing Counsel replied to respondents' motion for leave to appeal, stating that they did not oppose the granting of the appeal; and on March 26, 1962, they filed their reply to the brief of respondents on appeal. Leave to appeal was granted respondents by the Examiner on March 27, 1962.[4] The extraordinary circumstances required by Rule 10(m) were found by the Examiner in the fact that the pleadings showed that by a directive issued March 9, 1962, the Minister of Transport of the Government of the United Kingdom directed the respondents not to produce or make available such documents as were outside the United States, and that the documents requested by Hearing Counsel were located in the United Kingdom.

Of immediate concern in this appeal are the contentions of respondents regarding the validity of Rule 12(k) as used by the Examiner in this proceeding. If respondents are correct and Rule 12(k) is not supported by statutory authority, the Examiner's ruling must be reversed on that ground, and it would be unnecessary to consider respondents' contentions concerning our authority under the Shipping Act to call for the production of documents located abroad.

Rule 12(k) was promulgated pursuant to the provisions of Section 204(b) of the Merchant Marine Act, 1936.[5] That section provides:

> The Commission is hereby authorized to adopt all necessary rules and regulations to carry out the powers, duties and functions vested in it by this Act.

[4] The appeal of respondents is accompanied by a Motion to Dismiss based on the grounds of the appeal.

[5] Section 204(b) was enacted during the existence of the United States Maritime Commission and vested rule making authority in that agency. This authority was transferred to the Federal Maritime Board by Presidential Reorganization Plan No. 21 of 1950 (64 Stat. 1273) and from the Board to this Commission by Reorganization Plan No. 7 of 1961 (26 F.R. 7315, 75 Stat. 840). By General Order No. 1, dated August 14, 1961, the Commission continued in effect the rules promulgated by the Board (26 F.R. 7788).

It is upon the word "necessary" that respondents ground their attack on Rule 12(k). They contend that so long as Congress has in explicit statutory terms granted the subpoena power to the Commission, any device for the discovery and production of documents is "needlessly duplicative" and cannot be deemed necessary within the meaning of Section 204(b). Inherent in this contention is the suggestion that Congress meant to deny to the agency charged with the administration of the Shipping Act any discretion, latitude or flexibility in devising procedures to deal with the myriad and unforeseeable problems involved in regulating an industry as far-flung and complex as the shipping industry. It would attribute to Congress an intent to limit this Commission to the issuance of subpoenas in every investigation in which the Commission sought information. Such a restrictive interpretation would render nugatory the power granted in Section 204(b), and we think it clear that no such intent can be attributed to Congress.

As times and conditions change it is fitting that an administrative agency, before resorting to Congress, should seek to invoke means of coping with still unsolved problems. As stated by the Court of Appeals in *Cella* v. *United States*, 208 F. 2d 783, 789 (7th Cir. 1953):

> Administrative agencies should be "free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940).

Moreover, in grounding their arguments on the word "necessary", respondents are obviously using the word to import absolute physical necessity or inevitability. It is, however, an adjective expressive of degree, and a word which must be considered in the connection in which it is used. "Necessary" may connote that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought. *Black's Law Dictionary* (Fourth Ed., 1951, p. 1181). We believe that Congress intended the latter construction.

We agree with the statement of the Board made in answer to another challenge to Rule 12(k) under very similar circumstances:[6]

> We are of the opinion . . . that the power to direct the production of documents in the manner prescribed by Rule 12(k) is impliedly contained in the Shipping Act, 1916, as a necessary adjunct to the power vested in the Board by that Act to conduct administrative proceedings.

[6] *Unapproved Agreements—Spanish-Portuguese Trade,* 6 FMB 103, 105 (1960)

By Section 22 of the Act the Commission is authorized to investigate any alleged violation of the Act "in such manner and by such means, and make such order as it deems proper." The power involved is bounded only by the scope of the statute and answerable only to the established principles of administrative justice and fair play. It is sufficient if the rules are consistent with the regulatory system embodied in the statute. *American Trucking Association* v. *United States*, 344 U.S. 298 (1953).

But respondents argue that Rule 12(k) is not consistent with the regulatory system of the Act and is in fact "out of harmony with the Shipping Act and is a nullity." Respondents here rely on extensive quotations from the legislative history of Public Law 87–346 which they contend establish (1) that the Federal Maritime Board sought to obtain from Congress the very power that the Commission is here attempting to exercise—the production of documents outside the United States; (2) that Congress refused to vest that power in this Commission and (3) thus the Commission cannot now find this power in the provisions of the Shipping Act. The portions of legislative history cited by respondents[7] deal with two proposed amendments to Sections 15 and 21 of the Shipping Act respectively. One amendment would have included in Section 15 a requirement that no agreement would be approved by the Commission under that section unless it (1) designated a person upon whom service of process may be made within the United States, and (2) contained a provision that every signatory to the agreement would provide records or other information wherever located in response to a proper order of the Commission issued under Section 21 of the Act. The second amendment would have amended Section 21 to impose the same requirements upon "every common carrier by water engaged in the foreign commerce of the United States." The failure of Congress to enact these amendments, in respondents' view, declares the intent of Congress to deprive this Commission of the power to obtain documents overseas. Thus respondents suggest that Congress overruled the decisions of two United States Courts of Appeals[8] and numerous decisions of our predecessors by the mere failure to enact two

[7] Hearings before the Special Subcommittee on Steamship Conferences, of the House Committee on Merchant Marine and Fisheries on H.R. 4299, 87th Congress, 1st Sess. (1961) pages 2, 8, 11, 28, 161-164, 234-36, 541, 550; House Report No. 498, 87th Cong. 1st Sess. (1961) (to accompany H.R. 6775) page 7; Hearings before the Merchant Marine and Fisheries Subcommittee of the Senate Committee on Commerce on H.R. 6775, 87th Cong. 1st Sess. (1961), Part I pages 48-49, 71, 76, 161, Part II page 212.

[8] *Kerr Steamship Company* v. *United States*, 284 F. 2d 61 (2nd Cir. 1960) and *Montship Lines, Limited* v. *Federal Maritime Board*, 295 F. 2d 147 (D.C. Cir. 1961)

amendments to the Shipping Act. Such a conclusion is wholly untenable and must be rejected. The remarks of Chairman Bonner before the House on H.R. 6775 before the two amendments at issue here were removed clearly establish the Congressional intent regarding them:

> While it places certain burdens on foreign flag lines by way of requiring them to make available records of their business in the American trades, these provisions merely recast existing law that has been in effect since 1916 and do not represent any departure from or addition to requirements presently in existence. Their inclusion was dictated by the fact that as a result of activity growing out of the Committee on the Judiciary, the procedures contained in the 1916 Act have proven ineffective to obtain promptly information required by the Federal Maritime Board and the Department of Justice to effectively process violations of our laws.
>
> The procedures set forth in this bill requiring the appointment of an individual in this country to accept process on behalf of all the members of each conference will in the opinion of the committee be more effective in obtaining the information without attempting to extend American jurisdiction beyond its present limits. (107 Congressional Record 9371-9372).

Moreover the Merchant Marine and Fisheries Subcommittee of the Senate Committee on Commerce has clearly stated the reasons for the failure to include the proposed amendments in the final bill. The Senate Committee stated in its Report No. 860 which accompanied H.R. 6775:

> To date two U. S. courts of appeal have held that under the present section 21, Shipping Act, 1916 the Commission may lawfully order foreign flag ocean common carriers serving U.S. ports, inbound or outbound, to furnish documents in compliance with lawful section 21 orders. How the United States will be able to enforce such orders in the face of directives not to produce from five friendly maritime nations (Belgium, Italy, Japan, the Netherlands, and the United Kingdom) is a question of great foreign policy importance. Certainly, we would only muddy the waters and do violence to our foreign policy were we to leave such provisions in the bill. Furthermore, we are convinced that if we did so a number of steamship conferences would have to dissolve since a number of foreign lines would be compelled by their governments to withdraw, rather than submit to the receipt-of-process and document production pledge required by the language of the bill.

We think it clear from the above that Congress felt that the Commission already possessed the power sought by the two amendments, and chose to leave the law in its present state. Far from being out of harmony with the Shipping Act, Rule 12(k) and its use by the Examiner in this proceeding are in complete accord therewith. We turn now to respondents' arguments regarding

the Commission's power under the Shipping Act to compel the production of documents located outside the United States.

Respondents' arguments on the extraterritoriality of the ruling are in the main a restatement of those made to the Examiner. Their basic objections are that the ruling constitutes an unwarranted invasion of the sovereignty of the United Kingdom and the Irish Republic and that compliance with the ruling is forbidden by the Government of the United Kingdom. The Examiner treated the first of these contentions as a challenge to the Commission's authority to call for documents held overseas by respondents subject to our jurisdiction. He rejected this contention, relying upon *Kerr Steamship Company* v. *United States,* 284 F. 2d 61 (1960) and *Montship Lines, Limited* v. *Federal Maritime Board,* 295 F. 2d 147 (1961). We think the Examiner was correct. Respondents, however, maintain that the *Kerr* and *Montship* cases are inapplicable to this proceeding.

First respondents seek to distinguish the cases on the ground that they dealt only with Section 21 of the Shipping Act and not with Rule 12(k). Respondents suggest a distinction without a difference. The power involved is the same—the authority to call for documents located abroad. Once the validity of Rule 12(k) is established, as it has been, we can imagine no basis in law or reason for restricting its application to the territorial confines of the United States. But respondents go further. They contend that the ruling is wholly in violation of international law—a matter which they argue was ruled upon in neither *Kerr* nor *Montship.*

The basic premise upon which respondents proceed is that "neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens . . .; *U.S.* v. *Curtis-Wright Export Corp.,* 299 U.S. 304, 318 (1936)" [9] (Respondents' brief on appeal, page 5). Thus, respondents are placing in issue the question of the extraterritorial application of the Shipping Act—a question explicitly decided in both *Kerr* and *Montship.* As stated by Judge Hand in *Kerr, supra,* at page 847:

> [T]he petitioners complain that the orders were beyond the competence of the Board because they required petitioners to produce copies of contracts that were outside the United States . . .

[9] As a corollary to this argument, respondents offer the premise that no court has the right to order the doing of acts outside its territory This is an incorrect proposition of law. *Vanity Fair Mills* v. *T. Eaton Co.,* 234 F. 2d 633, cert. denied 352 US 871, rehearing denied 352 U.S. 913 (1956), and cases cited therein.

And in *Montship,* the Court speaking through Judge Bazelon stated:

> In the light of the coverage and the purposes of the Shipping Act, we can see no reason to restrict § 21 to cover only information within the United States . . . If the [Commission's] investigatory powers were limited to the territorial confiines of the United States, regulation of foreign carriers would be hampered to a substantial degree. Consequently, we will not read into § 21 a territorial limitation which appears to be contrary to the purposes of the Shipping Act.

We find it hard to imagine a clearer statement of extraterritorial applicability.

Respondents challenge the Examiner's ruling on still another ground. They urge that the ruling seeks to investigate activities of respondents outside the scope of the regulatory authority of the Commission. The basis of argument is that portion of the Board's order, which respondents cite, referring to "commissions" and "forwarding fees" fixed or paid in "the trade from Great Britain and Northern Ireland and Eire to U.S. North Atlantic ports." From this respondents fashion their own statement of the scope and purpose of this proceeding which they contend consists "of an investigation into alleged business dealings between foreign forwarders, brokers and shippers in the United Kingdom and the Irish Republic and a group of shipping companies in the British export trade, concerning commissions paid and fees charged in the United Kingdom and the Irish Republic." Obviously respondents seek to create the impression that the investigation is concerned only with the purely internal affairs of another sovereign.

Respondents deal at considerable length with past regulation of the domestic freight forwarding industry. They suggest an unbroken pattern of administrative construction limiting our power over the forwarding industry to those located in the United States which culminated in the passage of the "freight forwarder" legislation, now Section 44 of the Shipping Act. The examiner quite correctly disposed of this contention by noting that the order in this proceeding "is clearly limited to an investigation of the practices of the respondents as common carriers by water in the foreign commerce of the United States, as to which they are subject to our jurisdiction and the argument is untenable." (Ruling, p. 3). Respondents assert, however, that the Examiner indulged in the "sheerest question begging," and wholly failed to discuss their contentions.

775-794 O-65-17

We agree that the past investigations pointed to by respondents have been primarily concerned with domestic forwarders and the agreements of conferences and carriers regarding payment of brokerage thereto. We also agree that one of the results of these investigations was the passage of Public Law 87-254, the so-called "freight forwarder bill." It is from these propositions that respondents contend: (1) this freight forwarder legislation is in part a new and compelling guide to the scope of Section 15 under which this investigation is conducted, (2) that by reenacting Section 15 at the same session Congress intended to limit the scope of that section to "agreements" covering payments of brokerage solely in the outbound trades, and to exclude therefrom agreements in the inbound trades, and (3) such a construction is in accord with the controlling principle of judicial construction that statutes apply only to those transactions in which American law would be considered operative under prevalent principles of international law.

Respondents have ignored critical portions of the order of investigation, and have misinterpreted the nature and scope of this proceeding. The order states that the investigation is directed to respondents' practice of "paying commissions on shipments to ports south of New York and Boston, such as Philadelphia, Baltimore and Hampton Roads to the exclusion of New York and Boston." The order makes it clear that of principal concern to the Commission is whether this practice subjects "the ports of New York and Boston to undue or unreasonable prejudice or disadvantage or may give ports south thereof undue or unreasonable preference in violation of Section 16, Shipping Act, 1916." Such an investigation is clearly in accord with the principle enunciated by Judge Hand in *United States* v. *Aluminum Company of America*, 148 F. 2d 416, 443 (2d. Cir. 1945):

[I]t is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and those liabilities other states will ordinarily recognize. *Strassheim* v. *Daly*, 221 U.S. 280, 284, 285; . . . *Lamar* v. *United States*, 240 U.S. 60, 65, 66; . . . *Ford* v. *United States*, 273 U.S. 593, 620, 621 . . .; Restatement of Conflict of Laws § 65.

Respondents' position is untenable. An act designed to license and regulate the business activities of freight forwarders in the United States can have absolutely no bearing in logic, law or reason on the application of Section 15 to an agreement between carriers to regulate the payments of commissions to forwarders abroad in

such a manner as prefer shipments to one port to the disadvantage of another. This investigation is not concerned with the business activities of British forwarders. It is concerned with the practices of the carriers made respondents herein. We do not agree that an investigation into the activities of the carriers without a concurrent inquiry into the practices of forwarders discriminates against the carriers, as respondents suggest.

Respondents urge that we should not command production of the documents called for because the Government of the United Kingdom has forbidden respondents to produce them. The primary concern of the British Government is that the activities with which this investigation are concerned appear to be without the substantive jurisdiction of the United States.[10] We think we have made it clear that the activities in question are a proper subject of investigation. We hope the documents called for will be forthcoming. However, should they not be produced, several alternatives are open to us. We do not deem it appropriate to choose one here. If the choice becomes necessary, it will be made after careful consideration of the problem in the light of all its implications. The primary concern, of course, is how we may best discharge to the fullest extent our regulatory responsibilities under the statutes we are charged with administering.

There remain two arguments of respondents. They contend that Hearing Counsel has failed to show "good cause" for his motion. We agree with the Examiner that good cause has been shown. Hearing Counsel sought to secure the material requested by voluntary submission. The documents requested are specified with particularity and are *prima facie*, relevant and material to the proper determination of the issues. Finally, respondents urge that the statutes of limitation contained in 18 U.S.C. 3282 and 28 U.S.C. 2462 bar the investigation of matters as to which no suit for collection of a fine or civil penalty may now be brought. The Examiner's disposition of this matter was correct. The statutes cited by respondents relate to proceedings, criminal or otherwise, brought in court, and are no bar to the authority of the Commission to proceed with the investigation.

The appeal and motion to dismiss are denied.

[10] Aide Memoire of February 17, 1961 and January 22, 1962, and letter from the Minister of Transport dated March 9, 1962, addressed to each of the British respondents.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION, held at its office in Washington, D. C., on the 3rd day of May, 1962

No. 906

AGREEMENTS, CHARGES, COMMISSIONS AND PRACTICES OF THE NORTH ATLANTIC WESTBOUND FREIGHT ASSOCIATION

Consideration of the matters involved in this appeal and motion to dismiss, having been completed by the entry, on the date hereof, of the Commission's report containing its findings and conclusions, which report is made a part hereof by reference:

It is ordered, That the appeal and motion to dismiss be, and they are hereby, denied.

By the Commission.

(Sgd.) THOMAS LISI,
Secretary

FEDERAL MARITIME COMMISSION

No. 949

MATSON NAVIGATION COMPANY—
VAN MEASUREMENT/HEAVY CARGO RULES

Decided May 15, 1962

Rule of Matson Navigation Company, application of which determines rate on cargo shipped in vans from San Francisco Bay ports to Hawaii, found just, reasonable, and lawful.

Proceeding discontinued.

George D. Rives and *Robert N. Lowry* for Matson Navigation Company, respondent.

LaForest E. Phillips, Jr., Alexander D. Calhoun, Charles F. Warren, and *Winston Churchill Black,* for Wilsey Bennett Company, complainant.

T. W. Curley for Swift & Company, complainant.

Richard S. Harsh, as Hearing Counsel.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner;* JAMES V. DAY, *Commissioner*

BY THE COMMISSION:

We have before us for decision the legality of a rule [Rule 1-A(c)] of Matson Navigation Company (Matson), the application of which increases Matson's charge for carrying cargo by van from San Francisco Bay ports to Hawaiian ports.

The co-called "cargo van" is in fact, a simple container. The applicable charges for van cargo are computed on a measurement basis.

Prior to October, 1958 both Matson and a competitor, Hawaiian Textron (Textron) provided by rule that van cargo rates would be assessed on the outside measurement of the vans. The original cargo vans were of light plywood, about 8′ by 8′ by 8′, and 8′ by 8′ by 12′, and were primarily used for shipping household goods. From the beginning of van movement in 1957, Matson's "rate" has (except for general rate increases) been unchanged. The amount paid for shipping cargo by van has been changed, however, by application of measurement rules. Except for two or three vans of experimental type, the vans then in use were as above described, and their ratio of inside to outside measurement was 91-94 to 100.

Effective October 8, 1958, Textron changed its rule. The significant feature of the change was to assess charges on the measurement of the *cargo*—not the van. Thus, Textron's *maximum* charge for carriage of cargo by van from San Francisco Bay to the Hawaiian Islands became less than Matson's minimum (and maximum) charge, computed on the *outside* measurement of the van for the same service.

In about 60 days Matson met this competitive situation by also adopting cargo-measurement in place of van-measurement to assess charges.[1]

Both carriers (first Textron, then Matson) remedied what may be considered a built-in defect in their rules, by making it necessary in effect for the shipper to load the van to full capacity (otherwise the carrier could utilize the unused van-space for other cargo) and for practical purposes the charge became for both carriers an amount determined by the *inside* measurement of the van. The effect of the 1958 change in rules as to vans in general use was (for both carriers) a decrease of from 6% to 9% in van-revenue from 1957.

Subsequently, and before Matson published the rule under consideration, Textron ceased operations.

Some two years later, in the fall of 1960 (apparently as a result of the use of the experimental vans mentioned above for the transportation of dairy products and other perishables), Wilsey Bennett Company (Wilsey) and Swift & Company (Swift) became interested in shipping fresh meat via Matson in necessarily-insulated vans, and each acquired 19 vans at a cost of about $1,000 per van

[1] Both carriers made other changes in their rules, but the exterior against interior van-measurement is the point at issue here.

for that purpose. An understanding of the construction of these insulated vans is essential in understanding the problem before us.

The insulated vans, which measure 8′ by 8′ by 12′ (exterior), are heavily built of wood, metal, and insulating material. The ratio of inside to outside measurement of the insulated van is approximately 71% as compared to 91%—94% for the uninsulated van. It thus becomes clear that whereas Matson revenue for carrying an *uninsulated* van in late 1960 was between 91% and 94% of the early 1958 revenue, Matson's revenue for carrying an *insulated* van in late 1960 was only 71% of what it would have received had it carried the same van in early 1958,[2] something Matson certainly did not anticipate when it changed the rule in 1958. The general use of the insulated van made what had appeared to be revenue-decrease of 6%-9% on uninsulated vans, a 29% decrease on insulated vans. After some months, Matson not unnaturally changed the measurement rule back to its early 1958 status.[3] It is the rule thus changed that is before us. It reads in pertinent part as follows:

> Except as otherwise provided in this tariff, rates named herein apply on a weight or measurement basis and will be assessed on the actual over-all outside measurements of the three greatest outside dimensions of the Cargo Van and/or the actual gross weight of the Cargo Van and the combined pieces, packages or other freight units loaded therein, whichever yields the greater revenue . . . When freight charges are assessed on a measurement basis, Cargo Vans will be measured from the bottom of the floor to the top of the Cargo Van and the measurement of the skids below the floor will be excluded.

While neither by this rule nor otherwise has Matson, strictly speaking, changed the "rate" (which, except for application of general rate increase has remained constant at $20.70 per measurement ton since 1957) the rule increases the charge per van, California-Hawaii, from approximately $348.00 to approximately $492.00, or about 41%.[4]

The rule was suspended by our predecessor, the Federal Maritime Board, and therefore (although it is now effective) Matson carries the statutory burden of proving that it is just and reasonable. Upon its face, it clearly is just and reasonable. Space on

[2] This statement does not take into account an intervening general rate increase.

[3] In stating the facts herein some use is made of Matson and Textron rules and tariffs not put in evidence, but on file with the Commission. We take official notice of such matter, and any party upon request, will be afforded an opportunity to show the contrary. *Rule 13(q).*

[4] This takes into account the general rate increase, 10%, which became effective August 15, 1961.

shipboard is what an ocean carrier has to sell. It is just and reasonable for Matson to measure ship-space occupied by the shipper's cargo-carrying van, and charge the shipper for that space. This is what the rule, standing alone, provides. The real problem, however, is not the merit or demerit of the rule standing alone. What counts is if Matson's charge for transporting a cargo-van from California to Hawaii (which is determined by the application of the *changed rule* to the *unchanged rate*) is just and reasonable. In our opinion the charge is just and reasonable. This, of course, is Matson's position. The position taken by Wilsey, the only shipper now opposing the rule is stated in its exceptions to the initial decision of our Chief Examiner (with whose disposition of the matter we agree), as follows:[5]

At best, Matson has purely and simply failed to present sufficient credible and probative evidence from which it can be determined whether or not the rates under review are compensatory, just or reasonable; at worst it has established that its proposed increase is excessive.

Before looking at the evidence it may be well to look for a moment at the positions of Matson and Wilsey, *vis a vis*. Matson seeks to return the charge to the 1957 level (plus general rate increase). Wilsey does not object to the general rate increase, but argues that it should be applied to only 71% of the 1957 level. In effect, Wilsey seeks to perpetuate a charge in the nature of a windfall to the extent of at least 20% of the 1957 charge. This windfall flows from the fact that in 1958, Matson's change in its rule so as to decrease the charge on *uninsulated* vans by 6% to 9%, resulted in an unintentional decrease in the charge which would apply to Wilsey's insulated vans when they began to move in late 1961 of 29%. We cannot but assume that the Wilsey vans would have moved in 1960 and 1961 at the 1957 rate plus general rate increase. As previously indicated (footnote 5) the comparable Swift movement can be counted on to continue at that rate for the foreseeable future, and Wilsey also indicates that it will continue using the service although it predicts a falling off in traffic.

Wilsey's attack upon the credibility of Matson's witnesses, and the reliability of the evidence they submitted was initially addressed to our Chief Examiner, who has passed upon the credibility of witnesses in maritime rate cases, and the reliability of rate-evidence for about a quarter of a century. He found in favor

[5] Swift, in view of Matson's elimination of "heavy lift" charges which Matson originally proposed, no longer complains against the rule, stating that it can continue to ship "with the freight charges assessed on the outside measurement" of the vans.

of credibility and reliability, and we agree. Of course, this is not to say that each detail of Matson's testimony and evidence is considered wholly accurate. It does mean, however, that all things considered (including Wilsey's evidence and argument), we feel that it satisfies Matson's burden of proof, and supports our conclusion that Matson's proposed (and now effective) rule is just and reasonable.

Matson's proof that its charge is fair and reasonable was made along conventional lines. Its cost and operating results study was made on a measurement ton basis, and took into account the standard method of operation which is as follows:

The vans which are shippers' property secured at a cost of approximately $1000 each (the shipper may of course, use vans leased from others, but Wilsey and Swift use their own) are loaded by the shipper with hard-frozen meat (zero degrees), and usually dry ice, and delivered to the carriers' shipside in California. They are loaded on board by the carrier, and when they reach their destination in Hawaii, are discharged by the carrier.

It is naturally important for these vans to be carried on deck where they can be last in, first out. If carried below decks, they would go in several days before the ship sailed, and would not come out for a day or two after the ship docked. This would result in a substantial risk that the fresh meat and poultry shipped in the vans would spoil. Although there is dispute in the testimony as to whether the shipper insists upon deck-carriage of the vans, it is logical, and constitutes preferred treatment which Matson grants the shipper. Spoilage in carriage of this nature (as distinguished from the more expensive reefer service) is shippers' risk, but it would clearly mean the end of the traffic if the vans' location aboard ship resulted in the ruin of their contents.

Turning now to the general method of Matson's proof, we find that it determined vessel expense per revenue ton by dividing the average vessel expense of 28 voyages terminated during the first 9 months of 1961 carrying insulated vans by the average revenue tons carried. As this cargo van service is operating only between San Francisco and Honolulu, the mileage element is not significant, and Matson's method is practically equivalent to the ton-mile method of determining vessel expense, which we have heretofore approved.

Wilsey contends that we should not rely upon Matson's vessel expense because it is defective in that it applies round-trip expense to westbound revenue but excludes eastbound revenue from empty

vans returning from Hawaii, and that Matson's $6.26 figure for vessel expense is therefore subject to decrease in an amount not capable of determination here. We cannot agree. Matson's method above described results in allocation of vessel expense attributable to westbound movement to loaded cargo vans, which move west. Matson correctly excluded both revenue and cost data on eastbound vans from its cost study. Had they been included, the results would have certainly been no more favorable to Wilsey than the study as it stands.

As to cargo expense, loading and discharging costs, including stevedoring, heavy lift service, and terminal service, Matson in its cost study, determines and directly allocates to van service the costs based upon actual experience at the ports involved. Such costs are best determined by actual experience, and their direct application appears practicable and desirable. (It is true that the Honolulu discharge cost utilized the expense of a floating derrick, which is more expensive than the whirly crane on Matson's container-ship dock at Honolulu which was used to discharge vans at Honolulu on the voyages studies. This point will be discussed in detail.)

The carrier's loading and discharging costs for loaded vans, weighing on the average 20,300 pounds at least, are substantial. Loading aboard and unloading vans from shipboard requires heavy equipment. While the ship's jumbo boom can handle the vans, rigging the boom would result in lost stevedore time and added port time. These facts, plus the necessity of placing vans in particular deck-locations accessible to the jumbo boom, would obviously result in excessive unloading costs with the use of this tackle. Matson has utilized the cost of an outside derrick barge in its cost study, stating that this is the only feasible method of unloading vans which Matson can count upon using. Wilsey contends that Matson should compute the unloading cost item upon the use of a whirly crane located on Matson's container dock at Honolulu. While Matson has been able upon occasion, to use the container-ship dock to unload vans, it is quite clear that it cannot do so at all times. The container-ships must have first call on that dock and its equipment. If pinpoint accuracy were essential here, as it is not, probably the closest approach to such accuracy might be secured by assuming part-time use of the container-ship dock and crane for unloading cargo vans. The accuracy of such an assumption would be highly questionable however. In any event, we do not believe that any reasonably foreseeable use of

that Matson-owned shoreside equipment instead of an outside-owned derrick barge would decrease future cargo-handling cost enough to make the proposed charge per van more than is just and reasonable. Wilsey has not questioned the accuracy of Matson's expense figure for the use of floating lift, which of course is based upon actual experience.

Matson's allocation of Administrative and General Expense items primarily on the vessel expense basis closely approximates an allocation by relation to operating costs, which may well be the most desirable method. Matson's further allocation of overhead to the insulated van service on a per ton basis appears satisfactory. Wilsey has raised no objection as to method or amounts involved under this head.

Agency commissions and federal income tax are the other items involved and Wilsey excepts to neither. Commissions are based upon present figures, and 52% of net profit as an income tax figure appears reasonably accurate for use in connection with this unit rate.

Matson's study of operating results shows net profit after federal income tax per measurement ton of $2.28 and an operating ratio of 91.1%. Wilsey contends that the proposed rule will result in net profit, before federal income tax, per measurement ton of $7.21 and an operating ratio of 72%. After taking federal income tax into consideration Wilsey's profit figure becomes $3.46 and the operating ratio 86.5%. The main factor in the not-too-great difference in operating expense ($18.41 vs. $20.86) is found in Wilsey's assumption that all cargo vans will be discharged at Honolulu by the whirly crane on Matson's container ship dock. For reasons heretofore stated we cannot with respect to what is essentially an operating procedure, substitute a shipper's opinion of how the carrier will or should operate for the carrier's opinion. It was reasonable for Matson to determine costs upon what it considers a normal operation. We consider its cost study, based upon a reasonably foreseeable operating pattern, reliable and probative evidence that the rule and charges based upon the rule are just and reasonable, and we so find. This finding is to say the least, consistent with the intention of Swift and Wilsey expressed upon the record, to continue using the service at the increased cost.

What has been said shows that the proposed rule and charges meet the test of section 18 of the Shipping Act, 1916, which requires that they be just and reasonable. In so finding we have given full consideration to Wilsey's evidence and argument.

We turn now to Wilsey's allegation that the rule subjects it to undue and unreasonable prejudice and disadvantage in violation of section 16 of the Shipping Act, 1916. Here, the burden of proof is upon Wilsey, and it has not been sustained. The record contains no substantial evidence which would sustain such a finding, and much less, evidence which in our opinion would justify us in holding that Matson in any way discriminates against Wilsey or any similarly-situated shipper.

Wilsey's contention that in 1958 Matson reduced its van-cargo rate below a fair and remunerative basis with the intent of driving out or otherwise injuring a competing carrier (Textron), and hence according to section 19 of the Shipping Act, 1916, cannot increase such rate unless after hearing we find that the proposed increase rests upon changed conditions other than the elimination of competition also fails for complete lack of proof. Conceding *arguendo*, that by changing its rule in 1958, Matson *reduced its rates* below a fair and remunerative basis, the record establishes definitely that Textron amended its rule so as to decrease charges before Matson made its similar move to meet Textron.

Wilsey's attempt to show that Matson induced Wilsey to build vans by some character of express or implied assurance that charges would remain at the 1958 level failed utterly, and would have availed Wilsey nothing had it succeeded. Changes in rates are not invalidated by a pre-existing contract of a carrier not to change its rates. *Com. Club, etc.* v. *Chicago & Northwestern Ry. Co.*, 7 I.C.C. 386, 401 (1897).

Based upon the foregoing and the whole record in this proceeding we find and conclude that Matson's rule 1-A(c) is just and reasonable; is not unduly or unreasonably prejudicial, disadvantageous, preferential, or discriminatory; and is therefore legal. An appropriate order will be entered.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION, held at is Office in Washington, D. C., on the 15th day of May, 1962.

No. 949

MATSON NAVIGATION COMPANY
VAN MEASUREMENT/HEAVY CARGO RULES

Full investigation of the matters involved in this proceeding having been completed, and the Commission having on May 15, 1962; entered its decision herein, which decision is made a part hereof;

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

By the Commission.

(Sgd.) THOMAS LISI,
Secretary

(SEAL)

FEDERAL MARITIME COMMISSION

No. 918

MITSUI STEAMSHIP CO., LTD.—ALLEGED REBATES TO A. GRAF & CO

DENIAL OF MOTION TO VACATE SECTION 21 ORDER

Decided June 5, 1962

Alan F. Wohlstetter for respondent Mitsui Steamship Co., Ltd.
Donald J. Brunner and *Robert J. Blackwell,* as Hearing Councel.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner;* JAMES V. DAY, *Commissioner*

BY THE COMMISSION:

This proceeding is before us upon a motion of respondent Mitsui Steamship Co., Ltd., to vacate an order of the Federal Maritime Commission directing Mitsui to furnish the Commission certain information, wherever located, in its possession, custody or control.[1]

On October 3, 1960 our predecessor, the Federal Maritime Board, on its own motion, instituted an investigation into the activities of Mitsui in connection with the transportation aboard its ships of canned goods purchased by Alfred Graf & Company of Nurnberg, Germany (Graf).[2] The shipments under investigation

[1] The order, issued pursuant to section 21, Shipping Act, 1916 (46 U.S.C. 820) was entered on March 1, 1962, and served on Mitsui March 12, 1962. The order is hereinafter referred to as the section 21 order.

[2] Section 22 of the Shipping Act (46 U.S.C. 821) authorizes the Commission (or in this case the Board) to investigate any alleged violation of the Act "in such manner and by such means and make such order" as it deems necessary The order of investigation initiating this proceeding was entered by the Board on October 3, 1960 and was served on Mitsui October 4, 1960. Notice of the investigation was published in the Federal Register on October 14, 1960 (25 FR 9874).

moved in the export trade from U.S./California ports to European ports in the Antwerp/Hamburg Range. The purpose of the investigation is to determine whether Mitsui entered into an arrangement with Graf whereby Mitsui would return, refund or rebate to Graf a portion of the freight monies paid to Mitsui for the shipments in question. Should investigation prove the existence of such an arrangement, it is further the purpose of the proceeding to determine whether the arrangement: (1) provided for a deferred rebate, or an unjustly discriminatory contract based on volume of freight; or (2) gave to Graf an undue or unreasonable preference or advantage, or allowed Graf to obtain transportation at less than the regular rates then established and enforced by Mitsui; or (3) resulted in rates which were unjustly discriminatory between shippers in violation of sections 14, 16 and 17 of the Shipping Act (46 U.S.C. 812, 815, 816).

A prehearing conference was held by the Examiner on May 29, 1961. At the prehearing, Hearing Counsel presented Mitsuit with a request for information as specified in four numbered paragraphs. The Examiner directed Mitsui to produce for inspection and copying the information specified in three of the four numbered paragraphs, and ruled that the information sought in the remaining paragraph was outside the scope of the Board's order of investigation.[3] As a result of these rulings, hearing counsel on October 5, 1961 inspected certain documents produced by Mitsui in the office of Mitsui's counsel. The only documents made available were gathered from various Mitsui offices located in the United States.

At this time counsel for Mitsui also presented Hearing Counsel with copies of two letters. The first, dated July 30, 1961, was from Mitsui's New York representative to its home office in Japan and the second was the reply thereto from the home office in Tokyo, dated September 30, 1961. The letter of Mitsui's New York representative stated that he had requested Mitsui's London office to forward those documents subject to the Examiner's ruling which were then in the files of the London office but the latter had refused based on what it believed to be the position of the Government of Japan. The New York representative's letter then urged the home office to ask the Government of Japan for a waiver as to this proceeding. According to the reply of the home office, the request for a waiver was made but the Japanese Government "strongly in-

[3] The Examiner's ruling was the subject of a motion for clarification in certain particulars not here relevant. Subsequently the date fixed for Mitsui's compliance was set for October 5, 1961.

structed" Mitsui not to submit any documents located outside the United States.

As a result of Mitsui's failure to comply fully with the Examiner's ruling, Hearing Counsel on October 19, 1961 petitioned the Commission for the issuance of a section 21 order directing Mitsui to produce the requested information. Attached to this petition were the aforesaid letters of the New York representative and the reply from the home office. Mitsui opposed this petition, taking the position that a waiver from the Government of Japan was necessary, that the waiver had been refused, and that even if the statements made in the exchange of correspondence between New York and Tokyo were considered no more than allegations in pleadings, the proper course for the Commission to follow was to proceed through channels available to it to verify the position of the Government of Japan.

According to the New York representative's letter, the refusal of Mitsui's London office to submit the documents in their files was based upon the views of the Government of Japan as expressed in two aide memoire transmitted to the Department of State by the Japanese Embassy. The first aide memoire, dated August 23, 1960, was a protest lodged against a section 21 order of the Federal Maritime Board then under review by the Court of Appeals for the District of Columbia Circuit in the case of *Montship Lines, Ltd. v. Federal Maritime Board*, 295 F. 2d 147 (D.C. Cir. 1961). Insofar as here relevant the aide memoire provided:

> The Ambassador of Japan . . . wishes to draw attention to the Order issued by the Federal Maritime Board on April 11, 1960 . . . which purports to require production of a wide range of documents . . . both within and without the United States and to state the views of the Government of Japan as follows:
>
> (1) The Government of Japan wishes to remind the Department of State of the memorandum of March 7, 1960, in which it stated that the subpoenas *duces tecum* issued in connection with the Grand Jury investigation of the shipping industry initiated by the United States and the Department of Justice purporting to require Japanese shipping companies to produce documents located in Japan are not in conformity with established principles of international law and that the authority of the said subpoenas does not extend to any documents which might be found within the territorial jurisdiction of Japan. The Government of Japan now reasserts its view as stated therein in connection with the proceedings instituted by the Federal Maritime Board under said order.
>
> (2) While the Government of Japan considers that the Japanese shipping companies involved will continue to cooperate with reasonable requests of the Federal Maritime Board which are deemed properly within the jurisdiction of the United States, it is felt that the instant Order, apparently involving

a claim of jurisdiction over and beyond any such limitation, may give rise to conflicts of jurisdiction and maritime policies.[4]

The second aide memoire dated March 20, 1961 expressed the views of the Japanese Government with respect to a bill (H.R. 4299) then before Congress to amend the Shipping Act. The aide memoire provides in relevant part:

(3) The views of the Government of Japan on the section 21 orders issued by the Federal Maritime Board requesting various documents located abroad have already been transmitted to the Department of State. The provisions of H.R. 4299 which would require that shipping lines agree to the submission of documents, wherever located, as a condition precedent to the validation of conference agreements, completely disregards the rights of other states which might be affected. This provision which would involve an attempted exercise of authority by an agency of the United States within the jurisdiction of Japan is in violation of the principles of international law and one which the Government of Japan cannot countenance.

It appeared to the Commission from the evidence before it that there must be some misapprehension on the part of Mitsui or the Japanese Government or both as to the precise nature of the inquiry being conducted and the request for information made pursuant thereto. We therefore enlisted the aid of the Department of State in an attempt through diplomatic channels to clarify our position and dispel any misunderstandings. On February 28, 1962 we received the advices of the State Department based on its contacts with the Japanese Government. State informed us that the Government of Japan pointed out that the documents called for were not located within its territorial jurisdiction but were in the United Kingdom, and that Japan did not consider it appropriate even to suggest to Mitsui that it supply documents which were located in a third country.

Our efforts to secure cooperation having failed, we entered the section 21 order here under review on March 1, 1962. On March 30, 1962 Mitsui filed a motion to vacate this order. Accompanying the motion is a letter dated March 20, 1962 from the Japanese

[4] The subpoenas *duces tecum* referred to were the subject of motions to quash before the United States District Court for the District of Columbia. See *In the Matter of the Grand Jury Investigation of the Shipping Industry*, 186 F. Supp. 298 (1960). The court reserved the question of the production of documents located abroad until such time as the documents located within the United States had been examined and the necessity of obtaining the overseas documents was determined. As to the protests filed by foreign governments the court had the following to say:

"There was no indication in the correspondence on file emanating from the foreign embassies that they would interfere with the production of documents located in their respective countries if this Court, in the exercise of its discretion, found that it was necesary." 186 F. Supp. 298, at 318 (note 25).

Minister of Transportation to Mitsui's president reading as follows:

> With reference to the section 21 order issued by the Federal Maritime Commission on March 5, 1962, in Docket No. 918, I order you not to comply with the order of the Commission insofar as it relates to the production of documents located outside the United States which might be in the possession of your company, for the following reasons:
>
> The above mentioned Order requests your Company to produce documents held by your Company outside the United States. It is well established international custom and practice that the U.S. Government if it desires to obtain documents located outside the United States, must obtain them through the judicial authorities of the foreign country wherein such documents are located. The attempt of the U.S. Government compelling you to produce documents located outside the United States would therefore constitute an act in disregard of this well established international practice.

It is Mitsui's position that the Commission should, in the exercise of its discretion, vacate the section 21 order. Mitsui invites our attention to *Montship Lines Ltd.* v. *Federal Maritime Board, supra.* There the Court said:

> Consequently, these petitioners [foreign flag lines] should upon the remand bring any arguments that their local law prohibits compliance before the [Commission] so that it can then initially determine whether petitioners have made a good faith effort to secure waivers and, if so, whether compliance is to be required. (295 F. 2d at 156)

The amount of discretion the Commission can exercise in a case such as this, is, in our opinion, limited. Our first duty is of course to Congress, for it is to the Commission that Congress looks for the effectuation of the regulatory program embodied in the shipping statutes. We have, it seems clear, the duty to expend every effort compatible with sound regulation, to obtain the information necessary to the determination that all who engage in our commerce do so in compliance with the law. We are asked now by Mitsui to cease all efforts to obtain information necessary to determine whether there exist in an export trade of the United States practices violative of the Shipping Act. In effect, we are asked to abandon our statutory duty to investigate alleged malpractices in the trade. Such a request exceeds the bounds of our discretion and cannot be granted.

Mitsui is a Japanese flag carrier with its principal office located in Japan, and is admittedly obligated to obey the laws of Japan. But as a common carrier by water which chooses to engage in the commerce of the United States, Mitsui is equally obligated to meet the terms and conditions imposed by Congress upon all

who participate in our commerce. These terms and conditions prescribed in the regulatory shipping statutes enacted by Congress apply with equal force to all water carriers engaged in U. S. commerce, and they must be administered impartially. Obviously, they cannot be so administered if their application is to turn upon the incidental, or accidental, circumstance that needed information is not physically located within the United States. This would make a shambles of the law.

The Shipping Act, 1916, under which the present investigation was instituted, establishes the basic pattern of United States regulation of its ocean foreign commerce. The underlying philosophy of the Act was that certain practices then prevalent in such commerce constituted unjust, unfair and unreasonable methods of competition which should be prohibited or in some cases placed under government control and regulation. The practices outlawed included those of the type which the Commission is here seeking to investigate, and there can be no question that the traffic involved, namely, canned goods produced in this country and moving out of its ports, is properly a matter of concern to the United States. This interest in competitive practices deemed unjust, unfair and unreasonable in United States commerce has been established for more than 45 years, and the basic regulatory pattern implementing it remains unaltered under the recent amendments to the Shipping Act.[5]

We cannot emphasize too strongly that, as respects regulation of the competitive practices of water carriers, all carriers regardless of flag or nationality are placed on an equal footing under our laws. It is a prime concern of these laws to insure that competition among carriers for cargo moving in United States foreign commerce should be open and above board, with no curtain of secrecy preventing the disclosure of pertinent data to the Commission. Foreign flag carriers, although charged with the responsibilities imposed by our laws, are also the recipients of the benefits they confer. Indeed, the respondent here, Mitsui, has availed itself of these benefits on occasion past. Before this Commission and its predecessors, Mitsui has found a forum in which to air its grievances and seek relief in connection with the competitive practices of other carriers.[6] It would now appear, however, that

[5] The Shipping Act was amended on October 3, 1961 by Public Law 87-346 (75 Stat. 762).

[6] See, for example, *Mitsui Steamship Company Ltd.* v. *Anglo-Canadian Shipping Co., Ltd., et al.*, 5 FMB 74 (1956); *Pacific Coast European Conference—Limitation on Membership*, 5 FMB 247 (1957); and *Pacific Coast European Conference—Payment of Brokerage*, 4 FMB 696 (1955).

the Government of Japan, by its directive ostensibly precluding Mitsui from producing information bearing upon the lawfulness of its practices in an export trade of the United States, is seeking to insulate Mitsui from the responsibilities imposed by our laws.

We are aware of no international custom or practice that would require the United States Government to resort to the courts of another country to obtain information needed in the exercise of its sovereign jurisdiction and functions. Moreover, the Japanese Government's aide memoire refers to such documents as might be found within the territorial jurisdiction of Japan, whereas the information here in question appears to be located in the United Kingdom. Other representations of the Japanese Government indicate that cooperation will be extended in those cases which do not prejudice the interests of Japan, but it is not indicated or shown how the interests of Japan are or can be prejudiced by the Commission's order for Mitsui's production of the information in question and certainly such prejudice is not self-evident. Even if the documents were located in Japan, the trade involved is not an import or export trade of Japan but is the United States export trade from Pacific Coast Ports to European ports in the Antwerp/Hamburg Range.

Japan has a natural and proper interest in the well-being of one of its citizens and is anxious to protect it from unjust or discriminatory treatment at the hands of a foreign government. But there is not the slightest basis here for any suggestion of such discrimination. On the contrary, as we have already noted, the sole purpose of the present inquiry is to insure that Mitsui as a participant in United States commerce is observing requirements of United States law which all other carriers operating in our foreign commerce are required to observe. It would be discriminatory in favor of Mitsui and against all other carriers if the inquiry were not carried out. We cannot believe that the purpose of the Japanese Government is to secure for its citizens either undue preference or unwarranted immunity under the laws of those countries in which they conduct their business.

Our responsibility as we have said, is to insure the effective and impartial administration of the shipping statutes within our jurisdiction. Mitsui's motion to vacate the order must therefore be denied. Any other course would be in derogation of our duty and would frustrate the Shipping Act, 1916. Because of the circumstances herein cited we will grant Mitsui until *July 31, 1962* to produce the information as directed by the section 21 order,

without liability for the possible imposition of penalties for its failure thus far to comply with the order. We have accordingly treated Mitsui's motion as a petition for reconsideration tolling the running of the period for compliance, and have fixed a new date for such compliance in the attached order.

For the foregoing reasons, the motion of respondent Mitsui Steamship Co., Ltd. is denied.

(Sgd.) THOMAS LISI,
Secretary.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION held at its Office in Washington, D.C., this 5th day of June, 1962.

No. 918

MITSUI STEAMSHIP CO., LTD.—
ALLEGED REBATES TO A. GRAF & CO.

DENIAL OF MOTION TO VACATE AND EXTENSION OF TIME TO COMPLY WITH SECTION 21 ORDER

Consideration of the matters involved in this motion to vacate the Commission's order entered March 1, 1962, having been completed by the entry, on the date hereof, of the Commission's report containing its findings and conclusions, which report is made a part hereof by reference:

It is ordered, That the motion to vacate is hereby denied.

It is further ordered, That the order of March 1, 1962, is hereby amended by changing the date for compliance from April 4, 1962, to July 31, 1962.

By the Commission.

(Sgd.) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 920 & 920 (Sub. 1)

States Marine Lines Inc., and Global Bulk Transport Corporation

v.

Trans-Pacific Freight Conference of Japan, et al.

DENIAL OF PETITION FOR RECONSIDERATION AND STAY

Decided June 7, 1962

By the Commission:

The Commission, in its report dated April 16, 1962, found that respondents had violated section 15 of the Shipping Act, 1916 (46 U.S.C. 814) by the establishment and operation of a neutral body self-policing system which did not conform to the agreement that was approved by the Federal Maritime Board. Respondents were ordered to cancel fines found to be unlawful and to cease and desist from attempting to collect the fines assessed by the neutral body and from carrying out the neutral body amendment to the Conference agreement in any manner inconsistent with the amendment approved by the Federal Maritime Board or the Commission's report.

On May 17, 1962, respondents filed a petition for reconsideration of the Commission's previous finding, and also requested that the Commission stay the operation and effect of its order pending its ruling on the petition for reconsideration. On May 28, 1962 complainants filed a reply.

Respondents' contentions in support of their petition are for the most part simply reiterations of arguments that were considered and rejected by the Commission. One basically new argument

has, however, been introduced. In summary and quite belated fashion, respondents attack the Commission's jurisdiction to approve neutral body or self-policing provisions of conference agreements. Presumably, the question is raised only as to the neutral body agreements involved in this proceeding, since under section 15 of the Shipping Act as amended last October to emphasize our authority and duty over self-policing provisions (Public Law 87–346), the subject does not seem to be even open for discussion.

In effect respondents' position is that their neutral body agreements were matters separate and distinct from the activities embraced by section 15 and the Commission therefore had no jurisdiction to approve the neutral body agreements or regulate their effectuation. Respondents' basic premise ignores the fact that self-policing agreements are major amendments to section 15 conference agreements. They can and do have significant effects upon the operation of steamship conferences. It cannot be seriously contended that we do not have jurisdiction to approve and regulate the operation of the underlying conference agreements, for that is the very purpose of section 15, yet it is argued that we did not have jurisdiction over the manner in which respondents were enforcing their agreement. This reflects a substantial misconception of the Commission's functions and the purposes of the Shipping Act, 1916.

As we pointed out in our decision of April 17, 1962 in this same case, at p. 9-10, the enforcement of conference agreements is of primary concern to this Commission, and the effectuation of neutral body arrangements is part and parcel of that concern. A self-policing system can be used or abused in many ways. The possible deleterious effects of its misuse are innumerable. For example, it could be a means of "whitewashing" or concealing malpractices, or a convenient method by which to harass an individual conference member. On the other hand, if such a system is properly carried out, it may well help to cure many of the ills that beset steamship conferences, and that is the main purpose of the system.

It is not necessary here to discuss all of the ramifications of a neutral body or self-policing agreement. It is sufficient to note that such an arrangement is a basic part of the section 15 agreement and not a severable provision thereof. It affects the entire operation of the conference, and it cannot be viewed or interpreted separately from the section 15 agreement to which it applies. Neither the conference nor its self-policing arrangement can

exist without our approval and supervision. Conference agreements are not private contracts to be interpreted as the parties please or prefer, but have significant public aspects. We not only must be cognizant of them but must approve them before they can have any legal effect. See *Swift and Company* v. *Federal Maritime Commission,* 306 F. 2d 277 (D.C. Cir. 1962); *Pacific Coast European Conference,* 7 F.M.C. 27 (1961).

It is therefore ordered, That respondents' petition for reconsideration and stay is denied.

(Sgd.) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 869

PACIFIC COAST/HAWAII AND ATLANTIC-GULF/HAWAII GENERAL INCREASES IN RATES

No. 935

HAWAII/CROCKETT AND HAWAII/GALVESTON BULK SUGAR RATES

No. 941

HAWAIIAN RATES-TEN PERCENT INCREASE (1961)

Decided June 28, 1962

Rates between Pacific Coast ports and the State of Hawaii, as increased by 12½ percent and as further increased by 10 percent, and dollar equivalent increases in rates applicable between Atlantic Gulf ports and Hawaii, found just and reasonable.

Rates between the State of Hawaii and Crockett, California, and Galveston, Texas, applicable to raw sugar in bulk, found just and reasonable.

George D. Rives, Alvin J. Rockwell, John Sparks, Robert K. Kai, and *William H. Heen* for Matson Navigation Company and The Oceanic Steamship Company.

Willis R. Deming and *Charles E. Lucey* for Isthmian Lines, Inc.

Ronald A. Capone for United States Lines.

George F. Galland, William J. Lippman, and *William J. Ball* for Consolidated Freightways, Inc., and Hawaiian Marine Freightways, Inc.

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

Shiro Kashiwa, William D. Rogers, John T. Rigby, Richard S. Sasaki, and *Schuichi Miyasaki* for the State of Hawaii; *Alan F. Wohlstetter, Wm. I. Denning,* and *Ernset H. Land* for van lines and Sea Van Operators Association of Hawaii; *J. F. Morse* for Scott Paper Company; *G. M. Rebman* for United Van Lines, Inc., and Aero Mayflower Transit, Inc.; *Robert Y. Thornton* for the State of Oregon; *Gerald H. Trautman* and *William W. Schwarzer* for Pineapple Growers Association of Hawaii; *William R. Daly* for Harbor Commission of the City of San Diego; *Hiroshi Oshiro* for the City and County of Honolulu; *Roy Vitousek* for Hawaii Automobile Dealers Association; *James M. Morita* for Wholesale Fruit & Produce Dealers Association of Honolulu; *D. P. Falconer* for California and Hawaiian Sugar Refining Corporation, Limited; *C. S. Connolly* and *C. H. Fritze* for Carnation Company and Hawaiian Grain Corporation; *C. H. MacDonald* for California Milling Corporation; and *Harry E. Rockwood* for General Mills, Inc., interveners.

Edward Aptaker, Edward Schmeltzer, and *Richard Harsh* as Public Counsel.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner*

BY THE COMMISSION:

These are investigations instituted by the Federal Maritime Board (Board) to determine the lawfulness of increased rates for the transportation of cargo between Pacific coast ports and ports in Hawaii and also between Hawaiian ports and Atlantic and Gulf coast ports.

Three proceedings have been consolidated for the purposes of this report. Docket No. 869 involves a general increase in rates amounting to 12½ percent applicable to the transportation of all cargo except tinplate, molasses in bulk, dry fertilizer, fuel oil, and raw sugar in bulk between the Pacific coast and Hawaii, and amounting to dollar equivalent increases applicable to transportation between Atlantic-Gulf ports and Hawaii. Docket No. 935 involves rates for the transportation of raw sugar in bulk from Hawaii to Crockett, California, and Galveston, Texas.

Docket No. 941 involves a further general increase in rates amounting to 10 percent applicable to the same cargoes and trades as those in No. 869. The proceedings in Nos. 935 and 941 have not been the subject of a decision by the examiner, but the proceedings in No. 869 have been the subject of an initial decision to which exceptions and replies have been filed and oral argument heard. By stipulation, the record in No. 869 was incorporated in the record in Nos. 935 and 941. We ordered the record in Nos. 935 and 941 certified to us and No. 869 consolidated with Nos. 935 and 941 for a single decision by us.

The rates of Matson Navigation Company (Matson), American President Lines, Ltd. (APL), Isthmian Lines, Inc. (Isthmian), The Oceanic Steamship Company (Oceanic), United States Lines Company (USL), Lykes Bros. Steamship Co., Inc. (Lykes), Waterman Steamship Corporation (Waterman), Hawaiian Marine Freightways, Inc. (HMF), Consolidated Freightways, Inc. (Consolidated) are at issue in No. 869. With the exception of HMF and Consolidated, the same parties are respondents in No. 941. The rates for the carriage of bulk raw sugar only are involved in No. 935, which was combined with No. 941 for purposes of hearing. An initial tariff published by Isbrandtsen Company, Inc. (Isbrandtsen), for the transportation of cargo between Hawaii and San Diego, California, was also included by order of the Board.

The State of Hawaii (the State), various shippers, consignees, and shipper groups intervened in opposition to the increases. Briefs were filed by Matson, Isthmian, USL, the State, Pineapple growers Association of Hawaii (the Association), California and Hawaiian Sugar Refining Corporation, Limited (C & H), van line protestants, General Mills, Inc. (Genmil), California Milling Corporation (Calmil), jointly by Carnation Company and Hawaiian Grain Corporation, and Public Counsel.

In the past, Matson has been held to the rate-making line in the Hawaiian trade. *Matson Navigation Company—Rate Structure*, 3 U.S.M.C. 82, 83 (1948), *General Increase in Hawaiian Rates*, 5 F.M.B. 347, 349 (1957). Matson carried 91.3 percent of the Pacific coast/Hawaii cargo in 1957, 88 percent in 1958, and 90.1 percent in 1959. We will therefore determine the lawfulness of the proposed Pacific coast/Hawaii rates upon the results of Matson's operations.

In No. 869 the examiner held that shippers and consignees between the Pacific coast and Hawaii were entitled "to have the lawfulness of their rates determined upon the basis of the results of Matson's operation in that particular trade." We agree. The carriers in the Atlantic-Gulf/Hawaii trade in the past have based the rates in that trade upon the competitive relationship between that trade and the Pacific coast/Hawaii trade. Separate ships and separate solicitation services are needed and employed. There is no showing of interdependence except in rate setting. In a proceeding to determine the lawfulness of rates, the shipping public on the Pacific coast should have rates based on the cost of shipping their own commodities.

RESPONDENTS' SERVICE

During 1959 Matson provided the following cargo service: (a) three C-3 vessels sailing weekly between San Francisco Bay and Honolulu, each vessel equipped to handle 75 deck containers; (b) four C-3 vessels between San Francisco Bay and Honolulu and Hawaii outports, with weekly service from principal ports and fortnightly service to and from some outports; (c) three C-3 vessels between Los Angeles and Honolulu and Hawaii outports, each vessel equipped to handle 75 deck containers, sailing every nine days; (d) one Liberty vessel carrying lumber every 35 days from Humboldt Bay, California, to Hawaii ports, returning in ballast; (e) two C-3 vessels, each with refrigerated cargo capacity, operating on a 30-day turnaround, serve Tacoma, Seattle, Portland, and Honolulu and an outport in Hawaii; an additional nonrefrigerated C-3 vessel operates on a 35-day turnaround.

The pattern of operation was changed in 1960 in the following principal respects: (a) two C-3's, each with 75 deck containers, providing bi-weekly service between Los Angeles and Hawaii, plus the *Hawaiian Citizen*, a full-container vessel, with a 16-day turnaround, provide a triangular service between San Francisco, Los Angeles, and Honolulu; and (b) four C-3's, each with 75 deck containers, provide a weekly service from San Francisco Bay to Hawaii. The *Californian* and the *Hawaiian*, combination container and bulk-sugar vessels, provide container and bulk and bulk liquids service westbound, and bulk sugar, container, and liquids service eastbound, every nine days. Two other vessels

provide irregular service. The *Hawaiian Lumberman* was sold during 1960.

In 1960 the *Hawaiian Fisherman* was converted to an all-automobile carrier, with capacity for 500 automobiles and deck cargo, and special equipment to facilitate loading and unloading. It was placed in service at the end of December 1960 on a triangular 14-days turnaround between San Francisco-Los Angeles and Honolulu. In March 1961, the nonrefrigerated vessel was withdrawn from the Pacific Northwest service and the turnaround time for the other two vessels was reduced from 30 days to 27 days by reducing the number of calls at Hawaiian outports. In May 1961, the turnaround time of the two C-3 deck-container ships operating between Los Angeles and Hawaii was reduced from a 28-day turnaround to 21 days by reduction in the number of calls at Hawaiian outports. The Los Angeles ships call at the outports on the average of one each 15 days, and the Northwest vessels on an average of every 41 days.

USL operates a subsidized freighter service between U. S. Atlantic ports and the Far East on Essential Trade Route No. 12 (Line D-U.S. Atlantic/Far East Service) pursuant to an authorization in its Operating Differential Subsidy Agreement No. FMB 19. USL is authorized to call, and on occasion some of its ships do call, at ports in Hawaii while enroute to and from the Far East. USL has been historically a participating carrier and observes the rates set forth in the eastbound freight tariffs filed with the Commission by Matson, covering commodities moving from Hawaii to U. S. Atlantic ports. One of these tariffs, Eastbound Freight Tariff No. 3-0, is under inquiry in this proceeding. USL also is a member of the Atlantic and Gulf/Hawaii Conference and has been and is a participating carrier in westbound tariffs filed with the Commission by that conference, including Freight Tariff No. 14, which also is the subject of investigation in this proceeding. Matson and Isthmian are members of this conference.

Isthmian is a participating carrier in Tariff No. 3-0, and as a conference member it observes Tariff No. 14. Isthmian operates a joint service with Matson westbound from Atlantic and Gulf ports to Hawaii. Service on a 14-day frequency is offered from New York, Philadelphia, Baltimore, Norfolk, Mobile, and New Orleans, and on a 28-day frequency from Boston. Calls at Charleston, Savannah, Miami, and Houston are made as cargo

is offered. Loadings are made also at Tampa when offerings justify. The same pattern is offered eastbound. Isthmian has no fixed schedule of operations but only estimates it will make 13 westbound and 20 eastbound sailings in 1961 as against 11 westbound and 22 eastbound sailings in 1960.

CARGO PROJECTIONS

Respondents' traffic and revenue projections are based on an extension of their most recent experience. Matson's estimates include actual experience in 1960. There has been a gradual increase in cargo carried by Matson between Hawaii and the west coast; it predicted a decrease in 1961.

Matson's westbound Pacific coast results for 1960, show 1,808,934 revenue tons of commercial cargo, 58,354 revenue tons of sea vans with military household goods moving on Government bills of lading, and 220,925 revenue tons of Military Sea Transportation Service (MSTS) cargo. For the same period, 1,236,170 revenue tons of commercial cargo, 78,154 revenue tons of sea-van military household goods, and 72,843 revenue tons of MSTS cargo moved eastbound.

In 1960, Matson in its Pacific coast/Hawaii service carried 3,475,380 revenue tons, producing $59,505,000 voyage gross revenue. Using Matson's figures, this left a net income, after Federal income taxes, of $1,054,000. By the same method of computation, Matson had estimated in No. 869 that the net voyage profit in 1960 would be $2,008,000. Matson's estimates for 1961 include cargo actually carried during the first three months of the year. For the balance of the year, estimates were made "on the basis of historical tonnage data and a detailed survey of shippers and consignees to obtain their estimates of cargo expected to be shipped or received".

For 1961, Matson estimated that it will carry about 1 percent less cargo than in 1960. Although the movement of general merchandise westbound is expected to improve to the extent of about 5 percent, based upon the over-all expanded economy of Hawaii, declines are forecast for such commodities as automobiles (10 percent, considering registrations in Oahu (Honolulu) for the first five months); boxes and fibreboard (opening of second plant in Honolulu); furniture, household appliances, iron, steel, machinery lumber, and plywood. A drop in construction activity in the first four months, completion of oil refinery, curtailment of Mat-

son's Northwest service from lumber ports, a barge service for lumber from the Northwest, competition of Hawaii cement with lumber, and completion of two cement plants in Hawaii are advanced as causes. Eastbound, it is thought that the volume may increase about 85,000 tons, the sugar and molasses picture being somewhat brighter as the 1958 strike fades in the background. The pineapple industry predicts a smaller movement.

Public Counsel counters Matson's estimated drop of 1 percent by predicting an increase of 2 percent. He points out that Matson's volume for the first four months of 1961 was about 11 percent greater than for the same period in 1960. Carryings of the Atlantic-Gulf operators for the first six months of 1961 are up over the same period in 1960. Matson's exhibits anticipate substantial growth in the Hawaiian economy in the next decade; and C & H, Matson's largest shipper, plans heavier shipments of sugar in the next five years.

The heavier movement of sugar in the first four months of 1961 accounts in great part for the increased carryings in that period over the same period in 1960 but the increase in sugar has been included by Matson in its forecast for the entire year. April-May volume was below that for the same months in 1960, and 15,000 tons of military cargo can be added to this drop because it represents an acceleration of shipping time from later months, necessitated by the situation in Laos. Another factor to consider is that the curtailment of service from the Northwest will not begin to take on real significance until the last eight months of the year. The record does not explain the increase in Waterman's carryings in the Atlantic-Gulf trade in 1961, but Isthmian's estimated increase in that period can be explained by the shifting of cargo from Matson's vessels to Isthmian's vessels in their joint service resulting from the sale of one of Matson's vessels in the middle of the year.

On a slightly lower volume (37,148 revenue tons) for 1961 over 1960, Matson estimates the new rates will produce voyage revenue of $57,881,000, assuming the new rates to be in effect for the entire year. Assuming the lower volume for 1961, and also assuming the prior rates to be in effect for the entire year, Matson estimates its voyage revenue to be $54,157,000 for 1961. Using Matson's 1961 estimated figures again, this leaves a net profit before taxes of $3,792,000, which, after taxes of $1,782,000, leaves a net income of $2,010.00.

In view of Matson's changed operation we consider it inappropriate to take into account the 3-months' period of 1959 when the increased rates were in effect. The record contains both estimates of Matson's 1960 and 1961 operations and actual results for 1960 operations. Since 1959 Matson's expenses have increased substantially. For example, between December 1, 1956, and May 1, 1960, wages and related items rose from $8,790,549 to $10,104,-571, other vessel expenses except fuel oil, from $18,459,632 to $20,-891,566, and cargo expense from $27,413,235 to $32,031,114. Matson showed that the effect of wage and fuel price increases effective between May 1, 1960, and June 12, 1961, has been to increase Matson's estimated 1961 freighter expenses by over $3,000,000 more. Vessel wages and related items between 1960 and 1961 increased 7.12 percent, fuel oil 3.14 percent, and stevedoring, clerking, and auxiliary labor 8.20 percent.

There is evidence that Matson, through increased efficiency of operations as the result of its containerization program, has endeavored to minimize the impact of stated cost increases, but the containerization program, in turn, has led to increased financing costs.

Matson's 1960 results were poorer than expected because of an increased number of voyages and voyage days by reason of longer turnarounds and greater fluctuations in cargo offerings than anticipated, a fire at the Los Angeles container dock, and a strike at Los Angeles. Substantial wage increases were incurred during 1960. These were shown to have cost Matson $990,000. Cargo dropped about 120,000 tons, construction activity declined, and shippers failed to ship as estimated.

Under the Intercoastal Shipping Act, 1933, we are required to determine whether the increased rates under consideration are just and reasonable. Carriers are entitled to a fair return on the reasonable value of property devoted to the public use. We have recently held that the fair-return-on-fair-value standard is proper in determining the reasonableness of rates in the domestic offshore trades, and that the prudent investment standard would be used to determine the fair value of property. *Atlantic-Gulf/Puerto Rico General Increases in Rates and Charges*, 7 F.M.C. 87 (1962). We find nothing in the records before us which warrants a departure from our holdings in that case.

Before discussing the reasonableness of the general increases, we shall dispose of the issues raised as to (1) the rates on specific

775-794 O-65-19

commodities and (2) the terms and provisions of Matson's sugar tariffs and Waterman's sugar tariff. (Docket No. 935)

SPECIFIC RATES

(a) *Sugar.* One of the principal issues in this proceeding is the effect of Matson's revised rates on bulk raw sugar. As of December 3, 1958, the rate to Crockett, California, was $10.35 a ton, Matson assuming loading and discharging costs. This was the equivalent of a rate of $7.85 where the shipper assumes cost of loading. On the above date, following negotiations between the parties, the rate was reduced to $6.09 a ton, with the shipper paying costs of loading. This resulted in a diminution to Matson of about $3,000,000 in annual net revenue. The rate was further reduced to $4.18 a ton in July 1960, the shipper assuming loading and discharging costs. This meant an additional reduction of $263,000 in annual net revenue. The State and Public Counsel maintain that the rates were not arrived at as the result of arm's length negotiation, the former contending that the rate presently should be no lower then $10.35 and the latter urging that a reasonable rate would be $5.30, free in and out. Under the State's basis Matson would have to credit to itself approximately $2,704,000 in added revenues for rate purposes for 1961, whereas under Public Counsel's basis the revenue credit would be $818,000.

In 1958, 1959 and 1960, nine of Matson's 18 directors were associated with four companies which owned in 1958 approximately 40 percent of Matson's stock. The $10.35 and $6.09 rates were made during this period. As of December 1959, the four companies owned 73.6 percent of the stock. C & H is a nonprofit agricultural cooperative marketing association, the patrons of which are the growers of most all Hawaiian sugar cane. The patrons are 27 plantations and about 1,200 cane farmers cultivating single farms. Matson's four largest stock holders have a beneficial interest in Hawaii's sugar production of slightly more than 50 percent. About 90 percent of C & H's stock is owned by the plantations controlled by these four companies. Each patron has a marketing contract with C & H to deliver his sugar for marketing by C & H; the latter deals with all patrons on an equal basis. C &H owns a refinery at Crockett, near San Francisco, with an annual capacity of 780,000 tons. The refinery competes with beet sugar companies in the western and midwestern parts of the mainland, as well as with raw sugar from foreign companies, the transportation costs for the latter being lower than the costs of Hawaiian producers.

The Hawaiian sugar industry was in a serious financial condition in 1956. As the industry had paid approximately $14,000,000 as ocean freight in 1955, it was decided by C & H to conduct a study of the costs of storing and moving raw sugar to the mainland. It engaged McKinsey & Company, Inc. (McKinsey), a management consulting firm, to make the study. With the full cooperation of the industry, McKinsey was engaged in the task through 1957 and half of 1958.

In three reports, McKinsey estimated that Hawaiian sugar could be moved efficiently to the Crockett refinery by using two "jumboized" T-2 tankers, at a saving of approximately $3,100,000 a year. This estimate was based on a transportation cost of $5.78 per short ton. In furtherance of the three reports, McKinsey was authorized to explore more fully the cost of operating the proposed vessels. Maryland Shipbuilding & Drydock Company, which had had experience in jumboizing vessels, prepared a report which concluded that the plan was feasible. McKinsey conducted a computer study to analyze the storage and movement of raw sugar to Crockett, assuming the use of jumboized vessels. The storage cost was established, the availability and costs of the tankers were determined, and estimates of conversion were obtained from Maryland Shipbuilding.

During 1957 and 1958 Matson was informed of the study being made and was given copies of McKinsey's findings. Comments and criticism were invited. Matson's first proposed rate reduction was not agreeable to C & H, and Matson was advised that (1) the sugar industry considered the McKinsey report realistic, (2) the industry was determined to reduce its transportation costs, (3) the industry was prepared to make arrangements for proprietary or contract carriage, if necessary, in order to secure realistic rates, and (4) if Matson was interested in the sugar traffic it would have to submit a competitive proposal.

Negotiations between Matson and C & H continued. A Matson memorandum criticizing the McKinsey studies as unrealistically optimistic was made available to C & H. The criticisms were rejected, but meetings between C & H, Matson, sugar representatives, and McKinsey followed. These produced no results. The sugar representatives then submitted to a report to C & H, which included revisions in costs, and in which it was concluded that the proposed system could operate at an average cost of $5.70—$6.10 per short ton. The estimate included loading and discharg-

ing, ocean transportation, storage in Hawaii, and carrying costs. C & H accepted the report.

The parties, in the meantime, continued negotiations, C & H preferring to come to an agreement with Matson, if possible, in order to eliminate risks inherent in proprietary operation of vessels, and realizing also that the service proposed by McKinsey would require at least a year's time.

Matson's executive vice president, who was in charge of the negotiations, was authorized to make the best arrangements possible. He admitted that his higher figures were used as a basis for bargaining and did not represent the actual costs of carrying sugar. The idea was to set the sugar rate as high as possible and still retain the business. Matson's cost of $6.82 per ton, free in, was arbitrarily increased to $6.95. C & H's offer of $6.00, free in, was rejected by Matson, whose counter offer of $6.68 included a component of 59 cents for adjustment in the rental of the Hilo bulk sugar plant. An additional 19 cents would have to be included if Matson were to bear *force majeure* risks. C & H refused to consider the Hilo and *force majeure* factors, which thus would reduce Matson's $6.68 offer to $6.09 as compared to C & H's $6.00 proposal. As previously seen, the parties finally agreed upon $6.09, free in; this was on an interim basis. There then followed many meetings between the parties; and C & H served notice on Matson of its intention to terminate the sugar freighting agreement called for by the $6.09 rate. C & H finally agreed to take over from Matson the gantries used to unload sugar at Crockett, Matson purchased two C-4 vessels which lent themselves basically to the efficient carriage of bulk raw sugar, and the parties settled on the rate of $4.18, free in and out, referred to earlier. The present rate of $4.24 is the result of an escalation provision in the sugar freighting agreement. This rate is about the same as the $6.09 rate, free in. In that connection, another experienced American-flag company submitted to McKinsey an offer to carry C & H's sugar to Crockett on a 15-year contract of $4.15, free in and out, and using jumboized T-2 tankers.

When the Board ordered the investigation of the sugar tariff in March 1961 (No. 935), C & H asked McKinsey to review its earlier reports as to the feasibility and costs of jumboized tanker service. McKinsey reported that the proposed service was feasible and efficient, and that earlier costs had not increased appreciably as it was possible to eliminate certain contingency allowances included in the earlier cost estimates. McKinsey con-

:luded that the cost of such service would run between $3.51 and ;3.85 a short ton, free in and out, and would result in annual savngs of $3,600,000 in ocean transportation costs.

Public Counsel's suggested figure of $5.30 a ton as a reasonıble rate on sugar to Crockett is composed of (1) the base of $4.50, which is what Matson estimated it would cost C & H to operate ts own vessels; (2) escalation—clause increase of three cents; (3) three cents to install pumps in the vessels "at shipper's request"; (4) 19 cents as *force majeure* risks assumed by carrier; (5) 25 cents for "other"; and (6) non-transportation costs of 30 cents.

The initial decision in No. 869 stated that Matson's transportation consultant had analyzed all voyages handling sugar in 1959, and the method employed by the consultant was outlined. The procedure followed was generally approved by the examiner, and he concluded that "the rates on sugar were shown to be compensatory." In the present proceedings Matson placed in evidence a letter from the president of C & H to his directors, dated July 31, 1958, in which he concludes that the proposed rate of $6.09, free in, was fair and reasonable to Matson and to C & H. Attached to the latter was a computation by Matson based upon the $6.09 rate. This computation indicates that such rate would result in a return to Matson of 8 percent after taxes. Another attachment to the exhibit shows that Matson's negotiations with C & H contemplated a full recovery of costs by Matson and a reasonable profit for the service.

Opposition to the level of the sugar rate to Crockett is based upon the relationship between Matson, the four principal stockholders of Matson, and the sugar interests. The contention is made that the rate on sugar is so low as to cast a burden on other cargo, and that, when computing Matson's net revenue position, the company should be charged with the difference between the revenue receivable from a reasonable rate and the revenue received from the rates actually charged.

The record supports the conclusion that, prior to the reduction of the rate of $6.09, Matson's staff made bonafide efforts to ascertain the cost of carrying sugar. Matson's sole shipper of sugar presented a cost study prepared by a consultant with 40 years of transportation experience, particularly in the field of water carrier costs.

The estimates of McKinsey were not shown to be unrealistic, and it is not reasonable to suppose that Matson would deliberately

purchase two ships for the specialized handling of sugar if it thought it was going to lose money in carrying sugar. It must be kept uppermost in mind that Matson had the unpleasant choice of losing the sugar business entirely, with its valuable revenue or establishing a lower rate and retaining the business.

In addition to revising its rates for the carriage of sugar to California, Matson published new rates for the carriage of sugar from Hawaii to Galveston (Tariff No. 17). C & H has a contract with Imperial Sugar Company for the delivery of sugar to Galveston, the volume depending upon the size of the crop and the annual requirements of the Crockett refinery. The quantity shipped in 1960 was 99,000 tons. It is estimated that the movement will increase to 170,000 tons. As in the case of Crockett, C & H directed McKinsey to complete its study of the Galveston movement. McKinsey recommended proprietary carriage with a single jumboized T-2 tanker, at a minimum saving to C & H of about $400,000 a year. If back-haul cargo could be obtained, the saving might be in excess of $600,000 a year.

Negotiations between C & H and Matson, conducted during 1959 and 1960, were along the same lines followed in the case of Crockett. The McKinsey report indicated that it would cost C & H $13.90 a ton to load, transport, unload, and store its own vessel. Matson proposed a free-in-and-out rate of $12.50; C & H countered at $12.00, subject to a certain daily volume; and a compromise was reached at $12.20, free-in-and-out, at a standard lag-time of 1,680 tons a day, escalation clause for charterline costs, and a 3-year freighting agreement (Isthmian is a party to Tariff No. 17). C & H "recognized that Matson enjoyed greater flexibility than C & H would have if it were committed to a one ship service and was willing to incur certain costs in consideration of Matson's greater shipping experience." C & H remains free to use (and has done so) other common carriers for transporting sugar to Galveston.

In March, 1961, when No. 935 was initiated, C & H asked McKinsey to review the Galveston situation. The conclusion reached earlier was confirmed, with the possibility of eliminating certain contingent allowances included in the earlier cost estimates. The cost to C & H of using its own vessel is comparable to Matson's rate of $12.20. Another established operator offered to carry the Galveston sugar for $12.00 a ton, free-in-and-out, on a 15-year basis, and using a jumboized T-2 tanker.

Tariff No. 4 is Waterman's tariff for the transportation of sugar from Hawaii to Galveston. Waterman submitted data showing the volume of sugar carried and the cost of operation. It did not participate in the hearing and did not file a brief. C & H ships sugar on Waterman vessels, the rate being the same as Matson's. Without any discussion, Public Counsel, in his "Proposed Findings of Fact and Conclusion", finds that Waterman's rates are compensatory.

Upon the record in the three proceedings, it is found (1) that the sugar rates involved were negotiated in good faith and at arm's length, (2) that the rates agreed upon were reasonable and compensatory, and (3) that the sum of $818,000 suggested by Public Counsel need not be credited to Matson. In view of these findings, it is unnecessary to discuss the contentions of the State that the sugar rate to Crockett should be no lower than $10.35, which is higher than the rate proposed by Public Counsel but does not take into consideration the free-in-and-out characteristics of the present rate.

(b) *Tinplate.* Subsequent to *General Increase in Hawaiian Rates, supra* (Hawaii), the westbound rate on tinplate was raised 9 per cent. Shippers from the Atlantic coast continued to use the services of American Union Transport Co., at that time an unregulated carrier which handled about 30,000 tons of tinplate in 1958. On February 14, 1959, Matson's rate was reduced to $11.85 a ton (currently in effect), and its carryings of tinplate during the year increased. To retain the recaptured business, the rate on tinplate has not been increased. Failure to raise the rate was justified under all circumstances.

(c) *Molasses in bulk.* The island shippers of molasses informed Matson that their studies showed they could carry this commodity in their own T-2 tanker at a cost as low as $3.95 per ton, as compared with Matson's rate of $4.90. Furthermore, charter rates on molasses, at the time of hearing, were as low as $3.75. For these reasons, Matson felt it inadvisable to raise its rate, a position which was justified.

(d) *Dry fertilizer.* This commodity can be and is supplied to the islands from Japan and Canada as well as from the U. S. Pacific coast, the Japanese rate being slightly lower than Matson's total charges. Under the circumstances, Matson's failure to increase its rate on this commodity was justified.

(e) *Fuel oil.* About 260,000 tons of fuel oil is carried every year by Matson to the islands. Major oil companies have told Matson that they can carry it in their own vessels at about $4.00 a ton as compared with Matson's rate of $4.23 per ton. Because of Matson's frequency of service and multiple port schedules, the companies give the business to Matson rather than handle it themselves. A refinery has been built in Hawaii but Matson hopes to continue to carry some of the residual oil. The determination not to raise the rate on fuel oil was justified.

(f) *Household goods.* Military household goods are transported between the mainland and Hawaii in either of two ways: First the van lines pack the goods in their own containers at point of origin and transport them to the port, where Matson takes over and delivers them at destination, the entire movement being under a through Government bill of lading for which Matson assesses its regular port-to-port commercial rate against the van lines; and second, the goods are packed in Navy containers by the Government and transported by Matson under a port-to-port Government bill of lading pursuant to rate tenders on file with MSTS, in which case the Government arranges for the inland transportation.

Under the first method outlined above, the rate is $18.93 a revenue (measurement) ton, whereas the MSTS contract rate is $12.00 a revenue ton. It should be noted, however, that the MSTS rate is applicable to "general cargo, N.O.S." and not to household goods only. In contrast, the commercial rate is specifically applicable to household goods in sea vans. The principal reason for the difference in the rates is the fact that under the MSTS method the goods are handled by Matson on a free-in-and-out basis and the vessel must call at a military pier (if Matson exercises its option to lighter or truck the goods from the military facility to its pier, it must bear all transportation, loading, unloading, and overtime costs). Taking the various factors into consideration, the van lines contend the MSTS rate is approximately $3.13 lower than the van line rate from the Pacific coast to Hawaii and approximately $3.45 lower from Hawaii to the Pacific coast. The shipments under the two methods are the same, the containers are substantially the same, and the shipments receive similar stowage aboard ship. The van lines assert that Matson is charging different rates for military and civilian shipments and that the rates to van lines should not exceed the MSTS

rates because the nature of the shipments is identical, the services performed are identical, and the cargoes move side by side on the same ship.

The conditions of shipment which affect Matson's costs, however, are not the same. The standard form of MSTS contract which Matson has with the Government provides: "The loading and discharging of cargo at Army or Navy terminals shall be performed or arranged for by the Government; however, the loading or discharging of cargo moving over contractors' regular berth terminals shall be performed or arranged for by the contractors . . ." but that ". . . the Government or the consignee shall bear all expenses of loading, stowing, and discharging the cargo, such as lighterage (including loading and discharging costs in connection therewith), stevedoring, checking, tallying, manifesting, winchmen, . . ." The Government also provides certain other services and pays certain expenses in connection with loading and discharging. There are no solicitation costs to Matson. There is a reduction in administrative costs in that stevedoring, tallying, and manifesting are performed at the expense of the Government, the abbreviated tariff categories eliminate the necessity of classification, and the history of MSTS shipments shows lower damage losses. Considering volume alone, MSTS traffic is over twice as great as that of the van lines. The differences are more significant than the similarities. These facts show that the services may not vary as contended, but there are substantial differences in who performs and who pays for the same services. The differences in the expense burdens justify a difference in the rates. We hold that the reasonableness of the increases in the rates on household goods in shipper furnished containers has been established and that no unjust discrimination has been shown as to this property.

(g) *Canned pineapple and juice.* The initial decision in No. 869 found that it had not been shown that canned pineapple and canned pineapple juice should not take the general increase applicable to cargo in general. The Association argues that pineapple and juice should not be subject to the general increase here under consideration.

The Association offered the following factual situation in substantiation of its position: Pineapple is the only major backhaul commodity which fills space available by reason of the demands of the westbound service; pineapple accounts for the largest

revenue of any single commodity; foreign import into the United States increased 600,000 cases in 1960, most of it originating in areas that had hardly any imports two years ago; per capita consumption of Hawaiian pineapple decreased 10 percent; the spread in quality between Hawaiian and imported pineapple is being narrowed; foreign pineapple has lower labor and material costs, and in some instances receives government assistance; foreign pineapple has lower freight rates; foreign pineapple of competitive quality sells below the Hawaiian product in mainland markets; there has been a steady increase in the price spread between pineapple and competitive fruits from California, such as peaches, apricots, pears, and fruit cocktail, all the latter of which are below the 1952 price level; Hawaiian labor is unionized and receives higher wages than mainland fruit workers; Hawaii, unlike California, must bring in practically all of its growing and canning materials and supplies; and carry over inventories of competing fruits are of unprecedented size.

The situation as to pineapple juice is said to be worse since the hearing in No. 869. Prices were reduced in 1960 to the lowest point since 1946; prices were increased slightly in 1946; before the 1960 reduction the per capita consumption was the lowest since 1950; a slight improvement has taken place, but the selling price is about 91 percent of 1948 prices; the index of orange juice prices is 155 against 79 in 1948, and 119 for frozen concentrate against 93 in 1948; Puerto Rico has doubled its juice imports to the mainland; one of the largest processors is going to operate in Puerto Rico.

The Association also points out the following: the Hawaiian legislature reduced the processing tax on pineapple in 1960 by one-half of one percent; one large processor has decided to discontinue planting on Maui and has abandoned canning operations on that island; two other companies have recently closed their canneries, and another has discontinued planting; and another has shut down its canner operations on Kauai and is thinking about commencing operations in Honduras.

The Association contends that the raising of the pineapple rate will virtually wipe out any hope that the pineapple industry may have to market its products on the mainland; that the competitive circumstances justifying rate relief in the case of pineapple are more compelling than in the case of any of the other commodities (heretofore referred to) which have received relief;

that the retention of the pineapple traffic is crucial to Matson's profit picture; that Matson could not maintain its present service if much of the pineapple were lost through diversion to other forms of transportation or market attrition; that there is no other eastbound commodity to take the place of pineapple; that the loss of the pineapple traffic would result in higher rates for the westbound traffic; and that the cost of handling pineapple will decrease approximately $600,000 a year because of palletization and containerization.

Pineapple's competitive position is not a basis for establishing rates nor a reason for treating it differently than other general cargo commodities. Neither molasses nor sugar are comparable cargoes simply on the basis of their being "backhaul cargoes". To create an unreasonable or unjust discrimination, more significant similarities than the mere fact of a backhaul, must be shown. Similarities in handling and facilities used must be present. The facts show that these conditions are not similar. The Association has not shown, however, that pineapple subsidizes other traffic or bears more than its fair share of Matson's expenses. The claims of the Association are rejected.

(h) *Grain and Feed.* Matson's tariff has two rates for bulk grain and feed ingredients: $10.69 applicable to a minimum of 1,000 tons, and $10.13 applicable to a minimum of 2,000 tons. Rates apply from the end of spout at loading elevator, and wharfage and discharging expenses are for account of cargo. Intervener Carnation protests the full application of the 10-percent increase on bulk grain and feed ingredients on the grounds that cargo handling costs are not incurred in the transportation thereof, and that increased handling costs which may have been incurred by Matson cannot be attributable to bulk grain and feed ingredients.

Carnation recognizes, however, that it should share in any increased operating and fuel costs which are found to be justified. The increases advanced by Matson are: vessel wages and related items $667,000; fuel oil, $99,000; stevedoring, clerking, and auxiliary labor, $2,237,000; total of $3,003,000. Intervener points out that stevedoring, clerking, and auxiliary labor are not applicable to bulk grain and feed ingredients since cargo pays those expenses in any event. Vessel wages and fuel oil, totaling $766,000, represent 25.2 percent of the total increased costs of $3,003,000, and because of this, Carnation argues that the increase on bulk grain and feed ingredients should be 25.2 percent

of 10 percent, or 2.5 percent.

Matson counters that, by reason of the differential between the free-in-and-out rate on bulk grain and feed ingredients and the berth terms or container rates on feed or ingredients, the application of a uniform 10-percent increase produces substantially the result sought by Carnation. In other words, the rate differential is as much as $17.04 a ton, and the application of the 10-percent increase to bulk grain and ingredients and to feed and ingredients in bags or containers means an increase for the former of only 37 percent of that applicable to the latter.

The rate on manufactured feeds, feed ingredients, and grain shipped in bags or containers is higher than the rate on bulk grain and ingredients. Interveners Genmil and Calmil, which process the former category on the mainland and ship them to Hawaii, contend that the 10-percent increase puts them at a disadvantage with feeds processed by Carnation and others in Hawaii from raw grain and ingredients shipped in bulk from the mainland. Genmil does not dispute the need for the increased revenue nor contend that the resulting level of rates on manufactured feeds in bags or in containers, considered alone, would be unreasonable.

Competition is severe between the mainland manufacturers of animal and poultry feed and the processors of those commodities in Hawaii. The 10-percent increase is equivalent to 90-95 cents a ton on bulk grain as compared with $2.45 a ton on feed in sacks and $2.36 a ton in containers. Genmil concedes that the cost of handling bulk grain and ingredients on an f.i.o. basis is lower than for feed, feed ingredients, and grain in bags or containers, and believes that a rate structure involving a *constant* differential between the two methods of shipment would be reasonable and highly desirable in terms of the public interest. Percentage increases, it is claimed, destroy such differentials.

Matson argues that a percentage form of increase is a presumptively fair method as it apportions the revenue requirement among all commoditities in proportion to present participation in revenues. It believes that the preservation of differentials in revenue proceedings by means of flat increases is impossible in the present instance because of the inadequacy of the record and the problems involved in dealing with specific rates. Furthermore, Matson argues that the decline in the volume of feed shipments from the mainland is beyond its control, and that carriers are not required to equalize opportunities among shippers

nor to nullify the advantage of a shipper whose plant is close to the market. In conclusion, Matson says that only if loading and discharging costs on bulk ingredients have remained constant can it be assumed that changes in Matson's costs are the only factors bearing on the rate relationship.

Where possible, it is desirable to maintain reasonable rate relationships. As noted above, the 10-percent increase broadens the dollar differential between bulk grain and ingredients, on the one hand, and manufactured feed, feed ingredients, and grain in bags or containers, on the other hand. Generally, however, a carrier is not required to equalize opportunities among shippers or nullify the advantage of a shipper whose plant is close to the market, and this rule is applicable here.

It has not been shown that the proposed rates are unreasonable as a result of a percentage-across-the-board increase rather than a dollar-differential increase. The use of a percentage form of increase is presumptively fair because it apportions the increased revenue among all commodities in proportion to present participation in revenues.

GALVESTON TARIFFS

It is contended that Tariff No. 17 (Docket No. 935) is unlawful for the following reasons: (1) the service involved is noncommon carriage, not subject to the Commission's jurisdiction; (2) the freighting agreement prevents shippers from chartering vessels of other carriers; (3) Matson has another sugar tariff (No. 3-0) which contains a higher rate, thereby creating a dual rate system; (4) the term of the freight agreement is excessive; (5) the minimum volume requirement is excessive; and (6) the rate is undeterminable.

The argument that Tariff No. 17 sets up a noncommon-carrier service is predicated upon three asserted circumstances: the vessels are to be devoted to the exclusive use of a single shipper, the sugar will move under special contracts, and general cargo will not be solicited nor accepted for the vessels.

While it is possible that in some instances a vessel will carry only sugar, it is equally possible under the tariffs that others will carry general cargo. Tariff 17 does not compel Matson to exclude general cargo from vessels carrying C & H sugar, and the record before us does not warrant such an assumption on our part. We cannot ignore the economical and practical peculiar-

ities of the situation faced by Matson. At present C & H is the sole shipper of sugar from Hawaii to Galveston. The fact that a special arrangement is required to secure the business of C & H for Matson does not of itself convert the arrangement into one of contract carriage.

It is further contended that, because C & H is the only shipper of sugar that can meet the requirements of the sugar freighting agreement, it is an unjustly discriminatory special contract. While it may be correct that only C & H can qualify under the agreement, we fail to see how another nonexistent shipper can be discriminated against and there is no foreseeable prospect of a change in the existing situation.

Paragraph 3 of the sugar freighting agreement enjoins C & H from moving sugar to Galveston "in vessels owned or chartered from others by the shipper" unless it has been offered first to Matson. It is argued that this constitutes an attempt to penalize the shipper for patronizing another carrier, and is an attempt to employ a dual rate system with the intent to stifle outside competition in violation of section 14 Third of the Act. Insofar as relevant, 14 Third of the Act makes it unlawful for a common carrier to "resort to other discriminatory or unfair methods, because such shipper has patronized any other carrier." The obvious purpose of section 14, when read in its entirety, is to protect the independent common carrier from discriminatory retaliation against the shipper for patronizing another common carrier.

The sugar freighting agreement leaves the shipper free to utilize any other common carrier operating in the trade, and indeed, as we read the agreement, the shipper is free to enter into a contract with a contract carrier for the carriage of all or any portion of his sugar. The sole requirement of the agreement is that before the shipper uses his own vessel or operates a chartered vessel himself, he must first offer the cargo to Matson. Such an arrangement is not violative of section 14 Third. Nor do we feel that the three-year initial period of the agreement is unreasonable when the practical and economical circumstances prompting the agreement are considered.

It is said that Matson's use of two rates on sugar, the $12.20 rate in Tariff No. 17 and $18.81 in Tariff No. 3-0 constitutes a dual rate system which is unlawful under the Act. Matson has indicated a willingness to cancel the $18.81 rate in Tariff 3-0, and we assume that it will do so. Therefore, we do not consider the question of the existence of a dual rate system in this proceed-

ing. We note, however, that there is nothing in the tariff or the freighting agreement which requires a shipper to ship all or any fixed portion of his sugar during the period of the agreement.

Finally, it is contended that the escalation clause in the agreement makes it impossible to determine the actual rate to be paid by C & H for shipments on chartered vessels until the voyage is completed. This, it is argued, makes it impossible for Matson to comply with the provisions of section 2 of the Intercoastal Shipping Act, 1933, requiring that a common carrier file with the Commission the rates to be charged and that only the filed rate shall be charged.

As we understand the escalation clause, any increase in the rate under the clause is contingent upon an increase in the cost to Matson of chartering a vessel or vessels to meet the requirements of C & H. Since, in order to meet the requirements of C & H, Matson must charter vessels in advance of shipment, Matson will know what increased costs are involved and will be able to compute the increase in rate in advance of actual shipment. Thus, Matson will be able to file the actual rate to be charged under the tariff as the provisions of section 2 require.

OPERATING RESULTS

In the present posture of this proceeding, particularly in view of the consolidation of the three proceedings, it is possible to determine with better-than-average accuracy the actual operating results experienced by Matson in 1959 and 1960, and thus to make accurate findings concerning the lawfulness of the 12½ percent increase. Reasonable projections for the future may be made, based on revenue and expense data covering 1960 and 1961, under the combined 12½ percent and 10 percent increases, by which the lawfulness of the combined increase may be gauged.

It is contended that, if a carrier is free to readjust its projections based on costs which it later finds will actually happen, the tendency is for the carrier to submit for the record only those cost changes which are beneficial to the outcome of the case, as a carrier has no interest in attempting to bring into the record later circumstances which are detrimental to its case.

While the evidence respecting the new costs came later in the proceedings, the Examiner advised all parties that time would be afforded for consideration of the new data. It cannot be said

that anyone was prejudiced by the offer of the material. In the expanded record we cannot ignore evidence of the now available actual results any more than we can ignore other evidence of record in reaching our determination as to the lawfulness of the rates. Moreover, with the inclusion of Nos. 935 and 941 such information became available, and the contention referred to above as well as exceptions to the Examiner's rulings on the 1960 estimates are now academic.

Matson's 1960 cargo and revenue estimates in No. 869 were overoptimistic, as the actual results have shown. Its 1961 estimates include actual experience for the first three months of 1961 and for the remainder of the year are based on historical tonnage data and a survey of shippers and consignees. A predicted 1 percent decline in volume Matson claims is supported by a decline in construction activity and in new automobile registrations in Hawaii and a reduction in service to the Pacific Northwest. We will assume the 1961 results will be no better than those of 1960, for rate purposes.

PROFITS OF RELATED COMPANIES

As respects the use of revenues from shippers to pay profits of closely related companies, in *Atlantic-Gulf/Puerto Rico, supra,* at 113, we held that:

> Bull's operating expenses should be also reduced by $139,404 to cover the excess of commissions paid to A. H. Bull & Co. over and above the costs of the latter as allocated on a revenue prorate.

In that proceeding Bull-Insular Line was wholly owned by Bull Steamship Co., which was the parent of A. H. Bull, & Co. This wholly integrated grouping of companies, in the opinion of Matson, differentiates the situation there present from the situation in these proceedings. The shipping public is entitled to protection from the siphoning-off of revenues by affiliates of the regulated carrier. The profits of $784,693 in 1960 and $487,500 in 1961, derived by Matson's four principal stockholders for services rendered to Matson in Hawaii will be credited to Matson's net profit after taxes.

INACTIVE SHIP EXPENSES

Matson charged as an item in the year 1960 amounts for inactive ship expenses. The reasons for the lay-up were as follows: one ship was out of service while being converted to container

use; two ships were laid up for sale; and four ships were withdrawn from service. Where the ships are laid up for repairs or alterations for further use in service to shippers and before sale it is reasonable that shippers should bear an expense for their benefit. The lay-up and sale would protect shippers from expenses on ships no longer required in the service. Pending sale, shippers may reasonably be required to pay for the intervening lay-up expenses between withdrawal from service and sale because the lay-up stops further expense of operation. The ships which had been withdrawn from service altogether, on the other hand, were laid up for the benefit of the company and investors. As to ships withdrawn from service and from the trade, no lay-up expense will be allowed.

CHARTER LOSSES

The State contends that losses suffered by Matson on vessels taken out of the Hawaiian trade and chartered to others during periods when they are not required for the Hawaiian service should be disallowed in fixing Matson's rates. In No. 869 the Examiner offset Matson's losses on ships chartered to other carriers against profits in the Hawaiian trade. The chartered ships were not used in the Hawaiian common-carriage service. Our predecessors have previously disallowed both profits and expenses in unrelated operations even where the same ships were also used in the regulated service. *Atlantic & Gulf/Puerto Rico, supra.* The losses will be excluded as expenses.

DEPRECIATION EXPENSES

The State contends that adjustments should be made in Matson's depreciation expenses and depreciation on funds set aside pursuant to section 511 of the Merchant Marine Act, 1936. Matson claims vessel depreciation expense of $2,629,000 for estimated 1961. Its practice is to use a residual value of 2½ percent and an average useful life of 20 years. The procedure was approved by our predecessor in *Atlantic-Gulf/Puerto Rico General Rate Increases,* 6 F.M.B. 14 (1960). The State and the Association contend that the method results in excessive depreciation charges. In view of our holding in *Atlantic-Gulf/Puerto Rico, supra,* Matson's method of vessel depreciation is approved.

Under section 511 of the Merchant Marine Act, 1936, a shipowner may make deposit in a construction-reserve fund. Fed-

775-794 O-65-20

eral taxes on capital gains deposits of the proceeds of sale and indemnities from loss of ships are deferred. If such funds are used pursuant to the provisions of that section to construct a new ship, the depreciable base of such new ship for Federal tax purposes is reduced by the amount of such funds which represent capital gains. Matson, in computing net earnings on its freight operations, includes depreciation on such funds. We concur for the reason set forth hereafter in our discussion of capital gains, and the amount of $105,300 for 1960 and $80,394, used by Matson for 1961, will be allowed.

CONTAINER RENTAL

Matson shows total 1961 voyage expenses of $45,830,000, which includes container rental expenses as contracted for by Matson, involving large payments in the early years and smaller payments later on. In 1960 Matson placed into service the all-container *Hawaiian Citizen* and the partial-container *Hawaiian* and *Californian.* This required the acquisition of container units in which to stow the cargo and chassis to haul the containers. By the end of 1958 the company had 345 standard containers; the number increased to 1,138 by April 1960; and at the end of October it had 2,070. The containers were supplied by the manufacturer under a lease arrangement whereby the total payment for each dry container, over a 5-year period, was $2,167; for each reefer container it was $4,926; and for each chassis it was $2,749. At the end of such period the containers can be used for a nominal yearly sum of $20-$30 for each unit for as long as the units are usable. The total of the 5-year rental equals the amount Matson would have paid had the units been purchased outright.

Matson staggered its rental payments for rate-making purposes, the largest amount being credited the first year, with lowering amounts for each succeeding year. It is contended by various of the parties that the total rental cost should be normalized by apportioning the cost over the estimated period of the useful life on a straight-line average.

For rate-making purposes it is only fair to spread the 5-year total rentals evenly against Matson's operating expense, in spite of the fact that the lease agreement itself calls for a staggered method of payment. Only in this way can there be portrayed the true picture of Matson's operations in the future. Special expenses should be spread over that period which reasonably

represents the useful life of the asset. In the case of containers, they will perform the same service and be of the same relative value to Matson in each year of their operation. The testimony is that the useful life of the containers is about five years. Although it may well be that the actual life will be longer, there is nothing tangible in the record upon which to predicate a longer life span than five years.

The Examiner found that one-fifth of the cost of the container plus one-tenth of the cost of the chassis plus one-fifth of the cost of the tires, should be included as expense for estimated 1960 and constructive 1960. We agree. Matson's vessel expenses for 1960 will be reduced by $689,568, and for 1961 will be reduced by $644,868. For 1961 the voyage expenses are found to be $45,185,-132.

Matson argues that, if there is to be any adjustment of the lease-rental payments for the container equipment (see elsewhere herein), "then the amount of interest deductible for income tax purposes . . . should not be the full amount payable on the loan in its first year but should be one-sixth of the amount of interest payable throughout the six-year term of the loan."

The principal of the loan is repayable in 24 equal installments, plus interest, but the interest is figured on the outstanding balance of the principal. Strictly from an accounting viewpoint, it might be proper to charge to each year's operation only that part of the interest payable that year. Under that method the amount of interest would decrease as the principal decreases. For rate-making purposes, however, and as an aid to rate stability over a period of time, it is proper to split the total interest into equal parts and charge each year of the life of the loan with an equal amount of interest. We conclude that the sum of $260,000 each year for six years should be deducted in computing Matson's net income subject to tax.

CAPITAL GAINS

Since the hearing in No. 869, Matson has sold two Libertys and two Victorys, and three C-3's have been traded to its wholly-owned subsidiary, Oceanic, for four C-2's, three of which were later sold by Matson. The state argues that for 1961 the capital gain realized by Matson from the sale of ships in 1961, some $1,-774,000 should be credited to the rate-payers. It is contended that the ships were depreciated "down to low net book values through the excessive annual depreciation charges and, thereby, Matson

charged to the rate-payers in the trade a total of vessel depreciation expenses over the years which was substantially greater than the depreciation expenses with which the rate-payers should have been burdened." The State concludes that "the capital gain enjoyed by Matson measures the amount by which those past annual depreciation charges were excessive", and that the "excess measured by the capital gain on the sale of the vessels ought to be credited now to the rate-payers."

Public Counsel does not subscribe to the State's position. Instead, he proposes that capital gains should be credited to annual depreciation expense and only after realization. This could be accomplished by spreading the deduction over a uniform period, as an annual deduction against over-all depreciation vessel expense. Assuming the useful life of a vessel to be from one to 20 years, it is suggested that 10 years would be a fair period for the deduction; this would retain the straight-line 20-year life theory of vessel depreciation, to which Public Counsel adheres. By this method, Public Counsel concludes that the adjustment for 1961 would be $180,807.

Matson urges that, while it may have realized a capital gain from the sale of the vessels, this does not mean that it has realized any capital gain vis-a-vis its rate-payers; that the capital gain for tax purposes arises merely from the fact that the vessels were sold for an amount greater than their depreciated tax basis; and that for rate purposes the rate-payers have not in reality returned capital to Matson except to the extent that it has actually received its book depreciation accruals and, in addition, a full fair return.

The State proposes that depreciation charges be established, using "realistic" or current market residual values or a 5 percent reducing balance method of charges or a straight-line depreciation with a realistic judgment of the useful life of the vessels. Public Counsel argues that the difference between the undepreciated book value of any vessel withdrawn from the service and its market or sale value should be deducted from the depreciation base of any replacement vessels. Three replacement ships have been brought into Matson's fleet and the acquisition or reconstruction cost should be adjusted, it is contended, to reflect the capital gains realized from the sale of the retired ships. As already noted, Matson's rate base should include ships at their original

cost rather than at current market value. Depreciation expenses will be based on actual rather than speculative values. To diminish such expenses by a capital gain would give shippers the capital gain. Shippers are not entitled to receive capital gains any more than they are required to pay for losses on ships or to make capital contributions in the form of excessive depreciation charges. Shippers are required to pay investors the annual capital consumption as depreciation expense for the gradual disappearance of the investment devoted to the trade. Fairness to shippers does not require that they obtain the benefits of investors' profits nor relieve shippers from expenses for depreciation through the replenishment of depreciation reserves with gains received when ships are sold. There should be no deduction from the depreciation base of replacement ships.

ALLOCATION METHODS

Matson operates a passenger as well as a freight service. This necessitates allocation of various expenses between the passenger and freight services.

Matson divides its administrative and general expense into three parts: first, as it relates to shipping and nonshipping activities; second, as it concerns Matson and its wholly-owned (subsidized) subsidiary, Oceanic; and third, as it affects Matson's freight and passenger services. As to the first we agree with the method employed by Matson and the results derived therefrom.

The second formula, which prorates Matson/Oceanic expenses on a revenue basis pursuant to Oceanic's subsidy contract, is opposed by the Association. The Association complains that it is not fair for Matson to assume all expenses not chargeable to Oceanic, because "plainly the result of this allocation method is to place on Matson the entire burden of various expenses which at least in part inure to the benefit of Oceanic." We disagree with the Association in the light of the circumstances and absence of any showing that amounts chargeable to Matson are unreasonable or excessive.

The third stage is the most controversial and is strongly contested. In *Hawaii* Matson used, and the Board approved, the revenue prorate method of allocating expense as between passenger and freight services. In the present case Matson has shifted to expense prorate, which results in a greater amount being allocated to its freight operations.

Interveners contend that for the purpose of these proceedings either a revenue basis of allocation should be used, or a basis of the ratio of vessel expenses, exclusive of cargo handling, in the freighter service to total vessel expenses.

Where direct allocations are impossible or impracticable, expenses should be allocated between the passenger and freight services on the basis of the relation that the expenses incurred in the passenger and freight operations separately bear to the total expenses incurred in the operation of both. Administrative expenses should follow the expenses to which they relate. If revenues were used as a basis of allocating expenses, the increase in revenue resulting from a freight rate increase would result in an increased allocation of expenses. A rate increase might be used as the basis for justifying a further increase in rates. Accordingly, within Matson we have allocated administrative expenses on a voyage expense basis between passenger and freighter services.

ADJUSTED REVENUE AND EXPENSES

After giving effects to the adjustments discussed above, we find and conclude that Matson's projected income statements for 1960 and 1961 in its Pacific coast/Hawaii service, for rate-making purposes, are as follows:

	1960	1961
Revenue	$59,505,000	$57,881,000
Voyage Expense	49,718,432	45,185,132
	9,786,568	12,695,868
Administrative and General Expense	5,514,000	5,481,000
Depreciation	2,196,000	2,629,000
Inactive Vessel Expense	223,000	69,000
Depreciation—511 Funds	105,300	80,394
	8,038,300	8,259,394
	1,748,268	4,436,474
Federal Income Tax	467,995	2,149,101
	1,280,273	2,287,373
Profit of Related Companies	784,693	487,500
Net Income	$2,064,966	$2,774,873

VALUATION AND RATE BASE

Original cost plus betterments are shown as of December 31, 1959, and December 31, 1960, plus a pro rata portion of all improvements and additions made during each year based on that part of the year during which funds were so invested, less a pro rata portion of the funds invested in ships sold during each year based also on that part of the year during which such funds were so invested in those ships. Included in this cost are all section 511 funds employed in the acquisition of vessels, on the basis that such funds represent capital employed in the service regardless of their tax status and therefore should be recognized in the rate base. For 1961 the *Hawaiian Trader* was employed for 50 days and was included in Matson's market value of ships, but as no data was given as to its cost, it has been omitted. The depreciation figure represents the accumulated depreciation as of December 31, 1959, and 1960, including depreciation on section 511 funds invested in the ships. Other property and equipment is shown at original cost depreciated to December 31, 1959, and 1960, plus 50 per cent of the cost of net additions during each year. In the absence of any data as to actual dates of acquisition of other property, 50 per cent has been used as an approximation of the period of use within the year. Working capital is the average voyage expense of the Pacific coast-Hawaii service.

The State argues that depreciation should be computed on the difference between the original cost depreciated and the amount estimated to be realized when the vessels are disposed of rather than the difference between such cost and scrap value. We have held that carriers can charge annual depreciation using a residual value equal to scrap value, *Atlantic & Gulf-Puerto Rico*, supra. We find the amount Matson prudently invested in the vessels devoted to the trade, after allocation and after being depreciated to December 31, 1959, and to December 31, 1960, to be $17,055,671 and $18,215,839, respectively.

In *Atlantic & Gulf-Puerto Rico, supra,* we allowed as working capital an amount equal to one round voyage expense of each ship in the service. Applying the same measure here we find that the fair and reasonable allowance for working capital would be $4,564,906 for 1960 and $3,802,641 for 1961.

The following table sets forth the cost, plus betterments, of the vessels used by Matson in the Pacific coast-Hawaii service, the accrued depreciation thereon, the depreciated value of other property, and equipment, and working capital.

	1960	1961
Vessels—original cost plus betterments	$35,972,673	$36,489,821
Less accumulated depreciation	18,917,002	18,273,982
Net	$17,055,671	$18,215,839
Other property and equipment	3,212,000	4,175,000
Working capital	4,564,906	3,802,641
Total	$24,832,577	$26,193,480

RATE OF RETURN

The next issue is the reasonableness of net income of $2,064,966 in 1960 and $2,774,873 in 1961 (estimated), in relation to Matson's property used in providing the service which produces such a return. A reasonable rate of return is one that is (1) sufficient to produce earnings that meet the carrier's present costs of capital, including fixed charges, such as interest on secured debt, and reasonable dividend requirements for holders of equity obligations; and (2) adequate to attract capital in the future on favorable terms and to pay incidental costs of issuing securities. Protection of existing investors and protection of the carrier through capital attraction should provide returns commensurate with those of enterprises with comparable risks (*F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944), *Bluefield Waterworks & Improvement Co.* v. *Public Service Comm.*, 262 U.S. 679 (1923))

A comparison of respondent's business with other transportation or utility-type enterprises affects respondent's ability to meet obligations to investors and to attract capital. In the *Hope* case it was stated: "From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for capital costs of the business. These include service on the debt and dividends on the stock . . . By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital." (Page 603—See also *Colorado Interstate Gas Co.* v. *F.P.C.*, 209 F. 2d 717 (10th Cir. 1953)). In the shipping industry a 5-year average return on invested capital for six shipping companies ranged from 7.9 percent to 21.1 percent, averaging 15.5 percent. The return on net

worth by 65 of the most profitable of the 500 leading industrial concerns in the country, in the five years 1955 through 1959, was shown to be 15.6 percent, or more.

For the years 1955 through 1959, Moody's 125 industrial common stocks sold at an average of 197 per cent of book value and 24 utility common stocks at an average of 151 per cent of book value. In comparison, the common stock of shipping companies sold at an average of only 43 per cent of book value during the same 5-year period.

Earnings generated by book assets of shipping companies have been discounted by the capital market by more than 50 per cent during the same period that it evaluated monopoly-type utilities at 50 per cent above book value, and that of industrial companies almost 100 per cent above book value. This indicates that the investment market does not consider returns on net worth typified by six shipping companies for the five years 1955-1959 in the same amount of 10.3 per cent, nor returns on invested capital for the same companies in the same period at 15.5 per cent, as adequate to compensate for the risks inherent in the shipping industry in comparison with returns on investment in competing claimants for capital. Average earnings on common stock equity for the five-year period 1955 through 1959, by a representative group of electric companies, gas combination companies, gas distribution companies, and gas pipeline companies, ranged from 11.7 per cent for electric companies to 14.4 per cent for pipeline companies.

Unlike franchised utilities, there are no laws preventing a diminution or abandonment of service by the transfer of ships anywhere in the world where the return is greater. Sale or transfer of ships would be disadvantageous both to shippers and to the economy of Hawaii. Matson is also subject to competition by other carriers who are free to enter the trade, so competition is a factor affecting Matson's ability to attract capital. The attitude of investors toward shipping companies indicates that Matson's allowable rate of return must be commensurate with returns on investments in other enterprises having corresponding risks.

Money must be borrowed in a competitive market, just like any other product or service. The rate of return that is just and reasonable is almost universally recognized as that rate which is adequate to attract additional borrowed capital on favorable terms. Investors weigh the relative attractiveness of an investment

in carriers, such as Matson, with the gains expected from other investment opportunities. A carrier must offer inducements in earnings equivalent to those available elsewhere.

Matson was shown to have borrowed 8.7 million dollars of debt capital to finance the acquisition of containers and to convert ships and equipment. This money was obtained on the basis of Matson's general credit, not just the credit of its Hawaii freight operations. Matson claimed inability to obtain the full amount of the capital needed for its conversion program and resorted to leasing of equipment because it could not attract adequate capital to purchase it. The record contains testimony that substantial additional capital expenditures are under consideration in order that the shipping public may be afforded expended and modernized service at lower costs.

A rate base consisting of property valued at original cost depreciated of $24,832,577 and a net income of $2,064,966 in 1960, and of $26,193,480 and $2,774,873 for 1961, will produce a rate of return of 8.32 per cent and 10.59 per cent, respectively, in the two years under review. We find on this record that such rates of return are not excessive.

As previously noted Matson is the rate-making line in the Pacific Coast/Hawaii trade, and the lawfulness of the rates of the other respondents in this trade are determined on the basis of our conclusions with respect to the lawfulness of Matson rates.

As indicated, rates in the Atlantic-Gulf/Hawaii trade in the past have been based on the competitive relationship between that trade. The general increases in the Atlantic-Gulf/Hawaii trade under consideration in these proceedings amount to the dollar equivalent of the percentage increases in the Pacific Coast/Hawaii trade. Except as to the Galveston sugar tariff, these proceedings contain no specific evidence or arguments disputing the evidence presented by the respondents with respect to the lawfulness of the rates in the Atlantic-Gulf/Hawaii trade. Parties opposing the increases under consideration in these proceedings being generally of the view that our determination as to the lawfulness of the rates in the Pacific Coast/Hawaii trade would likewise determine the lawfulness of the increases in the Atlantic-Gulf/Hawaii trade. We agree.

Exceptions and proposed findings not discussed in this report, nor reflected in our findings, have been considered and found not justified.

We find and conclude that the rates, charges, classifications, rules, regulations, tariffs and practices contained in the new schedules under investigation in Docket No. 869 and No. 941, including the 12½ percent and the 10 percent general increases in rates applicable to all cargo, except tinplate, molasses in bulk, dry fertilizer, fuel oil, and raw sugar in bulk between the Pacific coast and Hawaii, and the dollar equivalent increases applicable to transportation between Atlantic-Gulf ports and Hawaii, are just and reasonable.

We further find and conclude that the rates, rules, conditions, charges, tariffs, regulations, and practices stated in the schedules under investigation in Docket No. 935 naming freight rates for raw sugar in bulk from Hawaiian Island ports of call to Crockett, California, and Galveston, Texas, are just and reasonable.

An order discontinuing these proceedings will be entered.

ORDER

FEDERAL MARITIME COMMISSION

No. 869

PACIFIC COAST/HAWAII AND ATLANTIC-GULF/HAWAII
GENERAL INCREASES IN RATES

No. 935

HAWAII/CROCKETT AND HAWAII/GALVESTON BULK SUGAR RATES

No. 941

HAWAIIAN RATES—TEN PERCENT INCREASE (1961)

Full investigation of the matters and things involved in these proceedings having been had, and the Commission on June 28, 1962, having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof, and having found that the proposed rates, charges, tariffs, and regulations herein under investigation are just and reasonable;

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

By the Commission, June 28, 1962.

(Sgd.) GEO. A. VIEHMANN
Assistant Secretary

FEDERAL MARITIME COMMISSION

No. 896

UNAPPROVED SECTION 15 AGREEMENT—COAL TO JAPAN/KOREA

Decided August 2, 1962.

Respondents (except Isbrandtsen and Isthmian) found during the period May-July 1958 to have carried out an unapproved agreement which established minimum rates for the carriage of coal from U. S. Pacific Coast Ports to Korea in violation of section 15, Shipping Act, 1916, and to have failed immediately to file the agreement with the Federal Maritime Board in violation of said section.

A rate-fixing agreement is carried out where the parties quote or otherwise adhere to the agreed rate.

A claim of disinterest by a carrier who participated in an agreement covered by section 15 of the Shipping Act, cannot be allowed absent positive evidence that steps were taken at the time to manifest its dissociation from the agreement.

The Federal Maritime Commission has no jurisdiction over the assessment of penalties for past violation of the Shipping Act, and matters offered in mitigation thereof are not relevant in Commission proceedings.

Warner W. Gardner and *Robert T. Basseches,* for respondents American Mail Line Ltd., American President Lines, Ltd., Pacific Far East Line, Inc., States Steamship Company and Waterman Steamship Company.

Edward D. Ransom, for respondents States Marine Lines, Inc., and Isthmian Lines, Inc.

Allen R. Moltzen, for intervenor Consolidated Coal Operators.

Wm. Jarrel Smith, Jr., and *Robert J. Blackwell,* Hearing Counsel.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner;* and JAMES V. DAY, *Commissioner*

BY THE COMMISSION:

This proceeding was instituted by our predecessor, the Federal Maritime Board, on its own motion, to determine whether respondents had entered into and carried out an agreement fixing and regulating rates and conditions for the transportation of coal from United States Pacific Coast ports to Japan and Korea, without Board approval as required by section 15, Shipping Act, 1916 (the "Act").

Hearings were held before an Examiner, briefs were submitted by the parties, and thereafter an Initial Decision was issued by the Examiner, to which all parties filed exceptions. We heard oral argument on May 1, 1962.

All of the respondents are U.S. flag lines, namely, American President Lines, Ltd. (APL), Pacific Far East Line, Inc. (PFEL), Waterman Steamship Corporation (Waterman), States Steamship Company (States), States Marine Lines, Inc. (SML), American Mail Lines (AML), Isbrandtsen Steamship Co., Inc. (Isbrandtsen), and Isthmian Lines, Inc. (Isthmian). Respondents, with the exception of Isbrandtsen, are members of the Pacific Westbound Conference (PWC). All of the respondents are members of the West Coast American Flag Berth Operators (WCBO). Both PWC and WCBO operate under agreements approved pursuant to section 15 of the Act.

From 1952 until 1956 or early 1957 coal moved to Korea via the Military Sea Transportation Service (MSTS) as defense support cargo financed through International Cooperation Administration funds. Thereafter the responsibility for procuring and shipping these coal cargoes was shifted to the General Services Administration (GSA). Respondents had carried such GSA coal shipments at the PWC tariff rate, averaging $18-$20/ton FIO (free in and out). On September 1, 1957 the PWC opened the rate on this coal, leaving its member lines free individually to quote or set any rate for the carriage thereof. This "open" coal rate under the PWC continued throughout the period here in question.

After the coal rate was opened, it declined rapidly due to competition. The carriers in the trade continued to underbid each

other to the point where the rate was approaching the cost of carriage. In April and May of 1958 respondents, with the exception of Isbrandtsen and Isthmian, held three meetings which were called by the WCBO secretary and were characterized by respondents as meetings of the WCBO. At the final meeting on May 5, 1958 respondents agreed to adhere to a minimum rate on coal of $10.75 per long ton FIO to Pusan, Korea on parcel lots, with corresponding rates to other Korean ports.

The WCBO section 15 agreement, No. 8186, authorizes its members jointly to negotiate and set rates for MSTS cargo and related shipper's services, *i.e.*, Army, Navy, Air Force and other United States military services. It includes the following relevant provisions:

WHEREAS, the undersigned common carriers * * * have from time to time been carrying cargo to and from United States Pacific Coast ports * * * for and at the request of the Military Sea Transportation Service and related "Shipper Services" (Army, Navy, Air Force, and other United States military services), and

WHEREAS, it is in the interest of the undersigned carriers and of the Military Sea Transportation Service that the carriers, parties hereto, be in a position to furnish promptly accurate data to the Military Sea Transportation Service and such related Shipper Services as to cargo transportation costs, space availability, sailing schedules, and related matters and to negotiate and establish rates, terms, and conditions for the carriage of such cargo.

NOW, THEREFORE, the undersigned carriers agree as follows:

* * * * * * *

2. That they may meet from time to time and discuss cargo transportation costs, space availability, sailing schedules, and related matters, and agree as to rates, terms, and conditions of carriage of such cargo, and as to matters relating thereto, which are to be used as a basis for discussions with Military Sea Transportation Service and said related Shipper Services for the purpose of negotiating rates, terms, and conditions for the carriage of such cargo; they may also negotiate as a body rates, terms, and conditions which become binding on all parties hereto.

3. * * * Except as otherwise provided for, all actions within the scope of this agreement shall be by unanimous vote of the entire membership. All actions so taken shall be binding on all parties hereto. Records of all final actions so taken shall be furnished promptly by the secretary to the Federal Maritime Board.

The aforesaid minimum rate agreement between respondents did not have the unanimous consent of all members of the WCBO and it was not reported to the Board.

After inviting bids on two cargoes of coal destined for Korea, the GSA on July 2, 1958 accepted the bid of Consolidated Coal Operators (Consolidated), an intervenor herein, to supply four parcels (17,600 tons total) to be shipped from Stockton, California. Before submitting its bid Consolidated asked all respondents except AML for freight quotations and received same at the $10.75 rate. It did not ask them for and did not receive a firm bid or option on space. In computing its bid, however, Consolidated used $10.40 per long ton for freight charges. After the GSA acceptance of its bid, Consolidated's broker contacted respondents regarding the carriage of the coal and attempted to get a $10.00 rate. These efforts were unsuccessful because respondents adhered to the $10.75 "floor" they had set. On July 8, 1958 Consolidated orally booked the coal with APL at the $10.75 rate and two days' later the formal charter party was executed. The four parcels were lifted by APL during July 1958. APL refused a request from Consolidated for an "address commission." This denial was in conformity with the agreement of respondents.

On July 9, 1958 a WCBO meeting was held at the instance of PFEL. At that time PFEL, in the belief that APL had secured the Consolidated cargo by breaking the rate, accused APL of bad faith and announced that the agreement was terminated so far as PFEL was concerned. The other parties to the agreement considered it terminated as of that time.

When Consolidated was seeking prices from respondents for the carriage of this coal, it omitted AML because this respondent did not serve Stockton. AML, though a participant in the meeting at which respondents agreed to the coal rate "floor," maintains that it was "disinterested" and would not have quoted a rate on coal even if it had been approached because coal carriage is incompatible with the carriage of its usual cargoes of flour and paper. PFEL, APL, States, SML and Waterman, the five remaining respondents, all quoted coal rates in accordance with the agreement. Only APL and SML made any firm offers to carry coal. SML's offers were "options" for full shiploads at the $10.75 rate and not parcels to which the agreement was limited. Some of the respondents did not have vessels in position for the carriage of the Consolidated parcels and none of the respondents actually carried any coal except APL, which as indicated lifted the four Consolidated parcels.

DISCUSSION AND CONCLUSIONS

The facts for all practical purposes are undisputed. It is clear that the respondents with the exception of Isbrandtsen and Isthmian, who did not participate, reached an agreement in May 1958 using WCBO machinery by which they fixed a minimum rate on the carriage of coal in the Pacific Coast-Korean trade. The question is whether respondents thereby violated section 15 of the Shipping Act of 1916. The Examiner found that they did and that there were multiple violations in that the agreement was not authorized by the WCBO, was not immediately filed with the Federal Maritime Board for approval, and was carried out without such approval. We agree fully with these findings.

The respondents have contended throughout the proceeding that their coal agreement was within the scope of the approved WCBO section 15 agreement. Although the WCBO Agreement was obviously intended to apply to cargo for MSTS and related shipper services, *i.e.*, Army, Navy, Air Force and other United States military services, respondents argue that the latter part of the second paragraph of the agreement gave them virtually unlimited power to set rates in concert for cargo other than that of MSTS and related shipper services. We have heretofore set out the WCBO agreement at some length and shall repeat here only the paragraph allegedly containing this broad independent authority with the portion respondents rely on underscored:

> That they may meet from time to time and discuss cargo transportation costs, space availability, sailing schedules, and related matters, and agree as to rates, terms, and conditions of carriage of such cargo, and as to matters relating thereto, which are to be used as a basis for discussions with Military Sea Transportation Service and said related Shipper Services for the purpose of negotiating rates, terms, and conditions for the carriage of such cargo; they may also negotiate as a body rates, terms, and conditions which become binding on all parties hereto.

Respondents claim the underscored language is not limited by the first part of the paragraph, preceding the semicolon, or by the agreement as a whole. An extended discussion of this position would serve little purpose. Respondents attempt to read the language out of context and thereby import into the agreement wide authority that is quite beyond anything that was intended by them. The Examiner interpreted this provision according to its plain import. He correctly concluded that it authorizes the WCBO members to meet, discuss and agree upon rates to be used as a basis for discussion and negotiation with MSTS or its related

shipper's services, and nothing more. The first part of the paragraph covers the preparation and discussion stage among the WCBO members prior to negotiation with the shipper. The latter part of the paragraph provides for their negotiations as a body with the shipper. Significantly, this latter part which respondents contend is independent also includes language binding all of the WCBO members to the results of the final negotiations with the shipper—an important stipulation clearly pertinent to the entire paragraph.

Respondents also argue that the clause is ambiguous and indicate it should be construed in their favor, citing in this connection cases involving the strict rule of construction of penal statutes. We see nothing ambiguous in the language as written. It becomes ambiguous, however, when the attempt is made to engraft upon it respondents' interpretation. Nor is there here any basis for an analogy to the rule applicable in construing a penal statute. In issue is not a penal statute but an agreement respondents themselves wrote and now seek to construe in a manner that is contrary to its plain meaning and intent.

The respondents' coal agreement was not one limited to MSTS cargo and related services and it was therefore beyond the scope of the approved WCBO section 15 agreement. Admittedly the coal agreement was not filed with the Board. However, respondents argue that this is not a violation of section 15, and they also contend that only APL carried out the agreement. The Examiner ruled against them on both counts. He found that all of the respondents (excepting Isbrandtsen and Isthmian) carried out the agreement and all were jointly responsible. We fail to see how he could have found otherwise. To say that only APL which lifted the coal is responsible, would do violence to section 15. A rate-fixing agreement is effectuated by presenting a united front, and participation by simply refusing to carry at less than the agreed rate quite effectively advances the cause of the parties. Here the cause or objective was to stabilize the coal rate at a minimum figure and this respondents achieved by concerted action. It matters not who carried this coal. What is significant is that the respondents jointly agreed to and did set a "floor" on the rate to which they adhered, as Consolidated's experience demonstrated. They thus restricted or eliminated competition. Their agreement would have been a nullity and failed to serve the desired anticompetitive purpose unless all of them had abided by its terms. This is not a new concept by any means. See *Agreements and Practices,*

etc., Gulf & South Atlantic Havana Steamship Conference, 6 F.M.B. 215 (1961) and *Beaumont Port Comm v. Seatrain Lines, Inc.,* 2 U.S.M.C. 500 (1941), *modified on other grounds* 2 U.S.M.C. 699 (1943) . It is immaterial that some of the respondents, though quoting the agreed rate, did not offer space, or did not have vessels in position, for the Consolidated coal. The rate agreement, moreover, was not made for these particular shipments but was generally applicable to Korean coal.

AML's situation requires some additional comment. It claims to have been "disinterested" in the subject of coal and as proof thereof says that it did not quote coal rates since coal is not compatible with its "ordinary" cargoes. The trouble with this claim is that it comes too late. AML did not express its alleged disinterest at the time. Instead it participated in at least the May 5, 1958, meeting at which respondents reached their coal rate agreement and under the WCBO unanimity rule must have voted for or assented to the arrangement. It was thus a party to the agreement. How are we to know that AML was not interested in coal? If it did not quote a coal rate, that could have been due to any of a number of reasons. Perhaps it was not asked. Consolidated did not ask it for a rate on the four parcels of coal hereinbefore discussed, but that was because they were to be loaded at Stockton which AML did not serve.

The anticompetitive activity covered by section 15 of the Shipping Act is permissible, if at all, under specified conditions which must be strictly complied with. Persons subject to the Act who participate in such activity must be held responsible therefor absent timely and positive steps evidencing their disinterest or dissociation. Unless this is done, it will be next to impossible in many instances to fix responsibility and the door will be thrown open for endless speculation and uncertainty over matters as to which the law commands precision. Nor is it essential that AML be shown to have actually quoted the agreed coal rates. It entered into the unauthorized agreement to limit competition. It is sufficient that one or more of its colleagues in this plan quoted the agreed rates or took other action to carry out the plan.

Respondents, moreover, failed immediately to file their agreement with the Board, consequently even lacking any effectuation of the agreement they breached section 15 of the Act. In our recent decision in *Unapproved Section 15 Agreements—South African Trade,* 7 F.M.C. 159 (1962) we stated that failure to file an agreement requiring section 15 approval is a separate and

distinct violation of the Act, and set forth in some detail the bases of this conclusion (see p. 191–3 of said Report). Respondents' argument to the contrary must therefore be rejected. Furthermore, we agree with the Examiner that the amendment to section 15 enacted in October 1961 (Public Law 87–346), so far as it related to this matter, was simply a clarification or reinforcing of the existing law, and not a substantive change therein. We so indicated in our decision in the *South African* case, *supra.*[1]

There are some aspects of the Examiner's decision with which we disagree. He accepted respondents' contention that even if they violated section 15, the infraction was "purely technical." Respondents claimed they acted under a mistaken assumption and in good faith in using WCBO machinery to set coal rates, and that they could have accomplished the same agreement with no trouble had they employed the Pacific Westbound Conference machinery. While recognizing that respondents' testimony to this effect was susceptible "to the natural suspicion that it is self-serving to a degree," the Examiner made the statement that the testimony "is uncontradicted in the record and must be accepted as substantial and probative." Hearing Counsel excepted to this. Perhaps the Examiner did not intend quite what he implied but in any case we think we should clear up any possible confusion in the matter. Testimony does not become sacrosanct when uncontradicted nor is self-serving testimony automatically to be discredited. These are but factors to be considered in determining the validity and probative value of the testimony and the inferences that may properly be drawn therefrom in light of all the evidence.

We do not accept the testimony referred to here. It may not be contradicted but its validity is certainly open to substantial doubt. If respondents could have readily used the PWC to agree on coal rates, it is a fair question why they did not do so. We are by no means persuaded that the answer is that they simply made an honest mistake. The coal rate that was thrown open was a PWC rate and not a WCBO rate, as respondents well knew. Further-

[1] Respondents' argument that failure to file is not a violation of section 15 contains a suggestion that the Board's order of investigation which instituted the proceeding did not put failure to file the agreement in issue. However, the order admittedly raised questions as to whether there was an unfiled agreement and whether it had been carried out, and called for an investigation under section 15 of the Act. This we think necessarily put in issue any activity violative of that section, including failure to file. If the order was not as exact as it might have been, it is nevertheless to be remembered that it was an order for an administrative investigation and not a statement of charges in a penal action. It constituted adequate notice to the parties of the matters of fact and law under inquiry which is all that is required in this type of proceeding. See *Unapproved Section 15 Agreements—South African Trade, supra.*

more, the WCBO as before noted had a limited purpose, and rather obviously so. At least only by strained and difficult construction can the WCBO be enlarged, even colorably, to include the respondents' agreement. Consequently, if indeed means were otherwise readily available to accomplish the same thing, it was certainly unreasonable to have attempted the tortuous WCBO route.

We shall not pursue the point further because it is associated in any event with an immaterial issue as to the respondents' motives. We suppose there could be an occasion where evidence of the parties' motive or intent is useful to the proper disposition of an investigation by this Commission of unlawful conduct. But where, as here, the objective is only to show a so-called "technical viola-irrelevant. This ground, also, we have been over in the *South African* case, *supra.* As stated there (7 F.M.C. 159, at 164–5, 194, 197) proceedings by this Commission inquiring into allegedly unlawful activity are regulatory in nature, not penal. They are instituted for the purpose of investigating and where necessary, insuring compliance with the law through the issuance of appropriate orders or rules to govern present or future conduct. The Commission has no power to punish past conduct and matters in mitigation or extenuation thereof are not relevant in its proceedings. For like reasons, the referral of law violations to the Department of Justice for consideration is not a proper subject of litigation in our proceedings.

Here the Examiner, after finding that the violations were "technical," indulged in respondents' fundamental misconception that the Commission could excuse them from any penalty. The Examiner concluded that they should be excused and that this could be accomplished by discontinuing the proceeding without referral to Justice. But the Commission as we have said lacks the power to assess penalties and it manifestly cannot excuse their assessment, by omitting to refer to Justice or by any other means. Prosecution and the assessment or waiver of penalties are matters that rest within the province of the Attorney General and the courts. In the *South African* case we made clear that our policy is to refer violations to the Justice Department and it may be assumed hereafter that the policy is being pursued, the same as it has been heretofore.

In conclusion, it is worth repeating that section 15 of the Shipping Act—

> affords little room for so-called technical violations. To us the breadth and force of its language literally implore attention and obedience, or at the very

least inquiry if in any doubt as to the propriety of proposed conduct. (*South African* case, *supra*, at 197.)

It is not necessary under section 15 to impute an evil motive. For the purposes of this statute nonfeasance is as objectionable as malfeasance. There is little, if any, excuse for failing to file with the Commission, or at the least make inquiry of it as to whether an agreement comes within the scope of section 15 and therefore must be filed and approved. We cannot view such failure lightly no matter what the parties' state of mind might have been, especially when these easy and safe courses are available to them.

In respondents' case, the unlawful activity herein found seems to be in keeping with a loose approach to the requirements of section 15. Even though they were allegedly acting within the framework of WCBO they did not report their final agreement to the Board. Such reporting of final actions is a WCBO stipulation apparently long ignored by respondents. They also have been interpreting the WCBO unanimous vote provision to only require unanimity by those members having an interest in the subject under consideration, whereas the approved agreement does not read this way and their interpretation is at odds with the meaning given unanimous vote provisions in general. However, these and other items that could be mentioned are not directly involved in this case and we shall drop the subject with an admonition to the WCBO members that they should put their house in order.

We find and conclude that respondents (with the exception of Isbrandtsen and Isthmian) failed to file an agreement fixing coal rates to Korea, which required approval under section 15 of the Shipping Act, 1916, and carried such agreement out without the approval of the Federal Maritime Board, both in violation of section 15.

Since respondents did not operate under the agreement after July 1958, there is no occasion for us to issue an order against them and the proceedings will be discontinued.

FEDERAL MARITIME COMMISSION

No. 952

INVESTIGATION OF TARIFF FILING PRACTICES OF CARRIERS BETWEEN CONTIGUOUS STATES OF THE UNITED STATES AND ALASKA

Decided August 2, 1962.

William Shimmel, an individual, (not now operating) has not operated as a common carrier by water in this trade.

Dan Starkweather, The Alaska Towing Co., Inc., has not operated, and does not operate as a common carrier by water in this trade.

Ghezzi Trucking, Inc., has filed with the Federal Maritime Board, effective June 28, 1961, a tariff covering traffic between Los Angeles, Calif., San Francisco, Calif., Portland, Ore., Seattle, Wash., and Alaskan ports, thus complying with the filing requirements of section 2 of the Intercoastal Shipping Act, 1933, as to common carriers by water, operating in that trade.

This proceeding is discontinued as to the three respondents named above.

Kimbrell-Lawrence Transportation, Inc., Alaska Outport Transportation Association, and Ketchikan Merchants Cooperative Association, Inc., have been and are operating as common carriers by water in this trade, without filing tariffs with this Commission, thus violating section 2 of the Intercoastal Shipping Act, 1933. These three respondents are ordered to cease and desist from their operations until they comply with section 2 by filing with the Commission tariffs covering their said operations, and keeping open to public inspection schedules showing their rates, fares, and charges in this trade.

Julian C. Rice, for Ghezzi Trucking, Inc., respondent.

Raymond J. Petersen, for Kimbrell-Lawrence Transporation, Inc., respondent.

Martin P. Detels, Jr. for Alaska Outport Transportation Association, respondent.

Alan F. Wohlstetter, for Ketchikan Merchants Cooperative Association, Inc., respondent, and Aleutian Marine Transportation Company, intervener.

Ira L. Ewers and *Stanley B. Long* for Alaska Steamship Company, intervener.

Robert J. Blackwell and *Norman D. Kline* as Hearing Counsel

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner.*

BY THE COMMISSION:

The Federal Maritime Board, our predecessor, initiated this proceeding to determine if certain parties have been operating as common carriers by water in the trade between Alaska and other states without filing tariffs with the Board, thus violating section 2 of the Intercoastal Shipping Act, 1933 (Act).

The parties, named as respondents, are William Shimmel, an individual (Shimmel); Dan Starkweather, an individual doing business as Alaska Towing Co., Inc. (Starkweather); Ghezzi Trucking, Inc. (Ghezzi Truck); Kimbrell-Lawrence Transportation, Inc. (KLT); Alaska Outport Transportation Association (AOTA); and Ketchikan Merchants Cooperative Association, Inc. (KMCA).

The pertinent facts are stated in numbered paragraphs below. We agree with the Examiner's conclusions as to the common carrier, noncommon carrier status of respondents Shimmel, Starkweather, KLT, AOTA, and KMCA.

AS TO SHIMMEL:

(1) This respondent, between May 1950 and May 17, 1961, operated his power barge between Seattle, Washington, and Alaskan ports.

(2) Shimmel's operation was conducted as follows: He would bareboat charter his barge and operate it for the charterer under some character of informal agreement, sometimes partaking of the nature of a joint venture. There is no indication that he conducted anything comparable to a recognized service. As an example, he would carry a cannery's fish, and his compensation would be paid, at least in part, by crediting his account with the cannery which canned his fish for him.

(3) On May 17, 1961, Shimmel's power barge burned, and later sank. He has not operated since.

We conclude that Shimmel has not operated and is not operating as a common carrier by water in this trade, and that as to him, this proceeding should be discontinued.

AS TO STARKWEATHER:

(4) This respondent has since 1955 operated between ports in Alaska, and between Washington ports and Alaskan ports with a tug and barge.

(5) Towing is his most important activity, but he has carried building materials, construction equipment, and used automobiles north to Alaska.

(6) Starkweather's operations are wholly irregular, and his business dealings informal in their nature. He neither advertises nor solicits business. It is necessary for those who wish to employ him to reach him at home in Alaska, or at a Seattle hotel, sometimes through his wife. He utilizes neither formal contracts of affreightment nor bills of lading, and occasionally operates upon oral understandings.

(7) His barge is open and exposed to the elements, and hence unsuitable for transportation of ordinary, dry cargo.

(8) His rates are computed at $500 per day for the tug and barge on an estimated duration of the trip, and he makes no rates upon weight or measurement of cargo. He may make more than anticipated on a short trip or actually lose money if the trip is longer than anticipated.

(9) He operates on no fixed schedules or routes but will go at any time to any safe port in southeastern Alaska.

We conclude that Starkweather has not operated and does not operate as a common carrier by water in this trade, and that as to him, this proceeding shall be discontinued.

AS TO GHEZZI TRUCK:

(10) The Board's order initiating this proceeding did not name Ghezzi Trucking, Inc. It named "Alfred C. Ghezzi, dba Ghezzi Towing Co., and/or Ghezzi Barge Co." No appearance was entered at the Prehearing Conference held August 23, 1961, or the Hearing on Subpenas held October 6, 1961 for the above-named, or for any party named "Ghezzi". On October 13, 1961, Julian C. Rice as attorney for "Alfred J. Ghezzi, Jr. and Ghezzi

Trucking, Inc." filed a "Motion for Dismissal of the Responden Alfred C. Ghezzi". This motion, notwithstanding its title, actuall prays that "Alfred J. Ghezzi, Jr. and Ghezzi Trucking, Inc." b dismissed "if in fact they have ever been a party as respondent in this investigation." This motion states that "the person actuall served with the original order in this matter" presumably, a cop addressed and mailed to Alfred C. Ghezzi, dba etc. "as in fact Alfred J. Ghezzi, Jr." The motion states: "It is conceivable tha there has been an error in identity, and that Alfred C. Ghezzi * * * and Ghezzi Trucking, Inc. are in fact one and the same,' and "Alfred C. Ghezzi * * * is believed is one and the same a Alfred J. Ghezzi, Jr., and there has been nothing more than a error in stating the proper name." The basis of the motion t dismiss was (1) that Alfred J. Ghezzi, Jr. is not doing busines as Ghezzi Towing Co. and/or Ghezzi Barge Co., in which styl Alfred C. Ghezzi was named in the Board's order of investigation and (2) that Ghezzi Trucking, Inc., an Alaska corporation o which Alfred J. Ghezzi, Jr. is president, is a common carrier i the intercoastal trade, and on June 26, 1961, filed with the Boar its tariff effective June 28, 1961. Hearing Counsel opposed thi motion upon the ground that the Board should determine afte the hearing if Ghezzi Towing Co. and/or Ghezzi Barge Co. ar one and the same as Ghezzi Trucking, Inc., and upon this groun the Commission on November 30, 1961, denied the motion t dismiss.

(11) The list of appearances in the transcript of the hearin contains the name of Julian C. Rice, on behalf of "Alfred Ghezz Jr." When called as a witness by Hearing Counsel, Julian C. Ric testified that he represented "Alfred Ghezzi." However previou to the hearing, by letter to the Board dated August 1, 1961, Julia C. Rice entered his appearance "on behalf of Alfred C. Ghezz dba Ghezzi Towing Co., and/or Ghezzi Barge Company."

(12) The only evidence with respect to any Ghezzi individua or organization is the testimony of Julian C. Rice. When on th stand, Mr. Rice proposed to file in connection with his motion t dismiss, described above, an affidavit from "Mr. David" not other wise identified, "covering those points which haven't been covere in my testimony here today". Hearing Counsel, in reply to M Rice's request, stipulated that "this affidavit from Mr. Ghezzi' should be late-filed as an exhibit "covering the identical points tha you (Mr. Rice) testified to here, namely, to avoid the fact tha

your testimony might have been hearsay." The affidavit was never filed.

(13) On June 23, 1961, a Ghezzi Truck tariff covering traffic between Los Angeles, Calif., San Francisco, Calif., Portland, Ore., Seattle, Wash., and Alaskan ports was mailed to this Commission. This tariff became effective on June 28, 1961.

The Examiner concluded that Ghezzi Trucking, Inc. was operating as a common carrier in interstate commerce prior to June 28, 1961, without an effective tariff on file here, and hence in violation of section 2 of the Act. Although no Ghezzi exceptions have been filed, we have weighed the evidence with respect to this respondent, and in our opinion, it does not support the Examiner's conclusion that Ghezzi Truck has violated the Act. (No question as to credibility of witnesses is involved.) The Examiner's conclusion as to Ghezzi Truck's pre-June 28, 1961 operations is based on a specific finding that its counsel "stated that respondent (Ghezzi Truck) had been operating as a common carrier in interstate commerce prior to June 1961 without having filed a tariff with the Federal Maritime Board." The Examiner describes this testimony as "evidence introduced on behalf of this respondent" Ghezzi Truck. As Mr. Rice, according to the transcript, was "called as a witness", presumably by Hearing Counsel, who directly examined him, the accuracy of the description is at least questionable. More important the statement in question (that Ghezzi Truck had been operating as a common carrier prior to June, 1961, without having filed a tariff with the Federal Maritime Board) was not made. The witness did testify at one point that "I believe at times he (Ghezzi) was actually engaged as a common carrier", but immediately destroyed any weight this statement might carry (even as to the individual he was talking about) by stating that it "is my interpretation from some facts that have been given me." Again, he testified that "it was Mr. Ghezzi's intent to engage as a common carrier", but by continuing the sentence, "and he did attempt to make a filing of what he thought was a tariff with the Federal Maritime Board sometime in the first part of June 1961" makes it quite impossible to construe this as an affirmation of past common carriage, even by the individual, Ghezzi. Mr. Rice testified that in June (prior to June 23) 1961 "I looked the thing over and felt that he had to cease any operations at that time until such time as he had a proper tariff on file", but continued "it is my understanding that he did so from what I know and *did not commence acting as*

a common carrier in this trade until such time as the tariff was actually filed" (sic).

We are unable on this record to find that Ghezzi Truck operated as a common carrier or otherwise prior to June, 1961. The record is devoid of any evidence that it did, and also of any evidence as to ports served, frequency of service, cargo carried, advertising, charges, or solicitation of business by Ghezzi Truck.

AS TO KLT:

It is quite clear that we cannot make findings or conclusions with respect to the common carrier, non-common carrier status of this respondent if, as alleged in its exceptions, the record before us is that of a proceeding in which the examiner denied this respondent full and fair hearing and due process of law. We would take no action as to KLT if we agreed with KLT's contention that as to it, the evidentiary hearing was unfair, even if such "unfairness" was not serious enough to amount to a denial of due process.

The facts relevant to KLT's contention in this regard are stated in the lettered paragraphs immediately following:

(a) KLT was represented at the hearing by Raymond J. Petersen. Mr. Petersen called no witnesses and introduced no exhibits, but did cross-examine Ed. L. Kimbrell (Captain Kimbrell), president of KLT, who was called and directly examined by Hearing Counsel.

(b) During Captain Kimbrell's testimony, exhibits 3 to 15, inclusive, were introduced in evidence. Mr. Peterson objected to only one, exhibit 5. With respect to this exhibit the Examiner stated that "Exhibit No. 5 will be received in evidence in order to avoid confusion to questions that have been asked on the record. Otherwise, unless Captain Kimbrell was asked some questions regarding Exhibit 5, it will be used for no other purpose."

(c) With respect to exhibit 5, the Examiner in his initial decision, said:

> At the hearing an exhibit identified as No. 5 was offered in evidence by the Hearing Counsel. This exhibit had been prepared by an employee of the Federal Maritime Commission from records of the respondent (KLT). The exhibit contains information concerning a northbound voyage made by respondent in 1961, and is alleged by Hearing Counsel to be representative of other voyages. Prior to offering the exhibit in evidence the President of respondent corporation had been queried concerning the exhibit. Neither the underlying documents nor the agent who had prepared the exhibit was present at the hearing. Upon objection to receipt in evidence of the exhibit

by counsel for respondent, the exhibit was received for the limited purpose of being available for reference as to questions the respondent's President had answered concerning it. Such answers generally tended to becloud rather than substantiate data in the exhibit. In the circumstances, none of the findings of fact or conclusions of law herein made concerning Kimbrell-Lawrence Transportation, Inc. is based in any degree upon the aforesaid exhibit.

(d) When the Examiner was ready to set dates for brief-filing, etc., counsel for Alaska Steamship Company, a common carrier in the trade, which had intervened, was permitted (no party objecting) to make an oral statement on Alaskan transportation problems in general, and the problems of common carriers by water in the Alaska trade, particularly. This statement summed up at most to an informal complaint about the scope and adequacy of the proceeding. It was in no sense an oral argument by counsel with respect to the common carrier, non-common carrier status of his client or KLT. Alaska Steamship Company is admittedly, a common carrier.

(e) After Mr. Long's statement, and a ruling that a motion to dismiss as to KLT must be in writing, to which Mr. Peterson acceded, the following was said:

Mr. Petersen: Perhaps I might be afforded the same right that was given to Mr. Long, to make a short statement to the Examiner.

Examiner Sweeney: If you care to.

Mr. Petersen: I mainly wanted to point out this, that I am not certain that it has been made clear in the course of this investigation the unique position that Kimbrell-Lawrence Transportation is in because, compared with other respondents and the intervener Alaska Steamship Company—

Mr. Wohlstetter: (Interrupting) Excuse me, Mr. Petersen, I don't mean to interrupt but I feel that it is necessary to do so to protect the rights of the intervener in this proceeding, Aleutian Marine Transportation Company. Mr. Examiner, I must object to what is going to be a legal argument and discussion of facts produced at this hearing prior to the submission of brief. I had no objection to Mr. Long's statement because it covered the position of the Alaska Steamship Company which you will recall I inquired about at the inception of this hearing and related to carriers who have not been named respondents in this proceeding.

I think it would confer an unfavorable advantage upon the respondent Kimbrell-Lawrence to argue this matter orally at this time before the Examiner, prejudicing the position of Aleutian Marine Transport who will take the position that Kimbrell-Lawrence Transportation Company is a common carrier required to file tariffs.

Examiner Sweeney: In view of your objection, we will hear no further from Mr. Petersen then on this mater.

* * * * * * *

Mr. Petersen: Mr. Sweeney, I don't like to labor a point, but Mr. Wohlstetter's statement to you, not withstanding, are you aware or I should say is it within your immediate attention that Rule 10 X does provide that a request for oral argument at the close of testimony will be granted or denied by the presiding officer at his discretion? I might say that if Aleutian Marine is going to be prejudiced by anything we say, we feel that we have already been prejudiced by anything that Mr. Long has said. I don't understand the import of your ruling. One party is allowed to address the court verbally and someone else is not.

Examiner Sweeney: Mr. Long made a statement in lieu of presenting testimony or witnesses.

Mr. Petersen: I presented no witnesses.

Examiner Sweeney: You have exhibits, have you not?

Mr. Petersen: I have no exhibits.

Mr. Wohlstetter: Mr. Examiner, nobody in this room objected to Mr. Long's making a statement, and I certainly didn't acquiesce in it with an idea of setting a standard for this procedure; and as far as the oral argument at the end of the hearing, that has customarily been permitted when no briefs have been filed as a substitute for the filing of briefs.

Mr. Petersen: I appreciate Mr. Wohlstetter's ernest [sic] desire to represent his client. I think at this point we are both reading the same book.

Examiner Sweeney: I have already ruled on it, Mr. Petersen.

Mr. Petersen: I just wanted to make sure that the Examiner was aware of Rule 10 (x) that provides for it.

Examiner Sweeney: Yes, I understand. I made the ruling.

Mr. Petersen: May I ask the Examiner to clarify for me what the distinction in his mind is between my request and that of the counsel for Alaska Steamship Company?

Examiner Sweeney: Because you want to argue now the case as to whether or not your client is a common carrier.

Mr. Petersen: I initially asked for permission to make a motion to dismiss I subsequently—

Examiner Sweeney: (Interrupting) You have the privilege of making a motion to dismiss in writing.

Mr. Petersen: I acceded to your ruling that that cannot be done verbally but then I am now asking the Examiner for the privilege to address—

Examiner Sweeney: (Interrupting) An oral argument?

Mr. Petersen: A clarification position of my client.

Mr. Wohlstetter: I object to any argument at this time on behalf of an adversary party, Aleutian Marine Transport. I waived my objection in the case of Mr. Long, as did everybody else in this proceeding.

Examiner Sweeney: If you feel the record is not clear, Mr. Petersen Captain Kimbrell is here in the room, you may recall him and question him or interrogate him.

Mr. Petersen: Then your ruling is that we will not have an opportunity to make any sort of a verbal statement for the record?

Examiner Sweeney: You asked to make oral argument. That's What I am ruling on.

Mr. Petersen: I just want to make it clear I just want to make the same kind of statement Mr. Long made, just a statement of our position.

Mr. Wohlstetter: I object to an argument or statement on behalf of the respondent in this proceeding over objections.

Examiner Sweeney: I have already ruled on the request for oral argument.

Mr. Petersen: Mr. Sweeney, would you be kind enough to rule on my request, then, to verbally address the Examiner with respect to clarification of our position?

Examiner Sweeney: Do you have a question?

Mr. Petersen: I want to clarify for the record what the position of Kimbrell-Lawrence Transportation, Inc., is as compared to the other respondents.

Examiner Sweeney: You will be given an opportunity in your brief to do that and an opportunity on exception, and you will be given an opportunity to request oral argument before the Federal Maritime Commission.

(f) In due course KLT filed its brief, the Examiner issued an initial decision, and KLT has filed exceptions. Although afforded opportunity to argue the case orally before the full membership of the Commission, KLT counsel (Mr. Petersen) declined to do so. KLT claims in its exceptions that "after first denying KLT the right of oral argument which was extended to another party," (obviously, Alaska Steamship Company, an intervener,) "to this proceeding, the Examiner refused to receive further testimony from KLT unless it elected to recall Captain Kimbrell for interrogation."

There is considerable ambiguity in KLT's oral and written statements. We extract from them two complaints, the first that the Examiner refused to permit counsel for KLT to argue orally the merits of this case. This, the Examiner did, exercising discretion vested in him by rule 10(x) of our Rules of Practice and Procedure. Rule 10(x) reads:

Oral argument at hearings. A request for oral argument at the close of testimony will be granted or denied by the presiding officer in his discretion.

KLT's counsel orally at the evidentiary hearing, and in the written exceptions before us has demonstrated his familiarity with our rule. Any disadvantage (we think there was none) to KLT in presenting its case to the Examiner without oral argument is surely cured by its written brief and exceptions, and the opportunity to argue the case orally before us, which KLT declined. We have carefully considered KLT's brief and exceptions in reaching our decision as to KLT. It is always to be remembered that

in this matter we are not simply affirming, reversing, or modifying the examiner's initial decision. We are finding the facts and applying the law to KLT after full consideration of KLT counsel's arguments. It may be pointed out that the only clear-cut decision that oral, as distinguished from written argument is required as due process, was reversed by the Supreme Court, which said that "the right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations." *F.C.C.* v. *W.J.R.*, the *Goodwill Station*, 337 US 265, 276 (1949). In this decision the court discussed *Londoner*, cited by KLT, and called attention to its statement in *first Morgan* (298 U.S. 468, 481 (1936) that "argument may be oral or written." And in the *W.J.R.* case there was *no opportunity for oral argument*. Here there was complete opportunity for KLT's case to be argued orally before us by its counsel. We fully subscribe to the following statement by Joseph B. Eastman, when as chairman of the Interstate Commerce Commission, he said:

> There is no safe substitute in the procedure of the tribunal for full hear ing and argument of the issues, when they are in controversy, *although the hearing need not always be oral.* This takes time, but it is time well spent (Emphasis supplied).

KLT seeks to refine this point in a novel and, as it apparently believes, a more powerful manner, as follows. KLT inferentially and none too clearly alleges that the Examiner acting within the scope of his discretion determined to hear oral argument, and that "once that discretion is exercised in favor of oral argument, each party is entitled to the right of argument." Apparently, KLT seeks to conjure up the spectacle of a judge who, in an adversary proceeding, listens attentively to one side and refuses to let the other side speak at all. But no such unedifying performance occurred. Counsel for Alaska Steamship Company, obviously dissatisfied with the scope of this proceeding, who called no witnesses, filed neither brief nor exceptions, and did not participate in oral argument before us, "blew off a little steam" to the Examiner. His statement certainly was in no sense an argument on the merits of this case (see finding "d", above). Neither KLT nor anyone else objected. Counsel for KLT then sought what he called "the same right that was given to Mr. Long, to make a short statement to the examiner." The Examiner permitted him to proceed. It immediately appeared that KLT's "short statement" would be a detailed, legal argument seeking to convince the Examiner that

KLT had not been operating as a common carrier. While constantly recurring to the theme that the "statement" he desired to make was "the same kind of statement Mr. Long made", counsel's repeated reference to our rule 10(x) on oral argument, shows he knew it was something else. Counsel for intervening Aleutian Marine Transport, stating that his client's position was adverse to KLT, objected to oral argument, and the Examiner decided against it. At the last, KLT counsel reiterated his desire "to clarify for the record what the position of Kimbrell-Lawrence Transportation, Inc., is as compared to the other respondents." The Examiner replied that "you will be given an opportunity in your brief to do that and an opportunity on exception, and you will be given an opportunity to request oral argument before the Federal Maritime Commission."

The record on the point sums up to the fact that prior to the Examiner's initial decision KLT presented written argument to the Examiner. Subsequently, and prior to this decision, KLT declined to present *oral* but did present *written* argument to us. We think it has had more than sufficient opportunity to say its say, and it has said it. We find no evidence in this record that the Examiner was guilty of any "impropriety", or much less, denial of due process of law.

KLT in its exceptions claims that "the Examiner refused to receive further testimony from KLT unless it elected to recall Captain Kimbrell for interrogation." Plainly, this is not so. KLT *offered* no "further testimony" and therefore the Examiner could not and did not refuse to allow further testimony. To support its very serious charge, KLT cites the transcript as quoted in finding "e", above. It shows that KLT counsel asked "to make a short statement to the Examiner." This would not be testimony. It shows that he considered this statement covered by section 10(x) of our rules, which governs argument, not testimony. It shows that KLT counsel contended to the Examiner that this "short statement" was the same as "that of the counsel for Alaska Steamship Company" which certainly was not testimony. He stated that he wished to "clarify for the record" the position of his client, but such a statement is not an offer of testimony. And when the Examiner said "You asked to make oral argument. That's what I'm ruling on", KLT counsel did not demur, but nevertheless now contends that he was asking to *testify,* and *that* is what the Examiner was ruling on. KLT counsel even seeks to take advantage of the

775-794 O-65-22

Examiner's expressed willingness to receive further testimony, by a wholly-unwarranted construction of the Examiner's statement to mean that he would listen to the witness the Examiner named, *and to no other.* The record conclusively negatives KLT's contention that its right to present testimony was limited, and that it "did not receive a full and fair hearing." KLT at this hearing was accorded the right to present its case by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination it felt was required for a full and true disclosure of the facts, and to argue the case to the Commission orally. It could ask no more. KLT, after the close of the evidentiary hearing and before issuance of the Examiner's initial decision, filed a brief before the Examiner. After receiving the examiner's initial decision, KLT excepted to it in writing, and its exceptions have been carefully considered in this decision. This, surely, is all that was required as due process, especially as KLT declined to argue the case orally, before us.

We turn now to make findings with respect to the common carrier, non-common carrier status of KLT.

(14) This water carrier is incorporated in the State of Washington, and maintains an office in Seattle. It operates one vessel, which is 180 feet long and has cargo space of 631 net tons, between Seattle and ports in western Alaska in the general areas of Shumagin Island.

(15) On northbound voyages the respondent hauls any type of general cargo, including cargo requiring refrigeration, offered to it by one or more shippers. However, northbound sailings are dependent upon prior commitments from shippers for utilization of the available cargo space on the southbound return trip. Such cargo space on southbound hauls is usually booked by two or three shippers of frozen fish. In order to assure respondent's service at ports in western Alaska, those engaged in the fishing industry in that area use respondent in obtaining supplies via Seattle. On some of the northbound voyages the respondent has hauled shipments for numerous consignees, including individual fisherman, while on other northbound trips the entire cargo space has been devoted to a single shipper.

(16) In 1958 the respondent served 32 shippers, and in 1959 it served 85 shippers. In 1960 the respondent carried 6,604 tons for 89 shippers. The 3 shippers with the most tonnage in 1960 consigned a total of 2,623 tons, and had an average shipment of

245 tons; the three shippers with the least tonnage consigned less than 1 ton each. During the first 8 months of 1961 the respondent hauled 5,085 tons for 77 shippers. Of that total, 3,231 tons were hauled for 3 shippers at an average shipment of 318 tons, and again the 3 smallest shippers shipped less than a ton each.

(17) Northbound shipments of general cargo move under one of two forms of transportation agreements between respondent and the shipper. Such agreements differ only as to whether loading will be by the respondent or at the expense of the shipper. The transportation agreement covering southbound traffic provides for loading by respondent. In other pertinent respects the agreements provide that respondent will make available, and the shipper will hire, a stated amount of space aboard respondent's vessel during a voyage from or to Seattle and a named Alaskan port, on or about a certain date, and in consideration of a specified sum of money to be paid by the shipper to respondent. It is also provided that the shipper will insure the cargo in his own and respondent's name. In addition to such insurance, respondent disclaims any responsibility for loss or damage to cargo. The described agreements are executed prior to carriage of the goods in most but not all instances. The respondent also issues a combination shipping document which receipts for the shipper's goods and bills the shipper for freight charges thereon.

(18) The respondent does not solicit cargo, advertise services or sailings, or sail at regularly scheduled intervals. Nevertheless, shippers in the Alaskan area served by respondent do know that upon request the carrier will advise as to approximate sailing dates. Weather permitting, service has been provided at approximately monthly frequency. A weekly marine trade magazine lists respondent as sailing from Puget Sound to Alaska on a monthly schedule. However, such publication is not made at respondent's request nor with its consent.

(19) Freight charges by respondent are assessed by an employee who did not testify at the hearing. The record does not contain a detailed account of how this employee computes such charges. The President of respondent corporation did, however, give a general description of the manner in which freight charges are determined. The rate making employee has divided general commodities into about eight categories. A different rate level applies to each such category, and further, rates for a category vary with the length of haul. Charges are computed by applying

the rate for the category of shipment and origin or destination port, to the amount of space specified in the transportation agreement. A list of such rates is not published and, so far as is shown of record, respondent's employee establishes rates by adding an undisclosed percentage to rates published in common carrier tariffs. It was stated by way of illustration that a shipper would not object to paying respondent $7,200 for transportation for which he would have been charged about $7,000 under published common carrier tariffs.

(20) KLT has not filed with this Commission or a predecessor, schedules showing its rates, fares, and charges.

The foregoing fact-findings were made by the Examiner who heard KLT's president, Captain Kimbrell, testify. Our independent consideration of the record confirms the Examiner's appraisal of the facts, and we make the above findings our own. KLT has excepted to the statement in finding (15) that northbound, KLT hauls *any type* of general cargo offered. We think it does, and have so found upon substantial evidence of record. As a matter of fact, it is not essential to being a common carrier that the carrier does haul or at least is willing to haul *any type* of cargo. A line may be a common carrier of certain commodities as long as it is willing to carry those commodities for all who wish to ship them. But we cannot feel that KLT, which carries fishing industry supplies for the fishing industry, states that it will carry the products of Montgomery-Ward upon request, has carried the goods of Sears Roebuck, and liquor for the general consumer, can be considered to carry only specialized industry cargo. Captain Kimbrell testified specifically that "We don't specify any commodities" and that the only limitations on which cargo KLT carries are vessel availability and the ports to be served. He stated that if revenue is adequate "whether it arrives off bananas or beans doesn't make any difference to us".

KLT in its exceptions contends that notwithstanding the examiner's specific statement that none of his findings of fact or conclusions of law concerning KLT are based in any degree upon Exhibit No. 5 (see our fact-finding "(c)" above), "it may be that the confusion which this exhibit engendered in the minds of counsel and Examiner at time of hearing still persists." Conceding *arguendo,* that the Examiner erred in admitting Exhibit No. 5 for a limited and legitimate purpose, and that the exhibit "engendered *in the minds of counsel and Examiner at time of hearing* * * * confusion (which) * * * still persists", this is at

most, harmless error. Being forewarned by KLT's exceptions, and the Examiner's statement (our finding "c"), we have carefully avoided Exhibit No. 5.

KLT further contends that the Examiner errs in that he "unduly isolates and lends a note of regularity to KLT's operations by finding that respondent's ports in western Alaska are in the general area of Shumagin Island". KLT does not deny that it actually operates between Seattle and ports in western Alaska in the general area of Shumagin Island. This is what the Examiner found and what we have found. This finding should not be construed as "lending a note of regularity to KLT's operations" as KLT argues, *by failing to point out that KLT also serves ports on the south side of the Alaskan peninsula, which may well be considered in the general area of Shumagin, and ports between Kodiak Island and the Aleutian Islands which might not be so considered.* This failure to point out other service (which is the apparent basis of the exception) has not misled, and will not mislead anybody.

Ae we construe Captain Kimbrell's testimony there is a distinct note of regularity in KLT's operations. He said that he sees every issue of the Marine Digest which for a period of one to three years has listed KLT as sailing monthly from Puget Sound ports to Alaska. Unless KLT's sailings were approximately monthly, this listing would certainly not have continued to appear so long. Captain Kimbrell testified that KLT does not sail north until it has commitments south; in other words, KLT's vessel is not a wanderer or tramp; it moves shuttlewise, north and south, and loses no time searching the Alaskan coast for cargo. Captain Kimbrell testified that KLT has no problems in getting cargo, and that he advises shippers of KLT's sailing schedules when asked by shippers, and also that as to the "rough, west side of Alaska, the Aleutian Islands, and the Alaska Peninsula", KLT has no competition. Under such circumstances, Captain Kimbrell's reiteration that KLT does not make regular monthly sailings appears unimportant. Doubtless, KLT tries to live up to its monthly listing, and we believe it is able to maintain an approximately monthly frequency, weather permitting, as we have found. But if KLT's sailings were more or fewer than once a month, or considerably irregular, this fact would not alter our conclusion that KLT is a common carrier in this trade. What we have said disposes of KLT's exception to the Examiner's findings that "KLT has provided service at approximately monthly frequency." Upon

exceptions, KLT urges us to hold that its operations are those of a contract carrier, and not a common carrier. The determining factors are the salient facts testified to by KLT's president, and inferences fairly drawn from his testimony. Our findings 14 to 20 inclusive set these out. KLT's service is one occupied busily between Seattle and Alaska, carrying whatever cargo is offered northbound to the Alaskan ports to be served on the voyage, and assured on each voyage, of cargo waiting in Alaska to be loaded aboard for the return trip to Seattle. This is *common carrier service.* "One transporting goods from place to place for hire, for such as see fit to employ him, whether usually or occasionally, whether as a principal or an incidental occupation, is a common carrier." *Certain Carriers Engaged in Transportation Between Pacific Coast Ports of the United States and Hawaii,* 3 U.S.M.C. 190, 197 (1950).

KLT argues that it is not a common carrier because KLT has never advertised its services or solicited for cargo, has never published a sailing schedule, has no regular routes and no regular ports of call, and carries cargo only after it has initially secured a negotiated, written transportation agreement, and it has neither sought nor assumed an obligation to carry for others.

Each of these points was unsuccessfully urged in support of the contention of respondents in the case just cited. In pertinent part, our predecessor commission said (at 196):

> On the common-carrier issue Mills claims that there is no evidence that he held himself out as a common carrier, pointing out that the record does not show that he ever published a sailing schedule, solicited any cargo, or advertised that he would take the cargo of anyone or everyone to Hawaii. Such acts are not essential to a common-carrier status. (*Citing cases*) Nor is a holding out as a common carrier negatived, as Mills contends it is, by the fact that the printed terms and conditions of the common-carrier form of bill of lading which he used were crossed out and the shipments covered by separate contracts. Common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest. (*Citing cases*)

Captain Kimbrell's repeated and carefully calculated assertion that KLT has no "regular" routes, no "regular" ports, and no "regular" sailing dates does not make KLT a tramp, and unless it does, it does not help its contention that it is not a common carrier. This was settled long ago. KLT is much more "regular" than was Mills, who made similar contentions, but was held to be a common carrier between the United States and Hawaii in the case we have just referred to.

It cannot be successfully contended at this late date that a carrier may avoid common carrier status by insisting on a transportation agreement with each shipper. All cargo carried for compensation moves on some form of transportation agreement, express or implied. KLT's statement that "it has neither sought nor assumed an obligation to carry for others" is characteristically cryptic. If it means that KLT seeks only cargo from shippers who will sign transportation agreements, it is answered above. If it means that it has not sought cargo owned by persons other than itself, it is refuted by its own testimony. If it means that KLT has not sought or willingly assumed common carrier status and common carrier obligations; this, while true, is of no aid to KLT. Common carrier status and obligations are results of a carrier's *operations*, not its desires.

In view of other cargo carried by KLT, it is of no significance that its vessel was specially designed for carriage of frozen fish, and generally carries frozen fish and fishing industry supplies for a few fishing companies. Clearly, KLT is not a private or industrial carrier. Of even less consequence is it that KLT, operating under charter to one shipper, may make an occasional *bona fide*, tramp sailing. And certainly, it is not necessary to common carrier status, as KLT implies it is, for a carrier to have a freight agent, a particular place to load and unload cargo, or provide regular and complete terminal service. These are among the characteristics of liner, berth operators, but such operators are, emphatically *not* the only common carriers.

We have carefully considered the evidence and written argument of KLT. We conclude upon the whole record, that KLT has been operating and is operating as a common carrier by water between the States of Washington and Alaska without filing its tariffs under section 2 of the Intercoastal Shipping Act, 1933, thus violating that section of the Act. A cease and desist order will be entered.

AS TO AOTA:

AOTA has taken no exception to the following findings of fact by the Examiner. They are supported by substantial record evidence, and we adopt them as our own.

(21) This unincorporated association of shippers who are located in Alaska was formed in 1959. The purpose of the association is to transport cargo owned by members between places or the inland waters of southeastern Alaska, or between such places

and places on the inland waters of the State of Washington. Membership in the association is on an annual basis which is initiated or renewed in April or May of each year by agreement among the shipper members who as a prerequisite must be doing business in Alaska. Admission to membership is then closed for a year. Applications for membership have been rejected in some instances on the grounds that available cargo space is insufficient to accommodate more members.

(22) In the fiscal year beginning on April 20, 1961, there were 104 members as named in the Appendix hereto. (We omit the names, which can have no relevance.) This membership covers most if not all of the various types of consignors or consignees among the shipping public in southeastern Alaska. The wide range of service offered by respondent is further indicated by the numerous commodities on which freight charges have been assessed. (Appliances, beer and mixer, boats, frozen bread, bin trucks, bottles, wood and fibre boxes, building material, cans, can ends, containers, cigarettes, tobacco, coal, cooperage, cordage, dairy products, eggs, canned fish, cured fish, frozen fish, canned crab, frozen crab, fruits, vegetables, potatoes, onions, furniture, groceries, insulating material, lumber, liquor, plywood, salt, tanks, matches, potato chips, melons, wallboard, radios, and televisions.) Additionally, respondent assesses charges on freight, n.o.s.

(23) The respondent association in its membership agreement each year has appointed Mr. S. B. Dahl, who does business under the name S. B. Dahl Agency, as its attorney with power to charter and operate vessels for the association. Such agreement also provides that the chartered vessels shall not be used to transport the cargo of shippers who are not members; that members will pay for their shipments in an amount equal to that which they would have paid on a specified date (February 1, 1961 in the latest agreement) if they had consigned the shipment via "means customarily used" by the shipper; that members will pay pro rata for costs in excess of annual expenses, and will share pro rata in the distribution of income which exceeds annual expenses; and that the association, the chartered vessels and the owners thereof, and other members are released from liability for loss of or damage to cargo. If members do not use respondents' services they do not pay freight charges, become liable for expenses in excess of income, or share in any surplus.

(24) At the time of the hearing two vessels were being operated by Dahl under bareboat charters. These vessels have refrigerated cargo space and are under 150 gross tons.

(25) Freight charges on shipments are assessed by clerks employed by Dahl at his Seattle office. The amounts they assess are taken from a list which was established by Dahl after reference to, and on the level of commodity rates in the tariffs of a common carrier by water. The latter carrier serves between Seattle and Alaska, and its tariffs are on file with the Commission.

(26) In return for his services Dahl collects agency fees based on the annual gross income derived from freight charges paid during the fiscal year by association members. He pays his employees from such fees. In the fiscal year 1960-1961, the gross assessments were $543,338 and Dahl received agency fees totaling $40,792. During each of the two fiscal years completed at the time of the hearing, there was a surplus. This extra income is being held in reserve for contingent liabilities. Later, if surpluses continue to be earned, an annual pro rata distribution will be made to members in accordance with the terms of the membership agreement.

(27) Solicitation of cargo and advertisement of sailing schedules are unnecessary for operations such as those conducted by respondent. Members know that Ketchikan and Sitka will be served weekly and that, dependent upon the season, other Alaskan ports will be served on a regular but less frequent basis. On northbound sailings from Seattle the members notify parties from whom they purchase goods to send such cargo via Alaska Outport Transportation Association. The latter vendors contact the S. B. Dahl Agency for advice as to sailing dates and receipt of cargo.

(28) In the last completed fiscal year, 1960-1961, the respondent transported 15,866 revenue tons of general cargo for 94 shippers. One shipper consigned a total of 2,719 revenue tons and amounts shipped by other members ranged to as little as one-half revenue ton.

(29) AOTA has not filed with this Commission or a predecessor, schedules showing its rates, fares and charges.

Inasmuch as there is considerable similarity in the factual and legal positions of AOTA and KMCA, we will state the fact-findings as to KMCA at this point, and thereafter take up the contentions of both AOTA and KMCA.

AS TO KMCA:

(30) This corporate respondent is a successor to an unincorporated association known as Ketchikan Merchants Charter Association. The latter organization was created in 1952 by merchants in southeastern Alaska to operate vessels to and from Seattle in the transportation of their freight. Subsequently, upon libel for penalties imposed by the U.S. Coast Guard for violation of 46 U.S. Code, section 404, *supra,* such transportation was considered by the U. S. District Court, Western District of Washington, Northern Division.

(31) A decision by the District Court was rendered on June 9, 1959, and is reported in *U. S.* v. *Ketchikan Mchts. Charter Asso.*, American Maritime Cases (1959) at page 2085. It was found that uninspected diesel screw merchant vessels of above 15 tons were regularly operated between Seattle and ports in southeastern Alaska in transporting freight owned by members of the Ketchikan Merchants Charter Association. Freight charges on the level of common carrier rates were assessed on the basis of the weight or cube of the individual shipments by members. The court decided that although demise charters were used to establish the relationship of the vessel owners and the shippers through the Ketchikan Merchants Charter Association, such document was not in fact a demise charter but merely an arrangement to carry out what was in fact a shipment of goods for hire on uninspected vessels in violation of the statute.

(32) In view of this decision, and the fact that Public Law 85-739, *supra,* had been passed in the meantime, Ketchikan Merchants Charter Association was disbanded in the belief that it was necessary to incorporate to be eligible for exemption from U. S. Coast Guard inspection under that law. On September 14, 1959, articles of incorporation of the Ketchikan Merchants Cooperative Association, Inc. were found to conform with the provisions of the Alaskan Cooperative Corporation Act, Chapter 107, SLA 1959, and a certificate of incorporation was issued by the Commissioner of Commerce, State of Alaska.

(33) There are about 300 members in the respondent incorporated association. Requirements for membership are that an applicant be doing business in Alaska. If accepted by a two-thirds vote of the board of directors, the new member pays a nominal initiation fee.

(34) Four vessels, one owned and the others chartered, are operated by respondent. These vessels are each self-propelled, diesel powered, under 150 gross tons, and with refrigerated space for cargo. General commodities, including some commodities requiring refrigeration, which belong to members of the association are transported in these vessels. The principal lading on southbound voyages consists of fish products. On northbound voyages the shipments are of general commodities which members of respondent corporation have instructed their suppliers to ship on vessels operated by respondent.

(35) The board of directors of respondent corporation meets quarterly and at such times determines the freight charges to be applied to commodities shipped by its members. These charges are labeled assessments by respondent and are based on weight or measurement. They are formulated with due consideration to the rates of common carriers by water, and are designed to return gross revenues sufficient to pay expenses of administration and operation. Freight charges applied by respondent have been insufficient to meet expenses. The deficits have been covered by issuing unsecured notes to some of the members in return for money in the various amounts of the notes. Such loans, both as to the member making the loan and the amount loaned, are voluntary. The loans have been necessary to enable the continuance of operations by respondent. The lenders have little or no expectation of repayment.

(36) The record affords no evidence which shows why this respondent operates at a deficit under freight charges patterned on common carrier rates, whereas respondent Alaska Outport Transportation Association, a carrier also organized on a nonprofit basis with freight charges established in the light of common carrier rates, is able to pay its operating agent a substantial commission and earn a surplus. The existence of such a difference in operating results, however, aptly illustrates why operating expenses and revenue yields are matters which are only incidental to, and not determinative of, common carrier status.

(37) Bills of lading are not issued by this respondent but freight charges are billed to shippers by means of expense bills. The freight charges are applied on a weight or measurement basis, depending on the commodity being shipped, and payment thereof by the shipper is for the actual weight carried or vessel space utilized on the trip from or to Seattle.

(38) There is no solicitation of cargo, or advertisement of sailing schedules by respondent. Since respondent transports only cargo which is shipped or received by its members, such activities are unnecessary. The members do know that respondent, in the operation of four vessels, can give reasonably regular service between Seattle and southeastern Alaska. When members purchase goods which are produced outside Alaska they instruct the sellers to ship via Ketchikan Merchants Cooperative Association, Inc. Upon inquiry by such vendors the respondent's agent in Seattle advises of the next available sailing date when the shipment can be accommodated. Respondent carries insurance covering loss or damage to cargo, subject to a deductible of $500 per voyage.

(39) In the year 1960 this respondent transported 20,874 gross tons for 339 members, the average shipment thus being about 62 gross tons. The most freight charges paid by one shipper were $51,075 and the least total charges paid by a shipper were $2.14. Similar data for the first half of 1961 are: 8,970 gross tons; 264 members; 34 gross tons average shipment; $26,455, largest total freight charges for one shipper; $2.14, smallest total freight charges.

(40) KMCA has not filed with this Commission or a predecessor, schedules showing its rates, fares and charges.

The foregoing findings (29) to (40) inclusive were made by the examiner, are not excepted to by KMCA, and we make them our own. KMCA does request that we make certain findings presented to the Examiner, which the Examiner neither accepted nor rejected. These are set out as an appendix to this decision, except for the first sentence (actually a conclusion) of proposed finding "b", which reads "KMCA does not carry cargo for the general public", and is discussed below. To a considerable extent the requested findings are substantially made above. To the extent that they are not made above, their relevance is doubtful, and their aggregate effect is negligible; and they are not inconsistent with our ultimate conclusions with respect to KMCA. With the exception of the conclusion that "KMCA does not carry cargo for the general public" (First sentence of proposed finding "6"), the request of KMCA that we adopt these proposed findings is granted. KMCA asserts that it carries cargo for its membership, and that the only restriction upon its membership is that members shall be licensed to do business in Alaska. In our opinion, the carriage of cargo in this trade for all persons

licensed to do business in Alaska who are willing to pay a nominal membership fee, is the carriage of cargo for the general public. While at KMCA's request, we find that KMCA has refused membership to some, it is clear that membership is refused only to persons not authorized to do business in Alaska.

We question the relevance of finding 12, to the effect that KMCA's president has received certain legal advice (not as to KMCA's carrier status) from his own counsel, and from the Attorney General of Alaska, but make it in order that the complete picture as seen by KMCA itself, may be presented herein. What has been said heretofore in connection with KLT disposes of AOTA's reliance upon lack of overt cargo-solicitation, such as advertising and publication of sailing schedules, as facts which prevent it from being a common carrier. What we have pointed out with respect to KMCA, i.e., that restricting carriage to a substantially unrestricted membership does not make KMCA other than a common carrier applies also to AOTA. A "private", distinguished from a "common" carrier, is essentially, a carrier which carries *for itself,* as distinguished from a carrier which carries for others. This is the effect of various decisions cited by AOTA, such as the Supreme Court's holding with reference to the Uncle Sam Oil Company in *The Pipe Line Cases,* 234 U.S. 548, 562 (1914).

To expand the "private carrier" concept to the arrangements set up by AOTA and KMCA, in which there is no common ownership of cargo between the diverse entities setting up the transportation system is simply not logically or legally sustainable.

Both AOTA and KMCA argue that Public Law 85-739 exempts them from common carrier status. It does not. P.L. 85-739 was enacted for one purpose and one only—to exempt nonprofit or cooperative associations from compulsory inspection of their vessels under 150 gross tons, which prior to P.L. 85-739's enactment was required by 46 USC 404. It accomplishes nothing more. Its effect is expressly limited to 46 USC 404, the statute it amends; and it has no effect upon section 2 of the Intercoastal Shipping Act, 1933.

Public Law 85-739 was the result of a decision of the United States District Court for the Western District of Washington, Northern Division, in 1959, reported in 1959 AMC 2085. Conceding, *arguendo,* that as AOTA complains, the Examiner viewed that case as authority for holding the operations of AOTA and

KMCA common carriage, and that KMCA's operations are now entirely different, we do not base our decision upon any belief that the District Court in that case held that KMCA was operating as a common carrier. It held, as AOTA states, that KMCA was operating "for hire". It is significant, however, that the relief from compulsory inspection sought and secured, had to be by congressional action, which was in no way inconsistent with the court's decision that the carrying was "for hire". It has long been settled (although both KMCA and AOTA contend to the contrary) that it is not necessary to make, or even seek a profit in order to be carrying for hire. *California* v. *United States*, 297 U.S. 175 (1936). No decisions holding to the contrary are cited by respondents.

The contention, made specifically by AOTA, and inferentially by KMCA, that if these organizations are common carriers they are by reason of that fact deprived of the exemption granted by P.L. 85-739 is unsound. It is necessary to say in reply only that Congress has in no way conditioned the exemption upon non-common carrier status. It has conditioned it only upon the vessel's being under 150 gross tons, and being owned or demise chartered to a cooperative or association engaged solely in transporting cargo owned by any one or more of the members of such cooperative or association between designated areas. These conditions can be met by vessels operated by AOTA and KMCA as common carriers. Of course, even if, as to KMCA and AOTA common carrier status would deprive them of the exemption this fact would not determine that they are not common carriers.

AOTA makes two other specific contentions with respect to P.L. 85-739, which we set out and answer here.

"1. Congress did not consider vessels operated by nonprofit associations and carrying only the goods of their own members to be common carriers."

There is nothing which supports this statement.

"2. It (Congress) issued its mandate for the performance of transportation of this character until adequate, frequent common carrier service was available."

No such mandate exists.

Both AOTA and KMCA appear to argue inferentially that Congress by enacting P.L. 85-739 has authorized if not directed the Commission to exempt cooperatives and non-profit organizations operating as common carriers from the tariff-filing requirement which section 2 of the Intercoastal Shipping Act imposes upon

all common carriers without exception. There is nothing in P.L. 85-739 which constitutes such direction or authorization.

Both KMCA and AOTA complain because the Examiner did not discuss a considerable number of cases argued in their briefs and advanced again in their exceptions. Their conclusion is that his failure to discuss them proves that he did not consider them—a clear *non sequitur.* They have all received careful consideration here, and our own conclusion is that the Examiner did not discuss them because he considered them (as we do) inapplicable upon their facts. We are unable, as an example, to assimilate KMCA or AOTA with the "free enterpriser" the "man of many pursuits" including farming, ginning, livestock raising, and trucking, held a contract carrier in *Home Insurance Company* v. *Riddell,* 252 F. 2d 1, (5th Cir. 1958). Neither AOTA nor KMCA resembles in any way the fishing boat master who chartered his 60 foot motorboat out of Bayou La Battre to carefully selected groups, and was held not to be a common carrier, in *Semon* v. *Royal Indemnity Company,* 279 F. 2d 737 (5th Cir. 1960). The principles which govern the regulation of mutual telephone companies as public utilities by the States are not necessarily those considered by Congress to be applicable with respect to interstate and intercoastal carriers by water.

We conclude that AOTA and KMCA have been operating and are operating as common carriers by water between the States of Washington and Alaska without filing tariffs under section 2 of the Intercoastal Shipping Act, 1933, thus violating that section of the Act, and requiring us to issue to each of them an order to cease and desist from such violation.

AOTA and KMCA take the position that if they are common carriers, they lose the exemption from Coast Guard inspection granted by Title 46, Sec. 404 of the United States Code. To be entitled to this exemption the vessel must be owned by or demise chartered to a nonprofit organization "engaged solely in transporting cargo owned by any one or more of the members of such cooperative or association on a nonprofit basis". It is argued that a common carrier must carry (within its capacity) for all who seek to utilize its services, and *therefore* AOTA and KMCA must carry for *non-members.* We do not agree that they must carry for non-members. Membership in the organization, which carries with it the right to ship, and pro-rata liability with respect to shipments by other members, is a reasonable condition of carriage, and so long as it is required of all shippers alike, will

certainly not detract from common carrier status. AOTA and KMCA must know well in advance who will patronize their carriers and to what extent. This is absolutely necessary in order to obtain sufficient vessels for each open season and avoid "shutting out" their members. As nonprofit operators, they can take no chance of overtonnaging. It is true that the unique position of KMCA and AOTA with respect to the exemption statute, poses certain difficulties in regard to the form of tariffs and rules, but we are quite sure that these can be solved.

We also desire to make it quite clear that pro rata return of payments for carrying cargo, in order to avoid profit-making will not be considered violation of the Shipping Act, 1916.

We take occasion here to point out, primarily for the future, that failure of Commission personnel to advise that an organization which has furnished full operating details is a common carrier, and required to file tariffs, in no way militates against Commission decision that the organization *is* a common carrier, and required to file. Neither would a direct statement by our staff that the organization is *not* a common carrier. It is unnecessary to cite cases to support a principle so well established.

At the same time, we wish it to be completely clear that we do not consider an inquiry by a carrier as to its status as any evidence, however slight, that it is a common carrier. Proof of such inquiry is not even admissible for that purpose. The common carrier, non-common carrier status of each operator is always dependent primarily upon the method of operation, made up of many details. This proceeding was originally designed to clarify the question as to what class of carriers in the Alaskan trade are common carriers, required to file tariffs. We hope, and believe it accomplishes its purpose. It makes clear that such as Starkweather and Shimmel are not subject to the filing requirements of section 2 of the Intercoastal Act. It makes equally clear that carriers like KLT, AOTA, and KMCA must file.

It was of course, not necessary for a proceeding of this nature to be filed. The Commission's predecessor might simply have caused proceedings to be instituted for penalties. The unclear situation, prior to this opinion, may have made such action appear harsh. We do not anticipate that those falling within the scope of this opinion will fail to file within a reasonable time.

An appropriate order will be entered.

APPENDIX

FINDINGS REQUESTED (AND AS NUMBERED) BY KMCA IN ITS EXCEPTIONS.

5. KMCA is a non-profit cooperative association. Article V of its articles of incorporation provides as follows:

> This cooperative corporation is one which does not contemplate pecuniary gain or profit to the members thereof and is organized for non-profit purposes and no part of any net earnings thereof shall inure to the benefit of any member or other individual.

6. Its carriage of cargo is restricted to its membership. It has refused cargo offerings by persons who are not members of the Association. It does not handle express shipments; it does not carry mail; it does not carry any military freight; it does not carry personal effects or household goods. The Association does not solicit freight or advertise its sailings or service.

7. The By-Laws of the Association restrict membership to persons who have been licensed to do business in the State of Alaska. The membership requirements have been honored and persons have been refused admission to the Association. A freight forwarder would not be eligible for membership; a branch of the military or government department would not be able to join the Association. Churches and other like institutions would not be eligible for memberships since they are not licensed to do business in Alaska. Members of KMCA are elected by the Board of Directors and an affirmative vote of two-thirds of the Board is required. The membership has been constant during the past two years. A written membership application in form set out in the By-Laws, accompanied by a membership fee of $10, is required.

8. Sailings are made to meet the requirements of the membership and KMCA has held up its sailings as long as three and one-half days to meet membership needs. This is not and cannot be done by common carriers.

9. Revenues of the Association are obtained in the following manner. The Board of Directors determines the amount of initial assessments to be made against members who tender their freight to be transported on the Association's vessels. It is attempted to have these assessments defray the operating cost of the Association and to contain *no* element of profit. The assessments have been on the low rather than on the high side and the Association's operations have resulted in a loss for the eight month period ended May 31, 1961, of $28,822.65 and a cumulative loss from operations as of that date of $184,436.65.

10. The Association has no paid in capital and would not have been able to operate on the basis of these assessments alone.

Additional funds are raised from the membership to make up the deficits, which contributions are unrelated to the volume or particular type of commodity shipped by the member-contributor. For example, one of the smallest shippers in the Association, City Motor Service, was one of these contributors.

Although these contributions are technically carried in the company's books as "loans," there is no expectation whatsoever by the contributing member that he will ever get his money back.

775-704 O-65-23

11. The Alaska Cooperative Corporation Act, under which KMCA is incorporated, requires the Association to make distribution to its members of any amounts over and above its expenses. It provides as follows:

(1) The net proceeds or savings of a cooperative shall be apportioned, distributed and paid periodically to those persons entitled to receive them, at such times and in such reasonable manner as the By-Laws shall provide; except that net proceeds or savings on patronage of the cooperative by its members shall be apportioned and distributed among those members in accordance with the ratio which each member's patronage during the period involved bears to total patronage by all members during that period. The By-Laws may contain any reasonable provisions for the apportionment and charging of net losses. For the purposes of this section work performed as a member of a workers' cooperative shall be deemed to be patronage of that cooperative.

12. The President of the Association testified that he had been advised by Mr. Ralph Moody, the Attorney General for the state of Alaska, that failure to refund to membership revenues in excess of operating expenses would result in revocation of KMCA'S corporate charter. He also testified that his counsel advised him that KMCA could not lawfully make such distribution to its member-shippers if the Commission held that KMCA was a common carrier required to file a tariff.

ORDER

FEDERAL MARITIME COMMISSION

No. 952

INVESTIGATION OF TARIFF FILING PRACTICES OF CARRIERS BETWEEN CONTIGUOUS STATES OF THE UNITED STATES AND ALASKA

Full investigation of the matters involved in this proceeding having been completed, and the Commission on August 2, 1962, entered its decision herein, which decision is made a part hereof,

It is ordered,

(1) That as to William Shimmel, Dan Starkweather, and Ghezzi Trucking, Inc. (including Alfred J. Ghezzi, Jr. and Alfred C. Ghezzi d/b/a Ghezzi Towing Co., and/or Ghezzi Barge Co.) this proceeding be, and it hereby is, dismissed.

(2) That Kimbrell-Lawrence Transportation, Inc., Alaska Outport Transportation Association, and Ketchikan Merchants Cooperative Association, Inc., and each of them be and they hereby are ordered to cease and desist from their operations by water between Alaska and other of the United States, within 60 days after the date of this order, unless within said 60 day period, they shall file with the Commission tariffs covering their said operations and keep open to public inspection schedules showing rates, fares and charges, pursuant to the provisions of section 2 of the Intercoastal Shipping Act, 1933.

By the Commission, August 2, 1962.

(Sgd.) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 994

AMERICAN UNION TRANSPORT, INC.—INCREASED RATES ON SUGAR, REFINED OR TURBINATED, IN BAGS

Decided August 16, 1962.

Proposed increased rates on sugar, refined or turbinated, in bags, from ports in Puerto Rico to Atlantic ports of the United States found just and reasonable. Order of suspension should be vacated, and proceeding discontinued.

Robert N. Kharasch for respondent.

Donald J. Brunner and *Robert J. Blackwell* as Hearing Counsel.

INITIAL DECISION OF ARNOLD J. ROTH, EXAMINER[1]

By third revised page No. 20[2] of its Inward Freight Tariff No. 7, FMC-F No. 7, filed with the Commission to become effective May 2, 1962, respondent American Union Transport, Inc., proposed to increase its rate on sugar, refined or turbinated, in bags (sugar), from ports in Puerto Rico to Atlantic ports of the United States, from 65 cents[3], any quantity, to 65 cents, minimum 500 short tons, and 75 cents, any quantity. The proposed rates are restricted to apply on palletized shipments only, the quantity per pallet to be a minimum of one short ton, and include the return

[1] In the absense of exceptions thereto by the parties, and upon notice by the commission, the initial decision of the Examiner became the decision of the Commission on the date shown (Section 8(a) of the Administrative Procedure Act and the Rules 13(d) and 13(h) of the Commissioner's Rules of Practice and Procedure.)

[2] Fourth revised page No. 20 of the same tariff, filed to become effective May 26, 1962, also suspended and brought under investigation, makes minor changes in the conditions attached to the proposed rates, but does not change the level of the rates. Reference herein to the proposed rates will include the changes thus made.

[3] Rates and charges are stated per 100 pounds.

of empty pallets to the respondent's terminal in Puerto Rico when returned to its terminal in New York. All bookings under the proposed rates are subject to prior arrangement. By order of April 30, 1962, the Commission instituted this investigation on its own motion to determine the justness, reasonableness, and lawfulness of the said tariff schedules pursuant to the Shipping Act, 1916, as amended, 46 U.S.C. 801 *et seq.*, and the Intercoastal Shipping Act, 1933, 46 U.S.C. 843 *et seq.*, and suspended the operation of the schedules to and including September 1, 1962.

No shippers of sugar intervened in the proceeding. By agreement of respondent and Hearing Counsel at a prehearing conference held May 21, 1962, evidence and arguments were received by written submission, in the form specified in Rule 11(b) of the Rules of Practice and Procedure, 46 CFR §201.182.

During 1961 and 1962 to date, respondent has carried no sugar. It shows that its present rate of 65 cents, any quantity, is insufficient by a wide margin to pay the full costs of carrying sugar. Hearing Counsel, while differing with respondent to some extent as to the proper method of calculating unit costs, agree that, based upon the operating and financial data of the respondent for 1961, the proposed rates are not fully compensatory. The data submitted of record do not permit precise resolution of the conflicting claims. However, as to the northbound movement, the lowest cost shown is $13.94 per measurement ton, covering vessel expense, port expenses, stevedoring, and other cargo expenses, before allocation of brokerage, vessel depreciation, and overhead expenses, and before allocation of any expenses to cover the cost of the return movement of empty pallets. Including revenues from the arrimo charge of 2.5 cents applicable in Puerto Rico, the proposed rate of 65 cents, minimum 500 short tons, would yield revenues of $11.72 per measurement ton[4], and the proposed any quantity rate of 75 cents would yield revenues of $13.46 per measurement ton.

Although respondent has had no experience in the carriage of sugar, it estimates that average cargo handling costs would be

[4] The parties accept for the purposes of this proceeding the finding in the initial decision in Docket No. 954 (Sub. 2), *Investigation of Increased Rates on Sugar, Refined or Turbinated, in Bags in the Atlantic/Gulf Puerto Rico Trade*, that sugar in bags measures 45 cubic feet per gross ton. Hearing Counsel show that pallets measure approximately 6.6 cubic feet each, so that a gross ton of palletized sugar would measure about 51.6 cubic feet. A measurement ton is 40 cubic feet, and is utilized by the parties to calculate unit costs, in view of the fact that the cubic capacity of a vessel generally governs the amount of cargo it can load and carry. The proposed rates would yield

reduced by about $2 per ton because of the required palletization and that on shipments of 500 tons or more clerical and accounting costs would be lower.

Upon the record as a whole, the conclusion is inescapable that the proposed rates are lower than just and reasonable maximum rates, and are not otherwise shown to be unlawful. Accordingly it is found that the proposed rates are just and reasonable. An appropriate order should be entered vacating the order of suspension and discontinuing the proceeding.

FEDERAL MARITIME COMMISSION

No. 885

UNAPPROVED SECTION 15 AGREEMENT—NORTH ATLANTIC SPANISH TRADE

Decided August 30, 1962.

Respondents found during the period from early 1954 to May 1955 to have carried out an unapproved agreement or understanding for the observance by United States Lines of the rates of the North Atlantic Spanish Conference in the trade from the U. S. North Atlantic to Spain in violation of section 15, Shipping Act, 1916, and to have failed immediately to file the agreement or understanding with the Federal Maritime Board in violation of said section.

In determining violations of the Shipping Act, 1916, the contemporaneous writings of persons subject to the Act which indicate the existence of prohibited conduct, are entitled to great weight. The Commission cannot regard as credible testimony subsequently given which is manifestly inconsistent with the contemporaneous documentary evidence or with logic.

Elmer C. Maddy and *Ronald A. Capone* for respondent United States Lines.

Roy C. Megargle and *J. Joseph Noble* for North Atlantic Spanish Conference and its member lines.

Frank Gormley, Roger McShea and *Robert J. Blackwell,* Hearing Counsel.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner;* JAMES V. DAY, *Commissioner*

BY THE COMMISSION:

This investigation was instituted by our predecessor, the Federal Maritime Board, on its own motion on January 7, 1960. The order of investigation named as respondents in the proceeding United States Lines Company (U. S. Lines) and the North Atlantic Spanish Conference and its member lines (the Conference).[1] The purpose of the investigation was to determine whether, during the period 1953 through 1957, there existed between U. S. Lines and the Conference, or its member lines, an agreement or understanding regarding the fixing or regulating of rates or the limiting or preventing of competition in the trade from United States North Atlantic ports to ports in Spain which had not been filed with nor approved by the Board pursuant to the provisions of section 15, Shipping Act, 1916 (the Act).

In March 1960 Fabre Line and American Export Lines were dismissed from the proceeding because it was ascertained that they had resigned from the Conference prior to the period under inquiry. Thereafter hearings were held before an Examiner who issued a recommended decision in which respondents were found not to have been acting pursuant to an unfiled agreement or understanding in violation of section 15.

The North Atlantic Spanish Conference is an association of steamship lines operating in the foreign commerce of the United States by virtue of Agreement No. 138, which was approved under section 15 of the Act on May 14, 1930. This agreement authorizes the parties to establish in concert the rates, charges, rules and regulations covering cargo carried by them in the trade from U. S. North Atlantic ports to ports in Spain.

For a number of years prior to 1948, U. S. Lines was a member of the Spanish Conference but it resigned therefrom in July 1948. When it resigned, it chose not to file a tariff of its own, but notified the agency then administering the Act that it would continue to use the Conference tariff with such variations as it from time to time saw fit to make. Such a procedure, contingent upon the filing of notice of any variations with the agency, was permitted by the order issued in Docket No. 128, *Investigation—Section 19 of the Merchant Marine Act, 1920,* 1 U.S.S.B. 470 (1935). The

[1] Member lines of the Conference named as respondents were Compania Espanola de Navegacion Maritime, S.A.; Compania Transatlantica Espanola, S.A. (Spanish Line); Compagnie de Navigation Cyprien Fabre (Fabre Line); American Export Lines, Inc., and Home Lines Inc.

record shows no such variations filed by U. S. Lines for the 1954-1955 period to which this case is now limited.

During the period in question U. S. Lines was a member of the North Atlantic United Kingdom Freight Conference (U.K. Conference). The U. K. Conference and the Spanish Conference and their respective members were parties to Agreement No. 1457 under section 15 of the Act, which provides in relevant part:

In consideration of the agreement by the North Atlantic U. K. Conference Lines to maintain the direct rates, terms and conditions of the North Atlantic Spanish Conference on cargo transported on the vessels of the said lines from North Atlantic Ports of the United States to Spain on transshipments via United Kingdom Ports, the members of the North Atlantic Spanish Conference have agreed to furnish said Lines with copies of the Rate Lists of the Conference . . .

Agreement 1457 thus obligated U. S. Lines, as a member of the U. K. Conference, to charge Spanish Conference rates on cargo carried by U. S. Lines and destined ultimately for Spain which was to be transshipped at a port in the United Kingdom. The agreement imposed no obligation upon U. S. Lines to charge Spanish Conference rates on cargo it carried directly to Spain. The record shows a number of such direct shipments carried by U. S. Lines from U. S. North Atlantic ports to ports in Spain during the period in question. The rates charged therefor by U. S. Lines were the same as those of the Spanish Conference.

Subsequent to U. S. Lines' resignation from the Conference and during the period in question, Mr. George S. Kohl, U. S. Lines eastbound traffic manager, attended at least two meetings at which the Conference chairman, Mr. Frederick Rothe, and members were present. The record shows that Rothe often contacted Kohl to "get his views" concerning rate changes proposed by the Conference, and indicates, also, that shipper requests for rate adjustments were distributed by the Conference chairman to U. S. Lines for comment, the same as to the members of the Conference.

There were introduced into the record two U. S. Lines interoffice memoranda, dated April 20, 1955 (Exhibit 1) and April 26, 1955 (Exhibit 13), respectively. The April 20 memorandum, from Mr. Kohl to his superior, Mr. W. B. Rand, then general freight traffic manager of U. S. Lines, was entitled "Spanish Service" and contained a list of the conference and nonconference lines then operating in the trade. This memorandum states in relevant part as follows:

> Elwell and Kerr profess to adhere to Conference Rates, but we have known them to deviate when there was a large parcel in the market. Export generally follow the market, but openly say, that they are not bound by it and will upon occasion, quote lower rates.
>
> American Export Lines are firmly of the opinion that the Garcia & Diaz Lines are in one way or another not always observing Conference Rates and Conditions, and we feel the same way about this. We have also experienced instances when the Conference rate has been formally reduced after the business has been closed by Garcia and Diaz.
>
> Under the circumstances, I feel that we should reconsider the undertaking we gave to Mr. Rothe to abide by the Spanish Conference tariff.

The memorandum bore, in the upper right-hand corner, the penciled notation, "Notified G & D of withdrawal 4/22/55." The handwriting was identified as that of Kohl, who testified that "G & D" referred to Garcia & Diaz, Inc., which was then acting as the agent of two Spanish Conference Lines. Mr. Rothe at that time, in addition to being chairman of the Spanish Conference, was in the employ of Garcia & Diaz.

The April 26 memorandum, from Kohl to R. O. Pickel, U. S. Lines' representative in Spain, states in relevant part:

> After a trial of well over a year we have been forced to the conclusion that if we are to continue to observe the rates and conditions of the Spanish Conference, we cannot expect to secure our fair share of the Spanish Traffic. Consequently, we have informed the Spanish Conference that effective immediately, we withdraw our verbal understanding with them, and hereafter will not undertake to strictly observe the rates, terms and conditions of the Spanish Conference.
>
> Our policy for the present will be to refrain from making any announcement of our new status. We will continue to quote and charge conference rates, but we will upon occasion take quiet independent action when we consider it to our advantage to do so.
>
> * * * * * * *
>
> This new policy, which actually will not take effect before our sailing of May 26th, will place you in a position to deal with situations which have heretofore appeared hopeless.

Witnesses Rand, Kohl and Rothe denied the existence of any agreement between U. S. Lines and the Spanish Conference or its members. Kohl testified that some time in early 1954, as a result of conversations between U. S. Lines vice president for freight traffic and the chairman of the Spanish Conference, U. S. Lines had established a unilateral "policy" of observing Spanish Conference rates. Notwithstanding the other evidence in the record, the Examiner accepted the testimony of these witnesses and found that there had been no agreement and no violation of section 15.

We disagree with this finding.

Before amendment by Public Law 87–346 (75 Stat. 763), and as it existed at the time the activity in question took place, section 15 provided in relevant part:

> That every common carrier by water, or other person subject to this Act, shall file immediately with the Board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, * * * to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; * * * controlling, regulating, preventing, or destroying competition; * * * or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.
>
> * * * * *
>
> All agreements * * * shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement * * *.

Section 15 exempts from the antitrust laws agreements approved by the agency administering the Act.

We are of the opinion that the evidence establishes the existence of an agreement or understanding between U. S. Lines and the Spanish Conference and its members within the meaning of section 15. The language of the two interoffice memoranda and the surrounding circumstances, such as the fact that U. S. Lines after it had resigned from the Conference continued to be consulted by the Conference on rate changes, can lead to no other conclusion.

In the April 20 memorandum, Kohl, U. S. Lines' traffic manager for the trade in question, apprised his superior, Rand, that various carriers in the trade were not strictly adhering to the Conference rates and suggested that U. S. Lines should withdraw from its "undertaking" to the Conference to adhere to such rates. Thus, Kohl stated:

> Under the circumstances, I feel that we should reconsider the *undertaking* we gave to Mr. Rothe to abide by the Spanish Conference tariff. (Emphasis ours)

Unless U. S. Lines had an agreement, understanding or arrangement to abide by the Conference tariff, this recommendation makes no sense. If U. S. Lines was merely pursuing a unilateral "policy" to observe such rates, why speak of an "undertaking" to the Conference. The words "undertaking" and "policy" are not susceptible to use interchangeably. Moreover, as we have noted, the

memorandum of April 20 bore the notation by Mr. Kohl—"Notified G & D of withdrawal 4/22/55," *i.e.*, notified Garcia & Diaz, Inc., agent of two of the Conference lines and employer of the Conference Chairman.

In the April 26 memorandum we find Kohl, his recommendation having been approved by Rand, advising the company's representative in Spain (R. O. Pickel) of the changed situation, as follows:

> After a trial of well over a year we have been forced to the conclusion that if we are to continue to observe the rates and conditions of the Spanish Conference, we cannot expect to secure our fair share of the Spanish Traffic. Consequently, we have informed the Spanish Conference that effective immediately, *we withdraw our verbal understanding with them* and hereafter will not *undertake to strictly observe the rates, terms and conditions of the Spanish Conference.*
>
> Our policy for the present will be to refrain from making any announcement of our *new status.* * * *
>
> This *new policy* * * * will place you in a position to deal with situations which have heretofore appeared hopeless. (Emphasis ours)

U. S. Lines cites the two paragraphs containing the word "policy" as support for its contention that the observance of the Conference rates was the result of its unilateral policy but it hardly seems necessary to point out that "policy" as used here refers to the change brought about by the "withdrawal" of U. S. Lines' "verbal understanding" with the Conference. It is clear that a change in policy did in fact occur at or about this time, and that U. S. Lines by reason of the change was freed of its "undertaking" to the Conference to abide by the Conference tariff. Thus freed, U. S. Lines was in a position to take, as the April 26 memo states, "quiet independent action" respecting rates when it was to its advantage to do so.

Experienced and responsible corporate officials do not use terms like "undertaking" or "verbal understanding," especially when referring to their relations with their competitors, without intending that the words convey their commonly accepted meaning. The testimony to the contrary is at best unconvincing, and is typical of the denials or explanations encountered when illegal rate arrangements are attempted to be probed. Although witnesses Rand and Kohl were unable, in the main, to recall the facts and circumstances surrounding the interoffice memoranda, they were able to say with some certainty that no agreement existed.

Considering the penalty prescribed by law for illicit anticompetitive activity, it is not to be expected that proof of such

activity will be obtained either easily or in abundance. In such cases the solid evidence may consist of no more than a few contemporaneous memoranda or other documents. These, however, are and of necessity must be entitled weight, and far greater weight than oral testimony given at some later date by those who are under investigation and whose "explanations" of the documents simply cannot be squared with their contents. The documents not only record events at the time but also are usually quite reliable evidence of the facts. Particularly is this so of interoffice memoranda, such as we have here. These are never intended to meet the eyes of anyone but the corporate officers themselves, and are therefore most candid. It has been said that they are entitled to the highest validity as evidence and that, to the extent that oral testimony contradicts them, the contradiction only serves to affect the general credibility of the testimony.[3] *United States* v. *Corn Products Refining Co.*, 234 Fed. 964 (1916); *United States* v. *Gypsum Co.*, 333 U.S. 364 (1948).

In two other recent cases involving unlawful section 15 activity, we have had occasion to rule on the acceptance of testimony which is contradicted by contemporaneous documents or by logic. *Unapproved Section 15 Agreements South African Trade*, 7 F.M.C. 159 (1962) and *Unapproved Section 15 Agreement—Coal to Japan/Korea*, 7 F.M.C. 295 (1962). We cannot regard such testimony as credible. The *South African* case, moreover, disposes of the contention that the memoranda authored by U. S. Lines officials are hearsay as to the Conference and its members and cannot establish a violation of the Act on their part. In that case we discussed at some length the admissibility, reliability, relevancy and probative value of hearsay evidence in an administrative proceeding. As to the admissibility against all respondents of documents like those here involved, we said (at 181):

> They were admissible, moreover, not only against the authoring respondent but against other respondents named therein because they showed or tended to show the existence of an agreement among respondents, and that was the heart of the matter under investigation.

Here as in the *South African* case, the memoranda in question show the existence of the agreement or understanding—the pre-

[3] Concerning the April 26 memorandum and the use therein of the phrase "verbal understanding," Witness Rand testified, "Well that is probably loosely used. This is just an interoffice letter. It was never written to be aired or interpreted at a public hearing I would say."

cise matter under investigation. They were clearly admissible against the Conference and its member lines and were reliable and substantial evidence in light of the entire record.

We find and conclude that from early 1954 until May 1955 there existed between the respondents U. S. Lines and the Spanish Conference and its member lines an agreement or understanding which provided for the observance by U. S. Lines of the Conference rates in the trade from U. S. North Atlantic ports to ports in Spain and therefore controlled or regulated competition between respondents; that such agreement or understanding was within the purview of section 15 of the Act but was neither filed with nor approved by the Board and was carried out by respondents; and that respondents thereby violated section 15 of the Act both by failing to file their agreement or understanding and by carrying it out absent approval. *South African* and *Coal to Korea* cases, *supra.*

We have considered other exceptions which were taken to the Examiner's decision but deem it unnecessary to discuss them in view of our findings and conclusion as herein set forth.

Since there is no evidence that respondents are currently acting contrary to the provisions of section 15, we have no occasion to issue an order against them and the proceeding will be discontinued.